International Criminal Procedure: View of the Accused

Summary

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Professor Antonio Cassese (former President of the International Criminal Tribunal for the former-Yugoslavia) explained that legitimacy is especially “the moral and psychological acceptance of a body by its constituency. A body politic or a domestic or international institution is considered legitimate when the majority of the population, or the majority of the institution’s constituency, expresses a high degree of consent and approval for it. If this condition is fulfilled, the body politic or the institution may obtain respect for, and compliance with, its commands without resort to force, except in limited circumstances. We could term this category of legitimacy ‘consent legitimacy’”².

In the context of international criminal justice until now research has exclusively focused on the legitimacy granted to international criminal justice by victims and populations subjected to serious violations of international criminal norms committed during conflicts. It has not considered the point of view of the presumed perpetrators of these acts or condemned individuals³. However, an international justice mechanism such as the International Criminal Tribunal for the former Yugoslavia (‘ICTY’) must be perceived as legitimate not only by the persons affected directly or indirectly by the violations it sanctions. International justice must also obtain a certain acceptance from the persons it judges if it wants to attain its objectives of restoration of social ties and deterrence – if this is indeed possible.

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The purpose of the present study is to focus on the perception of responsibilities recognized by an International Criminal Tribunal (in this case, the tribunal for the former Yugoslavia) by the people acquitted and condemned by it. The intention is, of course, not to trivialise the acts committed in the former Yugoslavia, but merely to analyse the perception of the persons judged by the ICTY in order to understand the experience of international criminal justice. For that we met 18 persons who were judged by ICTY: 15 condemned and 3 acquitted. They are from each part of the conflict. Participants of the study were condemned for Command responsibility (art. 7.3 of the Statute of the ICTY), Joint criminal enterprise and direct participation (art. 7.1 of the Statute of the ICTY) (murder, shelling, torture, rape, deportation; some for war crimes others for crimes against humanity). Some of them were generals in army, some of them did political career, others had hierarchical position in military organisation and some were combatants. To do this research, we did semi-directive interview and used two methods: Interpretative Phenomenological Analysis & Discourse analysis to analyse discourses/interviews, which were done in jail for many of them (with translator).

What may we conclude by this research?

As we will see:
Firstly, if before trial (as explain *a posteriori* by condemned or acquitted individuals) international criminal justice is viewed as a high level form of justice, after having be judged (acquitted or condemned) the perception of international criminal justice is a negative one, unfair, politicised and imposed by others (= an outgroup justice). We highlight that the question of procedural justice is more important than sentences. But these perception depends on the forms of liability and the responsibilities attributed by the Tribunal.

Indeed, it is the second main result (and explanation of the perception of International Criminal Justice by accused/condemned individuals), the liability in general and the different forms of responsibility are too separated to reality of field. Moreover, I assume that the attribution of responsibility is even more important in international criminal law, where the
judged crimes are crimes regarded as more serious (war crimes, crimes against humanity or genocide) and are heavy with symbolism.

A. Perception of ICTY and justice

When the participants express themselves on the perception that they had of international criminal justice prior to their confrontation with the criminal process, they refer to certain moral values in order to describe it. They express a feeling of belief in a superior, high-ranking justice, which would be irreproachable: a justice that should have been implemented. One of the participants explains, I quote, “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”. Another talks about an institution established “on the highest legal level”. Another participant compares international judges to god. They believe to an immanent justice.

But after the criminal process they think differently:
Firstly they criticise the location of ICTY => “Our case should have been referred to some local court”; We are confronted to an outgroup justice as explain by Stahl, Prooijen and Vermunt.

Secondly, the trial was unfair and inequal: the others are not prosecuted, not condemned and if they are, they have a lower sentence. A comparison is made by interviewees: comparison with other individuals from other ethnies or nationalities (who were condemnend by ICTY) and comparison with other individuals around the world (who are not judged). A comparison like that recalls researches made about the unfair feeling by Casper especially. Equity and equality are important on the evaluation of a “fair justice”.

Thirdly, ICTY is politicised. They consider that the ICTY is influenced, even controlled, by lobbyists (that they do not name nor define), by the opposing camp, or by an indefinable nebula (which seems to comprise the international community, the opposing camp and lobbyists). And the discourse is the same in each part of conflict: *In my opinion, that was the result of Croat propaganda, of the pressure from the Croatian State; In my opinion, there was a pressure on the Bosnian side to arrest someone as soon as possible and to create a sort of balance with Serbs and Croats; My conclusion was they needed the balance, you know, from each side, when I say sides, I mean Bosnian and Serb side […] So my impression was, they wanted to feed this Serb lobby, lobbyists and to satisfy them in a way that they, ok: was the one who slaughtered Serbs.*

This perception depends more on the process, the procedural justice, than the sentence. Indeed, acquitted and condemned have the same view. Moreover, all participants explain problem linked with the Prosecutor and witnesses (Most of the participants have evoked the lying of the Prosecutor with carriage of their case, the lying of the witnesses of the Prosecutor, as well as the will of the prosecutors to build their career and consequently to investigate exclusively incriminating evidence. For some participants, Prosecutor is not willing to establish the truth, but only his truth; For some participants the Prosecutors seemed young and ambitious.) And the judges (they do not know what they are doing, …).

So, has explained especially by Tyler (who had work about national justice), in international criminal justice, procedural justice is more important than outcome or sentence⁷.

But in the same time, the analysis of these interviews seems to deliver another result: the perception of justice by convicted people also depends on the responsibility that is attributed to them. I assume that the attribution of responsibility is even more important in international

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criminal law, where the judged crimes are crimes regarded as more serious (war crimes, crimes against humanity or genocide) and are heavy with symbolism.

B. Perception of responsibility

Firstly, for individuals condemned under Command responsibility or Joint Criminal Enterprise, we observe that they consider themselves to be wrongly condemned. “I was not accused for my own responsibility”, “I was condemned for responsibility of others”, “I did anything myself”, “I am not guilty for any single act, I am not directly guilty, I am guilty for other perpetrators”. Comments on command responsibility and joint criminal enterprise therefore seem to prove a real lack of understanding of it. The participants consider that it is founded more on political elements than legal ones, and at the very least it is not seen as based on the reality of facts. Neither is it seen as founded on the reality of power (to prevent or punish crimes OR to do crimes).

So as a result of geographical distance (Delpla talks about physical distance) and also the hierarchical relationship between the condemned person and the people who have committed the offences for which he has been convicted, these forms of responsibility does not seem to be appropriate in the light of their reality. The link is too distended; the will and the intent (which are fundamental criteria for establishing guilt) seem to be missing.

The second finding, which seems to imply a negative perception of the attributed responsibility (and thus of international criminal justice), deals with the rejection of the responsibility attributed to the condemned persons and justifications for the acts committed.

Doctrine have been highlighted several forms of non-acceptation of responsibility: neutralization (especially by Sykes and Matza); denial of the acts committed; justification of crimes by reaffirming their rightfulness, by legitimating them, by taking “the responsibility in connection with a political commitment that is not questioned […] [In this context, criminals] rather seem to want to maintain an internal coherence which has been built up over

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8 D. Bernard, Trois propositions pour une théorie du droit international pénal, Bruxelles, FUSL, à paraître en 2012.
time”\textsuperscript{12}; justifications related to duress\textsuperscript{13}; necessity or group pressure (Browning, 1992) or still the justification by the fact to be a cog in a machine (as did after the Second World War). Some of these explanations are partially reflected in the participants’ statements. However, this is not what is mainly put forward.

In the context of our research, except for an accused person, all participants deny their responsibility for acts on the grounds for which they were convicted. A permanent feature appears within explanations given by the participants: acts have been done, but these acts are not crimes. When they are told that they killed civilians, they answer that they killed combatants; when they are blamed for having deported people, they answer that they helped people escaping from the battlefield. It seems to be a specific paradigm, which is possible only related to crimes committed in time of war.

Moreover, because they do not accepted their liability for crimes, many of them explain that if tomorrow they will be in the same context, they will do same behaviour (except sexual violence)

**Conclusion**

So, in term of deterrence or rehabilitation, these results (viewed trial, process or international criminal law AND gap between responsibility and lived behaviour or lack of recognition) oblige to conclude that international criminal law does not manage to attain its purposes, its goals.

As explain by P. Ricoeur in *Le juste*, “As long as the sanction is not recognised itself as reasonable by the convicted person, it has not reached this latter as a reasonable human being”\textsuperscript{14}. In international criminal justice this purpose seems not to be achieve.


\textsuperscript{14} P. Ricoeur, Le juste, Paris, Esprit, p. 198-200.