

## INTRODUCTION TO THE SYMPOSIUM: A FOCUS ON ETHICS IN INTERNATIONAL COURTS AND TRIBUNALS

*Jeffrey L. Dunoff\* and Chiara Giorgetti\*\**

Alarming developments in a recent arbitration between Croatia and Slovenia catapulted ethical issues to the center of debates over the functioning of international dispute settlement. On July 22, 2015, a Croatian newspaper published transcripts and audio files of ex parte communications between the arbitrator Slovenia appointed and Slovenia's agent in the case. In these discussions, the arbitrator disclosed the Tribunal's preliminary conclusions (which allegedly favored Slovenia) and discussed ways to influence the other arbitrators on the panel.<sup>1</sup> Following the revelation of these conversations, Slovenia's Prime Minister demanded and received the resignations of both individuals and stated that the Slovenian Government had not known of the pair's exchanges. By this time, however, the arbitral process had been irreparably harmed. Days later, the arbitrator appointed by Croatia resigned. Croatia asked for a suspension of the proceedings; shortly thereafter, Croatia purported to terminate the agreement to arbitrate, claiming that the communications constituted a material breach of the agreement. A reconstituted tribunal nonetheless proceeded with a de novo consideration of all aspects of the case.<sup>2</sup> Although Croatia refused to participate in the proceedings, in June 2017 the tribunal issued a unanimous final award, which Croatia has refused to recognize.<sup>3</sup>

In most other circumstances, ethical issues that arise in international dispute settlement are considerably more nuanced. Yet even where all actors respect the rules, a hint of impropriety can cast a pall over the proceedings. In two separate recent cases under the UN Convention on the Law of the Sea dispute mechanisms, two different individuals acting as the appointing authority each decided to appoint himself as arbitrator, including in one case as presiding arbitrator.<sup>4</sup> Though these decisions do not violate any applicable provisions on appointments, it is potentially troubling that an appointing authority would select himself: What if an arbitrator challenge arises that the appointing authority needs to resolve? Should self-appointment be subject to an explicit rule of conduct?

Moreover, questions of ethics concern not only adjudicators, but also counsel and other actors in the international dispute system. Consider a recent challenge to the president of an International Centre for Settlement of

\* Fernand Braudel Senior Fellow, European University Institute; Laura H. Carnell Professor, Temple University Beasley School of Law.

\*\* Professor of Law, University of Richmond School of Law.

<sup>1</sup> See generally Arman Sarvarian & Rudy Baker, *Arbitration Between Croatia and Slovenia: Leaks, Wiretaps, Scandal*, EJIL:TALK! (July 28, 2015).

<sup>2</sup> [Arbitration Between the Republic of Croatia and the Republic of Slovenia](#), PCA Case No. 2012-04, Partial Award (June 30, 2016).

<sup>3</sup> [Arbitration Between the Republic of Croatia and the Republic of Slovenia](#), PCA Case No. 2012-04, Final Award (June 29, 2017); Nikolaj Nielsen, *Croatia Ignores Ruling on Slovenia Border Dispute*, EUOBSERVER (June 30, 2017).

<sup>4</sup> See generally Peter Tzeng, *Self-Appointment in International Arbitration*, EJIL:TALK! (June 7, 2017). For the order showing the appointment by the International Tribunal for the Law of the Sea President of himself as president of the arbitral tribunal, see [The Enrica Lexie Incident](#), (It. v. India), PCA Case 2015-28, Order on Preliminary Measures (Apr. 29, 2016). For the case in which the International Tribunal for the Law of the Sea's Vice-President appointed himself as arbitrator, see Ministry of Foreign Affairs of Ukraine, [The Hearing of the Case Ukraine v. Russian Federation Under UNCLOS Will Start at the Beginning of 2017](#) (Dec. 23, 2016).

Investment Disputes tribunal. The challenge was not based on any action by the president, but rather on the alleged financial benefits this individual receives from her husband's work as counsel to one of the parties in a separate case being litigated in a different forum.<sup>5</sup>

These examples are symptomatic of larger systemic issues and underscore the importance of a robust system of rules and norms to maintain the integrity and fairness of international dispute resolution processes. Among other lessons, these incidents remind us that unless all parties are confident that a dispute is resolved through fair and impartial processes, they are unlikely to respect the results. They also underscore the need to elucidate, interrogate, and progressively develop the ethical standards applicable to international dispute resolution. In this spirit, the contributions to this symposium explore some of the most important practical and normative issues in debates over ethics at international courts and tribunals (ICTs).

To set the stage for the essays that follow, this introduction briefly highlights two distinct yet intrinsically related issues that run through the symposium contributions: What ethics standards do and should apply in international proceedings? And to whom do or should they apply?

First, what ethical standards apply in international dispute resolution? There is no international bar or professional responsibility exam that attorneys must pass to participate in international litigation or arbitrations, and no single ethical code applies to all ICTs.<sup>6</sup> Moreover, the de facto international bar includes individuals from diverse legal backgrounds who are admitted to practice in a wide range of jurisdictions. Domestic lawyers are bound by bar-specific codes of ethics, but do these codes apply when lawyers practice in an international context?

Ethics rules at most ICTs exist in only an embryonic form. At the ICJ, for example, judges are not subject to a Code of Ethics, nor are other actors who participate in the proceedings.<sup>7</sup> The few applicable rules are found in the Statute of the Court and in the Rules of the Court. Article 2 of the ICJ Statute provides, for example, that the Court should be composed of a body of "independent judges, elected regardless of their nationality" from persons "of high moral character" and who possess the qualifications necessary to sit in the "highest judicial office" in their country or are juriconsults of recognized competence in international law.<sup>8</sup> Upon taking up their duties, judges must solemnly declare in open court that they "will perform [their] duties and exercise [their] powers as judges honourably, faithfully, impartially and conscientiously."<sup>9</sup> The Statute also provides that judges may not participate in decisions in cases in which they have taken part previously as agent, counsel, or advocate, or as members of a national or international court or commission.<sup>10</sup> Judges are also barred from exercising "any political or administrative function or engag[ing] in other occupation[s] of a professional nature."<sup>11</sup> More recently, a series of Practice Directions addresses the incompatibility of serving as a judge ad hoc and acting as counsel or advocate before the Court, as well as the appearance as counsel, agent, or advocate by former judges, judges ad hoc, or other former ICJ officials.<sup>12</sup>

<sup>5</sup> Cosmo Sanderson, *Malintoppi Resigns After Challenge over Husband's Counsel Work*, GLOBAL ARB. REV. (Feb. 6, 2019).

<sup>6</sup> We discuss whether a common code, at least for litigations involving a state as a party, is feasible and desirable in Chiara Giorgetti & Jeffrey L. Dunoff, *Ex Pluribus Unum? On the Form and Shape of a Common Code of Ethics in International Litigation*, 113 AJIL UNBOUND 312 (2019).

<sup>7</sup> See generally Chiara Giorgetti, *The Challenge and Recusal of Judges of the International Court of Justice*, in CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS 3 (Chiara Giorgetti ed., 2015); Christine Parajon Skinner, *Ethical Dilemmas in Inter-State Disputes*, 88 ALA. L. REV. 281 (2016).

<sup>8</sup> Statute of the International Court of Justice art. 2.

<sup>9</sup> ICJ, *Rules of the Court* art. 4 (1978).

<sup>10</sup> Statute of the International Court of Justice art. 17.

<sup>11</sup> *Id.* art. 16.

<sup>12</sup> ICJ, *Practice Directions VII and VIII*.

Most other international courts similarly lack prescribed codes of conduct binding upon judges, agents, and counsel. Thus, there is no code of ethics that applies generally in proceedings at the International Tribunal for the Law of the Sea, in litigation before international human rights courts, or in Investor-State Dispute Settlement disputes, though states and other actors have recently begun to discuss the possibility of introducing codes of ethics in various ICTs.<sup>13</sup>

The international criminal tribunals are notable exceptions. Detailed codes of conduct for judges, defense counsel, and prosecutors are found at the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court.<sup>14</sup> In their symposium contribution, Elena Cima and Makane Mbengue of the University of Geneva explore this development. They also highlight the difficulties of defining ethics requirements in professional settings consisting of individuals from widely heterogeneous cultures, legal traditions, and professional backgrounds. Finally, they provide a timely warning against adopting ethical standards that do not reflect meaningful substantive input from a wide array of interested parties who will be subject to the rules.<sup>15</sup>

Importantly, though there are no general ethics codes applicable across international proceedings, several common and important ethics concerns are intrinsic to all adjudicatory proceedings. These include the requirement that adjudicators be impartial and independent and that they be free from conflicts of interest. And yet, as two symposium contributions illustrate, the pursuit of even widely accepted ethical standards can raise unanticipated and difficult dilemmas. H el ene Ruiz Fabri of the Max Planck Institute (Luxembourg) discusses underappreciated aspects of the problem of conflicts of interest in international dispute resolution.<sup>16</sup> Ruiz Fabri notes that the system has long accepted certain types and a certain quantum of conflicts, often as part of a necessary trade-off in pursuit of other desirable goals, such as arbitrator expertise. Her observations suggest that ethical concerns may sometimes need to be balanced against competing systemic interests. John Crook, formerly an attorney-adviser at the U.S. State Department and currently an international arbitrator, develops a similar claim in his analysis of the highly contentious issue of double hatting, which refers to the practice of individuals simultaneously serving as arbitrators in one dispute and as counsel or expert witness in another. While many harshly criticize this practice,<sup>17</sup> Crook calls attention to potential unanticipated consequences that might result from prohibiting double hatting. In particular, he explores the inherent “push-me – pull-you” tension between efforts to curb double hatting and efforts to diversify the pool of new arbitrators.<sup>18</sup> Our own contribution to the symposium explores another underappreciated dimension of the debate over double hatting. Since the problem cuts across various dispute fora, only a systemic solution is likely to be effective. We develop arguments in support of a binding, general code of conduct applicable to litigation involving a state as a party.<sup>19</sup>

<sup>13</sup> The European Court of Human Rights adopted in 2008 a [Resolution on Judicial Ethics](#) consisting of ten general principles guiding members of the Court. *See generally* Arman Sarvarian, [Common Ethical Standards for Counsel Before the European Court of Justice and European Court of Human Rights](#), 23 EJIL 991 (2012).

<sup>14</sup> *See, e.g.*, [Regulations and Policies](#), UN International Residual Mechanism for Criminal Tribunals (collecting codes and directives); [Core ICC Texts](#), Int’l Crim. Ct. (collecting Code of Judicial Ethics, Code of Professional Conduct for Counsel, Regulations of the Office of the Prosecutor, and Regulations of the Registry).

<sup>15</sup> Elena Cima & Makane Mbengue, [Ethical Conduct in International Criminal Courts: Whose Ethics?](#), 113 AJIL UNBOUND 296 (2019).

<sup>16</sup> H el ene Ruiz Fabri, [Conflicts of Interests: Navigating in the Fog](#), 113 AJIL UNBOUND 307 (2019).

<sup>17</sup> *See, e.g.*, Phillippe Sands, [Conflict and Conflicts in Investment Treaty Arbitration: Ethical Standards for Counsel](#), in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 28–49 (Arthur Rovine ed., 2012).

<sup>18</sup> John R. Crook, [Dual Hats and Arbitrator Diversity: Goals in Tension](#), 113 AJIL UNBOUND 284 (2019).

<sup>19</sup> Giorgetti & Dunoff, *supra* note 6.

A second set of questions follows: To whom do ethics rules apply, and to whom should they apply? While international adjudicators and arbitrators are fundamental players in international dispute resolution, they are not the sole players. Even within each court and tribunal, numerous nonjudicial actors are deeply involved in various litigation processes, including registry staff, tribunal secretaries, translators, and, in international criminal fora, members of the office of the prosecutor. The importance of these actors cannot be overstated,<sup>20</sup> raising the question of what ethical rules, if any, should apply to these individuals.

Then, of course, there are the counsel. Like adjudicators and other institutional actors, counsel come from different legal backgrounds and thus often possess different understandings of required ethical standards. By way of example, consider the recurrent conundrum that counsel confront regarding witness preparation in international arbitration. In the United Kingdom, the solicitors' code of ethics forbids counsel from preparing a witness for testimony, as do ethical codes in numerous other jurisdictions. Yet in the United States, lawyers are not only allowed but expected to prepare witnesses; indeed, the failure to do so might be viewed as a form of professional malpractice. Similar divergences in ethical norms across different jurisdictions can be found with respect to practices concerning document production, confidentiality, professional privilege norms, and numerous other issues. How can differences like these be reconciled, especially in the absence of a comprehensive, common code of ethics?

To underscore the multiplicity of relevant actors, two contributions to this symposium address ethics issues from the perspective of different participants in the process. Two practitioners with substantial international experience, Kate Parlett, a member of 20 Essex Street Chambers, and Amy Sander, who practices at Essex Court Chambers, discuss the ethical conundrums that counsel face regarding the disclosure of documents in cases before the ICJ. Currently, no ethical rules govern the issue, giving rise to delicate questions, particularly concerning documents that are relevant, material, and not helpful to a client's position. Parlett and Sander propose two different strategies to address this situation: a duty on counsel not to mislead the Court, similar to that found in the soft law Hague Principles, and a duty of disclosure binding upon states that are parties to the proceeding. They argue that such a rules-based solution can best assist the Court in obtaining the evidence appropriate to render a fair and just outcome.<sup>21</sup> Judith Levine, Senior Legal Counsel at the Permanent Court of Arbitration, provides a perspective informed by long service at an institution that provides registry services and administrative support to parties and adjudicators. Levine highlights the quandaries raised by arbitrator resignations. She discusses various regulatory and market-based approaches to minimizing the disruptions caused by resignations, with particular attention to several innovative strategies for discouraging ethically dubious resignations.<sup>22</sup>

A related cluster of issues, not further explored in this symposium due to space constraints, concerns how ethics disputes are resolved and how ethics standards are enforced. Consider, by way of example, which actor should resolve challenges to the independence or impartiality of an adjudicator. Moreover, many questions exist over the scope of enforcement powers ICTs can exercise over counsel. Are they limited to admonishment? Do they include the power to impose financial penalties or to exclude counsel from current or future disputes? Alternatively, can—and should—attorney misconduct be addressed by domestic enforcement bodies?

To conclude, ethics in international courts and tribunals raise numerous practical and normative issues regarding the creation of applicable rules, their substance, and the procedures used to enforce them. The impressive contributions to this symposium foreground some of the most salient ethical issues in international dispute

<sup>20</sup> See, e.g., Stephanie Cartier & Christina Hoss, *The Role of Registries and Legal Secretariats in International Judicial Institutions*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 711 (Cesare Romano et al. eds., 2014).

<sup>21</sup> Kate Parlett & Amy Sander, *Into the Void: A Counsel Perspective on the Need to Articulate Rules Concerning Disclosure before the ICJ*, 113 AJIL UNBOUND 302 (2019).

<sup>22</sup> Judith Levine, *Ethical Dimensions of Arbitrators Resignations*, 113 AJIL UNBOUND 290 (2019).

settlement. Both individually and in the aggregate, the essays are meant not only to advance debates over certain ethics issues and the challenges they present, but also to raise the awareness of the international community regarding the centrality of ethical rules to the sound administration of international justice.