On Being an International Criminal Judge

Judge Theodor Meron

In 2001, I was elected by the United Nations General Assembly to the United Nations International Criminal Tribunal for the former Yugoslavia (ICTY). At the age of 71, I thus found myself starting a new career: as an international criminal judge.

For a person who was catapulted to an international criminal court after a quarter of a century of teaching at the NYU School of Law, the change was momentous, even existential. Academic habits learned over the years – from obsessing over footnotes on abstruse questions to drawing analogies from across the universe of international law – had rapidly to yield to a new way of thinking and a laser-like focus on the immediate facts and the law of the case. I had to move from the luxury of contemplating theoretical questions and advancing bold ideas about the state of the law to agonizing over the justice of convicting or acquitting a person charged with the gravest crimes known to humanity and heeding principles of judicial restraint and economy in my writing. And I had to forsake the comfort gained from circulating drafts to academic peers and learning from their comments, and follow instead a relatively cloistered decision-making process in which, save at a hearing or in an eventual judicial opinion, one may share one's thoughts and concerns only with a few fellow judges and a law clerk or two.

My experience as an international criminal judge has been exhausting at times. It has been disquieting, frustrating, and, indeed, solitary. Yet, my years on the appeals bench or as a president (or chief justice) of the court have also been extraordinarily exciting and rewarding. And there is absolutely nothing I would exchange these years for.

The kind of intellectual overhaul I experienced in joining the international judiciary may be common for many of those who become judges in national courts as well, particularly if they have previously followed a different career path. And indeed, there is much about being a judge at an international criminal court that is similar to the experience of serving in the criminal courts at the national level. Like judges in national courts, an international criminal judge hears argument, sifts evidence, rules on diverse motions, considers novel questions of law, drafts decisions and judgments, and deliberates on verdicts and sentences. Like their counterparts in domestic systems, international criminal judges must put the fairness of the proceedings at the center of all that they do and be guided by their commitment to judicial independence, to the judicial process's transparent and public nature, and to the importance of reasoned judicial decisions.

In other respects, however, the mission and work of an international criminal judge are different – and unique – from that of his or her national colleagues.

At the most basic level, the cases tried by an international criminal judge are unparalleled in evidentiary and geographic scope and scale and involve alleged crimes almost never prosecuted on a national level, such as genocide. An international criminal judge does not have the comfort of applying a penal code of long standing and supported by a gloss of interpretative precedent but must rely instead on typically skeletal statutes. Hence, to satisfy the principle of legality, international criminal judges at the ICTY, for instance, have had to ground their rulings in customary international law, the identification of which – due to customary law's often indeterminate nature – requires a judge to exercise both discretion and creativity, while resisting any possible drift toward progressive law-making.

An international criminal judge also cannot take for granted that his or her fellow judges, the advocates who come before them, or the public at large share a common understanding about how the law or legal procedures should be understood or, indeed, how a case should be managed. Judges trained in the common law and those trained in civil law may value legal precedents and their import differently, for example, and this difference may impact how the judges approach each new proposed ruling. Procedural and evidentiary rules, moreover, have to be developed and wielded based on the harmonization of diverse national precedents, legal traditions, and a variety of models: no small challenge.

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And even though the accused who come before international criminal courts are always tried as individuals, the work of those courts and the fates of the individual accused are often taken to be emblematic of broader political considerations. More than anything else, it is this broader political and historical context in which international criminal judges work – the conditions in which the court was created, the sensitive and often horrifying nature of the allegations at stake, the rank or seniority of those who typically stand accused, the ongoing struggles among ethnic and national groups fighting for the legitimization of their own historical narrative, the conflicting visions of rights and wrongs, and the competing claims of victimhood – that explains the unique nature of an international criminal judge's professional environment.

Given this context, it is perhaps inevitable that international criminal courts and their judges will face criticism for particular rulings. Of course, the right to publicly express disagreement with a judicial decision is an integral part of a free society and a free press. And just as obviously, judges cannot cave in to pressure, nor be swayed in any way by public sentiment or critiques. Extra-judicial considerations must remain outside a judge's decisional ambit, even at the cost of risking non-reelection to judicial posts in courts where such reelection is possible. Yet criticism can nonetheless have a corrosive effect on the credibility of a court, which risks not simply damaging perceptions of the court but undermining the aims of the court, and of international justice, more broadly.

Some criticism may reflect a lack of understanding of the ruling at issue or be driven by partisan concerns. But other criticism may come from those with the greatest hopes of and for international criminal justice and the judges entrusted with carrying it out. Indeed, international criminal judges must often carry out their work at the intersection of a myriad of strongly held and sometimes incompatible expectations about what role an international criminal court should play.

Some stakeholders, for instance, look to international criminal courts to establish the "truth" of a particular horrific event or to create a definitive historic record. When the court's judgment fails to agree with an expected narrative of guilt or to find that a specific crime attributed to a particular individual has been committed by him or her, the claim is made that the court itself or the judges involved have failed in their mission.

There is no doubt that the quantum of evidence collected in relation to a case is often extraordinary and a judgment compiling such evidence can offer a detailed record of particular events. Moreover, for jurists coming from the civil law tradition with its investigating magistrates, truth-seeking may be seen as an essential component of international criminal justice more, perhaps, than in the common law with its adversarial system.

But we must be careful to recall what is the core mandate of an international criminal court: it is to try individuals within a governing legal framework and to determine whether – given the specific evidence presented and admitted by the court – an individual's accused responsibility for international crimes has been established beyond reasonable doubt. The demands of due process, the substantive legal requirements, and the precise nature of the evidence necessarily constrain the court's findings in a way that a more free-ranging inquiry outside of the judicial process would not. And importantly, these same factors also permit different conclusions to be reached in different cases, meaning that responsibility for a crime may be found beyond reasonable doubt in one case while evidence of the same crime may be found insufficient in another.

Other stakeholders may look to international criminal courts – and to their judges – to bring about peace and post-conflict reconciliation, as indeed the United Nations Security Council and other bodies have at times suggested in establishing such courts. For those who believe that international criminal courts are mandated to promote peace and reconciliation, international criminal justice will almost invariably be found wanting where there is no evidence of any such impact or where rulings are thought to be counter-productive to reconciliatory aims.

Trying those accused of serious violations of international law in a public, fair, and careful way may have a beneficial impact on the restoration and maintenance of peace in an area previously torn asunder by conflict. But these salutary effects should not be confused with the narrow mandate of an international criminal court or its judges: to try those accused in accordance to the law. Were it otherwise – were international criminal courts responsible, even just in part, for ensuring reconciliation – the fairness of their proceedings would, almost inevitably, be put in doubt, as when the perceived interests of reconciliation would weigh in favor of a particular conviction or acquittal. Legal principle may not be trumped by an extraneous purpose, however desirable that purpose may be.

Finally, one of the most frequently voiced expectations is that international criminal courts should give victims justice. The idea that international criminal justice is done for the victims is popular, just as it is contested. It risks pitting the goal of many victims to ensure punishment of and retribution against those whom they believe to have committed crimes on the one hand against the rule of law guarantees of fairness, impartiality, and due process on the other. If one of the individuals accused of atrocities, and particularly one who is a political or military leader, is acquitted, or if the prosecution declines to pursue

charges, these decisions are sometimes viewed as a failure of international criminal justice.

But let us be clear. The true failure of international criminal justice would be if convictions or acquittals would be issued without support of law and evidence. If anything, occasional acquittals can be a sign of a mature and independent legal system and of a court that is focused on the narrow judicial mandate of trying those charged, rather than on attempting to satisfy the often conflicting expectations of diverse stakeholders. Even as we sympathize with the sentiments of victims, the overarching obligation of a criminal judge – whether at the national or the international level – is to respect the fundamental principles of the rule of law, a concept still more fragile in international than in most domestic jurisdictions. It is through affirming the importance of courts and due process – not simply in times of peace but in war and conflict and their aftermath – that we ensure that it is the law, and not the rifle and vengeance, that rules. And this, to my mind, is the animating principle at the very heart of international justice, and the principle that has been at the center of my work for nearly a decade and a half as an international criminal judge.