

Training of judges and prosecutors serving at international criminal courts: A necessity

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The opinions expressed in this article are those of the author and do not reflect the views of the organisation for which the author works.

The legitimacy of national, international or internationalised courts tasked with judging mass crimes is often considered and questioned in light of the political and/or diplomatic nature of the creation and status of these courts, in addition to the manner in which judges and prosecutors are recruited. Beyond the intense discussions, the legitimacy of judges who serve at these courts is also necessarily linked to their skills and training. Does the universal objective involving a commitment to judge the perpetrators of mass crimes require development of specific skills among those who will be called upon to hand down justice?

Work carried out at the national and international levels pertaining to judicial training has given rise to adoption of a declaration on the principles of judicial training by the members of the International Organization for Judicial Training (IOJT) on the 6th of November 2017. In particular, they emphasised that judicial training guarantees a high level of skills and is essential to ensure independent justice, in compliance with the rule of law and ensuring protection of rights. That being established, we can only support the obligation of judicial training for the judges and prosecutors who will be called upon to prosecute and judge the most serious crimes.

There are naturally discussions focussing on the nature of the qualities and qualifications expected from judges or prosecutors working in courts tasked with criminal humanitarian law. Should judges and prosecutors in these courts show only theoretical and academic knowledge?

Determining skills

Many judicial training institutes throughout the world have addressed the issue of the skills required of judges or prosecutors with a view to conducting their national training strategy. Work has been done at the European level, such as implementation of a pilot project on European judicial training¹ and also a guide on initial training for judges and prosecutors prepared by the Leonardo Da Vinci Lifelong Learning Programme. Tools for analysis have been developed and have led to definition of “professional references”. It is therefore commonly agreed that although judges or prosecutors must have extensive theoretical legal knowledge regarding national and international law, this knowledge is merely a prerequisite for acquisition of legal techniques such as drafting of judgments or indictments. As Carla Del Ponte pointed out in an interview: “The work of prosecutors is very technical and has nothing to do with politics or with emotion”².

Although investigation and prosecution work is rooted in the legal framework establishing the subject-matter and territorial jurisdiction of courts, the definition and implementation of prosecution strategies, however, involve a capacity to make decisions falling within a context which is inevitably political and human. We are still reflecting on the reasoning of the act of judging which, in law inspired by Romano-Germanic tradition, is much more complex than merely applying legal syllogism. The judge is much more than the “Mouth of the Law”, which means that even the most

¹ Tender JUST/ 2012/JUTR/PR/A4

² *Le Monde*, 2 May 2001

distinguished academics need to learn communication and listening techniques to allow them to perform their duties in compliance with the procedure. Prosecuting and judging are professions in which decisions must be made. This requires not only legal knowledge and acquisition of techniques, but also the ability to use specific skills such as the capacity to grasp human issues.

Having completed an analysis, the French National School for the Judiciary (*Ecole Nationale de la magistrature*) identified the following skills: Identifying, assimilating and implementing rules of professional conduct; analysing and summarising a situation or case; identifying, respecting and guaranteeing a procedural framework; adapting; adopting a position of authority and humility suited to circumstances; the ability to manage interpersonal relations, to listen and to exchange views; preparing and conducting a hearing or a judicial interview focused on due hearing of all parties; encouraging agreements and reconciling; making decisions that are well-founded in law and in fact, rooted in their context, marked by common sense and enforceable; stating grounds, formalising and explaining a decision; taking into account the national and international institutional environment, working as a team; organising, managing and innovating.

But focusing on the skills of those called upon to judge in the framework of international criminal justice necessarily involves a preliminary question which is: What exactly does this notion cover? Is international criminal justice first and foremost intended and perceived as criminal justice or as international justice³?

These issues are clearly addressed in article 36-3 of the Rome Statute which provides that every candidate for election to the Court shall:

- i) Have established competence in criminal law and procedure, as well as the necessary experience in criminal proceedings, whether as a judge, prosecutor, advocate or in another similar capacity (corresponding to List A) *or*
- ii) Have established competence in relevant areas of international law, such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court (corresponding to list B).

The prominent place given as from the first election to the judges elected from list A (9 judges) compared to list B (5 judges), a trend that was confirmed during subsequent elections (out of the 6 judges elected during the Assembly of States Parties in December 2017, 5 were elected from list A), shows the commitment of the States Parties to enshrine this justice as a judicial justice called upon to establish individual guilt or innocence through the prism of ordinary criminal justice rather than an internationalist/diplomatic approach.

Although international criminal justice may have appeared to correspond to an international court, with recruitment provisions within the courts reflecting geopolitical considerations, recent thinking on regionalisation of these courts (the Special Criminal Court in the Central African Republic is an excellent example) confirms a commitment to refocus on the nature of this justice, which is, first and foremost, criminal.

That being established, it could be tempting to simply state skills identical to those of national judges and prosecutors tasked with the most serious crimes under ordinary law. But is this act of prosecuting or judging identical, to be transposed as such in a specific area? Clearly, that is not the case.

Specificity of the role of international courts

³ *Trois paradigmes de la justice pénale internationale* (Three paradigms of international criminal justice), Frédéric Mégret, *L'observateur des nations-unies* 2012-1 volume 32

Behind the stated determination to judge only individuals, there is an emerging pattern of a historical justice, where judicial truth would be required to reflect a “historical truth”, in particular based on consideration of elements referred to as “contextual”.

The issue of international criminal justice therefore lies not only in the verdict, the final decision to convict or acquit, but in all the grounds for the judgement and in the process involved. Criticism aimed at the slow pace of international criminal justice or the significant influence of Common Law should not obstruct the fact that one of the major difficulties lies in the very definition of the role of the court in conduct of a criminal trial. How can we reconcile justice which judges human beings with a trial which is revealed to be a time, a place, an event where collective memory takes shape?

Daniel Bensaid⁴ wrote that the minutes of the Barbie, Touvier and Papon trials showed to what extent presiding judges struggled to control the number of witnesses and the scope of witness testimony: “We are supposed to judge individuals, but the ghosts who come to the stand want to bear witness to a collective history”. How can we limit the scope of their testimony or silence them when, to quote the words of Paul Ricoeur, “the victims of Auschwitz are the ultimate delegates of all history’s victims to our memory”?

Unlike national criminal justice which falls within the scope of the sovereignty and monopoly of States, the duty of international courts, although it falls within the scope of an institutionalised justice, cannot for all that do away with the action of other non-judicial stakeholders who participate in the all-encompassing process of social pacification such as mechanisms referred to as transitional justice (truth commission, lustration, memorials, etc.). International judges, whose role is restricted by the legal contours of the matters referred to them and penalty based in norm, must therefore be aware of the comprehensive work conducted around the processes of reconstruction and peace and must focus on complementarity with transitional justice mechanisms.

Supporting technical expertise

The development of international criminal justice over the last 25 years has given rise to great technicality. The diversity of sources, treaties, customary law, general principles of law, case law, doctrine, equity and sometimes national law in which the judge or prosecutor seeks to identify the applicable standards makes the process difficult.

The diversity of status of the courts does not make it possible to shed uniform light on the required technical expertise. In fact, one of the difficulties of judges sitting at the ICC could be familiarisation with the Statute, the Rules of procedure and evidence and the Rules of the Court involving handling of legal concepts including both Common Law notions and Romano-Germanic tradition. There is sometimes a great temptation to use previous skills acquired which are mainly related to the legal tradition of origin.

The process of regionalisation of international criminal justice and the development of internationalised national courts are leading practitioners to exercise caution in using the variety of applicable sources and standards. How can legal practitioners handle case law and doctrine elaborated by other courts without misrepresenting the specificity of the specific rules of procedure and evidence of the court to which the practitioner belongs? It would appear that judges and prosecutors first need to focus on contextualising the decisions handed down, thereby taking into account a breeding ground which is much more significant than when they work in a national law context.

⁴ *Qui est le juge ? Pour en finir avec le tribunal de l’histoire* (Who is the judge? Doing away with the court of history), Ed. Fayard

The universal scope expected of the decisions handed down by the international criminal courts lends an unusual slant to the work of judges and prosecutors and leads to questions regarding keen skills related to contextualisation and control of the trial, in conducting interviews and questioning. These skills cannot be restricted to those required in national professional practice. This reflection on the way hearings are conducted is related to the individual skills of judges but also to developing common skills and thinking within courts.

Reflecting on the role of judges also involves rethinking the judge's place within the court and, beyond the skills of the judge himself, training of court officers such as *legal advisers*. Because they work not only on purely technical legal issues but also shed light on contextual elements, they have an undeniable role and responsibility in the final decision. Judges or prosecutors who are not trained or who are insufficiently trained will also increase the weight of these "invisible judges and prosecutors", as they are sometimes called, despite the fact that notwithstanding their professional and personal qualities, they do not benefit from the legitimacy of recruitment by election or appointment.

Addressing ethical issues

Clearly each of the courts addressing special criminal law has set very high standards regarding ethics and professional conduct.

Although, as Robert Badinter emphasised concerning the Barbie trial, "the court had to examine for the first time crimes that were committed a half-century before", the recent development of hybrid courts, on the contrary, has established the specificity of judging in a place and/or at a time close to the acts with which the defendants are charged.

Although some courts have chosen to create a physical distance between the acts and the prosecution and judgment locations (for example, the ICTY, the STL, the ICC) in order to guarantee safety and impartiality of their action, regionalisation and hybridisation, one of the objectives of which is to avoid handing down "justice unrelated to local realities"⁵ and to facilitate local appropriation by involving judges from the countries impacted, lead us to reconsider the concept of impartiality.

Unlike national courts where guidelines are quite clearly established and where the judge is required to decline jurisdiction if that judge is linked to any of the parties, specific incrimination in particular with regard to genocide and crimes against humanity necessarily give rise to consideration of the notion of collective victims of such crimes and the place of the national judge or prosecutor in implementation of such justice. What position should or can judges adopt if they are themselves victims of the case judged, not directly and individually, but collectively and indirectly because judges and those close to them also suffered the disastrous consequences of the war? The individual and collective answer to this question cannot be found by applying a given standard in a code of conduct, but in reflection supported by notions of legitimacy, perceived legitimacy, credibility and perception of credibility by litigants and by the international community.

These issues were already raised by the creation of internationalised courts such as the extraordinary chambers in the courts of Cambodia, but they were less critical, as the years gone by offered a time buffer against possible partiality. The creation of internationalised courts such as the Special Criminal Court in the Central African Republic, however, which was undertaken in a post-conflict period (or even while conflict was still underway) gives rise to a much more difficult issue regarding this very specific problem. For these courts, the events judged took place not decades before, but just a few years before and in some cases just a few months before. The training organised jointly by the ICC, MINUSCA and ENM on the investigation phase for the Special Criminal Court focused

⁵ *La Paix contre la Justice ? Comment reconstruire un Etat avec des criminels de guerre* (Peace versus Justice? How to rebuild a State with war criminals), Pierre HAZAN, André Versailles éditeur

particularly on these ethical considerations as it appeared that these were major issues, in addition to acquiring technical expertise, which is also indispensable but insufficient in itself.

Individual training or collective training of the court?

If we acknowledge the need for judicial training of judges and prosecutors tasked with international criminal law, it may be worthwhile to discuss the permanence of individual training or to promote, beyond training of individual entities, training of an entire court.

Individual training is linked to recruitment that is not homogenous over time (for example, judges at the ICC). Customised training geared to the needs of judges is provided. Training may range from in-depth analysis of legal notions regarding accountability to the use of new technologies in the work of the court.

Collective training for a court as a whole could allow its members to reflect on issues together, in a place sheltered from outside pressure. In a framework conducive to exchange of views, issues such as the institutional strategy of the court, the difficulties encountered and ethical dilemmas could be discussed in greater depth and in a spirit of trust. The time used not to improve personal skills but to structure common objectives outside an overly formal institutional framework is therefore particularly valuable, just like the opportunity to implement specific sequences to analyse practice. Training institutions, by playing the role of neutral yet benevolent third parties, thereby, paradoxically, allow court staff to bond by thinking outside their usual framework.

Judge Bruno Cotte (who served at the ICC from 2008 to 2014) indicated that although the act of judging is an individual act performed with a bench of judges (or as a single judge if the conditions of the procedure so allow), one should bear in mind that the judge is part of a community of work. By implementing a broader framework of training at the level of the court, individual training allows judges and prosecutors to make their personal commitment and professional goals compatible with the objectives and specificities of the court for which they work.

Promising signs of change

Reflecting on and implementing specific in-service training for judges and prosecutors serving at international courts are still at a very early stage and need to overcome cultural and individual resistance. Some still consider that such training would be contrary to impartial exercise of their function or would reflect “weakness” on the part of judges sitting in the highest positions. But this viewpoint is changing.

The Kosovo Specialist Chambers, with the help of the Nuremberg Academy, have organised exchange sequences among judges to benefit from contributions on current events in international criminal law. The Paris Declaration of 16 October 2017 on the effectiveness of international criminal justice, arising from a consensus between the judges and presidents of the four international criminal courts (the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, the Kosovo Specialist Chambers and the Special Tribunal for Lebanon) advocates promotion of continuing education for judges and legal officers, in particular through partnerships with national institutions tasked with training of judges and prosecutors. Little by little, in-service training is increasingly considered as a necessity.