

In the Matter of the Complaint raised against Jean Logo Dhengachu by Trial Chamber VI, of 13 August 2015, pursuant to Section 10 of the Code of Conduct for Investigators before the International Criminal Court and Article 34 of the Code of Professional Conduct for Counsel.

Determination of Disciplinary Board (“the Board”) on Challenge by Jean Logo Dhengachu (“the Respondent”) as to Jurisdiction.

Challenge – General

1. Following receipt of the Alternate Commissioner’s Report of 12 May 2019 in relation to this matter, the Board (by Memorandum of 30 May 2019) sought further information from the Alternate Commissioner, which was provided to the Board by a Supplementary Report of 18 June 2019.
2. Pursuant to Article 8.1(b) of the Rules and Procedures of the Disciplinary Board and the Disciplinary Appeals Board, the Board, on or about 25 June 2019, determined that a disciplinary procedure should be initiated against the Respondent.
3. The Respondent *“challenge(d) the authority and jurisdiction of the Board...and otherwise invite(d) the Board to decline jurisdiction”* by way of a full written application and submission of 15 September 2019.
4. The Alternate Commissioner made a full written submission in response to the jurisdictional challenge, dated 15 October 2019.
5. The Board, by Direction of 8 November 2019, gave the Respondent a right of reply, which was availed of by way of a submission of 15 November 2019.
6. The Board is grateful for the full arguments received on behalf of the parties, and notes that all arguments advanced have been given full consideration by it, even if not specifically mentioned, or mentioned in full detail, in this Determination.
7. In his reply, the Respondent encapsulated his challenge(s) in this way: *“(he) maintains that the Board should decline jurisdiction given that the ASP (Assembly of State Parties) has not amended the Code of Professional Conduct for Counsel to extend the Board’s authority and an Administrative Instruction is insufficient to do so; the Code (of Conduct for Investigators) is deficient in important respects which not only underscore the inadequacy of the process by which it was produced but is unfair; and in any event there has been serious and unexplained delay in the matter being brought before the Board”*.

Jurisdiction

8. The Respondent in reality submits that if the Code of Conduct for Investigators (“the Investigators’ Code”) was to be brought into being and effect under the aegis of the Code of Professional Conduct for Counsel (“the Counsel Code”), which itself had been brought into being by the ASP, then the Counsel Code necessarily needed to be amended to achieve that; there being an explicit power (and procedure) given in the Counsel Code (Article 3 – by way of submission to the ASP).
9. Both parties agree that the Victims and Witnesses Unit (“the VWE”) was duly and properly established under the Rome Statute for the purpose, inter alia, of *“provid(ing)...protective measures and security arrangements...for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses”* (Article 43.6).
10. Rule 17 of the Rules and Procedure and Evidence (“RPE”) devolved to the VWE, inter alia, the function of *“(v) Recommending, in consultation with the Office of the Prosecutor, the elaboration of a code of conduct...for investigators...”*.
11. In distinct contrast with the Counsel Code, which, by Rule 8 of the RPE, required promulgation through the ASP, no such requirement was attached to the creation of the Investigators’ Code. The VWE duly drafted and prepared the Investigators’ Code (which commences as follows: *“The Registrar in consultation with the President and the Prosecutor, and pursuant to rule 17(2)(a)(v) of the Rules of Procedure and Evidence, promulgates the following:”*).
12. The Board’s view is that the genesis of, and the course then followed to promulgate, the Investigators’ Code did not require it to go to the ASP either as a “stand-alone” matter or as an amendment to the Counsel Code. Rule 17 RPE did not require such a process. And the Counsel Code was not being amended, nor purporting to be amended, in any way.
13. Indeed the Board’s view is that the Investigators’ Code, once having been created by the VWE under the RPE, had force, effect and authority from then; and that any subsequent step taken by the Registrar (by way of an Administrative Instruction of 10 September 2008) could properly be seen as a device to bring the Investigators’ Code into public light, to put it into circulation.
14. Even if the Board is mistaken as to that, and that the Investigators’ Code did require some formal promulgation process, then such process was in fact duly and properly fulfilled by the Registrar’s said Administrative Instruction. Such an Instruction is able to be given pursuant to Section 3.1(b) of the Presidential Directive of 9 December 2003 – the Registrar’s Administrative

Instruction here being one for *“The purpose...of regulat(ing) the administration of practical and organizational matters of general concern, including setting forth office practices and procedures”*. The Board does not accept that the latter words in this provision should lead to it being “read down” so that it relates only to matters of internal management, as the Respondent contends. Rather, the Board accepts the Alternate Commissioner’s argument that those latter words are *“a clarification but not a restriction. This can reasonably read as ‘including but not limited to”*.

15. In addition the Respondent submits that in any event, and even if the Investigators’ Code is properly promulgated, as drafted that Code goes beyond the scope of what was able to be done through Rule 17 RPE in that the Investigators’ Code includes *“disciplinary and punitive matters”* and that that Code, given the terms of Rule 17 (*“a code of conduct...for investigators”*), should only include *“moral and ethical matters”*.
16. The Board disagrees. The Investigators’ Code incorporates ethical standards to be complied with, with such standards to be seen and acted upon as rules of behaviour, the Code laying down and making explicit professional and ethical obligations. There would be no point in having any code of standards and conduct unless such a code (using the Alternate Commissioner’s words) *“necessarily involve(s) the identification of mean to determine its limits and to allow for independent assessment as to whether an individual subject to the Code has complied with or breached its terms. Without such, a Code would be no more than a set of guidelines or suggestions. It is submitted that this is self-evident, and that the expectation that those directing the creation of a Code would see it as such. There would therefore be no need to spell out the requirement of including an adjudication process, and the absence of a reference to such in Rule 17 of the RPE signifies nothing”*.

Deficiencies/Anomalies

17. Both parties agree that there are anomalies, emerging from the provisions contained in Section 10 of the Investigators’ Code. The Board agrees.
18. In this case the anomalies arise from Section 10.1 of the Investigators’ Code which states, relevantly, that *“In case of breach or attempted breach of this Code, appropriate disciplinary measures shall be taken by (b) the Disciplinary Board, with respect to Defence investigators, in accordance with the procedures spelled out in the Code of Professional Conduct for counsel”*.
19. The Respondent says that *“appropriate disciplinary measures”* is not defined in Section 10.1. The Board’s view is that such appropriate measures are clearly spelt out – under Section 10.1(a) by the agency of the Office of the Prosecutor through the relevant Staff Regulations and Rules; under Section 10.1(b) by the Disciplinary Board through the Counsel Code provisions; under Section 10.1(c) by the Chamber through the Counsel Code provisions.

20. Any inconsistencies which may be perceived, in working within the procedures spelled out in the Counsel Code, such as the appointment of an ad hoc member of the Board (Article 36.5) and in the application of the Complementarity provisions (Article 38), are capable of resolution (by consent or, if necessary, adjudication) in the Board's view. The Board notes that the words used in Section 10.1(b) of the Investigators' Code are "*in accordance with the procedures*" in the Counsel Code and not, for example, some more compulsory formulation such as "in strict compliance with the procedures in the Counsel Code". The distinction is real.
21. In addition to which the Board sees no merit in the "*no financial provision*" contention made on behalf of the Respondent – nor do counsel being subjected to disciplinary procedures have such; but, as with counsel, investigators being subjected to disciplinary procedures do have the rights given by Article 40 of the Counsel Code (i.e. to representation, to silence, to disclosure, to time to prepare, to examine witnesses). Which means that rights of natural justice, the right to a fair and impartial hearing, are preserved.

Delay

22. Undoubtedly there has been such – and much. The Board weighed such matters of delay in considering whether (in June 2019) to initiate this present disciplinary procedure. In particular the Board had before it, and considered, the detailed Chronology of 29 May 2019 (covering the period from 7 April 2015 to 14 February 2018) which had been provided to the Board by the Secretariat, as a result of the Board's concerns as to delay. In addition, that Chronology was specifically referred to the Alternate Commissioner by the Board, along with the Board's Memorandum of 30 May 2019. The Alternate Commissioner's Supplementary Report of 18 June 2019 followed. All of these documents have been provided to the Respondent, explaining the delay.
23. The Alternate Commissioner in his submissions (at paragraph 25) observed that the Respondent had not pointed out any specific prejudice suffered by him as a result of the delay (e.g. as to loss of evidence, inability to gather evidence). In his reply, the Respondent does not point to any item of specific prejudice which might impact on the fairness of the proceedings.
24. In the light of those matters, the Board's position is that this matter should proceed to a hearing where, of course, the delay aspect may still be able to be raised as a matter affecting, and potentially mitigating, sanction, should the disciplinary procedure reach that stage.

Conclusions

25. All of the Respondent's challenges are dismissed.

26. The Respondent's substantive defence should be filed and served, together with any defence evidence.
27. A timetable should then be set by the Board for the lodging of submissions on behalf of the Alternate Commissioner and the Respondent.
28. The substantive disciplinary procedure then should be set down for hearing.

Nigel Hampton QC
Presiding Member
3 January 2020