

SYMPOSIUM: A FOCUS ON ETHICS IN INTERNATIONAL COURTS AND TRIBUNALS
INTO THE VOID: A COUNSEL PERSPECTIVE ON THE NEED TO ARTICULATE RULES
CONCERNING DISCLOSURE BEFORE THE ICJ

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Individuals appearing before the ICJ on behalf of states are not subject under international law to any compulsory code of conduct to guide them in navigating issues of professional ethics. Article 42(2) of the ICJ Statute merely provides that parties “may have the assistance of counsel or advocates before the Court” and does not impose qualification requirements on those a state elects to appear on its behalf.¹ In practice, legal teams appearing before the Court are comprised of individuals from different legal backgrounds who are either qualified legal practitioners or academics (referred to below as “counsel”). Qualified practitioners will likely be subject to professional codes of conduct applicable to them in their home jurisdiction, and those codes of conduct may bind them in relation to proceedings before the ICJ. But the professional obligations applying to practitioners from different jurisdictions can vary considerably. Some may consider that their *domestic* code of conduct does not (and/or should not) bind counsel before an *international* court. Those who are academics or are not admitted in any jurisdiction may not be subject to any conduct rules when acting as counsel. The absence of a common set of professional obligations means that the obligations bearing upon the conduct of particular counsel are unclear and certainly not uniform. This may have an impact on the presentation of a case before the Court, and in turn on the Court’s understanding of the dispute. Ultimately, it could materially impact the outcome of a case.

There have been some attempts to articulate guidelines governing the conduct of counsel before international fora, significantly the International Law Association’s *The Hague Principles on Ethical Standards of Counsel Appearing before International Courts and Tribunals*.² But these guidelines are written at a high level of generality, and although they were considered to “represent a beginning rather than an end to discussion of this important topic,”³ they have not been developed (nor do they appear to have been commonly relied upon in practice) in the decade since

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¹ Article 17 of the ICJ Statute does provide that “[n]o member of the Court may act as agent, counsel, or advocate in any case,” and Practice Direction VIII indicates that parties should refrain from selecting a person as counsel who has held certain positions at the Court.

² Int’l Law Ass’n Study Group on the Practice and Procedure of International Courts and Tribunals, *The Hague Principles on Ethical Standards of Counsel Appearing before International Courts and Tribunals* (Sept. 27, 2010); see also Int’l Bar Ass’n, *IBA Guidelines on Party Representation in International Arbitration* (May 25, 2013); Council of the Bars and Law Societies of the European Union, *Code of Conduct for Lawyers in the European Union* (as amended May 19, 2006). See also Margie Jaime, Counsel Conduct in International Arbitration: An Ethical “No-Man’s Land?”, 85 *ARB. INT’L* 211 (2019).

³ See Mojtaba Kazazi, *Commentary on the Hague Principles on Ethical Standards of Counsel Appearing Before International Courts and Tribunals*, 10 *L. & PRAC. INT’L CTS. & TRIBS.* 17, 21 (2011).

their adoption. Furthermore, since *The Hague Principles* were adopted in 2010, there has been an increase in fact- and evidence-heavy disputes before the Court, alongside increased diversification of counsel.

Against this background, and with a view to furthering the debate on the development of specific rules of conduct, we address a concrete example—the disclosure of documents—to illustrate how the absence of common rules governing conduct of counsel may give rise to difficulties in practice, and we suggest how this issue might be addressed.

Disclosure of Documents

In preparing a claim before the Court, there will invariably be a process of collating and reviewing documents in the client's possession. Decisions are then made, normally on counsels' advice, as to which documents are to be referred to and likely annexed to the written pleadings. The focus here is primarily on documents helpful to the client's case. This is a function of the relevant rules: the burden of proof is on the party alleging a position,⁴ and the Court's Statute provides that the written proceedings include "all papers and documents *in support*."⁵

But what about disclosure of the document that is *not* helpful to the client's case, but is relevant to the dispute and potentially material to its outcome? The short answer seems to be that no one really knows, yet cases muddle on. But this lack of a shared understanding *within* a legal team risks confusion or disagreement amongst counsel, and *between* legal teams appearing before the Court risks a scenario where each side of the aisle may be playing by different rules on an issue as basic as the disclosure of documents.

Stepping back, there are two potential sources of obligation that could apply. The first is a positive duty of disclosure binding parties to a case. But no such obligation is found in the Court's Statute, Rules, or Practice Directions.⁶ It has been suggested that there is a duty of cooperation such that parties are to refrain from actions frustrating the purpose of the proceedings,⁷ but there is no consensus on the scope of that duty, including whether this encompasses a positive duty of disclosure.⁸ While the Court has stated that a respondent "should" cooperate in the provision of "such evidence as may be in its possession that could assist the Court in resolving the dispute,"⁹ it appears to have been reticent in framing it as a clear legal obligation,¹⁰ and certainly has not framed it as an unconditional one.¹¹

⁴ See, e.g., [Military and Paramilitary Activities in and Against Nicaragua](#) (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 ICJ REP 392, para. 101 (Nov. 26, 1984).

⁵ [Statute of the International Court of Justice](#) art. 43(2) (emphasis added); see also ICJ, [Rules of the Court](#) art. 50(1) (1978).

⁶ In contrast, Annex VII of UNCLOS requires the parties to an Annex VII case to "facilitate the work of the arbitral tribunal and, in particular, in accordance with their law and using all means at their disposal, shall: (a) provide it with all relevant documents, facilities and information (b) enable it when necessary to call witnesses or experts and receive their evidence and to visit the localities to which the case relates."

⁷ [THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY](#) 1247, paras. 44–45 (Andreas Zimmermann & Christian J. Tams eds., 2d ed. 2010).

⁸ See *id.*, at 1248 ("Given that the obligation to cooperate does not imply a duty to disclose all relevant evidence, it is too vague to have any meaningful relevance in specific procedural situations, especially for the law of evidence."). Cf. ANNA RIDDELL & BRENDAN PLANT, [EVIDENCE BEFORE THE INTERNATIONAL COURT OF JUSTICE](#) 49 (2009) (suggesting that the duty to cooperate may encompass a duty to produce all relevant evidence).

⁹ [Pulp Mills on the River Uruguay](#) (Arg. v. Uru.), 2010 ICJ REP 14, para. 163 (Apr. 20).

¹⁰ Cf. [Application of the Convention on the Prevention and Punishment of the Crime of Genocide](#) (Croatia v. Serbia), 2015 ICJ REP 3, para. 173 (Feb. 3 2015).

¹¹ [Application of the Convention on the Prevention and Punishment of the Crime of Genocide](#) (Bosn. & Herz. v. Serb. & Montenegro), 2007 ICJ REP 43, paras. 205–206 (Feb. 26). Cf. CHESTER BROWN, [A COMMON LAW OF INTERNATIONAL ADJUDICATION](#) 105 (2007).

The second potential source of obligation are the professional obligations binding counsel, which could give rise to a duty to advise the client to disclose a relevant document in particular circumstances, with attendant consequences on counsel's ability to continue to act if that advice is not taken. But that strikes at the heart of the issue outlined above: there is no uniform code governing all counsel appearing before the Court.

It follows from the absence of both (i) any clearly articulated relevant positive disclosure obligation and (ii) any common rules of professional conduct that parties may choose not to place before the Court documents that are nevertheless relevant and potentially material to the outcome. Given that many cases turn on evidence of disputed facts, the ramifications for the integrity of the proceedings—and a just and fair outcome—are potentially significant.¹²

Finding a Solution

When considering possible solutions, it is instructive to consider what the ultimate objective of dispute resolution before the Court is: a fair and just outcome,¹³ ensuring that the Court is able to “get at the whole truth as the basis for its final conclusion.”¹⁴

It may be that states can rely on document production requests to obviate (in practical terms) the need for a positive obligation of disclosure. The Court's *express* powers in relation to production of documents, however, are limited. Article 49 of the Court's Statute is not expressed in mandatory terms (providing only that the Court may “call upon the agents” to produce a document) and lacks any meaningful sanction (providing merely that “[f]ormal note shall be taken of any refusal”).¹⁵ Article 62 of the Court's Rules allows the Court to call upon the parties to “produce such evidence or to give such explanations as the Court may consider to be necessary for the elucidation of any aspect of the matters in issue,” but it is exercised at the Court's discretion and is rarely taken up.¹⁶

However, parties could elect to develop a practice of document production requests, either directly to their counterparty or through the Court. If a state refuses, a party could seek an order from the Court for production of such a document¹⁷ and make submissions before the Court as to the inference to be drawn against a non-producing party.¹⁸ In international investment arbitrations to which states are parties, such document production requests have become the norm. Arbitral tribunals generally take guidance from the *IBA Rules on the Taking of*

¹² For example, in the *ELSI* case, pursuant to a request from Italy, the President asked the United States to disclose a document, which was ultimately considered to be significant to the outcome of the case. See [Elettronica Sicula S.P.A. \(ELSI\)](#) (U.S. v. It.), 1989 ICJ REP. 15, paras. 19 & 79 (July 20).

¹³ See [Case concerning the Northern Cameroons](#) (Cameroon v. UK), Preliminary Objections, 1963 ICJ REP. 15, 2 (Dec. 2) (referring to the “duty of the Court to maintain its judicial character” and its “judicial integrity”); see also [Oil Platforms](#) (Iran v. U.S.), 2003 ICJ REP. 161, 323-23, paras. 46-47, 52 (separate opinion of Judge Owada) (Nov. 6, 2003).

¹⁴ [Oil Platforms](#), *supra* note 12, at 323-23, paras. 46-47, 52 (separate opinion of Judge Owada).

¹⁵ See JAMES GERARD DEVANEY, [FACT-FINDING BEFORE THE INTERNATIONAL COURT OF JUSTICE](#) 182 (2016). The Court has referred to the limits to its powers under Article 49. See [Case Concerning the Frontier Dispute](#) (Burk. Faso/Mali), 1986 ICJ REP. 554, 587, paras. 64-65 (Dec. 22). Further, the Court has exercised this power sparingly. Compare *ELSI*, *supra* note 11, with *Bosnian Genocide*, *supra* note 10. A similar power exists under Article 24(4) of the [Permanent Ct. of Arb. Optional Rules for Arbitrating Disputes Between Two States](#) (1992).

¹⁶ For criticisms of the Court for failing to make use of its powers regarding evidence, see [RIDDELL & PLANT](#), *supra* note 8, at 75. As to the invocation of Article 62, see JUAN JOSÉ QUINTANA, [LITIGATION AT THE INTERNATIONAL COURT OF JUSTICE: PRACTICE AND PROCEDURE](#) 416-24 (2015).

¹⁷ See, e.g., [Corfu Channel Case](#) (UK v. & Ir v. Alb.), 1949 ICJ REP. 4, 32 (Apr. 9, 1949); *ELSI*, *supra* note 11, at paras. 19 & 79.

¹⁸ In at least one currently pending interstate arbitration, the parties have referred to the IBA Rules in the context of a request by one state for the production of documents by another.

Evidence, which provide that the tribunal may order a party to produce documents and may draw adverse inferences should the party fail to comply with such an order.¹⁹ The *IBA Rules* also contain provisions enabling a party to raise confidentiality concerns, including in respect of national security, with the tribunal ultimately having authority to decide on particular document requests.

However, such a process depends on the initiative of a party to make a request and requires that party to demonstrate the likely existence, relevance, and materiality of the document(s). Frequently, a party will be unaware of the existence of documents and therefore not in a position to make a sufficiently particularized request. In addition, there is a risk of encouraging a culture of fishing expeditions, resulting in wasted costs. Further, in the absence of a positive rule of disclosure, states may be reluctant to make requests. One commentator has identified a “trend on the part of the Court not to honour [document production requests],”²⁰ although the relative infrequency with which requests are made may also simply reflect accepted practice and tradition.

So far as concerns the obligations of counsel with respect to disclosure, there are no uniform rules that provide specific guidance. Arguments can be advanced that there is presently an obligation on *all* counsel not to mislead the Court, for example with reference to the duty of cooperation or derived from a good faith performance of a party’s consent to the Court’s jurisdiction. Ultimately, however, this is not expressly stated. Thus, while an English barrister is expressly bound by such a duty before the Court, pursuant to the Bar Standards Board Code of Conduct, there is no clarity as to whether counsel from other jurisdictions consider themselves to be bound by an equivalent obligation.

A meaningful step forward would be the articulation by the Court of a duty on counsel not to mislead the Court, for example through a new practice direction.²¹ Such an obligation was proposed in *The Hague Principles*, with Article 6.1 providing 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.”²² An express obligation formulated in these terms would prevent counsel from making submissions that are (i) inconsistent with the evidence on the record; and (ii) inconsistent with evidence that is not on the record but is known to counsel. Further, the requirement that counsel “present evidence in a fair and reasonable manner” could imply a duty to (iii) make appropriate inquiries (or advise one’s client to do so) as to the existence of materially relevant evidence. However, in the absence of a positive duty of disclosure binding on the parties to a proceeding, a duty not to mislead does not clearly extend to requiring counsel to (iv) advise her or his client to disclose relevant and material but unhelpful documents within its possession or control. Ultimately, while it is crucial that the Court articulates an express obligation not to mislead the Court, that may not ensure that all documents that are relevant and material to a dispute are before the Court.

If there were a positive duty of disclosure binding on a state party to a proceeding to disclose relevant and material documents, then there are professional obligations that would logically follow from that, which could usefully be articulated in a practice direction. Counsel could be made subject to an express duty to advise a client to disclose all documents that are relevant to the dispute and material to its outcome, or at least be required to take reasonable

¹⁹ Int’l Bar Ass’n, *IBA Rules on the Taking of Evidence in International Arbitration* arts. 3(3), 3(6), 3(7) & 9(5) (May 29, 2010).

²⁰ QUINTANA, *supra* note 15, at 422.

²¹ See, e.g., ARMAN SAVARIAN, *PROFESSIONAL ETHICS AT THE INTERNATIONAL BAR* 90 (2013). It is generally acknowledged that the ICJ has an inherent power to regulate parties appearing before it and their representatives, at least in order to ensure respect for the principle of equality between the parties. See, e.g., Chester Brown, *The Inherent Powers of International Courts and Tribunals*, 66 *BRI. Y.B. INT’L L.* 195-244 (2006); *M/V “Louisa” (Saint Vincent v. Spain)*, Case No. 18, Judgment, May 28, 2013, Separate Opinion of Judge Cot, paras. 28-29 (Int’l Trib. for the Law of the Sea). See also Rosalyn Higgins, *Ethics and International Law*, 23 *LEIDEN J. INT’L L.* 277, 288 (2010).

²² Int’l Law Ass’n Study Group on the Practice and Procedure of International Courts and Tribunals, *The Hague Principles on Ethical Standards of Counsel Appearing before International Courts and Tribunals* art. 6.1 (Sept. 27, 2010).

steps to advise and assist the client to comply with its disclosure duties. These conduct obligations would go hand-in-hand with a state's disclosure obligations and would achieve the objective of ensuring that all documents that are relevant and material to a dispute are disclosed to both the opposing party and to the Court.

Conclusion

The absence of binding rules of disclosure *and* common rules governing the conduct of counsel appearing before the Court has the potential to jeopardize the efficiency and integrity of the Court's proceedings. Given the increasing number of fact- and evidence-heavy cases on the Court's docket, the time is ripe to develop a sufficiently particularized set of binding obligations for proceedings before the Court governing (i) disclosure of relevant and material documents by parties and (ii) the conduct of all counsel, including disclosure obligations.

There will no doubt be challenges in developing these rules. The Court has consulted with counsel in the past on various issues (for example, through the *2015 Counsel Survey*) and it could do so productively here. Ultimately, the articulation of such rules could go a significant way in addressing concerns about a level playing field, ensuring that those appearing before the Court are able to present their client's best case based on the relevant facts before *all* those in the Great Hall, thus enabling the Court to reach outcomes that are fair and just.