

BUNDESRECHTSANWALTSKAMMER

Körperschaft des öffentlichen Rechts

Stellungnahme

der Bundesrechtsanwaltskammer

zum

**Entwurf eines Verhaltenskodexes für Verteidiger vor dem
Internationalen Strafgerichtshof
(Draft Code of Conduct for Counsel before the ICC)**

**erarbeitet vom
Europaausschuss
der Bundesrechtsanwaltskammer**

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I. Introduction

1. In every society founded on respect for the rule of law a lawyer fulfils a special role. He must serve the interests of justice as well as those whose rights and liberties he is trusted to assert and defend. The lawyer's function therefore lays on him a variety of legal and moral obligations towards his client, the courts and other authorities before whom the lawyer pleads his client's cause or acts on his behalf and the public for whom the existence of a free and independent profession is an essential means of safeguarding human rights in face of the power of the state.

2. In light of those responsibilities, the lawyer has an obligation to inform himself as to the rules which will affect him in the performance of any particular activity. To ensure the proper performance by the lawyer of this function which is recognised as essential in all civilized societies, Rules of professional conduct are designed through their willing acceptance by those to whom they apply. The failure of the lawyer to observe these rules must in the last resort result in a disciplinary sanction.

3. The particular rules of national Bar Organisations or Law Societies regularly arise from their own traditions. They are adapted to the organisation and sphere of activity of the profession in the State concerned and to its judicial and administrative procedures and to its national legislation. It is neither possible nor desirable that those rules should be taken out of their context nor that an attempt should be made to give general application to rules which are inherently incapable of such application. Nevertheless, the particular rules of each Bar and Law Society are based on the same values and in most cases demonstrate a common foundation. It is for that reason, that the code of conduct for Counsel before the International Criminal Court must not only be adapted to the judicial and administrative procedures before the Court, but must also reflect the core values of an independent legal profession.

4. An earlier, if not the first necessity to establish a set of rules concerning ethical duties in a situation, where lawyers from all over the world would work together at the same legal institution, was made when the Code of Professional Conduct for Counsel appearing before the International Tribunal¹ ("ICTY-Code") was adopted at the International Criminal Tribunal for the Former Yugoslavia ("ICTY"). The fundamental principles were laid out in Art. 3 of this Code, which reads:

Article 3 **Basic Principles**

This Code is based, in particular, on the fundamental principles that:

- i. clients have the right to legal assistance of their own choosing;
- ii. as legal practitioners, counsel shall maintain high standards of professional conduct;

¹ As amended on 12 July 2002 (IT/125 REV.1).

- iii. the role of counsel as advocates in the administration of justice requires them to act honestly, independently, fairly, skilfully, diligently, efficiently and courageously;
- iv. counsel have a duty of loyalty to their clients consistent with their duty to the Tribunal to act with independence in the administration of justice;
- v. counsel shall take all necessary steps to ensure that their actions do not bring proceedings before the Tribunal into disrepute; and
- vi. counsel may be subject to disciplinary proceedings and should be informed of the circumstances under which such proceedings may take place and his rights and obligations in those proceedings.

The ICTY-Code has given guidance to many lawyers and has met with general approval. Given that, the code of conduct for Counsel before the International Criminal Court should meet the standards set by the ICTY-Code.

5. The available draft code of conduct for Counsel before the International Criminal Court shows that the draft, even though it is not based on or further developed on the basis of the ICTY-Code, generally reflects the fundamental principles of an independent legal profession and also demonstrates a common foundation with a view on numerous national regulations. It therefore provides a solid basis for the future drafting process.

6. However, the draft code contains several provisions that merely affect conditions of admission to practice and formal procedural obligations towards the Court rather than ethical duties. It is submitted that purely procedural obligations should not be mixed up with ethical duties and therefore only the latter should be included in a code of conduct. It is essential to acknowledge that the failure to observe procedural rules cannot lead to disciplinary measures.

7. Additionally, the draft tends to support the attitude that Counsel is a mere assistant to the Court and the Registrar, respectively, rather than an independent organ within the proceedings and that the provisions of the code merely reflect general terms and conditions of business. This attitude must be strongly rejected and it must be stressed that no difference between chosen and assigned Counsel can be made regarding the duty to act with utmost independence.

8. It is submitted that the two issues raised herein must lead to further consideration and amendments of the draft accordingly. To facilitate this future process, the following observations, comments and proposals regarding particular provisions are advanced. Those observations and comments are based on the English wording of the draft, bearing in mind that the English and French texts of this Code shall be equally authentic.

II. Chapter 1: General Provisions

- (1) Article 1 of the Draft Code reads as follows:

Subjects of this Code

This Code shall apply to the professional activities of all counsel, **as defined in regulation 2 of the Regulations of the Court.**

(Emphasis added)

It is submitted that the Code of Conduct should be a comprehensible document and should not refer to another legal text with regard to such an important issue as to whom the Code applies. It is therefore suggested to include a definition of counsel² in this Article.

- (2) Article 5 of the Draft Code provides the following:

Conflict between Codes

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 their conduct before the Court.

The provision in Article 5 is comparable to that in Art. 4 of the ICTY-Code, which reads:

Article 4 Conflicts

If there is any inconsistency between this Code and any other codes of practice and ethics governing counsel, the terms of this Code prevail in respect of counsel's conduct before the Tribunal.

The provision in Article 5 meets the standards set by the ICTY-Code with regard to different codes of practice and ethics. It is submitted that the draft provision is suitable to settle possible conflicts that may arise.

It is suggested however, that with regard to the supremacy of the Code in respect of counsel's conduct before the Tribunal, the Court has a duty to safeguard that Counsel are not in breach of domestic ethical obligations if adhering to ethical standards before the Tribunal.

² The text of the Regulations of the Court or a draft concerning those regulations, respectively, was not available for review.

- (3) Article 6 of the Draft Code reads as follows:

Compliance with Statute, Rules, Regulations

1. Before taking office, counsel shall give the following **solemn undertaking**: “I solemnly declare that I will perform my duties and exercise my mission before the Court with loyalty, diligence and dedication, honourably, independently and consciously, and that I will scrupulously respect professional secrecy”.

2. Counsel must at all times comply with the Statute, the Rules, 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. Counsel must at all times have due regard to the fair and **expeditious** conduct of proceedings.

(Emphasis added)

It is submitted that the Code of Conduct itself should not contain a provision with regard to a solemn undertaking, since such a solemn undertaking – in comparison to substantive professional obligations - is not a professional obligation *per se* rather than a condition of admission to practice.

Given the broad scope of Article 6 (2) it would be appropriate to replace the words “must” with the words “shall”. In addition, it is submitted that Counsel has no obligation regarding the expeditious conduct of the proceedings and therefore the words “and expeditious” should also be deleted. The amended version of the provision would reflect the standard set out in Article 20 of the ICTY-Code, which reads:

Article 20
Rules of the Tribunal

Counsel shall at all times comply with the Statute, the Rules, this Code or any other applicable law including such rulings as to conduct and procedure as may be issued by the Tribunal in its proceedings. Counsel shall at all times have due regard to the fair conduct of proceedings.

- (4) Article 8 of the Draft Code reads as follows:

Loyalty and integrity

1. Counsel shall be **loyal** and respectful in his or her relations with the Chamber, the **Office of the Prosecutor** and its members, the Registrar and the members of the Registry, the client, **opposing counsel**, accused persons, victims, witnesses, and any other person related to the proceedings.

2. 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 other persons**.

3. Counsel must not seek to influence a judge or other official of the Court in an improper manner.

(Emphasis added)

It is respectfully submitted that a Counsel has no professional obligation to be “loyal” in his or her relations with the Chamber or the Office of the Prosecutor and its members. To the contrary, it is the obligation of Counsel to act independently and to maintain absolute integrity.

With regard to the provision in Article 8 (2) it is submitted that, even if there is no doubt about Counsel’s obligation defend the client’s interests honourably and fearlessly, it might be excessive to ask this to be done “without regard to counsel’s own interests or to any consequences to counsel or other persons”.

The wording should therefore be amended accordingly.

III. Chapter 2: The Agreement

- (5) Article 11 of the Draft concerns the establishment of the mandate. It reads as follows:

Establishment of the representation agreement

1. The agreement is established when a client has commended counsel to act on his or her behalf and counsel has accepted or when the Chamber, after consultation with the Registrar, has appointed a counsel.
2. Counsel must inform the Registrar of the agreement as soon as it is established. The Registrar shall record the power of attorney after verification of the qualifications of counsel.
3. Counsel accepting an agreement shall prove he or she is covered by professional liability insurance.

It must be argued that the draft provision is more of technical nature and does not contain any substance as to ethical obligations that should be included in a Code of Conduct.

In addition, the available provision does not distinguish clearly between a Chosen Counsel (“Any person who is or has been engaged by a client and has filed a power of attorney with the Registrar”; see Art. 1 of the ICTY-Code) on the one hand and an assigned Counsel (“Any person, who is or has been assigned by the Registrar to represent a client”; see Art. 1 of the ICTY-Code) on the other hand. It is submitted that the term “agreement” should only be used with regard to the Chosen Counsel, whereas the “term” assignment” could be reserved with regard to the assigned Counsel.

As with regard to Article 11 (2), it is submitted that a provision according to which Chosen Counsel must inform the Registrar of the agreement as soon as it is established does not refer to a professional duty as such and should therefore not be included in the Code of Conduct. In addition, it must be stressed that no such obligation exists at all.

(6) Article 12 of the Draft reads as follows:

Publicity

1. Counsel must not advertise or seek personal publicity on locations **where not permitted**.

2. **When allowed**, the content 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.

3. Counsel shall not, directly or indirectly, approach potential clients with whom he or she has not had a previous professional relation.

(Emphasis added)

Article 12 provides no guidance as to where advertising or seeking personal publicity is "not permitted" (paragraph (1)) or "When allowed" (paragraph (2)). To avoid that gap, it is suggested to adapt a provision similar to Article 2.6. of the Code of Conduct for Lawyers in the European Union, ("CCBE-Code")³, which reads:

2.6. Personal Publicity

2.6.1. A lawyer is entitled to inform the public about his services provided that the information is accurate and not misleading, and respectful of the obligation of confidentiality and other core values of the profession.

2.6.2. Personal publicity by a lawyer in any form of media such as by press, radio, television, by electronic commercial communications or otherwise is permitted to the extent it complies with the requirements of 2.6.1.

(7) Article 13 of the Draft reads as follows:

Client with special needs or diminished capacities

1. In his or her relations with the client, counsel shall take into account the client's personal circumstances and needs, [e]specially in the case of victims of sexual violence, children, elderly, frail persons or persons under a disability.

³ The Code of Conduct for Lawyers in the European Union, ("CCBE-Code") was originally adopted at the CCBE Plenary Session held on 28 October 1988, and subsequently amended during the CCBE Plenary Sessions on 28 November 1998 and 6 December 2002. The organisations representing the legal profession through the CCBE proposed that the rules set out in the Code of Conduct be recognised as the expression of a consensus of all the Bars and Law Societies of the European Union and European Economic Area and be taken into account in all revisions of national rules of deontology or professional practice with a view to their progressive harmonisation.

2. When a client's ability to make adequately considered decisions in connection with the representation is impaired because of mental disability or some other reason, counsel **must**:

- a) **inform the Registrar and the Chamber**;
- b) take such steps as are necessary to assist in providing for the adequate legal representation of the client according to the Statute and the Rules; and

(Emphasis added)

Although Article 6 of the ICTY-Code provides a similar obligation to "inform the Judge or Chamber hearing the matter, if any, of the client's mental disability or status as a minor", it is submitted that with regard to Counsel's obligation to preserve the confidentiality of the client's affairs such an obligation without exception is not warranted. It is therefore suggested to delete the first Alternative in paragraph (2).

(8) Article 14 of the Draft provides:

Conflict of interests relating to the establishment of the agreement

1. Counsel shall not represent a client in connection with any matter in which he or she was involved or has been privy to information as an official or staff member of the Court, unless the Registrar consents, if necessary after consultation with the other participants in the proceedings.

2. Counsel 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 of counsel or his or her associates;
- b) the matter is the same or substantially related to another matter in which counsel or his or her associates had 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.

3. A **conflict** of interest as set forth in sub-paragraphs 1 and 2 **may be avoided** if counsel and his or her associates establish an efficient procedure to isolate the counsel carrying the confidential information that is the source of the conflict. This procedure must prevent **any communications**, written or verbal, between counsel and his or her assistants and staff and the person with whom the conflict of interest exists.

4. Counsel shall not act in proceedings 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;
- b) the testimony relates to the nature and value of legal services rendered during the case; or
- c) substantial hardship would be caused to the client if that counsel does not so act.

The provision in paragraph (2b)) provides that counsel could represent a client in the case of a conflict of interests if the client and the former client consent after consultation. However, under German law the client cannot release the counsel from his obligations. He is not in the position to solve the problem of conflict of in-

terests. The prohibition of representation in a conflict of interests belongs to the core values of the German legal profession. For the same reasons a conflict of interests can not be avoided if counsel establishes an efficient procedure to isolate the counsel carrying the confidential information that is the source of the conflict. This principle of “Chinese walls” cannot make a forbidden representation by the counsel a lawful representation just because there is a situation of conflict of interests.

(9) Article 16 of the Draft reads as follows:

General principles concerning remuneration

1. Counsel and his or her assistants and staff shall receive a fair remuneration for their work.
2. An estimate of fees to be charged by counsel shall be fully disclosed in advance to a client.
3. The basis or rate of the fee shall be communicated to the client in writing before or, if necessary, within a reasonable time after commencing the representation including the basis for calculating the costs, the billing arrangements and the right of the client to receive a bill of costs.

The provision in paragraph 1 must be regarded as a matter of course and reflects no professional obligation. It should therefore be deleted.

As pointed out with regard to Article 11, the available provision does not distinguish clearly enough between the Chosen Counsel, which works on the basis of a contract between Counsel and client, and assigned Counsel. This distinction regarding the content of Article 16 (2) and (3) is visible in Article 19 (A) of the ICTY-Code (Emphasis added):

Article 19
Fees and Compensation

A. Counsel, **other than counsel assigned by the Registrar**, shall provide to a client, in writing and before counsel is engaged to represent a client, a statement of costs of representation, including:

- i. the basis for calculating the costs;
- ii. the billing arrangements;
- iii. and the client’s right to receive a bill of costs.

B. Counsel, **other than counsel assigned by the Registrar**, shall not accept compensation for representing a client from a source other than that client unless:

- i. that client consents in writing after being fully informed by counsel of the source and any other information relevant to the interests of the client; and
- ii. there is no interference with counsel’s independence of professional judgment nor with the client-counsel relationship.

C. Counsel, **if assigned by the Registrar**, shall not accept compensation for representing a client except as provided for under the Directive.

(Emphasis added)

It is suggested to amend the provision accordingly.

(10) Article 18 of the Draft reads as follows:

Remuneration of counsel in the framework of legal assistance paid by the Court

1. The payment of counsel in the framework of legal assistance paid by the Court is regulated in accordance with the Regulations of the Court and the Regulations of the Registry, as well as in this regulation.

2. In this framework, counsel must not accept or solicit a fee, or require payment or a disbursement, from the client or any other person or group of persons than the Registrar, except in the **case of partial indigency** or if otherwise foreseen in the law enforced by the Court. They shall not borrow monies or assets from a client.

(Emphasis added)

Since paragraph 1 does not reflect a professional obligation as such rather than technical issues it is misplaced in a Code of Conduct and should be deleted⁴.

Paragraph 2 refers to the situation of “partial indigency” and tends to suggest that in such situations assigned Counsel is not paid to full extent by the Court and is referred to seek marginal payment from his client. It must be stressed that this practice leads to an unacceptable mixture of the positions of chosen and assigned counsel and to hardship for assigned counsel in practice, since the assigned counsel is in no way connected to his client on a contractual basis.

It is therefore submitted to amend this provision and the regulations in question.

(11) Article 19 of the Draft provides:

Fee splitting

1. Counsel shall neither permanently transfer nor lend or temporarily transfer all or part of their 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. Counsel shall inform the Registrar

- a) of any such arrangement by his or her assistants or staff;
- b) of any such arrangement by any other counsel or his or her assistants and staff;

or

- c) of any request of such arrangements by a client after having advised the client on the prohibition of such practice.

Even if there should be no doubt that “fee splitting” is not allowed, the duty to inform the Registrar of any such arrangement (Art. 19 (2) subpara. (a) and (b)) stands in stark contrast to the principle of the corporate spirit of the profession,

⁴ The text of the Regulations of the Registry or a draft concerning those regulations, respectively, was not available for review

that requires a relationship of trust and cooperation between lawyers for the benefit of their clients and in order to avoid unnecessary litigation and other behaviour harmful to the reputation of the profession (comp. Art. 5.1. CCBE-Code). According to that principle a lawyer should recognise all other lawyers as professional colleagues and act fairly and courteously towards them.

The obligation to inform the Registrar of any request of such an arrangement by a client (Art. 19 (2) subpara. (c)) is absolutely inconsistent with Counsel's duty to act loyal and to respect the confidentiality of all information that becomes known to him in the course of his professional activity. It has to be taken into account that confidentiality is a primary and fundamental right and duty of the lawyer (see Art. 2.3. CCBE-Code).

In light of the aforementioned considerations paragraph (2) should be deleted.

(12) Article 22 reads as follows:

Conflict of interests

1. Counsel shall exercise all care to ensure that no conflict of interests arises. Counsel shall put the client's interests **before counsel's own interests or those of any other person, organisation or State** having due regard to the law of the Statute and the Rules and the Code.

2. Counsel's professional judgement on behalf of the client will be, or may reasonably be expected to be, adversely affected by:

- a) the counsel's responsibilities to, or interests in, a third party; or
- b) the counsel's own financial, business, property or personal interests.

3. Where a conflict of interests does arise, counsel shall:

- a) promptly and fully inform each potentially affected client of the existence of the conflict;
and
- b) either:
 - i) withdraw with prior consent of a Chamber; or
 - ii) obtain the full and informed consent in writing of all potentially affected clients
to continue representation, but only if such consent, in the best judgement of
counsel, is unlikely to prejudice in any way the administration of justice.

(Emphasis added)

It is submitted that it might be excessive to require putting the client's interests before counsel's own interests or those of any other person, organisation or State from Counsel.

(13) Article 23 of the Draft reads as follows:

Termination of the agreement

1. Counsel may **only withdraw from agreement with prior consent of a Chamber**

- a) if the client engages in activities described in paragraph 22 (3);

- b) if there is a reason such as:
- i the client insisting upon pursuing an objective that the counsel considers repugnant or imprudent;
 - ii the client failing 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; or
 - iii representation resulting in an unreasonable financial burden on counsel or has
been rendered unreasonably difficult by the client.

2. Any withdrawal of counsel shall be done in such a manner as to have a minimum adverse effect for the client.

3. In case a client discharges counsel, the agreement shall not be terminated before the consent of a Chamber is obtained.

4. A counsel shall be withdrawn by a Chamber on his or her request or on proposal of the Registrar, the Chamber, the client or third parties, in case his or her physical or mental condition materially impairs his or her ability to represent the client.

(Emphasis added)

As already noted with regard to Article 11, the available provision does not distinguish clearly enough between the Chosen Counsel and an assigned Counsel. This distinction is visible in Article 19 (B) ICTY-Code, which distinguishes between "termination" and "withdrawal". Article 19 of the ICTY-Code reads as follows:

Article 9
Declining, Terminating or Withdrawing Representation

A. Counsel shall not represent a client if:

- i. representation will result in conduct which is criminal, fraudulent or a violation of the Statute, the Rules, this Code or any other applicable law;
- ii. counsel's physical or mental condition materially impairs counsel's ability to represent the client; or
- iii. counsel's representation is terminated by the client or withdrawn by the Registrar.

B. Counsel may terminate or request, if applicable subject to the provisions of the Directive, withdrawal of his representation of a client **if such termination or withdrawal can be accomplished without material adverse effect on the interests of the client, or if:**

- i. the client has used counsel's services to perpetrate a crime or fraud, or persists in a course of action involving counsel's services that counsel reasonably believes is criminal or fraudulent;
- ii. the client insists upon pursuing an objective that counsel considers repugnant or imprudent;
- iii. the client fails to substantially fulfil an obligation to counsel regarding counsel's services and has been given reasonable warning that counsel will terminate or request withdrawal of his representation unless the obligation is fulfilled; or

iv. other good cause for termination or withdrawal exists.

C. Subject to leave from the Chamber, if representation by counsel is to be terminated or withdrawn, counsel shall not do so until a replacement counsel is engaged by the client or assigned by the Registrar, or the client has notified the Registrar in writing of his intention to conduct his own defence.

D. Upon termination or withdrawal of representation, counsel shall take steps to the extent reasonably practicable to protect the client's interests, such as giving sufficient notice to the client, surrendering papers and property to which the client or the Tribunal is entitled and refunding any advance payment of fee that has not been earned.

(Emphasis added)

In light of the standard set in the ICTY-Code, it is submitted that a Chosen Counsel, who is working on the basis of a contract with the client, must be in a position to terminate his representation of a client if such termination can be accomplished without material adverse effect on the interests of the client without prior consent of a Chamber. This would reflect most properly the position set out in Article 15 (1) of the Draft according to which, Counsel has the right to refuse an agreement without stating reasons.

In addition, the Assigned Counsel should not be limited to request withdrawal only in the circumstances set out in paragraph (1), subparagraph b, if good cause for withdrawal exists. It is submitted that good cause would warrant the withdrawal, if the client has expressed that he has lost trust in his Counsel and asked for his withdrawal.

The numerous duties to which a lawyer is subject require his absolute independence, free from all other influence, especially such as may arise from external sources. Such independence is as necessary to trust in the process of justice as the impartiality of the judge. A lawyer must therefore avoid any impairment of his independence and be careful not to compromise his professional standards.

For the reasons set forth herein, the provision should be amended to meet the standard set out in the ICTY-Code.

(14) Article 24 of the Draft Code provides:

Consequences of the agreement

1. Counsel must advise and represent a client until
 - a) the matter before the Court has been finally determined, including all appeals;
 - b) a Chamber consented to a withdrawal or termination of the agreement as foreseen in paragraph 0; or
 - c) the assignment is withdrawn.
2. The duties of counsel towards the client continue until the representation has ended.
3. Counsel shall keep **files containing documents and record of work accomplished in fulfilment of mandate** for **seven years** following the termination of the mandate unless earlier turned over to subsequent counsel or client and shall allow a client or former client to inspect it, unless substantial grounds exist to refuse. After this time counsel shall seek **instruction from the Registrar** on the disposition of the files, with due regard to confidentiality.

(Emphasis added)

As submitted with regard to Article 23, paragraph (1) should be amended to meet the standard set out in the ICTY-Code. It might be taken into consideration that Article 8 of the ICTY-Code provides:

Article 8
Scope of Representation

- A. Counsel shall advise and represent a client until counsel's representation is terminated by the client or withdrawn by the Registrar.
- B. When representing a client, counsel shall:
- i. abide by the client's decisions concerning the objectives of representation;
 - ii. consult with the client about the means by which those objectives are to be pursued, but is not bound by the client's decision; and
 - iii. seek or accept only those instructions which emanate from the client and which are not given as the result of an inducement from any person, organisation or State.
- C. Counsel shall not advise or assist a client to engage in conduct which counsel knows is criminal or fraudulent, in breach of the Statute, the Rules, this Code or any other applicable law and, where counsel has been assigned to the client, the Directive. However, counsel may discuss the legal consequences of any proposed course of conduct with a client and may advise or assist a client in good faith to determine the validity, scope or meaning of the applicable law.

Given that proceedings before the court will involve large amounts of documents, it should be set out clearly, that the obligation to keep files only applies to documents that are not accessible to counsel in the court file, transcript or any other official collection or archive. It is also submitted that an obligation to keep documents for a period of time of five years would be sufficient.

In light of the position of integrity and independence of counsel it is not acceptable, that counsel shall seek instruction from the Registrar on the disposition of the files.

It is submitted to amend the provision accordingly.

IV.
Chapter 3: Proceedings

(15) Article 25 of the Draft Code reads as follows:

Registrar

1. All written communication with the **Court or other parties** is channelled through the Registrar.
2. Counsel shall request all available materials and information related to the matter and the client from the Registrar.

Comment:

This does not include the disclosure of evidence.

It is submitted that such a provision requiring all written communication and requests be channelled through the Registrar only refers to the technical and formal arrangements for the proceedings and contains not even the slightest trace of an ethical or professional obligation. Therefore the provision should be deleted.

(16) Article 26 of the Draft reads as follows:

Contact with Chambers

Counsel must not, unless permitted by the law of the Statute or the Rules, the Code, or by a Chamber seized of the matter, or within the proper context of the proceedings or before a representative of the Registrar, make contact with a Chamber concerning proceedings in which he or she is involved.

According to the standard set out in the CCBE-Code, a lawyer must always have due regard for the fair conduct of proceedings. He must not, for example, make contact with the judge without first informing the lawyer acting for the opposing party or submit exhibits, notes or documents to the judge without communicating them in good time to the lawyer on the other side unless such steps are permitted under the relevant rules of procedure. To the extent not prohibited by law a lawyer must not divulge or submit to the court any proposals for settlement of the case made by the other party or its lawyer without the express consent by the other party's lawyer. In light of that standard, it is submitted that the wording of the similar provision in Article 22 of the ICTY-Code is preferable.

Article 22 of the ICTY-Code reads:

Article 22
Communications with the Chambers

Unless permitted by the Rules, this Code or the Judge or Chamber hearing the matter, counsel shall not:

- i. make contact with a Judge or Chamber in relation to the merits of a particular case, except within the proper context of the proceedings in the case; or
- ii. submit exhibits, notes or documents to a Judge or Chamber without transmitting them through the Registry, except in an emergency or when at the same time transmitted to the Registry.

Therefore, the provision should be amended accordingly.

(17) Article 27 of the Draft Code provides:

Candour towards the Court

1. Counsel must take all necessary steps to ensure that his or her actions, or actions of his or her assistants or staff, do not bring proceedings before the Court into disrepute and do not offend the **dignity and decorum of the Court**.
2. Counsel is personally responsible for the conduct and presentation of the case of his or her client, and must exercise personal judgment on the substance and purpose of statements made and questions asked.
3. Counsel shall not deceive or knowingly mislead the Court. He or she must take all necessary steps to correct an erroneous statement made by him or her or by his or

her assistants or staff in ongoing proceedings before the Court as soon as possible after becoming aware that the statement was erroneous.

(Emphasis added)

A lawyer shall while maintaining due respect and courtesy towards the court defend the interests of his client honourably and fearlessly. It is respectfully submitted that even if desirable, it cannot be an ethical or professional obligation not to offend the “dignity and decorum” of the Court and that the ICTY-Code does not include such an obligation. The provision should be amended accordingly.

(18) Article 28 of the Draft Code sets out:

Evidence

1. 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. 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 the evidence or 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 under rule 116.

4. Counsel shall at all times maintain the privileged or confidential character of evidence disclosed or introduced, when so declared.

It is submitted that the scope of the obligations set out in paragraphs (2) and (3) remains less than clear. In addition, it contradicts Counsel’s integrity and independence to overburden any task with regard to evidence, which is not in his possession.

The comparable Article in the ICTY-Code provides:

Article 24
Integrity of Evidence

Counsel shall at all times maintain the integrity of evidence, whether in written, oral or any other form, which is or may be submitted to the Tribunal.

It is suggested to amend the Article in accordance with the standards set out in the ICTY-Code.

(19) Article 31 of the Draft code reads as follows:

Relation with other counsel

1. Counsel shall, in dealing with other counsel appearing or acting in relation to proceedings before the Court, consider them as professional colleagues and must act fairly, loyally and courteously towards them and their clients.
2. All correspondence between counsel who represent 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 must, at the outset, state clearly that the correspondence between counsel is not confidential.
4. Counsel shall not call another counsel involved in the proceedings as a witness unless there is a compelling need for that counsel's testimony. If another counsel involved in the proceedings 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 a Chamber.**

(Emphasis added)

The second sentence of paragraph (4) seems to assume the right of a Chamber to order counsel to testify to a confidential or privileged matter even if the client did not consent.

In light of the importance of the lawyer's function that he should be told by his client things which the client would not tell to others, and that he should be the recipient of other information on a basis of confidence and that without the certainty of confidentiality there cannot be trust, this assumption would be unacceptable. As set out already, confidentiality is a primary and fundamental right and duty of the lawyer. The lawyer's obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the Court (see Art. 2.3. of the CCBE-Code).

(20) Article 34 of the Draft Code provides:

Relation with witnesses and victims

1. Counsel must refrain from **gratuitously intimidating, bullying, badgering, humiliating witnesses or victims or otherwise causing them undue stress inside or outside the courtroom.** They shall have a special consideration for victims of sexual violence, children, elderly and frail persons.
2. Counsel shall not reveal the identity of protected victims and witnesses, or any information that may reveal their identity and whereabouts, unless they have been specifically authorized to do so by the Court.

(Emphasis added)

It is submitted that the wording of the provision is inappropriate in light of counsel's position of integrity. It is therefore submitted to amend the provision to meet the wording of the comparable Article 28 in the ICTY-Code which reads:

Article 28
Victims and Witnesses

A. Counsel shall not use any means that have no substantial purpose other than to embarrass, delay or burden victims and witnesses, or use coercive or other methods of obtaining evidence that violate the Statute, the Rules or this Code.

B. Counsel shall not make any payments in monies or assets to witnesses or potential witnesses for the purpose of unduly influencing or inducing such witnesses or potential witnesses.

V.
Chapter 4: Disciplinary Regime

(21) Article 44 of the Draft reads as follows:

Rights and duties of counsel

1. Counsel submitted to a disciplinary procedure shall be entitled to assistance and representation by another counsel.

2. Counsel submitted to a disciplinary procedure shall **cooperate fully** with the Registrar, the Disciplinary Board and the investigative person by answering all questions and by providing information and materials in whatever format they may be.

(Emphasis added)

In light of the fundamental principle that nobody has an obligation to self-incrimination ("*nemo tenetur se ipsum accusare*"), counsel should not be obliged to cooperate fully with the Registrar, the Disciplinary Board and the investigative person. The provision should be amended accordingly.

(22) Article 46 of the Draft Code provides:

Sanctions

1. The Disciplinary Board may impose sanctions on a finding of misconduct by way of:

- a) admonishment,
- b) public reprimand,
- c) fine up to 50,000 EUR,
- d) temporary suspension not exceeding two years,
- e) permanent ban from practising before the Court.

2. Misconduct and imposed sanction shall be communicated to the national authority competent to control the professional activity of the sanctioned counsel.

3. Admonishment may include recommendation, including advice regarding future conduct of the sanctioned counsel.

4. The costs of the procedure shall be borne by the sanctioned counsel.

(Emphasis added)

It is submitted that the obligation to bear the costs of the procedure should not be excessive in comparison to the actual sanction itself. It is therefore suggested to leave it to the discretion of the Disciplinary, whether to impose the obligation to bear the costs in whole or in part.