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ЛЕКЦИИ ЛЕТНЕЙ ШКОЛЫ ПО МЕЖДУНАРОДНОМУ ПУБЛИЧНОМУ ПРАВУ

Юридические советники, оказывающие
содействие государствам в международных
судах и трибуналах: роль и обязанности

Паоло Палкетти

COURSES OF THE SUMMER SCHOOL ON PUBLIC INTERNATIONAL LAW

Counsel Assisting States before International
Courts and Tribunals: Role and Duties

Paolo Palchetti

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The present publication contains the text of lectures by Paolo Palchetti on the topic “Counsel Assisting States before International Courts and Tribunals: Role and Duties”, delivered by him within the frames of the Summer School on Public International Law 2025.

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Летняя школа по международному публичному праву 2025 года
Summer School on Public International Law of 2025

Дорогие друзья!

Центр международных и сравнительно-правовых исследований продолжает публикацию лекций, прочитанных в рамках Летней школы по международному публичному праву.

Летняя школа — проект Центра, призванный дать возможность тем, кто изучает международное право, занимается или планирует заниматься им, получить дополнительные знания о предмете и стимулировать самостоятельную работу слушателей. Занятия в Летней школе состоят из общего курса по международному публичному праву, лекций по специальным темам и семинаров, которые проводятся ведущими экспертами по международному праву, а также индивидуальной и коллективной работы слушателей.

В 2025 году Летняя школа состоялась в шестой раз. Она прошла в гибридном формате и была посвящена общей теме: «Судебное разрешение международных споров с участием государств». В Москве курсы читали Жозе Луис Жезус, Брукс Дейли, Омри Сендер, Алексей Дронов, Мануэль Санчес Миранда и Альфредо Кросато Нойманн. Ряд лекций были проведены с подключением экспертов онлайн в библиотеке Центра. Онлайн-занятия провели Олуфemi Элайес, который прочёл общий курс по международному публичному праву, и Паоло Палкетти. Эти и другие материалы Летней школы прошлых лет доступны на сайте iclr.ru.

Центр международных и сравнительно-правовых исследований выражает благодарность членам Консультативного совета Летней школы: Р. А. Колодкину, С. М. Пунжину, Б. Р. Тузмухамедову — и всем, кто внёс вклад в реализацию этой идеи.

Dear friends,

The International and Comparative Law Research Center continues publication of lectures delivered at the Summer School on Public International Law.

The Summer School is a project of the ICLRC aimed at providing those learning, working, or aspiring to work in the sphere of international law with an opportunity to obtain advanced knowledge of the subject and encouraging participants to engage in independent research. The Summer School's curriculum is comprised of a general course on public international law, lectures on special topics, and seminars delivered by leading international law experts, as well as of independent and collective studying.

In 2025, the Summer School was held for the sixth time. It took place in a hybrid format and focused on the general topic: "Judicial Resolution of International Disputes Involving States". The offline courses in Moscow were delivered by José Luis Jesus, Brooks Daly, Omri M. Sender, Alexey Dronov, Manuel Sánchez Miranda, and Alfredo Crosato Neumann. A number of lectures were held at the Center's Library with remote experts, namely Olufemi Elias, who gave a general course on public international law, and Paolo Palchetti. These and the past years materials of the Summer School are available on the website iclr.ru.

The International and Comparative Law Research Center wishes to express its appreciation to the members of the Advisory Board — Roman Kolodkin, Sergey Punzhin, and Bakhtiyar Tuzmukhamedov — as well as others who helped implement the project.



Паоло Палкетти

Паоло Палкетти (PhD, Миланский университет) — профессор международного права в Университете Париж 1 Пантеон-Сорбонна, где он является директором магистратуры по международному праву и международным организациям. Ранее он был профессором международного права в Университете Мачераты (Италия). Автор книг и статей по различным направлениям международного права, в основном в области права международных организаций, внешних отношений Европейского союза, международной ответственности, разрешения международных споров. Занимал должности приглашённого преподавателя в нескольких университетах. Является одним из управляющих редакторов журнала *QIL-Questions of international law*, членом совета директоров *Rivista di diritto internazionale* и *Diritti Umani e Diritto Internazionale*, а также членом редакционного комитета *International Organizations Law Review* и *OXIO-Oxford International Organizations Database*. Консультирует государства по межгосударственным спорам и выступал в качестве защитника и адвоката по нескольким делам в Международном суде, включая такие дела, как *Применение Конвенции о предупреждении преступления геноцида и наказания за него в Судане (Судан против Объединённых Арабских Эмиратов)*; *Предполагаемые нарушения некоторых международных обязательств в отношении оккупированной палестинской территории (Никарагуа против Германии)*, *Арбитражное решение от 3 октября 1899 года (Гайана против Венесуэлы)*, *Обязательства, касающиеся переговоров о прекращении гонки ядерных вооружений и ядерном разоружении (Маршалловы острова против Индии; Маршалловы острова против Пакистана; Маршалловы острова против Соединённого Королевства)*, *Юрисдикционные иммунитеты государства (Германия против Италии)*.

Paolo Palchetti

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I.

Introduction

This contribution consists of the text of the two lectures I delivered at the Summer School on Public International Law in Moscow on 12-13 August 2025.¹ The topic on which I was invited to give the course is the work of counsel for states in international adjudication. This subject can be approached from different angles. One may focus, *inter alia*, on the tasks of counsel,² on the various national traditions of advocacy,³ or on litigation strategies.⁴ These two lectures adopt yet another perspective. They focus on the regulatory framework governing the activity of counsel: What rules of international law and what professional standards of conduct apply to counsel appearing on behalf of a state before an international court?

The first lecture examines the relationship between counsel and the state on whose behalf counsel acts. It addresses three issues: what requirements, if any, are to be met for being appointed as counsel for a state; whose interests counsel is expected to represent when acting on behalf of a state; what legal effects attach to statements made by counsel on behalf of the state in proceedings before international courts.

¹ I thank the staff of the International and Comparative Law Research Center for the support in the preparation of the lectures, and Judge Roman Kolodkin for the invitation on behalf of the Center.

² See S. Wordsworth KC and K. Parlett, 'Effective Advocacy at the ICJ', in C. Esposito and K. Parlett (eds), *The Cambridge Companion to the International Court of Justice* (CUP, 2023), pp. 277-300.

³ See J. Crawford, A. Pellet, C. Redgwell, 'Anglo-American and Continental Tradition in Advocacy before International Courts and Tribunals', *Cambridge Journal of International and Comparative Law* 4 (2023), pp. 715-737.

⁴ A. Pellet and T. Barsac, 'Litigation Strategy', in H. Ruiz-Fabri (ed.), *Max Planck Encyclopedia of International Procedural Law* (OUP, 2019).

The second lecture focuses on the relationship between counsel and the court. Counsel owe not only professional duties to their clients. They are also expected to contribute to the sound administration of justice by complying with a number of professional duties owed to the court. The difficulty lies mainly in identifying these duties. In a national context, deontological codes of conduct provide the answer. By contrast, as regards international courts dealing with inter-state disputes, such codes are generally lacking. Hence, several questions arise: Is there a need for deontological codes of conduct for counsel appearing before international courts and tribunals dealing with inter-state disputes? Who could eventually adopt such codes? How can compliance with ethical standards of conduct be ensured?

Two preliminary remarks are in order. First, the lectures will examine not only the rules applicable to persons acting as counsel but also those concerning the agents of the state. While the role and powers of the agent differ clearly from those of counsel, extending the analysis to agents will allow for a more complete overview of the law governing the representation of a state before international tribunals.

Second, the lectures focus on the law and practice of two international tribunals: The International Court of Justice (ICJ or the Court) and the International Tribunal for the Law of the Sea (ITLOS or the Tribunal). As is well known, the procedural rules governing the activity of these two courts, including matters relating to the representation of the parties, are quite similar. This provides a good reason to examine them together. At the same time, it seems preferable to restrict to them the analysis which follows. The fact that international courts and tribunals differ greatly from one another counsels caution when assessing whether the considerations made with regard to one tribunal may be extended to other tribunals.⁵

⁵ For this view, see also J. Crawford, 'The International Law Bar: Essence Before Existence?', in *The European Society of International Law Conference Paper Series*, N° 11/2013, pp. 1-12.

II.

The Relationship between Counsel and the State

This section examines three issues relating to the relationship between agents and counsel and the appointing state: (a) the conditions that must be satisfied to be appointed as agent or counsel; (b) the interests that agents and counsel are expected to protect; and (c) the possible legal effects attached to statements made by agents or counsel before an international tribunal.

a) The conditions for being appointed as agent or counsel

Writing in 1915, Dionisio Anzilotti observed: ‘*Naturalmente ogni Stato provvede come vuole alla tutela dei propri interessi nel contraddittorio*’ (‘Naturally, every State organises as it wishes the protection of its interests in adversarial proceedings’).⁶ More than a century later, Anzilotti’s observation remains largely accurate. In a judgment rendered in 2016, ITLOS recognized that, ‘under international law, it is for each State to determine the persons, including private persons, who represent the State or are authorized to act on its behalf in its relations with other States, international organizations and international institutions, including international courts and tribunals’.⁷ On this matter, international law appears to recognize a sort of *domaine réservé* of states. This does not exclude the possibility of derogations to the general rule. As ITLOS further observed, the state’s freedom

⁶ D. Anzilotti, *Corso di diritto internazionale* vol. III (Athenaeum, 1915), p. 109. I found this citation in S. Forlati, *The International Court of Justice. An Arbitral Tribunal or a Judicial Body?* (Springer, 2014), p. 53.

⁷ *M/V “Norstar” (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016, ITLOS Reports 2016, p. 44.

of choice ‘is without prejudice to the specific treaty regimes or other rules on State representation that may be applicable’.⁸ However, the general rule remains largely unaffected by the treaty regimes governing the activity of the ICJ or ITLOS.

The Statute of the ICJ contains one provision dealing specifically with the representation of the parties. Article 42 (1) establishes that ‘[t]he parties shall be represented by agents’; Article 42 (2) adds that the parties ‘may have the assistance of counsel or advocates before the Court’. This provision only describes, in a laconic manner, the functions agents and counsel are expected to perform. By “representing” the state, the agent is the person who takes decisions on behalf of the state regarding the procedure, who receives communications from the Court, and who, as will be seen, has the authority to make statements binding upon the appointing state.⁹ Indeed, Article 40 of the Rules makes clear that ‘all steps on behalf of the parties after proceedings have been instituted shall be taken by agents’ and that ‘[c]ommunications addressed to the agents of the parties shall be considered as having been addressed to the parties themselves’. The importance of the agent’s role for the orderly conduct of the proceedings is attested by the fact that the name of the agent must be included in the application instituting proceedings.¹⁰

Unlike the agent, the counsel does not formally represent the party. Counsel merely “assists” the party, such assistance essentially consisting in contributing to the development and presentation of the legal arguments supporting the claims of the state. No rule requires a party to appoint counsel to present its position.

⁸ Ibid. For a survey of some special regimes, see Crawford, fn. 5, pp. 6-12.

⁹ On the functions of agents, see F. Berman and G. Hernández, ‘Article 42’, in A. Zimmermann and Ch. Tams (eds), *The Statute of the International Court of Justice. A Commentary* (OUP, 3rd ed., 2018), pp. 1205-1209; Forlati, fn. 6, pp. 53-56.

¹⁰ Article 40 (3) of the Rules of the Court.

Neither Article 42 nor any other provision of the Statute or the Rules establishes conditions or qualifications that a person must satisfy or possess in order to be appointed as agent or counsel. They also impose no limitation on the number of agents or counsel a party may appoint. By providing that ‘the number of counsel and advocates to be heard on behalf of each party shall be settled by the Court’, Article 58 of the Rules alludes to the possibility of the Court limiting the number of counsel presenting arguments during the oral phase of the proceeding. In practice, however, the Court has generally left this matter to the discretion of the parties.¹¹

Ultimately, the main limitation is probably represented by the fact that a person who will appear before the Court as agent or counsel must communicate with the Court in one of its two official languages: French or English. In principle, even this requirement may be lifted: under Article 39 (3) of the Statute, at the request of a party, the Court may ‘authorize a language other than French or English to be used by that party’. In practice, however, the use of a language other than English or French is rather exceptional. This is also due to the practical difficulties that the use of a different language may entail. Article 70 of the Rules provides that, whenever ‘a language other than French or English is used, the necessary arrangements for interpretation into one of the two official languages shall be made by the party concerned’.

b) The interests that counsel (and the agent) are supposed to represent

With regard to the possibility of a state appointing a private lawyer as its agent, Judge Oda once observed:

¹¹ See Berman and Hernández, fn. 9, p. 1210, who, however, observe that ‘the power should nevertheless be seen as an inherent element of the Court’s control over its own proceedings; the very fact that the power exists may make it unnecessary for it to be exercised’.

Furthermore, in the present case, I note that a State appearing before the Court is not represented by a person holding high office in the Government acting as Agent, but by a private lawyer from another, highly developed, country. This has rarely been the case in the history of the Court and reinforces my feeling that a question arises as to whether the case is brought to the Court in the interest of the State involved or for some other reason.¹²

The agent is generally expected to be not only a national of the appointing state but also a person holding an official position in the organization of that state. Most often, it is the legal advisor to the ministry of foreign affairs who is appointed as agent.¹³ However, as we have seen, neither the Statute nor the Rules of the Court require the agent to be a national or an official of the state. Indeed, Judge Oda's criticism was not rooted in any lack of qualification under the rules of the Court. His concern was of a different nature. To him, the real issue was 'whether the case is brought to the Court in the interest of the State involved'. In other words, according to Judge Oda, the fact that the agent was 'a private lawyer from another, highly developed, country' could be taken as evidence that the state may have no genuine interest in having the dispute settled by the Court. Interestingly, Judge Oda invited the Court to consider possible remedies against the risk of 'offhand or casual unilateral referral of cases by some States (which would simply appear to be instigated by ambitious private lawyers in certain developed countries)'.¹⁴ He suggested that such situations might amount to 'an abuse of the right to institute proceedings before the Court'.¹⁵

¹² *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Provisional Measures, Order of 1 July 2000, Declaration of Judge Oda, ICJ Rep. 2000*, p. 132.

¹³ See Berman and Hernández, fn. 9, p. 1207.

¹⁴ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Provisional Measures, Order of 1 July 2000, Declaration of Judge Oda, ICJ Rep. 2000*, p. 132.

¹⁵ *Ibid.*

Adopting Judge Oda's line of reasoning, one may inquire whether the status or qualification of the person appointed as agent or counsel can shed light on the actual interests and motivations underlying a state's participation in a case, and whether this may have procedural implications. The remainder of this section examines three situations in which, beneath the unitary position of the state as a party to a proceeding before an international tribunal, a plurality of interests belonging to different actors may be identified.

i) Interaction between the interests of the state and the interests of private actors

When a state submits an application to an international tribunal, it is expected to act primarily to protect its own interests. This does not exclude the possibility that other actors, including private actors, may also have an interest involved in the case submitted by the state. The classical case is when a state acts in diplomatic protection: behind the interest of the state, which is the subject entitled to invoke responsibility, lies the interest of the national who suffered injury.¹⁶ Since diplomatic protection may represent the only remedy at the disposal of the individual for the protection of his/her interests, the individual may seek to persuade the state of nationality to bring a case against the state which caused the injury before an international tribunal and may even attempt to have a say, through the intermediary of his/

¹⁶ For a definition of diplomatic protection, see Article 1 of the Articles on Diplomatic Protection adopted by the International Law Commission in 2006: 'For the purposes of the present draft articles, diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility'. According to the ICJ, this definition reflects customary international law. See *Ahmadou Sadio Diallo (République de Guinée c. République démocratique du Congo)*, *Exceptions préliminaires*, arrêt du 24 mai 2007, C.I.J. Recueil 2007, p. 599.

her lawyers, in the proceedings before that tribunal. As Judge Cot noted,¹⁷

Mixed litigation, semi-public and semi-private, is becoming more common. Agents and co-agents act more and more often for private parties, under the cover of inter-State litigation and the fig leaf of diplomatic protection.

In “mixed litigations”, the private party is often the one who benefits most from having its lawyer included in the delegation representing the state before an international tribunal. Such presence helps ensure that the interests of the private party are adequately taken into account by the state when devising its litigation strategy before the tribunal. From the perspective of the state, the advantages are less obvious. The fact that the lawyer may have in-depth knowledge of the background to the dispute may be a valid reason for including him/her among the counsel of the state. To avoid any risk of conflict of interests, the dual role of the lawyer should be authorized by both the state and the private client.¹⁸

Precedents in which a state appointed as counsel a lawyer of a private party with a direct stake in the case are not lacking. In the *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)* case, the delegation of the United States included as counsel a person who was also the lawyer of the company owning the plant whose requisition was at the origin of the dispute.

¹⁷ See *M/V “Louisa” Case, Saint Vincent and the Grenadines v. Spain, Merits, Separate opinion of Judge Cot, ITLOS Case No 18, ITLOS Reports 2013*, p. 117. See also J.-P. Cot, ‘Remarques sur la déontologie des avocats et conseils auprès des cours et tribunaux internationaux’, in *Liber amicorum en l’honneur de Serge Sur*, (Pedone, 2014), pp. 243-252.

¹⁸ See in this respect the International Law Association’s *Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals*, adopted in 2010 and reproduced in *The Law & Practice of International Courts & Tribunals* 10 (2011), p. 6. Principle 4 provides that ‘counsel is not precluded from acting in a case in which he or she has made appropriate disclosure in writing of the facts relevant to the Principle [on conflict of interests] on the basis of which the parties have given their express consent’.

Interestingly, the fact that counsel for the United States was also the lawyer of the private company owning the plant had procedural consequences. Because, in his pleadings on behalf of the United States, counsel also referred to ‘matters of fact within his knowledge as a lawyer acting for Raytheon Company’,¹⁹ the Chamber of the Court dealing with the case acceded to the request of Italy that he be treated not only as counsel but also as a witness. He was therefore cross-examined by counsel for Italy. It is noteworthy that, while the President of the Chamber only asked the United States whether they had objection to their counsel being cross-examined, the lawyer emphasized that he accepted to be cross-examined only because Raytheon Company had waived any relevant privilege in this regard.²⁰

In proceedings before ITLOS it is not uncommon for a state to appoint as agent the lawyer of a private party who has an interest in the case. In *The “Grand Prince” (Belize v. France)* and *The M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain)* cases, the agents were private lawyers of the owners of the vessels detained by, respectively, the French and Spanish authorities. This practice may have been encouraged by the fact that both cases had been brought to the Tribunal on the basis of the special procedure for the prompt release of vessels and their crews established by Article 292 of the United Nations Convention on the Law of the Sea. Article 292 (2) provides that an application for release may be made “by or on behalf” of the flag state of the vessel. This formula — “on behalf of the flag state” — allows an application to be submitted directly by lawyers acting for the shipowners, the state limiting itself to authorize the submission of the application. Sometimes, the private lawyer is practically alone in representing

¹⁹ *Elettronica Sicula S.P.A. (ELSI)*, Judgment, ICJ Reports 1989, p. 19.

²⁰ Ibid.

the state before the Tribunal, state officials playing only a limited role, when they are not simply absent.²¹

The practice of appointing the lawyer of an interested private party extends beyond prompt release proceedings. In the *M/V “Norstar” (Panama v. Italy)* case, Italy raised an objection to such practice, arguing that ‘the power for an individual to act “on behalf” of a State for the purpose of prompt release proceedings is a unique kind of power under article 292’ and that this power ‘does not extend to the power to act on behalf of the State beyond those proceedings’.²² The Tribunal rejected Italy’s objection, finding that ‘the fact that Mr Carreyó is a lawyer in private practice, acting as a legal representative of the owner of the *M/V “Norstar”*, does not imply that Panama is prevented from entrusting him with the powers to represent Panama’.²³

The delegation of the representation of the state to a private lawyer has been criticized by individual judges. Thus, Judge Cot observed that, ‘since the lawyer-agent is not necessarily in close contact with the authorities of the flag State’, the ‘credibility and reliability of the information he provides as to the legal position of the flag State may be questionable’.²⁴ As already observed, Judge

²¹ See D. Anderson, ‘Prompt Release of Vessels and Crews’, in A. Peters (ed.), *Max Planck Encyclopedias of International Law* (OUP, 2008), para. 5: ‘Six such applications have been submitted to date [...]. The six applications were submitted by lawyers in private practice who were acting for the ship-owners, masters, etc. [...] Except in the *Chaisiri Reefer 2* case which was withdrawn following agreement between the parties, these lawyers also argued the cases, sometimes in the absence of any official from the applicant State’.

²² *M/V “Norstar” (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016, ITLOS Reports 2016, p. 39, para. 70.

²³ Ibid., p. 44, para. 95.

²⁴ “*Grand Prince*” (*Belize v. France*), Prompt Release, Judgment of 20 April 2001, Declaration of Judge ad hoc Cot, ITLOS Reports 2001, p. 53. See also A. R. Ziegler and K. R. Jonathan, ‘The Legitimacy of Private Lawyers Representing States Before International Tribunals’, in F. Baetens (ed.), *Legitimacy of Unseen Actors in International Adjudication* (OUP, 2019), pp. 544-565, at 556 (‘the private counsel can provide the tribunal with inaccurate information. As representative, the agent (and to a lesser degree the counsel) is the link between the court and the litigant State. Given this position, the agent is expected to be highly reliable’).

Oda warned of the risk of an increasing number of casual unilateral referral of cases by some states.²⁵

While this practice may create a number of practical problems, the fact that a state appoints as agent the lawyer of a private party with an interest in the case can hardly be regarded as a ground for dismissal. Judge Oda seems to make a suggestion to that effect when he invited the Court to consider whether this situation may be qualified as an ‘abuse of the right to institute proceedings’.²⁶ The existence of an abuse of process has sometimes been invoked before the ICJ in order to support a claim to the inadmissibility of an application. The Court has consistently rejected such a claim, holding that ‘[i]t is only in exceptional circumstances that the Court should reject a claim based on a valid title of jurisdiction on the ground of abuse of process’.²⁷ It could be argued that, when a state delegates its representation before the Court to a private party, the “true party” becomes the private party and this would be contrary to the limitations as to the capacity to be a party to a case provided by Article 34 of the Statute.²⁸ An argument of this kind was raised in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* case. Myanmar argued that, ‘by “appointing” or “tasking” a State to bring

²⁵ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Provisional Measures, Order of 1 July 2000, Declaration of Judge Oda, ICJ Rep. 2000*, p. 132: ‘I personally wonder, in the light of the increasing number of unilateral applications, whether the offhand or casual unilateral referral of cases by some States (which would simply appear to be instigated by ambitious private lawyers in certain developed countries), without the Government of the State concerned first exhausting diplomatic channels, is really consistent with the purpose of the International Court of Justice as the principal judicial organ of the United Nations’. See also Ziegler and Jonathan, fn. 24, p. 557.

²⁶ *Ibid.*

²⁷ *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment, ICJ Reports 2018*, p. 336, para. 150. On the attitude of international courts with regard to objections based on abuse of process see A.D. Mitchell and T. Malone, ‘Abuse of Process in Inter-State Dispute Resolution’, in H. Ruiz-Fabri (ed.), *Max Planck Encyclopedia of International Procedural Law* (OUP, 2018).

²⁸ According to Article 34, ‘[o]nly states may be parties in cases before the Court’.

a case on its behalf, an entity that is not a State can circumvent the limitations that only States may be parties in cases before the Court'.²⁹ The Court rejected such argument:

The Court observes that the fact that a State may have accepted the proposal of an intergovernmental organization of which it is a member to bring a case before the Court, or that it may have sought and obtained financial and political support from such an organization or its members in instituting these proceedings, does not detract from its status as the applicant before the Court. Moreover, the question of what may have motivated a State such as The Gambia to commence proceedings is not relevant for establishing the jurisdiction of the Court.³⁰

The same reasoning can be applied to the situation in which a state appears to delegate its representation before the ICJ to a private party.

ii) Interaction between the interests of the state and the interests of an NGO

It is well-known that non-governmental organizations (NGOs) may participate in the negotiation of multilateral treaties or in the work of an international organization by supporting the activity of a state, including by providing that state with legal or financial assistance.³¹ They may also play a role in supporting initiatives aimed at obtaining a decision from an international tribunal, for instance by encouraging states to adopt a resolution of the General Assembly requesting an advisory opinion from the ICJ, or by

²⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment, ICJ Reports 2022*, p. 492, para. 35.

³⁰ *Ibid.*, p. 495, para 44.

³¹ See, among others, A. Boyle and Ch. Chinkin, *The Making of International Law* (OUP, 2007), pp. 153-269; K. Anderson, 'The Ottawa Convention banning landmines, the role of international non-governmental organizations and the idea of international civil society', in *European Journal of International Law*, 11 (2000), pp. 91-120.

proposing to a state that it submit a dispute to the Court or the Tribunal.³² States may also agree to include as counsel persons who act as legal experts for an NGO.

So far, the role of NGOs in supporting and assisting states in bringing a case before the ICJ or the Tribunal has not attracted much attention. In the *Legality of the Threat or Use of Nuclear Weapons* case, however, Judge Guillaume referred to such issue. He openly criticized the role of NGOs. He emphasized that the opinion requested by the General Assembly of the United Nations originated from an initiative of a group of NGOs, and that these NGOs ‘worked very intensively to secure the adoption of the resolutions referring the question to the Court and to induce States hostile to nuclear weapons to appear before the Court’.³³ He then observed:

I am sure that the pressure brought to bear in this way did not influence the Court’s deliberations, but I wondered whether, in such circumstances, the requests for opinions could still be regarded as coming from the Assemblies which had adopted them or whether, piercing the veil, the Court should not have dismissed them as inadmissible. However, I dare to hope that Governments and intergovernmental institutions still retain sufficient independence of decision to resist the powerful pressure groups which besiege them today with the support of the mass media. I also note that none of the States which appeared before the Court raised such an objection. In the circumstances I did not believe that the Court should uphold it *proprio motu*.³⁴

³² For the role of NGOs in the global coalition to adopt a UN General Assembly Resolution asking the ICJ to clarify State obligations and legal consequences related to climate change, see the website <https://www.vanuatuicj.com/>.

³³ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, Separate Opinion of Judge Guillaume, ICJ Reports 1996*, p. 287.

³⁴ *Ibid.*, pp. 287-288.

The position of Judge Guillaume is in many respects similar to that of Judge Oda mentioned above. His main concern is that initiatives aimed at obtaining a decision from the Court do not, in fact, originate with states, nor are they brought in the interests of the states involved. Like Judge Oda, he invited the Court to consider dismissing the request for an opinion as inadmissible.

Positions such as those of Judges Guillaume and Oda remain, however, isolated. As already seen, the ICJ generally refrains from “piercing the veil” to determine whether, behind the formal presence of the state, there is another actor using the state to pursue its own distinct interest. Nor is the Court interested in assessing the motivations that led a state to bring a case before it or to vote in favor of a resolution requesting an advisory opinion. A state appearing before the Court therefore remains free to receive financial support or legal assistance from an NGO, including through the appointment as counsel of persons who simultaneously serve as legal experts for that NGO.

iii) Interaction between the views held by different powers of the state

So far, I have addressed two situations in which the different interests at stake are those of the state and of a non-state actor, whether the owner of a ship or an NGO. The situation I address here is different, as it concerns a possible divergence of views within the state itself, in particular among the different powers of the state. International legal thinking has long been dominated by the perception of the state as a unitary subject. Yet, if one pierces the unitary veil of the state, one finds a plurality of organs which, at times, speak with different voices on questions of international law.³⁵ How, then, can one determine the position of the state, when

³⁵ See R. Higgins, ‘The Concept of “The State”: Variable Geometry and Dualist Perceptions’, in L. Boisson de Chazournes and V. Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality. Liber Amicorum Georges Abi-Saab* (Kluwer, 2001), p. 561.

the different powers of the state disagree about the content of the international rule at issue in the dispute?

As the ICJ once put it, ‘in general, in international law and practice, it is the executive of the state that represents the state in its international relations and speaks for it at the international level’.³⁶ It may be added that, in general, it is the executive, normally the ministry of foreign affairs or the ministry of justice, that appoints the persons who act as agent or counsel of the state and issues instructions regarding the position to be taken on behalf of the state.³⁷ However, in certain cases, in light of the specific nature of the dispute, the executive may find it preferable to defend the views expressed by other organs of the state, even if those views differ from the position previously held by the executive.

The *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* case provides a clear illustration of such a situation. The case originated from a series of decisions of Italian courts denying immunity to Germany on the premise that, under international law, an exception to immunity existed in cases of international crimes. Germany contested the existence of such an exception, including through diplomatic notes of protest. In parallel with the inter-state dispute between Germany and Italy, the question of Germany’s immunity before Italian courts had generated an intense and prolonged confrontation between the Italian executive and the Italian judiciary, each expressing different views on the existence of an exception to immunity. When, in 2008, Germany brought the dispute before the ICJ, Italy was confronted with a choice: whether to maintain the views expressed by the executive before Italian courts or, instead, to align itself with the position of the Italian judiciary and plead in favor of the existence

³⁶ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment of 1 April 2011, ICJ Reports 2011 (I), p. 87, para. 37.

³⁷ See Berman and Hernández, fn. 9, p. 1209.

of an exception to immunity.³⁸ In the end, the Italian Government opted to defend the view of the Italian courts. The reason for this choice lies in the specific features of the Italian legal system, in which the judiciary enjoys considerable autonomy in determining the content of the rules of customary international law.³⁹ In that context, only a judgment rendered after an extensive review of all the arguments put forward by Italian courts could be regarded as authoritative in the eyes of Italian judges. Otherwise, there was a real risk that judges would resist enforcing a judgment of the ICJ recognizing Germany's right to immunity.

c) The effects of the statements made by the agent and counsel during the pleadings

When considering the legal effect to be attached to statements made on behalf of a party during the pleadings before an international tribunal, a distinction must be drawn between the position of the agent and that of counsel. As already observed, only the agent has the authority to formally bind the state.

The ICJ has recognized that unilateral statements made by the agent may create binding obligations for the state. Such binding declarations have been particularly relevant in the context of proceedings on provisional measures. The Court has accepted that it may rely on unilateral assurances given by the agent of a party regarding the future conduct of the state in order to determine

³⁸ In its Memorial, Germany referred to the divergences between different powers of the Italian state over the content of the rule on immunity. See, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Memorial of Germany, para. 130.

³⁹ See, more broadly, P. Palchetti, 'Conformità dell'ordinamento italiano alle norme del diritto internazionale generalmente riconosciute e controlimiti: problemi aperti', in G. Palmisano (ed.), *Il diritto internazionale ed europeo nei giudizi interni* (ES, 2020), pp. 371-388.

whether the conditions of risk of irreparable prejudice and urgency are met.

As to the conditions under which a statement of an agent may be regarded as creating obligations for the state, the ICJ observed in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*:

The Court recalls that unilateral declarations can give rise to legal obligations and that interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected [...]. The Court further recalls that, '[o]nce a State has made such a commitment concerning its conduct, its good faith in complying with that commitment is to be presumed [...]'. The Court notes that the undertakings of the Agent of Azerbaijan, which were made publicly before the Court and formulated in a detailed manner, are aimed at addressing the situation of persons of Armenian national or ethnic origin in Nagorno-Karabakh following the operation commenced by Azerbaijan in this region on 19 September 2023. The Court is of the view that the undertakings made by the Agent of Azerbaijan on behalf of his Government are binding and create legal obligations for Azerbaijan.⁴⁰

In this passage, the Court appears to emphasize three elements: that the declaration amounted to formal 'undertakings made by the Agent [...] on behalf of his Government'; that these undertakings 'were made publicly before the Court'; and that they were 'formulated in a detailed manner'. These conditions correspond closely to those identified by the International Law Commission (ILC) in its *Guiding Principles applicable to unilateral*

⁴⁰ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 17 November 2023, ICJ Reports 2023*, pp. 637-638.

*declarations of States capable of creating legal obligations.*⁴¹ According to this text, in order to have binding effect, a unilateral declaration must be ‘publicly made’ and must manifest ‘the will to be bound’.⁴² Moreover, it must be ‘stated in clear and specific terms’.⁴³ The ILC further requires that the declaration be made ‘by an authority vested with the power to do so’, specifying that, apart from heads of state, heads of Government and ministers for foreign affairs, ‘[o]ther persons representing the State in specified areas may be authorized to bind it, through their declarations, in areas falling within their competence’.⁴⁴ While the Court does not explicitly address the last condition, it is clear that a statement made by an agent concerning the conduct of the state and relevant to the dispute before the Court may be regarded as falling within the competence of the agent.

While counsel is not vested with the power to bind the state, the fact that he/she has been authorized to speak on behalf of the state means that statements made before the tribunal are attributable to the state and may be regarded as reflecting its position. This is all the more so since it is presumed that the competent authority of the state, and in particular the agent, has prior knowledge of, and has approved, the text of the pleading that

⁴¹ ILC Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto, in *Yearbook of the International Law Commission*, 2006, vol. II, Part Two, pp. 369-381.

⁴² See Principle I: Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations. When the conditions for this are met, the binding character of such declarations is based on good faith; States concerned may then take them into consideration and rely on them; such States are entitled to require that such obligations be respected.

⁴³ See Principle VII: A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms.

⁴⁴ See Principle IV: A unilateral declaration binds the State internationally only if it is made by an authority vested with the power to do so. By virtue of their functions, heads of State, heads of Government and ministers for foreign affairs are competent to formulate such declarations. Other persons representing the State in specified areas may be authorized to bind it, through their declarations, in areas falling within their competence.

counsel will present to the tribunal. Even when individual judges pose questions to the parties during the oral proceedings, the practice followed by the ICJ is to grant each party adequate time to consult with its legal team, including, obviously, the agent, before answering.⁴⁵

It has been suggested that statements of counsel ‘may be seen as containing a strong advocacy element not always representing the general view of the law of the State they defend’.⁴⁶ This statement requires qualification. As a matter of principle, irrespective of any advocacy element, statements of counsel do represent the view of the state.⁴⁷ Insofar as such statements express the position of the state regarding the existence or content of a rule of customary international law, they may be regarded as a form of state practice or as evidence of *opinio juris*. The ILC is therefore correct to include ‘claims before national or international courts and tribunals’ among the forms of state

⁴⁵ Article 61 (2) of the Rules of the Court provides that ‘[t]he Court may, during the hearing, put questions to the agents, counsel and advocates, and may ask them for explanations’; Article 61 (4) specifies that ‘[t]he agents, counsel and advocates may answer either immediately or within a time-limit fixed by the President’. Wordsworth and Parlett, fn. 2, p. 293, explain the fact that the Court does not interrupt advocates to put questions and almost never expect an immediate answer on the basis of ‘the Court’s long-standing deference to sovereign States’.

⁴⁶ See T. Treves, ‘The Expansion of International Law’, in *Recueil des cours* 398 (2019), p. 162, who observes that ‘[s]tatements of agents before international courts may be seen as expressing the view of the State they represent, while statements of counsel — even though they may be presumed to have been approved by the State’s authorities — may be seen as containing a strong advocacy element not always representing the general view of the law of the State they defend’.

⁴⁷ According to Crawford, ‘what you say in the International Court is read by the agent and approved by the agent, and it is as such a representative view of the state. Of course, it is not usual for counsel to make commitments on behalf of the state—that is only for the agent—but nonetheless what you say is very carefully looked at. I do not think there is any doubt that it constitutes state practice. But it is state practice *sub modo*’. See Crawford, Pellet, Redgwell, fn. 3, p. 724.

practice relevant for determining customary international law.⁴⁸ In the same way, a statement establishing the interpretation to be given to a provision may constitute subsequent practice under Article 31 (3)(b) of the Vienna Convention on the Law of Treaties. While there is no doubt that these statements qualify as a form of state practice, their weight in determining the general position of the state must be assessed in light of their particular nature. The fact that these statements are made in order to win a case, and concern matters on which the parties have agreed to accept the decision of the Court, may diminish their weight among the various manifestations of the practice of that state. In this respect, in certain circumstances they may indeed be found not to reflect ‘the general view of the law of the State’.⁴⁹

It may happen that a statement made by counsel on behalf of a state contradicts views previously expressed by the same person in an academic publication or when pleading on behalf of another state in a different case. Since counsel ‘are working exclusively as representatives of the State concerned and not as unauthorized experts or *amici curiae*’,⁵⁰ there is nothing inherently problematic in the same person expressing different positions on the same legal issue. In reality, however, the matter is slightly more complex. In certain circumstances, such inconsistencies may weaken the persuasiveness of the argument advanced by counsel.

⁴⁸ See the ILC’s Commentary to Draft Conclusion 6 of the ILC’s Draft Conclusions on Identification of Customary International Law: ‘The expression “executive conduct”, for example, refers comprehensively to any form of executive act, including executive orders, decrees and other measures; official statements on the international plane or before a legislature, and claims before national or international courts and tribunals’. UN doc A/73/10, p. 134. On this issue, see M. Longobardo, ‘States’ Mouthpieces or Independent Practitioners? The Role of Counsel before the ICJ from the Perspective of the Legal Value of their Oral Pleadings’, in *The Law & Practice of International Courts & Tribunals* 20 (2021), p. 66.

⁴⁹ On the assessment of the practice of a state, see Draft Conclusion 7 of the ILC’s Draft Conclusions on Identification of Customary International Law.

⁵⁰ I. Brownlie, ‘The Perspective of International Law from the Bar’ (2003), reported by Longobardo, fn. 48, p. 73.

The risk is lower when the conflict is between statements made in two separate cases.⁵¹ This is so because the context — the fact of defending two different states in relation to separate disputes — makes it easier to explain and accept some inconsistencies. The embarrassment may be greater when counsel is also an academic and the previously expressed view was articulated in an academic capacity.

⁵¹ For an example of counsel being challenged for statements made before the Court in another case and on behalf of a different state, see *Public sitting held on Friday 9 June 2006, at 10 a.m., at the Peace Palace in the case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, CR 2006/48, p. 43.

III.

The Relationship between Counsel and the Court⁵²

Counsel are not only representatives of a state; they may also be regarded as officers of the Court (or of the Tribunal). As such, they owe several duties to the Court. In particular, as provided by the ILA's *Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals*, counsel have 'a duty to the international court or tribunal to contribute to the fair administration of justice and the promotion of the rule of law'.⁵³

Beyond the duty to comply with the rules set out in the statute and rules of a tribunal, counsel are also guided in their professional activity by ethical standards of conduct. In domestic legal systems, these standards are generally codified in national ethical codes. With respect to international courts and tribunals, however, the desirability and usefulness of adopting professional rules of conduct applicable to lawyers has been the subject of significant debate. When considering whether a code of conduct should be established, or when assessing the aspects that such a code should primarily address, it is preferable to take into account the specific characteristics of each international court and tribunal rather than providing a general response intended to apply uniformly to all. Although the issue arises for all courts and tribunals, the appropriate solution may vary depending on the type of jurisdiction, the nature of the parties, or the institutional features of the court. From this

⁵² This section is based on P. Palchetti, 'Le regard de l'avocat', in G. Le Floch and N. Peltier (eds), *Ethique et Justice internationale* (Pedone, 2025), pp. 359-365.

⁵³ See Principle 2.1: 'Fair administration of justice: Counsel has a duty of loyalty to his or her client consistent with a duty to the international court or tribunal to contribute to the fair administration of justice and the promotion of the rule of law'. *Hague Principles on Ethical Standards*, fn. 18.

perspective, it does not seem appropriate, as some authors propose,⁵⁴ to place all international courts with jurisdiction over disputes in which at least one of the parties is a state on the same footing. The considerations that can be made with respect to the ICJ or the Tribunal, for example, do not seem to be immediately transposable to investment arbitration tribunals.⁵⁵

a) Is there a need for a professional code of conduct before the Court?

So far, the ICJ has refrained from adopting a code of conduct for counsel. It has, however, adopted certain guidelines aimed at limiting the freedom of states to choose the individuals who may act as agent or counsel. Thus, Practice Direction VII provides that ‘parties should [...] refrain from designating as agent, counsel or advocate in a case before the Court a person who sits as judge *ad hoc* in another case before the Court’. Practice Direction VIII adds that ‘parties should refrain from designating as agent, counsel or advocate in a case before the Court a person who in the three years preceding the date of the designation was a Member of the Court, judge *ad hoc*, Registrar, Deputy-Registrar or higher official of the Court’.

It has been argued that the absence of an ethical code of conduct ‘has negatively affected the ICJ’s legitimacy and ability to function effectively’.⁵⁶ This assertion is hardly convincing. It illustrates the risk of oversimplifying the issue and distorting the way the Court’s practice is presented. It oversimplifies the matter

⁵⁴ See C. Giorgetti, J. Dunoff, ‘*Ex Pluribus Unum? On the Formation and Shape of a Common Code of Ethics in International Litigation*’, in *AJIL Unbound* 2019, pp. 314-315.

⁵⁵ See Crawford, fn. 5.

⁵⁶ See H. Sajjadi, ‘The International Court of Justice: The Need for a Code of Professional Conduct for Counsel’, *Georgetown Journal of Legal Ethics* (2018), pp. 817-830, at p. 818.

because some authors appear to assume that the mere absence of a code of ethics is, in itself, sufficient to undermine the legitimacy of a court. It distorts the debate insofar as, in order to justify the need for a code of conduct, certain scholars tend to give disproportionate importance to isolated instances of unethical behavior. With regard to the ICJ, it would be excessive and misleading to speak of a crisis of legitimacy or of the absence of effective safeguards merely because the Court has not yet enacted ethical rules for counsel appearing before it. While it is possible to find a few cases of unethical behavior by one of the parties in the Court's practice,⁵⁷ these remain isolated incidents that have not affected the Court's legitimacy or the effective exercise of its judicial function.

Several authors, including counsel with extensive experience before the Court, defend the *status quo* and consider the adoption of a code of conduct unnecessary. This view is essentially based on two considerations. First, practice does not reveal significant violations of professional rules. Second, the limited number of individuals regularly appearing as counsel before the Court or the Tribunal has long ensured a form of self-regulation and self-control that functions effectively.⁵⁸ As James Crawford observed, '[d]espite the lack of formal regulation, the existence of the "invisible bar" has ensured a form of self-regulation' and this 'system of self-regulation works fairly well in practice'.⁵⁹ Similarly, Alain Pellet noted that the reason for 'l'inopportunité d'un code d'éthique' lies in 'la "petitesse" du monde de la justice,

⁵⁷ See, for instance, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, ICJ Reports 2001*, pp. 46-47, where one party raised the question of the authenticity of several documents submitted by the other party. On other cases where the question of unethical behavior of a party was raised, see A. Sarvarian, *Professional Ethics at the International Bar* (OUP, 2013), pp. 80-113.

⁵⁸ For an empirical study on the composition of the legal teams appearing before the ICJ, see Sh. P. Kumar and C. Rose, 'A Study of Lawyers Appearing before the International Court of Justice, 1999-2012', *European Journal of International Law* 25 (2014), pp. 893-917.

⁵⁹ Crawford, fn. 5, pp. 8-9.

sinon internationale, du moins interétatique'.⁶⁰ Both authors also emphasize that states would likely oppose the adoption of such a code, insofar as it would ultimately limit their sovereign freedom to choose their counsel.⁶¹

While it is true that, to date, the practice of the Court or the Tribunal does not reveal significant cases of misconduct by counsel, reliance on self-regulation alone does appear no longer sufficient. At least two reasons justify the Court taking the initiative to adopt certain professional standards of conduct applicable to counsel.

The first reason concerns the composition of legal teams defending states. It is true that, as Crawford and Pellet noted, until recently only a small number of counsel regularly appeared before the Court. While this may have ensured that the “rules of the game”, including certain informal rules of professional ethics, were generally known and respected, it may also risk to foster a form of “optimism bias” — that is, excessive confidence among some counsel in their ability to determine for themselves what is professionally ethical.⁶² Most importantly, as Judge Cot has rightly remarked,⁶³ there has been a significant increase in the number of individuals appearing before the Court, including teams composed of counsel with no prior experience in this type of litigation. No doubt, the greater variety of persons appearing as counsel constitutes a welcome development. However, it also means that the Court can no longer rely solely on the unwritten rules shared by a small group of insiders. Informal rules and internal peer pressures may no longer be sufficient to prevent the danger of unethical behavior.

⁶⁰ A. Pellet, ‘Conclusions’, in J.-M. Thouvenin and J. Joly Hébert (eds), *La Cour internationale de Justice à 75 ans* (Pedone, 2023), p. 313.

⁶¹ Pellet, fn. 60, p. 314; Crawford, fn. 5, p. 9.

⁶² On this, see H. Ruiz Fabri, ‘Conflicts of Interests: Navigating in the Fog’, in *AJIL Unbound* (2019), pp. 307-311, at p. 310.

⁶³ Cot, ‘Remarques sur la déontologie des avocats’, fn. 17, pp. 244-245.

The second reason relates to the ICJ's "audience".⁶⁴ As illustrated by the media attention surrounding the recent case brought by South Africa against Israel,⁶⁵ global public opinion is increasingly attentive to the Court's activities. The need for ethical rules for counsel must also be assessed in light of this development. It is no longer sufficient to rely on the fact that no major ethical incidents have occurred so far. The possibility that such incidents may arise in the future could seriously undermine the authority of an institution whose activities are now closely observed and scrutinized by a global audience. In other words, the Court must increasingly adapt to the logic that justice must not only be done, but must also be seen to be done. In this respect, adopting ethical rules could be a valuable tool for protecting the legitimacy and authority of the Court.⁶⁶ Beyond their direct impact on counsel's conduct, such rules would carry considerable symbolic and educational weight. They would demonstrate the Court's commitment to fundamental ethical principles and promote greater awareness among the various actors of the role that these principles play in ensuring the proper administration of justice.

As to the question of who should adopt ethical rules for counsel, various proposals have been made. The option of referring to national ethical codes is unsuitable, as it would lead to the application of different standards depending on the domestic bar of which counsel are members; moreover, a counsel who is not a member of a domestic bar might not be subject to any such rules. Leaving the task to a private institution is equally problematic, as it raises questions about the legitimacy of such

⁶⁴ On this notion, see J. Salmon, 'L'auditoire de la Cour internationale de Justice: du bilatéral à l'universel', *Universität des Saarlandes, Europa Institut*, n° 350, 1996.

⁶⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*.

⁶⁶ As noted by Ziegler and Jonathan, fn. 24, p. 562, in an era of increased public scrutiny, it is important for international courts to preserve their legitimacy in the eyes of their constituencies.

an institution to set rules applicable to counsel appearing before the Court.⁶⁷

In fact, the best solution appears to be for the Court itself to adopt such rules. The Court's power to establish professional standards of conduct for counsel may be viewed as part of its general authority to regulate its own procedure under Article 30 of the Statute.⁶⁸ In particular, as several authors have suggested,⁶⁹ such rules could take the form of Practice Directions. The fact that Practice Directions are not binding does not make this instrument any less useful.⁷⁰ Their symbolic and pedagogical importance would remain intact. Moreover, Practice Directions are generally respected.

b) Issues on which certain rules of conduct for counsel could be adopted

A professional code of conduct for lawyers normally covers three areas: the conditions for admission to the bar, the ethical

⁶⁷ On this proposal, see Sarvarian, fn. 57, p. 266.

⁶⁸ Other authors refer to the existence of inherent power as a possible basis for the adoption of such rules. See Ziegler and Jonathan, fn. 24, p. 562: 'In fact, we would rather suggest that international adjudicative bodies' inherent powers are sufficient to deal with this issue. The appeal of entrusting international tribunals with the determination of the accountability of counsels or agents acting before them is twofold: to clarify their accountability and thereby enhance their legitimacy'. For a different view, see E. Stoecker and M. Wood, 'The International Bar', in C. P. R. Romano, K. Alter, Y. Shany (eds), *The Oxford Handbook of International Adjudication* (OUP, 2013), p. 640: 'While individual courts and tribunals might seek to prescribe rules, it is doubtful that they have the power to do so. Also, the states that established the courts and tribunals may themselves be unwilling to do so'.

⁶⁹ See, among others, Sarvarian, fn. 57, p. 90; K. Parlett and A. Sander, 'Into the Void: A Counsel Perspective on the Need to Articulate Rules Concerning Disclosure Before the ICJ', *AJIL Unbound* (2019), p. 305.

⁷⁰ On the debate around the uncertain legal force of Practice Directions, see P. Couvreur 'Le Statut de la Cour internationale de Justice: bilan et perspectives', in *Recueil des Cours* 450 (2025), pp. 25-436, at p. 265.

rules that lawyers must follow in the practice of their profession, and the disciplinary sanctions for violations of such rules.⁷¹

As for the first category, it has already been observed that the ICJ Statute does not establish requirements concerning the professional qualifications that counsel must possess. There is no need for the Court to intervene on this point. Arguably, the Court could not go beyond introducing a general requirement of “recognized competence in international law”, similar to that contained in Article 2 of the Court’s Statute with respect to the qualifications of judges.⁷² The argument that access to the Court should be limited to lawyers who are members of a national bar, on the grounds that they would at least be subject to domestic ethical regulation, is not convincing.⁷³ Conversely, should the requirement for appearing as counsel before the Court be that of having ‘recognized competence in international law’, it would be difficult to use such a requirement to restrict access to the Court to counsel who are members of a national bar or to university professors, as some authors propose.⁷⁴ As the professional backgrounds of sitting and former judges demonstrate,⁷⁵ this requirement can also be met by diplomats or experts outside academia.

A Practice Direction containing ethical rules for counsel appearing before the Court should focus on articulating a set of fundamental principles and rules governing the relationship

⁷¹ Sarvarian, fn. 57, p. 14.

⁷² Article 2 provides that ‘The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law’.

⁷³ See Cot, ‘Remarques sur la déontologie des avocats’, fn. 17, pp. 250-251.

⁷⁴ Sarvarian, fn. 57, p. 287.

⁷⁵ M. J. Aznar, E. Methymaki, ‘Article 2’, in A. Zimmermann, Ch. Tams (eds), *The Statute of the International Court of Justice. A Commentary* (3rd ed., OUP, 2019), pp. 289-306.

between counsel and the Court, particularly in matters of evidence.⁷⁶ As illustrated by the ILA's Hague Principles, issues of professional ethics also concern the relationship between counsel and client. However, the Court may choose not to address this dimension, especially since certain ethical obligations, such as confidentiality, loyalty, or conflicts of interest, are often already regulated in the private-law contract between counsel and the state.

Regarding potential sanctions for breaches of ethical rules, little can realistically be expected from the Court. Since the Court is generally reluctant to sanction a party for failure to comply with procedural requirements, it is difficult to imagine that it would now seek to develop rules specifically aimed at sanctioning counsel for breaches of professional rules. Challenges to counsel are also rare before other international tribunals. Whether international courts possess an inherent power to exclude state-appointed counsel remains a matter of debate.⁷⁷

Nevertheless, breaches of ethical rules may negatively affect the party represented by counsel. In the field of evidence, for instance, inappropriate behavior by counsel may be taken into account by the Court in assessing the weight to be given to the evidence submitted by that party.

In principle, the Court's Statute allows it to go further. The Court could rely on its power to determine which party must bear the costs of the proceedings as a means for sanctioning inappropriate conduct by counsel. The Statute does not preclude such a possibility. The fact that an order on costs benefits the opposing party does

⁷⁶ For an example showing the usefulness of professional rules in matters of evidence, see Palchetti, fn. 52, pp. 364-365.

⁷⁷ For an assessment of the case law of investment tribunal with regard to this issue, see E. Stoecker and M. Wood, fn. 68, p. 645. According to Ziegler and Jonathan, fn. 24, pp. 563-564, 'international tribunals' inherent powers include not only the power to adopt rules of conduct for counsel (or agents if they are private lawyers) but also the power to sanction'.

not deprive this measure of its punitive and deterrent character. Although not in a matter related to lack of compliance with ethical standards, the issue of imposing the costs on the non-complying party was raised before the ICJ in the joint cases *Certain activities carried out by Nicaragua in the border area* and *Construction of a road in Costa Rica along the San Juan River*. '[T]aking into account the overall circumstances of the case', the Court found, however, that 'an award of costs ... would not be appropriate'.⁷⁸ Thus far, the Court has been prudent in making use of its power to award costs. This attitude reflects a broader reluctance to adopt measures that openly sanction the conduct of one of the parties.

⁷⁸ *Certain activities carried out by Nicaragua in the border area and Construction of a road in Costa Rica along the San Juan River* (Nicaragua v. Costa Rica), Merit, ICJ Reports 2015, p. 665.

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