An Outsider's View from Inside

The Experience of Acquittals before International Criminal Tribunals

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Abstract

Acquittal in international criminal law has long been disregarded by the governing bodies of international criminal courts. However, the acquittal exposes constitutive (and constituent) components of this very body of law. The authors draw conclusions from semi-directive interviews with (acquitted and condemned) people tried by the ad hoc tribunals. Their approach creates an opportunity to highlight and comprehend — from the perspective of the acquitted individual — the failures of the functioning of international criminal justice, which is focused on the idea of guilt. Moreover, this research shows how the position of tried individuals affects their perception and acceptance of international criminal law.

1. Introduction

Until the creation of the International Criminal Court (ICC), the acquittal has long been neglected by the constitutive bodies of the international criminal tribunals, that is, the respective statutes contain only a few articles on acquittals. Observers have only taken acquittals into consideration under a criminal law approach.[1] Judges have, nonetheless, delivered several judgments of acquittal. From the Nuremberg Military Tribunal to the ICC, every international court has acquitted defendants — thereby strengthening the expression of a certain independence from their creators, within a framework in which considerable

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1 See particularly the following: B. Holá and J. van Wijk, 'Life After Conviction at International Criminal Tribunals: Empirical Overview', 12 *Journal of International Criminal Justice* (2014) 109; *ibid.*, 'Acquittals in International Criminal Justice: Pyrrhic Victories?' 30 *Leiden Journal of International Law* (*LJIL*) (2017) 241.

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importance is attached to the prosecution. International criminal courts and tribunals have thus demonstrated that they were not only established to fight impunity, which is first and foremost the prosecutor's role, but, also to find truth, at the very least a judicial one,[2] following the commission of the most serious crimes.

While acquittals pronounced by international criminal courts remain relatively rare, they are essential for what they demonstrate about courts, specifically, and international criminal law, as a whole — both its functioning and rationality as well as the founding principles. Indeed, the acquittal appears as an oversight within international criminal law — that is, an outcome of the trial that was not anticipated, and that, moreover, does not appear easily acceptable. If acquittals could be understood from a perspective other than a simple judicial reading (i.e. the delivery of a judgment of not guilty or innocent), the context surrounding these acquittal judgments and their effects is particularly instructive. Therefore, in this article, we do not address acquittal from a *stricto sensu* judicial approach but with an empirical method, by studying it from the point of view of its main stakeholders: the individuals acquitted by ad hoc tribunals. Our methodology is based on an empirical qualitative approach that we call the 'respondent's approach', not in a legal sense, but in contrast to the so-called 'perpetrator's approach'.[3] This methodology highlights the importance of considering these individuals' stories and experiences as a vehicle of knowledge concerning international criminal justice and its functioning.

Within this framework, the analysis of international acquittals reveals two tendencies that are interdependent through a relation of mutual causality. On the one hand, the lack of consideration of acquittals by international criminal law. On the other hand, the effect of those omission, in particular, the possible effect of stigmatization and victimization on defendants themselves. Before presenting the results of this analysis, we will start our contribution with some epistemological and methodological clarifications.

2. Epistemological and Methodological Approach

Before explaining our respondent's approach in detail, it is useful to clarify some epistemological and empirical principles. We will then present some elements linked to our methodology of data collection and analysis.

2 About the concept of judicial truth in international law, see M.L. Wade, 'Genocide: The Criminal Law between Truth and Justice', 19 *International Criminal Justice Review* (2009) 150; J. Nevis, 'Truth and Justice in the Aftermath of War Crimes and Crimes Against Humanity', 5 *Punishment & Society* (2003) 207.

3 These terms refer to Perpetrator Studies. See for example, the Perpetrator Studies Network, Utrecht University, available online at https://perpetratorstudies.sites.uu.nl/ (visited 1 April 2018).

A. Representation versus Experience

When faced with the stories of accused persons who were ultimately acquitted by international courts, their accounts of their experiences may be considered in two distinct ways. First, the way they perceive the process of justice by collecting their stories can be examined to gain an idea of their views and opinions regarding the functioning of the relevant institution. A second approach is to ask them to relate their experience of this justice, that is, to narrate what they have experienced, what they went through, and how the events unfolded. The distinction between these two approaches, though subtle, is crucial to our methodology. Indeed, the view that tried persons can give only a subjective view, a perception or an opinion of the justice they have experienced, is not heuristically sufficient to us, and it is limited in regard to our research ambition and its focus on the process of justice rather than on the individual. It is our opinion that the acquitted person's experience reflects more than biased representations and allows for a general assessment of the very framework that shapes the perceptions that are delivered within this research.[4]

Experience, as a conceptual tool, not only allows for a focus on singular stories, but also allows for identifying institutional functioning, settings and normative constraints.[5] When a person tells us about, for example, the conditions of her or his arrest, she or he is sharing an interactional experience, a singular perception and gives specific meaning to this event.[6] However, by doing so, she or he does not speak only of herself or himself, but also reveals, directly or not, the functioning of international criminal justice.[7] This person brings factual elements sometimes unknown beforehand and gives information that allows us to understand how, within the framework of this justice, standards are applied, institutions work, stakeholders act and interact and how interpretations are made. In other words, this individual exposes constitutive and constituent components of this justice, which leads us to say that, as with every account of experience,[8] the account of an experience of this justice is essential. Henceforth, in our approach, 'the analysis of social matters is built upon the

4 Regarding the notion of the experience framework, see E. Goffman, *Frame Analysis: An Essay on the Organization of Experience* (Harper and Row, 1974).

5 This notion, not to be confused with the sociology of experience, see e.g. the work of François Dubet, draws from theories developed from the analysis of life stories. These theories acknowledge that the individual who came to live a specific experience holds knowledge, the value of which lies in the fact it is a personal understanding resulting from the experience, in this instance, of being personally confronted with the process of justice at an international level. See D. Bertaux (ed.), *Biography and Society: The Life History Approach in the Social Sciences* (Sage, 1981); M.-S. Devresse, *Usagers de drogues et justice pénale: Constructions et expériences* (De Boeck-Larcier, 2006).

6 See e.g. H. Blumer, *Symbolic Interactionism: Perspective and Method* (Prentice Hall, 1969).

7 D. Kaminski and M. Kokoreff (eds), *Sociologie pénale: Système et expérience: Pour Claude Faugeron* (Éditions Érès, 2004).

8 D. Bertaux, 'Stories as Clues to Sociological Understanding', in P. Thompson (ed.), *Our Common History: The Transformation of Europe* (Pluto Press, 1982) 93; L. Presser, 'The Narratives of Offenders', 13 *Theoretical Criminology* (2009) 177; J.I. Ross and S.C. Richards, *Convict Criminology: Inside and Out* (Wadsworth, 2003).

actions of the individuals' and we 'do not aim at reproducing the stakeholders' point of view, but [we] aim at reporting the way individual behaviours adjust to one another from the meaning assigned to them within the framework of a particular form of collective activity'.[9] From the study of these adjustments within a collective activity, as the criminal process is considered a fundamentally interactive process, we intend to draw a portrait of the international legal institution, instead of staying focused on the defendant's crimes, which would be tantamount to stating that this person does not have anything to say about his or her experiences with justice.[10]

B. Acquittal and Acquitted, Specific Notions?

The perspective that has guided our work of interview and analysis led us to make other choices related to the topic of this article. Thus, we present research results regarding the experience of accused who were acquitted by one of the ad hoc international criminal tribunals, without focusing on the sole moment of acquittal, as such. Indeed, considering only the moment of the acquittal itself appears too limited. Acquittal does not really represent an event that can be isolated from the whole experience of justice, even if it is a distinct step that stands at the end of the legal process. This moment, due to its impact, is obviously important and is intensely felt through various experiences, but does not, in and of itself, give an account of the complexity of the experience of justice of which it is a part. Therefore, to be validly studied, the experience of acquittal must be located inside a path and a process and must allow us to highlight the mechanism that brings someone along this path and process. We consequently envisage drawing upon the experience of this particular form of justice of persons, knowing that those persons were, or are expected to be, released at the end of their judicial proceedings and that this angle may shed a new light on existing knowledge in the field.

This perspective is based on the hypothesis that acquitted individuals have something specific to teach us, or, in other words, that they are able to highlight specificities of international criminal justice that the convicted or professionals cannot show us. We believe that there is not only a specific experience shared by acquitted individuals, but also, in the light of this, a particular way of relating the process of justice that is unique to their situation.

Let us be clear: this approach does not correspond to the common conception that being acquitted necessarily proves innocence and that, therefore, a person who was acquitted will necessarily experience the indictment and the intervention of justice differently. This point of view, while enticing, would require adopting an essentialist approach that would take us away from our epistemological and methodological postulates. Therefore, we try to avoid the

9 A. Ogien, *Sociologie de la déviance* (Presses universitaires de France, 2012), at 116 (authors' own translation).

10 M.-S. Devresse and D. Scalia, 'Hearing Tried People in International Criminal Justice: Sympathy for the Devil?' 16 *International Criminal Law Review* (*ICLR*) (2016) 796.

positivist trap of 'essentializing' the experience by drawing a distinction between convicted and acquitted, innocent and guilty. Moreover, we do not consider that these terms refer to some substantial reality.[11] From our point of view, the expressions, 'innocent' and 'guilty', mainly refer to a legal approach and more precisely to categories created by (and during) the legal process from which it is relevant to study the structure.[12]

C. Respondent's Approach

The respondent's approach is based on the understanding that the subjective account of an individual accused of committing (or participating in) crimes perceived as 'the most serious' is pertinent to understanding international criminal justice. This position is based on the point of view of the stakeholders, 'their experience, the sense they give to their behaviour, the manner they apprehend their environment, the way they occupy the institutions that support or manage them'.[13] In this sense, subjectivity and partiality are no longer per se a bias in research, instead they provide substantial data. Linked with this previous element, even if it is not always accepted, the narrative of tried persons — condemned and acquitted — is as interesting as that of the other stakeholders of international criminal justice, including judges, prosecutors, attorneys or victims.

Accordingly, taking into account these elements, we developed the respondent's approach to seek to understand international criminal law as a social process. It is important to understand why, for the type of research we conduct, we prefer speaking of the respondent's approach. We do not intend to characterize people by their supposed criminal behaviours and we avoid confounding their conduct with legal categories. Moreover, if, as perpetrators, they are seen as 'active participants' in relation to their criminal acts, they are considered as rather 'passive' vis-à-vis the criminal process. The various meanings of the term 'respondent' offer a particularly interesting and multidimensional approach: she or he is answering for her or his actions and words to and before justice and she or he is responding to researchers.

D. Methodology

In addition to our epistemological approach, it is essential to present our methodology. As we do not work quantitatively, we did not develop a theoretical representative sample but rather operated from a diversification target

11 C.-N. Robert, *L'impératif sacrificiel: Au-delà de l'innocence et de la culpabilité* (Edition d'en Bas, 1984).

12 Regarding the various steps of the criminal process and the operations of legal categorization, see P. Robert, 'Les statistiques criminelles et la recherche: Réflexions conceptuelles', 1 *Déviance et société* (1977) 3; P. Bourdieu, 'La force du droit: Eléments pour une sociologie du champ juridique', 10 *Actes de la recherche en sciences sociales* (1986) 3, at 13.

13 Devresse and Scalia, *supra* note 10, at 818.

based on variables related to the charges, the nature of conflict and the type of court before which the accused were judged. However, as in any research carried out in this delicate area, our actual sample depended on the agreement of people to participate. We performed more than 60 interviews — including with nine acquitted persons — carried out with an interview guideline following a semi-directive structure (semi-structured interviews).[14] We interviewed people we met only once. The anonymity of interviewees was respected and every precaution taken to ensure, with the attribution of a code to each interview, that interviews could in no way be related to the respondents' identity. Thus, to ensure there can be no recognition, the detailed extracts transcribed in our articles systematically refer to similar extracts found in other interviews. The interviews with tried persons were carried out in collaboration with interpreters, given that some of those convicted did not speak English or French.[15] The interviews were then fully transcribed for analysis. We analysed the data according to guidelines of the so-called 'grounded theory'.[16] The grounded theory aims at describing structures and regularities of social phenomena and elaborating on a theory implanted in an empirical reality.[17] The implementation of these methods allows the thorough probing of these complex notions by organizing them, while highlighting as well as confronting, the different mechanisms characterizing them. This approach enables us to bring out the perceived influence of intangible factors that are difficult to quantify, such as the normative context, the experience of judicial bodies or the perceived responsibility for international crimes.

3. The Oversight of International Criminal Law

The voice given to those who have been acquitted by an international criminal tribunal must be understood because it highlights three essential failures the acquitted individuals felt existed even long after their appearance before a court. The first failure, as expressed to us, relates to the lack of opportunity to express their views during court appearances as well as a loss of control regarding their words and image throughout a process after which it is necessary to plan for the future. The second concerns the way the repressive process

14 A. Blanchet and A. Gottman, *L'enquête et ses méthodes: L'entretien* (Nathan, 1992).

15 In this article, the interview extracts as transposed appear between inverted commas. In some cases, the English version is the result of the interpretation carried out during the interview. In other cases, the interviews were conducted in French, and translated when writing the article. In both cases, there may be some grammar mistakes that we did not correct to remain faithful to the words of our respondents and/or interpreter.

16 B.G. Glaser and A.L. Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine Publishing Company, 1967); A. Bryant and K. Charmaz, *The SAGE Handbook of Grounded Theory* (SAGE, 2007).

17 A. Laperrière, 'La théorisation ancrée (grounded theory): Démarche analytique et comparaison avec d'autres approaches apparentées', in J. Poupart et al. (eds), *La recherche qualitative* (Gallimard, 1997) 309, at 309.

is conceived and the lack of interest expressed in regard to the consequences of the repressive process when it does not result in a condemnation. More precisely, everything is carried out as if the event of an acquittal before an international court has never been envisaged at any stage of the process or level of decision-making. Finally, the third flaw concerns the lack of institutional solutions brought in response to the difficulty faced by some acquitted persons to find a place to settle with their family after the trial and the acquittal. These three flaws end up being connected to one another through the stigma of being charged and tried before an international criminal court.

A. On the Need to Express Themselves and to Control their Image

The first piece of information that arises from all the interviews is that all respondents — not only the acquitted — stated that it was the first time they were able to talk about their experience of the international criminal justice outside of court proceedings to a person outside the judicial system. Indeed, for these acquitted persons we met — no journalist, no researcher, no therapist, no representative from any institution had listened to their stories or expressed any interest in regard to their experience. For those that we interviewed, meeting us was their first opportunity to put into words their experience of international criminal justice as well as some aspects of the war and consequences on their lives. Yet, the judicial process represents a significant moment in their lives, a moment that may be protracted in time — for some, over ten years — that affected their personal path or immediate and more distant environment.

This lack of outside interest in the experience of justice of those tried before an international criminal tribunal is a common thread for everyone who has lived through a trial. For those who were acquitted, this detail is without doubt a significant fact. Placed under the international media spotlight from the moment of their arrest and throughout the subsequent trial,[18] they deeply resent the lack of interest in their acquittal. Therefore, the role of scapegoat they say they experienced during the whole judicial process, as we will see later, is reinforced and continues even after the acquittal. For most of them, the possibility of returning to their former lives at the end of the trial represents a significant issue because it is considered as crucial for their future.[19]

18 V. Vanneau, 'Le tribunal pénal international doit-il faire l'événement? Ou les paradoxes d'une justice pour l'histoire', 32 *Sociétés et représentations* (2011) 135.

19 D. Bernard, *Trois propositions pour une théorie du droit international pénal* (Université Saint-Louis, 2014); I. Tallgren, 'The Sensibility and Sense of International Criminal Law', 13 *European Journal of International Law* (*EJIL*) (2002) 561; M. Aksenova, 'Symbolism as Constraint on International Criminal Law', 30 *LJIL* (2017) 475; C. Schwöbel, 'The Market and Marketing Culture of International Criminal Law', in C. Schwöbel (ed.), *Critical Approaches to International Criminal Law: An Introduction* (Routledge, 2014) 264.

B. On Acquittal

Going back to square one and starting over is always presented as essential for those acquitted because, as our interviewees highlighted, the crimes for which they were tried were among the most serious crimes of concern to humankind. Thus, as none of them acknowledged any of the charges against them (the words 'genocide' and 'crimes against humanity' were undeniably unbearable to hear for all the persons we interviewed), it was important for them to free themselves from this accusation of monstrosity and to get rid of this heavy stigma that follows them. Many of them referred to the non-acceptance of acquittal by their local communities. This is more often the case for those acquitted by the International Criminal Tribunal for Rwanda (ICTR) than for those acquitted by the International Criminal Tribunal for the former Yugoslavia (ICTY), who reported some expressions of sympathy at their release. Such rejection of the acquittal verdict may take several forms including protests in the concerned city or country, public contestation of the ruling by leading figures and authorities, and political statements of disbelief. Thus, notwithstanding a judicial verdict, the acquitted feel extremely unsafe and definitively stained by the original accusation.

Most of our interviewees put forward the idea that their acquittal was not even conceivable — for them or for others — and the rejection of the relevant court's decision is proportionate to such belief. They describe the process of trials at international courts as conceived exclusively around the idea of guiltiness, in which the debate is not on a possible exoneration, but more on the conditions and the details with which the unanimously established facts were committed. It is interesting to recall here that, from a formal point of view, this conception is quite correct. As with the Nuremberg Military Tribunal, acquittal was not provided for by the founding instruments of the ad hoc tribunals. There is neither provision contained in the ICTY Statute nor the ICTR Statute explicitly considering the eventuality of an acquittal. This could mean that, at the time of the creation of *ad hoc* tribunals, this issue was not seen as fundamental, which is disturbing in the context of a justice project. At the outset, it was solely within the Rules of Procedure and Evidence of the ICTY, specifically Rule 99, the first document approved by the Judges upon their appointment, that specific reference to the term 'acquittal' was made.

With respect to social impact, practice shows that an acquittal does not have the same resonance as a conviction. Although some acquittals received significant media attention, for instance, the acquittal of Ante Gotovina,[20] the media are rarely interested in them. At the very least, significantly less

20 See, inter alia, W.B. Huffman, 'Margin of Error: Potential Pitfalls of the Ruling in *Prosecutor v. Ante Gotovina*', 211 *Military Law Review* (2012) 1; V. Pavlaković, 'Croatia, the International Criminal Tribunal for the former Yugoslavia, and General Gotovina as a Political Symbol', 62 *Europe-Asia Studies* (2010) 1707; R. Nakarada, 'Acquittal of Gotovina and Markač: A Blow to the Serbian and Croatian Reconciliation Process', 76 *Utrecht Journal of International and European Law* (2013) 102.

interested in acquittals than in indictments and hearings. Thus, one of the respondents explains:

> I found out the indictment in …. When it was published through the media and from that moment, I was trying to prepare myself for something that was inevitable somehow. And after … years, I achieved my justice and this is something that changes your life completely upside down. There are a lot of reasons to be happy and to be in a good mood, but generally I was sharing the destiny with the other … accused, and I was not able to be cheerful that much for my acquittal …. When I was on board the plane on the way to … and when I met my friends and family at the airport in …, my happiness was completely endless, you know. Something what I was carrying for … years, this burden and this problem that I was accused, which makes me a real criminal in all media like almost as a monster.

Another of our research respondents relates that: '[T]here was a lot of noise, a lot of protests around arrests, around trials, but when there was an acquittal, as in my case, almost nobody spoke of it.' To which he adds: 'what I wanted to say, is that the tribunal arrests … everyone knows that someone has been arrested, is tried, we wait for the decision, the decision does not have the same definition as an arrest on the day of the trial, and I think that this, this should be fixed, especially for the acquitted persons.' To the question: 'Did being acquitted rebuild your trust in this tribunal?', his answer is as clear: 'No, no, I just got lucky.'

In addition, as put forward by others, the tribunal itself does not seem to communicate with the same intensity regarding these decisions as it does for convictions.[21] The persons we interviewed highlighted this issue and the consequences it had, and still has, on their lives after acquittal. General acceptance of the verdict seems particularly significant for those acquitted, because, as they leave the tribunal free, they must look forward and plan for their future, including figuring out where to settle.[22]

C. On the Need for a Place of Settlement and a Positive Environment

Uprooting and downgrading are experienced by everyone affected by the stigma of criminal justice and who has been kept away from the place of residence for reasons of justice. However, the reintegration of the acquitted persons in international law into normal life is not limited to the choice of a country, a city or a neighbourhood to settle, but raises several political and administrative problems. The situation of those interviewed differed depending on whether it was the ICTY or ICTR which had acquitted them. Those acquitted by the ICTY were able to go back to their region of origin to resettle, for better or worse. Despite this 'opportunity', several of the people we interviewed

21 D. Jacobs, 'Is the ICTY Ashamed by its own Seselj Judgment?', Blog: Spreading the Jam: International Law, International Criminal Law, Human Rights and Transitional Justice, 31 March 2016, available online at https://dovjacobs.com/2016/03/31/is-the-icty-ashamed-by-its-own-seselj-judgment/ (visited 2 April 2018).

22 Regarding this issue, see R.O. Savadogo, 'Après que justice soit rendue: La réinstallation des acquittés des juridictions pénales internationales dans des États tiers', 15 *ICLR* (2015) 989.

condemned the way their acquittal was handled and the consequences of being accused of, and tried for, the most serious crimes by an international jurisdiction. One of the respondents explains in how his life changed:

> 300% different than before the prison. I lost my business; practically the entire business was destroyed. I came back [to my region], I wrote letters to the Tribunal claiming damages, wanting them to pay compensation, because all the courts in the world they have you know, they pay damages. So I kept writing letters to each new subsequent chairman of the court. There would always answer that they are really sorry but according to the article of the Statute, you know the Statute of the Tribunal does not provide for compensation in such cases … no one is responsible. Regardless of the fact that you were released, you keep wearing the stigma that you were in prison, that you were a Hague prisoner. And I said they referred to me as the one from Hague.

The situation of those acquitted by the ICTR is even more problematic. First, they tell us that it is impossible for them to return to Rwanda, for reasons of threats to their life: being accused by the ICTR, even with an acquittal at the end of the process, means being guilty — especially for the authorities of Rwanda. This fear is shared by one of the respondents, who explained:

> Here justice is not fully delivered. When we speak of justice, there is rehabilitation, the question of how to reintegrate into society. But the tribunal players did not plan for acquittals. The statutory texts do not even explicitly address the matter. Was it intended? Maybe yes, maybe not …. They could state that once the person was acquitted he could return home. But, given the context, it is not possible to return to Rwanda. There must be something, meet with the families, it must be possible. But families can not stay in Rwanda, they are at risk.

Moreover, while some of them were able to meet with their families in other countries, most of them are still denied freedom and cannot leave Tanzania, where they reside in a safe house in Arusha.[23] Regarding the acquitted who were reunited with their families, one of our respondents, who now lives in a European country, is categorical on the issue of support to reintegration: there is no such thing: '[W]e are not redeemed in any way.'

Another respondent told us that for one year after his arrival in the country that (after many other countries had refused) agreed to receive him, he had to report every month to the police station of the city where he lives. Another respondent says 'we had been so demonized that, even after acquittal, some countries were hesitant over receiving us'. Concerning those acquitted individuals remaining in Tanzania — due to the fact that no other country had agreed to accept them — they expressed anger and rejected the international institution which had tried them, especially because, according to them, justice was not really delivered, and they are still 'locked' in a safe house and have no future. One of the individuals we met in Arusha, and who still lives there despite his acquittal, explains that 'the conditions of acquittal are eventually

23 B.S. Lyons, 'Acquitted but Still Not Free', Blog: IntLawGrrls: Voices on International Law, Policy, Practice, 19 May 2014, available online at https://ilg2.org/2014/05/19/acquitted-but-still-not-free/ (visited 2 April 2018); Savadogo, *supra* note 22.

worse than prison … however what we fear is that, at the end, the ICTR could come back on its decision. I deserve better than that even if my previous life will never come back, the chauffeurs, the Mercedes and everything. I have been acquitted! …. We need a solution before the ICTR is shut down, and it looks like we are on the wrong way.'

For respondents looking toward the future, the personal degrading and humiliation they have endured, the lack of media coverage of their acquittal, the clear disapproval and the shroud of silence which come with it, are all factors that can only be seen as harmful and discouraging.

4. The Effects of the Intervention of International Criminal Law

After studying the shortcomings of the respondents' appearance before the international criminal justice system, let us now examine the concrete effects of this appearance, once again from their point of view. We first note that, in line with what was highlighted above, the stories and experiences of these people seem to have been obscured by the repressive process, limiting what was said and what was experienced to what was audible only in the terms and categories of international criminal justice. We then consider how violence, carried out in the name of justice, is endured (and denounced) by numerous respondents. Lastly, we examine how the cumulative effects of these first two sets of factors bring our respondents to substitute the vocabulary of justice for a political rhetoric that allows them to distance themselves from the negative dimension of their experience by reintroducing it into the context of war.

A. Moulding the Speech and the Experience

Within the context of the narrative experience, one of the respondents told of the awkwardness he felt at the beginning of the criminal process against him, regarding his ability to express himself and to speak about his experience. He explained that from the moment the proceedings were engaged, the possibility of speaking to third parties other than his relatives and his lawyer was no longer conceivable. He added that nobody explained to him what would happen in the legal proceedings, and that he could not question any person of trust on this matter. Even in a context of such loneliness, while the lawyer is perceived as an adviser and a potential support, the lawyer is still frequently assimilated to the judicial system and may not always be seen as the most appropriate person to speak to about one's fate.

Similarly, one of our Serbian respondents told of the way he learned he was wanted by the authorities: 'In the beginning of [date] …, there was some rumours that I, myself and … others officers of the JNA were indicted for war

crimes. There were articles in the media and television about that. No officials of state ever invited me to talk about that or to do any kind of statement.'

Moreover, the immediate call from the prosecutor and the judges for a plea in answer to the charges of committing particularly extreme acts, immediately leads to a self-protective attitude from which it seems impossible to escape. This defensive game has an effect on every subsequent interaction that happens within this process. Criminal law and procedure are then considered as situated on the side of the enemy.[24] Yet, not all defendants wish to enter this game in which interactions are limited to head-on oppositions and binary categories.

One of our respondents explained how pleading guilty or not guilty did not seem to fit the way he wanted to appear in court. If he considered he was guilty of certain acts, he did not consider himself guilty of genocide. He did not wish to present himself as either innocent or guilty of genocide. The procedure did not allow this nuance, he was, therefore, obliged to plead not guilty while it was not what he wanted. Our interviewee repeated several times how terrible the situations he experienced were. He said that all these situations, in the context of war, did not necessarily refer to deliberate choices, to planned projects, to clear options, even if, with hindsight, he knew that terrible things had happened and that he had taken part in them. The question asked by the prosecutor suddenly seemed so simplistic to him compared to the way he saw things now. The interview conducted with this person shows how the complexity of personal experiences occupies a tenuous place in the criminal trial. Criminal categories, created to optimize the functioning of the judicial system itself, have nothing to do with human nuances and ambiguities, whoever these people are. Instead of problematizing individuals' resistances and 'working' on it to produce effects in terms of consciousness, imposed formatting is preferred.[25] by the judicial context and the criminal process, requiring the accused's speech to adhere to rigid categories. When hearing the whole story of this man, while he also spoke of his position in the political conflict and the war, we clearly note the constant 'moulding' to which his speech about his experience is subjected. In fact, such moulding starts with the frame built by the war, including through its norms, organization, chaos, roles attributed to everyone, and continues within the judicial organization. This man's account, just like many others', clearly highlights the continuity between the judicial moulding of the individual experience and the one originated by the war. This continuity is particularly visible in the sharing of rhetoric, including parties to the conflict, defence and weapons. Individuals freely expressing themselves at the beginning, from their own point of view and in their own words, are quite rare, including after trials that ended with an acquittal. We could add that, in this matter, the fact of speaking about the

24 G. Jakobs, 'Aux limites de l'orientation par le droit: Le droit pénal de l'ennemi', 1 *Revue de sciences criminelles et de droit pénal comparé* (2009) 7.

25 M. Rauschenbach and D. Scalia, *Parcours des accusés du TPIY: Maîtrise du processus et résistance* (forthcoming article, on file with the authors).

committed acts and the way one experienced them could turn problematic in the sense that it could be associated with proselytism. Thus, testimony made before the court appears to be restricted and locked down, and this raises questions about the status attributed to the words of the defendant within the investigation and the criminal process. Indeed, if the rules of the game want the words of the defendant, and if doubt is constant, then what status is attributed to defendants? What is the purpose of giving voice to the defendant?[26]

B. Encounter with Institutional Violence

Another noticeable element in our interviews is that the experience of the international criminal trial, the pre-trial conditions as well as the consequences of the trial are always presented as something difficult, tiresome or even traumatising. This led us to reaffirm something already known for a long time: it is possible to feel the arduousness of the intervention of justice without necessarily being convicted.[27] One of our Bosnian respondents spoke with cautious words. To our question: 'How did you experience the court from the inside?', after a long pause, he answered: 'I can answer you with one word: horrible. And I can answer you with many other words.'

That being said, what strikes us in all the material collected is the extent of the range of experiences recounted in this way. Physical violence, however, when mentioned, appears relatively rare. Most instances of physical violence were related to the moment of arrest, when visibly aggressive actions were taken to apprehend the suspect. In the remaining instances of physical violence, injuries mentioned during the interviews were for the most part consequences of the transition period after the moment of arrest and during the stay in a national prison while awaiting for transfer to the international prison. This detention necessarily happens first in the territory in which the person was arrested. Thus, the conditions of detention and the relations with co-detainees are quite random. A Serbian soldier told us about his experience which is quite similar to the degradation ceremonies observed by Harold Garfinkel, where, by various practices, an individual with a strong identity is lowered to a weak status within the social group:[28]

> After two days in a basement, I was transferred to the central jail in …. 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, 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

26 Regarding freedom of speech before the judiciary and, in particular, the prosecution, see the study conducted in the field of narcotics by M.-S. Devresse, *Drug Users and Criminal Justice: Construction and Experiments* (De Boeck and Larcier, 2006), at 195–210.

27 See e.g. Robert, *supra* note 11, at 111–152.

28 H. Garfinkel, 'Conditions of Successful Degradation Ceremonies', 61 *American Journal of Sociology* (1956) 420.

> 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 warm, but … [i]t 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.

Concerning the moment of arrest, while the related experiences are diverse, they have in common the difficulty of facing an intervention carried out in the early hours, unexpected (by definition) and made with an impressive number of (police or military) officers, reportedly much more than perceived necessary, heavily armed and hooded. Some of the stories highlight the contrast between the calm of the moment and the violence of this kind of intervention, especially when it happens at a home (often, in the presence of spouse and/or children). The respondents speak of sleepy people, in pyjamas, of children playing or eating, who are brutally exposed to the deployment of an extraordinary strength (noise, screaming, threatening, pointing weapons, taking people to the ground, breaking down doors, handcuffs, etc.). It is interesting to note that, in most of the cases, according to our respondents, a single injunction from the law enforcement officers would have sufficed, particularly in relation to the number of people on the site, and the physical impossibility of escaping such an arrest. Moreover, some respondents highlighted that they knew this moment would come, sooner or later. This long interview extract from the same Serbian soldier is particularly clear:

> On date … I was sitting in my apartment reading a book; my son was attending a match of Yugoslav national team. My wife and younger daughter were not at home but my older daughter was there with me at the apartment. … Somebody came at the door and rang, my daughter looked and then I asked who it was and she said: nobody. I have a fully-proof door in my apartment, five minutes later, a strong blow happened and the entire building was … heard it. I jumped and then headed towards the door. My daughter told me that some people wearing masks on their head were at the door. I looked through the … and indeed there were some people wearing masks on their head. I wanted to open the door, but the key was stuck because they just hit the lock from the outside. In my opinion, they wanted to surprise me and I saw them holding a big iron bat. And they intended to break the door with that bat. I really don't know why, even today I do not know why. … At the end, the policemen brought big iron bats and they dropped the walls around the door and they tore out the door so that they could come in. And they took me with no basis to some cellar, some basement, I really don't remember where. My family stayed in the apartment, very upset and sad. Before that, I always told to my senior officers in the army, that I will not voluntarily surrender, because I do not know why I would. And if they think that I should go to jail, then they should arrest me and take me there. But I always asked my family to be protected and my children because they are not responsible for any of my acts. If I was invited by my seniors, I would attend any kind of trial in my country and they could have arrested me, they could have also put two policemen in front of my door and I would have left the apartment, they could arrest me. Why did they wreck my wall in my apartment, why did they do that, in such a manner, I really do not know.

This deployment of violence directly refers to the spectacular character attached to international criminal justice. The acquitted persons we met told us that, throughout the proceedings, they felt that they were placed, as spoils, in

the spotlight of international criminal justice as a permanent reminder of the strength of this institution.

If this feeling is subjective, a visit to the ICC website confirms the will to stage institutional power and to maximize the visibility and the strength of the justice process. The tab entitled 'Get involved' offers to visitors, in addition to didactic tools and opportunities for mobile exhibitions, some short promotional videos of various praise for the process of justice as conceived within the ICC, see the tab entitled 'Making Justice Happen'. We furthermore note the repetitive use of the phrase 'most heinous crimes' to designate the core business of the courts. Used as a slogan in its communication with the general public and participating in the legitimacy of the courts, it is somehow distinctive in the sense that it leaves no room for determinism, no place for any element of context, constraints or background. All the responsibility weighs on the individual actor.[29] In addition, if we linger over this merchandising of the courts (you can even buy an ICC mug), we notice that this spectacular and commercial dimension, completely accepted, only concerns the repressive dimension of the process. When reading the texts published on the website, and when viewing the videos, we understand that delivering justice is more associated with recognizing victims and punishing those responsible than the confrontation of various points of view, which at times leads to acquittals. The feeling of 'being at the heart of a promotional process', if not always so clearly stated, transpires in most of our interviews and finds a direct manifestation for the acquitted in the communication of the court, which fails to deal with their particular situation.

Finally, unlike physical violence that is always attributed to particular people, we note that emotional violence can be attributable to the whole of a judicial process and can hide in the tiniest detail. When speaking of this type of violence, our respondents use the word 'horror' and describe the number of steps they went through during the legal process as 'terrible' and 'stressful'. In this area, the acquitted make a point of recalling to us how most of the steps of the process, including arrest, indictment, detention and trial, were reasons to feel harmed, and have created anxiety, or very negative emotions, including loss of autonomy, feelings of helplessness, separation from the family, unbearable self-image, misunderstanding of the legal process, of its functioning and effects, feelings of not being understood, contempt from the judicial staff, and feelings of betrayal from their relatives. However, without doubt, the moment they discovered the charge(s) against them — the crime(s) they were accused of having committed, and also the words that accompanied them — systematically represents a moment of astonishment, as related in details shared by a Serbian soldier:

> 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,

29 For a criticism on the notion of rationality regarding criminal justice, see J. Poupart, 'Choix rationnel et criminologie: Limites et enjeux', 34 *Sociologie et sociétés* (2002) 133.

> that it did not 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.

The accused we met whose cases ended in an acquittal, and indeed everyone accused before an international tribunal, whether convicted or not, made a point of affirming that this experience felt unbearable to them precisely because they were innocent. Reaffirming such innocence throughout the interview, they told us how this element has contributed to the constant feeling of injustice they lived with during the trial and thus introduced themselves as the ultimate victims of international criminal justice. That being said, in order to remain coherent with our research perspective, it appears to us important, without detaching ourselves from this point of view, to note that this innocence does not matter. The fact that someone has felt humiliation, anxiousness, and awkwardness appears sufficient to take this experience seriously. These feelings are to be considered for what they mean per se for the individual, irrespective whether the crime that brought him or her before the court was actually committed.

We believe it is important also to clarify that the experiences related to us were not all negative. Our interviews also include positive elements, in which our respondents felt they were treated well and met with respect. They hold positive memories of these moments. Moreover, the way they related their conditions of detention in The Hague or, to a lesser extent, in Arusha was usually positive:

> Then I met the administrator of the detention unit and one or two ladies from the Registry of the Tribunal came too. They were all kind to me. I really cannot say anything. One of those supervisors, if I remember correctly, his name was … he brought me to the cell and he did his best to explain everything to me and assist me. He tried to make this whole situation much easier for me. Two days later, I met … who was the administrator of the detention unit; he personally helped me a lot to find my place in that detention unit. Three or four administrators from the detention unit came after Mr. … but he was the most professional administrator of all. He always abided by the book … he did not misuse his authority, but he always found time to listen to our problems and gave us answers, although those answers where sometimes negative.

Most interviews show that physical, psychological and symbolic violence, whether deliberate or not, is as much a question of institutional violence as of direct interactions. For instance, the stay in The Hague prison can generally be described as satisfactory in regard to meeting international comfort standards and respecting the detainees by the staff. The imprisonment, however, as a singular experience of the deprivation of liberty, and of confinement, as part of the judicial process, is described a more problematic.

C. Politicization

While the elements discussed above refer primarily to the way criminal justice was delivered, it appears that this exercise does not represent the most

essential part of the experience of justice. A significant element emerging from our empirical material is the political view through which the respondents end up considering their own trials. This is not surprising insofar as the allegations are part of a collective conflict of which the political aspect (broadly speaking) is undeniable.[30] However, the side that mainly concerns the commission of crimes as such is maybe not the most interesting aspect. Indeed, what is interesting is that it is no longer simply the allegations, but rather the very process of justice and the way the defendants experienced and endured it, that is seen as political.

We note that most of our respondents refer to a rather positive view of international criminal justice at the beginning of their trial. For most of them, the fear of facing it did not seem to conflict with a certain trust in the fact that the process would bring something to them, at least the occasion to express themselves. Thus, a Serbian respondent explained: 'I believed the tribunal is an international institution of highest rank that will fight for justice and truth and I believed that I will succeed in explaining and proving my truth before the tribunal.' A Rwandese citizen told us: 'I think the idea of setting up an international tribunal to judge the perpetrators of horrible crimes as we saw in Rwanda, is wonderful. I truly agree with them and the creation of the tribunal.'

This point of view is interesting as it speaks directly to the image promoted by the international criminal jurisdictions themselves. As we said above, this image is a representation of justice, human rights, truth, fundamental principles and reconstruction, rather than politics, at least not regarding the committed crimes. In this regard, the process of justice is not presented as political as such. The allusion to human rights as spread by international criminal jurisdictions refers to a functionalist idea of justice, a consensual and non-confrontational conception of social values underlying criminal law. Based on the idea that fundamental principles are unanimously shared, judicial stakeholders of international criminal institutions stand above the fray, in the service of a legal system, if not neutral, at least endowed with an impartial legal authority and aimed at pacification and social peace restoration.[31]

What astonished us during the interviews is that for some of our respondents who shared this conception we noticed that as their 'practice' of the system of justice at the international tribunals developed and as they discovered its real functioning, this consensual idea of justice and of the existence of a 'superior' law, guardian of the truth, and thoughtful about fairness completely disappeared.[32] It came to be replaced by a diametrically opposite

30 F. Mégret, 'The Politics of International Criminal Justice', 13 *EJIL* (2002) 1261; S.M.H. Nouwen, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', 21 *EJIL* (2011) 941.

31 A. Cassese, 'The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice', 25 *LJIL* (2012) 491; T. Treves, 'Aspects of Legitimacy of Decisions of International Courts and Tribunals', in R. Wolfrum and V. Röben (eds), *Legitimacy in International Law* (Springer, 2008) 169.

32 M. Rauschenbach, D. Scalia and C. Staerklé, 'Paroles d'accusés sur la légitimité de la justice internationale pénale', 3 *Revue de sciences criminelles et de droit pénal comparé* (2012) 727.

conception in which divergences cannot be overcome, normative systems enter into conflict, and norms are plural and necessarily antagonistic. Respondents then employed the rhetoric of so-called 'victor's justice', unequal relations between countries on the international stage, and pressures exercised by states on judges as well as witnesses. This shift towards disillusion has the effect of completely relativizing the stage of confrontation with victims or with witnesses, which nevertheless represented, unanimously by our interlocutors, one of the most painful moments of the judicial process. This confrontation was, however, experienced by the respondents as a tiresome moment, not because it meant confronting their own acts or remembering dreadful events, but rather because it represented unfairness, in which feelings of powerlessness and being used as scapegoats reached a climax.

It is above all in the tone of our respondent's speech that we notice clearly this change of attitude towards international justice, in other words, they violently shift from an idealized justice that they trusted to a completely fake justice that has been endured, but it is also based on real experience. We note here a few examples provided by the respondents to substantiate their experiences: the issue of choosing a lawyer and the use of languages at court, which limits interactions; the payment of 'compensation', that is, daily and attendance allowances, for witnesses; the importance attributed to non-governmental organizations promoting the interests of victims in the legal process; the very principles of the law, both from common and civil law. These elements that *a priori* have little to do with the conflict in which the crimes were committed, nevertheless gave opportunity to our respondents to replace the conflict within their experience, definitively moving them to the side of the 'defeated', whose point of view they adopted when then looking at the trial. For that reason, the defendants see themselves as people who had to put their weapons down, and who were completely helpless in front of a powerful and confusing machine built to crush them. Thus, the criminal trial, first considered by them as an opportunity to reveal the truth and to be able to tell their own story, only became the continuation of the armed conflict that brought them to court.

That said, a minority of respondents expressed that even from the outset they held a political conception of international criminal justice, expressing their immediate mistrust of the system. This mistrust could seem logical for observers, given the position of the accused person within the trial. However, what is important to note here, is that these people were not convicted — nonetheless, the experience of the acquittal does not seem to have changed their opinion or reinstated trust in the judicial system. Their anger, as well as their despondency, appeared to us still present, even years after it all ended. This analysis contradicts the hypothesis often used to criticize the results of our research conducted with convicted persons: that it is the sentence itself that leads them to adopt, out of resentment, a negative conception of international criminal justice.

5. Conclusion

In international criminal law, acquittal, in addition to raising numerous questions of a legal nature, remains a particular experience. Of course, every one of our respondents agrees that their acquittal was justice, however much they presented us with a legal process full of failures, a process not thoughtful enough in taking into account their personal background and opinion and exclusively focused on issues related to their guilt alone. In other words, a process that, if it did not traumatize them as much as the armed conflict, left them nonetheless in a situation of disenchantment and anger. A number of them felt, however, that in their case, the acquittal was a consequence of pure luck, because it seemed completely impossible *a priori*.

Having previously worked on the experiences of individuals convicted by international courts who highlight their idea that these courts constitute a failure, we often faced the criticism that their conclusions could not be attributed to the legal process, but rather to their inability to accept a negative outcome of their trial. It is thus interesting to note how, at the end of this short analysis, the experience of acquittal does not seem to influence our respondents' point of view. Such a rejection all accused felt seems to come from their common perceptions, which by and large include: the treatment they endured (the judicial treatment *stricto sensu* — the arrest, the duration of the trial); their direct confrontation with a politicization of international criminal justice; their position as a scapegoat; their experience with the media. Of course, many academic lawyers attribute such a rejection of justice to the defensive position of the accused (justification for their crimes or responsibility). However, this doctrine is mainly based on an ideal of justice, considered as the result of a consensual conception of social relations and international relations through the idea of fundamental rights.[33]

The position of the acquitted we met, which we have addressed in this article, shows the limits of this reasoning and refers to a conception of the social world established though conflicts and oppositions. While justice seems to have been delivered to these persons who ended up being acquitted by international courts, these individuals show us how that the position they were forced to endure during the proceedings sent them back to the logic of conflict they experienced during the war, as if continuing hostilities, which in turn led them (at best) to adopt a defensive stance and (at worst) to question the legitimacy of justice itself as delivered by the judicial process. The question here is to come to an understanding of whether we can do without recognition of the legitimacy of the legal process from the people such a process is directly aimed at. Can we ignore the impact of the antagonistic side of the trial itself, if this is supposed to restore social peace? Can we assume that the people accused by international jurisdictions, acquitted or convicted, have nothing to

33 Devresse and Scalia, *supra* note 10, at 803–805.

say and nothing to teach us about the possible failures of the process in which they participate and, above all, about the meaning it takes for them and the people who judge them? Indeed, without an acceptance of justice by one of its main stakeholders, the defendant, it seems that justice's outcomes can only be met with scepticism or even rejection.