An Empirical Analysis of International Criminal Law: The Perception and Experience of the Accused

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Abstract and Keywords

This chapter is an empirical study of how individuals who have been defendants at the International Criminal Tribunal for the former Yugoslavia (ICTY) and Rwanda (ICTR) perceived and understood the trial process. Breaking with those who resist taking seriously the lived experience of individuals accused of being responsible for terrible acts, the chapter insists that even the most despised *genocidaire* can contribute to knowledge-production about international criminal justice. This chapter's conclusions, which are based on an analysis of 60 interviews, though enlightening are often counterintuitive. It finds, for example, that a defendant's acceptance of the legitimacy of their trial generally depends far more on whether the defendant believes the process treated them fairly than on pragmatic considerations such as the outcome of the trial and the severity of any resulting sentence. Moreover, most defendants felt estranged from the trial process on account of its symbolic 'violence' toward them and the passive position it necessarily assigns them during the trial.

Keywords: International criminal law, International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), Genocide, international criminal justice

I. Introduction

[12]WHILE the ad hoc international criminal tribunals are closing their doors after 25 years of operation and the International Criminal Court (ICC) has regularly been subjected to criticisms (both political and legal), few empirical studies have been carried out on and with the principal stakeholders of international criminal law. Scholars have mainly focused on the technical aspects of international criminal law, on its legitimacy, and on its philosophy. While these approaches are crucial in order to analyze international criminal justice, they seem too narrow to provide an analysis or an appraisal of justice as a whole. On the one hand, legalistic approaches have a restricted objective, limited to constitutive texts (i.e., statutes of international criminal tribunals) and case law, but excluding their

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functioning, their social impact, their interpretation by local populations, as well as their localization on the political (p. 22) and economic map. On the other hand, legitimacy is such a polysemic term[3] that it might be seen as an aporetic, circular, and empty concept.[4]

This chapter is therefore based on the hypothesis that an empirical approach could open a window into a renewed analysis of international criminal justice, focusing on its social impact and concrete significance. It is true that there have been some empirical studies on international criminal law, but they have been carried out mostly on justice professionals,[5] on victims of international crimes, or on populations who have experienced war,[6] as opposed to perpetrators. When studies take into consideration those prosecuted, it is not as 'accused before the court' but as perpetrators. For example, various studies have examined the normative and socio-political conditions of collective violence: the interindividual or intergroup factors facilitating the perpetration of crimes;[7] historical factors explaining mass crimes;[8] and perceptions of justice of ordinary offenders.[9] However, very few scholars have questioned what it really means to be involved in an international justice process, to be accused of the worst crimes, and to have to appear before judges. As a result, the judicial positioning of those prosecuted arouses very little interest among researchers, even though one might think it could help to better understand the functioning of the criminal justice process.

The approach we use for this study intends to fill this gap. Our aim is to analyze international criminal law through the prism of one of the main actors of criminal proceedings: the person who has been tried (i.e., in our research study, after the end of the trial). Our approach proceeds on the assumption that such individuals have 'something to say' (p. 23) on the institution that has tried them, and that the account of their experience should enable us to better understand how international criminal tribunals work. Indeed, their actual experience of the judicial system 'does not only provide information on these persons' paths, representations, failures and practices; it also provides information on the functioning of the penal system, what needs to be fixed and which are the blind spots'.[10] In addition, by interviewing persons who have been tried by international criminal tribunals, we can better assess the impact of the tribunals beyond the trial.

With this assumption in mind, we developed a specific approach for the analysis and understanding of international criminal justice (an approach that complements the other approaches for this field of study), which we named the *Respondents' approach.*[11] In the second part of this chapter, we present some epistemological milestones that support our approach and introduce the methodological choices that have guided our research (II). In the third part, we present some of the results of our study (III). As will be seen, these question the effectiveness and the impact of international criminal justice.

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II. Listening to the Accused as a Vector of Knowledge

A. Epistemological Approach

An epistemological introduction appears necessary to support our approach and perspective. First of all, it is worth bearing in mind that the point of view and the experiences of social actors have not always been recognized in the construction of scientific knowledge, and that such recognition is still controversial in some academic circles. Alongside quantitative studies with an objectivist vocation (that had hitherto dominated the field of sociology), qualitative research came to prominence in the 1920s when empirical research emerged and led to new data-collecting methods, such as observation and interviews. Following the work of renowned US scholars W. T. Thomas, G. H. Mead or H. Garfinkel, sociological research began to take into account '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 which support or manage them'.[12] In this sense, subjectivity and partiality were no longer seen as a bias in research, but as an opportunity to produce substantial (p. 24) data. That material, when rigorously analyzed, can tell us a great deal about society and provide knowledge about institutions.

In the same vein, how to consider the person on trial has long been controversial and still polarizes in academic work. The lawyer generally views the individual as someone who is either accused, condemned, guilty, or innocent, not as someone who can as such tell us anything interesting. By contrast, the critical criminologist or empirical researcher will see 'a person brought to justice' as someone who, through this very experience, has something to say about justice itself. No longer the passive object of positivist research, the defendant can be seen as an active player in the production of knowledge regarding the construction of social reality. We propose, therefore, an analytical model that wishes to distance itself from objective conceptions of social reality by defending the idea, supported by P. Berger and T. Luckmann, that this reality is the product of a permanent construct and 'is characterized by intersubjectivity which refers to the coexistence of multiple realities',[13] like the reality of our respondents, as much as ours.[14]

However, if this view has gained ground and is now commonly recognized in social sciences, considering the experience of the accused still elicits substantial resistance in research on the trial and judicial institutions, resistance that comes mostly from lawyers. Whilst there is by now no difficulty in taking into account what a judge, a prosecutor, an attorney, or a victim may say in the context of research studies on trial, meeting with those accused of crimes—*a fortiori* some of the greatest crimes—to listen to her/his appraisal of the administration of justice is still viewed with scepticism, even frowned upon. Seen perforce by some academic commentators or reviewers of our work[15] as liars, manipulators, or as always trying to justify themselves, said 'perpetrators' are not regarded as capable of reporting credible information about criminal justice. This is not a revela-

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tion; H. Becker analyzed this attitude a long time ago, stating that 'credibility and the right to be heard are differentially distributed through the rank of the [social] system'.[16] Criminal justice is not beyond a pyramidal distribution of power, and we very much tend to find the person accused of a crime as sitting at the bottom of the 'hierarchy of credibility'.[17] Indeed, we found that people charged with 'genocide' are located even lower, whether they were previously powerful individuals or not.

The type of research proposed in this chapter is premised on the necessity to overcome this controversy and to embrace, instead, a more open approach. The crux of this approach is that we do not characterize the people we meet on the basis of the crimes for which they are tried.[18] We just see them as individuals who have something to say about the justice process and we avoid framing their conduct at the outset within legal (p. 25) categories. This is an approach, in other words, that re-empowers the accused for scientific purposes. Although the latter are typically seen as having been very 'active' in relation to their criminal acts, they are often assigned a very passive role in the course of criminal proceedings. Furthermore, the various meanings of the term 'respondent' offer a particularly interesting and multidimensional perspective. First, because criminal justice asks the defendants to *respond* to certain allegations, to explain themselves about their activities, this is precisely why we are and should be interested in their experience. Second, we met with people who often chose to respond to our requests and to answer our questions indicating a willingness to contribute, in their own way, to knowledge-construction about international criminal justice. In this context, the words of respondents raise many questions and highlight issues that otherwise might not have been brought to light such as the 'rise and fall' effect of an arrest, the sensation of being the 'fall guy' of episodes of criminality, the 'violence' of the judicial system, etc.

B. Methodology

In terms of methodology, our findings are based on two qualitative studies that were carried out successively.[19] About 60 semi-structured individual interviews were conducted in the course of these two studies, with an interpreter when necessary. When possible, the place of the interview was chosen by the respondents; however, for most of them, having been convicted, it had to be the prison in which they were serving their sentences. To our knowledge, the interviews conducted have not been placed under audio surveillance nor have they been visually monitored. The topic of the international criminal proceedings in their entirety (from the moment of arrest to the serving of the sentence), and questions about the rights and procedures relating to each individual case were addressed with the respondents. The interviews lasted from 60 to 270 minutes and, with the consent of the respondents, the majority of them were recorded. All of them were then transcribed *verbatim* and analyzed. Our analysis was mainly based on coding procedures taken from the grounded theory approach,[20] with the aim of describing structures and consistencies, and to elaborate hypotheses built on observed reality.[21] In other words, it is a matter of progressively interpreting empirical findings using various techniques of data reduction, organization, and conceptualization. This is 'an iterative approach of progressive theoriza-

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tion of a phenomenon'.[22] For ethical reasons, the anonymity of the respondents was guaranteed.

(p. 26) In terms of the people we met, we should mention that, whereas the International Criminal Tribunal for the former Yugoslavia (ICTY) has judged individuals coming from all sides of the conflict that devastated the former Yugoslavia, the International Criminal Tribunal for Rwanda (ICTR) has judged only Hutus accused of having played a part in the 1994 genocide. As a result, the participants of our study of the ICTY came only from some horizons (Bosnians, and Serbs from Serbia or Bosnia), whilst for the ICTR we met only with individuals of Hutu origin.[23] In both contexts, those we met were political leaders (at a national, regional, or local level), high-ranking officers, heads of administration, as well as individuals active in the field, such as combatants and civilians. Some having intermediate positions within the military hierarchy also participated in the research. Considering the small number of women brought before the international criminal justice system (and our dependence on their motivation to meet us), only men were interviewed. Among these men, nine participants had been acquitted, whereas the others had been condemned under command responsibility, for participation in a 'joint criminal enterprise', or for having directly committed (or been an accomplice to)[24] crimes against humanity, war crimes, and genocide.

Finally, it is important to highlight that, as required in many qualitative research studies, the sampling of our respondents is not representative but follows a diversification principle (i.e., in terms of institutions, crimes, forms of responsibility) and pursues a saturation goal, two standards that allow production of general results.[25] In this type of qualitative study, we do not aim at representativeness (which would have little meaning for such a limited audience). It is more important to have a sample that contains a great diversity of profiles, so as to include a very broad spectrum of experienced situations. As said before, we were also constrained by acceptance on the part of those solicited.

III. Positioning of Those Tried: A Structural Interrelation

In recounting their experiences, those convicted by the International Criminal Tribunals expressed overwhelmingly paradoxical feelings: they acknowledged having (p. 27) been in the trial, but felt totally outside of what was going on in the justice process. They often said that they did not understand what was really happening and that they felt like the prosecutor or the judges were talking to someone else. This perception of being an alien to a judicial process may not be obvious for those who felt they had an informed knowledge of what criminal justice entails. In many cases, at one time or another, those interviewed had held a position of high political responsibility and frequently told us, as we started our interviews, that they had expectations about the judicial process. It is thus essential to highlight the reasons for this sense of rejection, particularly because one of our most significant findings is that criticism was equally strong among the convicted and the acquitted, even though one could have expected the latter to show greater satisfaction in

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a system that ruled in their favour. This part will therefore cover four points. First of all, there is a difference between the respondents' expectations and the reality they experienced (A). Furthermore, the participants explained how they experienced the procedure as 'violent' (actually and symbolically) (B); and saw themselves as being confronted with a politicized and external justice (C). Last, we will explore how the role that is assigned to them within the criminal procedure is related to the radical rejection of the figure they embody (D).

A. A Gap Between Expectations and Reality

From Aristotle to Rawls, numerous theorists have shown that there is no unified conception of justice. It thus seemed promising as a starting point to examine what our interviewees' initial concept of justice was. We noticed a significant individual positioning in relation to international criminal justice. By this we mean a conception of justice that pre-existed their prosecution and that seemed to have led them to expect a better performance than what they experienced. This conception mainly pertains to 'moral-humanist' referents. When the participants expressed how they perceived justice before being directly brought to it, they referred to some moral values and conceptions of justice that were relatively well constructed. They expressed beliefs in higher principles of justice, a justice that must be beyond reproach and that aims to establish the truth. One of the participants explained, '*I thought the tribunal was a high-level international institution that was going to fight for the truth, and I thought I would be able to explain and prove my truth in the court*'.[26] Another one spoke of an institution created at the '*highest legal level*'. One of them even compared international judges to '*gods*', referring to a belief that justice is above men and rules for the 'Just'. Their expectations of international justice were thus set very high and were well elaborated. This justice is considered even more important in light of the chaotic context that brought the respondents to the tribunals.

Yet, this representation of international criminal justice (partly related to the prestige granted to the international criminal justice system itself and the decorum that comes (p. 28) with it) clashed violently with the reality of the accused as they experienced it, leading these initial expectations to be bitterly disappointed. This reality has been described in very negative terms: '*It was not a very fair court, when it handled my case … I found that very unfair from the Tribunal*'. Again: '*What I found very unfair from the Tribunal is that you had to wait for a year, a year and a half, and nothing happened, the trial did not begin*'. Another one added: '*I have to accept this as something that came directly from hell*'. This disappointment induced a heavy sense of rejection by the criminal justice system and its professionals. This observation confirms the hypotheses of studies carried out at a national level, namely by J.D. Casper,[27] that show that the gap between expectations and experienced reality constitutes a fundamental component of the negative evaluation of justice. That being said, what are the specific details related to the experience of those tried that create such a sense of rejection?

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B. Violence and Unfairness of the Procedure

The people we interviewed, whether condemned or acquitted, invariably felt the experience of the international criminal trial, and its preliminary proceedings and developments were extremely difficult to deal with, ranging from tough to traumatizing. The fact that even the acquitted shared this feeling shows that there is no need to be convicted to strongly experience the harshness of the intervention of justice.[28] An interviewee tried by the ICTY chose his words carefully in response to our question, '*how did you experience the court from the inside?*' He answered with this strong statement, '*I can answer you with one word: horrible. And I can answer you with many other words*'. That being said, the range of experiences appears quite wide, even if physical violence is rare. Specifically, there are reports of 'degradation ceremonies', analyzed by H. Garfinkel as a 'communicative work direct to transforming an individual's total identity into an identity lower in the group's scheme of social type'.[29] According to H. Garfinkel, the purpose of these ceremonies is shaming that person for (supposedly) violating norms, rules, or laws, and to inflict punishment by taking away his/her rights and privileges. Thus, a convicted Bosnian told us of the conditions of his transfer to The Hague:

> *After two days in a basement, I was transferred to the central jail in X. I had visits from many stakeholders, they told that I have to go to The Hague, and I just went along with it. I expected that I would go some normal way, but one evening, around 6 o'clock,* (p. 29) *I was tricked and pulled out of the cell where I was, under the excuse that the jail administrator summoned me for a conversation. Since I was wearing shorts when I was brought out of my apartment and I had some kind of yellow t-shirt and they did not allow for any other clothes to be brought in the jail from home, dressed like that in shorts and t-shirt and in my slippers, I was transferred to The Hague. It was June, it was warm, but … It was difficult, especially when we landed in Amsterdam, when some 3–5 officials from the UN received me, they were nicely dressed, and I looked like a homeless person.*

This unfolding of violence that is part of 'degradation ceremonies' directly reflects the spectacular dimension that has been associated with international criminal justice from its beginning. However, this violence is symbolic most of the time and appears throughout the entire criminal proceeding. Participants even mention '*horror*' or use terms like '*terrible*', '*stressful*', '*frustrating*', to describe various moments they experienced during the judicial process. Here the acquitted points out how most steps of the process (arrest, indictment, detention, trial, and so on) have represented hurtful moments, which generated anxiety and very negative emotions (loss of autonomy; feelings of helplessness; separation from their families; unbearable self-image; failure to understand the judicial process, its functioning, and its effects; feelings of not being understood; contempt from the judicial staff; feelings of betrayal from relatives; etc.).

One moment stands out as more violent than the others: the moment they became aware of the charges against them. It is often described as a moment of dismay:

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> *When I read the first indictment, I could not believe it … that such men could exist and, let alone the fact that it was me. Maybe only in some American movie, with lots of murders, in situation that didn't exist. I then realized that I was supposed to be a man who eats live people. I am sitting in my cell and thinking to myself, who am I? And that was my understanding of the indictment.*

As described to us, this distressing, unbearable moment was felt as fundamentally unfair, both by the acquitted and the convicted, particularly in relation to the use of symbolically heavy words ('genocide', 'massacres', 'mass violence', etc.) that were difficult for respondents to comprehend and to accept. We will come back later to the situation that confronts the prosecuted with the collective crimes he is charged with.

Beyond this symbolic violence, throughout our interviews the prosecuted insisted on explaining to us how they were confronted with what they described as an unfair, inequitable, and sometimes 'absurd' process. Here again, the acquitted—by both tribunals—told their stories in an equally negative way, as if the outcome of the trial had no impact on their perception of it. The participants thus described procedures they still did not understand, or during which they felt they had not been able to express themselves or been listened to. They highlighted what they saw as the 'lies' of the prosecution and the witnesses, the length and difficulty of the trial, and claimed that the prosecution witnesses were prepared and paid a high price in order to accuse them.

(p. 30) These accounts confirm studies carried out at a national level that show that the perception of justice depends more on the fairness of the procedure (or the perception of it) than its final outcome.[30] People consider their trial to be satisfying and fair if they feel they had the occasion to fully explain themselves and their points of view, whether these points of view were then followed by the judges or not. Thus, in many cases, the satisfaction of the defendants does not depend solely on the severity (or lenience) of the sanction; rather, criminal proceedings matter more than the outcome, and the accused, even those convicted, may be satisfied by the process as they experienced it. However, satisfaction with the fairness of proceedings was clearly absent for those convicted persons we interviewed. Moreover, this negative perception related to every step of the process.

C. A Politicized and 'Outgroup' Justice

Another recurring feature in the accounts of those tried by international criminal jurisdictions is what they perceive as its politicized character and the external influences it is subjected to.

First of all, participants describe a justice owned by '*others*', that means by people external to the context in which the crimes were committed. They confirm here the theory of Pierre Hazan who has written about international criminal justice as an 'off-ground'[31] justice. This distance, which separates the 'judges' from the accused, appears at every step of the criminal proceedings: during the arrest (they are rarely arrested by compatriots—and often in a foreign country), during the trial (judges come from various countries,

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sometimes very distant ones), and when serving their sentences (which is enforced in the States that have agreed to host those convicted by international jurisdictions).

Referring to the ICTR, one of the participants explains:

> *They created the tribunal and they brought foreign people. Foreigners who are not driven by this principle of justice … foreigners who know nothing, nothing of the Rwandan psychology. When a Tutsi speaks to me … if s/he tells me a story, and then tells it to you, do not be mistaken, you won't perceive this story the same as I will … and in the tribunal cases, us, Rwandan people, are judged by foreigners whom I call blind people who know nothing inherent to the context. … You might apply the rules, but you cannot understand.*

Another interviewee compares the ICTR with national mechanisms, reckoning that in Rwanda '*there has been the "Gacaca" tribunals, in which everything was addressed*' (p. 31) (unlike in the international tribunal).[32] The ability to recognize oneself in one's judges, of being placed among one's own, seems particularly important for the accused. Thus, the reducing of the distance operated by the Gacaca in the justice process appears as a strong element of its legitimacy.

In a similar vein, the account of a confrontation with a 'foreign justice' (namely, a justice external to their group—as the Arusha or the The Hague tribunals are seen by those prosecuted by them), is reminiscent of the studies carried out by T. Ståhl, J.W. Prooijen, and R. Vermunt on the perception and the experience of outgroup justice v. ingroup justice. These writers have shown that, when confronted with an 'outgroup' justice, people may be more afflicted by the procedural justice than when confronted with an 'ingroup' justice.[33] In international criminal law, this is a significant issue because procedural justice seemed essential for the people we interviewed. International criminal justice appeared to them as a foreign justice: it was administered thousands of kilometres away, in a country that was neither the perpetrators' nor the victims', nor the country in which the alleged crimes were committed.[34] It is even more striking that, in the research that was carried out at a national level, those who were convicted domestically did not express a feeling of otherness, and frequently mentioned the idea of 'being in debt to society', recognizing being part of the group who judged them and belonging to a community to whom they were accountable.[35]

Moreover, all participants mentioned the idea of a politicized justice. First of all, they felt the international criminal tribunals were mainly established for political purposes and were influenced or even led by their war enemies. As such, people tried by the ICTY considered that, because of their own origins, the composition of the tribunal was not favourable to them. Here are some examples of their accounts mentioning this point:

> *I cannot say that the Tribunal in its whole has done bad things, but I only say that the people who constituted the appeal chamber have done bad things. In my opin-*

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> *ion, it is the result of the Croatian propaganda and of the pressure from the Croatian state.*

Another explains:

> *I say that, regarding my situation, the people who wrote the indictment, have been influenced by lobbies, they have their own interests … my conclusion was that they needed to create some balance, you know, between both sides … When I speak of sides, I mean the Serbian and Bosnian sides … so my feeling was that they wanted to feed this Serbian lobby, the lobbyists, and to satisfy them: I needed to be designed as the one who slaughtered the Serbian people.*

(p. 32) Or again: '*The ICTY and the prosecution do not make an indictment for justice purposes, but rather for political purposes*'.

Those who were tried by the ICTR produced identical accounts, based on the fact that no leader from the Rwandan Patriotic Front (against which they fought from 1990 to 1994 and that is today in power in Rwanda) has been judged by the ICTR. They therefore not only denounced a justice influenced by Rwandan state power, but also the fact that none of their former enemy had been judged:

> *[At the beginning], it was the government who made the list of people to be arrested. … And when Rwanda took hold of the ICTR, because at one moment, they took hold of the ICTR … I say it took hold, because when Barayagwiza was released and then Rwanda said no! So from that moment, Rwanda took hold of the ICTR.*

Another explains that: '*It is like the judges received orders from somewhere; it is a political tribunal*'; or, '*[t]he judges became active combatants of the RPF… it is a shame that such an institution became*'.

For the people we interviewed, these points of view are the result of a difference in the way their cases were being handled by international tribunals, depending on the origin of the defendant. International criminal law appeared to be a criminal law owned by the enemy. These criticisms reflect some of those we can find in the literature,[36] even at times written by judges themselves: it is the suspicion of victor's justice, a justice administered by the people who won the war.[37] International criminal law is seen as a continuation of war, a new weapon on a new battlefield. Indeed, some authors have even argued—speaking about the ICTR, ICC, or international criminal law in general—that only those who are defeated in the conflict (the former enemy) must be accountable before international criminal jurisdictions. For example, F. Muñoz Conde claims that international criminal law '[does] not simply try to punish the offenders, but also to fight against its [own] enemies'.[38] International criminal law thus becomes a weapon for use after victory—a weapon that further destroys those who are already 'down'. This point of view reminds us of the work of G. Jakobs in *On the Theory of Enemy Criminal Law*[39] that has proved influential.[40] Quoting Jakobs, Muñoz Conde writes that judicial (p. 33) logic mirrors the logic

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of war, 'it is above all essential to defeat the other, and *law is a means used to finish the enemy*'.[41]

Moreover, some people we interviewed condemned what they viewed as a very peculiar political and legal system that was imposed by Western countries on the rest of the world. They mainly highlighted two arguments: the fact that no leader or national from developed countries has yet been judged by an international body and the fact that these tribunals are precisely controlled by developed countries. Joining here a third-world or anti-colonialist interpretation of international criminal law,[42] people (tried by the ICTY here) thus explained:

> *Great powers like China, Russia, or the United States agree without signing. They do not wish to be submitted to this. That is how the ICTY works. It is a partisan vision. Serbia started a procedure against NATO for similar and even far worse crimes than the one I was charged with, the ones committed in Kosovo. A commission has been established for this purpose and has repeated the allegations against NATO. It is the bombing of a bridge because of a situation 1000 km away that was Kosovo, and civilians have been targeted. 33.000 tons of explosive material have been used in Serbia by NATO and the damages are estimated at 97 billion.*

Or again: '*That is why I have an impression that what went on there is not law, is not a decision based on law, but it is some kind of a game by strong political forces that form the tribunal*'.

It is interesting that those tried by the ICTR gave broadly identical accounts:

> *I cannot say this is a case of racism, because among the judges, there are African people, there are black people at the ICTR. Some people may think it is the motive, but I say that it is not … it is more likely pressure from the Rwandan government and its allies.*

Or:

> *The ICTs are only accountable to the people who pay them. Whereas national justice, even if there are some violations, is accountable to the people, they administer justice on behalf of the people. If you are a judge and you are neutral, everything is fine, but if you are partial …*
>
> *…*
>
> *The outcome, because, the outcome in the end, we understand that they are political rulings, those are tribunals manipulated by powerful countries. Why do the Americans not want their citizens to be judged by international tribunals? … because they know!*[43]

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(p. 34) This criticism also mirrors several criticisms raised against international (criminal) law coming from African States, the African Union, and scholars. Indeed, when the ICC issued warrants against state leaders from Sudan and Kenya, the African Union denounced it as a 'racist' court and called on States not to cooperate with it.[44] However, it is also interesting that this criticism quite specifically focused on lobbies and pressure from States rather than being rooted in a broader critique of imperialism and colonialism.

D. The Role Assigned to the Defendant

As can be seen, those tried by international criminal tribunals have presented us with various pitfalls relating to international criminal justice and have outlined the issues they have been confronted with throughout the proceedings. Beyond this experience, the analysis of these accounts allows us to highlight the frequently used rhetoric of scapegoating. This section will highlight that rhetoric although it will not enumerate all of the ways in which sacrificial rituals occur (we previously referred to the degradation ceremonies of H. Garfinkel, which reflect in another way the sacrificial rites of R. Girard), or present in any detail the theory of sacrifice, something that has already been done elsewhere.[45] Nor do we intend to present all the participants as victims of international criminal justice. We merely aim to point out that at a given moment of the process, people ceased to be able to experience the criminal proceeding in a way other than by positioning themselves as 'scapegoats'—condemned for others, or for crimes committed by others or collectively. Beyond that point, the question of innocence or guilt appears almost secondary. The 'scapegoat' role endorsed in the trial suddenly takes precedence over reality. Everything happens as if that role operated at a distance from any truth.[46] This caused a rejection of the actions and facts established by the judicial system and thus a rejection of allegations of responsibility. Ironically, the defendants are often accused of having resorted to scapegoating themselves.

This feeling of being a scapegoat appears equally among those convicted and acquitted. Thus, some of the participants do not hesitate to present themselves as victims, not of the conflict but of the judicial process: *'The death of an innocent person does not justify* (p. 35) *the lynching of other innocent people by the justice. … I am first a victim of the conflict in Rwanda, and then a victim of the United Nations'*. Another said: *'We were so much demonized that even as acquitted … some countries are hesitant over receiving us'*.

This feeling of being a scapegoat appears at two levels. It first relates to the criminal proceedings: those tried feel they are in a position of weakness in the courtroom, dominated by the judges, guilty from the outset, prevented from speaking, and not listened to. More relevant is the importance that respondents place on the global or international context of the proceedings: participants feel their sentence is the consequence of current international relations and power struggles (as we previously mentioned). Thus, the feeling of being a scapegoat is even more significant when it comes to the political process: a process that, if we follow R. Girard, has experienced a serious crisis and in the face of which it is necessary[47] to find rites that allow it to rebuild itself through sacrifice. Thus, the criminal trial, in the context of armed conflict, is the means to a catharsis in which

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the defendant (and the convicted even more) plays an essential role in a sacrificial game that enables the reconstruction of social relationships between former enemies.

Having played this role, defendants point out how this position was the cause of tensions. One tension is due to the opposition between the collective dimension of the crimes and individual responsibility. This is a fundamental issue that the doctrine of international criminal justice has long sought to address,[48] one that questions the tension inherent in bringing individuals to justice for crimes committed in the context of collective conflicts. We do not intend to delve into the reasons that led to the implementation of certain judicial mechanisms, such as individual responsibility for mass crimes.[49] The point here is merely to highlight the impact this responsibility seems to have on individuals convicted for these crimes. It is precisely because of this tension that those tried by international criminal justice invoke the scapegoat metaphor when speaking of their cases. For example, those tried by the ICTR constantly reminded us that not all of the perpetrators had been judged and that it would be impossible anyway. On the other hand, some people we met were really convinced, despite any plausibility, that there were quotas set in the lawsuits, ('x% of Serbians, x% of Bosnians had to be prosecuted') and that they were part of this ratio.

(p. 36) Moreover, this hegemonic individual responsibility[50] explicitly refers to the 'sacrificial imperative' as described by R. Girard[51] in which, in order to rebuild the society after a major crisis, it is essential that the 'expiatory' victim[52] brings about unanimity against her/him.[53] From the point of view of the defendants we met, this is what happens in international criminal law and paradoxically, by not recognizing the actions for which they were brought to justice, they *in fine* perfectly fulfilled their role and complied with the judicial process. Indeed, among the 51 convicted participants, only two of them explicitly mentioned and recognized a direct responsibility for the actions for which they were sentenced. In fact, through their experience, those convicted by international criminal jurisdictions point out that they find themselves in an impossible position. The violence and the politicization of the process lead them to take a position 'outside the system' even as they are required to take part in the trial as insiders. Violence and politicization are factors that bring them to their downfall as 'expiatory' victims too. Summoned to speak on their individual behalf about issues they perceived and experienced as collective ones, they reject any individual responsibility and, in fact, any responsibility 'as an individual'. Our research thus helps to understand how the individual positioning of the accused is closely linked to institutional categorization, to judicial expectations, but also to the constraints induced by the procedure. This is especially the case when the court refuses to fully recognize the impact of a collective dynamic or a hierarchy on the individual's choice. Being unable to assert the complexity of their situation in the collective context of war during the trial, they end up simply denying all responsibility. In so doing, they in a way further reinforce the very image that is being produced about them. They are monsters who recognize nothing, an ideal enemy that will help to federate everyone against him and thus recreate community.

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This analysis raises questions. How can we expect the expression of a real recognition of responsibility in a context that, as we have seen, mirrors the war logic or, at least, is experienced as a form of war logic? As explained by F. Digneffe, '[T]he ways of perceiving and recognizing—or not—our own responsibility appear only in the context of a relatively "free" world, out of pressure and with no worries about possible implications'.[54] Again and again, those we met kept repeating that their words, within the criminal trial framework, were restricted by the high stakes of their situations and were in no way free. It is possible, then, that the logic of the trial actually makes it harder if not impossible for defendants to come to terms with their responsibility, as the case may be. Further questions that arise at the conclusion of this analysis are therefore: whether the (p. 37) international criminal trial does not lead, in itself, to this contrarian positioning of the defendants (in particular the non-recognition of the alleged responsibilities)? At what cost to both criminal and transitional justice? And whether the trial is not speaking directly to everyone except the very person facing charges.

IV. Conclusion

International criminal justice, analyzed from various points of view, has hitherto rarely been addressed from the experience of the ones who encounter it as defendants, whether they were convicted or acquitted. Indeed, the stigmatization that is inherent to every criminal proceeding seems to reach its climax when it concerns people accused of the 'most serious' crimes, to the point that it appears nearly subversive to listen to them speak of something other than their crimes and to consider them as a source of knowledge about the trial itself.

At the start of this analysis, we aimed first to recognize a status of real stakeholder, of 'active respondent' (in the various meanings of the term), to those brought to justice, rather than seeing them only as 'perpetrators'. From this internal point of view, we then aimed to better understand the functioning of international justice as it has recently been implemented, how it is perceived, and the way it impacts the people who were indicted by it. Through our empirical research, we were then able to highlight several details specific to international criminal justice, details that distinguish it from criminal justice administered at a national level. We will review two of them in our conclusion.

The first refers to the way the very idea of justice is defended by these tribunals. Our respondents, far from considering themselves as being ignorant in terms of justice, proved themselves to be open to the idea of a trial. Several of their expectations, however, were not met in the process. The second and more significant element is that their disappointment does not relate to the outcome of the trial (condemnation or acquittal) but rather focuses on details specific to the criminal proceedings, specifically on the symbolic and real violence that seems inherent to numerous facets of the trial, as well as the passive position necessarily held by the defendant. Indeed such criminal proceedings work on the basis of two principles: (a) the 'outside feeling' of the defendant and the continuous empha-

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sis on his/her otherness, as well as (b) the predominance of a dynamic of conflict all along the process.

If these two principles are common to all repressive processes, they gain a special meaning in a transitional environment. Indeed, there is much to the idea that the criminal trial represents the extension of war: the experience of physical or symbolical violence, the war rhetoric of the trial, the staged confrontation, the reference to the monstrosity of alleged crimes and the radical otherness, the concealment of the collective stake behind the individual accusation, the manifestation of power, the antagonistic dimension of the process, etc. Translated into a subjective experience, this extension tends to imprison those brought to international criminal justice following a war, (p. 38) constantly underlining the influence of political structures over the process, as well as the inability of defendants to feel as if they belong to the world that judges them. In this context, the reference by our respondents to the notion of scapegoating casts the defendants as victims. Though this reversal of roles may be strange for the system of international justice, it may actually be intrinsic to the very functioning of the judicial bodies.

This way of presenting themselves, however disturbing, complies not only with the role and real position assigned to them throughout the trial, but also with the very aim of this justice, namely to rebuild a collective ground by rejecting the singular individual. The notion of responsibility so valued by criminal lawyers cannot, in these conditions, limit itself to confront in the void the accused to material evidence with no guarantee of reaching the core of the moral responsibility and producing awareness. It thus seems, upon completion of this study, that if international criminal justice aims to reach the heart of its target and wants to take into account those tried as human beings, it needs to more significantly extract itself from a frame of a justice that sees it as merely a continuation of war.

Notes:

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(3) Antonio Cassese, ‘The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice’ (2012) 25(2) Leiden J of Intl L 491; Frédéric Lordon, ‘La légitimité n’existe pas. Éléments pour une théorie des institutions’ (2007) 53 Cahiers d’économie politique 135 (hereafter Lordon, La légitimité n’existe pas); Tullio Trèves, ‘Aspects of Legitimacy of Decisions of International Courts and Tribunals’ in Rudiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer 2008).

(4) Lordon, La légitimité n’existe pas (n 3) 150–53.

(5) See not. Niguel Eltringham, Genocide Never Sleeps, Living Law at the ICTR, (CUP, 2019); Philip Caine, ‘The International Criminal Tribunal for former Yugoslavia: Planners and Instigators or Foot Soldiers?’ (2009) 11(3) Intl J of Police Science and Management 345; John R Cencich, ‘International Criminal Investigations of Genocide and Crimes

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Against Humanity: A War Crimes Investigator's Perspective' (2009) 11(2) Intl Crim Justice Rev 175; 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' (2004) 3 Droit et société 567.

(6) Guy Elcheroth and Dario Spini, 'Public support for the prosecution of human rights violations in the former Yugoslavia' (2009) 15(2) Peace and Conflict: Journal of Peace Psychology 189; Sanja Kutnjak and John Hagan, 'Victims' Perceptions of the ICTY Justice' (Paper presented at the annual meeting of the Law and Society Association, Montréal, Canada, 27 May 2008).

(7) Christopher Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (Harper-Collins Publishers 1992).

(8) Harald Welzer, *Les exécuteurs. Des hommes normaux aux meurtriers de masse* (Gallimard 2007).

(9) Jonathan Jackson and Tom Tyler, 'Future challenges in the study of legitimacy and criminal justice' in Justice Tankeba and Alison Liebling (eds), *Legitimacy and Criminal Justice: An International Exploration* (OUP 2013) 83; Tom Tyler, *Why People Obey the Law: Procedural Justice, Legitimacy and Compliance* (Yale UP 1990).

(10) Dan Kaminski and Michel Kokoreff (eds), *Sociologie pénale. Système et expérience: pour Claude Faugeron* (Eres 2004) 12.

(11) Marie-Sophie Devresse and Damien Scalia, 'Hearing Tried People in International Criminal Justice: Sympathy for the Devil?' (2016) 16(5) Intl Crim L Rev 796 (hereafter Devresse and Scalia, Hearing Tried People).

(12) ibid 818.

(13) Pieter Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Anchor Books 1966) 23–5.

(14) Devresse and Scalia, Hearing Tried People (n 11) 824.

(15) About the context and the statement of these perceptions, see Devresse and Scalia, Hearing Tried People (n 11).

(16) Howard S Becker, 'Whose Side Are We On?' (1967) 14(3) Social Problems 241.

(17) Howard S Becker, *Sociological Work: Method and Substance* (Aldine 1970) 127.

(18) It is important to highlight that—in order to conduct our research study—we met individuals after definitive condemnation of acquittal. That being said, the *Respondents' approach* could be applied to people during trial.

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(19) The first study has been carried out by Damien Scalia and Mrs Mina Rauschenbach, doctor of social psychology. The second study is carried out in cooperation with the author and Professor M-S Devresse from the Catholic University of Louvain.

(20) Barney Glaser and Anselm Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Transaction 2006).

(21) Anne Laperrière, 'La théorisation ancrée (grounded theory): démarche analytique et comparaison avec d'autres approches apparentées' in Jean Poupart and others (eds), *La recherché qualitative, Enjeux épistémologiques et méthodologiques* (Gaëtan Morin 1997).

(22) Pierre Paillé, 'L'analyse par théorisation ancrée' (1994) 23 Cahiers de recherche sociologique 147.

(23) Participants present themselves as such.

(24) The forms of responsibility are mentioned in Articles 7(1), 7(3) and 6(1), 6(3) respectively from the ICTY and ICTR Statutes. See *Statute of the International Criminal Tribunal for the Former Yugoslavia*, UNSC Res 827, UNSCOR, 48th Sess, 3217th Mtg, UN Doc S/RES/827 (25 May 1993); *Statute of the International Criminal Tribunal for Rwanda*, UNSC Res 955, UNSCOR, 49th Sess, 3453rd Mtg, UN Doc S/RES/955, (8 November 1994).

(25) Alvaro Pires, 'De quelques enjeux épistémologiques d'une méthodologie générale pour les sciences sociales', in Jean Poupart and others (eds), *La recherché qualitative, Enjeux épistémologiques et méthodologiques* (Gaëtan Morin 1997).

(26) In order to highlight the respondents' discourses, we use italics here unlike the other quotations.

(27) Jonathan D Casper, *Criminal Courts: The Defendant's Perspective* (US Department of Justice, Law Enforcement Assistance Administration, National Institute of Law Enforcement and Criminal Justice, 1978); Jonathan D Casper, 'Having Their Day in Court: Defendant Evaluations of the Fairness of Their Treatment' (1978) 12 Law and Society Rev 237.

(28) See e.g., Christian-Nils Robert, *L'Impératif sacrificiel. Justice pénale: au-delà de l'innocence et de la culpabilité* (Editions d'en bas 1986) (hereafter Robert, *L'Impératif sacrificiel*).

(29) Harold Garfinkel, 'Conditions of Successful Degradation Ceremonies' (1956) 61(5) American J of Sociology 420.

(30) Tomas Ståhl, Jan-Willem Van Prooijen, and Riël Vermunt, 'On the psychology of procedural justice: Reactions to procedures of ingroup vs. outgroup authorities' (2004) 34 European Journal of Social Psychology 173 (hereafter Ståhl, Van Prooijen, and Vermunt, On the psychology of procedural justice).

(31) Pierre Hazan, *La justice face à la guerre* (Stock 2000) 240.

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(32) The ‘Gacaca’ are made up of people elected for their good reputation and honesty. The defendants do not have a lawyer, but all the villagers can participate and intervene.

(33) Ståhl, Van Prooijen, and Vermunt, On the psychology of procedural justice (n 30).

(34) For more details: Damien Scalia, ‘Expérience de justice internationale pénale: perception de domination par d’anciens dominants’ (2015) HS Revue québécoise de droit international 15.

(35) Marie-Sophie Devresse, *Usagers de drogues et justice pénale. Constructions et expériences* (De Boeck-Larcier 2006) 241–54.

(36) Thierry Cruvellier, *Le Tribunal des vaincus, Un Nuremberg pour le Rwanda* (Calmann-Lévy 2006).

(37) Radhabinod Pal, ‘Dissenting opinion’ in C F Rüter and Bernard Victor Aloysius Röling (eds), *International Military Tribunal for the Far East, The Tokyo Judgment, 29 April 1946–12 November 1948,* vol I (APA-University Press Amsterdam 1977).

(38) Francisco Muñoz Conde, ‘Le droit pénal international est-il un “droit pénal de l’ennemi”?’ (2009) 1 Revue de science criminelle et de droit pénal comparé 19 (hereafter Muñoz Conde, Le droit pénal international).

(39) Gunter Jakobs, ‘Aux limites de l’orientation par le droit: le droit pénal de l’ennemi’ (2009) 1 Revue de science criminelle et de droit pénal comparé 7.

(40) Jean-François Dreuille, ‘Le droit pénal de l’ennemi : éléments pour une discussion’ (2013) Jurisprudence 149; Geneviève Giudicelli-Delage, ‘Droit pénal de la dangerosité – Droit pénal de l’ennemi’ (2010) 1 Revue de science criminelle et de droit pénal compare 69.

(41) Muñoz Conde, Le droit pénal international (n 38) 22 (emphasis added).

(42) Christopher Gevers, ‘International Criminal Law and Individualism: An African Perspective’ in Christine Schwöbel (ed), *Critical Approaches to International Criminal Law: An Introduction* (Routledge 2014) (see also other contributions in this book).

(43) We should note here that, despite the criticisms, some people tried by the ICTR feel an international tribunal is better than national jurisdictions ‘*under the authority of the power*’. In this view, we see that geographic proximity is no longer sufficient to define the in-group as in national criminal justice. The definitions of allies and enemies in the war sometimes take over all other considerations about propinquity.

(44) ‘South Africa Reverses Decision on Arrest of Sudan’s Al Bashir’ *Sudan Tribute* (30 July 2009) <https://monitoring.bbc.co.uk/product/40357875> accessed 7 September 2018. On the ICC and Africa, see e.g., Jacques B Mbokani, ‘La Cour pénale internationale: une

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cour contre les Africains ou une cour attentive à la souffrance des victimes africaines?' (2014) 26(2) Revue Québécoise de Droit International 47.

(45) See e.g., David Tait, 'Popular Sovereignty and the Justice Process: Towards a Comparative Methodology for Observing Courtroom Rituals' (2001) 4(2) Contemporary Justice Rev 201; Edwin Bikundo, 'The International Criminal Court and Africa: Exemplary Justice' (2012) 23 Law and Critique 21 (hereafter Bikundo, The International Criminal Court and Africa).

(46) Robert, *L'Impératif sacrificiel* (n 28).

(47) René Girard, *Le bouc émissaire* (Grasset 1982); Bikundo, The International Criminal Court and Africa (n 45).

(48) Frédéric Mégret, 'Les angles mort de la responsabilité pénale individuelle en droit international' (2013) 71(2) Revue interdisciplinaire d'études juridiques 83 (hereafter Mégret, Les angles mort); Karine Wurtz, 'La responsabilité du génocidaire: entre responsabilité individuelle et responsabilité collective' (2006) 39(2) Criminologie 59; Françoise Digneffe, 'Crimes de masses et responsabilité individuelle' (2005) Champ pénal/Penal field, XXXIVe Congrès français de criminologie, Responsabilité/Irresponsabilité Pénale <http://champpenal.revues.org/66> accessed 5 September 2018.

(49) See Mégret, Les angles mort (n 48); Élisabeth Claverie, 'Mettre en cause la légitimité de la violence d'État' (2012) 78 Quaderni 67 (in that regard, E. Claverie highlights that it is 'difficult, or even absurd … to describe a genocide, war crimes …, "crimes against humanity" … through the sum of unrelated individual decisions with no coordination' at 76).

(50) Mégret, Les angles mort (n 48) 98.

(51) Robert, *L'Impératif sacrificiel* (n 28).

(52) Larry Cata Backer, 'The Fuhrer Principle of International Law: Individual Responsibility and Collective Punishment' (2003) 21(3) Penn State Intl L Rev 509. See also Damien Scalia, *Du principe de légalité en droit international penal* (Bruylant 2011).

(53) Robert, *L'Impératif sacrificiel* (n 28) 140.

(54) Françoise Digneffe, 'Attribution de responsabilité et sentiment vécu de responsabilité—Réflexions sur les contours de la responsabilité pénale à propos du genocide au Rwanda', in Françoise Digneffe and Thierry Moreau (eds), *La responsabilité et la responsabilisation dans la justice pénale* (De Boeck-Larcier 2006) 418.

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An Empirical Analysis of International Criminal Law: The Perception and Experience of the Accused

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