

ETHICAL DILEMMAS IN INTER-STATE DISPUTES

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ABSTRACT

Despite the growth of international adjudication in the past few decades, ethical standards for counsel appearing before public international courts and tribunals remain underdeveloped. Today, counsel has scant guidance—as a matter of international norms or law—as to what behavior is appropriate and professional. Consequently, litigants’ behavior is largely governed by ethical rules established and enforced by domestic regulatory authorities. This Essay challenges this ethical status quo and urges a firmer set of internationally transcendent ethical principles to apply in public international litigation.

In particular, this Essay considers the lack of ethical guidance for counsel litigating inter-state disputes before the International Court of Justice (ICJ). It argues that, as a baseline, concrete duties of diligence and disclosure should be developed as the foundation of an ICJ-specific ethical code of conduct. The Essay questions, however, whether the ICJ would be the ideal enforcer of such code, and points to several reasons why assuming such a role may undermine some of the Court’s broader purposes and goals. It suggests that national courts or political systems could be more effective in playing an enforcement role if domestic commitment to do so could be firmly secured.

Ultimately, the Essay aims to spark conversation between scholars and practitioners of international law about the need to set ethical boundaries for litigants appearing before the International Court. It also seeks to encourage further steps toward drafting diligence and disclosure standards and identifying a credible and authoritative mechanism to enforce them.

INTRODUCTION

For some time now, scholars have pointed to a gap in international legal ethics—a lack of internationally agreed upon standards of professional conduct and accompanying enforcement devices.¹ The ethical conflict and confusion arising out of this gap is as pressing today as ever before. Indeed, as Professor Detlev Vagts predicted, now twenty years ago, “[a]s the activities of international law agencies, both public and private, involve more countries and more cultures, disputes about standards of behavior can be expected to multiply.”² Precisely as Professor Vagts

1. See, e.g., W. MICHAEL REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS 116–17 (1971); Detlev F. Vagts, *The International Legal Profession: A Need for More Governance?*, 90 AM J. INT’L L. 250 (1996).

2. Vagts, *supra* note 1, at 250.

envisioned, international legal disputes have multiplied in the past few decades and, with them, thorny ethical dilemmas.

Scholars of international law have not only identified ethical gaps as a problem, but have also—particularly in the last few years—sought to fill them. Much of these academics' work has asked, in the first instance, whether common ethical standards among international lawyers are desirable and if so, whether such a project would be feasible.³ Some scholars, like Professor Catherine Rogers, have also proposed methods for deriving the content of ethical norms. Specifically, Professor Rogers argues in favor of “functional” ethical standards in international arbitration, which requires looking to the “interrelational” role of advocates with respect to other actors in the adjudicatory system.⁴ And in her recent book, Professor Rogers further explores the potential of a self-regulatory regime of enforcing ethical standards in arbitration.⁵

In another recent book, Professor Michael Reisman and I chronicled various cases of fraudulent evidence in public international litigation. In *Fraudulent Evidence Before Public International Tribunals*, Professor Reisman and I examined cases—ranging in history from the Weil and La Abra cases that were brought before the Mexican-American Claims Commission in the late nineteenth century to the case of *Qatar v. Bahrain* in the 1990s—where parties either affirmatively submitted false evidence to a public international court or tribunal or engaged in conduct that resulted in an incomplete or inaccurate factual picture.⁶ We intentionally refrained, however, from offering a definitive solution to the problem of fraudulent or unethical conduct in public international litigation, concerned instead with highlighting the difficulties of positively identifying misbehavior in this varied and multicultural setting.

Still, more work is required. Developing and implementing standards for ethical conduct has been a slow-going project in many corners of international law. While some international courts and tribunals, like the International Criminal Court, have adopted ethical codes, most others have not.⁷ Indeed, the International Court of Justice (ICJ)—the World's Court—

3. See, e.g., THE ROLE OF ETHICS IN INTERNATIONAL LAW (Donald Earl Childress III ed., 2012); ARMAN SARVARIAN, PROFESSIONAL ETHICS AT THE INTERNATIONAL BAR (2013).

4. Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT'L L. 341, 346–47 (2002) (suggesting that the “content of norms . . . must be developed—not from national norms or abstract ideas about the purpose of ethical norms—but from the defining features of international arbitration and the role of the advocate in that setting”).

5. CATHERINE A. ROGERS, ETHICS IN INTERNATIONAL ARBITRATION (2014).

6. W. MICHAEL REISMAN & CHRISTINA PARAJON SKINNER, FRAUDULENT EVIDENCE BEFORE PUBLIC INTERNATIONAL TRIBUNALS: THE DIRTY STORIES OF INTERNATIONAL LAW (2014).

7. Arman Sarvarian, *Common Ethical Standards for Counsel Before the European Court of Justice and European Court of Human Rights*, 23 EUR. J. INT'L L. 991–92 (2012).

has no ethical code or other guiding document of its own that applies to the attorneys litigating in that forum. Although the ICJ has issued various “Practice Directions” to clarify procedural standards, this guidance is merely designed to supplement the Court’s established rules (and its Statute).⁸ Consequently, the International Court has too few tools to resolve ethical dilemmas that arise before it.

Simply consider the ethical ambiguities implicated by the following hypothetical dilemma: Two states, the Republic of Salah and the State of Garem, have long disputed their border. Eventually, the parties agree to submit their dispute to the International Court. One state, Garem, retains lawyers from a private, internationally active law firm while the other, Salah, relies on a team of government lawyers from its Ministries of Justice and Foreign Affairs. While preparing their case, counsel for Garem suspects that some of the documents provided by its client (the State of Garem) may be forgeries.

Upon an initial inquiry into their authenticity, political actors within Garem admit that some of the evidence should not be submitted to the Court, but affirms the authenticity of others. Meanwhile, upon receiving Salah’s submission, Garem’s counsel suspects that some of *its* documents may be false. Difficult ethical questions arise:

- How far must counsel for Garem go in investigating the authenticity of the documents that it ultimately submits to the Court?
- Is counsel for Garem obligated to challenge Salah’s submission—or at least make its suspicions known to the Court?
- And what are the Court’s obligations, if any, if presented with allegations of fraudulent or unethical behavior on the part of either party?⁹

Answering questions of this complexity demands a robust discussion among scholars and practitioners of international law of what is meant by “ethical” behavior and how best to motivate it. To that end, the balance of this Essay considers, primarily from a policy standpoint, what ethical rules and standards should govern the conduct of parties appearing before the ICJ and how such ethical rules might credibly be enforced. It offers an attempt to answer, even if just in part, the question that Professor Vagts

8. *Practice Directions*, INT’L COURT OF JUSTICE (Mar. 21, 2013), <http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0>.

9. This hypothetical was created by Professor Rogers, to anchor the discussion at the 2016 Vagts Roundtable.

posed so many years ago: “what, if any, further steps might be taken to create clearer rules [of international professional conduct] or make their enforcement more effective”?¹⁰

I. DUTIES OF LITIGANTS

As the hypothetical inter-state dispute between Garem and Salah makes plain, there are a number of unanswered ethical questions surrounding the norm of “truthfulness” in inter-state adjudication. What, exactly, is entailed by an obligation to be honest or truthful?

The details of such duty can be fuzzy. Indeed, as Professor Rogers has discussed, while most nations of the world agree that truthfulness is a “universal norm[]” that should “inform all legal ethics,” in implementing that norm, national systems impose “radically different obligations.”¹¹ Yet counsel’s interpretation of its duty to be truthful has serious consequences in an inter-state adjudication, as it inevitably affects the accuracy of information that reaches the Court.

Arguably, information accuracy is critical to the overall integrity of the court’s process and decisions. For one, there are high social and economic costs—externalities—to inaccuracies in the Court’s decisions. The decision of how to delimit a border, for example, is likely to displace or attract homes, businesses, and/or public services, thereby shaping the rights and obligations of many (probably dispersed) constituencies within the litigating States—both now and in future generations.

Moreover, information accuracy is crucial for the legitimacy of the Court’s opinion. A post-judgment discovery that an ICJ decision was based on inaccurate facts exposes the decision to suspicion and, subsequently, denial or attack. Finally, there are efficiency concerns to bear in mind. The Court has limited resources to find facts for itself and so it must rely on the parties’ representatives and the adversarial process to be truthful and correct. If the Court cannot so rely on counsel, it will be forced to spend its limited energy and resources attempting to correct or fill in the facts.

Much, then, is at stake in solidifying and giving firm content to counsel’s ethical duty to be truthful, both in its dealings with the Court and with its adversary.¹² Part I thus focuses on the norm of truthfulness and

10. Vagts, *supra* note 1, at 251.

11. Rogers, *supra* note 4, at 357–58.

12. As Professor Rogers has noted, “By most accounts, the primary if not sole purpose of adjudication is to discern truth.” *Id.* at 358. So, she explains, most systems prohibit outright lying (through perjury rules) or overt misrepresentations to the tribunal. However, “[a]part from these extreme instances of misconduct . . . legal systems have developed different interpretations of what the demands of truth require from counsel.” *Id.* at 359.

attempts to derive some relatively detailed content for it.¹³ To that end, Part I first takes a step back and discusses several features of inter-state litigation that are relevant to the design of ICJ-tailored ethical rules or standards. In doing so, it demonstrates why defaulting to national ethical standards for truthfulness (or attempting to import them) is a suboptimal approach.

Part I then suggests a way to break down the duty of truthfulness into two component parts, involving standards for diligence and disclosure. It attempts to explain how such standards might be structured as a truly international set of ethical norms for truthfulness, which, at the same time, reflect the political realities and exigencies of inter-state litigation. Lastly, Part I segues into a discussion of enforcement, which is continued in Part II.

A. *Finding Content for Ethical Duties*

Suggesting that litigants in inter-state disputes require ethical guidance begs a key question—how to (and who should) decide what the content of those standards should be? Currently, in the absence of ICJ-specific rules, national codes of conduct effectively operate as a background default.¹⁴ But arguably, this domestic default is substantively, procedurally, and normatively undesirable insofar as it does not account for the particular context and characteristics of inter-state disputes.

First, domestic attorney codes of conduct may not appreciate the diversity of stakeholders involved in presenting a case at the International Court. Typically, a range of actors appear before the Court on behalf of the state, including agents—usually government representatives—as well as the advocates who litigate the merits of the case. These various actors may or may not be professionally trained lawyers. As Arman Sarvarian explains, the parties to a dispute before the ICJ have “absolute discretion concerning whom they appoint as their agents and counsel so that anyone regardless of training, vocation or character can represent a party before the Court.”¹⁵

13. Michael Reisman and I likewise emphasized the value of informational accuracy in our study of international legal ethics. As we argued:

[T]he contribution of international courts and tribunals to world order and their very credibility depend, in no small measure, on the accuracy of the factual basis of the decisions which they render. That factual accuracy depends, in turn and in large part, on the probity of the states and state representatives who appear before them.

REISMAN & SKINNER, *supra* note 6, at 200.

14. Technically, most national rules operate as mandatory rules, but because their applicability and enforcement can be ambiguous, attorneys may treat them as defaults.

15. SARVARIAN, *supra* note 3, at 80.

Moreover, not only will these actors have varied backgrounds and training, but they will also likely face differing incentives (and professional obligations) that shape their decision-making calculus. As a consequence, the professional conduct rules for truthfulness and honesty that are found in most national codes may be too narrow and specific, and be more readily dismissed or misunderstood. Any effort to develop professional ethical guidance for ICJ cases should thus be sensitive to this diversity and designed to capture the conduct of a broad range of formal and informal advocates.

Second, there are procedural difficulties in relying on national ethical guidelines to fill the international ethical gap. For one, national systems can and do conflict, resulting in differing expectations of what is ethical behavior between the two parties. And resolving these kinds of ethical conflicts between lawyers or agents from different jurisdictions is no simple task. Although the United States has an ethical conflict-of-law apparatus in its Model Rule 8.5, which applies the rules of the jurisdiction in which the tribunal sits or the rules of the jurisdiction that experienced the “predominant effect” of the lawyer’s conduct,¹⁶ some other countries that are members of the Court lack an analogous rule.

Even if ethical conflicts could be resolved through choice-of-law rules, it seems normatively unappealing to do so. States are likely to have differing perceptions of the proper roles of their advocates and representatives,¹⁷ and thus, the selection of one state’s ethical code over another’s is necessarily a value-laden decision. Consequently, such attempt to mediate ethical values between states may very well heighten tensions between the two parties and disserve the Court’s primary objective of peacefully resolving their dispute.

A third important characteristic to bear in mind is the increasing professionalization of lawyering before the ICJ. The past several years have seen a shift in the nature of party representation at the Court. Whereas historically, states looked inward to their government lawyers to advocate their interests at the Court, states now increasingly hire private lawyers from large law firms that have developed an expertise litigating cases before international courts and tribunals.¹⁸

16. See MODEL RULES OF PROF’L CONDUCT r. 8.5 (AM. BAR ASS’N 1983).

17. ROGERS, *supra* note 5, at 2 (“Nationally-derived assumptions about what constitutes proper conduct can and do often clash with the ethical assumptions of other participants from other jurisdictions . . .”).

18. I thank Professor Catherine Rogers for this observation. See, e.g., *Public International Law*, ARNOLD & PORTER, <http://www.arnoldporter.com/en/services/capabilities/practices/public-international-law> (last visited Aug. 20, 2016); *Public International Law Practice at Crowell & Moring LLP*, CROWELL & MORING, <https://www.crowell.com/pdf/public-international-law-practice-crowell-moring.pdf> (last visited Aug. 20, 2016); *Public International Law*, STEPTOE & JOHNSON LLP, <http://www.steptoelaw.com/practices-69.html> (last visited Aug. 20, 2016). For an extremely useful

This trend toward privatization of legal advocacy suggests that drafters of an ICJ code of conduct should account for the differing motives of private and public lawyers in inter-state disputes. Specifically, for government lawyers, Professor Reisman and I discussed the political reality that:

In national legal systems, the assumption is that there is a single authority to which loyalty is owed. In international politics, by contrast, there are competing loyalty systems. First and foremost, citizens still owe allegiance to their states, not to the world community. When individuals representing their states confront each other in an international tribunal or another international institution, their loyalty will be to the sovereign. In the competition for loyalty, international tribunals, with the fragility of their power base . . . are a weak second.¹⁹

On the other hand, these kinds of competing loyalties are unlikely to saddle the decision-making of private-practicing attorneys—or if they do, to a substantially lesser degree.

Any international code of ethics should wrestle with this political reality in setting standards and expectations. At the same time, however, drafters must be mindful of the danger in creating separate standards for public and private counsel. Again, this unique feature of public international law makes national attorney codes a poor source (on their own, at least) of ethical guidance for counsel in inter-state disputes.

In light of these reasons to move away from a national default, the next Part explores what a set of transcendent ethical principles, which could guide counsel in resolving the hypothetical questions posed above, might look like.

B. Defining Baseline Duties

Assuming that national codes are unlikely to provide adequate guidance for counsel facing ethical dilemmas in inter-state disputes, how might we begin to fashion ICJ-specific guidelines for honesty and truthfulness? As discussed earlier, this Essay suggests that truth-related duties are a useful starting point in any project to develop new ethical standards at the ICJ. Not only is truth central to information accuracy—and thus central to the Court's legitimacy, stability, and efficiency—but counsel

empirical account of the demographics of counsel appearing before the International Court, see Shashank P. Kumar & Cecily Rose, *A Study of Lawyers Appearing Before the International Court of Justice, 1999–2012*, 25 EUR. J. INT'L L. 893 (2014).

19. REISMAN & SKINNER, *supra* note 6, at 8–9.

behavior that skirts the margins of truth and honesty has also been a recurring issue in ICJ cases.

Accordingly, the following two Subparts explore how two sets of guidelines—oriented around due diligence and disclosure—could likely go far in aiding counsel interpret their duties to be truthful and honest in a way that promotes the integrity of the information that reaches the Court and also balances any competing loyalties to the State-client.

1. *Diligence*

In interpreting what it means to be truthful to the Court (and one's adversary), it is important to understand how far counsel must go to proactively secure or guarantee the truth. As the hypothetical dispute well illustrates, there is some question as to whether a duty of truth should also include an embedded duty of due diligence. The hypothetical also raises an important permutation of this basic question. Namely, are government lawyers, in contrast to private attorneys, ethically obligated to investigate the authenticity of evidence provided to them from other governmental departments or agencies? And should the answer change if the lawyer is a private attorney?

The answers are far from clear. On the one hand, under U.S. law and the International Bar Association rules for arbitration, while a lawyer may not knowingly present forged documents to a court or tribunal, he or she may ordinarily rely on factual statements made by the client in the absence of unusual circumstances.²⁰ On the other hand, as a matter of conscience and intuition, it seems that counsel should have some basic duty of due diligence if counsel suspects that the client has not provided truthful (i.e., accurate) information. There may also be efficiency-related reasons to require counsel to engage in due diligence—requiring counsel to conduct *some* level of due diligence on evidence before submitting it to the Court places the ethical burden to detect fraud on the party that is likely best positioned to do so, following the “least cost avoider” philosophy in law and economics.

Assuming that a diligence standard were to be adopted, as a component of broader ethical duties of truth, honesty, or that which pertain to the presentation of evidence, its drafters would ideally provide substantive guidance on three ancillary questions. First, drafters of a due diligence standard should take care to define what constitutes sufficiently

20. See, e.g., *Calloway v. Marvel Entm't Grp.*, 854 F.2d 1452, 1470 (2d Cir. 1988) (“An attorney is entitled to rely on his or her client's statements as to factual claims when those statements are objectively reasonable.”), *rev'd in part on other grounds sub nom. Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120 (1989); IBA GUIDELINES ON PARTY REPRESENTATION IN INTERNATIONAL ARBITRATION r. 11 (2013).

“reasonable suspicion” that triggers the duty in the first place. The *Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals* (*Hague Principles*), for example, require that “[c]ounsel shall present evidence in a fair and reasonable manner and shall refrain from presenting or otherwise relying upon evidence that he or she knows or has reason to believe to be false or misleading.”²¹ But without additional specification as to the knowledge standard (i.e., how *much* must counsel know to reasonably suspect something is amiss?), the standard may be easily averted or misunderstood. Second, drafters should set out in some detail their expectations for how much diligence is required once reasonable suspicion is confirmed. Third, there is a question of whether the duty differs for government and private lawyers.

Firmer guidance on those three questions might have been useful to counsel in the case of *Qatar v. Bahrain*, decided by the ICJ in 2001.²² There, the legal team for Bahrain, some of whom were private lawyers, suspected and eventually confirmed through robust forensic analysis that a substantial number of the documents that Qatar had submitted in its memorial were forgeries.²³ Did counsel for Qatar act ethically? It is, of course, impossible to know whether Qatar’s lawyers were culpable of misconduct themselves or had instead been misled by other actors within the government or by third parties that had sold historical documents to the State. Yet, one wonders whether and to what extent its lawyers performed due diligence on the provenance of the documents before submitting them to the Court—or whether anyone had suggested that they should.

As for the level of diligence required once reasonable suspicion is aroused, practically speaking, it may be unrealistic to create a standard that requires anything more than some basic threshold level of counsel’s “best effort.” Ultimately, the lawyer’s decision about when to stop asking hard questions will be personal and highly context-dependent. In assessing the situation, lawyers will thus require some latitude of professional discretion to make real-time judgments as to whether their diligence inquiries have been satisfied and moving forward with the submission is ethically appropriate. Here, as will be discussed, culture is likely to be critical in driving counsel to internalize norms of proper conduct; an ethical rule or

21. HAGUE PRINCIPLES ON ETHICAL STANDARDS FOR COUNSEL APPEARING BEFORE INTERNATIONAL COURTS AND TRIBUNALS r. 6.1 (2010). These standards, drafted by a Study Group established by the International Law Association, set minimum ethical standards for advocates appearing before international courts and tribunals. See Philippe Sands, *The ILA Hague Principles on Ethical Standards for Counsel Appearing Before International Courts and Tribunals*, L. & PRAC. INT’L COURTS & TRIBUNALS, May 2011, at 1.

22. Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (*Qatar v. Bahrain*), Judgment, 2001 I.C.J. 40 (Mar. 16).

23. *Id.* ¶ 20.

standard is unlikely to be effective at precisely defining, *ex ante*, the boundaries of the due diligence requirement.

Finally, regarding a possible distinction between government and private attorneys, separate standards for each group would likely be far too contentious to develop, implement, and monitor. Whether counsel is employed by a private law firm, academia, or a state government, legal professionals and those playing such a role should be held to the same ethical bar. It is, after all, doubtful that a system of international ethical principles could legitimately subject one group of advocates to a lower set of ethical standards in the name of political exigency. And separate systems simply create room for counsel to exploit loopholes and for decision makers to engage in arbitrary line-drawing.

2. *Disclosure*

Closely related to an ethical obligation of due diligence is one that demands disclosure. Once counsel conducts due diligence, doubts may remain; or, it may be the case that in the course of performing due diligence, counsel discovers other evidentiary problems. At such point, does counsel have an ethical duty to disclose doubts as to the authenticity of its own evidence or its adversary's evidence, or to affirmatively disclose material that was not specifically requested or required but that might improve the accuracy of the Court's and its opponent's factual view of the dispute? Ultimately, these questions boil down to a common inquiry: must counsel disclose information that might damage its client's case if it improves factual accuracy?

Such disclosure dilemma has come up several times before in public international disputes. In the *Corfu Channel* case, for example, U.K. government lawyers ultimately decided against disclosing a critical document because doing so could harm the State's long-term political interests.²⁴ There, a critical naval document, called "XCU," suggested that, contrary to the U.K.'s argument at the UN Security Council and then later before the ICJ, the U.K.'s passage through the Corfu straits may not have been "innocent" under international law.²⁵ The document was not initially disclosed to the Court because the U.K. lawyers were not aware it existed. When they did later discover XCU, counsel debated (together with the naval department and political actors) whether it should be provided to the Court. But ultimately, they did not disclose it.

Decades later in the *Taba Arbitration*—not before the ICJ but an *ad hoc* arbitral tribunal—counsel for Israel decided to not disclose critical

24. *Corfu Channel (U.K. v. Alb.)*, Preliminary Objection, 1948 I.C.J. 15 (Mar. 28).

25. SARVARIAN, *supra* note 3, at 103.

information about the location of certain boundary markers that would have helped Egypt understand the impossibility of its initial arguments.²⁶ Egypt then accused Israel of violating some kind of duty of “good faith” for not having shared this information.²⁷ Implicit in that argument was an allegation that Israel had behaved unethically by withholding the pertinent information. As Professor Reisman and I argued elsewhere, although the Court did not expressly credit the argument that Israel had violated an ethical duty of good faith, its decision not to prejudice Egypt for having misperceived the facts on the ground implies that it was at least sympathetic to the claim.²⁸

As seen in both *Corfu Channel* and *Taba*, failures to disclose will often come to light, triggering a process of inquiry, investigation, and correction. This, again, takes time and resources and risks the credibility of the final judgment. Proactively requiring disclosure of material factual information—including suspicions of authenticity or correcting misimpressions—can avoid these types of situations by clarifying expectations about how far a party must go to assist the Court and its adversary gain an accurate factual picture. Views on this are likely to differ among lawyers, and so a clearer articulation of what facts to disclose and when would likely be useful to counsel in drawing the appropriate lines.²⁹

To be sure, adhering to a new disclosure duty will not be easy for the government lawyer who faces conflicting loyalties to the Court and to his or her sovereign. But ethical guidelines could very well help. As we saw in the *Corfu Channel* case, a decision to subvert the Court’s truth-seeking function is not taken lightly. The decision not to disclose XCU clearly strained the conscience of the then-Attorney General Sir Hartley Shawcross, as he pondered:

If the case were before an English Court, there could, of course, be no possible question. How far one is entitled to adopt a different code of ethics in regard to the International Court I do not know. Does the maxim ‘My country . . . right or wrong, my country’

26. Location of Boundary Markers in Taba Between Egypt and Israel (Egypt v. Isr.), 20 R.I.A.A 3 (1988).

27. REISMAN & SKINNER, *supra* note 6, at 141–43 (citing EGYPT-ISR. ARB. TRIB., THE EGYPT-ISRAEL ARBITRATION TRIBUNAL ESTABLISHED IN ACCORDANCE WITH THE COMPROMISE SIGNED 11 SEPTEMBER 1986: VERBATIM RECORD OF THE HEARING, HOTEL DE VILLE, GENEVA 14-25 MARCH 1988, 11-15 APRIL 1988 831 (1988); Rejoinder of the Arab Republic of Egypt, In the Matter of an Arbitration Between the Arab Republic of Egypt and the State of Israel, ¶ 2.23 (Feb. 1, 1988)).

28. REISMAN & SKINNER, *supra* note 6, at 152–55.

29. With respect to disclosing suspicions about the adversary’s case, some additional guidance may be necessary to prevent abuse or harassment. In those situations, the duty of disclosure might also include a duty of *discretion*—to have some firm basis of suspecting that an adversary’s submission is fraudulent before bringing the issue to the court’s attention.

relieve one from the professional consequence which would otherwise arise?³⁰

Thus, for government lawyers who must make decisions in the face of competing loyalties, firmer ethical guidance on disclosure may bolster their ability to resist pressure from political actors; at the very least, the guidance should give the government lawyer a powerful tool of persuasion to wield against dissenting political voices. For private attorneys who do not face such conflict, a firm duty of disclosure could also be helpful by giving them a solid ground on which to stand against any client pressure to withhold information or documents.

C. *Enforcing Ethical Duties*

Identifying normatively desirable—and practically feasible—ethical duties is only the starting point in any project to standardize ethical conduct in inter-state disputes. Enforcing ethical guidelines is also important. Without a credible enforcement mechanism, the guidance will likely remain aspirational, with counsel abiding or ignoring it as it suits them. But historically, the International Court has been quite reluctant to perform an enforcement role. It has shied away from publicly acknowledging fraudulent behavior, let alone seeking to “punish it,” as seen in the *Corfu Channel*, *Nicaragua*, and *Qatar v. Bahrain* cases.³¹

Unlike the substantive task of defining the content of ethical rules, national authorities could be quite effective enforcers. Consider a more recent case that was brought in U.S. federal court, *Chevron v. Donziger*.³² There, the U.S. district court considered fraud that was allegedly perpetrated in a transnational dispute between Chevron and Ecuador. Chevron’s attorneys claimed that counsel for Ecuador had violated the civil provisions of the RICO statute in connection with a fraudulent report that was submitted to the Ecuadorian Court.³³ In analyzing that case, I argued

30. REISMAN & SKINNER, *supra* note 6, at 77 (quoting Minute from Hartley Shawcross, Attorney Gen., to William Jowitt, Lord Chancellor (Nov. 1, 1948) (on file with U.K. Nat’l Archives at LCO 2/4515)).

31. REISMAN & SKINNER, *supra* note 6, at 73, 98–99, 187–88.

32. *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362 (S.D.N.Y.), *aff’d*, No. 14-0826, 2016 WL 4173988 (2d Cir. Aug. 8, 2014).

33. See Declaration of Juan Pablo Saenz M., Exhibit 39 at 49–55, *Chevron Corp.*, 974 F. Supp. 2d 362 (No. 11-cv-00691) (opinion of the Ecuadorian trial court). Subsequent to the judgment, both parties appealed the claim. Although Chevron made claims of “fraud and corruption [on the part] of . . . plaintiffs, counsel and representatives,” the intermediate appellate court did “not refer at all” to these claims “except to let it be emphasized that the same accusations are pending resolution before authorities of the United States of America due to a complaint that has been filed by . . . Chevron, under what is known as the RICO act” and stated that the court “has no competence to rule on the conduct of counsel, experts or other officials or administrators” Appendix 2 to Brief for Defendants-

that it illustrated one way in which national courts could rely on national laws to effectively sanction counsel for misconduct perpetrated in a transnational or international case.³⁴

Some, however, like Professor Vagts, disfavor national courts as enforcers of international legal ethics.³⁵ And certainly, it is a defensible view. One can readily see why national enforcement might seem like a less than ideal choice in the current state of affairs, where national authorities are not *obligated* to enforce international ethical codes at all. That said, the most likely alternative—the International Court as enforcer of international ethics—also has significant downsides. The following Part considers these costs in further depth in discussing whether the International Court could and should assume responsibility for enforcing international ethical standards for attorney conduct.

II. DUTIES OF THE INTERNATIONAL COURT

As a general matter, the International Court does not have a disciplinary or enforcement power, save its ability pursuant to its Statute to remove other members of the Court for failure to act impartially.³⁶ The Court lacks the typical sorts of tools that national courts have for sanctioning parties' conduct, such as the ability to fine, suspend, or disbar; and it has no firm obligation to report attorney misconduct.³⁷

It is in fact unclear whether the Court has the power to sanction counsel at all for their misbehavior. As others have suggested, “[t]he competence of international courts and tribunals to develop and to enforce standards of professional conduct of counsel appearing before them is often

Appellants Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje at A-462, *Chevron Corp. v. Donziger*, No. 14-0826, 2016 WL 4173988 (2d Cir. Aug. 8, 2014) (opinion of the Ecuadorian Intermediate Appellate Court, Jan. 3, 2012); *see also Donziger*, 974 F. Supp. 2d at 385–86.

34. Christina Parajon Skinner, *RICO and International Legal Ethics*, 40 *YALE J. INT'L L. ONLINE* 20, 31 (2014).

35. In his opinion, “Clearly, the enforcement of professional behavior in tribunals of the world of public international law is a matter of international and not of national law.” Vagts, *supra* note 1, at 251. Professor Rogers is similarly skeptical of national actors enforcing international ethical codes. She writes:

If national actors were to become active in regulation of professional conduct . . . they could undermine efforts to promote neutral, effective, and efficient decision-making. National bar authorities, courts, and legislatures are neither equipped nor positioned to effectively assess the nature of professional conduct and related needs for ethical regulation in international arbitration practice.

ROGERS, *supra* note 5, at 6.

36. *See* Statute of the International Court of Justice art. 18, ¶ 1, June 26, 1945, 59 Stat. 1031, 1057, [http://www.icj-cij.org/documents/?p1=4&p2=2](http://www.icj-cij.org/documents/?p1=4&p2=2;); *id.* art. 20.

37. SARVARIAN, *supra* note 3, at 111.

questioned.”³⁸ As noted, the Court’s Statute provides no such explicit authority, which may explain why, in past cases of fraud, the Court has found ways to avoid the issue and resolve the dispute independent of the tainted evidence.

Professor Vagts believed that, notwithstanding the lack of express authority, the Court has inherent authority to sanction attorneys for their misconduct. In his view, “[a]n argument could be made that an international tribunal has inherent power to discipline lawyers who practice before it, that it is sanctioned by general principles of law recognized by civilized nations.”³⁹ But even if the Court does have some such inherent authority to sanction misbehaving counsel, what, exactly, *should* it do?

This Part considers a range of possible ethics enforcement duties that the International Court could have if we were to imagine a world in which revision to its Statute were possible. But, as will be argued, most of the options would come with significant costs.

A. *A Duty to Investigate*

One way to vest the Court with some ethical enforcement authority is to require it to investigate any allegation of party misconduct. So, returning to the hypothetical case of Garem and Salah, the Court would be obligated to investigate the authenticity of the documents submitted by Salah (assuming Garem attorneys had abided their duty of disclosure and brought their suspicions to the Court’s attention). An even more aggressive version of the duty to investigate would require the Court to undertake an independent investigation of documentary authenticity, even if fraud were not formally raised by one of the parties.

There are, however, significant (perhaps insurmountable) practical constraints to imposing such a duty. The ICJ is not well-equipped to undertake factual investigations of allegations of professional misconduct. As Shabtai Rosenne pointed out in connection with the *Nicaragua* case and

38. 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, 495 (Pieter H.F. Bekker, Rudolf Dolzer & Michael Waibel eds., 2010).

39. Vagts, *supra* note 1, at 253. Other tribunals have also concluded as much—in particular, the ICSID Tribunal in *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia* found that, pursuant to Article 56(1) of the ICSID Convention, it had inherent jurisdiction to protect the legitimacy of its proceedings. ICSID Case No. ARB/05/24, Tribunal’s Ruling, ¶¶ 25–30 (May 6, 2008). Interestingly, that tribunal found it implausible that it would have to rely on national authorities to enforce standards regulating the conduct of parties appearing before it. It stated: “For an international system like that of ICSID, it seems unacceptable for the solution to reside in the individual national bodies which regulate the work of professional service providers, because that might lead to inconsistent or indeed arbitrary outcomes depending on the attitudes of such bodies, or the content (or lack of relevant content) of their rules.” *Id.* ¶ 23.

the Court's fact-finding in general: "The International Court . . . [is] at the same time a court of first instance and a Supreme Court. It is rare for supreme courts to determine facts themselves, Trial experience is not a qualification required of the Members of the International Court" ⁴⁰

Even so, there are ways to overcome the Court's lack of institutional resources and capacity. For one, the Court could simply delegate the investigation by requiring the parties to engage in further diligence—by employing forensic and historical experts—and to present the findings to the Court. Alternatively, the Court could be given authority to commission a fact-finding mission led by third parties (NGOs, consultants, or nonprofits), with costs imposed on the appropriate party. The United Nations frequently uses fact-finding missions of this sort to investigate allegations of abuse in, for example, the biological and chemical weapons arena. ⁴¹

But whether the Court should attempt to engage in this kind of factual investigative work, directly or by delegation, is a more difficult question. One concern is that doing so could delay the case, leading to prolonged uncertainty that could have significant social and economic costs. An independent fact-finding mission could take months, even years. Moreover, and relatedly, parties may be tempted to abuse a newly created duty to investigate by alleging fraud as a delay or harassment technique. For these reasons, it may be preferable to focus on the development and implementation of counsel's obligations to engage in adequate due diligence, so that factual accuracy can be sorted prior to the submission of the pleadings and without the Court's involvement.

Now, this is not to say that the Court should be powerless to investigate the facts of a case. Surely, if the Court's suspicions *are* independently aroused, it should have the authority to require further diligence from the parties. But to impose an independent burden of fact-checking on the Court seems a step too far.

B. *A Duty to Censure*

A second way to enlist the Court as ethical enforcer is to require it to censure parties when they engage in unethical behavior. Specifically, such duty would obligate the Court to call attention to the misconduct by, for example, reprimanding counsel in the body of its opinion. Other tribunals have certainly gone down that path. In *Pope & Talbot, Inc. v. Canada*, for

40. REISMAN & SKINNER, *supra* note 6, at 99–100 (alterations in original) (quoting Shabtai Rosenne, Address to the United Nations Conference on Public International Law (Mar. 15, 1995)).

41. U.N. Office for Disarmament Affairs, Fact Sheet: The Secretary-General's Mechanism for Investigation of Alleged Use of Chemical and Biological Weapons (Jan. 2016), <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/2016/01/SGM-fact-sheet-Jan2016.pdf>.

example, the North American Free Trade Agreement (NAFTA) Chapter 11 tribunal called out counsel's breach of a confidentiality agreement as "highly reprehensible."⁴² A public rebuke of this sort could be an effective deterrent as well as meaningful punishment, particularly for private attorneys whose reputation wins and keeps their high-paying clients.

But publicly censuring counsel can be uncomfortable for the Court to do. In the inter-state dispute, a public rebuke of counsel also says something distasteful about the State that hired (or employed) the lawyers and thus presumably instructed them on the case and provided the evidence to submit. Preferring to avoid the political costs, the Court may, if pressed to engage in public censure, become imbalanced in its discipline. It may, for instance, find itself more willing to censure private lawyers for misconduct than to censure government attorneys.

If such disparity emerged, the duty to censure could create a perverse incentive for states to shy away from hiring private lawyers and a preference to go "in-house." Yet, ironically, those private lawyers might very well have performed robust due diligence and been more forthright in their disclosures, given their lack of conflicting loyalties. Thus, imposing a duty to censure on the Court could unintentionally create a bifurcated ethical system where private counsel is more routinely punished than State lawyers, potentially reducing the range of representation available to States engaged in inter-state litigation before the Court.

Moreover, publicly calling attention to attorney misconduct can undermine the legitimacy of the Court's decision by suggesting that it may have been based on inaccurate facts. Even if the Court confirms that it did, eventually, discover the fraud, revealing that fraud was present may still make the judgment vulnerable to speculation that the judgment was somehow irreparably tainted or that the fraud was not entirely exposed.

III. A PATH FORWARD

Thus far, this Essay has urged the need for firm ethical guidance regarding diligence and disclosure for counsel appearing before the International Court. It has also attempted to show the institutional limitations and collateral costs of relying on the Court itself to enforce such ethical norms. In light of these arguments, which may seem in tension at first blush, this Part concludes by offering some preliminary policy proposals for a productive way forward.

42. Pope & Talbot Inc. v. Canada, Decision, ¶ 6 (N. Am. Free Trade Agreement Arb. Trib. Sept. 27, 2000), https://www.uncitral.org/res/transparency-registry/registry/data/pope_talbot_inc_html/pope-12.pdf.

A. *An ICJ Code of Conduct*

The hypothetical posed in the Introduction to this Essay threw into sharp relief the need for clarification—concrete guidance—for counsel appearing before the International Court. Part I then argued that guidelines for diligence and disclosure could be an ideal starting place, serving as a basic foundation for ethical standards in inter-state disputes.

The prescriptive implication of that analysis is that a new, ICJ-specific attorney code of conduct is warranted. As discussed, such code should not be formed from national transplants, but rather developed in reference to the practical necessities of the Court—the ethical dilemmas that it can and has seen. And, as argued, informational accuracy should be the code’s animating goal. Once truth-based diligence and disclosure duties were established as the foundation of the code, guidelines on other matters (such as confidentiality, civility, or the use of experts, perhaps) could certainly build upon it.

As for who should develop such a code, one possibility is to enlist the International Law Commission (ILC) to engage in the expert drafting, with subsequent referral to the U.N. General Assembly with a request for a Resolution. Drafting such a code certainly fits within the mandate of the ILC, and ILC drafting would help ensure that the Code is inclusive and not just limited to the views of the Western world.⁴³ A U.N. Resolution, meanwhile, could speak to the obligations of national regulatory authorities vis-à-vis the Code but, because it would be non-binding, may avoid polarizing states that might otherwise resist the implementation of international legal standards on nationally regulated attorneys.

B. *Ethical Culture*

Alone, a code is unlikely to be enough to ensure that parties abide it. Given the difficulty in identifying enforcement mechanisms, developing an ethical *culture* among international legal counsel is also important. Efforts at the American Society of International Law, the European Society of International Law, and the International Bar Association to develop a sense of professional civility and integrity could go far in instilling a culture of ethical responsibility where it is lacking or weak. Inasmuch as these organizations focus on substantive training and cross-border exchanges,

43. Such inclusion is a core tenet of the Court’s operation. Notably, Article 9 of the Court’s Statute requires that, in connection with the election of members of the Court “the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.” Statute of the International Court of Justice art. 9, *supra* note 36, at 1056.

focusing on transnational and international ethical culture should also be a high priority. Local (and even national) bar authorities frequently engage in such professional-culture-building missions through continuing legal education programs that focus on concepts such as civility and professionalism (which speak more so to what it means to be a professional in character, as an ethos to assume beyond compliance with hard-and-fast rules).

The need to cultivate ethical culture in tandem with ethical rules has gained attention in other similar settings as well. In particular, regulators have become increasingly concerned with the culture of international finance and have, in the past year or so, begun to think critically about what regulators can do to encourage private institutions (like global banks) to internalize norms of proper behavior. As one group of commentators noted with respect to the London Interbank Offered Rate (LIBOR) scandal, during which several global banks manipulated this critical interest-rate benchmark: “It is not enough to encourage the use of the whistleblowing mechanism if . . . employees are not encouraged to also challenge social conformity.”⁴⁴

In the LIBOR situation, part of the problem was that some industry actors may not have recognized that their behavior in manipulating the benchmark was wrongful. Here, too, in the context of public international litigation, without firm guidelines, it is not surprising that attorneys from differing cultural backgrounds may also take widely divergent views on where their behavior falls on the ethical spectrum. Finding ways to set an ethical culture that is specific to ICJ litigation is important in minimizing these differences—at least insofar as parties meet and interact at the International Court.

C. Enforcement Mechanisms—What Can Nations and Courts Do?

Finally, I remain cautiously optimistic about the potential for national court systems to enforce an international code. As noted, the current problem with relying on national authorities to enforce international ethics is that such enforcement remains wholly within a state’s discretion. Given the stakes in an inter-state dispute, it may seem doubtful that political actors within a state would sanction an attorney for protecting its sovereign interests at the expense of the Court’s interest in accurate information. And we cannot assume that all national courts (in the U.S. or elsewhere) will be

44. PRICEWATERHOUSECOOPERS LLP, THREATS TO THE FINANCIAL SERVICES SECTOR 16 (2014), <https://www.pwc.com/gx/en/financial-services/publications/assets/pwc-gecs-2014-threats-to-the-financial-services-sector.pdf>.

willing to discipline international attorneys that flout an international rule like the *Chevron* court did.

But what if a state's discretion to enforce an ICJ code could be reduced through a credible commitment device? For example, states' treaty obligations at the ICJ could be amended to require them to enforce an ICJ ethical code as a condition of their participation at the Court. This "enforcement" obligation could be as basic (and limited) as imposing a duty on states to refer counsel to a domestic disciplinary body if the Court reports that counsel has breached the ICJ ethics code. To be sure, this suggestion is not made lightly and with full understanding that a treaty amendment may be extraordinarily difficult to achieve. Even so, finding some credible commitment device—like a treaty obligation—may be less costly than attempting to shoehorn the Court into a public censure role.

As for the Court, it is also worthwhile to consider which institutional actor would be well suited to provide further guidance on its role and responsibilities vis-à-vis attorney misconduct. Even if the International Court is not ultimately charged with enforcing—through formal sanctions—its own code, it should, at the very least, have some additional instruction as to how to respond to parties' ethical dilemmas. Ignoring or side-stepping the problem cannot be the ideal solution.

One possibility is to guide the Court on methods of private censure. The Court could, for example, have a method of private referral to national regulatory authorities to report attorney ethical breaches, thus requiring national authorities to investigate and engage in private (or public) censure as they see fit. Such non-public censure could be an effective way for the Court to impose reputational sanctions in the relevant professional community without the social costs attendant to a public rebuke. It would also go hand in hand with the proposal above to have nations commit to taking disciplinary authority against wayward counsel.

D. A Functional Enforcement Approach

Finally, as an alternative to either the Court or national regulatory authorities, there may increasingly be functional methods of enforcement. In particular, the electronic services that have emerged in the past few years, like the Global Arbitration Review⁴⁵ (GAR) and others, may occupy this role. These services—and the widespread news dissemination that they offer—may be forming as a functional jury in appraisals of the behavior of individual arbitrators and counsel.⁴⁶

45. GLOBAL ARBITRATION REVIEW, <http://globalarbitrationreview.com/> (last visited Mar. 21, 2016).

46. I thank Michael Reisman for this observation.

Take, for example, the recent arbitration between Croatia and Slovenia, under the auspices of the Permanent Court of Arbitration. In July 2015, it surfaced that Slovenia's appointment to the Tribunal was leaking confidential information to a government agent.⁴⁷ Upon discovering this, Croatia announced that it would not participate further in the "tainted" arbitration.⁴⁸ It then wrote to Slovenia's foreign ministry, accusing Slovenia of "material breaches" of their arbitral agreement, thus "irrevocably damag[ing]" the proceeding.⁴⁹

GAR published various articles reporting these events as well as parts of the taped conversations revealing how the Slovenian appointee breached the confidentiality of the deliberations and discussed ways to improperly influence the proceeding.⁵⁰ In performing this public reporting function, services like GAR are thus providing a forum, of sorts, for public sanction, perhaps alleviating pressure on courts and tribunals themselves to publicly censure ethical misconduct.

CONCLUSION

This Essay has offered some preliminary thoughts on ethical dilemmas in inter-state disputes. It has highlighted the gap in international legal standards for counsel appearing before the International Court and suggested, as a start, internationally framed duties of due diligence and disclosure be codified for firm guidance. As for enforcement, the Essay suggested that private censure by the Court together with national disciplinary action might be the most productive way to make such a code credible, as the collateral costs of court-imposed public sanction may simply be too great. Ultimately, the aim of this Essay is to spark conversation about such a project—developing a code of conduct to guide litigants in the International Court as well as concrete options that the Court may take when faced with attorney misconduct.

47. Croatia v. Slovenia, PCA Case Repository 2012-04, Partial Award, ¶ 80 (Perm. Ct. Arb. June 30, 2016), <https://pcacases.com/web/sendAttach/1787>.

48. See Alison Ross, *Croatia Boycotts Hearings on Implications of Sekolec Scandal*, GLOBAL ARBITRATION REVIEW (Mar. 18, 2016), <http://globalarbitrationreview.com/news/article/34840/croatia-boycotts-hearing-implications-sekolec-scandal/>.

49. *Id.*

50. *Id.*