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LEGAL ETHICS IN INTERNATIONAL CRIMINAL PRACTICE

Introduction

1. Whereas legal practitioners coming from domestic legal practice work in a stable environment with long-standing codes of professional conduct and professional regulating bodies governing professional ethical practice standards, international criminal law, in practice, is a dynamic fusion of procedures and approaches taken from the common law (adversarial) tradition and the civil law (inquisitorial) tradition, with practitioners coming from culturally diverse backgrounds, experienced in their various domestic legal settings.

2. In international criminal institutions, there is significantly less certainty about acceptable norms of behaviour for lawyers, and very rarely, adequate guidelines for ethical professional legal conduct or a legal framework to deal with misconduct. Ethical considerations are therefore based on the practices, assumptions, values and expectations of the mixture of practitioners who work within the setting, resulting in ad hoc determinations of ethical obligations and inconsistency across the different tribunals.

3. This paper discusses common ethical issues that arise in the international criminal law arena, where the applicable procedures are a hybrid of the inquisitorial and adversarial legal traditions. The paper draws on my personal experiences and observations from my involvement as International Counsel for Civil Parties at the Extraordinary

Chambers in the Courts of Cambodia (ECCC or "Khmer Rouge Tribunal"). Topics touched upon include:

a. the independence and impartiality of judges on an international bench
b. prosecutorial ethics (witness conferencing and proofing)
c. defence ethics (duties to the client appears to usurp duties to the court)
d. common issues confronted by Civil Party counsel
e. the duty of client confidentiality within the physical structures and networked electronic systems used by international(ised) courts and tribunals
f. the lack of guidelines for ethics in international courts and tribunals
g. the lack of mechanisms to deal with ethical transgressions

4. Whilst the paper examines and discusses both theoretical/academic and practical aspects to these ethical considerations, I will, during the presentation, flesh out some examples from each of these areas (without so much naming names).

Principles of Legal Ethics in the Common Law

5. In Australia, the sources of ethical duties and obligations are set out in the various state and territory *Legal Professional Acts* and *Regulations*, the Australian *Solicitors Conduct Rules* (or equivalent Law Society's Rules of Professional Conduct and Practice), and the Australian Bar Association's *Barristers' Conduct Rules* (or its state and territory equivalents). Lawyers duties are also spelt out by terms of a retainer (contract law), and dictated through the development of relevant common law and equity case precedents.

6. In common law systems, the lawyer's duties to the court is paramount and prevails over his or her duties to his or her client. These duties are informed by concepts of the independence of the profession, a lawyer's duties to the public interest, the limits of over-zealous representation of a client and the consequences of failing to uphold the duty to the court. A lawyer's duties to the court include:

a. Duty to conduct proceedings with candour & honesty: *Incorporated Law Institute of NSW v Meaher* (1901) 9 CLR 655 per Isaacs J at 681

b. Duty to assist the court as to the law
c. Duty not to knowingly mislead the court

7. The lawyer-client relationship is a fiduciary relationship which imposes obligations of trust, integrity and confidence and fiduciary duties. Statutory and common law duties to the client include:

    a. Duty of confidentiality (this obligation encourages full and frank disclosure between client and lawyer and is a duty that outlives the life of the retainer or death of client) and
    b. Duty to act with competence and diligence

8. Lawyers, as the face of the law, also have duties to the public, including:

    a. Duty to uphold the law
    b. Duty to refrain from assisting client break law
    c. Duty to maintain the integrity and reputation of the legal profession (courteous communications)
    d. Duty not to make misleading representations
    e. Duty to undertake continuing legal development

9. Counsel having the conduct of litigation proceedings hold a position of trust in an adversarial system, which carries specific duties, such as:

    a. Duty to conduct cases efficiently and expeditiously
    b. Duty not to make forensic decisions to gain a collateral advantage
    c. Duty not to be a mere mouthpiece for the client
    d. Duty not to abuse court processes / corrupt administration of justice
    e. Duty not to mislead the court in pleadings, submissions, openings or closings
    f. Duty not to allege any matter of fact without material to support
    g. Duty to cross-examine fairly
    h. Duty not to allege any matter of fact amounting to criminality, fraud or other serious misconduct unless reasonable basis to support allegation

i. Duty not to make suggestion on credit unless reasonable belief that if accepted, the suggestion would diminish the witness' credibility

10. Counsel engaged in prosecutorial work have additional obligations, particularly obligations of disclosure, and the obligation to act fairly and in a balanced manner at all times.

11. Counsel acting in adversarial *ex parte* interlocutory applications or proceedings involving unrepresented parties, have a special duty to be candid, to make accurate representations, and comprehensively represent the client's case, to ensure the court is not misled.

Key Differences between Common Law and Civil Law Systems

12. In order to understand why legal professional ethics in the international criminal law arena is complex, uncertain and often *ad hoc*, it is necessary to have a brief comparison of the key differences between the common law (largely the English-speaking world) and civil law traditions (continental Europe and its colonies):

    a. **Legal System**: Whilst the common law legal system is characterised by the development of precedent through evolving case law, from the decision of judges, in the civil law legal system, core principles of law are codified into a referable system which serves as the primary source of law.

    b. **Judges**: In common law systems, judges make rulings and set precedents, without so much enquiring extensively on matters before them, instead, relying on counsel presenting arguments to adduce evidence and make submissions. Except for matters involving a jury, judges will also determine matters of fact. In civil law systems, a judge plays the role of chief investigator, whose role is to establish the facts of a case and apply the code to those facts.[1]

[1] In civil law systems, law graduates can complete judges training programs and become investigating judges following successfully completing the course, whereas in common law systems, a practitioner would very rarely become a judge until and unless they acquire years of specialised legal skills and knowledge, often after taking silk.

c. **Charges**: In civil systems, Investigating Judges investigate matters and lay the formal charge. In common law systems, there is often independence between the investigating police and the Office of the Prosecution:

i. In state and territory criminal matters, police investigate matters and lay charges, after which a brief is referred to the Prosecuting Office, which independently assesses the charges, and amends or discontinues charges as necessary.

ii. In Commonwealth criminal matters, investigators refer to the Commonwealth DPP briefs of evidence, with charges being assessed and laid by prosecutors.

Background to my work at the ECCC

13. In order to give context to the examples I will provide of ethical dilemmas in the international criminal law space, I will provide a brief overview of the institutional structures, jurisdiction, and cases before the Extraordinary Chambers in the Courts of Cambodia, in which I practice.

14. The ECCC was established in 2003 through an agreement between the Government of Cambodia and the United Nations and the *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia* (hereinafter, "ECCC Law").[2]

15. The tribunal is a hybrid, internationalised court, based largely on a civil law (inquisitorial) model, within the domestic courts in Cambodia. However, in practice, the tribunal is infiltrated by common law (adversarial) influences, as practitioners come from both civil and common law backgrounds.

[2] *Agreement between United Nations and Cambodian Government regarding Prosecution under Cambodian Law of Crimes Committed During Period of Democratic Kampuchea* (signed 2003, amended 2004); *and Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea* (2001; amended 2004).

16. The tribunal operates in three languages (local language, Khmer, and the two international languages, English and French) and applies both substantive international and domestic law, as well as Cambodian procedural law. Cambodian and international legal professionals are engaged in each of the tribunal's judicial components (Prosecution, Defence, Civil Parties, Pre-Trial Chamber, Trial Chamber, and Supreme Court Chamber) as well as its administrative components (Office of Administration, Public Affairs Office, Victim Support Section and Defence Support Section). Each side of the court operates its own respective budget, financing and human resources.[3]

17. The tribunal has jurisdiction to "try Senior Leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during 17 April 1975 to 6 January 1979". These include genocide, crimes against humanity and grave breaches of the Geneva Conventions (war crimes) under the *Law on the Establishment of the ECCC* and domestic crimes under the *Cambodian Penal Code* 1956, such as homicide, torture and religious persecution.

18. In an unprecedented victim participation scheme, based on Cambodia's domestic procedural law, founded on the civil law tradition, and introduced in 2007, victims of crime were permitted to join the (criminal) proceedings as "civil parties", with a mandate to support the prosecution, and to seek "moral and collective reparations" for harm suffered. The unprecedented procedural rights afforded to Civil Parties are more extensive than rights given to victim participants at the International Criminal Court and include rights to request further investigations at the investigative phase; rights to examine witnesses at the trial phase; and rights against self-incrimination for Civil Parties giving evidence.

19. Since its inception, the ECCC has charged individuals in Cases 001, 002, 003 and 004. This paper draws from my experiences in Cases 002 (at trial phase) and 003 and 004 (pre-trial phase).

[3] The international community largely funds the international side of the court, and the Cambodian government is responsible for funding the national (human) resources of the court.

20. The case currently at trial phase is Case 002, in which four accused Senior Leaders were charged with committing atrocity crimes via a Joint Criminal Enterprise, including genocide against two minority groups: the ethnic Vietnamese and the Cham Muslims.

21. I represent the ethnic Vietnamese minority the subject of the genocide charges. The Vietnamese genocide case was based on evidence of mass deportations of the group; discriminatory treatment amounting to persecution; incitement of anti-Vietnamese hatred and war propaganda; mixed marriage policies whereby Khmer individuals in mixed Khmer/Vietnamese couples were ordered to kill their Vietnamese spouse and children; and a pattern of systemic and widespread execution of members of the group. An ECCC's demographic expert report established that the Khmer Rouge regime achieved a 100% elimination of the ethnic Vietnamese from Cambodia by the time the regime collapsed in 1979.

22. Four of the Khmer Rouge Regime's former Senior Leaders were initially charged in Case 002.[4] Of these four, two have passed away: Ieng Sary in March 2013, the death of his wife, Ieng Thirith, in August 2015, following years of being unfit to stand trial. Presently, there remain only two accused: Nuon Chea (Brother Number 2 to Pol Pot, Brother Number 1), 89 years old; and Khieu Samphan (Nominal Head of State), 84 years old.

23. The ECCC's other cases deserve a brief mention as there will also be examples of ethical digressions arising from these cases:

    a. On 26 July 2010, the first verdict against Kaing Guek Eav (alias "Duch", the Chief of S21, the torture centre in Phnom Penh), was issued, in which Duch was found guilty of war crimes and crimes against humanity and convicting and sentencing him to an effective total sentence of 19 years imprisonment,[5] which, on appeal by the Prosecution, was increased to life imprisonment.

[4] The charged persons are: Nuon Chea, 87, Former Chief Ideologue/Brother Number 2; Khieu Samphan, 81, Nominal Head of State; Ieng Sary, 87, Deputy Prime Minister, Foreign Affairs Minister (passed away 14 March 2013), and Ieng Thirith, 80, Minister for Social Affairs (found unfit to stand trial on 16 September 2012).
[5] Duch was initially sentenced to 35 years imprisonment, minus 5 years for illegal military detention, minus 11 years in pre-trial detention counted as served – a total effective sentence of 19 years.

b. Cases 003 and 004, concerning "those most responsible" (ie. middle ranking leaders, as opposed to the "Senior Leaders") have been wrought with political interference, and stalemates between the national and international bench, both at the Office of the Co-Investigating Judges and at the Pre-Trial Chamber (dealing with appeals from the Co-Investigating Judges). A Civil Party admissibility appeal I conducted uncovered certain irregularities at the court, which I will discuss later.[6] After years of uncertainty was to whether Cases 003 and 004 will proceed to trial, the suspects under investigation have now been charged.

Common Ethical Issues in International Criminal Law

The independence and impartiality of judges on an international bench

24. Whilst each international tribunal may prescribe rules of conduct (oftentimes under the procedural internal rules of the court), the "ICC Code of Ethics", adopted by the ICC judges and entering into force on 9 March 2005[7], complements the Rome Statue and Rules of Procedure and Evidence by regulating the independence, impartiality of conduct of judges at the International Criminal Court (**ICC**).

25. In international criminal law, one clear challenge for judges is the obligation to remain impartial in the face of adjudicating proceedings concerning evidence about mass atrocity crimes (war crimes, genocide and crimes against humanity) and despite any human, human rights, or political affiliations they may feel personally aligned with.

[6] This was the appeal against the decision of the Co-Investigating Judges deeming a client, Rob Hamill, inadmissible in Case 003, in circumstances where he had been admitted as a Civil Party in Cases 001 and 002 on the same facts. Rob Hamill was affected by the death of his brother at S21, who was admitted in Case 001 (against Duch, Head of S21) and Case 002 (against the Senior Leaders who managed Duch), but, on the same facts, rejected in Case 003 (against the Commander of the Navy, responsible for capturing foreign nationals off the coast of Cambodia and conveying them to S21).

[7] International Criminal Court, "Code of Judicial Ethics"(ICC-BD/02-01-05) (9 March 2005).

26. Article 11 of the ICC Code states that the Code shall serve as guidelines on the essential ethical standards required of judges in the performance of their duties and"are advisory in nature, having the object of assisting judges with respect to ethical and professional issues with which they are confronted. As such, it appears they remain guidelines only, with no real enforceable mechanism.

27. The guidelines provide:

    a. **Judicial Independence**: Judges shall uphold the independence of their office; shall conduct themselves accordingly in carrying out their judicial functions; and shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence (Article 3).

    b. **Impartiality**: Judges shall be impartial and ensure the appearance of impartiality in the discharge of their judicial functions, and avoid any perceived or actual conflict of interest (Article 4).

    c. **Integrity**: Judges shall conduct themselves with probity and integrity, enhancing public confidence in the judiciary, and shall not accept any gift, advantage, privilege or reward that can reasonably be perceived as being intended to influence the performance of their judicial functions (Article 5).

    d. **Confidentiality**: Judges shall respect the confidentiality of consultations which relate to their judicial functions and the secrecy of deliberations (Article 6).

    e. **Diligence**: Judges shall act diligently in the exercise of their duties; take reasonable steps to maintain and enhance the knowledge, skills and personal qualities necessary for judicial office; perform all judicial duties properly and expeditiously and deliver their decisions and any other rulings without undue delay (Article 7).

    f. **Conduct during proceedings**: In conducting judicial proceedings, judges shall: maintain order, act in accordance with commonly accepted decorum, remain patient and courteous towards all participants and members of the public present

and require them to act likewise; exercise vigilance in controlling the manner of questioning of witnesses or victims in accordance with the Rules and give special attention to the right of participants to the proceedings to equal protection and benefit of the law; and avoid conduct or comments which are racist, sexist or otherwise degrading and ensure that any person participating in the proceedings refrains from such comments or conduct (Article 8).

g. **Public expression and association**: Judges shall exercise their freedom of expression and association in a manner that does not affect or appear to affect judicial independence or impartiality; shall not comment on pending cases and shall avoid expressing views which may undermine the standing and integrity of the Court (Article 9).

h. **Extra-judicial activity**: Judges shall not engage in any extra-judicial activity incompatible with their judicial or that may affect or may reasonably appear to affect their independence or impartiality. Judges shall not exercise any political function (Article 10).

Examples at ECCC where judicial independence in question:

- National and international hybrid structure of the court
- Political interference in Cases 003 and 004 – public statements by Prime Minister Hun Sen that these cases will not proceed
- Rob Hamill Civil Party admissibility appeal uncovers irregularities at the court (2011)
- Differences between national and international judges concerning charging the suspected persons

Prosecutorial Ethics

Witness Proofing

28. Witness conferences (pre-trial witness preparation) enables counsel to meet with a witness to explain the likely areas of evidence in chief and cross-examination, and to advise witnesses about the role of the prosecution, defence and judge, as well as

familiarise a witness about courtroom layout and procedures, prior to the giving of evidence. Whilst witness proofing is acceptable and commonly practised in the common law traditions, in international courts, the practice varies.

29. Both the prosecution and defence teams at the International Criminal Tribunal for Rwanda (**ICTR**) and the International Criminal Tribunal for the Former Yugoslavia (**ICTY**) commonly proof their witnesses (noting that the Statues and Rules of Procedure and Evidence at the ICTR and ICTY are silent on this topic). Witness coaching, is of course, not permitted.

30. However, the Pre-Trial Chamber of the International Criminal Court, in the case of *Prosecutor v Lubanga Dyilo*, in November 2006, banned witness proofing, stating that the facilitation of the witnesses' familiarisation of the courtroom can only be done through the court's witness service. In 2007, this ruling was relaxed and witnesses were permitted to refresh their memory by reviewing their prior statements. However, a prohibition still existed in relation to lawyers meeting or talking with witnesses once they arrived in The Hague. The Trial Chamber considered that "any discussion on the topics to be dealt with in court or any exhibits which may be shown to a witness … could lead to a distortion of the truth and may come dangerously close to constituting a rehearsal of in-court testimony".[8]

31. This is in spite of the fact that victims and witnesses of mass crimes, in international(ised) trials, who have experienced and/or witnessed a large number of crimes throughout different locations over a longer duration of time, would clearly be assisted with proofing to assist their understanding of the scope and relevance of their evidence to the charges in the indictment at trial. Further, witness conference could avoid unnecessary court time spent over objections and argument over the scope and relevance of evidence to be adduced.

32. At the ECCC, one of the benefits of Civil Party participation is that Civil Party Lawyers can conference their clients (victims of crime who are proposed to give factual and

[8] *Prosecutor v Lubanga Dyilo*, Decsion Regarding the Practices Used to Prepare and Familiarse Witnesses for Giving Testimony at Trial, Case No. ICC-01/04-01/06, Trial Chamber I at 51 (30 November 2007).

victim impact testimony) ahead of their in-court testimony, whereas the Prosecution cannot proof their witnesses. Instead, the Prosecution is limited to the witnesses interviewed by their Office, or by the Co-Investigating Judges Office at the pre-trial investigation phase, even if it has been many years between the first interview, and the time the witness is scheduled to give evidence at trial. Civil Parties, who can be conferenced, selected as proposed victim-witnesses of fact and harm, and proofed ahead of time, have proven to be very effective in giving both fact evidence and victim impact statements at trial, at times, moreso than prosecution witnesses.

Witness Payments

33. International courts must be, and be seen to be, institutions that foster judicial independence, impartiality and fairness in all the various court chambers. At the Special Court for Sierra Leone, the first accused, Issa Sesay, challenged the creation of a Witness Management Unit (**WMU**) under the Office of the Prosecutor (**OTP**), which allegedly made payments to witnesses who were to testify for the prosecution. The witness payments authorised by the prosecution unit would have undermined the credibility of the trial proceedings. The court in that matter did not directly address the issue. However, the structural mechanisms in place for the administration and payment of witness expenses in international courts should be always be structured in a way in which allegations of witness inducement by one party upon another can be avoided.

Other Examples at ECCC touching upon Prosecutorial Ethics

- In Case 001, against Kaing Guek Eav (alias "Duch"), the Prosecution initially sought 40 years imprisonment for crimes associated with Duch's role at the torture centre, S21. Duch was initially sentenced to a total effective sentence of 19 years (being 35 years imprisonment, minus 5 years for illegal military detention, minus 11 years in pre-trial detention counted as time served). The prosecution (perhaps in part, bowing down to public pressure) appealed the "light" sentence, after which Duch received life imprisonment.

- After four years of Case 002 being at pre-trial phase (2007-2010) and nearly three years of Case 002 being at trial phase (2010 - 2013), the prosecution changed the particulars

of the joint criminal enterprise of which the four co-accused Senior Leaders had been initially charged, just before the Closing of Case 002/01 (2013), when all or most of the evidence hearings had already taken place.

- Late disclosure of materials from investigations in Cases 003 and 004 relevant to matters tried in Case 002.

Defence Ethics

Examples of Defence Digressions on Ethical Issues in International Criminal Law

34. My personal experience with the conduct of defence counsel at the ECCC (and my observations of such conduct in other international(ised) proceedings), lead me to an understanding that, unlike the common law system, where a lawyer's duty to the court is paramount, the same does not hold true for lawyers practising in civil law based systems, where conduct otherwise amounting to contempt of court is not only tolerated, but permissible. Some examples include:

- Withdrawal from a case following termination of counsel by client (in spite of an order by Trial Chamber to continue representing the client) – *Prosecutor v Taylor,* Special Court for Sierra Leone
- Open contempt of court – including:
    - making a mockery of proceedings
    - personal attacks against judges on the bench
    - boycotting proceedings – eg. Defence for Nuon Chea in ECCC Case 002
- Allegations against fellow practitioners without proper basis (my personal experience on 16 Dec 2015 re: allegation from Victor Koppe, Defence for Nuon Chea in ECCC Case 002 of an unspecified nature, where defence counsel said in open court that he would not hesitate to "refer the matter to the Australian Bar Association")
- Referrals by Trial Chamber to National Bar Associations of various Defence Lawyers (The Netherlands, France etc) – the national bar associations then finding that lawyer's conduct (amounting to contempt, in the common law system) was not professional misconduct in the civil law system.

Civil Party Counsel Ethics

35. At the ECCC, Civil Party Lawyers, at the pre-trial phase, were not provided a room at the court premises, which created issues pertaining to an inability to strictly keep the confidentiality of client information. Following a request for the court administration to provide a room for Civil Party Lawyers at the court premises for the upcoming trial phase (noting that Defence and Prosecution and all other arms of the court were provided a space to work in at the court premises but that *pro bono* counsel acting for hundreds of Civil Parties were excluded), the Administration of the Court accused myself and another international Civil Party Lawyer, Silke Studzinsky of contravening Article 1 of the Cambodian Bar Association's Code of Conduct, for "not having a professional domicile in Cambodia". This went to the Pre-Trial Chamber, whose judges invited a response from myself and Ms Studzinsky. Responses were provided following which the Pre-Trial Chamber took a view that it did not have jurisdiction to determine the matter.

Other Examples of Ethical Issues Confronted by Civil Party Lawyers at ECCC

- As above: Duty of client confidentiality impeded when Civil Party Lawyers forcibly moved from ECCC court premises (within the physical structures and networked electronic systems used by the ECCC) to work at Phnom Penh's "ECCC Public Information Centre" – submissions to Pre-Trial Chamber (2010/2011)
- Allegation of "genocide denial" by fellow Civil Party Lawyer who, without legal merit, sought to have "genocide charges" for his client recognised prior to the closing in Case 002/01
- Working with volunteers/interns and the duty to maintain confidentiality:
    - Working abroad with remote access to the court's electronic systems
    - When interns "switch jobs" between the different sections of the court

Conclusion

36. Witness proofing, terminating counsel, conflicts of interest principles that apply when changing jobs, defense conduct during proceedings, including boycotting proceedings on behalf of the accused, are common issues that arise in international criminal law

ethics. It is clear that there is a lack of legal professional ethics guidelines for lawyers working in international criminal law, and further, a lack of mechanisms to deal comprehensively with ethical transgressions. "Transnational lawyers" – or lawyers working across multiple jurisdictions – may face multiple and even contradictory rules of ethics.

37. It has been argued that tribunals should develop a Code of Conduct for all counsel (whether appearing for the prosecution, defence or civil parties), to provide uniform guidelines to give practitioners clearer guidance about how to behave in certain/various situations unique to the practice of international criminal law.

38. At present, questions still remain about whether a Code of Ethics would act as a sword or a shield; whether specific or general provisions should be specified in such a Code; what body governs the behavior of lawyers and judges in international criminal jurisdictions; and how and to whom should both lawyers and judges be held accountable, leaving this area an *ad hoc* practice.

Sources

ASIL Proceedings, *Challenges of Transnational Legal Practice: Advocacy and Ethics* (2009), 255 – 267.

Australian Bar Association, *Barristers' Conduct Rules*, 1 February 2010.

Brandeis Institute for International Judges, *Toward the Development of Ethics Guidelines for International Court* (excerpt from the 2003 Report found at www.brandeis.edu/ethics/internationaljustice .

Dal Pont, *Lawyers' Professional Responsibility*, 5th ed, Thomson Reuters, 2013.

Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, EJIL (2002), Vol. 13, No 3, 561 – 595.

International Criminal Court, *Code of Judicial Ethics*, (ICC-BD/02-01-05) (9 March 2005)

Jenia Iontcheva Turner, *Legal Ethics in International criminal Defence,* Chicago Journal of International Law, Vol. 10, No. 2, pp 1 – 62.