LECTURE ON CONFLICTS OF INTEREST

by Michael G. Karnavas

"'Conflict of interests' is a term that is often used and seldom defined."[1]

On 16 April 2014 I was invited by the Association of Defence Counsel practicing before the International Criminal Tribunal for the Former Yugoslavia (ADC-ICTY) to conduct training for its members and others on ethics. The topic chosen was Conflicts of Interest. The lecture lasted 2 hours. A modest PowerPoint presentation was used to guide the lecture which was based on handout material made available after the lecture. Certificates were also issued to the participants for those who wished to claim 2 hours of CLE on ethics with their national / state bar.

The lecture focused on the lawyer's core responsibilities to the client in both national and international jurisdictions: c*ompetence, diligence, communication, confidentiality, loyalty, honesty*, and *independence.* Principles that are universal.

National codes of conduct have inspired the codes of conduct adopted by the various international and internationalized tribunals. Thus, for comparative purposes (and to show the universality of these core principles), I began by discussing some of the national codes such as the American Bar Association Model Rules of Professional Conduct, the United Kingdom's Bar Standards Board Handbook for Barristers, France's Règlement intérieur national de la profession d'avocat, and others. In addition to discussing some of the codes of conduct at the international tribunals such as ICTY Code of Professional Conduct for Counsel Appearing before the International Tribunal, the ICC's Code of Professional Conduct for Counsel, the Code of Professional Conduct for Defence Counsel and Legal Representatives of Victims appearing before the Special Tribunal for Lebanon and the Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone, I also made reference to other relevant codes, such as International Bar Association's International Principles for the Conduct of the Legal Profession, The Hague Principles on Ethical Standards for Counsel Appearing Before International Courts and Tribunals and the International Criminal Bar Code of Conduct and Disciplinary Procedure of the International Criminal Bar.

[1] *Cuyler v. Sullivan*, 446 U.S. 335, 356 (1980) (United States Supreme Court Justice Thurgood Marshall, dissenting).

Most of the cases concerning conflicts of interest in the international criminal law arena come from the ICTY, though this is not to say that other tribunals are bound by or necessarily follow ICTY jurisprudence. In fact some hybrid tribunals, such as the Extraordinary Chamber in the Courts of Cambodia (ECCC), are first and foremost a domestic court and as such must first looked to national standards. And since the Cambodian legal system is based on the French civil law system, where there is need for guidance, French procedure and jurisprudence is the most appropriate source for answers on conflicts of interest questions.

However, since the lecture was for ICTY lawyers, I focused on defining conflicts of interests and how they can be resolved, based on ICTY jurisprudence. P*rosecutor v. Simić,* the seminal ICTY case, served as the point of departure:

> A conflict of interest between an attorney and a client arises in any situation where, by reason of certain circumstances, representation by such an attorney prejudices, or could prejudice, the interests of the client and the wider interests of justice. Most systems of law have rules governing the participation of an attorney in a trial when there is a conflict of interest between the attorney and the client; such a conflict affects the essential fairness of the trial, and in respect of the Tribunal, implicates, first, the responsibility of the Trial Chamber … to 'ensure that a trial is fair … with full respect for the rights of the accused…,' and secondly, the right of the accused … to a fair trial.[2]

ICTY jurisprudence shows that there is single uniform standard applied at the ICTY in determining conflicts of interest. From ICTY jurisprudence it appears that the Chambers have faced four basic situations[3] concerning possible conflicts of interest, carving out four distinct, albeit nuanced, tests. The four different situations are: **a.** conflicts arising because counsel may be called as a witness; **b.** conflicts arising because counsel was a former member of the Prosecution; **c.** conflicts arising because of counsel's concurrent representation of two clients; and **d.** conflicts arising because of counsel's former representation of another client. All four situations were discussed in some detail, setting

[2] *Prosecutor v. Simić et al.,* IT-95-9-PT, Decision on the Prosecution Motion to Resolve Conflict of Interest Regarding Attorney Borislav Pisarević, 25 March 1999, p. 6.

[3] One additional situation not discussed herein involved the Accused Knežević's request to have Mr. Zeć assigned to represent him. Mr. Zeć worked in the same law firm as a lawyer Mr. Deretić, who the Registrar had previously refused to assign to Knežević. The Registrar had learned of unprivileged phone calls in which Mr. Zeć encouraged Knežević to request Mr. Zeć's assignment, stating that if Mr. Zeć was assigned, Mr. Deretić could continue to work alongside him, since both worked in the same law firm. The Registrar submitted that this would contradict his previous decision not to assign Mr. Deretić. The Trial Chamber considered these phone calls to amount to improper conduct and denied the application to review the Registry's decision. *See Prosecutor v. Knežević*, IT-95-4-PT / IT-95-8/1-PT, Decision on Accused's Request for Review of Registrar's Decision as to Assignment of Counsel, 6 September 2002.

out the tests established through the cases. Part of the handout material provided was a summary of cases showing how Chambers have resolved conflicts.

Part of the lecture focused on some of the factors the ICTY and national chambers consider in determining the existence of conflicts of interest and whether such conflicts can be resolved (overcome) by appropriate waivers or are irreconcilable requiring disqualification. Though a Suspect or Accused has the right to counsel of his or her own choosing, this right is not unqualified. That said, former-client rules provide opportunities for predatory use in disqualification motions which are not necessary to protect the confidentiality of client information. It is not uncommon for prosecutors to seek the removal of a lawyer solely for tactical reasons. Courts should be circumspect before disqualifying lawyers on illusory claims and fanciful anticipatory scenarios. Judge Mumba, in her Separate Opinion in the *Prlić* Appeals Chamber Decision, put it best:

> In as much as it is the duty of Judges to conduct proceedings with integrity, it is of the utmost importance, in my view, that caution should be exercised in the intervention as to choice of counsel for accused persons. An accused person's right to choose counsel is inherent in the right to a fair trial, albeit not absolute. In a number of cases in this Tribunal charges overlap, but that does not give the Prosecution any right to decide the strategy of the Defence case. The discussion of the possible scenarios for conflict of interest in the impugned decision hinge, in my view, on mere speculation. No iota of evidence was adduced to allow for the level of interference in the strategy of the Defence case as was pleaded by the Prosecution. Similarly, it is for the accused, and not the Chamber, to strategise the Defence case. Accepting that every trial bears a potential for conflict of interest, a Chamber's intervention should be based on more than mere speculation in this important aspect of the rights of accused persons to a fair trial. The accused persons concerned gave informed consent in my view. That having been done, the Trial Chamber's obligation is to keep the lines of adversary clear during the trial. In addition, the analysis by the Trial Chamber, of the possible defences available to the accused persons, presents a misunderstanding of the duties of Defence counsel as the Prosecution's perception of a conflict of interest is based on the allegations contained in an indictment that has yet to be proved, and to accept that line of reasoning is, in my view, a misdirection.[4]

I concluded by noting (both from experience and analysis) that conflicts of interest in the international tribunals are handled more or less as they would be in national jurisdictions. At the international tribunals judges will look to the relevant Tribunal's code of conduct, and if it does not sufficiently address the situation, the judges will look to national jurisdictions. National jurisdictions are not necessarily consistent, though certain principles seem to be universal. There is no one standard. Courts deal with conflicts of interest on a case-by-case

[4] *Prosecutor v. Prlić et al.*, IT-04-74-AR73.1, Decision on Appeal by Bruno Stojić Against Trial Chamber's Decision on Request for Appointment of Counsel, 24 November 2004, Separate Opinion of Judge Mumba, para. 3.

basis. As such, there is no magic formula. It is incumbent on defence counsel to be proactive by exploring the possibilities of any conflicts and whether appropriate waivers will be sufficient. At the end of the day, defence counsel must demonstrate c*ompetence, diligence, communication*, *confidentiality*, *loyalty*, *honesty*, and *independence* in all her dealings with the client. This exemplifies the best tradition of our profession.

Conflicts of Interest Lecture Materials:

Conflict Lecture Handout
Conflict Case Summaries
Conflict Table of Authorities