

Professional Ethics at the International Bar

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Preview www.oxfordjournals.org/doi/10.1093/ajph/94.11.1991

OXFORD
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Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

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First Edition published in 2013

Impression: 1

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Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2013943481

ISBN 978-0-19-967946-1

Printed and bound in Great Britain by
CPI Group (UK) Ltd, Croydon, CR0 4YY

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Introduction

The practice of public international law has been evolving over the past thirty years.¹ International litigation, once a rarefied field confined to insiders at traditional institutions such as the ICJ, has expanded greatly. This has been prompted by two major trends, namely an increase in the number of international courts and tribunals² ('international courts') and the revitalization of older courts. As parties have shown a greater propensity to litigate, older institutions like the PCA and ICJ have seen a resurgence of business and new courts have been created in growth areas like international criminal law and international investment law.

Moreover, the subject matter of international litigation has diversified. Once largely confined to areas such as territorial disputes and the law of the sea, it now covers a wider range of politically sensitive areas such as the use of force, trade, investment, and criminality. International law in general has correspondingly acquired a higher profile in the consciousness of societies throughout the world due to the expansion of the international judicial system. Whether in a war crimes trial at the ICC, trade disputes at WTO dispute settlement panels, or inter-State disputes at the ICJ, outsiders to international litigation have a growing interest in it.

One of the consequences of this expansion for the international judicial system is a greater focus on procedural matters. As parties resort to international litigation more often and in more sensitive areas and societies acquire a greater awareness of international courts, expectations of the judicial process can be expected to rise accordingly. Not only are new procedural issues such as jurisdictional conflicts between international courts emerging but longstanding matters like the independence of the judiciary have renewed importance.

Amidst these historical trends, this book examines the problem of common ethical standards for counsel appearing before international courts. As an emerging procedural issue, the regulation of advocacy in international litigation is increasingly important as the quantity and quality of litigation continues to grow and diversify. Traditionally considered to be a minor matter that was the exclusive prerogative of parties,³ the conduct of counsel in international litigation has become increasingly topical.⁴ In investment arbitration, procedural objections concerning the conduct of counsel and applications for their disqualification have become more commonplace

¹ Eg, Buergenthal, 'Proliferation of International Courts and Tribunals: Is it Good or Bad?', 14 *LJIL* (2001), 267–75; Guillaume, 'Advantages and Risks of Proliferation: A Blueprint for Action', 2 *JICJ* (2004), 300–3; Pocar, 'The Proliferation of International Criminal Courts and Tribunals: A Necessity in the Current International Community' 2 *JICJ* (2004), 304–8.

² For definition, see Chapter 1.

³ Historically, 'parties' were only States—see Chapter 4. Today, parties are far more diverse.

⁴ Eg, Vagts, 'The International Legal Profession: A Need for More Governance?' 90 *AJIL* (1996), 250–61; Mendelson, 'The International Lawyer in Domestic Law' in Wickremasinghe, *The International Lawyer as Practitioner* (2000), 163–84, 180–3; Cot, 'Appearing "For" or "On Behalf Of" a State: The

and there is ongoing debate concerning the feasibility of common ethical standards for counsel. The conduct of counsel appearing before other courts such as the ICJ and ITLOS has also been scrutinized. Prosecutors, defence counsel, and judges at the international criminal tribunals have encountered a variety of problems in creating a common culture designed to promote the integrity of the international judicial process.

As the parties in international litigation have greatly diversified, so too has the profile of the counsel who represent them. Whilst the group of primarily European professors and practitioners who have traditionally dominated the ICJ bar remains pre-eminent, the volume and variety of international litigation has nevertheless opened access to the international judicial system for counsel from other national and professional backgrounds. Those counsel bring with them a greater diversity of cultural traditions, standards, and preconceptions concerning the role of advocacy. The college of international lawyers has become increasingly aware of the propensity of these cultures to conflict, creating important procedural problems.

In the latter half of the twentieth century, there was a trend towards codification of ethical standards amongst national jurisdictions.⁵ Wider developments such as the advent of the European Economic Community prompted efforts to identify common ethical standards amongst national jurisdictions for transnational work.⁶ These include the International Bar Association (IBA) International Code of Ethics 1956, the Council of Bars and Law Societies of Europe (CCBE) Code of Conduct for European Lawyers 1988, the UN Basic Principles on the Role of Lawyers 1990 and the *Union Internationale des Avocats* Turin Principles of Professional Conduct for the Legal Profession in the Twenty-first Century 2002. In addition, codes of conduct were prescribed by the international criminal tribunals created at the turn of the twentieth century.⁷ However, these articulated standards were not intended to address the specific problems arising for counsel from diverse national jurisdictions appearing before international courts.

Role of Private Counsel: Before International Tribunals' in Ando, McWhinney, and Wolfrum, *Liber Amicorum Judge Shigeru Oda* (2002), 835–47; Jennings, 'The Work of the International Bar' in Vohrah et al, *Man's Inhumanity to Man* (2003), 443–66; Benson, 'Can Professional Ethics Wait: The Need for Transparency in International Arbitration', 3 *Dispute Resolution International* (2009), 78; Mosk, 'Attorney Ethics in International Arbitration', 5 *Berkeley Journal of International Law Publicist* (2010), 32–7; Higgins, 'Ethics and International Law' 23(2) *LJIL* (2010), 277–89, 288–9; Rogers, 'The Ethics of Advocacy in International Arbitration' in Bishop and Kehoe, *The Art of Advocacy in International Arbitration* (2010), 49–66; Crawford, 'Advocacy Before the International Court of Justice and Other International Tribunals in State-to-State Cases' in Bishop and Kehoe, *The Art of Advocacy*, 303–30, 304; Sands, 'Interaction between Counsel and International Courts and Arbitral Tribunals: Ethical Standards for Counsel' in Wolfrum and Gätzschmann (eds), *International Dispute Settlement: Room for Innovations?* (2010), 127–36; Sthoeger and Wood, 'The International Bar', in Romano, Alter, and Shany (eds), *The Oxford Handbook of International Adjudication* (2013). Confer the view that 'no legal rule governs the profession of Counsel before the ICJ'—Pellet, 'The Role of the International Lawyer in International Litigation' in Wickremasinghe, *The International Lawyer as Practitioner*, 147–62, 149.

⁵ See Chapter 2.

⁶ For background, see Rogers, 'The Ethics of Advocacy in International Arbitration' in Bishop and Kehoe, *The Art of Advocacy*, 49–68.

⁷ See Chapter 8.

As a reaction to the perceived need for common ethical standards for counsel focusing upon international litigation senior members of the informal college of international lawyers have begun to address the problem. In 2001, the ILA created its 'Study Group on International Courts and Tribunals' tasked with, *inter alia*, examining ethics at the international Bench and Bar. In 2004, the Study Group published its 'Burgh House Principles on the Independence of the International Judiciary'. In 2010, this was followed by the 'Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals'. In 2010, the IBA Arbitration Committee created a 'Task Force on Counsel Ethics in International Arbitration' to investigate whether the lack of international guidelines and conflicting norms in counsel ethics undermines the fundamental protections of fairness, equality, and the integrity of international arbitration proceedings. Also in 2010, the CCBE also created a working group to examine much the same territory.

Amidst the emerging debate concerning the need for professionalization of advocacy before international courts, there is limited scholarship on the subject. Although there is a growing awareness amongst practitioners concerning the problems emanating from divergent ethical standards, the causes and consequences of such conflicts have not been explored. The existing literature has drawn attention to specific problems (eg conflicts of interest) arising in the practice of particular courts but there is no work that comprehensively examines the subject from the perspective of the international judicial system as a whole. Whilst identifying particular problems (eg 'double deontology'⁸) concerning the prescription of common ethical standards, the scholarship has not hitherto comprehensively analysed the professionalization of advocacy.

Against this background, this book examines whether the professionalization of international advocacy through the articulation of common ethical standards for counsel is desirable and feasible. In addressing this question, the book has three objectives aimed at filling the gap in the scholarship in order to inform the debate concerning professionalization. The first objective is empirical, whereby it is intended to provide original research concerning hitherto little-known problems of international advocacy. As nascent initiatives to articulate common ethical standards and problems concerning counsel continue, the book is designed to provide judges, practitioners, and academics interested in the subject with a comprehensive analysis. Thus, the debate can be assisted by the original research contained in the book.

The second objective is practical, in that the book is aimed at providing judges and practitioners with a resource that can assist in the resolution of procedural problems arising from divergent ethical standards. Judges, arbitrators, registrars, and counsel who need to address challenges to the participation of counsel, allegations of professional misconduct, or other ethical issues connected to counsel would be able to refer to this book as a resource. The book can also assist in explaining points of divergence between national standards of advocacy.

The third objective is normative, whereby the book advocates the professionalization of advocacy. In this respect, the book is aimed widely at all persons (specialists,

⁸ For explanation, see Chapter 2.

lawyers, or non-lawyers alike) who are interested in the conduct and integrity of the international judicial process. In seeking to persuade its readers of the potential benefits of professionalization, the book is intended to stimulate the process and thereby encourage the progressive development of international judicial procedure and the creation of an international judicial culture.

The book addresses divergences amongst ethical standards of counsel appearing before international courts. Accordingly, its scope is restricted to the practice of international advocacy connected with litigation. This necessarily excludes issues such as the advisory functions of legal advisers to governments, diplomatic functions exercised in international negotiations, and non-litigious dispute settlement. Whilst the book engages in comparative analysis of national ethics, it is also not concerned with transnational advocacy involving counsel appearing before various national courts.

Whilst select reference is made to various international courts, the book focuses upon the practice of advocacy before the ICJ, the ECJ, and the ICC. These courts were selected due to their different histories, jurisdictions and cultures. Whereas the ICJ is a traditional inter-State court, the ECJ is a regional court with a review-based jurisdiction for States, EU organs, and individuals and companies and the ICC is a criminal court hearing the Prosecutor (representing the States Parties and victims) and individual defendants. Thus, their commonalities (eg all three are permanent courts) and differences (eg different parties) provide a basis for comparison concerning the problems of advocacy in the international judicial system.

In considering the role of counsel, the book adopts a functional definition whereby it considers those who appear as counsel before international courts regardless of their professional or national backgrounds. This enables not only the identification of divergent standards in practice according to backgrounds but also the analysis of the efficacy of qualification requirements that already exist and additional requirements that could be imposed. Finally, it provides consideration of the functions of representatives (eg agents and counsel) before courts without preconceptions.

The material of the book comes from three categories of sources. The first category consists of primary research on treaties, cases, rules of procedure, national legislation and codes of conduct, international codes of conduct, and other instruments. The sources for this category comprise archival research, commentaries written by drafters and other key actors as well as biographical research into the protagonists. Thus, the book seeks not only to describe the cases and instruments but also to contextualize and interpret them in light of the participants' national and professional backgrounds.

The second category entails secondary sources, including commentaries concerning the practice and procedure of international litigation. In addition to the standard sources of published books and journal articles, the book draws upon electronic and other resources (particularly in constructing biographical information). The comparative analyses of national ethical standards rely upon national legislation, codes of conduct, and secondary commentaries by legal scholars and anthropologists upon the historical development of the legal professions.

The third category comprises 23 interviews with judges, registrars, and counsel from various international courts. These have been invaluable not only in informing

the research and strengthening the analysis but also in illustrating the issues that are of particular concern to practitioners. The interviews are cited where permission has been given by the interviewee pursuant to approved drafts on file with the author. Where remarks have been provided on condition of anonymity, no attribution to the source has been made. Materials confidentially provided have similarly not been attributed but are noted as being on file with the author.

The book adopts a broadly historical structure which also accords with the division of the book into the two research questions of the desirability and feasibility of professionalization. Chapter 1 identifies the conceptual issues engaged by the topic and the arguments for and against the professionalization of advocacy. In particular, it focuses upon the role of advocacy within the international judicial system and its connection to the integrity of the international judicial process. It defines the key concepts and breaks the research question into its component parts.

Chapter 2 explores the historical origins of professional advocacy in key national jurisdictions and compares them in order to determine their commonalities and differences concerning the role and ethical standards of the professional advocate. In explaining the ethical standards and professional cultures that counsel bring with them to international courts, it provides the context in which international advocacy can be examined. Chapter 3 examines the historical development of international advocacy from the nineteenth century until the PCIJ, focusing upon the functions of representation in international judicial procedure and the issues arising in historical cases. This historical narrative identifies the origins of the modern procedural system of representation and brings hitherto unknown historical examples of arbitral tribunals and the PCIJ considering the professional regulation of counsel.

Chapters 4 to 8 examine certain aspects of the practice of advocacy before the ICJ, ECJ, and ICC. This continues the historical approach in moving from the oldest to the newest court. The structure of each chapter is broadly similar. First, it sets out the historical background to the creation of the court. Secondly, it analyses the relevant provisions concerning advocacy in its statute and rules of procedure. Thirdly, it examines the requirements laid down by the court for the admission of counsel to practise before it. Fourthly, it scrutinizes the problems that have arisen in practice in connection with the professional conduct of counsel. Finally, it addresses the disciplinary regime available at each court to address matters arising in practice concerning the conduct of agents and counsel.

Chapters 9 and 10 concern the current and future professionalization of advocacy before international courts. Chapter 9 examines the legal and practical challenges to international courts exercising regulatory jurisdiction over counsel as well as the nascent efforts made by practitioners to articulate common ethical standards. As indicated in Chapter 2, this is because international courts are considered by practitioners to be the principal candidates to regulate counsel in the event of professionalization in the absence of an international bar authority. Chapter 10 considers the possibility of creating such an authority as a long-term project as well as the potential consequences of professionalization for the international judicial system. The concluding section of this book summarizes its findings and offers final thoughts concerning the prospects for professionalization of advocacy before international courts and tribunals.

The central thesis of this book is that the professionalization of advocacy before international courts—the articulation of common, fundamental ethical standards regulating counsel appearing before international courts—is both desirable and feasible as a means of protecting the integrity of the international judicial process and thereby promoting the legitimacy of international courts. In arguing that professionalization is desirable, the book refers not only to its practical necessity as a means of solving existing problems and precluding potential ones but also as a means of raising standards in order to enhance the image of the international judicial system. In arguing that professionalization is feasible, the book refers both to the legal and practical challenges to its realization. In particular, it addresses the jurisdictional issues concerning the regulatory powers of international courts as well as the resources necessary for that jurisdiction to be exercised fairly and in harmony with national bars.

In proposing its central thesis, the book also offers arguments concerning the various sub-issues. A key argument concerning the articulation of common ethical standards is that conflicts amongst national standards should be resolved through selection where compromise and hybridization are impossible. This selectivity should be generally in favour of a stricter standard in the interest of procedural integrity. The book proposes a related argument that the ideological foundation of the international bar should be based upon the professional values of justice, independence, and the rule of law. Whilst these values are not shared by authoritarian judicial systems, they are nevertheless espoused as the core values of professional advocacy both by historical legacy and by moral necessity.

This subject is concerned with the creation of an ‘international judicial culture’⁹ within the procedural laws of international courts and tribunals. This necessarily entails the articulation of uniform professional values and the inculcation of those values into the practice of international advocacy. Whilst this endeavour is much broader than the role of counsel, the professionalization of advocacy is a part of that wider process. Professionalization is but one step in the continuous journey towards a comprehensively developed international judicial system that is equipped to handle the full spectrum of procedural issues connected to the judicial and arbitral settlement of international disputes.

⁹ Harhoff, ‘It is All in the Process: Reflections on the Relation Between International Criminal Tribunals and International Humanitarian Law’ 78(4) *NJIL* (2009), 469–80.