



# The Code of Professional Conduct for ICC Counsel : the interrelation between the ICC disciplinary competence and the counsel's national jurisdiction(s)

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# Introduction

Rules of professional conduct constitute a global practice and were established well before the foundation of permanent International Criminal Court or the *ad hoc* / hybrid international criminal tribunals.

In fact the regulation of professional conduct is an essential feature of legal orders, although it may, of course, differ in various respects.



## About myself:

I am a barrister at NEWLAW law firm, Vice-President for Victims of the International Criminal Court Bar Association, Alternate Member of the International Criminal Court Disciplinary Board and adjunct lecturer.



Undoubtedly a lawyer has duties arising from the fact that he/she is representing a client, and therefore is in a position of trust where he is expected to safeguard the client's interests.

On the other hand, professional rules are absolutely essential for the proper function of the administration of justice as a whole, since the said system cannot adequately operate if there exists an overall imbalance.



- Scholars and practitioners have endorsed that **character, personality and individual integrity** are the crucial characteristics which can shield a counsel from facing any legal ethics issues.



- In the other jurisdictions, and having the USA as a role model, David Wilkins has put forward a sophisticated model of how lawyers are regulated, describing four types of enforcement mechanisms: 1) **disciplinary controls**, 2) **liability controls**, 3) **institutional controls** and 4) **legislative controls**.



- **Disciplinary controls** are handled by independent agencies which engage in a process resembling a criminal prosecution; hence to name but one example the ICC Disciplinary Board falls into this category.

- **Liability controls** depict those instances that lawyers are primarily sued by affected individuals or legal entities.

- **Institutional controls** are those mechanisms which are used by the institutions themselves within which lawyers work; to name but one example a law firm might have its own proceedings if a legal ethics issue is raised concerning one of its lawyers.



- Finally, **legislative controls** are those controls placed by state authority and legislation, regardless of whether they are applied by executive or legislative bodies, where ‘authority and operation ultimately rest in the hands of the executive or the legislative branch rather than the courts’.





>>> Hence in Greece **Law 4194/2013** (under the title ‘The Lawyers’ Code) as well as the Regulation of Lawyers’ Ethics of 1980 constitute the national legislative controls of a Greek counsel. Contemporaneously a Greek counsel included in the ICC List of Counsel must also comply with the **ICC Code of Professional Code for Counsel** (hereinafter **CPCC**) adopted at the 3<sup>rd</sup> plenary meeting of the Assembly of States Parties on 2 December 2005, when he practices before the ICC.

- Note: The CPCC was adopted pursuant to Article 8 of the ICC Rules of Procedure and Evidence, which foresaw the drafting up of the said Code.



Consequently potential conflicts between these two legislative controls cannot be excluded and **the counsel must always a rule of thumb** abide by the legislative controls of the state or international environment he/she practices each distinct time.

(more elaboration on this issue on the intersection part of the presentation)





>>> **E.g.** An interesting example of potential conflict is **Article 21§2 CPCC** which prohibits a Counsel from making “his or her fees contingent on the outcome of a case in which he or she is involved”; **contrast:** Articles 58§1 and 60§1 of the Greek Lawyers’ Code allow making a lawyer’s fee contingent on the outcome of the case up to 20-30%.



*(Must read: **A Civil Action** by Jonathan Harr, where we see the US ‘no win no fee doctrine’ can be a sword cutting both ways - Anderson v. Cryovac)*



# The interrelation between the jurisdiction of the ICC and the counsel's national jurisdiction(s)

“It does violence to the English language to assert that a president who has violated a duty entrusted to him by the Constitution is not guilty of official misconduct.”

*US Chief Justice Charles T. Canady*

**Fact:** Counsel admitted to the ICC List of Counsel receive their training and principal admission nationally, at their respective state; and each state has understandably each own sets of rules and procedures.





# The interrelation between the jurisdiction of the ICC and the counsel's national jurisdiction(s)

- **Article 38 CPCC - Complementarity of disciplinary measures**
- The ICC's jurisdiction over legal ethics does not mean that its disciplinary bodies will exercise their disciplinary powers under all circumstances. Article 38 CPCC is in that respect a 'twin brother' of Article 17 ICC, which consists the foundation of the Court's cornerstone complementarity principle.
- This principle can be summarised succinctly by noting that the Court, despite having *prima facie* jurisdiction will not exercise it for reasons of inadmissibility **whenever** an able and willing state prosecutes appropriately the case at hand.



# The interrelation between the jurisdiction of the ICC and the counsel's national jurisdiction(s)

- Article 38 CPCC - Complementarity of disciplinary measures

## IMPORTANT EXCEPTION TO THE COMPLEMENTARITY RULE:

Offences prescribed in **Article 70** of the Rome Statute of the International Criminal Court (hereinafter **ICCRSt**) are exempted from the complementarity requirement. Professional discipline is a particularised, albeit softened sanctioning mechanism which relates to the administration of justice of the Court itself just as much as those criminal offences.





# The interrelation between the jurisdiction of the ICC and the counsel's national jurisdiction(s)

- Article 38 CPCC - Complementarity of disciplinary measures

## IMPORTANT EXCEPTION TO THE COMPLEMENTARITY RULE (continued):

Which are exactly these offences prescribed in **Article 70 ICCRSt**?

- **ANSWER:** These are the offences against the administration of justice, i.e.:
  - (a) Giving false testimony
  - (b) Presenting evidence that the party knows is false or forged;



# The interrelation between the jurisdiction of the ICC and the counsel's national jurisdiction(s)

- Article 38 CPCC - Complementarity of disciplinary measures

## ANSWER (continued):

(c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness or destroying, tampering with or interfering with the collection of evidence;

(d) Impeding, intimidating or corruptly influencing an official of the Court in order not to perform, or to perform improperly, his or her duties;





# The interrelation between the jurisdiction of the ICC and the counsel's national jurisdiction(s)

- Article 38 CPCC - Complementarity of disciplinary measures

## ANSWER (continued):

(e) Retaliating against an official of the Court on account of duties performed by that or another official;

(f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.



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- Article 38 CPCC - Complementarity of disciplinary measures

## ANSWER (continued):

>>>> Final note: This critical but sometimes overlooked exception to the complementarity principle of the ICC disciplinary related powers and proceedings can be found at **Rule 163§2, Part 2 of the Rules of Procedure and Evidence** (hereinafter RPE).





# The interrelation between the jurisdiction of the ICC and the counsel's national jurisdiction(s)

- **Article 38 CPCC - Complementarity of disciplinary measures**
  1. The disciplinary procedure in this Code shall be applied by the Disciplinary Board.
  2. The *ad hoc* member of the Disciplinary Board shall serve as the contact point with the relevant national authority for all communication and consultation regarding the procedure.



# The interrelation between the jurisdiction of the ICC and the counsel's national jurisdiction(s)

- **Article 38 CPCC - Complementarity of disciplinary measures (continued)**

3. Counsel subject to the disciplinary procedure shall request the national authority dealing with the matter to inform the Disciplinary Board of the progress of **any national disciplinary procedure** concerning the alleged misconduct **and of its final decision**, and shall take all measures necessary to facilitate such communication.





# The interrelation between the jurisdiction of the ICC and the counsel's national jurisdiction(s)

- Article 38 CPCC - Complementarity of disciplinary measures (continued)

4. When the alleged misconduct is the basis of a disciplinary procedure which has already been initiated before the relevant national authority, **the procedure** before the Disciplinary Board **shall be suspended until** a final decision is reached regarding the former procedure, **unless:**



# The interrelation between the jurisdiction of the ICC and the counsel's national jurisdiction(s)

- **Article 38 CPCC - Complementarity of disciplinary measures (continued)**
  - (a) the national authority **does not** respond to communications and consultations in accordance with paragraph 2 of this article within a reasonable time;
  - (b) the Disciplinary Board considers that the **information received is not** satisfactory; or
  - (c) the Disciplinary Board considers that, in the light of the information received, the national authority is **unable or unwilling** to conclude the disciplinary procedure.





# The interrelation between the jurisdiction of the ICC and the counsel's national jurisdiction(s)

- **Article 38 CPCC - Complementarity of disciplinary measures (continued)**
5. As soon as it receives the decision of the national authority, the Disciplinary Board shall:
- (a) declare the **procedure closed**, unless the decision adopted does not adequately address a complaint of misconduct under this Code; or
  - (b) declare 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.



# The interrelation between the jurisdiction of the ICC and the counsel's national jurisdiction(s)

- **Article 38 CPCC - Complementarity of disciplinary measures (continued)**

6. In the case of paragraphs 3 and paragraph 4 (b) of this article, the Disciplinary Board may ask counsel subject to the disciplinary procedure to provide detailed information about the procedure, including any minute or evidence which might have been submitted.

**Important Note:** Article 38§§3 and 4(b) CPCC refer either to: 1) cases that the Disciplinary Board considers that the **information received by national authorities** regarding an ongoing case before it **is not** satisfactory [para 4(b)] 2) cases that progress of **any national disciplinary procedure** concerning the alleged misconduct **and of its final decision**



# The interrelation between the jurisdiction of the ICC and the counsel's national jurisdiction(s)

- Article 38 CPCC - Complementarity of disciplinary measures (continued)

**Important Note (continued):** 2) cases that have progressed in the State that the counsel practices law primarily **or even a final decision** has been issued by the national disciplinary authority.

**7. (Finally)** A decision by the Disciplinary Board based on this article may be appealed before the Disciplinary Appeals Board ( >>>> to my knowledge **no case** has been heard thus far by the Appeals Board, i.e. no decision has been appealed).





# The interrelation between the jurisdiction of the ICC and the counsel's national jurisdiction(s)

- **Recently ruled:** In the recent case against **GSX** the Disciplinary Board ruled in its preliminary decision regarding the defendant's submission that a request for mediation was submitted and efforts were made in order a mediation process via the Rotterdam Bar in The Netherlands to begin, that this **did not** actually qualify as a disciplinary procedure as stipulated in Article 38(4) CPCC.
- **Personal Note:** It is believed that the decision should remain the same even if the mediation process had actually begun.



# The interrelation between the jurisdiction of the ICC and the counsel's national jurisdiction(s)

- **Ambivalent Issue:** A critical question would arise if the mediation process had actually been concluded, since the issue would not revolve around the question whether mediation amounts to disciplinary proceedings, but rather whether the plaintiff had been satisfied and indirectly resigned from his rights to raise a complaint.
- Admittedly this would also involve answering the question whether the examined disciplinary issues should be examined on a *proprio motu* basis, i.e. without the need of a formal request from another party.



# The interrelation between the jurisdiction of the ICC and the counsel's national jurisdiction(s)

- **Recently ruled No2:** In the recent case against **XX** the Commissioner has submitted, following the defendant's submissions that the ICC Disciplinary Board for Counsel is indeed the competent organ to hear cases against other non-legal professionals pursuant to the Code of Conduct for Investigators (hereinafter **CCI**).
- **Defendant's submissions:** The CCI was promulgated by an Administrative Instruction of the Registrar, without its adoption by the Assembly of States Parties and hence the Registrar has acted *ultra vires* in adopting the said Code.





# Final Conclusions

“The mediocre teacher tells. The good teacher explains.  
The superior teacher demonstrates. The great teacher inspires.”

*William Arthur Ward*



# Final Conclusions

- The ICC's legal framework vests the Court with a sound foundation for regulating the activities of counsel and if necessary sanctioning counsel.
- The Court wishes to apply the complementarity principle in disciplinary proceedings as well whenever this is feasible and legally permissible (see Art. 70 ICCRSt exceptions).
- Thus far, the ICC has put an emphasis on institutional measures. It does not hold contempt powers, as the UN tribunals do, but has made use of other institutional mechanisms when, for example, denying fees to counsel Hadi Shalluf.



# Essential Reading

Till Gut, **COUNSEL MISCONDUCT BEFORE THE INTERNATIONAL CRIMINAL COURT**, (Oxford and Portland, Oregon: Hart Publishing), 2012





**I would candidly like to thank you  
for your time and attention.**



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