International Courts and Tribunals as Regulators of Counsel Conduct

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INTERNATIONAL COURTS AND TRIBUNALS AS REGULATORS OF COUNSEL CONDUCT

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THE CASE FOR COURT- AND TRIBUNAL-DRIVEN REGULATION

The growing number of proceedings before international courts and tribunals, and the increasing diversification of counsel representing parties before them, has reinforced the need for a debate about the regulation of the international bar that Detlev Vagts already called for two decades ago.[1] Such a debate is pertinent, now more than ever before, as diverging ethical obligations of counsel from different jurisdictions, as well as a lack of clarity about acceptable standards of conduct in international proceedings, can jeopardize the integrity and effectiveness of the proceedings and cast the legitimacy of the administration of international justice into doubt. It is for these reasons that efforts both to develop the basic framework for "professional ethics" in international proceedings, and to translate it into concrete codes of conduct have recently intensified, principally in academic circles and by professional organizations.[2]

While private bodies and professional self-regulation are the institutions and instruments most participants in the current debate focus on, public actors, and chiefly amongst them the international courts and tribunals concerned, should not be forgotten as potential regulators of counsel conduct and enforcers of sanctions for misconduct. This is particularly the case for those aspects of "professional ethics" that form part of the law of procedure because they concern the relationship between counsel and court (or tribunal). The nature and scope of counsel duties with respect to the presentation of truthful evidence is an example falling into this category. These procedural aspects are to be distinguished from those elements of "professional ethics" that concern the regulation of the market for legal services in order to ensure equal and fair competition among counsel and to protect clients against inappropriate counsel conduct.

While hardly well placed to regulate the market for international legal services generally, international courts and tribunals appear appropriate regulators for questions concerning those aspects of "professional ethics" that are part of the law of procedure. In fact, ensuring the integrity and efficiency of international proceedings by upholding basic procedural principles, such as the equality of the parties, and safeguarding the legitimacy of the proceedings in the presence of improper or even recalcitrant counsel conduct, are objectives that seem best pursued by regulation through international courts and tribunals, rather than by private organizations or national bar associations.

Regulations by private bodies, such as professional organizations of the international bar, may be seen as self-serving instruments that have the "private" interest of international lawyers as a group in mind, rather than the "public" interest of the international community in the administration of international justice. Regulation of conduct of counsel in international proceedings by international courts and tribunals themselves would avoid that concern. Furthermore, only the international court or tribunal concerned is able, in the absence of some other international body in charge, to ensure that all actors appearing before it in the function as counsel are subject to the same rules of professional conduct.

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[1] Detlev F. Vagts, *The International Legal Profession. A Need for More Governance?*, 90 AJIL 250 (1996).

[2] *See* CATHERINE ROGERS, ETHICS IN INTERNATIONAL ARBITRATION (2014); ARMAN SARVARIAN, PROFESSIONAL ETHICS AT THE INTERNATIONAL BAR (2013).

By contrast, the dominant approach so far, which consists of allocating power and responsibility to regulate counsel conduct and sanction breaches to national bar associations or state courts, is unable to provide such a level playing field. National institutions may not only establish different rules, administer identical rules differently, differ in their enforcement and sanctioning practices, and not reach nonlawyers appearing as counsel before an international court or tribunal. Giving these institutions power to regulate counsel conduct and sanction breaches may also create, at least in theory, risks to the integrity of international proceedings. After all, it is conceivable that national institutions are captured by one of the state parties to an international proceeding and used to sabotage the proceeding by taking action against the opposing party's counsel. Such a result is avoided if the international court or tribunal itself is the institution developing and administering rules for counsel conduct in relation to international proceedings.

THE POWER OF INTERNATIONAL COURTS AND TRIBUNALS TO REGULATE COUNSEL CONDUCT

International courts and tribunals are not only well placed to ensure uniform and legitimate regulation of counsel conduct in international proceedings, they also dispose of the legal authority and competence to develop and enforce such rules. Rather than viewing such powers as inherently governmental, and therefore restricted to national bar associations or domestic courts in whose jurisdiction counsel are admitted to practice,[3] the rules governing counsel conduct in relation to an impending or ongoing international proceeding can be enacted as part of the competences to "lay down rules of procedure" that many international courts and tribunals, including the International Court of Justice (ICJ), are expressly given.[4] This competence encompasses not only questions concerning the organization of hearings, presentation of evidence, and the process of decision-making of the court or tribunal, but also the procedural rights and obligations of the parties and the standards of conduct for their counsel in relation to the proceedings.[5] Thus, on the basis of Article 30(1) of its Statute, the ICJ has laid down in its "Practice Directions" some, albeit limited, standards of conduct for counsel.[6]

International courts and tribunals missing such an express authorization to develop rules of procedure can rely, and have successfully done so, on the inherent powers all international courts and tribunals dispose of as part of the general principle of law to take all necessary measures for the preservation of the integrity of the proceedings before them, and to ensure the effectiveness of their judicial function.[7] These inherent powers could also serve as a basis for international courts and tribunals to develop, in the form of codes of conduct, rules on how counsel should conduct themselves in international proceedings and to implement

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[3] *See* Catherine A. Rogers, *Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration*, 39 STAN. J. INT'L L. 1, 41–57 (2003); Jan Paulsson, *Standards of Conduct for Counsel in International Arbitration*, 3 AM. REV. INT'L ARB. 214, 215 (1992).

[4] *See* Statute of the International Court of Justice, Art. 30(1). Further examples include: Article 16 of the Statute of the International Tribunal for the Law of the Sea; and Article 14 of the Statute of the International Criminal Tribunal for Rwanda.

[5] *See* Hugh Thirlway, *Article 30*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 516, 520–21 (Andreas Zimmerman, Christian Tomuschat, Karin Oellers-Frahm & Christian J. Tams eds., 2006) (stating that Article 30 of the Court's Statute constitutes the basis for the Practice Directions).

[6] *See* International Court of Justice, Practice Directions, *at* www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0.

[7] Hrvatska Elektroprivreda v. Slovenia, ICSID Case No. ARB/05/24, Tribunal's Ruling Regarding the Participation of David Mildon QC in Further Stages of the Proceedings, para. 33 (May 6, 2008); Prosecutor v. Beqa Beqaj, Case No. IT-03-66-T-R77, Judgment on Contempt Allegations, paras. 9–10 (Int'l Crim. Trib. for Former Yugoslavia May 27, 2005); Prosecutor v. Duško Tadić, Case No. IT-94-I-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, para. 13 (Int'l Crim. Trib. for Former Yugoslavia Jan. 31, 2000); Vagts, *supra* note 1, at 253.

sanctions in case they are breached. For example, the standing international criminal courts and tribunals have adopted codes of conduct that include wide-ranging sanctions, including admonition, public reprimands, the imposition of fines, and even the suspension or permanent ban on practicing before the respective court or tribunal.[8] Likewise, other international courts and tribunals in interstate or hybrid proceedings have used a variety of means to sanction counsel misconduct, ranging from reprimanding counsel in the award or judgment and imposing costs on the party whose counsel engaged in professional misconduct, to taking into account certain misconduct in weighing evidence and even excluding counsel from further proceedings.[9] These sanctions, if properly employed, are likely no less effective in ensuring compliance of counsel with standards of conduct than the sanctions that can be imposed by state courts or national bar associations.

IS THERE AN OBLIGATION TO SANCTION COUNSEL (MIS)CONDUCT?

The question of whether an international court or tribunal has the power to regulate counsel conduct and sanction breach is to be distinguished from the question whether the court or tribunal also has a duty to exercise those powers and take any of the above-mentioned measures. The ICJ, for example, has traditionally been cautious in this respect, having so far not gone beyond rebuking counsel for unduly delaying the proceedings,[10] and disregarding untruthful evidence without reproaching counsel.[11] In interstate proceedings, such restraint in regulating counsel conduct and sanctioning misbehavior is generally appropriate as counsel behavior, more often than not, will be a reflection of the state party's instruction, rather than counsel's independent course of action. Moreover, in the absence of compulsory jurisdiction, an international court or tribunal must navigate the fine line between exercising its judicial function independently of the state parties before it, while maintaining states' willingness to submit future disputes to international dispute settlement.

The attitude of the court or tribunal should, however, change if more and more private attorneys start acting as counsel in international proceedings, as already is the case in investment treaty arbitration, and start developing behavior that is independent of state instructions and prejudices not only the integrity of the proceedings, but has the potential to cause detriment to the party represented. In such cases, a duty of the court or tribunal may kick in to address unethical counsel behavior more actively, and through formal means. For this purpose, international courts and tribunals should be cognizant of the powers to regulate counsel conduct and to sanction breach, which are expressly given to them in their founding statutes or conferred upon them as a matter of inherent necessity, and make use of them in order to ensure the fair, efficient and legitimate administration of international justice.

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[8] *See* TILL GUT, COUNSEL MISCONDUCT BEFORE THE INTERNATIONAL CRIMINAL COURT: PROFESSIONAL RESPONSIBILITY IN INTERNATIONAL CRIMINAL DEFENCE (2012).

[9] *See* Charles N. Brower & Stephan W. Schill, *Regulating Counsel Conduct Before International Arbitral Tribunals*, *in* MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY: ESSAYS IN HONOUR OF DETLEV VAGTS 488, 500–06 (Pieter H. F. Bekker, Rudolf Dolzer & Michael Waibel eds., 2010) (with further references).

[10] *See* SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 542 (2d ed. 1985) (referencing *Corfu Channel*, Pleadings, Vol. III, at 187–88). *See also* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Provisional Measures, Order 1993 ICJ Rep. 325, 336–37, para. 21 (Sept. 13).

[11] *See* Keith Highet, *Evidence, the Chamber and the ELSI Case*, *in* FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS 33, 65–68 (Richard Lillich ed., 1992); Elettronica Sicula (U.S. v. It.), Judgment, 1989 ICJ Rep. 15, para. 26 (July 20); W. MICHAEL REISMAN & CHRISTINA PARAJON SKINNER, FRAUDULENT EVIDENCE BEFORE PUBLIC INTERNATIONAL TRIBUNALS: THE DIRTY STORIES OF INTERNATIONAL LAW 54–77, 163–92 (2014).