



**British Institute of
International and
Comparative Law**

‘Ethics in the "International Bar":
Rules, Gaps and Improvements in the Regulation
of the Professional Ethics before International
Courts and Tribunals’

Temple Garden Seminar Series in International Adjudication

Event Report

Date: 28 May 2015, 17:30-19:00

Venue: British Institute of International and Comparative Law
Charles Clore House, 17 Russell Square, London WC1B 5JP

Keynote Speaker:

- Judge Jean-Pierre Cot, International Tribunal for the Law of the Sea

Discussants:

- Dr Arman Sarvarian, University of Surrey
- José María Alonso, Baker & McKenzie (Madrid)

Chair:

- Rodney Dixon QC, Temple Garden Chambers



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On 28 May 2015, the British Institute of International and Comparative Law (BIICL) organized a seminar on professional ethics at the 'International Bar.' The panel included Rodney Dixon QC (Temple Garden Chambers) as chair; Dr Arman Sarvarian (University of Surrey) as a discussant; Judge Jean-Pierre Cot (International Tribunal for the Law of the Sea) as the keynote speaker and José Maria Alonso Puig (Baker & McKenzie – Madrid) as a final discussant.

As a first order of business, Rodney Dixon QC opened the event by introducing members of the panel then giving the floor to the first speaker, Dr Sarvarian.

Dr Sarvarian indicated two common threads running across the discussion of professional ethics. First, he cautioned against focusing on the theoretical aspects (e.g. architecture, content, rules and norms) overmuch and thereby losing sight of the overarching purpose of ethics: the influencing of behaviour and the bringing about of practical change. Secondly, he pointed out that we should not lose sight of the human dynamic represented by an instinctive reaction to or fear of the prospect of regulation. This 'human element' may prove to be valuable for the purposes of cross-fertilization across different jurisdictions and between non-inter-state and inter-state fora. Dr Sarvarian went on to give a comprehensive overview of the debates and developments in various adjudicatory forums, such as: the International Criminal Court Code of Conduct for the Office of the Prosecutor 2013 (CoC), the International Bar Association Guidelines on Party Representation 2013, the Arbitration Rules of the London Court of International Arbitration 2013, developments before the International Court of Justice (e.g. – the treatment of the Practice Directions and controversy concerning 'experts as counsel') and the European Court of Human Rights Resolution on Judicial Ethics. Dr Sarvarian concluded that the development so far is asymmetrical: we are seeing a quicker pace in some areas (e.g. commercial arbitration) than in others (e.g. inter-State litigation). In line with his emphasis on the human dynamic, he identified investment arbitration as a potential weathervane, as it is a mixed professional community with members from both the commercial and public international fields and one in which the practical application of the IBA Guidelines is practicable. He sees scope for the adoption of ethical standards on an incremental, cross-fertilizing basis but cautioned that the scholarly and professional debate has yet to fully shift from 'whether to professionally self-regulate' to 'how do we self-regulate'.

The keynote speaker, Judge Cot proceeded to give his insights into the ethics debate in inter-state adjudication. He pointed to the fact – also raised by Dr Sarvarian – that the inter-state court's general reluctance to introduce ethical standards is due to the fact that counsel represent sovereign States and the question of ethical conduct is somehow linked to the issue of State sovereignty. He noted that this phenomenon is also demonstrated by the International Tribunal of the Law of the Sea (ITLOS) which is reluctant to take action when ethical issues arise until there is some tangible practice or a plausible precedent emerging from jurisprudence of other international courts (e.g. ICJ). However, this can lead to "a difficulty rather a problem", as in concrete cases it is always possible to find answers to such challenges. Judge Cot emphasised that there is one important consequence for misconduct of counsel that is built into the adjudicatory process; namely, unprofessional or unethical conduct may have adverse consequences on the outcome of the case and that adverse inference is a serious sanction, in particular in the eyes of affected parties. One must not forget that in international litigation professional reputation is extremely important. Judge Cot also



highlighted that there is an expansion of the exercise of international jurisdiction which creates issues and new challenges. For Judge Cot there is a room for progress concerning ethics in inter-state dispute settlement and inter-state courts, however, these developments would likely proceed on the basis of practical solutions and in an informal way, rather than through the process of adopting official rules.

The last speaker, Mr Puig, focused his comments on the practice of international arbitration and the ethics of arbitrators. First, he underlined that arbitration is based on confidence and emphasized that this area is an “ethical no man’s land”. He highlighted that different practitioners with civil law and common law backgrounds acting in the same case might produce an imbalance between the parties as they follow different ethical standards (preparation of witnesses, disclosure of harmful facts, ex parte communications, etc.). He also enumerated a desired range of requirements for an arbitrator beyond the standard expectations, such as being aligned with ethical standards; avoidance of ex parte communications; adherence to the principle of confidentiality among the arbitrator’s duties; as well as availability and expertise. Mr Puig acknowledged the importance of the IBA Guidelines on Conflict of Interest which, although it cannot cover all situations, is a good instrument to help arbitrators and parties recognise basic conflicts of interest that should be disclosed. He also pointed out that adopting standards of ethics might lead to “guerrilla tactics” of challenging awards based on supposed violations of such rules of ethics. Mr Puig noted that this has led some commentators to argue that it is unnecessary to produce additional standards, rules or a code, or establish a body to deal with ethics.

After the panellists’ presentations, the question was raised of which body shall provide external monitoring of the CoC. In the panel’s response it was pointed out that to a certain degree, there is a conflict between how the Office of the Prosecutor (OTP) views itself and how an external commentator would view the Office, since the former has a tendency to consider itself being different than defence counsel. Such differentiation should be avoided because when members of the OTP appear before the court they are functioning as counsel in that case and have a client (the Assembly of States Parties in a technical sense) and should not act as judges. According to Dr Sarvarian the regulation should be joint, such as the mechanism of the standing disciplinary judge in the Special Court for Sierra Leone. It was also added that Registrars can act as a filtering mechanism and can have a key role in regulating the conduct of counsel.

The question of sanctions for violation of ethical rules was also put to the panel. Judge Cot pointed out that inter-state courts (for example ITLOS) lack minimum procedural rules to address such issues, whereas Mr Puig added that in arbitration sanctions can be deployed indirectly through awarding high costs for the misbehaving party, thus creating high reputational costs. However, this strategy would have no impact on inter-state dispute settlement where the costs are low and could even be harmful in human rights courts where clients would be disadvantaged instead of counsel. With regard to human rights jurisdictions, reliance on the power to exclude practitioners who contravene ethical standards is the right measure to take; albeit counsel is often not aware of the exact scope of standards one should respect. Furthermore, it was argued that national regulations are not a viable option since in inter-state courts parties are mostly represented by academics falling outside the purview of national bars. In its final remarks the panel reiterated that there is no clear answer: in some



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areas more regulation is needed while in others the focus should be on providing a higher level of transparency instead.

This Report was prepared by **János György Drienyovszki** and **Martin Clark**

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