States' Mouthpieces or Independent Practitioners? The Role of Counsel before the ICJ from the Perspective of the Legal Value of Their Oral Pleadings

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States' Mouthpieces or Independent Practitioners? The Role of Counsel before the ICJ from the Perspective of the Legal Value of Their Oral Pleadings

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Abstract

This article explores the role of counsel before the International Court of Justice, taking into account their tasks under the Statute of the Court and the legal value of their pleadings in international law. Pleadings of counsel constitute State practice for the formation of international customary law and treaty interpretation, and that they are attributable to the litigating State under the law on State responsibility. Accordingly, in principle, counsel present the views of the litigating State, which in practice approves in advance the pleadings. This consideration is relevant in discussing the role of counsel assisting Sates in politically sensitive cases, where there is no necessary correspondence between the views of the States and that of their counsel. Especially when less powerful States are parties to the relevant disputes, the availability of competent counsel in politically sensitive cases should not be discouraged since it advances the legitimacy of the international judicial function.

Key words: Advocate; Agent; Counsel; Representation; Rule of Law

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1 Introduction

This article investigates the role of counsel before the International Court of Justice (ICJ) from the perspective of the legal value of their pleadings. Commenting on his own experience before the Court as counsel for numerous States, the late Sir Ian Brownlie stated that "[i]n the preparation of written and oral arguments before international tribunals, the freelance pleaders are working exclusively as representatives of the State concerned",[1] cautioning at the same time that "[i]f the barrister simply identifies with the client in all respects, his value will diminish." [2] These two statements may appear as a contradiction: whereas in the first part Brownlie recognised that counsel speaks for the State, in the second one he emphasised the need to acknowledge that the ideas of a lawyer and that of the State they assists

[1] Ian Brownlie, "The Perspective of International Law from the Bar" (2003), 3, https://fdslive.oup.com/www.oup.com/orc/resources/law/intl/evans4e/resources/insights/evans4e_insights_14piece3.pdf.

[2] *Ibid*.

may differ. This article aims at exploring this thin line on which counsel before the ICJ thread, taking into account the value of their pleadings under international law. Addressing this perspective contributes to understanding the legal position of counsel acting in politically sensitive cases such as those against their State of nationality or involving serious violations of human rights.

This article aims a filling a lacuna in existing scholarship. So far, the role of counsel has been mainly analysed from the standpoint of practitioners who have acted in this capacity, with contributions covering interesting practical issues such as the different styles and traditions of pleadings[3] or advocacy strategies and techniques.[4] The issue of the legal value of the statements of counsel before the Court has attracted less

[3] See, e.g., James Crawford, Alain Pellet and Catherine Redgwell, "Anglo-American and Continental Traditions in Advocacy before International Courts and Tribunals", 2 *Cambridge Journal of International and Comparative Law* (2013), 1, https://doi.org/10.7574/cjicl.02.04.128.

[4] James Crawford, "Advocacy Before International Tribunals in State-To-State Cases", in D. Bishop and E. G. Kehoe (eds.), *The Art of Advocacy in International Arbitration* (2nd ed., 2010), 303, 330; Sergio Ugalde and Juan José Quintana, "Managing Litigation before the International Court of Justice", 9 *Journal of International Dispute Settlement* (2018), 691, https://doi.org/10.1093/jnlids/idy027; Alain Pellet and Tessa Barsac, "Litigation Strategy", in *Max Planck Encyclopedia of Public International Law online* (2019).

attention, largely because general studies on the representation of States before the ICJ have focused mainly on the role of the agent.[5]

In order to address this topic, this article investigates the legal differences between agents on the one hand, and counsel on the other, assessing whether the pleadings of counsel can be characterised as acts of the litigating States, taking into account rules from different areas of international law and a variety of judicial and scholarly sources. The article explores also the approach of counsel that have pleaded in politically sensitive cases, concluding that the availability of first rate legal assistance for all parties is indispensable for the proper functioning of the ICJ, the legitimacy of the international judicial function, and, overall, the international rule of law.

Although this article focuses on the role of counsel before the ICJ, when appropriate, practice from other international courts and tribunals where State counsel play a role is taken into account.

2 Agents, Counsel, and Advocates: Between Holy Trinity and Overlapping Roles

This section deals with the role of counsel in the representation and assistance of States before the ICJ in light of the rules embodied in the ICJ Statute and other applicable rules. In order to assess this issue, it is

[5] See, e.g., Roberto Monaco, "Représentation et défense des Parties devant les instances internationales", in E. Diez (ed.), *Festschrift für Rudolf Bindschedler* (1980), 373.

necessary to clarify the distinctions – if any – between agents, counsel, and advocates, the three professional figures usually mentioned together by the relevant provisions. Their different roles should be taken into account in discussing whether the acts of counsel should be considered as acts of the State under international law. This discussion is specific to the proceedings before the ICJ, where the distinction between agents versus counsel is provided by the Statute.[6]

2.1 The Agent or, The Representation of the State before the ICJ

Article 42 of the ICJ Statue is the main rule that governs the representation of States before the ICJ in relation to the oral phase before the Court.[7] In line with past practice of international courts and arbitral tribunals,[8] the first paragraph of Article 42 provides that "[t]he parties shall be represented by agents." The ICJ Statute does not embody any

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[6] Indeed, before investor-State arbitral tribunals, counsel can represent States (see, e.g., *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, 18 July 2014, para. 1880).

[7] See Eduardo Valencia-Ospina, "International Courts and Tribunals, Agents, Counsel and Advocates", in *Max Planck Encyclopedia of Public International Law online* (2006); Franklin Berman and Gleider Hernández, "Article 42", in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (3rd ed., 2019), 1203.

[8] E.g., Article 62, 1907 Convention pour le règlement pacifique des conflits internationaux; Article 42, 1920 Statute of the Permanent Court of International Justice.

rules on whom can be designed as agent. On account of State sovereignty and of the States' right to organise the governmental apparatus without external interference, States are free to choose whoever they prefer as agent before the ICJ.[9] As affirmed by Judge Cot, in inter-State litigations, States "acting in sovereign fashion, organize their representation and the defence of their interests. They do so at their own risk."[10] There is no prerequisite that agents be lawyers, as demonstrated by the fact that, in 1922, the drafters of the rules governing the Permanent Court of International Justice decided not to include any formal requirements regarding the agent's professional qualifications.[11] Usually, the agent is a member of the administration of the State, often appointed among the ranks of the Ministry of Foreign Affairs.[12] Sometimes, the agent is the

[9] Shabtai Rosenne, "International Court of Justice: Practice Directions on Judges ad Hoc; Agents, Counsel and Advocates; and Submission of New Documents", 1 *Law and Practice of International Courts and Tribunals* (2002), 223, 225, https://doi.org/10.1163/157180302760505343.

[10] *Grand Prince* case *(Belize v. France), Prompt Release, Judgment, ITLOS Reports 2001*, 17, Declaration of Judge Ad hoc Cot, para. 15. See, also, ITLOS, *The M/V Louisa* case *(Saint Vincent and the Grenadines v. Kingdom of Spain), Merits, Judgment, ITLOS Reports 2013*, 237, Individual Opinion of Judge Cot, para. 48.

[11] Malcolm N. Shaw, *Rosenne's Law and Practice of the International Court, 1920-2015* (5th ed., 2016), para. 277.

[12] See, e.g., the British practice described in Arthur D. Watts, "International Law and International Relations: United Kingdom Practice", 2 *European Journal of International Law* (1991), 157, 159, https://doi.org/10.1093/ejil/2.1.157.

very Head of State, Prime Minister, or the Ministry for Foreign Affairs,[13] especially when the litigation before the ICJ is considered to be highly political at the domestic level.[14] However, in recent years, there has been a substantial trend towards delegation of sovereign State representation before the ICJ and other international adjudicative bodies to private individuals formally not belonging to the State apparatus.[15] Notwithstanding the fact that, in principle, anyone could be appointed as an agent, on one occasion an ICJ judge criticised the appointment of a private lawyer as an agent in his individual opinion,[16] which was followed by similar remarks in another individual opinion appended to a decision

[13] The Prime Minister of Iran, Mohammad Mosaddegh, appeared, with no formal designation and alongside an agent, in the *Anglo-Iranian Oil Co. case (Jurisdiction), Judgment, I.C.J. Reports I952*, 93. President of Bolivia Evo Morales was listed as co-agent in the case *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Judgment, I.C.J. Reports 2018*, 507. The Minister for Foreign Affairs of Myanmar (de facto Head of Government) Aung San Suu Kyi is the agent in the case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order of 23 January 2020, www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf.

[14] On the practical considerations relevant for the appointment of agents, see Michael J. Matheson, "Practical Aspects of the Agent's Role in Cases before the International

of the International Tribunal for the Law of the Sea (ITLOS).[17] Similarly, in the different field of investment arbitrations, it has been argued that an agent from the executive branch could enhance credibility, reliability and legitimacy of the State's position.[18]

Before the ICJ, the only limitation to the choice of the agent is posed by rules on incompatibility such as Article 17(1) of the ICJ Statute, according to which "[n]o member of the Court may act as agent, counsel, or advocate in any case", and Article 17(2), which declares that "[n]o member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties".[19] Moreover, Practice Direction VII affirms that "parties should likewise refrain from designating as agent, counsel or advocate in a case

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Court", 1 *Law and Practice of International Courts and Tribunals* (2002), 467, https://doi.org/10.1163/156918502761939026.

[15] Jean-Pierre Cot, "Appearing 'for' or 'on Behalf of' a State: The Role of Private Counsel before International Tribunals", in N. Ando, E. McWhinney and R. Wolfrum (eds.), *Liber Amicorum Judge Shigeru Oda* (2002), 835, 840.

[16] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Provisional Measures, I.C.J. Reports 2000*, 111, Declaration of Judge Oda, 132-133. See, generally, Cot, *supra* note 15, at 835-847.

[17] *Grand Prince* case, Declaration of Judge Ad Hoc Cot, *supra* note 10, para. 14.

[18] Jeremy K. Sharpe, "The Agent's Indispensable Role in International Investment Arbitration", 33 *ICSID Review* (2018), 675, 680-684, https://doi.org/10.1093/icsidreview/siy017.

[19] This provision is integrated by Article 34 of the Rules of the Court. See Philippe Couvreur, "Article 17", in Zimmermann et al., *supra* note 7, 444, 449-451.

before the Court a person who sits as judge ad hoc in another case before the Court", while Practice Direction VIII states that parties should do the same in relation to "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." These rules aims at preserving the credibility of the Court rather than constraining the freedom of choice of States in the appointment of their agents, as demonstrated by their location in the section on the organisation of the Court.[20]

The very wording of Article 42(2) allows no doubt that the agent is an organ of the State tasked with its representation before the ICJ, in line with relevant arbitral practice.[21] The agent is usually equated to a diplomatic representative of the State in its relation to the Court or other adjudicative body.[22] If the agent is appointed within the Head of the State, the Head of the Government, or the Ministry of Foreign Affairs, then its power to represent the State is inherent in its role under international law, whereas, if another individual is appointed as agent,

[20] Rosenne, *supra* note 9; Arthur Watts, "New Practice Directions of the International Court of Justice", 1 *Law and Practice of International Courts and Tribunals* (2002), 247, https://doi.org/10.1163/157180302760505352.

[21] *French-Mexican Claims Commission (Georges Pinson (France) v. United Mexican States)*, V *RIAA* 327, 355.

[22] *Affaire des navires Cape Horn Pigeon, James Hamilton Lewis, C. H. White et Kate and Anna (Etats-Unis d'Amérique c. Russie)*, IX *RIAAA* 51, 60; Monaco, *supra* note 5, at 375.

then they must show credentials from one of the aforementioned organs,[23] which are usually attributed following domestic law.[24]

Before any international tribunal, the role of the agent is to act as the intermediary between the State and the tribunal on matters of procedures,[25] so that the agent "has exclusive control over the relations between the Government and the Court in respect of that particular case."[26] As a consequence of the role of the agent as representative of the State, their word binds the State before international tribunals such as the ICJ.[27] In this vein, the ICJ Statute and the Rules of the Court prescribe that certain procedural activities should be reserved to the agent. For instance, the application instituting proceedings before the

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[23] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, 3, 11, para. 13; *idem, Preliminary Objections, Judgment, I.C.J. Reports 1996*, 595, 622, para. 44. The rule is shaped on Article 5 of the 1969 Vienna Convention on the Law of Treaties.

[24] Monaco, *supra* note 5, at 377; Berman and Hernández, *supra* note 7, at 1204.

[25] *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment of 24 July 1964, I.C.J. Reports 1964*, 6, 23; *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf between Them*, XXVII *RIAAA*, 147, para. 291.

[26] Shaw, *supra* note 11, at para. 277.

[27] *Certain German Interests in Polish Upper Silesia (Merits)*, *PCIJ Reports*, Series A – No. 7, 13; *Arbitration between Barbados and the Republic of Trinidad and Tobago*, *supra*

ICJ[28] and the the original of every pleading[29] must be signed by them. In general, "all steps on behalf of the parties after proceedings have been instituted shall be taken by agents", who also receive all the communication pertaining to the case.[30]

Although a literal interpretation of Article 42 of the ICJ Statute would lead one to consider the appointment of an agent to be compulsory for all the parties to a dispute before the ICJ,[31] the context of this provision demonstrates that only the applicant has a legal duty to appoint an agent.[32] In particular, if a State decides not to participate in any way in the litigation there is no legal duty or practical need to appoint an agent.[33]

From the ensemble of rules pertaining to the agent before the ICJ, and in line with arbitral practice, it is evident that the agent plays an indispensable role regarding the relation between the State and the

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note 25, at para. 291; *CMS Gas Transmission Company v. Argentine Republic*, ICSID No. ARB/01/8, Decision of 1 September 2006, 15-16, para. 49; *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, 147, 158, para. 44.

[28] Article 38(3) of the Rules of the Court.

[29] *Ibid.*, Article 52(1).

[30] *Ibid.*, Article 40(1). Other procedural powers are mentioned *ibid.*, Article 31 (on discussing procedural matters with the President) and by Article 49 of the ICJ Statute (on the production of documents and explanations).

[31] Monaco, *supra* note 5, at 375.

[32] Shaw, *supra* note 11, at para. 277.

[33] *Ibid.*; Juan José Quintana, *Litigation at the International Court of Justice: Practice and Procedure* (2015), 417.

Court, acting as the voice of the State and undertaking all the sovereign functions that are linked to State participation in judicial proceedings.

2.2 Counsel and Advocates or, The Legal Assistance to the State

Article 42(2) of the ICJ Statute provides that States parties to a case before the ICJ "may have the assistance of counsel or advocates before the Court." The use of the word "may" shows that a State is free not to appoint any counsel or advocate to assist the agent.[34]

There is no rule defining the concepts of "counsel" and "advocate". Whereas Rosenne suggests that "counsel" refers only to individuals with legal qualifications, such as members of national Bars or law professors,[35] Valencia-Ospina takes the opposite stance, noting that "advocate" may be a synonym of "lawyer".[36] According to Remiro Brotóns, "advocate" should be applied only to individuals who plead before the Court, whereas "counsel" would encompass also those who advise the State in the written phase.[37] The International Law Association (ILA) adopts a broad and

[34] Monaco, *supra* note 5, at 375, 380.

[35] Rosenne, *supra* note 9, at 225, fn 5.

[36] Valencia-Ospina, *supra* note 7, at para. 10.

[37] Antonio Remiro Brotóns, "The International Legal Consultancy of Governments from the Outside", in C. Jimenez Piernas (ed.), *The Legal Practice in International Law and European Community Law: A Spanish Perspective* (2006), 489, 500; Esperenza Orihuela Calatayud, "Antonio Remiro Brotóns: asesor de gobiernos y abogado internacional", in

elastic definition of "counsel", which encompasses any person "representing, appearing on behalf of, or providing legal advice to a party in proceedings before an international court or tribunal, however such person may be described, and whether or not the person has professional legal training or is admitted as a member of a bar association or other professional body".[38] In the practice of the Court, States are free to use the expressions "counsel" and "advocate" interchangeably, with no legal difference from one or another designation.[39]

Although the agent, the only indispensable figure, may undertake activities habitually performed by the counsel, usually States prefer to seek the assistance of specialised international lawyers. In the absence of a formal ICJ Bar,[40] counsel are chosen among a quite restricted group of English and French speaking international law professors and barristers, who have gained practical knowledge of the functioning of the

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J. Díez-Hochleitner et al. (eds), *Principios y justicia en el Derecho Internacional: Libro homenaje al Profesor Antonio Remiro Brotóns* (2018), 19, 23-24.

[38] ILA, The Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals (2010), Principle 1.

[39] Monaco, *supra* note 5, at 380; Berman and Hernández, *supra* note 7, at 1209, fn 35; Andreas R. Ziegler and Kabre R. Jonathan, "The Legitimacy of Private Lawyers Representing States Before International Tribunals", in Freya Baetens (ed.), *Legitimacy of Unseen Actors in International Adjudication* (2019), 544, 547-548.

[40] See the position of the Registry in *Electricité de Beyrouth Company (France v. Lebanon)* case, *ICJ Pleadings* (1953), 531.

ICJ through working on numerous cases.[41] As in relation to the agents, the ICJ Statute does not require that counsel are lawyers,[42] even though this is often in the best interest of the appointing State. Indeed, States trusts some individuals who have appeared many times before the ICJ to know the "rules of the game", often trying to assemble a strong legal team that mixes generalist international lawyers with experts of the specific subject-matter of the dispute.[43] Frequently, the choice of university professors as counsel takes into account the views previously expressed by them in their academic role, since scholars may feel uncomfortable to present States' arguments in conflict with their previous writings, which could be easily used by the opposing party against their very authors.[44] Nationals of the opposing party are frequently included too, especially if the dispute requires a deep knowledge of the other

[41] Mohammed Bedjaoui, "The 'Manufacture' of Judgments at the International Court of Justice", 51 *International Court of Justice Yearbook* (1996–1997), 237. This group is labelled as a "mafia" by Alain Pellet, "The Role of the International Lawyer in International litigation", in C. Wickremasinghe (ed.), *The International Lawyer as Practitioner* (2000), 147. See, generally, James Crawford, "The International Law Bar: Essence Before Existence?", in J, d'Aspremont et al. (eds), *International Law as a Profession* (2017) 338.

[42] Humphrey Waldock, "The International Court of Justice as Seen from Bar and Bench", 54 *British Yearbook of International Law* (1983), 1, 3, https://doi.org/10.1093/bybil/54.1.1.

[43] Pellet and Barsac, *supra* note 4, at paras. 5-9.

[44] See, with some autobiographic references, Remiro Brotóns, *supra* note 37, at 518-519.

State's internal law.[45] Usually, the costs of these teams weighs significantly on the overall expenses related to the participation in international legal proceedings, with possible concerns of access to competent assistance by less wealthy States.[46]

More recently, there is a trend to include among the counsel some experts (for instance scientific or technical experts) or even witnesses, who present their scientific or technical views as well as their personal recollections while acting as counsel.[47] Deciding on the weight to accord to this expert evidence in a 2010 case, the ICJ stressed that it would have been more useful had they been presented as expert witnesses, rather than as counsel.[48] The Court clarified that "those persons who provide evidence before the Court based on their scientific or technical knowledge

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[45] *Ibid.*, 505.

[46] See Cesare P.R. Romano, "International Justice and Developing Countries (Continued): A Qualitative Analysis", 1 *Law and Practice of International Courts and Tribunals* (2002), 531, 553-557, https://doi.org/10.1163/156918502761939044; Alicia Miron, "Le coût de la justice internationale: enquête sur les aspects financiers du contentieux interétatique", 60 *Annuaire français de droit international* (2014), 241, 256-257.

[47] See, generally, Giorgio Gaja, "Assessing Expert Evidence in the ICJ", 15 *The Law & Practice of International Courts and Tribunals* (2016), 409, https://doi.org/10.1163/15718034-1234133; and the papers collected in L. Boisson de Chazournes et al. (eds.), "Special Issue: Experts in the International Adjudicative Process", 9 *Journal of International Dispute Settlement* (2018), 339.

[48] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, 14, para. 167.

and on their personal experience should testify before the Court as experts, witnesses or in some cases in both capacities, rather than counsel, so that they may be submitted to questioning by the other party as well as by the Court."[49] Maybe as a consequence of this position, States refrained from using experts as counsel in subsequent disputes.[50]

Although the aforementioned rules on incompatibility introduced by Practice Directions VII and VIII apply to counsel, their conduct is not governed by any ethical standard at the levels of the ICJ Statute and of the Rules of the Court.[51] To fill this lacuna, over the time, scholars have intensively plead for more regulations for the conduct of counsel before the ICJ and other inter-State adjudicative bodies.[52] This claim has received a partial answer in a series of non-binding codes of conduct that have been produced and that could contribute to the crystallization of

[49] *Ibid.*

[50] Lucas Carlos Lima, "The Evidential Weight of Experts before the ICJ: Reflections on the *Whaling in the Antarctic* Case", 6 *Journal of International Dispute Settlement* (2015), 621, 629, https://doi.org/10.1093/jnlids/idv022.

[51] Pellet, *supra* note 41, at 149; Kate Parlett and Amy Sander, "Into the Void: A Counsel Perspective on the Need to Articulate Rules Concerning Disclosure Before the ICJ", 113 *AJIL Unbound* (2019), 302, https://doi.org/10.1017/aju.2019.37.

[52] See, e.g., Detlev F. Vagts, "The International Legal Profession: A Need for More Governance?", 90 *American Journal of International Law* (1996), 250, https://doi.org/10.1017/S0002930000020509; Parlett and Sander, *supra* note 46, at 302.

customary international law rules.[53] The main content of these ethical standards may be summarised as follows: counsel must be loyal to the clients in a way that is consistent with the fair administration of justice and promotion of the rule of law by the relevant court; they shall perform their duties with independence and without regard to personal interests or external pressure, discharging their duties with integrity, diligence, efficiency, and confidentiality.[54] Furthermore, if a counsel is also a member of a national Bar, their professional conduct may be governed by domestic law, under the relevant national rules on professional ethics, if they apply to activities before international adjudicative institutions.[55] Moreover, the reputation of the counsel may play a significant role in ensuring respect for ethical standards as well, since a renowned counsel has an interest in preserving their reputation to attract more clients.[56]

Written pleadings are usually prepared by the agent and are subject to careful scrutiny by different governmental bodies.[57] As noted by Rosalyn Higgins, "legal argument advanced on behalf of a State requires prior agreement between a myriad of governmental departments before the

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[53] See, e.g., ILA, *supra* note 38. See, generally, Arman Sarvarian, *Professional Ethics at the International Bar* (2013).

[54] ILA, *supra* note 38, Principle 2. The content of these standards is detailed *ibid.*, Principles 3-7.

[55] *The M/V Louisa* case, Individual Opinion of Judge Cot, *supra* note 10, at para. 34; Parlett and Sander, *supra* note 51, at 304.

[56] Cot, *supra* note 15, at 836.

[57] See Pellet, *supra* note 41, at 154.

hapless counsel can begin to draft. And then his draft submissions will have to be crawled over by each and every one of the departments concerned and probably even be cleared by ministers".[58] Consequently, although counsel may contribute to the drafting of the written pleadings, the ICJ Statute mentions them mainly in relation to the oral phase,[59] where their role of "appearing on behalf of the parties becomes evident".[60] It is in this phase that counsel usually take the stage, after a brief allocution by the agent, to explore the legal dimensions of the dispute at hand and try to persuade the Court of the soundness of their client's arguments.

Accordingly, counsel are tasked with the legal assistance of the State, which does not encompass the entitlement to exercise procedural powers on behalf of the State. They do not play any formal role in relation to the procedure before the ICJ, which is strictly controlled by the agent.

2.3 The Different Functions of Agents versus Counsel

The distinction between the agent on the one hand and counsel on the other is apparently simple in the ICJ Statute: the agent *represents* the

[58] Rosalyn Higgins, "Respecting Sovereign States and Running a Tight Courtroom", 50 *International & Comparative Law Quarterly* (2001), 121, 127, https://doi.org/10.1093/iclq/50.1.121.

[59] See, e.g., Articles 43(5) and 54(1) of the ICJ Statute.

[60] Hugh Thirlway, *The International Court of Justice* (2016), 98.

State, the counsel *assists* the State.[61] The separation between the functions of representation and assistance before the Word Court has been confirmed during the first amendment of the Rules of the Permanent Court of International Justice, when the Registrar emphasised the clear distinction between the role of the agent, who was tasked with liaising between the Court and their government, "and the task of an advocate whose duty it was to expound his government's legal standpoint."[62] An early arbitral award has stressed this distinction of roles, by affirming that agents should be considered "not as mere lawyers, [...] but as the official representatives of the [State]. Otherwise, it will never be known whether the agent is expressing personal opinions, or the official point of view of his Government, and the proceedings would be hybrid and indefinable."[63] Accordingly, there is no doubt that the role of the agent is prominent in comparison to that of the counsel. However, this does not bar necessarily from considering the counsel's words as acts of the State.

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[61] On this difference, see Angela Del Vecchio, *Le parti nel processo internazionale* (1975), 119-120; Ziegler and Jonathan, *supra* note 39, at 549. The use of the expression 'legal representation' (e.g. by Quintana, *supra* note 33, at 223) is not aimed at conflating the roles of agents and counsel.

[62] *Ibid.*, at 224, fn 27 (quoting Permanent Court of International Kustice Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee* (1920), 119).

[63] *French-Mexican Claims Commission*, *supra* note 21, at 355 (author's translation).

The fact that only the agent can liaise with the Court does not mean that counsel "are involved in a personal capacity",[64] but simply that they lack the ability of binding the State in procedural matters before the ICJ. As aptly pointed out by Juan José Quintana, the ICJ Statute and customary international law never prevent the counsel from binding their State, but rather, only limit their capacity in relation to *procedural* matters.[65] The following section explains why counsel do not act in a personal capacity, but rather, why, under international law, their words should be considered as the words of the State they assist.

3 The Pleadings of Counsel as Acts of the Litigating State

Whereas counsel assisting the State in the written phase are not directly governed by the ICJ Statute, arguably, counsel who appear during the oral phase are organs of the litigating State even though they lack the power of representation.[66] At a closer scrutiny, international law, though a prism of different legal rules, considers to certain extent the words pronounced by counsel as originating from the State they assist in the courtroom.

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[64] Serena Forlati, *The International Court of Justice: An Arbitral Tribunal or a Judicial Body?* (2014), 53.

[65] Quintana, *supra* note 33, at 224.

[66] According to Monaco, in the written phase, only agents acts as State organs (Monaco, *supra* note 5, at 376).

The key conceptual node is the difference between attribution of State conduct and representation of the State, which crosses different areas of international law.[67] "Attribution" means the fact that a certain human conduct can be regarded as a conduct of a State.[68] This concept is relevant both for lawful and unlawful conduct of States,[69] even though it has been explored mainly in relation to the attribution of wrongful acts.[70] Accordingly, the use of the word "attribution" in the context of this study should not be considered as blurring the distinction between rules pertaining to lawful and unlawful conduct.[71] What is important here is the

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[67] E.g., in the law of treaties, only some specific organs of the State can express the consent to be bound (see Arts. 7-8 VCLT), even though the capacity to conclude a treaty pertains to the entire State (see Art. 6 VCLT). I have discussed this difference in relation to the response to an international wrongful act in Marco Longobardo, "State Immunity and Judicial Countermeasures", 31 *European Journal of International Law* (forthcoming), section 3, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3688059.

[68] James Crawford, *State Responsibility: The General Part* (2013), 113.

[69] Luigi Condorelli, "L'imputation à l'état d'un fait internationalment illicite: solutions classiques et nouvelles tendances", 189 *Recueil des Cours* (1984) 9, 38 and 40, http://dx.doi.org/10.1163/1875-8096_pplrdc_A9780792300571_01.

[70] See *ibid.*; Paolo Palchetti, *L'organo di fatto dello Stato nell'illecito internazionale* (2007); Gaetano Arangio-Ruiz, *State Responsibility Revisited: The Factual Nature of the Attribution of Conduct to the State* (2017).

[71] ILC, Draft Conclusions on Subsequent Agreements and Subsequent Practice, UN Doc. A/73/10 (2018) 37, para. 2. See, also, Third Report on State Responsibility of the Special Rapporteur, Mr. Roberto Ago, UN Doc. A/CN.4/246 and Add.1-3 (1971), para. 109.

fact that, although only the agent *represents* the State before the ICJ, also the statements of counsel are attributable to the State with some consequences that are relevant for international law.

The fact that the words of counsel are attributed to the State is demonstrated by a number of factors. For instance, the ICJ does not make any distinctions between the pleadings of the agents and the pleadings of the counsel when it reconstructs the position of the parties to a dispute.[72] The ICJ regularly relies on pleadings of counsel both in relation to assertion of facts that are relevant for a specific dispute,[73] and

[72] See, among many other examples, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, 168, para. 97; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, 43, paras. 139, 158, 215; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, 99, para. 105; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v.* Senegal), Judgment, I.C.J. Reports 2012, 422, paras. 65-66; *Jadhav (India v. Pakistan), Judgment, I.C.J. Reports 2019*, 418, paras. 102, 145.

[73] See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 72, at paras. 139, 158, 215; *Certain Activities Carried*

in relation to assertions of law.[74] Accordingly, there is no doubt that the Court takes their words as the official position of the litigating States, rather than as private opinions. For this reason, usually counsel do not reply directly to the questions posed by the bench, but rather, they prefer to discuss the content with the agent, usually providing written replies subsequently.[75]

Moreover, the ILC has recognised that pleadings before the ICJ are sources of relevant State practice and *opinio juris* in relation to the formation of international customary law, without making any distinction between the words expressed by agents and by counsel.[76] This position reflects the ILA's view as expressed in relation to the formation of

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Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015, 665, para. 158; *Jadhav*, *supra* note 72, at para. 145.

[74] See, e.g., *Jurisdictional Immunities of the State*, *supra* note 72, at para. 105; *Questions relating to the Obligation to Prosecute or Extradite*, *supra* note 72, at paras. 65-66; *Jadhav*, *supra* note 72, at para. 102.

[75] See Arthur Watts, "Enhancing the Effectiveness of International Dispute Settlement", 5 *Max Planck Yearbook of United Nations Law* (2001), 21, 26; Cecily Rose, "Questioning the Silence of the Bench: Reflections on Oral Proceedings at the International Court of Justice", 18 *Journal of Transnational Law & Policy* (2008), 47, 56.

[76] ILC, *supra* note 71, commentary to Conclusion 6, para. 5 and commentary to Conclusion 10, para. 4; Second Report on Identification of Customary International Law

customary international law.[77] Counsel acknowledged that the content of their pleadings constitutes State practice or manifestations of *opinio juris*, even though they have emphasised that the relevant statements are directed to win the litigation rather than to express the formal view of the State on a point of law: for example, Crawford does not think that "there is any doubt that [a counsel's pleading] constitutes state practice. But it is state practice *sub modo*, because it is not free of the environment in which it occurs", whereas Pellet observes that it "is very interesting to use the pleadings before the ICJ or elsewhere to establish *opinio iuris*".[78] The view that pleadings, with no distinctions between statements of the agents versus statements of counsel, are a source of relevant State practice and/or *opinio juris* is shared also by the International Committee

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by Michael Wood, Special Rapporteur, UN Doc. A/CN.4/672 (2014), paras. 41(b) and 75.

[77] ILA, *Report on Formation of Customary International Law* (2000), 14.

[78] Crawford, Pellet and Redgwell, *supra* note 3, at 10.

of the Red Cross[79] and by most scholars.[80] Even those who suggest a more cautious approach in considering pleadings as elements of international customary law do not base their position on the fact that counsel's pleadings are not attributable to the State.[81] Overall, the assumption that the content of these pleadings is State practice that may be relevant for the formation of customary international law appears sound and, to the best knowledge of this author, there is no serious claim that pleadings of counsel should be seen as "teachings of the most highly qualified publicists" under Article 38(1)(d) of the ICJ Statute.[82]

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[79] See Jean Marie-Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law, Volume I, Rules* (2005), 851. Note that the reference is to an advisory proceeding, where the spokespersons for the relevant States are not identified either as agents or counsel.

[80] See Michael Akehurst, "Custom as a Source of International Law", 47 *British Yearbook of International Law* (1976), 1, 2, https://doi.org/10.1093/bybil/47.1.1; Maurice H. Mendelson, "The Formation of Customary International Law", 272 *Recueil des Cours* (1998), 155, 204, http://dx.doi.org/10.1163/1875-8096_pplrdc_A9789041112378_02; Watts, *supra* note 75, at 26 and 29; Mark E. Villiger in ILA, *supra* note 77, at 19, fn 42; Rose, *supra* note 75, at 56; Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (2013), 16; Patrick Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (2016), 214, 221-224; Sharpe, *supra* note 18, at 677-678, 695; Shaw, *supra* note 11, at para. 281.

[81] See, e.g., Ugo Villani, "La rilevazione della consuetudine internazionale: una lezione ancora attuale", in G. Nesi and P. Gargiulo (eds.), *Luigi Ferrari Bravo: il diritto*

Similarly, the pleadings of counsel may be considered as relevant "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" under Article 31(3)(b) of the VCLT, or broader subsequent practice relevant as a supplementary means of interpretation under Article 32 of the VCLT.[83] This does not mean that only the practice mentioned by the pleadings should be taken into account, but rather, also the pleadings themselves are manifestations of the oral practice of the litigating State. As noted by the ILC, subsequent State practice "may either consist of a direct application of the respective treaty or be *a statement regarding the interpretation* or application of the treaty".[84] The latter includes

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internazionale come professione (2015), 67, 72; Tarcisio Gazzini, *Interpretation of International Investment Treaties* (2016), 193-195; Stephan W. Schill, "MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J. Benton Heath", 111 *American Journal of International Law* (2017), 914, 927, https://doi.org/10.1017/ajil.2017.94; Tullio Treves, "The Expansion of International Law", 398 *Recueil des Cours* (2019), 162, http://dx.doi.org/10.1163/1875-8096_pplrdc_A9789004412248_01.

[82] See, e.g., Sandesh Sivakumaran, "The Influence of Teachings of Publicists on the Development of International Law", 66 *International & Comparative Law Quarterly* (2017), 1, 19 and 28, https://doi.org/10.1017/S0020589316000531 (who refers to teachings that are cited by counsel, rather than to counsel's pleadings as teachings themselves).

statements rendered before the ICJ, either by the agents or by counsel. Indeed, it is quite common that counsel advance particular interpretations of relevant treaties in their pleadings, which are duly considered by the ICJ as the State's official view on that interpretive issue: for instance, the Court quoted a counsel for Serbia in relation on whether the Genocide Convention envisages or not that a State can commit genocide,[85] while the words of a counsel for Uganda were quoted in relation to the interpretation of the 1999 Lusaka Agreement.[86] Moreover, in the *Oil Platform* case, the ICJ defined the scope of Article X(1) of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the US and Iran taking into specific account the fact that a counsel for Iran had expressed a view on the interpretation of that treaty in the oral pleadings that was consistent with the US one.[87]

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[83] On these two different roles of subsequent practice in treaty interpretation, see ILC, *supra* note 71, at paras. 16-35).

[84] First Report on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties of the Special Rapporteur, Mr. Georg Nolte, UN Doc. A/CN.4/660 (2013), para. 110 (emphasis added). See, also, ILC, *supra* note 71, Conclusion 5. For more on this, see Irina Buga, *Modification of Treaties by Subsequent Practice* (2018), 24-27.

[85] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 72, at para. 158

[86] *Armed Activities on the Territory of the Congo*, *supra* note 72, at para. 97.

[87] *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I. C. J. Reports 2003*, 161, para. 115: "Article X, paragraph 1, envisages both freedoms,

As demonstrated by the significant practice of investor-State arbitral tribunals, the main problem of considering counsel's pleadings under Article 31(3)(b) of the VCLT rests on the fact that sometimes *they do not establish an agreement* of the parties regarding one treaty's interpretation, since they are rendered in adversarial contexts in order to win a specific case.[88] Yet, there is no opposition against the idea that, in principle, counsel's pleadings are acts of the litigating State that may be relevant to demonstrate the existence of a subsequent practice establishing an agreement on the treaty interpretation.[89] Indeed, States have increasingly accepted this view,[90] which should be considered to be correct.

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freedom of commerce and freedom of navigation, as argued by the United States and *accepted by Iran during the oral hearings*" (emphasis added).

[88] See, e.g., *Gas Natural SDG SA v. Argentine Republic*, ICSID No. ARB/03/10, Decision of 17 June 2005, 47, fn 12. See also the cases analysed by Anthea Roberts, "Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States", 104 *American Journal of International Law* (2010), 179, 217-224, https://doi.org/10.5305/amerjintelaw.104.2.0179; Kendra Magraw, "Investor-State Disputes and the Rise of Recourse to State Party Pleadings as Subsequent Agreements or Subsequent Practice under the Vienna Convention on the Law of Treaties", 30 *ICSID Review* (2015), 142, https://doi.org/10.1093/icsidreview/siu036.

[89] Roberts, *supra* note 88, at 217-218; Dumberry, *supra* note 80, at 220-227.

[90] See Lisa Bohmer, "USA and Mexico Submit that NAFTA Parties Reached a Binding Subsequent Agreement on Interpretation of the Treaty's National Treatment Provision", *IAReporter* (24 June 2020), www.iareporter.com/articles/usa-and-mexico-submit-that-nafta-parties-reached-a-binding-subsequent-agreement-on-interpretation-of-the-

The same conclusion may be reached by applying the law on State responsibility to counsel's conduct, even if this is done here just for theoretical completeness rather than in response to actual instances in international practice. Should a counsel violate a rule of international law during their activity before the Court, that conduct very likely would be considered a wrongful act of the State. The identification of the relevant rule of attribution needs some clarification. Usually, counsel are not organs of the State according to its domestic law and, as a result, they are outside the scope of Article 4(2) of the DARS. However, it is possible to consider counsel as individuals acting under "the instructions of, or under the direction or control of, that State" pursuant to Article 8 of the DARS. As affirmed by Crawford, "what [a counsel] say[s] 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",[91] whereas Rosenne points out that "speeches by counsel, of whatever nationality, are normally made in Court on the authority of the agent."[92] Similarly, Brownlie recalls that "all material presented to the tribunal must have the authorization of the government-appointed head of the team, the head

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treatys-national-treatment-provision/. See, for more references, Martins Paparinskis, "MFN Clauses and Substantive Treatment: A Law of Treaties Perspective of the 'Conventional Wisdom'", 112 *AJIL Unbound* (2018), 49, 51-52, https://doi.org/10.1017/aju.2018.28

[91] Crawford in Crawford, Pellet and Redgwell, *supra* note 3, at 10. See, also, Dumberry, *supra* note 80, at 221.

[92] Shaw, *supra* note 11, at para. 281.

of the delegation, usually designated as 'the agent'".[93] Accordingly, Monaco's view that the entire activity of counsel "se fais sous le contrôle des agents"[94] appears correct and in line with the requirements of Article 8. However, so far no responsibility of States has been invoked in relation to counsel's conduct before the Court.

Finally, the ICJ Statute embodies further evidence of the fact that counsel's actions are acts of the State by conferring functional immunity on counsel in their dealings with the ICJ. Under Article 42(3), "[t]he agents, counsel, and advocates of parties before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties." Although this rule resonates those on diplomatic immunity, at a closer glance it pertains to functional immunity of counsel in their relationship with the ICJ.[95] For the purposes of this article, it should be noted that, traditionally, international law grants functional immunity to protect individuals who act on behalf of the State.[96] Accordingly, even the rules on immunity of counsel point towards the conclusion that, when involved in the oral pleadings, they act on behalf of the appointing State.

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[93] Brownlie, *supra* note 1, at 3.

[94] Monaco, *supra* note 5, at 380. See, also, Del Vecchio, *supra* note 61, at 120.

[95] Valencia-Ospina, *supra* note 7, at paras. 20-21; Robert Kolb, *The International Court of Justice* (2013), 1193.

[96] See the award in the case *The Enrica Lexie Incident (Italy v. India)*, 21 May 2020, paras. 843-846, https://pcacases.com/web/sendAttach/16500. See, also, Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (2008), 103-157.

4 Counsel and the Legitimacy of the International Judicial Function

The fact that counsel appear on behalf of one State and that their statements are considered as emanated by that State should be taken into account when assessing counsel's role in relation to the international judicial function. Indeed, most counsel consider that putting forward the best argument for the State that has appointed them furthers the goals of international justice, especially in relation to States that are perceived as less powerful in the international arena and that are involved in politically sensitive cases.

The most notable case is that of Brownlie who appeared as a counsel in a number of sensitive cases before the ICJ, defending States represented by regimes that are sometimes perceived as pariahs, such as Libya,[97] suspect genocidaire such as Serbia,[98] and alleged perpetrators of massive violations of international humanitarian law such as Uganda.[99] Brownlie, who never assisted the UK but, rather, often

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[97] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. UK; Libyan Arab Jamahiriya v. USA), Preliminary Objections, I.C.J. Reports 1998*, 9 and 115.

[98] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 72.

[99] *Armed Activities on the Territory of the Congo*, *supra* note 72.

advocated cases against his own State,[100] took pride in defending unpopular clients. In a number of occasions, he declared that he was guided by the "cab-rank" principle, a rule of the British Bar according to which a lawyer must accept every case falling into their field of expertise if approached by a potential client,[101] even though this rule does not bind barristers appearing before the ICJ.[102] Brownlie believed that the availability of legal counsel to every State strengthened the international rule of law, even in cases of politically sensitive disputes.[103]

Brownlie's position received widespread praises over the years[104] and, other counsel involved in politically sensitive cases have echoed it. For instance, already in 1949, Pierre Cot, answering some newspapers

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[100] In addition to the aforementioned case on behalf of Libya, see *Legality of Use of Force (Serbia and Montenegro v. UK), Preliminary Objections, Judgment, I.C.J. Reports 2004*, 1307.

[101] Brownlie, *supra* note 1, at 3; Ian Brownlie, "International Law at the Fiftieth Anniversary of the United Nations: General Course on Public International Law", 255 *Recueil des Cours* (1996), 9, 22, http://dx.doi.org/10.1163/1875-8096_pplrdc_A9789041103185_01.

[102] Philippe Sands and Arman Sarvarian, "The Contribution of the UK Bar to International Law", in R. McCorquodale and J.-P. Gauci (eds.), *British Influences on International Law, 1915-2015* (2016), 497, 516.

[103] Brownlie, *supra* note 101, at 22.

[104] See, e.g., Philippe Sands, "Sir Ian Brownlie Obituary", *The Guardian* (11 January 2010); Hisashi Owada, "Sir Ian Brownlie, KT, CBE, QC (1932–2010): The Professor as

criticism against his assistance to the pro-Soviet Albania,[105] affirmed that "tant que la France existera, on y trouvera des juristes pour présenter devant les tribunaux internationaux la cause des petits quand ils sont accusés à tort au même à raison par des grands".[106] Likewise, the former legal adviser to the US State Department Abram Chayes, in response to criticism on his role as counsel of Nicaragua against the US – which led to the removal of his portrait from the wall of legal counsel in the State Department![107] –, declared that he wanted "[t]o hold America to its own best standards", mentioning respect for the rule of law and commitment to the peaceful settlement of internal disputes.[108] Similarly, William Schabas, in response to some criticisms on his assistance to Myanmar in

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Counsel", 81 *British Yearbook of International Law* (2011), 1, 6, https://doi.org/10.1093/bybil/brr004; Vaughan Lowe, "Sir Ian Brownlie, KT, CBE, QC (1932–2010)", *ibid.*, 9, 11-12, https://doi.org/10.1093/bybil/brr005; Sands and Sarvarian, *supra* note 102, at 517.

[105] Jean-Pierre Cot, "The Bar", in K. Bannelier, T. Christakis and S. Heathcote (eds)., *The ICJ and the Evolution of International Law: The Enduring Impact of the* Corfu Channel *Case* (2012), 21, 24.

[106] *Corfu Channel (UK v. Albania)* case, Verbatim record 1949/2, 662.

[107] Alain Pellet, "The *Nicaragua* Case: 'Mafiosi's' and 'Veteran's' Approaches Combined", 25 *Leiden Journal of International Law* (2012), 481, 481-482, https://doi.org/10.1017/S0922156512000155.

[108] Paul S. Reichler, "Holding America to Its Own Best Standards: Abe Chayes and Nicaragua in the World Court", 42 *Harvard International Law Journal* (2001), 15, 15.

the 2019 genocide case,[109] noted that both sides of any dispute before the ICJ have a right to employ competent legal assistance.[110]

In this author's opinion, the invocation of such a "right" is intrinsically linked to Brownlie's idea of competent legal assistance by counsel as a factor strengthening international rule of law.[111] Absent the availability of external competent legal counsel, litigating States without strong governmental expertise in the field of public international law would be disadvantaged when involved in unpopular cases, and might decide not to participate in the proceedings or would avoid consenting to the ICJ jurisdiction *tout court*.

Moreover, it should be born in mind that counsel before the ICJ play a wider role in addition to just advancing the interests of their clients. Through their arguments, counsel feed legal inputs into the Bench, contributing to the ascertainment and development of international law by the Court.[112] To this end, it is necessary to recall that the ICJ has a

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[109] See Anthony Deutsch, "Myanmar's Lawyer to Critics on Genocide Case: Everyone Has Right to Defense", *Reuters* (13 December 2019), https://www.reuters.com/article/us-myanmar-rohingya-profile-schabas/myanmars-lawyer-to-critics-on-genocide-case-everyone-has-right-to-defense-idUSKBN1YH02J.

[110] *Ibid.*

[111] Andrew Nachemson, "The Truth About Myanmar's Genocide Case Defense Lawyer", *The Diplomat* (10 March 2020), https://thediplomat.com/2020/03/the-truth-about-myanmars-genocide-case-defense-lawyer/.

[112] Sivakumaran, *supra* note 82, at 28; Gregory Messenger, "The Practice of Litigation at the ICJ: The Role of Counsel in the Development of International Law", in Moshe

public function broader than the settlement of the specific dispute at hand, in relation to the proper administration of international justice and the clarification and the progressive development of international law.[113] Accordingly, States should be entitled to the best available legal assistance as a means to allow the ICJ to perform its functions in the best possible way, enhancing the perception of legitimacy of the entire international judicial function especially when politically sensitive matters are at stake.

Since counsel act on behalf of the State, it is possible that they are called to present arguments that they would not support as individuals or scholars. As admitted by Crawford, "[t]here comes a point where you simply have to do your best and then comply with instructions. And instructions may turn out to be right or wrong".[114] For this reason, in the passage quoted at the beginning of this article, Brownlie was crystal-clear in affirming that the counsel "are working exclusively as representatives of the State concerned and not as unauthorized experts or *amici curiae*",[115] implicitly recognising that the same individuals might hold different views if heard in their personal capacity. From this perspective and in light of the aforementioned control of the agents on the text of

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Hirsch and Andrew Lang (eds.), *Research Handbook on the Sociology of International Law* (2018), 208.

[113] Ziegler and Jonathan, *supra* note 39, at 563, fn 101.

[114] Crawford in Crawford, Pellet and Redgwell, *supra* note 3, at 21. See, also, Remiro Brotóns, *supra* note 37, at 508.

[115] Brownlie, *supra* note 1, at 3.

counsel's oral pleadings, affirming that counsel have "liberté dénoncer toute sorte d'opinions personnelles, quand bien même ces opinions seraient en contradiction avec l'opinion de leur Gouvernement"[116] refers to statements rendered *outside* the Courtroom, where the practitioner who acted as a counsel may hold a view that is different from that of the assisted State.

As a result, in principle, the content of pleadings of counsel should primarily been regarded as reflecting the position of the State rather than that of a specific counsel as a scholar, who might or might not agree with the State on all the legal points advanced. As noted by Remiro Brotóns, "[a] professor's only obligation is to search for the truth; the advocate has to look for ways to satisfy his client using the laws that suit him best, his task consists in solving difficulties, not in making the solutions difficult."[117] Conflating the personal view of the counsel and the adversarial position of a litigating State would be a dangerous simplification that could discourage qualified practitioners from playing an important role in the service of the proper functioning of international justice.

For this reason, the position of the counsel in the oral pleadings is different from that of legal advisers of the State in the extrajudicial conduct of international relations. While the latter has a duty to highlight with diligence the negative aspects of a certain course of action so that

[116] *French-Mexican Claims Commission*, *supra* note 21, at 355.

[117] Remiro Brotóns, *supra* note 37, at 518.

the State can take the best decision,[118] the former must present the official position of the State to the Court *after having negotiated it* with the agent outside the Courtroom.[119] When involved in ICJ proceedings, usually legal advisers are members of the agent's team rather than counsel,[120] and, notwithstanding the aforementioned diligence professional obligations, when they act as counsel before the ICJ, they are perceived as mainly defending the interests of the State they represent rather than exercising truly advisory functions.[121]

Clearly, there are limits to the fact that counsel are expected to follow instructions in light of their ethical duties towards the Court, which prevails over their clients' interests.[122] For instance, the fact that,

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[118] The exploration of the duties of legal advisers in international law is beyond the purview of this article. On this topic, see, generally, Antonio Cassese, "The Role of Legal Advisors in Ensuring that Foreign Policy Conforms to International Legal Standards", 14 *Michigan Journal of International Law* (1992-1993), 139; Richard B. Bilder and Detlev F. Vagts, "Speaking Law to Power: Lawyers and Torture", 98 *American Journal of International Law* (2004), 689, https://doi.org/10.2307/3216693; Harold H. Koh, "The Legal Adviser's Duty to Explain", 41 *Yale Journal of International Law* (2016), 189; A. Zidar and J.-P. Gauci (eds.), *The Role of Legal Advisers in International Law* (2016).

[119] On this difference, see Luigi Ferrari Bravo, "Méthodes de recherché de la coutume internationale dans la pratique des Etats", 192 *Recueil des Cours* (1985), 233, 270-271, http://dx.doi.org/10.1163/1875-8096_pplrdc_A9789024733736_02. Consequently, this author would be cautious in endorsing the equation between legal advisers and counsel suggested by Harry Aitken, "The Duties of a Government International Legal Adviser", *EJIL:Talk!* (2 June 2020), www.ejiltalk.org/the-duties-of-a-government-international-legal-adviser/.

according to some reconstructions, an eminent British counsel knowingly presented misleading information to the ICJ in the *Corfu Channel* case is regrettable.[123] Counsel are not mouthpiece of the States they assist, but rather, their conduct should always be linked to the proper functioning of international justice.[124] Here, the second quote by Brownlie, already partially mentioned at the beginning of this article, should be borne in mind: the counsel "retains a significant degree of independence and aloofness. If the barrister simply identifies with the client in all respects, his value will diminish."[125] Especially in defending States that are alleged to have committed gross violations of international law, counsel should act upon a sense of duty rather than sympathy.[126]

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[120] Jessica Gladstone, "The Legal Adviser and International Disputes: Preparing to Commence or Defend Litigation or Arbitration", in Zidar and Gauci (eds.), *supra* note 118, 34, at 38-39.

[121] Andraž Zidar, "Legal Advisers and Professional Ethics", *ibid.*, 313, at 320.

[122] "Fair administration of justice" is the first principle guiding counsel under the ILA rules, *supra* note 38, Principle 2.

[123] The reference is to the British legal team's decision to label as covered by naval secrecy documents which would have been detrimental to the British position in the *Corfu Channel* case when, apparently, there was no ground for naval secrecy. For different views, see A. Carty, "The *Corfu Channel* Case – and the Missing Admiralty Orders", 3 *The Law and Practice of International Courts and Tribunals* (2004), 1, https://doi.org/10.1163/157180301773732618; Cot, *supra* note 93, at 32-33; Sarvarian, *supra* note 53, at 103-104.

[124] Crawford, *supra* note 1, at 330.

[125] Brownlie, *supra* note 1, at 3. See, also, Remiro Brotóns, *supra* note 37, at 520.

In extreme cases, if constrained between their ethical principles and the instructions received from their States, counsel might decide to refuse to work for the State or to resign.[127] Such a last resort measure would hardly become of public knowledge. One could wonder whether the resignation of Maurice Mendelson before Qatar submitted forged documents in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case is relevant for the present article.[128] Likewise, in 2019, when Kenya asked the Court to delay the hearings in the *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* case to recruit a new legal team,[129] one commentator asked whether this was due to a resignation of the legal team following discussions in Kenya to settle the dispute militarily.[130]

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[126] James Crawford, "Ian Brownlie 1932-2010", (2012), 17, papers.ssrn.com/sol3/papers.cfm?abstract_id=2202713.

[127] Remiro Brotóns, *supra* note 37, at 506.

[128] On the episode, see Maurice Mendelson, "The Curious Case of *Qatar v. Bahrain* in the International Court of Justice, 72 *British Yearbook of International Law* (2001), 183 (with attention to fn ** and 70), https://doi.org/10.1093/bybil/72.1.183. Today, Principle 6.1 of ILA, *supra* note 38, affirms that counsel "shall refrain from presenting or otherwise relying upon evidence that he or she knows or has reason to believe to be false or misleading."

[129] Aggrey Mutambo, "ICJ Postpones Kenya-Somalia Case to November to Allow Nairobi Seek New Legal Team", *The East African* (6 September 2019).

[130] Bruno Gelinas-Faucher, Tweets dated 8 September 2009, https://twitter.com/bruno_faucher/status/1170732132173565952). No evidence that substantiates this has been found by this author.

In any case, the role of counsel in politically sensitive proceedings is delicate. It is a continuous process of negotiation, with counsel constrained between the fact that the pleadings should reflect the State's view rather than their personal opinions, and their professional ethical standards. Such a negotiation should not ignore the fact that the availability of competent legal assistance enhances the credibility and legitimacy of the ICJ judicial function, especially in relation to politically sensitive disputes involving represented by regimes that are sometimes perceived as pariahs.

5 Conclusions

This article has demonstrated that counsel do not act before the ICJ in their private capacity, but rather, the content of their pleadings is considered under international law as an act of the litigating State. This means that counsel, despite lacking the representative powers bestowed upon the agent in relation to the Curt's proceedings, can produce statements with legal value in relation to the position of the State they assist. For this reason, States keep a strict control on the content of the pleadings read by counsel. This situation deserves attention in relation to politically sensitive litigations, when there is a significant risk that a counsel could be identified with the argument presented on behalf of the litigating State. The content of the pleadings is both an act of the litigating State and a responsibility of the counsel who presents them and who

must follow applicable ethical professional standards. It should be borne in mind that, especially when proceedings involve States represented by regimes that are sometimes perceived as pariahs, the availability of professional and competent counsel is in the interest of all stakeholders, since it enhances international rule of law and the legitimacy of international dispute settlement before the ICJ.