

Hearing Tried People in International Criminal Justice: Sympathy for the Devil?

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Abstract

By considering critics of research studies which take into consideration the ‘voice of prosecuted people’ before international criminal tribunals, this contribution develops a theoretical argument that would justify the recourse to the penal experience of prosecuted people in order to analyse the rationality and impact of international criminal justice. Our reasoning, based on conceptual landmarks drawn from the social sciences, allows us also to support a specific approach to the legal process as phenomenon. It is therefore not only addressed to sociologists, social psychologists and criminologists, but also to lawyers, who are, considering the foundations of their field, probably the most resistant to our perspective. The article expounds the necessity to establish a new approach: the *respondents’ approach*.

Keywords

criminology – penal experience – epistemology – respondents’ approach

* This bright formula is from Dario Melossi when he argues that hegemonic public perceptions of *criminals* tend to change according different cycles of tolerance. See: Dario Melossi, *Controlling Crime, Controlling Society: Thinking about Crime in Europe and America* (Polity Press, Cambridge, 2008).

1 Introduction¹

For the past several years we have been conducting research on people tried by international criminal tribunals.² These people have been prosecuted for war crimes, crimes against humanity and/or genocide. They have been accused, and some of them convicted, of crimes considered ‘most grave’ on an international level.

Many other research studies have been conducted on similar people, and are usually designated by the term ‘perpetrator’s approach’. Indeed, research (mainly in social psychology or in criminology) has focused on the study of normative and socio-political conditions facilitating collective violence;³ on cultural and societal conditions facilitating violence;⁴ on inter-individual or inter-group factors facilitating the commission of crimes;⁵ and on historical

1 The authors wish to thank Dan Kaminski for rereading this article, and for his stimulating feedback, the traces of which this text discreetly carries.

2 The research under scrutiny here has been conducted by Damien Scalia since 2011 (based on financing from the Swiss National Foundation, in collaboration, among others, with Mina Rauschenbach). It is only since 2014 that he was joined by Marie-Sophie Devresse.

3 Alexander Haslam and Stephen Reicher, ‘Beyond the banality of evil: Three dynamics of an interactionist social psychology of tyranny’, 33(5) *Personality and Social Psychology Bulletin* (2007) 615–622; Mark Levine and Stephen Reicher, ‘Making sense of symptoms: self-categorization and the meaning of illness and injury’, 35 *British Journal of Social Psychology* (1996) 245–256; Michael Mann, *The Dark Side of Democracy: Explaining Ethnic Cleansing* (CUP, New York, 2005); Arthur G. Miller, ‘Harming other people: Perspective on evil and violence’, 3(3) *Personality and Social Psychology Review* (1974) 176–178; Arthur G. Miller, ‘What can the Milgram obedience experiments tell us about the Holocaust? Generalizing from the social psychology laboratory’, in Arthur G. Miller (eds.), *The Social Psychology of Good and Evil: Understanding Our Capacity for Kindness and Cruelty* (Guilford, New York, 2004), pp. 193–239; Alette Smeulers, ‘Perpetrators of international crimes: towards a typology’, in Alette Smeulers and Roelof Haveman (eds.), *Supranational Criminology: Towards a Criminology of International Crimes* (Intersentia, Antwerp, 2008), pp. 233–265; Alette Smeulers and Lotte Hoex, ‘Studying the Micro-dynamics of the Rwandan genocide’, 50(3) *British Journal of Criminology* (2010) 435–454.

4 Ervin Staub, *The Roots of Evil: The Origins of Genocide and Other Group Violence* (CUP, New York, 1989); Ervin Staub, ‘Cultural-societal roots of violence. The examples of genocidal violence and of contemporary youth violence in the United States’, 51(2) *American Psychologist* (1996) 117–132.

5 Christopher Browning, *Ordinary Men. Reserve Police Battalion 101 and the Final Solution in Poland* (Harper-Collins Publishers, New York, 1992); David R. Mandel, ‘Instigators of genocide’, in Leonard S. Newman and Ralph Erber (eds.), *Understanding Genocide: The Social Psychology of the Holocaust* (OUP, Oxford, 2002) pp. 259–284; Mina Rauschenbach, Christian Staerklé and Damien Scalia, ‘Accused for involvement in collective violence: The discursive

factors explaining mass crimes.⁶ Differing from these research studies, our work does not deal with the execution of the criminal act itself or with the causes or the context which led to the carrying out of the said criminal act. Nor is it focused on the personality of the perpetrators.⁷ We are not concerned, as opposed to some other works,⁸ with finding out whether or not (international) criminal justice is legitimate in the eyes of the prosecuted parties. These questions are not without value or interest to us, and indeed we have even worked on the perception of legitimacy in the past,⁹ but since then, we have moved in another direction.

The research we are currently conducting concerns the functioning of international criminal justice. We base our analysis of this mechanism on the experience of those that it concerns most directly, namely the tried (acquitted or convicted) parties. We have therefore moved the focus of our research toward the judiciary institution, and no longer focus on the justiciable parties. The latter remain, nonetheless, at the heart of our inquiry through what we refer to as their 'penal experience' which means, by extension, the experience of the criminal justice system as a whole. Simply put, they are no longer the object of research, but rather are considered a vector of knowledge. Taking as our starting point the belief that the accused is the great absent figure from the literature analysing international criminal justice,¹⁰ with the exception of a

reconstruction of agency and identity by perpetrators of international crimes', *Political Psychology* (2015), online: 13 Jan. 2015, DOI: 10.1111/pops.12241.

- 6 Harald Welzer, *Les exécuteurs. Des hommes normaux aux meurtriers de masse* (Gallimard, Paris, 2007).
- 7 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books, New York, 1963); Browning, *supra* note 5; Roger D. Peterson, *Understanding Ethnic Violence: Fear, Hatred, and Resentment in Twentieth-century Eastern Europe* (CUP, Cambridge, 2004); Jacques Sémelin, 'Analyser le massacre. Réflexions comparatives', 7 *Questions de Recherches / Research in question* (2002) 1–42; Pierre Thys, *Criminels de guerre. Etude criminologique* (L'Harmattan, Paris, 2007); Welzer, *supra* note 6.
- 8 Jonathan D. Casper, *Criminal Courts: The Defendant's Perspective* (US Department of Justice, Washington, DC, 1978); Jonathan Jackson and Tom Tyler, 'Future challenges in the study of legitimacy and criminal justice', in Justice Tankeba and Alison Lieblich (eds.), *Legitimacy and Criminal Justice: An International Exploration* (OUP, Oxford, 2013) pp. 83–104; Tom Tyler, *Why People Obey the Law: Procedural Justice, Legitimacy and Compliance* (Yale University Press, New Haven, CT, 1990).
- 9 Damien Scalia, Mina Rauschenbach and Christian Staerkle, 'Paroles d'accusés sur la légitimité de la justice internationale pénale', 3 *Revue de Science Criminelle et de Droit Pénal Comparé* (2012), 727–745.
- 10 Frédéric Mégret and Marika G. Sampson, 'Between Defiance and Defence: When and Why do the Accused Decide to 'Play by the Rules' of International Trials?' (2017) forthcoming;

few studies,¹¹ our research concerns those specific moments including 'trial', 'prosecution', 'acquittal' that we consider from a singular experience in all its complexity. The goal is to understand the international criminal process (from arrest up to the end of the execution or the deprivation of liberty) through how it is experienced by the people tried, especially as they represent, in our view, key actors of the said process. We have therefore met with around sixty people tried by two international criminal tribunals (International Criminal Tribunals for the former Yugoslavia and Rwanda)¹² and analysed around thirty of these semi-structured interviews. We are still working on the rest of this corpus. To some extent, people with such experience (when not incarcerated), can be methodologically considered as a 'hidden population'. The strategy put in place to contact and to meet them is therefore limited by a lot of practical considerations, and is thus based on various methods especially including intermediaries, chain referral system, direct solicitations. When not interviewed in detention, they were met at home or in a place of their choice, and, as they have chosen, isolated from any audience. All the people were free to respond positively or not to our request. They have not been subject to the IRB (Institutional Review Board, a protocol review to assess the ethics of the research and its methods) because this practice is rare in the European countries where we work (Belgium, France, Switzerland) and the IRB was not stipulated by the grants that have supported our research. That being said, this protocol is the subject of many critics,¹³ particularly in areas where political issues are sensitive and the identities of respondents far from neutral. This is the case in our research, in which criminological concerns are situated in the delicate context of international conflict, with people who sometimes have high profiles. In this framework, where anonymity must necessarily be guaranteed and where people are met because of a possible legal transgression and are asked about their view of the penal system, any form of formal commitment (with complicated

Damien Scalia, 'Expérience de justice internationale pénale : perception de domination par d'anciens dominants', *HS Revue Québécoise de Droit International* (2015) 15–33.

- 11 Isabelle Delpla, 'Catégories juridiques et cartographies des jugements moraux. Le TPIY évalué par victimes, témoins et condamnés', in Isabelle Delpla and Magali Bessone (eds.), *Peines de guerre. La justice pénale internationale et l'ex-Yougoslavie* (Editions de l'EHESS, Paris, 2009) pp. 267–285 ; Barbora Holà and Joris van Wijk, 'Life after Conviction at International Criminal Tribunals – Empirical Overview', 12 *J. of Int. Crim. Just.* (2014) 109–132.
- 12 Referred to hereafter as ICTR and ICTY.
- 13 See Charlotte Baarts, 'Stuck in the Middle. Research Ethics Caught between Science and Politics', 9(4) *Qualitative Research* (2009) 423–439; Maritza Felices-Luna, 'Attention au chercheur! L'éthique sous la menace de la recherche, la science sous l'emprise des comités d'éthique en recherche', 40(1) *Déviance et Société* (2016) 3–23.

procedures, forms to fill out, openings for legal actions or judicial recourse) can appear totally counterproductive. And it is especially so for researchers, particularly in view of their need to radically distinguish themselves from the law and its institutions. The fact remains that, if ethical commitments have not been formalized with an IRB, they have of course been taken into account during the interviews. Accordingly, we therefore made formal commitments to unrecognizability, respect for the hesitations to talk, scientific use of the data, and deletion of records with each interviewee.

Furthermore, the method of grounded theory was used to analyse the data collected by semi-structured interviews. Additionally, we still continue to conduct similar interviews on a regular basis, including with people brought before internationalised or national criminal courts. Through this approach, we also intend to question penal and extra-penal rationality¹⁴ that underlies the functioning of international criminal tribunals. In our current research, our questions are thus formulated as follows: what can we learn from the experience of prosecuted people about the judicial process? Does this knowledge throw new light on the latter, and if so, to what extent? What does the experience tell us about international criminal justice, as far as its stakes, its key ideas, its weaknesses and its impacts are concerned?

Several intermediate results have already been presented at conferences¹⁵ and in publications.¹⁶ The results of the research described above are not the most important for the purpose of this article, where we will mostly focus on epistemological issues. Even if the questions that have been raised are interesting, we will leave them aside and will not discuss our findings. What interests us here and represents the core of our article, is the fact that each time we have given spoken or written presentations of our research, we have been met with scepticism and even fierce criticism. We have almost systematically

14 Margarida Garcia, 'La théorie de la rationalité pénale moderne: un cadre d'observation d'organisation et de description des idées propres au système de droit criminel', in Richard Dubé, Margarida Garcia and Maira Rocha Machado (eds.), *La rationalité pénale moderne. Réflexions théoriques et explorations empiriques* (PUO, Ottawa, 2013) pp. 37–72; Alvaro Pires, 'Aspects, traces et parcours de la rationalité pénale moderne', in Christian Debuyst, Françoise Digneffe and Alvaro P. Pires (eds.), *Histoire des savoirs sur le crime et la peine*, vol. 2., *La rationalité pénale moderne et la naissance de la criminologie* (De Boeck, Brussels, 1998) pp. 1–52.

15 The findings have been presented at conferences, including: Annual Meeting of American Society of Criminology (2014); European Consortium for Political Research (2013); Annual Congress of the International Sociological Association/Institut d'études politiques (2013); Law & Society Annual Meeting (2013).

16 Scalia *et al.*, *supra* note 9; Scalia, *supra* note 10.

had to justify our approach, considered utterly incomprehensible or indefensible by some colleagues. This viewpoint has also been expressed during the peer review of articles we submitted for publication. While it goes without saying that critical confrontation is an integral part of the work of any researcher, we must point out that the scepticism does not concern the quality of our material, the validity of our methodology of data collection or analysis (remarks on these are generally positive, and it is usually upon these areas that the bulk of evaluations does focus). What seems to be most problematic in the eyes of our reviewers is our basic postulate. Criticism we have received could be summarised as follows: ‘why – or to what end – interview international criminals in order to acquire a better knowledge of criminal justice?’ As we shall see, under this general question and the reproaches formulated against our approach and their epistemological foundations, scores of presuppositions lay hidden (more or less successfully). We now wish to shed light upon them in order to probe them in depth.

In view of the recurrent criticism we have encountered, we consider it relevant to develop a theoretical argument that would justify the recourse to the penal experience of people prosecuted by international criminal tribunals. The questions this article intends to answer are as follows: what are the roots of such disapproval? How and why are these criticisms formulated? Does the specific context of the research favour reservations about this type of study? What are the epistemological arguments in support of our approach? Can we consider the word of the accused as valid data for scientific knowledge? To answer these questions, our reasoning, based on conceptual landmarks drawn from the social sciences, allows us to also support a specific approach to the legal process as phenomenon, and its impact. What is special about this approach is that it provides much needed distance from the ‘point of view’ of criminal justice. We do not want to think or to reason within its frame. Our goal is also not to observe how the constraints of the trial influence the positioning of the people it involves.¹⁷ On the contrary, the perspective here aims, to defend a view and research completely located ‘outside the box’, emancipated from legal, judicial and penal categories. It is therefore not only addressed to sociologists, social psychologists and criminologists, but also to lawyers, who are, considering the foundations of their field, probably the most resistant to our approach. This article is also a consequence of the current system of peer-reviewing, in which anonymity is (almost always) compulsory, thereby precluding the possibility of engaging in a real discussion with those who evaluate our articles.

17 See for example Mégret, *supra* note 10.

Besides, if numerous texts in sociology, criminology or social psychology defend the interest of empirical research that engages with the perpetrators of a crime,¹⁸ then our approach is justified in particular by the level of criminal justice that it tackles, and therefore the behaviours it responds to, namely the international level and international crimes described as 'the most grave.' To take up the terms of M. Garcia, it is thus 'a questioning of the epistemological questioning'.¹⁹ In other words, we offer to take law into question using the tools of social sciences.

In order to support the interest in approaching international criminal law from the perspective of penal experience, we shall first point out the criticisms that have kept arising throughout our research. We will preserve the anonymity of those who formulated them, knowing that we mostly did not know their identities.²⁰ These criticisms will be organised in two categories: those that we characterise as 'moralistic', based on the dismissal of our 'partners in research' under labels such as '*génocidaire*'. Secondly, we shall look at more 'substantive' criticism that questions or even attacks the validity of our data by making the claim that, for various reasons, what we learn during our interviews is biased (2). Then we shall endeavour to identify the foundations of these criticisms from three categories of argumentation: 'moral-functional' explanations (that rest on the main finality pursued by international criminal law), 'contextual' explanations (that envision the environment in which criticism is formulated, that is to say international criminal law and its related doctrine), and lastly the

18 Jackson and Tyler, *supra* note 8; Dan Kaminski and Michel Kokoreff (eds.), *Sociologie pénale. Système et expérience : pour Claude Faugeron* (Erès, Ramonville-Saint-Agne, 2004); Tomas Ståhl, Jan-Willem Van Prooijen and Riël Vermunt, 'On the psychology of procedural justice: Reactions to procedures of ingroup vs. outgroup authorities', 34 *European Journal of Social Psychology* (2004) 173–189; Tyler, *supra* note 8.

19 Margarida Garcia, 'De nouveaux horizons épistémologiques pour la recherche empirique en droit : décentrer le sujet, interviewer le système et 'désubstantialiser' les catégories juridiques', 52(3–4) *Les Cahiers du Droit* (2011) 417–459, p. 420.

20 For this reason, it will be impossible for us to proceed toward a nominative referencing of the critical arguments that we will be quoting. Elements of discourse mentioned in this article between quotation marks thus either quote the words we heard during talks or conferences that we carefully recorded in view of preparing this article (that we have been thinking about for a while now), or summaries of peer reviews emanating from journals that we will not mention by name, for reasons that our readers will easily understand. We shall therefore designate under the terms 'interlocutors', 'evaluators' or 'contradictors' the people who have formulated negative criticism against our work, even if we have not always been able, to our regret, to enter into a real dialogue with them. We would like to thank these people, in any case, for leading us toward this captivating discussion and thereby contributing to the consolidation of our point of view.

‘disciplinary’ explanations (founded upon the validity of knowledge produced by social actors and particularly the ‘offender’ in social sciences) (3). Lastly, we shall conclude by broaching the necessity for our research and considering its epistemology in order to clarify what we refer to as an ethical position. The latter justifies at once our response to criticism as well as the pursuit and deepening of this type of work, taking as its source the knowledge of prosecuted people, whether they have been acquitted or found guilty. Without developing it in our article, we will refer to this perspective as the *respondents’ approach* (a term not focused on acts and used to contrast with positivism), and call for its development.

But before proceeding further in depth, and in order to pre-empt a criticism that has not yet been formulated, let us clarify that the position we defend here does in no way imply that our approach should be isolated and meant to delegitimise work conducted with victims or professionals of international criminal law. Our research is justified precisely insofar as it complements those other works. It offers a possible prism, an additional view that sheds new light on the analysis of international criminal law.

2 Criticism for Taking into Account the Point of View of the Prosecuted Parties

Upon closer scrutiny of the criticism formulated against our research, it appears that the criticism can be divided into two different general types: ‘moralist’ criticism targeted, explicitly or not, against the category of people which we chose to meet (2.1); and substantive criticism, aimed rather at the content of what they say (2.2). These two types of criticism are not entirely separate or impervious to one another: various shifts happen between them. Nonetheless, these two categories reveal the key ideas that have been formulated, sometimes with more or less benevolence, with regard to our approach.

2.1 *Moralist Criticism: ‘Discourse(s) without Value(s)’*

The most commonly encountered – and most virulent – criticism formulated against our work consists in stating that people who are brought before international criminal tribunals have no right to speak out, precisely because they are international criminals who took part in facts of unspeakable atrocity. According to this view, since the people who take part in our research are ‘*génocidaires*’, their word is necessarily worthless. Some of our reviewers even go so far as to declare that the fact alone of meeting these people is in and of itself unacceptable. One offering such a critique would explain that

denial would seem to be the most obvious response to crimes by perpetrators in any court. It does not matter whether denial emerges around participation in a joint criminal enterprise or command responsibility; perpetrators deny responsibility for wrong-doing.

This type of 'moralist' criticism is based specifically on the fact that the crimes at hand are among the worst that can be imagined, and that their perpetrators are no longer part of society. They are thereby considered as real outsiders, using H.S. Becker's expression.²¹ To listen to what these people have to say would be tantamount to challenging the system that judges them, or even the gravity of the facts for which they are being prosecuted. The implicit suggestion here being that we, the authors, are genocide deniers, something we can only robustly defend ourselves against. The overall objection we have encountered is expressed in terms such as: 'in the end, this justice system is being criticized, without saying a word about the Tutsi genocide' or

[with such research,] one loses sight entirely of the fact that this justice system is prosecuting ... a genocide that has been committed, by people who did give orders, others who followed them, and which claimed the lives of at least 800 000 people.

We have thus been reproached for not broaching the subject of the crimes themselves – as if it were impossible for any research of value to ignore the subject – even though the crimes themselves are not the object of our research.

The discarding of the discourse of people prosecuted by international criminal justice consequently has a disqualifying effect on the analysis conducted. In spite of this, we constantly hear that the word of international criminals, contrary to other actors, must necessarily be put into perspective and placed in another value system, since these people have indeed committed the worst crimes. From this point of view, the analysis, if it can be carried out (which is not always the case), can then only deal with the inadequacies and inconsistencies to be found in our subjects' interviews. In short, it must be a corrective, distancing device with respect to what is said by the justiciable parties. A sort of sociological banishment should thus be operated and the analysis of the words of prosecuted people should be considered irrelevant in understanding international criminal justice. To take their discourse into consideration could only, at best, be done in order to consolidate them in their status of

21 Howard S. Becker, *Outsiders: Studies in the Sociology of Deviance* (The Free Press, New York, 1963).

'monster', which the international community and international criminal law, but also a part of legal doctrine, have assigned them. According to 'moralist' criticism therefore, the magnitude of the facts represents an obstacle to any word a perpetrator or presumed perpetrator might utter about the institution that tries them, as if accepting to listen to them meant tacitly accepting their crime, and thereby discrediting justice. One will note, however, that when this word is used to explain how the crime was committed, it immediately appears as much more acceptable. It should also be noted that to listen to what these people have to say about their deeds constitutes one of the projects of criminal justice, as well as an important part of research conducted in social psychology and positivist criminology.

2.2 *Substantive Criticism: 'An Invalid Discourse'*

The second type of criticism that we are confronted with, although quite similar to the first one, distinguishes itself from the latter subtly, and targets not the legitimacy of the word of the prosecuted parties, but rather the validity of its content. The reproach is then expressed under the form of a 'logical' reasoning, whereby all the positions of acquitted or convicted people can only be formatted, predictable and necessarily partisan (and therefore without any value or interest), since the justice system has tried these parties, and, in some cases, convicted them. In this perspective, any critical element, any sign of dissatisfaction or incomprehension emanating from the people we interview is seen as an expression of these people's personal qualities (which brings us back to our previous criticism), or as a reflection of their unfavourable position in the criminal law game. Increasingly, the chance to have their voices be considered leads these tried people inevitably to justify their crimes and proselytise for their side of the story.

This point of view has, for instance, been expressed as follows in some written evaluations of articles submitted to publications for review or in grant applications: 'It is not clear, in other words, why perpetrators' views – whether of international law, international courts, or the judgments against them – have any bearing on the legitimacy of law or courts':

The determination of the legitimacy of international law [...] would not be determined by the perpetrators but by other acts. This could be the victims of the acts [...] Alternatively, it could be broader society as reflected in media reports or NGO publications that condemn the courts and the decisions ... It could also be determined through legal analysis. Finally, even the perpetrators' defense attorneys or the arguments they made in court might be more relevant to the argument than perpetrators' views.

Since they have been found guilty, convicted people would presumably only speak in negative terms of international criminal law. Their narrative would thus contribute nothing to social sciences and even less to legal sciences. The underlying idea would be that our interlocutors can only situate themselves in one of the 'techniques of neutralization' identified by Sykes and Matza, whereby deviants operate a 'condemnation of the condemners' in order to divest themselves from their responsibilities.²² This being said, if a cursory reading of this theory suggests that guilty people systematically oppose and negatively criticise the justice system, it is important to point out that Sykes and Matza saw in this attitude the manifestation of a community of values between people considered as deviant and those who judge them – a fact that our contradictors seldom, if ever, acknowledge. Our material very often makes note of an initial trust granted to international criminal justice by our respondents prior to their appearance before its institutions.

It is important to point out that this criticism rationally envisions the position of the accused, convicted or acquitted people always with the same perspective: participants in our research had to defend themselves from the crimes of which they were accused (and, in some cases, convicted); additionally, they had to implement a strategy in order to mitigate or negate their responsibility and would thus be bound forever to this logic, even in front of researchers. The clarity of such reasoning also reveals its strange character: our interlocutors could not talk about their position vis-à-vis the legal system, precisely because they were alienated by its effects on them [...] As a result, when their narrative is not purely and simply discarded, it is only read as a consequence of their desire to exonerate themselves. Their discourse would therefore be perverted, since it is inscribed in the continuity of the defense system that appeared during their trial. The accused is thus represented as a calculating figure whose discourse is at best strategic, and at worst, entirely mendacious. As a consequence, the analysis of their experience is not considered to be relevant to efforts to apprehend the legal system because their testimony would simply not be valid. This critique is often expressed through 'they are lying!', or their discourse is deemed 'partisan', the narrative being naturally inscribed within a 'logic of guilt removal'. It is interesting to point out here that our contradictors offer no distinction between condemned and acquitted people, whereas we also met people who ended up being acquitted.

In certain cases, the criticism is expressed in more sober terms: it is then the denial of responsibility that is brought forward in order to discredit the

22 Gresham M. Sykes and David Matza, 'Techniques of neutralization: A theory of delinquency', 22(6) *Am. Soc. Rev.* (1957) 664–670.

discourse or to wipe it from the field of analysis. This then becomes the perfect analogue to the confession concern that traverses criminal justice, as has been illuminated by M. Foucault. For example, one reviewer wrote: 'The research behind the article hinges on perpetrators' accounts regarding the convictions they face. Unsurprisingly, they deny their guilt'. Let us not forget, by the way, that criminal behaviour and its acknowledgment are not part of our research, and that we are in no way interested in finding out whether a person is guilty or not of the facts he is judged for. This question might however arise in our interviews during the development of another topic of conversation. It then appears that the simple manifestation of denial by the accused steals our readers' complete attention, and subjectively taints the rest of the accused's narrative (even if it is generally highly contrasted). Consequently, it is often recommended to us, before presenting the words of the subjects of our study, 'to specify the limits of this discourse', and to clearly highlight 'its partial or biased nature.'

What also interests us about this critical attitude is that, in parallel, the other actors of the legal process, about whom we talk as well in our research, are not, it seems, ever considered as strategic or calculating in their own accounts presented in interviews with other researchers.²³ The judge as well as the victim are rarely perceived as having an interest in lying or putting a strategy into place. In this view, their word is presumed to be true and accepted and analysed without ever being put into perspective, without distance, outside any context. This is revealed, indeed, in numerous pieces of empirical research that analyse, and rightly so, the discourse of international judges, of victims of international crimes, of prosecutors of international criminal tribunals or lawyers before the same courts, without there ever being a need for these

23 Nevertheless, the strategies of actors of the legal process has been the object of some studies, particularly focused on international prosecutors, for instance why the ICTY tried 'secondary figures'. See Philip Caine, 'The International Criminal Tribunal for former Yugoslavia: Planners and Instigators or Foot Soldiers?', 11(3) *Int J. of Police Science and Management* (2009) 345–357; see also: Corey M. Bayliss and Elmer O. Polk, 'Attorneys' Self-Reported Perspectives and Criteria for Requesting Competency Evaluations in Criminal Defense Cases', 30 *Criminal Justice Review* (2005) 312–324. Cencich has analyzed the strategies of investigators (John R. Cencich, 'International Criminal Investigations of Genocide and Crimes Against Humanity: A War Crimes Investigator's Perspective', 19(2) *Int Crim. Justice Review* (2009) 175–191); Dan Kaminski, *Condamner: une analyse des pratiques pénales* (Erès, Paris, 2015); Elisabeth Claverie, 'La violence, le procès, et la justification, scènes d'audience au TPIY', in *Retour sur de la justification*, Actes – Colloque de Cerisy, Economica (2009); Pierre-Yves Condé, 'Quatre témoignages sur la justice pénale internationale : entre ordre public international et politiques de justice', 3 *Droit et société* (2003) 567–594.

researchers to justify their work with respect to methodological positioning or with regard to the validity of the research itself.²⁴

We do not want to be misunderstood: the question here is not in redirecting the criticism formulated against us onto those other works. Rather, we seek to understand why the analysis of the discourse of prosecuted people, as opposed to that of others should be particularly justified. After more than fifteen years of research in the field of criminal law and criminology, we are, like Jones *et al.*,²⁵ rather inclined to think that 'most academics have a low opinion of criminals'. We do not, however, want to stop here: it is important to us to delve more deeply into the roots of the resistance we encounter.

3 The Supposed Foundations of Criticism

In this section, and before positioning ourselves clearly with regard to the criticism we have encountered, we will dare to present a triple explanation. The first explanation, already hinted at, has to do with the peculiar position occupied by morality in the finalities pursued by international criminal justice (3.1). The second places the criticism in the specific context of criminal trials before international authorities (3.2). Finally, the third addresses a major epistemological misunderstanding produced by the disciplinary antagonisms in which we find ourselves stuck against our will, and whose clarification seems fundamental to us (3.3).

3.1 The 'Moral-functional' Hypothesis

The recourse to the moral argument that traverses most criticisms formulated against our work, cannot in our view be understood without regard to international criminal law and its goals. Criticism seems indeed to be voiced, implicitly or explicitly, in view of moral presuppositions implicit in international criminal law and inherited in part from legal doctrine. This morality clearly appears in the goals of this branch of law. Indeed, if international criminal law aims, much like its national counterpart, at several objectives borrowed from classical thought, it seems that morality, at this level, represents one of the most powerful arguments that allow its legitimacy.

24 Condé, *supra* note 23; Delpla, *supra* note 11; Richard A. Wilson, *Writing History in International Criminal Trials* (CUP, Cambridge, 2011).

25 Rick Jones, Stephen C. Richards, Jeffrey I. Ross and Daniel S. Murphy, 'The First Dime: A Decade of Convict Criminology', 89(2) *The Prison Journal* (2009) 151–171, p. 158.

Whereas the arguments brought forward to justify the exercise of criminal law administered at the international level appear multiple and complex,²⁶ the jurisprudence of international criminal tribunals reveals several direct goals of unequal importance. Thus, two major goals are assigned to the sanctioning of international crimes: punishment – or retribution – and dissuasion – specific and general.²⁷ Whereas it is usually expected from the competency of national criminal law, in the ICTs' case-law, the rehabilitation of convicts only holds a marginal place.²⁸ As for reparation for victims, another objective progressively valorised in national rights, only very recently has it appeared in the case of ICTs²⁹ and attained its full place before the International Criminal Court.

Nonetheless, when looking closer at most of these goals, one sees that in the international context they have a fairly limited reach. On the one hand, while victims are indeed now parties at the trial, not all victims can be represented before the International Criminal Court because of, notably, the great difficulties that come with their identification or in view of their often astounding numbers. On the other hand, in historical hindsight, one cannot reasonably hold the position that general prevention, in the international context, is a goal that has demonstrated its efficiency,³⁰ at the very least as far as the impact on the respect and observance of the law is concerned.³¹ Lastly, special prevention seems to having been very quickly dropped as one of the finalities pursued by

26 Michel van de Kerchove, 'Introduction', in Diane Bernard, Yves Cartuyvels, Christine Guillaïn and Damien Scalia, *Fondements et objectifs des incriminations et des peines en droit pénal européen et international* (Anthemis, Brussels, 2013) pp. 11–36.

27 *The Prosecutor v. Stakić*, 31 July 2003, ICTY, Judgment, n° IT-97-24-T, paras. 899–902; *The Prosecutor v. Zdravko Tolimir*, 12 December 2012, ICTY, Judgment, n° IT-05-88/2-T, para. 1209; *The Prosecutor v. Germain Katanga*, 23 May 2014, ICC, Public Document Decision on Sentence pursuant to Article 76 of the Statute.

28 Damien Scalia, *Du principe de légalité des peines en droit international pénal* (Bruylant, Brussels, 2011).

29 SGNU, *Letter from October 12th, 2000*, S/2000/1063, 3 November 2000.

30 Ezzat A. Fattah, 'Une revue de la littérature sur l'effet dissuasif de la peine', in *La crainte du châtime* (Commission de réforme du droit du Canada, Ottawa, 1976) pp. 1–127; Jean-Baptiste Jeangène-Vilmer, *Pas de paix sans justice ? Le dilemme de la paix et de la justice en sortie de conflit armé* (Presses de Sciences Po, Paris, 2011).

31 Jackson and Tyler, *supra* note 8; Mark W. Lipsey and Francis T. Cullen, 'The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews', 3 *Annual Review of Law and Social Science* (2007) 297–320; Raymond Paternoster, 'The Deterrent Effect of the Perceived Certainty and Severity of Punishment: A Review of the Evidence and Issues', 4(2) *Justice Quarterly* (1987) 173–217.

international criminal tribunals. The latter, by the way, are not reluctant to admit in many judgments or decisions of early release that there exists (almost) no risk of recidivism in the case of international crimes.

Punishment seems to be the lone element truly justifying criminal action on the international level. It is the expression of a will of retribution that represents itself as a moral objective *par excellence*. It is indeed founded upon on the rejection of behaviour (crime) in regard to its offense to commonly shared values. The criminal trial and the sentence then fulfil an expressive function:³² they pursue a goal of symbolic consolidating or restoration of the moral order, with a 'socio-pedagogic' finality sometimes presented as 'counter-impunity'.³³ As Durkheim explained over a century ago, what is targeted then is not 'the instrumental efficiency of a criminal law norm that would reside in its ability to prevent the realization of other behaviours', but rather 'the symbolic efficiency of the norm which resides in its ability to produce a certain number of individual or collective representations'.³⁴ Indeed, even in the case of the victims, it is rather in the symbolic register that reconstruction or reparation is expected, through the notion of collective acknowledgment of what has been suffered and mainly goes through a process of institutionalized narration.

In other words, we can formulate the hypothesis whereby, in international criminal law, it has been agreed to valorise first and foremost the idea of fighting against impunity and to promote symbolic moral acknowledgment over any other objective. This rings particularly true in view of the fact that mass crimes necessarily require the selection of some responsible parties. A message of emblematic disapproval of the events is expected from the convicting of those singled out individuals, even if the magnitude of these events otherwise prevents the substantiation and prosecution of all the crimes perpetrated. Considering the offense to morality that has been committed, being situated on the highest degree of reprobation, it is important to make 'significant work'³⁵ that will 'conceive of collective violence as a transgression of universal norms'.³⁶

32 Jean Hampton, 'Correcting Harms Versus Righting Wrongs', 39 *UCLA Law Review* (1992) 1659–1702.

33 Jean-Paul Brodeur, 'Sanction pénale et contre-impunité', 127 *Informations Sociales* (2005) 122–133.

34 Emile Durkheim, *L'éducation morale* (PUF, Paris, 1963) p. 141 (authors translation).

35 Diane Bernard, 'Faut-il croire en le droit (international pénal) ?', *Champ pénal* (2016), online at < <https://champpenal.revues.org/9264>>, February 2016.

36 *Ibid.*; Mark Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity', 99(2) *Northwestern University Law Review* (2005) 539–611.

It is our belief, then, that this specific conception of justice and the expected effects is expressed in part in the criticism formulated against efforts to listen to what tried people have to say about the process in which they took part. Indeed, how can one *not* depart from an instrumental perspective that is the one adopted vis-à-vis the people prosecuted? If the condemnation is first and foremost a mode of affirming collective values and restoring a broken social link, how does one come to terms with the fact that the point of view of those who are the object of said condemnation could contribute to the understanding of this restoration process?

3.2 *The 'Contextual' Hypothesis*

Other reasons seem to explain the resistance of our peer-reviewers to listening to the word of individuals tried by international criminal tribunals, and their refusal to accept that such a perspective could help us to better understand the functioning of the judicial machine. They are firstly anchored in the functioning of international criminal law, within which a specific place is attributed to the accused (3.2.1). Secondly, the reluctance we have encountered seems to be influenced by a widely accepted fiction within (international) criminal law, namely the supposition of a unique and unified truth: the one produced during the course of a trial (3.2.2).

3.2.1 The Accused in an International Criminal Trial: Passive and Rational

As in any trial, the accused who appears before an international criminal tribunal is compelled to play a specific part, and this part does not guarantee that attention is paid to his voice. First of all, any criminal trial presupposes a ritual, and international criminal law is no exception to the rule.³⁷ In this ritual the role of the accused implies a specific positioning that he did not get to choose.³⁸ He is usually alone, finds himself lost in a game he (nearly) does not know and must follow rules that usually, he will not master.³⁹ This positioning finds, according to A. Garapon, its

37 Bernard, *supra* note 35.

38 Antoine Garapon, *L'Ane portant les reliques* (Le Centurion, Paris, 1985) pp. 91–101; Roger Grenier, *Le rôle de l'accusé* (Gallimard, Paris, 1948); Niklas Luhmann, *La légitimation par la procédure* (Presses de l'Université Laval, Québec, 2011).

39 Garapon, *ibid.*, pp. 91–101; Grenier, *ibid.*, pp. 1–63; Christian-Nils Robert, *L'impératif sacrifié : au-delà de l'innocence et de la culpabilité* (Edition d'en Bas, Lausanne, 1986).

ultimate justification in the sacrificial mechanism which characterizes the criminal trial. The judicial ritual must provide the audience with a good victim [of the sacrificial mechanism], who will not rebel, and whose earlier fault will overshadow any symbolic exchange made at their expense.⁴⁰

The accused's word is furthermore filtered through a lawyer, who is precisely expected to be, based on his/her good knowledge of the rules of the criminal law game, the authorised interpreter. The mechanism of exclusion presupposed by the trial, or even its 'sacrificial imperative',⁴¹ is one of its 'hidden structural principles'.⁴² In this perspective, the individual in the expiatory position⁴³ has no say in assessing the system that excludes him. The accused is passive, incurring the fate that befalls him because whatever he might say will have no major impact, the final decision being more important than the process that leads to it. There is thus no particular space in international criminal law for the expression on the part of the accused, of any opinion about the process they take part in. It is therefore easier to understand the resistance that some of our contradictors (who, by the way, might be part of this very institution and play a role in it) may have in accepting that academic research might allow for a space of critical expression by the accused and/or the convicted parties that justice itself did not wish to grant them.

Then – and we have already stressed this – the criminal trial envisions the one it judges from a rational perspective that is, however, simply one option among many others. Modern penal rationality acquired its shape at the turn of the 19th century in correlation with classical theories of punishment and which is still generally ascribed to today,⁴⁴ presupposes indeed that a committed crime is the product of a rational choice on the part of the individual; and that the punishment, including in its function to act as a deterrent, is decided upon with the same understanding. Surely, before addressing crimes that constitute international criminal law offences, the circumstances of these crimes as well as their perpetrators and victims, should be considered in various ways.⁴⁵

40 Garapon, *ibid.*, p. 101.

41 Robert, *supra* note 39.

42 René Girard, *Le bouc émissaire* (Grasset, Paris, 1982) p. 172.

43 *Ibid.*, p. 37.

44 Alvaro Pires, 'La rationalité pénale moderne, la société du risque et la juridicisation de l'opinion publique', 33(1) *Sociologie et Sociétés* (2001) 179–204.

45 Thus, for instance, mitigating or exonerating circumstances are in place, in case there is a state of necessity or concerns (Sylvia D'Ascoli, *Sentencing in International Criminal Law: The Approach of the Two UN ad hoc Tribunals and Future Perspectives for the International*

But whereas in this field it is mass crimes, or even State crimes⁴⁶ that are usually judged, the accused cannot argue the context of generalised conflict or specific political structures into which they were inserted in order to attempt to mitigate their responsibility. Besides, it is symptomatic to see that *only individuals*, and not States' factions or groups are tried by international criminal tribunals. The individual brought before justice is necessarily seen as isolated, free and rational in the crime that he committed as well as in the manner that he understands justice or sanction.⁴⁷

The two explanations that we suggest here regarding the way in which the accused is envisaged in the frame of a criminal trial (as passive and rational), shed light on how the criticisms formulated against our research reproduce this conception. This representation of the person answerable to the law, the one who is usually defended by criminal justice, informs the critic's conception of what we should have within our research apparatus, as though these two spaces had anything in common. To us, it is a fundamental element to flag: the context of expression within the criminal trial is in no way comparable to that during a research interview. The stakes are totally different during a court hearing or its preliminaries and during an encounter with a researcher. If, as A. Garapon underlines, the criminal trial forces the accused to defend themselves – the ones who do not play the expected part expose themselves to far worse than the ones who do fulfil it dutifully⁴⁸ – this position has no meaning for tried people in front of the researcher, whom they need not fear or expect anything from. And if in spite of this reservation, one persists in considering that the condemned wish first and foremost to justify themselves before the researcher for some reason (considering what the researcher represents, by virtue of their origin, social status or by the connection they might establish with other social spheres), our empirical data reveal that this is not the case: the positions of people who have accepted to take part in our studies have, in the majority of cases, not at all been the same as they were during their trial.

Criminal Court (Hart, London, 2011)), or constitutive elements of crimes against humanity implying that the facts have been committed in the frame of a 'generalized or systematic attack'.

46 In the Statute of the International Criminal Court, crimes against humanity implicate a State or quasi-State politics – Robert Kolb, *Droit international pénal* (Helbing Lichtenhahn, Basel, 2012).

47 Sara Liwerant, *Crimes sans tabou. Les meurtres collectifs en jugement* (Bruylant, Brussels, 2009) p. 159.

48 Garapon, *supra* note 38.

Even if it is not obvious at first sight, the heart of this whole debate is theoretical. As N. Carrier and P. Lauzon underline,⁴⁹ ignoring the context of production of a discourse is tantamount to 'treating the points of view as things independent from their conditions of dialogic construction', that is to say to adopt a positivistic point of view that neglects the idea that knowledge is of a co-produced nature. Let us stress, finally, and in order to make ourselves as clear as possible, that our point of view does not suggest in any way that during our research there could not be particular attitudes and behaviours of our interviewees that would target us in particular. We have thus noted defiance, seduction, claims, denial. Simply, we do not envisage those from any other position than our own: the solicitations arising during our research process, as well as its context, the relationships that are forged in its course. In short, in no way do we consider the option of *essentialising* these particular postures. We have however, found helpful to understand the functioning of international criminal justice those testimonies in which powerfully negative experiences were shared with us on the one hand (for instance, an arrest during which our interviewee was pinned down to the ground by a dozen masked men at home, before the eyes of his young child), and on the other, a feeling of complete satisfaction (for instance, an overall good experience in the Hague prison).

3.2.2 An International Criminal Law in Search of a Unified Truth

A second element deeply rooted in the context of international criminal law that allows us to understand the criticism formulated against us lies in the project of that very law. As already mentioned, a recurrent reproach rests on the fact that our research interlocutors 'lie' because they can at best only try to justify the crimes that they have committed, and can only envisage justice from this point of view.

As a consequence, their speech would only be guided by the concern of justifying themselves, and could not bring any valuable information, be it about international criminal justice or the context of its exercise. Besides the fact that it is symptomatic, again, that empirical research conducted with legal practitioners or victims is not subjected to the same criticism, we note most of all that said criticism once again reproduces the logic of the trial and of its goals. The idea of 'lie' itself is particularly relevant in this context, and can only be associated with the quest for truth pursued by international criminal tribunals; a quest more powerful at that level than in national criminal law.

49 Nicolas Carrier and Pierre Lauzon, 'Se shooter en présence d'intervenants? Les points de vue des consommateurs sur la mise en place éventuelle de lieux d'injection de drogues illicites à Montréal', 2(1) *Drogues, Santé et Société* (2003) 5–6 (authors' translation).

As P. Lagrou reminds us, many authors have stressed the extent to which international criminal justice seems to respond to the necessity to organise ‘trials for history’ that ‘intends to establish a historic truth because it constitutes archives for posterity and allows the fight against oblivion’.⁵⁰ We notice indeed that international criminal courts and tribunals were created and function particularly with the aim of participating in the writing of history at the same time as they use the latter in order to apprehend contextual crimes and their constitutive elements.⁵¹ Besides, the idea of truth in the context of the international criminal trial sends us to particularly important strategic stakes when it comes to establishing, on the international level, processes of reconciliation or democratic reconstruction. But if the trial can be seen as a ‘production mechanism of a judicial truth’, the latter can only be very specific and is obviously ‘confronted with other modes of production of other forms of truth’.⁵²

Historians have thus been the first ones to wonder about this confrontation, quickly agreeing on ‘the superiority of historical truth over judicial truth’ to the point that ‘all consider judicial sources to be filled with trappings or slanted, filled with lacunae and dead angles’.⁵³ Lawyers such as Michel van de Kerchove help us envisage ‘judicial truth’.⁵⁴ Thus, he explains, as opposed to the scientific approach that aims through diverse methods to produce a group of findings as the basis of an observation of reality, judicial truth concerns, as such, normative enunciations, even if the latter are partly founded on judgments of reality. Judicial truth, says van de Kerchove, ‘is founded more on “argumenting” the greater or smaller conviction power of which has as its goal to create the adhesion of a judge whose power of appreciation [is] inevitable’.⁵⁵ Thus, judicial truth is the truth only because the law wants it as such, and not because reality can be characterised by unique truths. As a result, such a judgment does not content itself with accounting for a pre-existing reality, but has partly as its effect that ‘reality finds itself immediately transformed by enunciation itself’.⁵⁶

50 Pieter Lagrou, ‘L’Histoire à la barre, la vérité est-elle possible ?’, in Julie Allard, Olivier Corten, Martyna Falkowska, Vincent Lefebvre and Patricia Naftali (eds.), *La vérité en procès. Les juges et la vérité politique* (LGDJ, Droit et Société, Recherche et Travaux, Paris, 2014) pp. 293–306 (authors’ translation).

51 Wilson, *supra* note 24.

52 Robert Jacob, ‘La justiciabilité de la vérité, un élément de culture juridique ?’, in Allard *et al.*, *supra* note 50 pp. 285–292, p. 285 (authors’ translation).

53 Lagrou, *supra* note 50, p. 294 (authors’ translation).

54 Michel van de Kerchove, ‘La vérité judiciaire: quelle vérité, rien que la vérité, toute la vérité?’, 24(1) *Déviante et Société* (2000) 95–101 (authors’ translation).

55 *Ibid.*, p. 96.

56 *Ibid.*, quoting François Recanat, *Les énoncés performatifs. Contribution à la pragmatique* (Editions de Minuit, Paris, 1981) p. 180 (authors’ translation).

One of the functions assigned to the judicial process is to reach an agreement, to propose a unified point of view from several versions of reality that are necessarily divergent in order to decide at the end of the contradictory process what will be considered true. We note that this debate, where historic and judicial notions of 'truth' are measured against another, essentially reveals the fundamental contradiction that may exist between the normative approach supported by law (that aims at influencing the real by the production of a truth that is necessarily situated within a specific context), and a project of knowledge like the one that can be supported by historians or other researchers in the social sciences.

But the debate relative to truth necessarily leads one to focus on facts, events or their interpretation (that are specific to judicial organs and their commentators). This seems far from the object of our research that focalised on the judicial process, rests on the findings of an 'already old criminological tradition'.⁵⁷ This tradition, to which we shall return, indeed radically distinguishes criminality (and, therefore, acts committed and their circumstances) and the mechanisms that handle it (penal processes in particular), and relocates the gaze onto the process of construction and transformation of what, first of all, represents a social fact before it becomes a crime. The object of study is thus not a historic or a judicial truth that must be revealed, but an institutional and political process that constructs a social reality through the interpretative operations of selection and orientation; one that is provisional and evolving. In this perspective, we contend that the notion of truth can be posed only in view of the epistemological choice of the researcher and that, far from limiting itself to a choice of object, supposes that one reasons in terms of theoretical options, analysis methods and models. This brings us to our final explicative hypothesis that places the criticism we received within the frame of various conflicts, the disciplinary basis of which appear to be central to our discussion.

3.3 *The Disciplinary Hypothesis*

On the surface, it would seem that the criticism formulated against our studies rests upon a moral position and the demands coterminous with the foundations and workings of institutions such as the ICTs or ICC. But they also find their roots in age-old debates in the humanities. In this context, discarding an accused or convicted person's account sends us obviously to two

57 Charlotte Vanneste, 'L'évolution de la population pénitentiaire belge de 1830 à nos jours: comment et pourquoi ? Des logiques socio-économiques à leur traduction pénale', 6 *Revue de Droit Pénal et de Criminologie* (2000) 689–724, p. 690.

epistemological reflections: the place of the actor in the construction of knowledge in the humanities and, correlated to this, the status of qualitative research (3.3.1). The way in which the delinquent is envisaged has evolved in criminology and as a consequence, his or her reflexive and critical capacity has been increasingly acknowledged (3.3.2). This is hardly a discovery: the word of the layman has not always been welcomed by the scientific field, much as qualitative research has been (and still is) the object of virulent critique, including from some inveterate quantitative researchers.⁵⁸ In the same way, and ahead of the construction of knowledge, the word of criminals has not always been heard historically, and their position in the community of humans is hardly the object of a broad consensus.

And yet these findings and the questions that they raise (which for some researchers appear to be entirely familiar) are still the object of controversies or have simply not entered all disciplinary fields. It is therefore hardly surprising that the criticism against our work is mostly formulated by jurists, as if these debates had no room within legal studies (if they had any right to exist in the first place). To work on the justice process, its functioning and its normative stakes from an empirical analysis situated on the side of actors (and, furthermore, actors considered non-legitimate), leads researchers to follow the path of interdisciplinarity, and therefore to take risks, forcing them to establish theoretical dialogues whose epistemological foundations can at best diverge, or, at worst, mutually ignore one another. The discredit then comes from the difference in approach, and the misunderstanding caused by this difference. Thus, a clarification seems necessary to us in order to strengthen a position that perhaps a bit too rapidly qualified as inadequate, does, after due reflection, turn out to be fully relevant, precisely when looked at from an interdisciplinary angle.

3.3.1 Social Actors and Knowledge Building

It would be presumptuous to retrace here, in a few lines, one century of development of social sciences and, particularly, the debates within these sciences placing overemphasis on actors, their experience and their points of view in our

⁵⁸ Let us point out that, contrary to Carrier and Lauzon (*supra* note 49, p. 5), who write of this frequent experience in qualitative research (that we have experienced), in the course of our research in international criminal law, we have seldom been confronted with criticism of 'non representativeness' regarding the sample of our respondents. We have been spared this criticism, inadequate in view of standards of qualitative research (that usually resorts to a sampling by diversification), given the low numbers of people brought before international tribunals, as well as the (apparent) homogeneity of their profiles.

understanding of the world. Accordingly, we will allow ourselves a momentary focus on the important break that occurred within sociology in the middle of the 20th century when researchers, in an answer to a positivistic approach that excluded any idea whereby social phenomena could be apprehended by those who are directly implicated in them, proposed on the contrary that social reality could only be understood 'with respect to the perspective of the actors themselves'.⁵⁹ J. Poupart reminds us how fundamental this epistemological break was to the evolution of social sciences, allowing qualitative methods to create for themselves a respectable place in a field hitherto largely dominated by quantitative studies with an objectivistic vocation. He also stresses the major impact of those approaches developed by American sociologists such as W.I. Thomas⁶⁰ on the importance of 'definition of the situation' of social actors; G.H. Mead⁶¹ and H. Blumer⁶² when they insist on the necessity to explore 'the meaning that actors give to their actions; or H. Garfinkel,⁶³ who, opening the way to ethnomethodology, explores categories of common sense and 'the manner in which the actors build their reality throughout their daily activities'.⁶⁴ After this momentous break in the field of sociology, the point of view of actors, their experience, the sense that they give to their behaviour, the manner in which they apprehend their environment, the way in which they occupy the institutions that support or manage them, would thenceforth appear as one of the major keys to understanding society, its functioning and organisation. As a result, methods such as observation, interviews or life experience inquiry would become the privileged tools of the social sciences.

The opening created by this perspective in traditional sociology, though it appears to be fundamental today, was met with a lot of resistance, of which we still find traces to this day, and of which we find echoes in the criticism that we aim to answer to through this article. The debate touches upon many fundamental questions as much as it reveals obstacles in the resistance at the borders of some fields, for instance, the line separating law from sociology or

59 Jean Poupart, 'L'entretien de type qualitatif : considérations épistémologiques, théoriques et méthodologiques', in Jean Poupart, Jean-Pierre Deslauriers, Lionel-Henry Groulx, Anne Laperrière, Robert Mayer and Alvaro Pires, *La recherche qualitative. Enjeux épistémologiques et méthodologiques* (Gaëtan Morin, Montréal, 1997) pp. 173–209, p. 175.

60 William I. Thomas, *The Unadjusted Girl* (University of Chicago Press, Chicago, 1929).

61 George H. Mead, *L'esprit, le soi et la société* (Presses Universitaires de France, Paris, 1934).

62 Herbert Blumer, *Symbolic Interactionism: Perspective and Method* (Prentice-Hall, Englewood Cliffs, NJ, 1969).

63 Harold Garfinkel, *Studies in Ethnomethodology* (Prentice-Hall, Englewood Cliffs, NJ, 1967).

64 Poupart, *supra* note 59, p. 175.

critical theory in criminology. As J. Poupart underlines, besides ‘the traditional debate between subjectivist and objectivist disciplines’, there is also the question of ‘agreeing to grant to non-specialized knowledge [a value] in the eyes of scientific knowledge’⁶⁵ and their implicit methodologies that are upset by such a break.⁶⁶

As a result, through the criticism formulated against us and beyond some punctual elements identified earlier, it appears that a whole epistemological universe is challenged here. All the same, our contradictors do not necessarily situate the debate at that level, nor do they seem to clearly identify its stakes. Indeed, we are of the belief that the reference model that has been proposed to us to envisage the offender (or, rather, to not envisage him) cannot be thought of outside of a positivistic frame. Only a position of exteriority on our part with respect to our object of research can make it heard and acceptable. It has been asked of us to envisage our research from within socially instituted categories, in particular where the points of reference are produced by the judicial system itself. As we examined earlier, this points to our critics’ persistent belief in the absence of break between what can be said about people in a judicial frame and in a scientific frame. By means of conclusion, we will note the reasons why this perspective cannot be our own as in our view it does not allow for the production of valid knowledge on either the methodological or the ethical levels.

3.3.2 Taking the Criminal into Account

This epistemological clarification would not be complete without taking into account our own field of research, its specificities and its own evolution. To envisage the point of view of the actors of course presupposes confronting oneself directly with the latter, and to take into account all of their singularity. And if it appears legitimate for many researchers today to grant the actors their due place in research, when it comes to criminalised individuals the enthusiasm for this weakens and things undoubtedly become more complicated. The moral positioning mentioned above often leads to situating them at the bottom

65 This being said, let us recall, to mention only the most obvious landmarks of this dialectical evolution, the discussion started by H. Garfinkel around the concept of ‘cultural dope’ or, still, the vigorous debate that followed the publication of the work by Pierre Bourdieu, Jean-Claude Chamboredon and Jean-Claude Passeron, *Le métier de sociologue* (Editions de l'EHESS, Paris, 1968), about the status that should be given to common sense and to common knowledge.

66 Poupart, *supra* note 59, p. 176 (authors’ translation).

of a 'hierarchy of credibility',⁶⁷ lowering them to the level of actors with unauthorised speech. Some of our critics are well aware of this, as is evidenced by the radical difference between the perspective of professionals of justice and victims, and that of perpetrators of what we call 'the most grave crimes'. They consider that the latter have, at best, no place in a study, or worse, no right to express themselves whatsoever. Indeed, a quick glance over social sciences research leads to the realisation that studies that give voice to people who have committed crimes are few and far between, even in the field of criminology.⁶⁸

A small note about the history of this discipline allows us to understand in part this point of view, when one realises that for centuries, the study of delinquency was principally focused on criminals and their offenses: their characteristics, the motives of their actions, their life background and this most often with the almost exclusive aim of *explaining* a behaviour by a cause-and-effect schema.⁶⁹ More specifically, the scientific project has long been one to demonstrate in what way the criminal is 'essentially' a being physically, morally, psychologically or socially different from the normal being, or to explain how, even if he is not different by nature, he ends up becoming so through specific social and psychological mechanisms. For decades, criminology has thus been a 'science of difference', focused on the explanation of crimes rather than on their understanding.⁷⁰ Additionally, many researchers have continued to present it as such. It suffices to think of those who, starting from a substantialist paradigm, study the neurobiological characteristics of people having

67 This concept, developed by Howard Becker, sends us back to the idea whereby, in any system of hierarchical group, the 'question of rank and status are inscribed in the mores', and that 'credibility and the right to be heard are differently distributed over the various hierarchical levels of the system' (Howard S. Becker, *Sociological Work: Method and Substance* (Aldine, Chicago, 1970) 126.

68 As underlined in our introduction, when word is given to offenders, it most often concerns the criminal act itself. Much rarer are studies concerning the criminal justice system from the perspective of the justiciable, and when this is the case, it is mostly about the experience of the criminal sanction, and, particularly, imprisonment. This final observation is confirmed in the field of *convict criminology*, a movement that aims to promote research conducted by those who have themselves directly experienced the criminal justice system. In this case the prison experience dominates the field of scientific production. See particularly Jones *et al.*, *supra* note 25, p. 161; or Grégory Salle, 'Une sociologie des 'taulards': la convict criminology', 68(3) *Genèses* (2007) 132–144.

69 Christian Debuyst, Françoise Digneffe and Alvaro Pires, *Histoire des savoirs sur le crime et la peine. T. 3. Expliquer et comprendre la délinquance (1920–1960)* (Larcier, Brussels, 2008).

70 Christian Debuyst, Françoise Digneffe and Alvaro Pires, *Histoire des savoirs sur le crime et la peine. T. 2. Expliquer et comprendre la délinquance (1920–1960)* (Larcier, Brussels, 2008), p. 262.

committed deeds considered as criminal, with predictable goals.⁷¹ This apprehension of the criminal (in all the senses of the term), in accordance with the postulates of criminal law, inscribes the project of knowledge into a 'technical, expert and ancillary' conception; that is to say, into a '*science d'appoint* or to serve the conception of criminal law and criminal policies, as well as their application'.⁷² The person is perceived there as fundamentally 'different' and envisaged exclusively in view of categories constructed by the judicial institution. It is therefore not surprising that the words of the criminal could only be conceived from this totalising perspective.

However, from the 1950s onward and parallel to this approach, another idea formed, whereby speaking of crime not only consists of 'behaviour or a way of doing' but also represents a 'qualification, an institutional way of defining an act'.⁷³ It is not surprising that it was in American sociology, dealing with the debates identified above, that this widening of perspective took place, leading to new ways of conducting research on the subject. Criminologists then authorised themselves to completely deconstruct the notion of crime by observing how much it could be a label stapled onto some behaviours or, how the reaction provoked by a behaviour could itself contribute to build the latter, or amplify it as a social problem. This approach studied the shift from fact to crime and the activity of the authority that has as its mission the management of transgressions of the law, namely the criminal justice system.⁷⁴ The focus thus being moved, the point of view and the experience of individuals, when incorporated into research, produced information about the functioning of the system rather than about the actors themselves.

While this perspective undeniably influences our own work – as when, for instance, we distance ourselves radically from the idea that the individuals we meet are and should be considered totally as '*génocidaires*', 'liars' or 'manipulators' – it no less remains misunderstood. Often criticised for its relativist character, it leaves little room for moral considerations, emotion, or, in the scientific field, differentialist approaches in which many researchers situate

71 For a critical overview of these approaches, see particularly chapter 6, 'The Antisocial Brain' of the book by Nikolas Rose and Joelle M. Abi-Rached, *Neuro: The New Brain Sciences and the Management of the Mind* (Princeton University Press, Princeton, NJ, 2013), p. 164.

72 Christophe Adam, Jean-François Cauchie, Marie-Sophie Devresse, Françoise Digneffe and Dan Kaminski, *Crime, justice et lieux communs. Une introduction à la criminologie* (Larcier, Brussels, 2014), p. 250.

73 Debuyst *et al.*, *supra* note 70, p. 65.

74 See for instance the synthesis of S. Pfohl (Stefen Pfohl, *Images of Deviance and Social Control. A Sociological History*, 2nd ed. (Waveland Press, Long Grove, IL, 1994), pp. 345–346).

themselves to this day, and whose services are much appreciated by lawyers. Yet, between the postulate of criminal nature and the disqualifying of the condemned and their word, there is only a small step to take, one that is often taken by our reviewers. Consider that criminal law itself, as Debuyst *et al.* describe, favours this attitude in how it ‘tends to operate a distinction between two subject categories: delinquents and non-delinquents; the first of these two categories being the object of a socially negative assessment’.⁷⁵ This point of view has indeed considerably oriented research, which allows us to gain a better understanding of, while still not embracing, the criticism that we have frequently received.

But surely this is not the only reason behind the low level of interest shown by legal studies in the experience and the point of view of the perpetrators of a crime. For if we refuse to essentialise all forms of alterity between the researcher and the ‘criminal’, to fully deny the singularity of such an approach and the discomfort that it provokes is surely too radical. The perspective of meeting people who have been accused of killing others, of having committed dreadful acts, whose moral discourse and lifestyle are often worlds apart from ours, may represent a deterrent for some scholars who may not, quite simply, want to have to overcome their emotions in order to hear such a point of view or to struggle to make other people hear it. This, must we specify, indeed occurs in a general context where research financing in international criminal law is seldom granted to studies that take a critical stance toward it. Through the affirmation of our choice to follow this path all the same, we touch upon another dimension of our approach; an ethical dimension whose unveiling will be at the heart of our conclusions.

4 Conclusion: Toward and for a ‘Respondents’ Approach’

Through identifying possible sources of criticism formulated against our work, we have attempted to shed light on several points of contention relative not only to our scientific project and to our chosen approach to conduct it, but also to our way of dealing with the person who is under scrutiny in international criminal trials.

Our project of knowledge aims at a specific institution and its functioning; an institution whose object is the judicial treatment of perpetrators of deeds that have been placed, through what is traditionally referred to as the ‘international community’, on the highest level of the hierarchy of horror.

75 Debuyst *et al.*, *supra* note 70, p. 262 (authors’ translation).

The approach we have chosen valorises the point of view of the actor, one of those people sometimes qualified as, and sometimes accused of, being ‘criminals’, ‘assassins’, ‘*génocidaires*’, or even ‘monsters’. We have met these people, listened to them, heard them, taken them seriously into consideration, all the while maintaining a specific relationship with limits that, sometimes shifting, were at least implicitly delineated by our frame of research. A major misunderstanding often touches upon, as we have seen, the idea that ‘acts are denied’ by an approach such as ours which presupposes a closer relationship between us and those who perpetrated the acts. It is important for us to specify that the questions of ‘reality’, of the actions that were carried out, of their circumstances, of their consequences, of the institutional treatment or of its consequences does not locate themselves, from our point of view, on a path that would lead from acknowledgment to negation. We believe that ‘reality’ can only be conceived in a dynamic and procedural perspective where actions, feelings, representations, norms, institutions, definitions, interactions and interpretations are intermingled. It is not a static reality, but rather it is complex and shifting, and it in no way leads us, as Ch. Adam *et al.* rightly point out, to having to ‘choose one’s side’,⁷⁶ as if criminal research was all about locating ourselves in the war conflict, a conflict that criminal law paradoxically (re)produces in retaliation, precisely, to war and its devastating effects.

In our respective capacities as criminal lawyer and criminologist, we are necessarily brought to work on and with the notion of crime, a complex notion that concerns normativity, be it on the side of law or morality. But we also know that this notion is marked in a fatal way by pain and suffering, sometimes to an unbearable degree. It is thus in no way our goal to sap the emotional load out of the tragic situation, or to ‘negate reality’ in the way that it is understood by our contradictors. Considering things as they are however, must the intolerable character of those who have violated fundamental values, and the indignation that the latter provokes, be an obstacle to reflection or research, including concerning the suffering that criminal justice itself inflicts upon the perpetrators and their victims? Must one adopt a position that in the name of some superior moral would suggest putting in between brackets the idea that the other, however distant, should not be taken into account?⁷⁷ Hence, if ethics of research rest in part on the enunciation of our presuppositions, we can affirm that our research constitutes a positive response to the invitation

⁷⁶ Adam *et al.*, *supra* note 72, p. 251.

⁷⁷ Françoise Digneffe and Dan Kaminski, ‘Crime et sagesse pratique : quelques enseignements éthiques de l’affaire Dutroux’, 38 *Documents de Travail du Département de Criminologie et de Droit Pénal de l’UCL* (1999).

formulated by F. Digneffe and D. Kaminski 'to experience the unbearable without subjecting oneself to tragic extremities'.⁷⁸ We are thus compelled to adopt a 'perilous' position⁷⁹ that consists, for the purpose of our research, in 'standing by the side of those whom problematic acts have isolated (...) without scientifically reproducing this isolation'.⁸⁰ This we do because we think that, indeed, in spite of the type of problems that international criminal tribunals must address, a prosecuted individual is always alone and in a position of vulnerability in any judicial process. In that sense, by making our choice explicit, we directly attempt to answer the question raised by H. Becker in 1967: 'Whose side are we on?'⁸¹ The error of some of our reviewers is, however, to believe that the term 'side' refers to the way the criminal process defines itself by antagonism, while for us it is simply a question of focusing on a heuristic viewpoint and certainly not to take part in a conflict.

In view of what has just been said, it is easy to understand why the question of the legitimacy of the word of the accused people we met has caused, even indirectly, an epistemological debate. Our proximity with these people is in the service of the project of knowledge as an ethical intention, but also as a methodological tool. Nevertheless, in the register of method, must one constantly remind readers of the existence itself of this posture and of its foundations, as we have done in this article? We are not quite certain of this, as this question, inversely to ethics, is to us a matter of the general implication of the qualitative approach. As such it has been clarified, explained, reiterated and rehashed in thousands of pages dedicated to the subject. Thenceforth, the simple claim that we situate ourselves in a constructivist approach should be sufficient. This position, as we have already underlined, proposes models of analysis founded on the break with substantive conceptions of social reality, and defends the idea that the latter, as the concepts that account for it, are the product of a permanent construct to which the researcher participates in the same capacity as the other actors.⁸² In this perspective, the alleged 'hyper-subjectivity of the *génocidaires*' far from hindering research, constitutes its main asset.

78 *Ibid.*, p. 16.

79 Ricardo Cappi, *Motifs du contrôle et figures du danger. A la lumière du débat brésilien sur l'âge de la majorité pénale* (Larcier, Brussels, 2015), pp. 313–314.

80 Adam *et al.*, *supra* note 72, p. 249.

81 Howard Becker, 'Whose Side Are We On?', (14)3 *Social Problems* (1967) 239–247. See also Alison Liebling, 'Whose Side Are We On? Theory, Practice and Allegiances in Prison Research', 41 *British Journal of Criminology* (2001) 472–484.

82 Pieter Berger and Thomas Luckmann, *La construction sociale de la réalité* (Armand Colin, Paris, 1966).

We thus propose to envision the people who have taken part in our research not from a passive and totalising angle in which they would be seen today only through their past crimes. Rather, we see them as subjects who 'have a perspective of their own, which depends on the position that they occupy in the social frame, of the history that was theirs and the projects around which their activity is organized' a social subject brought, in the frame of interrelations, to 'be an actor, that is to say, 'acting', or intervening'.⁸³ In this sense we do not deny actors their capacity to be autonomous, provided that this autonomy can be recognised in all its dimensions: not only – as in criminal law – in view of an act qualified as criminal, in quest of a responsible party, but also in the ability of the ones held as such (be it rightly or wrongly), to express themselves on the way in which they are tried. While we have hesitated for a long time on the way to designate, in the present article, our interlocutors' struggle with international criminal justice, we suggest, at the end of our reflection and within our frame of research, considering them as 'respondents'. The polysemy of this term allows us to consider our interlocutors in a plural manner. Firstly, we ask them to participate in our research because they have to respond to criminal justice for certain actions. Secondly, we see them as 'respondents' because these individuals have agreed to respond positively to our requests. In doing so, what they told us can represent a variety of answers to questions asked (and others that were not). As opposed to the idea of pursuing a 'perpetrator's approach' in social sciences or law that presupposes attention to committed acts, their motives and consequences in the criminal and social fields, we prefer to engage with a 'respondent's approach', which implicitly entails a position that is no less active, but which is located on the side of the reflexive capacity of the actors. The development of this proposal will undoubtedly be the object of our forthcoming article – provided it moves beyond the stage of the new critical response to which – and this is obviously desirable – it will surely be subjected.

83 Christian Debuyst, *Essais de criminologie clinique. Entre psychologie et justice pénale* (Larcier, Brussels, 2009) (authors' translation).