

# CONTENTS

<i>Preface</i>	ix
<i>Acknowledgements</i>	xi
Introduction	1
I. Common Professional Standards for Defence Lawyers before the ICC	1
II. Concepts of Professional Conduct, Professional Responsibility and Professional Ethics	2
III. The Various Types of Enforcement Mechanisms in Counsel Regulation	4
Chapter 1 The UN International Criminal Tribunals: ICTY, ICTR and SCSL	6
I. The UN Tribunals: Criminal Justice Steps onto the International Arena Again	6
A. The General Context of the UN Tribunals	7
B. The Defence before the UN Tribunals	9
II. Misconduct before the International Criminal Tribunal for the former Yugoslavia	11
A. The Legal Sources of the ICTY on Counsel Misconduct	11
B. The ICTY's Practice	14
i. Disciplinary Proceedings	14
ii. Contempt of the Tribunal	16
iii. Other Decisions by the Chambers	25
iv. The Registrar	26
v. The Association of Defence Counsel Practising before the ICTY	27
C. The Assessment of the ICTY's Regime in Scholarship	28
i. Critique of Contempt in Particular	28
ii. Comments on the Code of Conduct and the other Aspects of the Disciplinary Regime	32
D. Analysis of the ICTY Regime	33
III. Misconduct before the International Criminal Tribunal for Rwanda	37
A. The Legal Sources of the ICTR on Counsel Misconduct	37
B. The ICTR's Practice	38
i. Disciplinary Proceedings	38
ii. Contempt of the Tribunal	39

## *Contents*

iii. Other Decisions by the Chambers	40
iv. The Registrar	42
v. The Defence Lawyers' Association at the ICTR	43
C. Assessment of the ICTR's Regime in Scholarship	44
D. Analysis of the ICTR Regime	44
IV. Misconduct before the Special Court For Sierra Leone	46
A. The Legal Sources of the SCSL on Counsel	46
B. The SCSL's Practice	46
i. Disciplinary Proceedings	46
ii. Contempt of the Special Court	47
iii. Other Measures by the Chambers	47
iv. Appointment and Withdrawal of Counsel	48
C. Analysis of the SCSL Regime	48
V. Conclusion on the UN Tribunals: Lessons to Learn	49
Chapter 2 The National Models: Germany and the United States	51
I. The Two National Models: Commonalities and Differences	51
A. Criminal Defence in Germany	52
B. The German Approach to the Regulation of Counsel	54
C. Criminal Defence in the United States	55
D. The US Approach to the Regulation of Counsel	56
II. Legal Responses to Misconduct: Germany	59
A. The General Layout of the German System	59
B. Specific Measures against Counsel Misconduct	61
i. Professional Discipline	61
ii. Criminal Law	67
iii. Other Measures as Institutional Controls	73
iv. Liability Controls as an Indirect Measure	84
v. Conclusion	85
C. The Procedure for the Various Measures	86
i. Disciplinary Procedure	86
ii. Criminal Procedure	88
iii. The Procedure for Other Measures	88
iv. Analysis of the Applicable Procedures	92
D. The Relationship of the Various Measures	93
i. Multiple Proceedings for the Same Facts	93
ii. Proceedings in Other Jurisdictions and Transnational Work	97
E. Defence Rights and their Impact on the Regulation of Counsel	100
i. Constitutional Guarantees	100
ii. Delineating the Permissible from the Impermissible	101
F. Conclusion on the German Model	105
III. Legal Responses to Misconduct: United States	106
A. The General Layout of the US System	106
B. Specific Measures Against Counsel Misconduct	114

## *Contents*

i. Professional Discipline	114
ii. Criminal Offences	124
iii. Other Measures as Institutional Controls	130
iv. Liability Controls	139
v. Conclusion	141
C. Comparison of the Procedure for the Various Measures	142
i. Disciplinary Procedure	142
ii. Procedure for Criminal Offences	145
iii. Procedure for Contempt	147
iv. Other Procedures	150
v. Analysis	154
D. The Relationship of the Various Measures	155
i. General Connections	155
ii. Multiple Proceedings for the Same Facts within the Same Jurisdiction	158
iii. Proceedings in Separate Jurisdictions	162
E. Defence Rights and their Impact on the Regulation of Counsel	163
i. Chilling Effect and Zealous Advocacy	163
ii. The Engrained Tension	165
F. Conclusion on the US Model	166
IV. A Comparative Assessment	166
Chapter 3 The International Criminal Court's System	170
I. The General Layout of the ICC System of the Regulation of Counsel	170
A. Introduction to the ICC's Legal Instruments in General	170
B. The Bases for Disciplining Counsel in Particular	173
i. The Statute and the Rules of Procedure and Evidence	173
ii. The Code of Conduct for Counsel and the Rules of Procedure and Evidence of the Disciplinary Board and the Disciplinary Appeals Board	173
iii. The Regulations of the Court and the Registry	176
II. Specific Measures against Counsel Misconduct	177
A. The Disciplinary System of the ICC	177
i. An Overview of the ICC Code	178
ii. The Nature of Professional Discipline under the ICC Code and the Burden of Proof in particular	179
iii. The Jurisdictional Scope of the Code and other Issues of Applicability	185
iv. The Definition of Misconduct for the Purpose of Disciplinary Proceedings	193
v. The Disciplinary Procedure	208
vi. Conclusion	234
B. Criminal Offences under the ICC Statute	237

## *Contents*

i.	Offences in Connection with the Administration of Justice	237
ii.	Offences on Specific Professional Duties or Pertaining to Financial Irregularities	243
iii.	Legal Consequences of Criminal Offences	244
iv.	The Procedure for Criminal Offences	249
v.	Conclusion on Criminal Offences	251
C.	Other Measures as Institutional Controls	252
i.	Institutional Controls and Inherent Powers	252
ii.	Article 71 of the Statute	256
iii.	Other Measures by Chambers	263
iv.	Registry Measures against Misconduct	266
v.	General Ethics Advice	269
D.	Liability Controls: Individual Action against Misconduct	272
E.	Self-governing Professional Bodies	274
III.	A Comparison and Analysis of the Various Measures	274
A.	The Available Measures and their Scope with regard to Counsel Misconduct	274
B.	The Differences in Procedure	278
IV.	Defence Rights and their Impact on the Regulation of Counsel	279
V.	Assessment of the ICC Regime	283
Chapter 4	The Relationships between the Different Regimes	286
I.	The Concurrence of the ICC and National Jurisdictions	286
A.	The Multiplicity of Applicable Regimes	286
B.	The Conflict of Professional Rules in particular	287
C.	Criminal Offences	289
II.	Enforcing Professional Discipline	291
A.	The ICC Disciplinary Procedure vis-a-vis National Disciplinary Procedures	291
i.	The Nature of Article 38 Complementarity	291
ii.	The Application of Article 38 Complementarity	295
B.	International Cooperation for ICC Disciplinary Proceedings	297
C.	Reciprocal Discipline	298
III.	Criminal Proceedings	300
A.	ICC Proceedings for Offences under Article 70 of the Statute	300
B.	International Cooperation for ICC Criminal Proceedings	302
C.	National Criminal Prosecutions	306
IV.	The Relationships of Sanctions within the ICC Regime	307
A.	Concurrence Issues between the ICC's Enforcement Mechanisms	307
B.	The Relationship of Article 70 Proceedings to Article 71	308
C.	The Relationship of Professional Discipline towards Article 70 and Article 71 Sanctions	308

*Contents*

Conclusions on International Counsel and Misconduct	311
I. A Summary of the Study	311
II. Sanctioning Counsel and the Various Types of Enforcement Mechanisms	313
III. Misconduct and the Double Role of Counsel	316
<i>Bibliography</i>	319
<i>Index</i>	341