# CORRESPONDENCE

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TO THE CO-EDITORS IN CHIEF:

Professor Detlev Vagts, in an Editorial Comment in this *Journal* (90 AJIL 250 (1996)), described a number of interesting issues relating to the need for more governance of the international legal profession.

The following issues, which were not addressed in the Editorial Comment, may merit further reflection. They underscore the need for more governance, as advocated by Professor Vagts.

As to the category of *counsel*, including agents and advocates before the International Court of Justice (ICJ), Professor Vagts referred to some examples (p. 260 and notes 71–72). The ICJ Statute and Rules of Court do not contain any substantive rules of behavior and the question therefore arises what the Court can or should do in case of misconduct. For example, according to Article 53 of the ICJ Statute, it is for the Court to decide whether copies of the written pleadings filed in a case shall be made available, before or after the oral proceedings, to "a State entitled to appear before it which has requested to be furnished with such copies," or, on or after the opening of the hearings, to the public. But what if a state party in proceedings pending before the Court provides a third party with a copy of its own or, even worse, its opponent's written pleadings in violation of Article 53, paragraph 1, as has actually occurred more than once? Who is to be held responsible for such misconduct, which might in practice be tracked to somewhere in the Foreign Ministry unrelated to the ICJ legal team itself? Can the Court penalize the agent, who is often the legal adviser to the Foreign Ministry? Should it refer to the misconduct in its judgment or in an order, or should it, or the Registrar, merely point out the misconduct in a letter addressed to the agent?

There is precious little experience concerning the conduct of yet another category, namely, *states as litigants* before international tribunals. Perhaps the most famous example from the jurisprudence of the ICJ is the Judgment in *United States Diplomatic and Consular Staff in Tehran* (1980 ICJ Rep. 3 (May 24)). In paragraph 93 of that Judgment, the Court rebuked the applicant for having reverted to self-help in an effort to free the U.S. hostages, by stating: "The Court therefore feels bound to observe that an operation undertaken in those circumstances, from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations . . . ."

As to the categories of *counsel* and *judges and arbitrators*, an interesting issue is presented by the situation of an ICJ judge *ad hoc* who also appears as counsel or advocate in another active case before the Court. The ICJ Statute and Rules of Court do not prevent a state party to a case from selecting as judge *ad hoc* a person who is acting as counsel in another, unrelated case pending before the ICJ. Likewise, the ICJ Statute and Rules of Court do not explicitly prevent a person who is counsel in one case from accepting an invitation to sit as judge *ad hoc* in another case. In fact, the provisions of the Statute actually imply that counsel in one active case can properly be designated as a judge *ad hoc* in another case. According to Article 31, paragraph 6 of the ICJ Statute, Article 17, paragraph 1, which provides that "[n]o member of the Court may act as agent, counsel, or advocate in any case," does not apply to judges *ad hoc*; however, the latter cannot have worked as agent, counsel or advocate in that *same* case within the meaning of Article 17, paragraph 2. It could be argued that instances of this kind might involve a situation of evident inequality or inappropriateness, since active counsel can then attend meetings and delib-

erations with the rest of the bench and deal with the judges on an equal footing as dictated by Article 31, paragraph 6 of the Statute. It is not always easy to distinguish in the meetings of the Court between the various cases on the Court's General List, given that legal and factual (agenda-type) issues that are relevant to one pending case, including the one in which the judge *ad hoc* appears as counsel, may be referred to in another and may result in certain unjust advantages in terms of litigation strategy. At best, this appears to involve an artificial distinction that may indeed be difficult to maintain in practice, despite the guarantees that Articles 2 and 20 of the ICJ Statute seek to provide. Consequently, from an ethical point of view, it could be argued that counsel should decline the invitation to become judge *ad hoc*.

The category of *judges and arbitrators* poses the issue of the interpretation to be given to Article 3, paragraph 2 of the ICJ Statute. Paragraph 1 of Article 3 lays down the fundamental principle that no two judges may be nationals of the same state, which applies both to the election stage and to the situation in which an incumbent judge obtains dual citizenship. According to paragraph 2, the nationality of the state in which the person "ordinarily exercises civil and political rights" shall govern. But what if a judge possesses dual citizenship and has left the country of his birth, but for practical purposes has no ties with that country and resides in the country of his other nationality where he does not "exercise any civil and political rights," i.e., he merely does not vote there? Perhaps in such a case the holding in the *Nottebohm (Second Phase)* Judgment of 1955 (1955 ICJ Rep. 4, 26 (Apr. 6)), introducing a "genuine link" concept of nationality, should be applied by the Court itself for internal purposes.

Still on the position of *judges*, one might argue that additional rules of conduct should elaborate on the broad principle set forth in Article 16, paragraph 1 of the Statute that "[n]o member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature." As Professor Vagts pointed out, "the prohibition in Article 16(1) on exercising other occupations seems to have been lightly, if at all, administered" (90 AJIL at 256). Should "any other occupation of a professional nature" be interpreted to include the involvement of judges in commercial or public law arbitrations that run for long periods of time? If so, should there be a limit to such involvements? And how should one interpret Article 7, paragraph 2 of Annex VI (Statute of the International Tribunal for the Law of the Sea) to the United Nations Convention on the Law of the Sea, which states that "[n]o member of the Tribunal may act as agent, counsel or advocate in any case"? Does this clause, which is an exact copy of Article 17, paragraph 1 of the ICJ Statute, also prohibit members of the Tribunal, for most of whom the assignment and remuneration will be on a part-time basis, from acting in any case being litigated before any other international tribunals, including the ICJ? How should the ICJ deal with a situation in which a member of the Tribunal appears as counsel or is proposed to be a judge *ad hoc* in a case pending before the Court?

The above list demonstrates that Professor Vagts's Comment introducing this topic is a timely one that does not raise mere academic issues. They are real issues in need of regulation in one form or another, especially in light of the recent proliferation of international tribunals that look to the ICJ as an example. An "International Code of Conduct," endorsed by international tribunals, might help to clarify these issues. Clarification of the above issues would assist any international court or tribunal in dealing with them, and would enhance respect for such a court or tribunal in the eyes of the public, potential litigants and the international legal profession itself.

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