



Drawing on the experience of prosecuting at the international level in multicultural environments

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Abstract

This contribution offers a practitioner's reflection on the cultural challenges of international criminal prosecutions, drawing on the author's experience in the early genocide trials at the International Criminal Tribunal for Rwanda (ICTR) and as Deputy Prosecutor at the International Criminal Court (ICC). Rather than a formal analysis, it distills practical, common-sense lessons about working in court with eyewitnesses who were victims and survivors. It examines how counsel may prepare witnesses across linguistic and cultural divides, how cultural norms shape memory, narrative, and demeanour, and how those norms extend to interpreters, counsel, and judges from divergent legal traditions. Throughout, it stresses cultural sensitivity and genuine human connection as foundations for the court's search for truth — concluding that, in such settings, it is often wisest simply to listen and learn.

Key words

International criminal justice, witness preparation, cultural sensitivity, eyewitness testimony, intercultural communication, ICTR and ICC practice

Resumen

Esta contribución ofrece una reflexión desde la perspectiva de un profesional sobre los retos culturales que plantean los procesos penales internacionales, basándose en la experiencia del autor en los primeros juicios por genocidio celebrados en el Tribunal Penal Internacional para Ruanda (TPIR) y en su cargo de fiscal adjunto en la Corte Penal Internacional (CPI). Más que realizar un análisis formal, el texto recoge lecciones prácticas y de sentido común sobre el trabajo en los tribunales con testigos oculares que fueron víctimas y supervivientes. Examina cómo los abogados pueden preparar a los testigos más allá de las barreras lingüísticas y culturales, cómo las normas culturales moldean la memoria, la narrativa y el comportamiento, y cómo esas normas

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se extienden a intérpretes, abogados y jueces procedentes de tradiciones jurídicas divergentes. A lo largo del texto, se hace hincapié en la sensibilidad cultural y la conexión humana genuina como fundamentos de la búsqueda de la verdad por parte del tribunal, concluyendo que, en tales contextos, a menudo lo más sensato es simplemente escuchar y aprender.

Palabras clave

Justicia penal internacional, preparación de testigos, sensibilidad cultural, testimonio de testigos oculares, comunicación intercultural, jurisprudencia del TPIR y de la CPI

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1. Introduction

While the workshop focused, as a whole, on the challenges of culture and practice encountered in international criminal *investigations*, this short article adopts the perspective of counsel dealing with such challenges in the course of international criminal *prosecutions*. In doing so, it touches upon some of the themes of the workshop, such as:

- dealing in court with the evidence of eyewitnesses, particularly eyewitnesses who were victims and survivors;
- how cultural norms might influence eyewitness memory and testimony; and
- issues of intercultural communication involving judicial officers at international tribunals and courts.

The article is based upon the speaking notes that the author prepared for his presentation on the panel where he appeared, and drawing upon his firsthand practical experience in the early genocide trials at the UN International Criminal Tribunal for Rwanda, or ICTR, and also on what he observed, as Deputy Prosecutor, at the International Criminal Court, the ICC.

The approach he adopted is not scientific, but simply based on the practical lessons the author learned — or hopes he learned — as a practitioner. Nothing that follows will offer any startling insights; it will draw upon what would seem to be common sense, and yet be deserving of attention.

The issues addressed will seem like small ones, but what appear to be humble issues can assume importance, because one of the challenges for counsel engaged in administering international criminal justice is to assist witnesses, through their testimony in court, to convey what happened, at the moment events occurred, to the judges hearing the case, within the legal framework that applies, and to assist the judges in understanding the legal consequences for the accused person. In accomplishing these tasks at the international level, counsel must navigate multicultural environments; a few examples will illustrate some of the challenges this endeavour can entail.

2. Evidence of eyewitnesses and witnesses who were victims and survivors

2.1. Preparing a witness to testify

In many legal systems, preparing witnesses to testify comes within the normal responsibilities of counsel, whether acting for the prosecution or the defence; it is often a feature of adversarial systems, where counsel play the leading role in adducing the evidence of witnesses in court.

However, this is not the case in other legal systems, where the judges play the leading role in examining witnesses; thus, witness preparation by counsel is not a feature of inquisitorial systems.

When these systems are blended at the international level, however, in judicial institutions, such as the ICC, tensions can be generated within the court, as judges from differing legal backgrounds, and with sometimes contradictory conceptions about how best to proceed, seek to find fair and efficient ways to run criminal trials.

Thus, witness preparation at the ICC was a controversial issue, until recently, with some trial chambers permitting it and others not; but this brief article is not the place to examine why this controversy existed at the ICC and how it has likely been resolved, in favour of witness preparation, according to strict protocols designed to ensure the integrity of the process.

So, recognising that some controversy may surround the issue of witness preparation, we can begin examining this matter, by considering why witness preparation might be useful, in the multicultural environment existing at the level of international criminal justice.

In the context of international criminal investigations and prosecutions, witnesses — unless they are journalists, or officials, or forensic experts of one sort or another — most often come to court without any previous experience of testifying. They are brought from distant places to a court environment that is alien and terrifying. They will have to communicate with court officials, counsel, and the judges, not in their own languages, but through interpretation. In their testimony, they will have to relive painful, often horrifying, experiences. In today's practice, some of these difficulties can be alleviated by having witnesses testify via video-link from a location close to home; even then, however, giving evidence in a criminal trial will be an emotionally difficult experience. Hence, the importance of preparing witnesses to testify.

At the ICTR, the obligation of counsel to prepare witnesses to testify was never in issue. Witness preparation had to be done ethically, of course, with a view to assisting the witness to present truthful and accurate testimony to the judges hearing the case, bearing on the issues in the case that the judges were required to decide. Counsel cannot put words in a witness's mouth, or coach the witness, but merely facilitate the testimony the witness has to give, and nothing more.

In preparing a witness to testify, and then adducing the witness's testimony in court, counsel seeks from the witness a truthful and accurate narrative of events that will assist the judges in deciding the case. With this objective in mind, witness preparation can play a role in overcoming cultural challenges that counsel may encounter in international criminal trials.

2.2. *Prepare to prepare*

So, counsel must first *prepare to prepare*: that is, become thoroughly familiar with the witness's context, even before speaking with the witness. Counsel must appreciate the historical, political, and cultural background to the conflict that swept the witness up, and the witness's place in it.

At the ICC, the practice developed of engaging "country experts" to help the investigation team become familiar with the context of the situation under investigation, in relation to the particular country in which they would be operating, so that even from the outset of the process cultural differences could be factored into the investigation. Such an approach offers an advantage to counsel later involved in eventual court proceedings. With time, the team involved in the investigation, and subsequent prosecution, where an accused is brought before the Court, will become thoroughly familiar with the context from which the witnesses emerge.

At the ICTR, however, prosecuting counsel, such as the author, simply had to read all they could about Rwanda and the events of 1994 before they even arrived in Kigali. There was no training or orientation; this was left to individual initiative.

2.3. Cultural sensitivity

In dealing with witnesses, counsel must be aware of particular sensitivities the witness may have. To illustrate, here is a small example from the ICTR: in 1997, when the first trials for genocide were just underway at the seat of the Tribunal, in Arusha, Tanzania, we, on the Prosecution side, knew that the Rwandan Government was attempting to erase the concept of ethnic identity — Hutu, Tutsi, Twa — and instil a notion of Rwandan identity. This made witnesses uncomfortable about self-identifying according to ethnic group, but, for us, the ethnic identity of the witness in 1994, when the genocide of the Tutsi occurred, was a vital piece of evidence.

So, we got around the problem and secured the needed evidence in a simple way, by asking:

Counsel: In 1994, did you have an identity card?

Witness: Yes.

Was there an ethnic mention on your identity card?

Yes.

What was it?

Tutsi.

This simple statement of fact got around the awkwardness. We could then elicit from the witness his or her personal account, evidence that helped prove genocide and also provided a vivid foundation for the expert opinion evidence we adduced, respecting the historical, political, and sociological background of the genocide.

2.4. Demystify the process

It is also important for counsel to learn how best to approach the witness, especially if the witness comes from a "hierarchical" culture, in order to get past the natural deference the witness may feel toward a lawyer, such as prosecuting counsel. The objective is to get from the witness the witness's *own* experience — what the witness actually experienced and can describe in testimony — and not what the witness may think is *expected* of him or her.

One can help overcome any deferential tendency on the witness's part by *demystifying* the process: explaining how important it is for the witness to give an account of what he or she saw personally, and avoid repeating what others may have reported to the witness; to emphasize the need for the witness to provide an accurate and truthful account to the judges, so the judges are equipped to decide the case; and gently to keep the witness focused upon the piece of the puzzle, so to speak, that the witness has the ability to describe.

Witnesses can become indignant under cross-examination, if they feel their testimony is being challenged. In preparing witnesses for cross-examination, it is helpful to point out to them that cross-examination was designed to test their recall of events, and counsel

for the Defence are just doing the job they have to do in any trial — it was therefore important to listen to the question and give an accurate and truthful answer, because the judges would be watching and listening, and, in the end, the witness was there to help the judges understand what happened at the time of the events.

2.5. *Speak directly to the witness*

Just as investigators do, counsel most often has to work through interpreters. It is important to work *through* the interpreter, so as to make a human contact directly with the witness. At ICTR, the author once heard a member of his prosecution team, who was interviewing a witness, say to the interpreter, “Ask him — ” — referring to the witness — whatever the question was. The author said to the lawyer: “No, ask the witness directly — speak *to* the witness, as if the interpreter wasn’t there.”

When the author interviewed witnesses, in preparation for a court hearing, he always tried to achieve eye contact, to speak to the witness, as if he and the witness were speaking the same language — and here is the gift of really good interpreters: to be self-effacing and mere instruments of communication between two other people. In this way, one gets the best from the witness — and makes that critically important human contact, even across cultural barriers.

And counsel do have to work across what might seem to be a cultural and linguistic abyss, and so must find points of reference, for example, relating to distance, time, colour, and other details, which make sense to the witness. For example, seven o’clock in the morning in English or French is the first hour of the morning in Kinyarwanda, and so there is no direct correlation of hours in the way time is kept between the languages over the course of the day: thus, interpretation involves, not only translation, but a quick mental recalculation.

When the author met with a witness, he wanted to know — even though he had read the witness’s statement — what the witness could tell the court, how the witness was likely to behave before the judges, and the best way he could take him (the witnesses, as it turned out, were all men) through his account.

In the courtroom, questioning in chief — direct examination — was designed to allow the witness to give to the judges a full, accurate, and truthful account of his experience of events, but one that was focused upon the issues in the case. The relationship of trust that witness preparation may help counsel to create with the witness assists this process, and, ultimately, the fact-finding task of the judges hearing the case.

The points covered above are all small points — really just a matter of common sense — but they are important.

2.6. *A human connection*

At ICTR, we always used to go to the safe house, where the witnesses stayed, after they had testified. Their reactions were revealing: some remarked that there was a lot of negative comment on ICTR in Rwanda, but they felt the judges had listened to them and genuinely wanted to understand; one said that she never expected to see the accused on trial; they all seemed to be glad they had testified.

Our trials were held before the ICTR trial chambers sitting in Arusha, Tanzania. The author was once back in Kigali, Rwanda, and spotted across the road a witness, whose testimony he had recently adduced in Arusha. The witness was a protected witness and the author didn't want to betray his status, by acknowledging that he knew him — *but the witness saw the author and came across the road to embrace him!*

This anecdote only demonstrates how important it is for counsel to make that *human* connection with a witness — across the trauma of events, across cultural and linguistic differences, across the wide variation of life experiences — a connection that will allow counsel to go some way in overcoming cultural challenges in the pursuit of truth.

In June 2014, the Human Rights Center of the University of California, Berkeley, School of Law, published a study, entitled, *Bearing Witness at the International Criminal Court: An Interview Survey of 109 Witnesses*. The study was based on the experience witnesses had in early ICC trials with the witness orientation process done by the Registry's Victims and Witnesses Unit. This familiarisation process was much lighter than the witness preparation we did at the ICTR, but, even so, the researchers found that the Registry orientation process mitigated the anxieties that witnesses felt at the prospect of testifying.

These were witnesses who had no previous experience with courts and who had survived horrendous crimes. Many of them described the experience of testifying in a way very similar to how our witnesses at ICTR appeared to feel. Generally speaking, they felt glad they had testified and believed they had made some contribution to justice.

In sum, the criminal trial process, in which witnesses play so essential a role, is a human process, and counsel, in learning to navigate the challenges of a multicultural environment at the international level, as they deal with witnesses, play a vital part in the court's search for truth.

3. Influence of cultural norms on eyewitness memory and testimony

3.1. Hearsay use of evidence

As a second point, one can consider briefly the influence that cultural norms may have on eyewitness memory and testimony. On the matter of memory, the importance of focusing the witness on his or her direct experience of events, to avoid what we call hearsay, has already been referred to above.

At the ICC, and before that, at the ICTR, the hearsay use of evidence — that is, having a witness tell the court what another person, who was not present in court and subject to cross-examination, reported to the witness — was permissible; but one had to make clear that this is what the witness was doing, and not relating what the witness had experienced firsthand. While trial and appellate chambers were prepared to accept what they considered to be reliable hearsay, they often gave hearsay evidence much less weight, and so it was important for counsel to ensure that the source of the witness's account was clear — his or her own experience, or that of another.

Rwanda, at the time of the first trials before the ICTR, still had a high rate of illiteracy, and, in a largely aural culture, people relied for information on word-of-mouth. So, with less literate witnesses, it was important to explain that it was the witness's direct

observations that we were seeking to have the judges hear — and the witnesses appeared to grasp this very well. The objective was to ensure that the evidence presented was not a reflection of a collective memory of some sort, but relied upon the witness's own experience of events.

3.2. Impact on testimony of investigative methods

When witnesses testified at the ICTR, the investigative work had, obviously, already been done; however, the witness statements did not necessarily cover all that the witness could remember and give as testimony in court. The PEACE² model of investigative interviewing, which is followed at the ICC, is designed to acquire from witnesses a full account of events, and to avoid selective accounts; but this model may not have been in general use at the ICTR. When we received fresh evidence during witness preparation, we disclosed it to the Defence right away, but this still presented a situation that was less than ideal.

In some cases, the investigative interviews had tended to focus on particular actors during the events of 1994 in Rwanda, even though the witnesses knew more. Anecdotally, if a witness's statement focused on suspect A, but the witness testified in court about Accused B, when there was no mention of B in the witness's statement, Defence counsel would challenge the witness's veracity by pointing to the omission in the statement. The witness would respond, "They didn't ask me about B." And this was very often the case.

Was this a matter of culture? Would a witness stick to what was asked, and not offer more? As counsel, the author wondered about this, because it struck him how witnesses would sometimes answer questions in examination-in-chief in court. For example, examination-in-chief of a witness might go, as follows:

Question: Could you tell the court who was in the room?

Witness: Yes.

[Pause...]

Question: Then, please tell us who was in the room.

[Witness now provides details.]

Or was it just a matter of interpretation from French, or English, into Kinyarwanda?

The author can't say — but did observe, however, that under cross-examination witnesses often became more voluble and forthcoming in response to questions. This too may have been a function of culture — the witness may have felt honour-bound to defend his testimony in chief, and thus became more responsive, a very human reaction, it must be said.

² The acronym, PEACE, summarizes the five stages of investigative interviewing, namely, Preparation and Planning; Engage and Explain; Account, Clarification, Challenge; Closure; Evaluation. It is an essentially open-ended method of interviewing designed to obtain a full account from the witness, and is also used in questioning suspects.

3.3. Not just witnesses are affected by cultural norms

Cultural norms could affect not just witnesses.

In one trial in Arusha, the Accused interrupted his counsel during her cross-examination of a witness the Prosecution had called. The Accused, who spoke both Kinyarwanda and French, and so could monitor the interpretation, put up his hand and was recognised by the presiding Judge. He then reported that the witness, in answer to a question, had said his counsel was lying, but this had not been interpreted.

The presiding Judge asked the interpreter, a young woman, whether this was true, had the witness said Defence counsel was lying? The interpreter confirmed that the witness had said this. The Judge then explained that it was important that she interpret everything the witness said, for the benefit of the Judges.

The interpreter may have wanted to avoid repeating something that she considered to be disrespectful and rude — yet the witness's answer was important for the Chamber's assessment of his credibility. A cultural norm of deference and courtesy may have been in play here.

There are other significant issues one could touch upon, but the above illustration may suffice.

As a further example, but one that does not necessarily involve cultural norms, a witness, who testified in one of our proceedings at ICTR, was obviously suffering from PTSD: his memory of events was vivid — he saw his best friend killed very shortly after the Accused in the case had arrived on the scene and triggered violence — but his recall of events was fragmented and he had trouble linking them in sequence; there were gaps in his account. The Chamber was gentle in its consideration of this witness's evidence, but gave it little weight. At the ICC, the psychosocial support for such a witness would have been far better.

This sort of problem, of course, transcends cultural differences and can affect any survivor of deeply traumatising events. If anything, the author was impressed by how detached many Rwandan witnesses were in describing horrific events, even violence to themselves and members of their families. Was this a function of the self-protective psychological mechanism of dissociation? Or was it also partly a function of a stoical attitude to such tragic events imbued in the witnesses by Rwandan culture?

Such issues only underscore the importance for counsel to be sensitive to the impact of trauma upon witnesses, who are now called to testify and must, in a real sense, relive events that have scarred them, not only physically, but psychologically.

4. Issues of intercultural communication involving judicial officers at international courts

Coming to the last point, one can go beyond consideration of intercultural communication with witnesses to embrace other challenges counsel working in a multicultural judicial context can encounter. So, to cite just one example, for counsel it becomes important to learn how to "read" and adapt to judges, who come from different legal and cultural backgrounds than those of counsel.

At the ICC, for example, one of the Prosecution's Senior Trial Lawyers modified the way he examined witnesses in court, because he sensed the presiding Judge was uncomfortable with the approach he was taking.

The Senior Trial Lawyer in question was a barrister from the UK, where trial judges expected counsel to keep a tight rein on witnesses, focusing their testimony on the issues in the case and moving through their evidence briskly. Such an approach, however, was making the presiding Judge of the ICC Trial Chamber restless — this Judge was an experienced judge from Germany, where a presiding judge was used to questioning the witnesses and receiving their evidence unmediated, so to speak, by the interventions of any lawyer.

So, the Senior Trial Lawyer adjusted his approach. He began to allow the witnesses he called much more leeway to give a free narrative of events, even as he kept them on relevant topics, and he saw that this engaged the presiding Judge in a far better way. This may appear to be a mere detail, but, for a courtroom advocate, who must persuade the court of his or her case, such sensitivity is vital.

One could give many examples of how lawyers and judges have to adjust to the very different environment of international criminal justice, but here is one final word: when working with colleagues of widely different legal and cultural backgrounds, it is often wise simply to listen and learn!