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ON CULTURAL ISSUES, HUMAN RIGHTS AND SECURITY

UNIVERSITÀ DEGLI STUDI DI SALERNO

EU GLOBACT

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International Criminal Law and Perpetrators' Perspectives

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TRANSNATIONAL CRIME AND EU LAW:
towards **Glob**al **A**ction against **C**ross-border **T**hreats to common security, rule of law, and human rights

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Introduction

‘Consent Legitimacy’:

Research in ICJ until now has exclusively focused on the legitimacy granted by victims and populations.

=> Two aspects of our research:

-the perception (and legitimacy) by people tried by ICTs

-the functioning of ICTs

Indeed, as explained by Kaminski and Kokoreff: "the experience of the judiciary 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."

Content:

I. Epistemological and Methodological elements
- A. Epistemological elements
- B. Methodological elements

II. Results of the research
- A. Gap between expectations and reality
- B. Violence and unfairness of the procedure
- C. Politicised and outgroupe justice
- D. Role assigned to the defendant

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I. A. Epistemological elements

-**First**:

H. Garfinkel: sociological research began to increase knowledge by taking 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."

In this sense, subjectivity and partiality are no longer a bias in research, but signify instead substantial data.

-**Second**:

Lawyers -> people are "accused", "condemned", "guilty", "innocent"… essentialization of perpetrators

Criminologists -> "a person brought to justice"

Tried people are not passive in trials, they are also active – they have to respond =

Respondents' Approach

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I. B. Methodological elements

-Sixty semi-structured interviews

-Interviews lasted from 60 to 270 minutes

-Interviews have been recorded and transcribed verbatim

-Interviews have been analysed following the Inspired Grounded Theory approach, with the aim of describing the structures ans consistencies of the discours and to elaborate hypotheses

-Every parts of the conflict (except for the ICTR)

-Every forms of responsibility

II. Results of research

A. Gap between expectations and reality

A significant individual positioning in relation to ICJ: participants have a pre-existed conception of justice. This conception mainly pertains to "moral-humanist" referents.

Believes in a higher justice, of a high level, which must be beyond reproach and that aims to establish the truth.

"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."

≠

"It was not a very fair court, when it handled my case […] I found that very unfair from the Tribunal."

= **Studies carried out at a national level, by J.D. Casper**:

the gap between expectations and reality constitutes a fundamental component of the perception of justice.

What are the specific details related to the experience of the tried people that will create such a sense of rejection?

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B. Violence and Unfairness

Same experiences for condemned or acquitted people:

"I can answer you with one word: horrible".

Symbolic and Physical violence: Ceremonies of degradation (Garfinkel)

Symbolic violence most of the time and appears throughout the entire criminal proceeding. Participants even mention "*horror*" or use terms like "*terrible*", "*stressful*", "*frustrating*", etc. to describe various moments they experienced during the judicial process.

An important moment (the discovery of indictment) :

"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, 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?".

B. Violence and Unfairness

Same experiences for condemned or acquitted people:

Tried people explain how they were confronted with what they described as an unfair, inequitable, and sometimes “absurd” process.

They highlight the “lies” of the prosecution and the witnesses, the long and difficult trial to go through, and the prosecution witnesses who were prepared and paid at a high price in order to accuse them.

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This confirms studies carried out at a national level: Tyler and Jackson showed that the perception of justice depends more on the fairness of the procedure (or the perception of the fairness of the procedure) than its final outcome.

Thus the satisfaction of the defendants does not depend solely on the severity (or not) of the sanction; rather, the criminal proceeding matters more than the outcome, and people, even those convicted, may be satisfied by the process as they experienced it.

C. Politicised and outgroup justice

First: participants describe a justice owned by "others", which means by people external to the context in which the crimes were committed.

= *off-ground* justice (Hazan)

"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.".

= Studies carried out related to the perception and the experience of the *outgroup justice vs. ingroup justice* (Stahl, Prooijen, Vermunt).

When confronted with an "outgroup" justice, people may be more affected by the procedural justice than when confronted with an "ingroup" justice

Second, participants feel the international criminal tribunals are mainly established for **political purposes and are influenced or even led by their former enemies**.

"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 opinion, it is the result of the Croatian propaganda and of the pressure from the Croatian state".

"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".

These criticisms reflect the ones we can find in the literature, sometimes written by the very tribunal judges themselves: it is the **victor's justice**.

International criminal law appears to be a **continuation of the war**, with a new weapon on a new battlefield: the law within the courtroom.

International criminal law *"[does] not simply try to punish the offenders, but also to fight against its enemies"* (Munoz Conde).

= *Le droit pénal de l'ennemi* (Jakobs)

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ICL is imposed by Western countries on the rest of the World

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D. Role Assigned to the Defendant

Beyond the experience, the analysis of these accounts allows us to highlight the frequently used **rhetoric of scapegoating**.

! At a specific moment of the process, people ceased to be able to experience the criminal proceeding in a way other than by positioning themselves as scapegoats !

"The death of an innocent person does not justify 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…"

"We were so much demonised that even as acquitted people… some countries are hesitant over receiving us".

This feeling of being a scapegoat appears at two levels:

-Related to the criminal proceedings:

-Related to current international relations and power struggles.

In the context of armed conflict, a catharsis in which the defendant plays an essential role in a sacrificial game that enables the reconstruction of the society.

This is due to the position between individual responsibility and collective crimes.

“It is a question of stigmatizing the Nazis, the leaders of Hutu Power or even thr Bosnian-Serb leaders precisely in order to better remove the populations from them, offering in exchange a form of implicit absolution” (Fr. Mégret)

This hegemonic individual responsibility explicitly refers to the “sacrificial imperative” (R. Girard) in which, in order to rebuild the society after a major crisis, it is essential that the “expiatory” victim brings about unanimity against her/him.

Consequence: Non-recognition of criminal liability

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Conclusion

Criminal proceedings work on the basis of two principles:

-the exclusion of the defendant

-the predominance of a dynamic of conflicts all along the process.

In this context, the reference by our respondents to the notion of scapegoating casts the defendants as victims.

This notion fully complies, not only with the real position that is assigned to them throughout the trial, but also with the very aim of this justice, namely to rebuild the collective ground by rejecting the singular individual.

If international criminal justice aims to reach the heart of its target and wants to take into account the convicted person, “pulling itself out of the war” appears to be one of the main necessary steps to take for international criminal justice today, despite its high peacemaker ambitions...