

Common Ethical Standards for Counsel before the European Court of Justice and European Court of Human Rights

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Abstract

There is no 'international bar' that regulates the practice of forensic advocacy before international courts and tribunals. The lack of common ethical standards for representatives before international courts and tribunals has been becoming increasingly topical, particularly in the field of investment arbitration. Initiatives by such professional organizations as the International Law Association and the International Bar Association to identify universal ethical principles suggest that there is a body of opinion amongst practitioners who believe that common ethical standards are necessary. However, the topic remains virgin territory in relation to the European Court of Justice and the European Court of Human Rights. This article examines the historical evolution of the representation before the Courts and the procedural and ethical problems concerning representatives that have arisen in practice. It concludes that, far from being a topic of only theoretical interest, there have been considerable problems in practice arising from questionable professional conduct by representatives and conflicting national standards. It suggests that the absence of a prescribed code of conduct setting out the Courts' precise standard for representatives is a threat to the Courts' procedural integrity and legitimacy. It proposes that the Council of Bars and Law Societies of Europe take the lead in drafting a code of conduct for the European Courts, in consultation with their judiciaries, which could subsequently be adopted by the Courts and integrated into national codes of conduct.

There has been increasing interest in recent years in the field of professional ethics for counsel appearing before international courts and tribunals.¹ With the qualified exception

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¹ See, e.g., Vagts, 'The International Legal Profession: A Need for More Governance?', 90 *AJIL* (1996) 250; Pellet, 'The Role of the International Lawyer in International Litigation', in C. Wickremasinghe (ed.), *The*

of the criminal tribunals,² international courts and tribunals ('international courts') do not have prescribed codes of conduct binding upon agents and counsel. Activity amongst professional organizations to identify and formulate ethical principles common to divergent national jurisdictions, notably the 'Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals' drafted by the International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals, has grown.³ The ILA Hague Principles represent the first attempt to articulate common ethical standards for counsel for all international courts.

Ethical standards for representatives⁴ before the European Court of Justice (CJEU) at Luxembourg and the European Court of Human Rights (ECtHR) at Strasbourg ('the European Courts') have never been comprehensively examined. Through analysis of the procedural rules and jurisprudence of these Courts through the framework of the Hague Principles, this article argues that common ethical standards for counsel are crucial to protect the procedural integrity and legitimacy of the European Courts. It suggests that the prescription of codes of conduct by a professional organization with links to national bars (e.g., the CCBE⁵) with appropriate judicial consultation would be the ideal drafting process to ensure a careful, well-informed, and deliberate outcome. Far from being an unwelcome intrusion into practitioners' and judges' work, such a code could be of great use to them as a means of harmonizing divergent national standards and equipping the Courts to address ethical issues within a clear framework.

While the CJEU and ECtHR have different histories, jurisdictions, and procedures, they are examined comparatively for two reasons: (1) they share many

International Lawyer as Practitioner (2000), at 147; Jennings, 'The Work of the International Bar', in L.C. Vohrah *et al.* (eds), *Man's Inhumanity to Man* (2003), at 443; Cot, 'Appearing "for" or "on behalf of" a State: The Role of Private Counsel Before International Tribunals', in N. Ando *et al.* (eds), *Liber Amicorum Judge Shigeru Oda* (2002), at n835; Rogers, 'The Ethics of Advocacy in International Arbitration', in D. Bishop and E.G. Kehoe (eds), *The Art of Advocacy in International Arbitration* (2010), 49.

² Defence counsel are ethically regulated by the courts, whereas prosecutors are self-regulating. See ICTY/ICTR Prosecutor's Regulation No. 2 (1999) and the ICC Regulations of the Office of the Prosecutor. Cf. Art. 2, SCSL Code of Conduct 2006; 'Scope', STL Code of Conduct 2011.

³ 10 *LPICT* (2011) 6.

⁴ 'Counsel' is used here to encompass both 'agents' and 'lawyers' discharging the functions of advocacy: Principle 1.1, Hague Principles.

⁵ The Council of Bars and Law Societies of Europe, at: www.ccbe.eu/index.php?id=12&L=0 (accessed 22 Feb. 2012).

common constituents, as all EU members must also be party to the European Convention on Human Rights 1950 (ECHR); and (2) the Treaty of Lisbon envisages the eventual accession of the EU to the ECHR,⁶ thus creating a direct relationship between them. This article first sets out the historical development of advocacy before the European Courts. Secondly, it sets out the admission requirements for counsel. Thirdly, it analyses certain problems that have arisen in the Courts' practice concerning the professional conduct of counsel with illustrative reference to the Hague Principles. Fourthly, it examines the disciplinary powers of the Courts towards counsel. Finally, it proposes that the CCBE draft codes of conduct to professionalize advocacy before the European Courts.

1 Historical Background⁷

The CJEU was created in 1952 as the judicial body of the European Coal and Steel Community (ECSC) by a Protocol on the Code of the Court of Justice (ECSC Protocol) annexed to the Treaty of Paris 1951 (ECSC Treaty).⁸ In 1958, the 'Protocol on the Statute of the Court of Justice'⁹ (ECJ Statute) was annexed to the Treaty of Rome 1957. The first Rules of Procedure (ECSC Rules), enacted on 4 March 1953,¹⁰ were 'inspired by' the ICJ Rules and national codes.¹¹ The *travaux préparatoires* to the Statute and Rules remain unpublished.¹²

The scholarship in French and English does not generally discuss the professional ethics of advocacy.¹³ However, Brown and Kennedy write:

⁶ Art. 218, Treaty on Functioning of the European Union ('TFEU'), Consolidated Version, OJ (2010) C83/47. See also the work of the Council of Europe, 'Informal Group on Accession of the European Union to the Convention', including a draft accession agreement of 19 July 2011, available at: www.coe.int/t/dghl/standardsetting/hrpolicy/CDDH-UE/CDDH-UE_documents_en.asp (accessed 13 May 2015).

⁷ R. Mackenzie *et al.* (eds), *The Manual on International Courts and Tribunals* (2010), at 278–333.

⁸ ECSC Treaty, Arts 7, 31.

⁹ The current version is at OJ (2008) C115/226.

¹⁰ L. Delvaux, *La Cour de Justice de la Communauté Européenne du Charbon et de l'Acier* (1956), at 251.

¹¹ *Ibid.*, at 45–46. See also Riese, 'Die Verfahrensordnung des Gerichtshofes der Europäischen Gemeinschaft für Kohle und Stahl', 6 *Neue Juristische Wochenschrift* (1953) 52, at 521.

¹² See R. Schulz and T. Hoeren (eds), *Dokumente zum Europäischen Recht Bandz Justiz (bis 1957)* (2000).

¹³ J. de Richemont, *Communauté européenne du charbon et de l'acier: La cour de justice, code annoté guide pratique*, (1954), at 101-106-3; D.G. Valentine, *The Court of Justice of the European Communities* (1965), i, at 47–50; A.G. Toth, *Legal Protection of Individuals in the European Communities* (ii, Remedies and Procedures)(1978), at 11–12; J.A. Usher, *European Court Practice* (1983), at 113–117, 220–223; C. Philip, *La Cour de Justice des Communautés Européennes* (1983), at 12; P. Lasok, *European Court of Justice: Practice and Procedure* (1984), at 66–88; Darmon, 'L'avocat devant la Cour de Justice des Communautés Européennes', in M. Schaffer (ed.), *L'avocat et l'Europe des 12 et des 21* (1988), at 177;

Rules governing lawyers' professional ethics...vary widely between Member States. Moreover, apart from the notes for the guidance of counsel for the parties at the hearing, which are intended to ensure the efficient management of court business, there are no common rules governing the conduct of lawyers before the Court of Justice and the Court of First Instance and it would be invidious for the Court of Justice to attempt such a labour of Sisyphus.¹⁴

Similarly, Anderson opines:

[T]here is no code of conduct for lawyers practising before the European Court, whether in preliminary reference cases or direct actions. The construction of such a code might have advantages but it would be a formidable task, bearing in mind the very different traditions from which European advocates, procurators and legal advisers have evolved.¹⁵

That the topic has not been researched in more than 50 years of practice is explicable by the fact that the Court has never formally invoked its disciplinary powers.¹⁶

The ECSC Court of Justice rules concerning representation were historic in two important respects. First, the admission requirements imposed by Article 20 of the ECSC Protocol marked the first time that parties' discretion to appoint counsel was fettered by an international court. Contemporary commentaries¹⁷ do not explain why the drafters

Yaqub, 'Lawyers in the European Transnational Courts', in A. Tyrrell and Z. Yaqub (eds), *The Legal Professions in the New Europe* (1996), at 33; Chavier, 'L'avocat devant les juridictions européennes', 52 *L'observateur de Bruxelles* (2003) 21; J. Mouton and C. Soulard, *La Cour de justice des Communautés Européennes* (2004), at 63–64; J. Boudant, *La Cour de justice des Communautés Européennes* (2005), at 48. Others do not discuss representation, e.g. E.H. Wall, *The Court of Justice of the European Communities: Jurisdiction and Procedure* (1966), at 209–270; Vaughan and Grey, 'Litigating in Luxembourg and the Role of the Advocate at the Court of Justice', in T. Tridimas *et al.* (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (2008), at 48, 51–54.

¹⁴ L.N. Brown and T. Kennedy, *The Court of Justice of the European Communities* (2000), at 302–303.

¹⁵ D.W.K. Anderson and M. Demetriou, *References to the European Court* (2002), at 252 (para. 9-051).

¹⁶ Letter from the Registrar (22 Oct. 2009), on file with the author.

¹⁷ Delvaux, *supra* note 10, at 251–313; Reuter, 'Le Plan Schuman', 81 *Recueil des Cours* (1952-II) 523, at 559–571; P. Reuter, *La Communauté Européenne du Charbon et de l'Acier* (1953), at 66; Antoine, 'La Cour de Justice de la C.E.C.A. et la Cour internationale de Justice', 57 *RGDIP* (1953) 210, at 221, 252–253; Lagrange, 'La Cour de Justice de la Communauté Européenne du Charbon et de l'Acier', 70 *Revue du Droit Public et de la Science Politique* (1954) 417, at 433; Jeantet, 'Les intérêts privés devant la Cour de Justice de la Communauté Européenne du Charbon et de l'Acier', 70 *Revue du Droit Public et de la Science Politique* (1954) 684, at 709; D.G. Valentine, *The Court of Justice of the European Coal and Steel Community* (1955), at 149–151; van Houtte, 'La Cour de Justice de la Communauté Européenne du Charbon et de l'Acier', II *Annuaire Européen* (1956) 183; Robertson, 'Legal Problems of European Integration', 91(I) *Recueil des Cours* (1957) 105, at 149–153; C. van Reepinghen and P. Orianne, *La procédure devant la Cour de justice des communautés européennes* (1961), at 26–27; R. Schuman, *Pour l'Europe* (1963), at 151–176; J. Monnet, *Mémoires* (1976), at 318–335; Lagrange, 'La Cour de Justice des

departed from the ICJ policy permitting parties absolute control over representation.¹⁸ Secondly, Article 6 of the ECSC Supplementary Rules¹⁹ for the first time vested an international court with the power to exclude counsel from proceedings for ‘behaviour incompatible with the dignity of the Court’.²⁰ Contemporary works do not explain the rationale for this power.²¹

Concerning ECJ procedure, four important factors should be explained. First, the Court unusually lacks control over its own procedural rules.²² While the ECSC Court of Justice was vested with the power to frame its Rules,²³ the EEC Treaty required the CJEU to obtain the approval of the EU Council.²⁴ Although the CJEU can request amendment of its Statute, its consent is not required.²⁵ In light of an increasing caseload, the CJEU has proposed amendments to its Statute as well as a new set of Rules.²⁶ Secondly, the CJEU is not confined to one or two official languages. While the sole authentic language of the ECSC Protocol and Rules of Procedure was French,²⁷ the four languages of ‘the original Six’ were authentic languages of the ECJ Statute.²⁸

Thirdly, there are important architectural differences among the legal professions of the Member States. For example, the functional meaning of an *avocat* within Article 19 of the Statute derives from French civil procedure. Thus, linguistic differences in the texts should be overlaid with civil procedural distinctions. Fourthly, the Court’s jurisdiction (consisting of direct actions and preliminary references) is principally review-based.²⁹ Direct actions are subdivided into actions between institutions and Member

Communautés Européennes: du Plan Schuman à l’union Européenne’, *Revue Trimestrielle de Droit Européenne* (1978) 2.

¹⁸ S. Rosenne, *The Law and Practice of the International Courts 1920–2005* (2006), iii, at 1133. An indirect link to the Nuremberg Tribunal may have existed through Professor André Gros. See Art. 32, Charter of the Nuremberg International Military Tribunal and Art. 20, ECSC Protocol.

¹⁹ Art. 35(1), Rules of Procedure of the European Court of Justice, OJ (2010) C117/1 (‘ECJ Rules’).

²⁰ Art. 20, ECSC Protocol. See also Delvaux, *supra* note 10, at 310.

²¹ Delvaux, *supra* note 10, at 50–51. See also Riese, *supra* note 11, at 521–525.

²² Art. 253 TFEU.

²³ Art. 44 ECSC Treaty.

²⁴ Art. 188 EEC Treaty.

²⁵ Art. 281 TFEU. See also Rodríguez Iglesias, ‘Réformer la Cour de justice européenne’, *Le Monde*, 28 April 2000.

²⁶ ‘Draft CJEU Amendments to the Statute’ (28 Mar. 2011) and ‘Draft ECJ Rules of Procedure’ (25 May 2011), available at: http://curia.europa.eu/jcms/jcms/Jo2_7031/ (accessed 23 Feb. 2012).

²⁷ Art. 100 ECSC Treaty. Cf. Art. 27(1) ECSC Rules.

²⁸ Art. 248 EEC Treaty. See also Art. 29(1) ECJ Rules.

²⁹ Arts 263, 267–268, 270 TFEU.

States and actions between individuals and institutions.³⁰ Since ‘staff cases’ are now delegated to the EU Civil Service Tribunal,³¹ evidence is rare.³²

Although the *travaux préparatoires* of the ECHR are published,³³ those of the ECtHR Rules of Procedure are not, and the scholarship does not discuss the professional ethics of counsel.³⁴ Since the advent of rights of litigation for applicants in 1998, the Court’s most pressing problems have included its backlog of applications and uneven state compliance with its judgments. Insufficient resources amid expanding membership and a low application threshold have also contributed to the backlog even while efficiency reforms have doubled the Court’s productivity.³⁵

The role of counsel before the ECtHR has historically been connected to the filtering of applications. During the ECHR negotiations,³⁶ it was proposed that applicants be required to present petitions through counsel for ‘purely practical [reasons]...to facilitate the work of the Commission...by excluding appeals, as it were, through the obligation to make use of the services of a barrister or a jurisconsult’.³⁷ This proposal was adopted at the committee stage but redacted in plenary and left to the Commission.³⁸

Due to the ban upon rights of litigation for applicants until 1997,³⁹ the Commission was compelled to adopt a dual role as an ‘objective and impartial’ fact-

³⁰ Art. 63 ECJ Statute; Art. 104 ECJ Rules.

³¹ Art. 257 TFEU. See also Council Dec. of 2 Nov. 2004, OJ (2004) L333/1.

³² However, the Court can re-examine factual issues in referral cases: Interview with President Eric Jaeger, Judge Nicholas Forwood, and Registrar Emmanuel Coulon (14 Oct. 2010), cited with permission.

³³ *Collected Edition of the Travaux Préparatoires* (1975).

³⁴ A. Robertson, *The Law of International Institutions in Europe* (1961); Mosler, ‘The Protection of Human Rights by International Legal Procedure’, 52 *Georgetown LJ* (1964) 800; F. Monconduit, *La Commission Européenne des Droits de l’Homme* (1965); Krüger, ‘The European Commission of Human Rights’, *Human Rts LJ* (1980) 66; L. Mikaelson, *European Protection of Human Rights* (1980), at 38–59; Mahoney, ‘Developments in the Procedure of the European Court of Human Rights: the Revised Rules of Court’, 3 *Yrbk European L* (1984) 127, at 128–134; Eissen, ‘L’avocat devant la Cour européenne des Droits de l’Homme’, in F. Matscher and H. Petzold (eds), *Protecting Human Rights: The European Dimension* (1988), at 159; O’Boyle, ‘Procedure before the European Court of Human Rights’, 2 *All-European Human Rts Yrbk* (1992) 93, at 102–103; Konstantinov, ‘Procedure of the New Permanent European Court of Human Rights’, 3 *E European Human Rts Rev* (1997) 101, at 114; P. Leach, *Taking a Case to the European Court of Human Rights* (2005); Chavrier, ‘L’avocat devant les juridictions européennes’, 52 *L’observateur de Bruxelles* (2003) 21, at 27–28; K. Reid, *A Practitioner’s Guide to the European Convention on Human Rights* (2008), at 21–23; Lambert, ‘L’avocat devant la Cour européenne des droits de l’homme’, in R. Badinter (ed.), *Liber Amicorum Jean-Pierre Cot: le procès international* (2009), at 171.

³⁵ D. Shelton, *The Regional Protection of Human Rights* (2008), at 493–497, 1013–1023.

³⁶ *Travaux Préparatoires*, *supra* note 33, i, at 154.

³⁷ *Ibid.*, vi, at 34 (Doc. A 2299), 170–171.

³⁸ *Ibid.*, 38–40, 64 (para. 6), 98, 166–172.

³⁹ *Ibid.*, vii, at 172. See also Arts 44, 48 ECHR.

finding body on the one hand and as the indirect representative of the applicant before the Court on the other.⁴⁰ Following the *Vagrants* case,⁴¹ this problem was partially solved in 1983 when applicants' counsel gained rights of hearing under the supervision of the Commission.⁴² However, compulsory representation remained desirable 'as a precaution to prevent abuse and to ensure a proper administration of justice'.

Given certain negative experiences involving vexatious petitions,⁴³ offensive language,⁴⁴ baseless accusations,⁴⁵ and misrepresentations,⁴⁶ compulsory representation at point of application may be a useful filtering mechanism. However, vulnerable applicants (e.g., prisoners) may struggle to retain counsel:

There are three filtering ideas being considered now: 1) applications to be drafted in one of the official languages; 2) an application fee; and 3) compulsory professional representation...[t]he problem with imposing the professional representation option is that a legal aid system at that stage would be required, for which there is little funding at the moment...[c]urrently the filtering costs are borne by the Court and the financial case would need to be made that requiring applicants to engage a lawyer would be more effective.⁴⁷

One way to address the financial difficulty of creating a legal aid system may be to make discretionary exceptions for vulnerable applicants who would have difficulty retaining professional counsel such as prisoners, residents in war zones, or the indigent.

2 Qualification Requirements

This section examines the qualification requirements laid down by the Courts to regulate the admission of representatives. In principle, such requirements entail reduced access to

⁴⁰ Mahoney, *supra* note 34, at 128–129.

⁴¹ *De Wilde, Ooms and Versip v. Belgium (Questions of Procedure)*(No 1) (1971), 1 EHRR (373).

⁴² Mahoney, *supra* note 34, at 130–134.

⁴³ *M v. UK* (1987), 54 DR 214.

⁴⁴ *Varbanov v. Bulgaria* ECHR (2000) 457, at paras 36, 63–66; App. No. 46488/99, *Manoussos v. Czech Republic*, 9 July 2002, at 20–21; App. No. 32438/96, *I.S. v. Bulgaria*, 6 Apr. 2000, at 6; *Akdivar v. Turkey* (1997) 23 EHRR 143; *Aslan v. Turkey* (1995) DR 80A 138; *Assenov v. Bulgaria* (1996), DR 86-A, 54, at 68.

⁴⁵ App. Nos. 61164/00 and 18589/02, *Duringer and others v. France*, 4 Feb. 2003; App. No. 67208/01, *Řehák v. Czech Republic*, 18 May 2004.

⁴⁶ App.No. 46640/99, *Jian v. Romania*, 30 Mar. 2004; *F.M. v. Spain* (1991) 69 DR 185, at 194.

⁴⁷ Interview with Ms Clare Ovey, 15 Oct. 2010, cited with permission.

courts and higher litigation costs for litigants in exchange for professional standards of competence and integrity. In comparing the European Courts, the first issue common to both is the lack of such requirements for agents. The second, specific to the CJEU, is the definition of the term ‘lawyer’. The third, specific to the ECtHR, is the idea that applicants be represented by counsel from the application stage as a filtering mechanism. Minor issues not addressed in this article include the lack of requirements of specialist expertise and advocacy experience for lawyers and the admission of academics.

A Agents

Representation of litigants before the CJEU is governed by Article 19 of the Statute.⁴⁸ Under Article 19, advocacy is bifurcated between states and EU organs (‘privileged parties’) and individuals and companies (‘unprivileged parties’). Whereas the former must be represented by ‘an agent appointed for each case’, the latter must be represented by ‘a lawyer authorised to practise before a Court of a Member State’.⁴⁹

In practice, agents are usually in-house government lawyers.⁵⁰ As the UK delegation to the CoE Committee of Legal Advisers on Public International Law (CAHDI) has noted, there are real questions concerning ‘how effective [their national rules] are to control conduct before international courts’.⁵¹ The author has been confidentially informed that when the EU Civil Service Tribunal drafted its Rules of Procedure, it wished to include agents within its disciplinary powers.⁵² It was required to consult the CJEU before submitting them to the Council. The proposal was not adopted. The CJEU has not proposed to amend Article 19 in its draft amendments.⁵³

As before the CJEU, representation before the ECtHR is bifurcated in that individuals are generally required to be represented by counsel whereas the states can be

⁴⁸ Originally Art. 20 ECSC Statute. See also Art. 104(2) ECJ Rules.

⁴⁹ Case T-37/98, *FTA and Others v. Council* [2000] ECR II-00373, Order (24 Feb. 2000), at para. 25. Agency, a feature of 19th-century international arbitration, was probably taken from the ICJ Statute: Antoine, *supra* note 17, at 252; de Richemont, *supra* note 13, at 103. Alternatively, it reflects the role of the *avocat* as an agent empowered to perform procedural acts: Lasok, *supra* note 13, at 66.

⁵⁰ *Ibid.*, at 70.

⁵¹ CAHDI, ‘Item 7: Organisation and Functions of the Office of the Legal Adviser of the Ministry for Foreign Affairs’ (2006), available at: www.coe.int/t/dlapil/cahdi (accessed: 11 Dec. 2011), at 2 (note 1).

⁵² Arts 31–32 EU Civil Service Tribunal Rules of Procedure 2007, OJ (2007) L225/1.

⁵³ Draft ECJ Amendments to the Statute, note 26, *supra*. Cf. Art. 46 Draft ECJ Rules.

represented by agents.⁵⁴ Following the ICJ⁵⁵ and ECSC Court of Justice⁵⁶ practice, the states must be represented by agents, assisted by advocates.⁵⁷ Applicants must generally be represented by ‘an advocate authorised to practise in any of the Contracting States...or any other person approved by the President of the Chamber’ with ‘an adequate understanding of one of the Court’s official languages’.⁵⁸ The lack of requirements for agents may be criticized in light of cases involving questionable conduct.⁵⁹

B Lawyers

The phrase ‘lawyer authorised to practise before the Court of a Member State’ in Article 19 was a translation done upon the accession of the UK and Ireland in 1973. While the General Court has construed two discrete requirements,⁶⁰ the textual history suggests that it should be read as a definition. The original phrase *avocats inscrit à un barreau* was clearly understood in Continental jurisdictions as membership of a bar providing the right to perform procedural acts. In the translation, ‘lawyers’ was shorthand for ‘advocates, barristers and solicitors’, and the qualifier ‘authorised to practise before the Court of a Member State’ was intended to exclude ‘non-practising’⁶¹ professionals. Thus, Article 19 should have been better translated as ‘practising advocates, barristers and solicitors’.⁶²

Following the Agreement on the European Economic Area 1994, all of the versions were amended to conform linguistically to the English.⁶³ The original definition *avocats inscrit à un barreau* was replaced with *avocats habilité à exercer devant une juridiction d’un État Membre*, compounding the ambiguity introduced by the poor

⁵⁴ Rules 35–36 ECtHR Rules of Procedure (1 Feb. 2012)(‘ECtHR Rules’).

⁵⁵ Mosler, ‘La procédure de la Cour Internationale de Justice et de la Cour Européenne des Droits de l’Homme’, in R. Cassin, *René Cassin Amicorum Discipulorumque Liber I: Problèmes de protection internationale des droits de l’homme* (1969), at 196, 197.

⁵⁶ Mahoney, *supra* note 34, at 127–168, 167.

⁵⁷ Rule 35 ECtHR Rules.

⁵⁸ Rules 36(4)(a), 36(5)(a) ECtHR Rules.

⁵⁹ *Supra* notes 44–46.

⁶⁰ A person must be: (1) a ‘lawyer’; and (2) ‘authorised to appear before the Court of a Member State’.

⁶¹ ‘Practising members’ are those licensed to perform ‘reserved legal activities’, such as exercising rights of audience: ss. 12(1), 13, 18(1), Sch. 5 (Part 1), Courts and Legal Services Act 2007.

⁶² See Art. 1(2) of Dir. 77/249/EEC, OJ (1977) L78/1; Art. 1(2) of Dir. 98/5/EC, OJ (1998) L77/1.

⁶³ ‘Décision du Conseil, du 22 décembre 1994, modifiant le protocole sur le statut de la Cour de justice des Communautés européennes’ (94/993/CE), OJ (1994) L379/1.

translation into English. Nevertheless, the old definition has apparently been retained in denying patent attorneys admission in their own right in intellectual property cases.⁶⁴

Although there is no express textual basis, the General Court's jurisprudence concerning Article 19 suggests that 'professional ethics and discipline' and 'independence' are key to its definition of a 'lawyer'. It has consistently cited the *A.M.&S. Europe* case that 'the requirements as to the position and status as an independent lawyer...is based on a conception of the lawyer's role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs'.⁶⁵ Although the CJEU based its decision in that case on EU 'common legal principles',⁶⁶ its citation of Article 19 implicitly excluded employed lawyers.⁶⁷

In *Akzo Nobel*, the General Court applied *A.M.&S.* that communications with an employed lawyer were not legally confidential.⁶⁸ The Grand Chamber upheld the decision, holding that there was no 'predominant trend' among the Member States to justify a change.⁶⁹ It went further in finding that an employed lawyer lacks independence because he cannot ignore his employer's commercial strategies. It is unclear whether the General Court excludes employed lawyers and it is not always possible to detect them in practice.⁷⁰ In *Endesa*, the Court reportedly instructed an employed lawyer to withdraw.⁷¹

2 Ethical Standards

In comparing the professional conduct of counsel before the CJEU and ECtHR, two general observations may be made. First, professional misconduct is a more pressing

⁶⁴ See Case T-14/04, *Alto de Casablanca, SA v. OHIM* [2005] ETMR 71, at paras 7-12; Case T-315/03 *Wilfer v. OHIM*, Judgment of 8 June 2005, at para. 11; Case C-363/06 P, *Comunidad Autónoma de Valencia v. Comisión*, Auto del Tribunal de Justicia, 20 Feb. 2008, at para. 12 (sub-paras 10-11); Case T-487/07, *Imperial Chemical Industries Plc v. OHIM*, Order of 20 Oct. 2008, at paras 11-12, 19-28; Case T-472/07, *Enercon GmbH v. OHIM*, Judgment of 3 Feb. 2010.

⁶⁵ Case 155/79, *A.M. & S. Europe Ltd v. Commission* [1983] QB 878, at 950 (paras 24, 26).

⁶⁶ *Ibid.*, at 949 (para. 21) and 951 (paras 26-27). Cf. the opinion of A-G Sir Gordon Slynn.

⁶⁷ Usher, *supra* note 13, at 216; Brown and Kennedy, *supra* note 14, at 304-305.

⁶⁸ Cases T-125/03 & 253/03, *Akzo Nobel Chemicals Ltd and Another v. Commission*, Judgment of 17 Sept. 2007, at paras 168-170.

⁶⁹ Case 550/07 P, *Akzo Nobel Chemicals Ltd and Another v. Commission*, Judgment of 14 Sept. 2010, at paras 32, 40-51, 65-76.

⁷⁰ Registrar Coulon, Interview, *supra* note 32.

⁷¹ *Ibid.* There is no express reference in the judgment: Case T-417/05, *Endesa, SA v. Commission*, Judgment of 14 July 2006, at paras 34-48.

issue before the ECtHR than the CJEU. This may be attributed to two key differences in their respective jurisdictions: (1) the membership of the Council of Europe is far larger than that of the EU, resulting in even greater divergences in standards; and 2) the CJEU jurisdiction is considerably narrower than that of the ECtHR and mostly excludes factual issues, restricting the scope for counsel to misbehave. Secondly, while the frequency of misconduct is greater before the ECtHR than the CJEU several of the same issues apply to both Courts (e.g., conflicts of interest and misleading the Court).

The CJEU Statute, Rules of Procedure, and ‘Notes for the Guidance of Counsel’ (originally created for oral hearings only⁷²) do not address professional conduct by counsel. While Brown and Kennedy cite the Council of Bars and Law Societies of Europe Code of Conduct 1988 (CCBE Code),⁷³ it is inapplicable to CJEU proceedings because it was expressly designed for transnational practice⁷⁴ rather than international courts. While counsel are presumably bound by their national standards,⁷⁵ national bars are unlikely to apply them to international litigation. The English Bar – one of the few to have provided for such enforcement – has never held disciplinary proceedings concerning counsel’s misconduct before an international court.⁷⁶

The CJEU has never invoked its disciplinary powers concerning lawyers, with such matters being dealt with on an *ad hoc* basis:

Only if real problems arise, would a real incentive be provided to justify the intellectual effort and energy required to draft a comprehensive code of conduct. That said, [there are] some particular issues which are problems that, if they have not already arisen, may do so in the future. Confidentiality issues particularly come to mind in the context of counsel passing on to their client confidential material made available to him by the Court on a restrictive basis.⁷⁷

⁷² Usher, *supra* note 13, at 233.

⁷³ *Supra* note 14, at 302 (note 14).

⁷⁴ Arts 1, 3.1 CCBE Code.

⁷⁵ E.g., Code of Conduct of the Bar of England and Wales 2004 (‘English Code’), Annexe A (‘International Practice Rules’); *Recueil des Règles Professionnelles du Barreau de Bruxelles* (‘Brussels Code’), *Règlement Intérieur du Barreau de Paris* (‘Paris Code’); Federal Republic of Germany Assembly of *Rechtsanwälte* Rules of Professional Practice (1 Mar. 2010).

⁷⁶ Email from Ms Sara Down, Bar Standards Board (9 July 2010), on file with author.

⁷⁷ Interview with Judge Forwood, *supra* note 13.

Three reasons for the rarity of ethical issues may be suggested: (1) the narrow, review-based jurisdiction of the Court excluding evidentiary matters; (2) the small number of regular practitioners before the Court; and (3) the relative procedural homogeneity of the ‘original Six’ jurisdictions. With membership expansion, ethical standards are consequently more relative including formerly authoritarian jurisdictions with limited experience of independent bars. The dormancy of the Court’s disciplinary jurisdiction may also be attributable to the absence of a clear textual framework.

Like the CJEU, the ECtHR lacks prescribed ethical standards for counsel though it has recently prescribed judicial standards.⁷⁸ According to an architect of those standards:

For me, having a code of conduct is as much a question of appearances to the outside world as it is a question of practice. It is difficult to explain to the outside world why we have ethics for judges, doctors, politicians and even for companies but we do not need them for counsel. Also, can we as a Court honestly say that we are so much better that we are not ourselves subject to temptations or to difficulties?...[w]hen you get into the details, you realise that things are more complex than they may at first appear. Another aspect is that a code of conduct, backed by disciplinary sanctions, clearly has a deterrent effect upon bad behaviour. Who knows what might happen? Everyone can fail and everyone can make mistakes. It would be naïve, or even foolish, to say ‘don’t do anything because nothing has happened yet’. It would be better to already have rules ready in such a situation than to have *to invent* rules on the spot to deal with it once it has already occurred.⁷⁹

Thus, ethical standards can be useful not only to address existing problems but also to pre-empt potential problems and promote institutional legitimacy. Such issues may be simple yet important, as when counsel makes an urgent application for interim measures in a torture case but is unavailable to be contacted by the Court, fails to notify the Court that he is no longer representing a client, or uses intemperate language.⁸⁰ Ethical standards can be a particularly useful shield for junior counsel against client pressure:

⁷⁸ ‘Resolution on Judicial Ethics’ 2008, available at: http://www.echr.coe.int/NR/rdonlyres/1F0376F2-01FE-4971-9C54-EBC7D0DD2B77/0/Resolution_on_Judicial_Ethics.pdf (accessed 7 Feb. 2011).

⁷⁹ Interview with Judge Elisabet Fura (15 Oct. 2010), cited with permission.

⁸⁰ *Ibid.*

[T]his is something that I as a former practising lawyer can detect in observing the demeanour of counsel and client from the Bench. For example, colleagues of mine who say ‘why did that counsel make such a silly point?’ who have not been practising lawyers having to deal with clients in the past have not observed that it was because of the client that the lawyer had to say that. For a junior counsel, it *can* often be very difficult to deal with this and there will be all sorts of reasons why, such as age difference, client literacy, dealing with government officials as clients and so on. A senior counsel will find it easier, though problems will still arise for them too. They arise for judges. For example, during the drafting of the Resolution the point was made that ‘one day, one of us will have problems and we will need to refer to the Resolution to support us’.⁸¹

The authority of counsel towards his client varies considerably, and it is counsel who will face pressure from his client or others to commit misconduct threatening procedural integrity.

A Duties to the Client

1. Conflicts of interest

There are neither procedural rules nor precedents prescribing the circumstances in which an advocate may (or must) accept a representation agreement or withdraw from one. Conflicts of interest are an increasingly important issue before international courts. The CJEU has addressed one type of conflict through Article 6(2) of its Code of Conduct 2007,⁸² which prohibits judges from, *inter alia*, acting as representatives of parties for a three-year period after their term of office. This is an important issue:

[The three-year freezing period] is the Court of Justice's considered response to a potential problem. Several former Advocates-General, judges and even a President of the General Court have subsequently returned to practice and appeared as counsel. This is, moreover, a practical issue because EU judges are appointed for only six years or even shorter, rather than as a lifetime career, and (particularly if they have been appointed early) it would be severe to require them to sacrifice rights of audience permanently in the future, upon becoming judges.⁸³

⁸¹ *Ibid.*

⁸² OJ (2007) C223/2.

⁸³ Judge Forwood, Interview, *supra* note 32.

As seen below, this problem has also arisen before the ECtHR. It is interesting that the freezing period is the same as that of the ICJ, suggesting cross-fertilization. However, other important types of conflict (e.g., multiple clients, links with the judiciary, or financial interest in litigation⁸⁴) remain unregulated by the Court.

Before the ECtHR, there is no rule prohibiting judges from serving as counsel following their term of office. However, the author is confidentially aware of a pending case in which a former judge (Loukis Loucaides of Cyprus) sought to appear as counsel. While the application of the Court's power to exclude counsel was seriously considered, the problem was ultimately resolved when, after being approached, the advocate voluntarily withdrew. Since the average age of Strasbourg judges, like Luxembourg judges, is relatively low compared with those of other courts like the ICJ, there would appear to be a need for normativity concerning the apparent conflict of a former judge or registrar acting as counsel before his past colleagues. The inclusion of a 'freezing period'⁸⁵ for such persons would be a useful precaution against allegations of bias or unfairness.

Another interesting ECtHR issue, particularly affecting human rights organizations, is a conflict between the duty of loyalty to an individual client and a wider campaign interest for human rights standards. For example, in *Roma*, *Chechen*, and *Kurdish* cases the applicants' circumstances are such that the applications are propelled more by the lawyers than by the applicants. While this means that vulnerable applicants receive an opportunity to seek a remedy, the question arises how far the lawyers can go in pushing the 'background interest' of human rights campaigning.

According to a confidential source, in the *Tahsin Acar* case⁸⁶ (a Kurdish case) the applicant did not accept a very substantial offer from the respondent in friendly settlement negotiations.⁸⁷ The Grand Chamber ruled that the 'unilateral declaration' should not be imposed upon the applicant, but in the end the Court found only minor violations. There are two possibilities from this: (1) the applicant did not want the settlement offer; or (2) the lawyer convinced the client to reject it. One can only speculate

⁸⁴ Principle 4, Hague Principles.

⁸⁵ Principle 4.3.4, Hague Principles.

⁸⁶ App. No. 26307/95, *Tahsin Acar v. Turkey*, Judgment of 8 Apr. 2004.

⁸⁷ *Ibid.*, at paras 21–26.

whether the ‘background interest’ played a role. Although the human rights organizations have brought cases that would otherwise never have come to the Court, in certain cases they may detrimentally affect individual applicants’ interests in pushing a wider doctrinal interest.

2. *Client confidentiality*

Confidentiality between lawyer and client, a shared issue before both European Courts, has both legal and ethical dimensions. The legal aspect ensures that third parties may not generally view such confidential communications without client consent. The ethical aspect encourages trust between lawyer and client. However, legal protection from outside scrutiny creates a danger of abuse. Safeguards include a judicial power to view confidential communications⁸⁸ and an ethical duty for counsel to disclose in abusive circumstances. De Richemont’s commentary explains that this rule protects the *cabinet d’avocat* except where a delict (e.g., a false pleading) has been committed.⁸⁹

Consequently, the legal protection of confidential or privileged material is qualified. In commenting that *justice* may demand the disclosure of material comprising a delict, de Richemont probably intended that it would be for the Court to order⁹⁰ rather than for the advocate to disclose *ex proprio motu*. This is supported by Article 34 of the Rules (originally Article 3(1)(2) of the ECSC Supplementary Rules) providing:

The privileges...specified in Article 32 of these Rules are granted exclusively in the interests of the proper conduct of proceedings. The Court may waive the immunity where it considers that the proper conduct of proceedings will not be hindered thereby.

De Richemont commented that party independence is subject to interest of procedural harmony and does not extend to defamatory statements or other serious misconduct.⁹¹

Applying this reasoning, the Court may order disclosure of confidential material where there appears to be a serious threat to procedural integrity. Since the advocate is the only person other than the client (who is unlikely to disclose his own wrongdoing) privy to the threat, an ethical duty to alert the Court where there is reasonable suspicion

⁸⁸ Art. 32(2)(a) ECJ Rules.,originally Art. 1(2)(a) ECSC Supplementary Rules.

⁸⁹ *Supra* note **Error! Bookmark not defined.**, at 105-2.

⁹⁰ Art. 24 ECJ Statute; Art. 57, CJEU Rules; Art. 48(1), ECSC Rules.

⁹¹ De Richemont, *supra* note 13, at 105–108.

of misconduct would provide a useful safeguard. An advocate ought not to be suborned into protecting a client who seeks to corrupt the proceedings.

As explained above, the ‘independence’ of the lawyer from the client was crucial to the *A.M.&S. Europe* and *Akso Nobel* judgments. Those cases illustrate by analogy the problem of divergent ethical standards within the context of potential client misconduct being shielded by the confidentiality principle. The need for a general, rather than absolute, ethical duty of confidentiality would strike a balance between the competing priorities of lawyer–client trust and the integrity of judicial proceedings. The Hague Principles, which authorize counsel to disclose confidential information only where the rules of the international court permit,⁹² do not adequately address this issue.

B Duties to the Court

1. Misleading the Court

A universal issue before international courts, including both European Courts, concerns the exact standard by which counsel ‘misleads the court’ through legal or factual assertions that counsel ‘knows’ to be false. In the *List D*⁹³ case, Greece asserted that a pre-accession system of import authorization was abolished. However, the CJEU found:

The Hellenic Republic has not produced any instrument providing for the abolition of that system...the Commission has produced to the Court photocopies of the two import application forms... [o]n each form the refusal of the application is hand-written, accompanied by the Greek letter ‘D’, also hand-written...the fact that the refusal of the application was accompanied by the letter ‘D’ proves the continued existence of a so-called ‘List D’...system...In the absence of any other convincing explanation from the Government of the Hellenic Republic it must therefore be concluded that there was in existence in that State a ‘Procedure D’.⁹⁴

The agent’s failure to adduce any documentary evidence to sustain her assertion begs the question whether she decided against adducing such evidence because, like the

⁹² Principle 3.4, Hague Principles.

⁹³ Case C–65/91, *Commission v Hellenic Republic* [1992] ECR I–05245.

⁹⁴ *Ibid.*, at paras 6–10.

Commission's evidence, it was adverse to her argument.⁹⁵ This example gives rise to the question of the exact standard of 'knowledge' by which counsel 'misleads' the Court.

While the client in such cases bears the consequences of engaging poor counsel or insisting upon bringing a bad case, the Court is also affected. An 'independent' advocate should not compromise his professional standards to please his client. An example of this is the *Koelman* case,⁹⁶ concerning which the author is aware on a confidential basis that the applicant was nominally represented by a Luxembourgish *avocat* who, in order to comply with a filing deadline, signed pleadings that the applicant had himself drafted. The advocate subsequently refused to answer questions put by the Court at the oral hearing, apparently because he was unfamiliar with the pleadings.⁹⁷

Before the ECtHR, Rule 44D⁹⁸ prescribes broad principles of courtesy, honesty, and competence in counsel's relations with the Court. In light of certain negative experiences concerning abusive submissions,⁹⁹ the addition of this provision in 2004 is understandable and demonstrates a need for common and rigorous ethical standards.¹⁰⁰ In the *Foxley* case, the applicant's representative, who was alleged to have had prior convictions for perjury and perverting the course of justice, was found to have attempted to mislead the Court by clumsily forging letters by the Commission.¹⁰¹ There is an argument for sanctioning representatives who collaborate with clients to conceal

⁹⁵ There is a division between, *sensu lato*, 'common law' and 'civil law' procedures though there are also differences within the two legal families. Under the English procedure, parties are required under 'standard disclosure' to disclose adverse evidence, and barristers must withdraw if a party refuses to do so and must not make unsupported factual assertions: para. 31.6 English Civil Procedure Rules ('CPR') 1998; para. 704(b) Written Standards for the Conduct of Professional Work; para. 7.1 English Code. Under the German procedure, while parties are obliged to 'make their declarations as to the facts and circumstances fully and completely' they are required to disclose adverse documents only upon judicial order and the ethical standards for advocates are silent: ss. 138(1), 142(1) *Zivilprozessordnung* (Code of Civil Procedure) 2005; *Berufsordnung für Rechtsanwälte* (Professional Rules of Conduct for Lawyers). The French rules broadly resemble the German: Arts 9–11, 138–141 *Code de procédure civile* (Code of Civil Procedure); *Règlement Intérieur du Barreau de Paris* ('Paris Code').

⁹⁶ Case T-575/93, *Koelman v. Commission* [1996] ECR II-00001.

⁹⁷ *Ibid.*, at para. 18.

⁹⁸ 'If the representative of a party makes abusive, frivolous, vexatious, misleading or prolix submissions, the President of the Chamber may exclude that representative from the proceedings, refuse to accept all or part of the submissions or make any other order which he or she considers it appropriate to make, without prejudice to Article 35(3) of the Convention.' The use of the term 'representative' rather than 'advocate' suggests that this also applies to agents.

⁹⁹ *Supra* notes **Error! Bookmark not defined.–Error! Bookmark not defined.**

¹⁰⁰ Principles 5.1 and 7.1, Hague Principles.

¹⁰¹ App. No. 33274/96 *Foxley v. UK*, Judgment of 12 Dec. 1999, at 6–8. See also App. No. 50963/99, *Al-Nashif v. Bulgaria*, Judgment of 20 June 2002, at paras 88–89.

evidence.¹⁰² A particular problem concerning applicants entails attempts to mislead by not informing the Court of compensatory payments made by Respondents.¹⁰³

The backlog at the Court also creates a particular challenge for applicants' advocates who should be ethically obliged to protect the Court from frivolous cases while advancing meritorious ones. Respondents' advocates, particularly those appearing for states facing many applications, may face pressure to contest every case regardless of merits. The disparity in volume of pending cases from state to state is striking:

For the UK, there are some 4000 cases pending...Russia has some 30000 cases pending. The Court's policy changed from chronological handling to prioritisation on the basis of urgency and importance, as we used to deal with cases indiscriminately as they came in. Now, the main problem with the docket is simply the volume of cases. It should be said that right across the Court, regardless of Respondent, around 90% of applications are filtered as inadmissible.¹⁰⁴

While compulsory professional representation is a potential safeguard against abusive applications, ethical standards are helpful for advocates to resist client pressure.¹⁰⁵

While the danger of counsel misleading the court is clearly greater before the ECtHR than the CJEU due to its more factually intensive jurisdiction and the even greater diversity of membership, the issues that arise in practice are similar. Apart from asserting facts that counsel actually knows to be false, there are the grey areas of suppressing or failing to disclose adverse evidence and making unsupported factual assertions. Not only do these practices endanger judicial integrity but they can also result in a waste of judicial resources on factual matters that could be properly agreed. The Hague Principles propose a vague standard of 'reasonableness'¹⁰⁶ that does not address these problems.

¹⁰² See, e.g., App. No. 52/1997/836/1042, *Tekin v. Turkey*, 78 Reports of Judgments and Decisions (1998–IV), at 1507, 1530.

¹⁰³ See, e.g., App. No. 5667/02, *Kérétchachvili v. Georgia*, Decision (2 May 2006); App. Nos 33052/05 & 31404/05, *Lozinschi and Rujavnita v. Moldova*, Decision of 4 Nov. 2008; App. Nos 41369/05, etc., *Sumila and 6 others v. Moldova*, Decision of 26 Jan. 2010.

¹⁰⁴ Clare Ovey, Interview, *supra* note 276.

¹⁰⁵ Principle 2.2, Hague Principles.

¹⁰⁶ Principle 6.1, Hague Principles: 'Counsel shall present evidence in a fair and reasonable manner and shall refrain from presenting or otherwise relying upon evidence that he or she knows or has reason to believe to be false or misleading'.

2. *Documentary evidence*

Since the procedure of both European Courts is weighted towards written pleadings and documentary evidence, their handling by counsel is an important issue for both. While the ECJ's review-based jurisdiction generally excludes factual matters, the rarity of oral evidence means that where they do arise the integrity of the proceedings relies heavily upon the credibility of documentary evidence.¹⁰⁷ The ethical dimension concerns the adducing of false documents by counsel, which has occurred before several international courts.¹⁰⁸ In particular, whether counsel should merely refrain from intentionally adducing false documents or he should take steps to verify authenticity.

In *Società Italiana Vetro*,¹⁰⁹ the General Court found that certain relevant passages were deliberately deleted without objectively justifiable reason that changed completely the tenor of the document.¹¹⁰ The Commission was 'represented' as agents by two members of its Legal Service who were 'assisted' by an Italian *avvocato* and a French *avocat*. In the absence of prescribed common standards, it is unclear whether the alteration of the documents would have been unethical.¹¹¹ Another problem arose in the *BP Chemicals* case,¹¹² in which certain documents submitted by the Commission were seemingly reconstructed from memory.¹¹³ This appears to have been a failure by the legal team to scrutinize the documents prepared by the case team.

Before the ECtHR, there is no specific provision addressing the veracity of documentary evidence.¹¹⁴ The Court has experienced dubious documentary evidence, as in *Foxley* discussed above.¹¹⁵ Although an advocate who knowingly adduces false documents would presumably commit misconduct, it is less clear whether a failure to

¹⁰⁷ Art. 33(7) ECSC Rules provided verification powers for disputed authenticity: de Richemont, *supra* note 13, at 125.

¹⁰⁸ See, e.g., Marston, 'Falsification of Documentary Evidence before International Tribunals', 71 *BYBIL* (2000) 357; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)(Merits)* [2001] ICJ Rep 40, discussed in J.S. al-Arayed, *A Line in the Sea: The Qatar v. Bahrain Border Dispute in the World Court* (2003), at 355–393 and Mendelson, 'The Curious Case of Qatar v. Bahrain in the International Court of Justice', 72 *BYBIL* (2001) 183, at 211 (para. 4). See also Case No. 771, *Norman Gabay v. Islamic Republic of Iran*, 27 Iran-US CTR (1992) 40.

¹⁰⁹ Case T-68/89, *Società Italiana Vetro SpA et al. v. Commission* [1992] ECR II-01403.

¹¹⁰ *Ibid.*, at paras 90–95.

¹¹¹ Principle 6.1, Hague Principles.

¹¹² Case T-11/95, *BP Chemicals Ltd v. Commission* [1998] ECR II-03235.

¹¹³ *Ibid.*, at paras 27, 133–135.

¹¹⁴ 'Misleading submissions' in Rule 44D is presumably broad enough to cover false documents.

¹¹⁵ *Supra* notes 101–103.

disclose the existence of probative documents or to take steps to verify the authenticity of documents in circumstances where he could be reasonably expected to have doubts would be sanctioned.

In light of the importance of written pleadings, safeguards certifying the veracity of documents are critical to both Courts' procedural integrity. Ethical standards requiring counsel not only to refrain from submitting documents that he actually knows to be false but also actively to take steps to certify the authenticity of documents could be a useful safeguard. While Principle 6.1 of the Hague Principles requires counsel to 'refrain from presenting or otherwise relying upon evidence that he or she knows or has reason to believe to be false or misleading', this arguably places the bar too low by catching actions but not omissions. However, failures to take steps to verify documents could infringe an ethical duty of diligence.¹¹⁶

3. *Testimonial evidence*

Testimonial evidence is very rare before both European Courts. At the CJEU,¹¹⁷ it principally arises in staff cases¹¹⁸ now delegated to the Civil Service Tribunal. Although it arises more frequently before the ECtHR, it is not common.¹¹⁹ Although the principal reason for this rarity is both Courts' reliance upon documents in keeping with the written Continental tradition, the unfamiliarity of many of the judges and counsel at both Courts with the handling of witnesses is also a factor. The European Courts' procedures are relatively vague¹²⁰ and lack many of the safeguards for the interrogation of witnesses known to the common law tradition.

¹¹⁶ Principle 2.3, Hague Principles.

¹¹⁷ Brown and Kennedy, *supra* note 14, at 279.

¹¹⁸ Judge Forwood, Interview, *supra* note 32.

¹¹⁹ Leach, *supra* note 34, at 62. See "*Lawless*" Case, Series B (No. 1), 53 at para. 41 ff; App. Nos 9940–9942/82, *France et al. v. Turkey*, 44 DR 35, at para. 20; *Ireland v. UK*, Series B (Vol. 23–I), 128, at para. 3 ff.

¹²⁰ The broad procedural rules of the CJEU concerning witnesses are virtually identical to those of the ICJ: Arts 26 and 32 CJEU Statute; Art. 47(4) CJEU Rules. See also Van Reepinghen and Orianne, *supra* note 17, at 44. Advocates could directly question witnesses only from 1974: Brown and Kennedy, *infra* note 124; Delvaux, *supra* note 10, at 283. The *status quo* is preserved in Art. 67 Draft CJEU Rules 2011, *supra* note 26. The ECtHR procedure on witness examination can vary greatly, though like that of the CJEU it generally follows the inquisitorial procedure whereby the judges principally question the witnesses and counsel ask supplementary questions. See Rules A1(1) and A7(2) ECtHR Rules. See also *Lawless*, *supra* note **Error! Bookmark not defined.**, at 167 (para. 130(a)), 169 (para. 132(b)); *Ireland v. UK*, *supra* note **Error! Bookmark not defined.**, at 131–142; *Ringeisen Case*, Series B (Vol. 11), at 283; Leach, *supra* note

There are no CJEU rules concerning witness statements or interrogation procedure.¹²¹ Although these matters are not addressed in much of the English literature,¹²² Usher writes:

Since all witnesses are ultimately called by the Court on matters decided by the Court, distinctions known to common lawyers between witnesses called by one side or the other are not recognised. In particular...there is no real distinction between examination-in-chief and cross-examination, and no prohibition upon leading witnesses.¹²³

Also, Brown and Kennedy observe:

The taking of evidence from a witness conforms, for the most part, with the normal practice of continental courts – practice which common lawyers generally regard as much inferior to their own for the establishment of facts where this depends on the credibility of a witness...[t]he witness is heard by the Court in the presence of the parties or their representatives. After the witness has given his or her evidence, questions may be put to the witness by the presiding judge, the other judges or the advocate general...the different context of the Luxembourg [cross-examination] makes it no more than a pale shadow of the English original.¹²⁴

They cite a case in which ‘[t]he parties were each represented by distinguished leading counsel from the English bar who were repeatedly admonished by the presiding judge for attempting to turn the inquisitorial hearing of witnesses into an adversarial trial’.¹²⁵ According to a barrister who appeared in that case, the incident was minor in that counsel for both sides had wished to cross-examine witnesses but were instructed by the President that, as those witnesses were ‘the Court’s witnesses’, they must be examined through the

34, at 69–70; Eissen, *La présentation de la preuve dans la jurisprudence et la pratique de la Cour européenne des Droits de l’Homme*, in M.D. Castelli (ed.), *La présentation de la preuve et la sauvegarde des libertés individuelles* (1977), at 143, 169 (note 73); Giovannini, ‘The Continental European Perspective and Practice of Advocacy’, in Bishop and Kehoe, *supra* note 1, at 499, 512; D.V. Sandifer, *Evidence before International Tribunals* (1975), at 288, 303–305.

¹²¹ This problem has apparently also arisen on the rare occasions when witnesses are called before the Court: telephone interview with Mr David Vaughan QC (22 July 2010) cited with permission.

¹²² *Supra* note 13.

¹²³ Usher, *supra* note 13, at 199.

¹²⁴ *Supra* note 14, at 278.

¹²⁵ No reference appears in the judgment: Case 145/83, *Adams v. Commission* [1985] ECR 3539.

Court.¹²⁶ The interrogations ‘came off in a similar way to a normal cross-examination, in that the same progress was made but in a less confrontational manner’.¹²⁷

While the distinction between witnesses called by parties and those called by the Court may be technically correct, it is an unsatisfactory rationale. Instead of the technicality of calling witnesses, a more compelling explanation for the Court’s relaxed rules of witness examination is historical, in that there were no common law members of the ‘original Six’. Naturally, the protagonists drew upon their own national practices as well as the *laissez-faire* regime of the ICJ in shaping the Court’s early procedure. However, like all international courts the CJEU is far removed from the vicinity of the disputed facts.

While the European Courts are vested with certain powers to collect evidence,¹²⁸ in practice the parties have readier access to witnesses and, unlike in civil law jurisdictions, counsel are not excluded from the evidentiary process. This justifies the inclusion of common law standards designed to protect procedural integrity from inappropriate advocacy such as pre-testimonial communication, communication with witnesses under oath, preparation of witness statements, and interrogation technique (e.g., ‘leading’ questions and impugning the credibility of a witness). Although Principle 6.2 of the Hague Principles cautiously permits the controversial American practice of ‘witness proofing’, Principle 6.3 merely requires counsel ‘to comply with the procedural rules of international court or tribunal when presenting evidence’. More detailed ethical standards for counsel designed to protect the integrity of testimonial evidence would be a useful addition to the European Courts’ procedural rules to provide tighter safeguards for the hearing of witnesses.

4. *Judicial orders*

An issue that has arisen in ECtHR proceedings, though not before the CJEU, has been the infringement of judicial confidentiality orders.¹²⁹ In *Popov*¹³⁰ the (represented) applicant revealed the substance of friendly-settlement negotiations to the Court, alleging that

¹²⁶ Mr Vaughan, Interview, *supra* note 121.

¹²⁷ *Ibid.*

¹²⁸ Arts 45–49 CJEU Rules.

¹²⁹ Rule 62(2) ECtHR Rules.

¹³⁰ App. No. 74153/01, *Popov v. Moldova (no. 1)*, Judgment of 18 Jan. 2005.

Moldova had attempted to coerce the applicant into a settlement. The respondent countered that the applicant's assertion was 'offensive and defamatory' and an 'abuse of process'. In *F.M. v. Spain*,¹³¹ the Commission had occasion to investigate whether a Spanish *abogado* violated the confidentiality of its proceedings by speaking with Spanish media. While it found that the press had obtained confidential information, it did not have conclusive evidence that the representative was responsible.¹³²

In *B. and P.*,¹³³ the principal issue was whether the presumption in English law that confidential proceedings concerning children violated fathers' fair trial rights. The Vice-President's order, Mr Andrew McFarlane QC for the first applicant, and the self-represented second applicant referred to the full names of the applicants, their former partners, and their children.¹³⁴ This case preceded Rules 44A and 44D and the Court took no disciplinary measures. While it is uncontroversial that an advocate who breaches Court confidentiality acts unethically, it is less clear whether the advocate should be required to take steps to prevent his client from breaching confidentiality. Principle 5.1 of the Hague Principles requires counsel 'to abide by the rules of conduct, orders and directions of the international court or tribunal'.

5. *Courtesy*

The observance of decorum and courtesy towards the Court, the parties, witnesses, and other counsel is an uncontroversial ethical principle that is nevertheless vital for ensuring the smooth and efficient conduct of judicial proceedings. However, different standards of courtesy are observed in national jurisdictions and rude behaviour is not unheard-of before international courts. While a rare problem before the CJEU, one senior English counsel has confidentially related a case in which he was accused of dishonesty by a German opposing counsel. Although he was instructed by the British judge to withdraw his unsupported accusation,¹³⁵ the other judges did not consider the matter to be serious.

¹³¹ App. No. 13524/88, *F.M. v. Spain* (1991), 69 DR 185.

¹³² *Ibid.*, at 194. See also App. No. 25403/94, *Drozd v. Poland*, Judgment of 5 Mar. 1996.

¹³³ App. Nos 36337/97 & 35974/97, *B. and P. v. UK*, Judgment of 24 Apr. 2001.

¹³⁴ *Ibid.*, at para. 9.

¹³⁵ Para. 708, English Code.

Rudeness by counsel towards opposing parties and their representation has been more frequent before the ECtHR.¹³⁶ Apart from a reference to ‘abusive submissions’ in Rule 44D¹³⁷ there are no specific procedural rules concerning decorum. Although overt insults by counsel would presumably constitute misconduct, matters like ‘impeaching the credibility of a witness’ or accusing other counsel of dishonesty are more complex. In addition, there is a need for a professional duty of cooperation to promote orderly and expeditious proceedings. The lack of detailed rules in such situations renders it difficult to draw the line between zealous advocacy and professional misconduct. Principle 7.1 of the Hague Principles requires counsel to treat one another and others with ‘due respect, courtesy and dignity’. Principle 7.2 goes further in requiring counsel to use ‘best endeavours to cooperate effectively with each other’. While these provisions are straightforward, unsupported accusations of misconduct should also be forbidden.

3 Disciplinary Jurisdiction

While both European Courts have prescribed disciplinary powers concerning counsel,¹³⁸ they have never been exercised by the CJEU and are rarely invoked by the ECtHR. The CJEU is empowered to inform national bars or exclude lawyers for conduct ‘incompatible with the dignity of the Court or with the requirements of the proper administration of justice’ following a hearing of the impugned counsel. However, the omission of agents from this jurisdiction is questionable in light of cases such as *List D* and *Società Italiana Vetro*.¹³⁹ While the Court has issued costs orders to parties,¹⁴⁰ it may not have the power to issue costs orders to counsel¹⁴¹ for wasteful or abusive pleadings.¹⁴²

¹³⁶ Needless to say, the harassment or intimidation of opposing parties or their counsel should be considered unethical. See, e.g., M.D. Goldhaber, *A People’s History of the European Court of Human Rights* (2009), at 125–127, 138, 142–144.

¹³⁷ *Supra* note **Error! Bookmark not defined.**

¹³⁸ Art. 35(1) CJEU Rules; Rules 36(4)(b) and 44(D) ECtHR Rules.

¹³⁹ The CJEU has proposed including agents in its new Rules: Art. 46 Draft CJEU Rules, *supra* note 26.

¹⁴⁰ See, e.g., Case T–464/04, *Impala v. Commission*, Judgment of 13 July 2006, at paras 544–554. Prolix pleadings appear to have factored into the costs decision in Cases T–191/98 & 212/98–214/98, *Atlantic Container Line AB and Others v. Commission*, Judgment of 30 Sept. 2003, at paras 1646–1647.

¹⁴¹ Judge Forwood, Interview, *supra* note 32.

¹⁴² See, e.g., Case T–302/00, *Goldstein v. Commission*, [2001] ECR II–01127, at paras 40–41. According to the reporting judge, ‘It was clear that the lawyer in question had not drafted the party’s applications himself but had merely signed them. This clearly concerns not just the multiplicity of actions by the same party but

The ECtHR has only prescribed for itself the power to exclude. Rules 36(4)(b) and 44D¹⁴³ empower the President of the Chamber to exclude applicants' advocates 'in exceptional circumstances' or 'the representative of a party' who makes 'abusive, vexatious, misleading or prolix submissions'. The Rule 44D reference to 'representatives', in contrast to the Rule 36 reference to 'advocates', suggests that the power applies also to agents. The Court has exercised these powers rarely.¹⁴⁴

In addition to the problem of articulating common ethical standards for the divergent European professions, their enforcement is equally important. In the absence of an international bar authority, the Courts themselves are the logical forum to uphold the integrity of the common standards. As noted above, the rarity of professional conduct issues before the former is the principal reason for the dormancy of its disciplinary jurisdiction. However, there are also two important gaps in the disciplinary frameworks of the European Courts: (1) natural justice safeguards; and (2) reconciliation of jurisdictional conflicts with national bars ('double deontology').

Apart from the right to be heard in the CJEU Rules, the disciplinary powers do not provide natural justice rights (e.g., hearing, representation and appeal) for impugned counsel enshrined in Article 6(1) of the ECHR.¹⁴⁵ An important point is whether there are enough judges with the requisite expertise to exercise such powers competently:

Absolutely correct, and this seems to me to be self-evident. For example, I have an advantage in this area over *those of my colleagues* who have principally been academics, for example...[f]or these types of matters, it is important that judges called upon to deal with disciplinary matters concerning counsel have the background necessary to see all of the issues.¹⁴⁶

also issues like the duty of the lawyer to present tenable arguments, the independence of the lawyers and the duty of the lawyer to assume personal responsibility for the content of pleadings. However, the isolated nature of this case demonstrates that this sort of occurrence is not a general problem': Judge Forwood, Interview, *supra* note 32.

¹⁴³ A 2004 addition, Rule 44D was probably prompted by abusive submissions in practice. See, e.g., *Varbanov*, *supra* note **Error! Bookmark not defined.**

¹⁴⁴ In *Media Pro SRL v. Moldova*, the President invoked Rule 36(4)(b) to exclude counsel and ban him from future representation for fraudulently filing an application on behalf of an 'applicant': 'Letter in Media Pro' and 'Letter to applicants' provided by a confidential source (on file with author). See also 36 Coll. Dec. (1971) 37.

¹⁴⁵ R. Clayton and H. Tomlinson, *The Law of Human Rights* (2009), at 860 (para. 11.425).

¹⁴⁶ Interview with Judge Fura, *supra* note 79.

A disciplinary architecture needs to ensure that counsel can be confident that the judges and registrars are familiar with the realities and ethics of forensic advocacy.¹⁴⁷

The problem of ‘double deontology’ entails jurisdictional conflicts between international courts and national bars. This comprises two facets, namely, prescriptive conflicts between national and international codes of conduct and conflicts between the disciplinary jurisdictions of national bars and international courts. While this has arisen before international criminal tribunals,¹⁴⁸ the rarity of disciplinary proceedings before the European Courts has hitherto precluded its occurrence. One judge has surmised:

On that problem, it is likely that the EU Courts would be in a stronger position than the international criminal tribunals towards national bars because they can invoke the Article 10 duty of cooperation of the Member States, which is broad, to compel national bars to respect the jurisdiction of the Courts.¹⁴⁹

The essence of the problem is that counsel may be investigated for the same matter by two jurisdictions according to different standards. Without regulatory certainty, counsel lack the freedom necessary to discharge their professional duties effectively.

To preclude double deontology, national bars should relinquish disciplinary jurisdiction concerning conduct before the European Courts in exchange for their direct participation in the Courts’ disciplinary procedures. While national bars have the right of participation in the ICC framework for defence counsel,¹⁵⁰ they have not fully relinquished their jurisdiction. The practice of the international criminal tribunals illustrates that the supremacy of international courts’ disciplinary jurisdictions is vital to ensure that all counsel respect the common standards, especially when those standards conflict with those of their home bars.

¹⁴⁷ R. Mackenzie *et al.*, *Selecting International Judges: Principle, Process, and Politics* (2010), at 59–62.

¹⁴⁸ See, e.g., Decision on Assigned Counsel’s Motion for Withdrawal, *Milošević* (IT-02-54), Trial Chamber, 7 Dec. 2004; Decision on Defence Counsel’s Motion to Withdraw, *Barayagwiza* (ICTR-97-19), Trial Chamber, 2 Nov. 2000; Verbatim Record, *Taylor* (SCSL-2003-01-T), Trial Chamber, 4 June 2007, at 258–267; Decision on the Application of Sam Hinga Normal, *Norman et al.* (SCSL-04-14-PT), Trial Chamber, 8 June 2004; Decision on Appeal against the Trial Chamber’s Decision on Assignment of Counsel, *Šešelj* (IT-03-67), Appeals Chamber, 20 Oct. 2006; Verbatim Record, *Stanisic and Zupljanin* (IT-08-91-T), Verbatim Record (10 Nov. 2009), at 2846.

¹⁴⁹ Judge Forwood, Interview, *supra* note 32.

¹⁵⁰ Arts 37(2) and 38 ICC Code of Professional Conduct for Counsel 2005 (ICC-ASP/4/Res.1).

4 The Articulation of Common Ethical Standards

The feasibility of the prescription of common ethical standards for counsel depends upon the cooperation of three key actors: (1) the European Courts; (2) the national bars; and (3) the CCBE. While the CCBE is not a ‘federal bar’, it is nevertheless the logical forum for the drafting of codes of conduct for the European Courts for three reasons. First, the CCBE membership comprises national bars of all EU members and almost all of Council of Europe (‘CoE’) members.¹⁵¹ Secondly, the CCBE has the experience of having drafted its Code of Conduct applicable to transnational legal services within the Common Market. Thirdly, judges at both Courts have independently recommended the CCBE. Finally, the CCBE has the technical expertise concerning counsel’s ethics.

The participation of national bars through the CCBE is crucial for the authority of the standards. According to the President of the General Court:

Although I can anticipate that many national bars would not be in favour of a ‘European bar’, I can see intellectual arguments in favour of such an idea. We have some 700,000 lawyers who now may plead before the Court, from 27 Member States all with their own deontological rules, so there are strong arguments for the Court to only deal with one bar and one set of rules.¹⁵²

Consultation with the judges would also be essential:

If the CCBE were to adopt a code of conduct for cases before the CJEU, the judges of both the EU Courts would necessarily be consulted as part of that process for our views. That would likely be the way in which such a project could be achieved. Having previously served as the CCBE Representative to the ECJ as part of its Permanent Delegation, I can imagine that there would be interest within the CCBE to undertake such a project.¹⁵³

The idea of CCBE-drafted standards is of interest to judges at both European Courts. Despite the considerable differences between the two Courts, there are factors that

¹⁵¹ Andorra, Azerbaijan, Bosnia and Herzegovina, Monaco, Russia, and San Marino are the exceptions: ‘Status of the CCBE Code of Conduct at a national level’, available at: www.ccbe.org/fileadmin/user_upload/NTCdocument/Status_of_the_CCBE_C1_1251875770.pdf (accessed 20 Feb. 2012).

¹⁵² President Jaeger, Interview, *supra* note 13.

¹⁵³ Judge Forwood, Interview, *supra* note 13.

militate for the adoption of similar codes of conduct through the CCBE: (1) the anticipated EU accession to the ECHR; (2) the shared 27 states which are both EU and CoE members; (3) shared regional legal cultures; and (4) as explored above, shared ethical and procedural issues in practice such as conflicts of interest and misleading the court. While each Court has its own particular jurisdiction, there is a sufficient basis for CCBE-drafted standards to be articulated for both Courts to promote consistency.

A key dynamic of the drafting process is the instinct to favour the familiar, namely principles that derive from one's own national legal culture. To prevent the process from descending into a clash between the merits of these different cultures, committees will often adopt an approach that focuses upon finding the lowest common denominator among competing principles. Where it is impossible to do so because the difference is too great, controversial issues are redacted to preserve areas of agreement. This dynamic promotes minimal standards because it provides a veto for those jurisdictions with the laxest standards, which results in the irony that those areas most in need of normativity in practice are the least likely to be addressed.

Although the ILA Hague Principles suggest that there are areas where different national approaches are capable of synthesis, they also illustrate the limitations of minimal standards. To articulate common standards in areas of national disagreement, principles need to be selected that promote the procedural integrity of the European Courts in light of practical realities. For example, the Continental scepticism of employed lawyers' independence is arguably more likely to promote strict ethics than the permissive English approach. However, the stricter common law rules on witnesses are preferable to the relaxed Continental rules due to the party-centred evidentiary process. Thus, the drafting process should not entail bartering amongst national jurisdictions but rather a pragmatic selection of principles to protect the integrity of the judicial process

5 Conclusions

This article has examined the procedural rules concerning advocacy at the European Courts and certain ethical problems that have emerged in practice. While ethical issues have been relatively rare and minor before the CJEU, they have occurred more frequently and seriously before the ECtHR. This suggests that the prescription of ethical standards

for counsel is more necessary for the latter than for the former. However, certain issues such as dishonesty and documentary evidence have arisen in the practice of both Courts and ongoing EU membership expansion can potentially increase the relevance of counsel misconduct before the CJEU. Thus, it is suggested that the prescription of codes of conduct for counsel would be a useful step to promote the procedural integrity of both Courts.

Qualification requirements, ethical standards, and disciplinary powers were examined with reference to the procedural rules and practice of the European Courts as well as the ILA Hague Principles. While certain problems are more important before one Court than the other, in general the issues that were identified are common to both. Concerning qualification requirements, the bifurcation between agents and lawyers is doubtful with reference to the principle of equality of arms as well as cases involving questionable conduct by agents. Despite the important differences in the jurisdictions and procedures of the respective Courts – notably the greater role of evidence in ECtHR proceedings – issues such as dishonesty, the authenticity of documentary evidence, appropriate handling of witnesses, and breaching judicial orders are relevant to both. Regarding disciplinary powers, the importance of natural justice guarantees for counsel (in particular, the expertise of the judges) and the harmonization of international disciplinary jurisdiction with those of national bars are also common problems.

The articulation of common ethical standards is about not only solving existing problems but also precluding potential ones. For example, there has been no suggestion in practice that *ex parte* communications (e.g., between agents and judges of the same nationality) are a major problem at either Court. Prescribed standards¹⁵⁴ can nevertheless serve a deterrent function. Common standards also promote the creation of an international judicial culture amongst lawyers from diverse national jurisdictions. Finally, such standards would arguably promote institutional legitimacy in the outside world.

Interviews with judges, registrars, and counsel suggest that the CCBE is the best forum for the drafting of codes of conduct. The CCBE, as a common organization for national bars, can serve as an important focal point between the bars and the Courts. Despite the considerable differences between the jurisdictions, procedures, and

¹⁵⁴ Hague Principles, Principles 5.4–5.5.

memberships of the two Courts, there is a case for the CCBE to draft codes for both Courts. This would not only strengthen the authority of the putative codes of conduct, as the agreed text amongst the various jurisdictions, but would also go some way towards precluding the double deontology problem through their adoption by the national bars.

Even anodyne standards provide a textual framework within which counsel and judges can better address the entire field of professional ethics before the Courts. Accretion through practice can provide convergence in those areas upon which agreement was not possible. What is necessary is a common foundation concerning the role of the advocate as a servant of the judicial system and an independent intermediary between court and client. In the nascent process of professionalization of advocacy in the international judicial system, this shared European legal culture is an important factor in the continuing formation of an common international judicial culture.