

International Criminal Justice: The Contribution of the Human Sciences

Liora ISRAËL

The evolution of international criminal justice since the 1990s has spurred both scholarly study and controversy. Against those who bluntly denounce “victors’ justice” to the point of paving the way for negationism, a recent book takes an empirical approach to the question of the reception of the work of international courts and the effects of their decisions on the populations involved.

Reviewed: Danilo Zolo, *La justice des vainqueurs. De Nuremberg à Bagdad*, Éditions Jacqueline Chambon, Paris, 2009 (first published in Italian in 2006).

- Sandrine Lefranc, “La professionnalisation d’un militantisme réformateur du droit : l’invention de la justice transitionnelle,” in a special issue edited by Pierre-Yves Condé et Anne Devillé, “À l’épreuve de la violence, figures de la ‘justice transitionnelle,’” *Droit et Société* n°73/2009, pp. 561-590.

- Isabelle Delpla and Magali Bessone (eds.), *Peines de guerre. La justice pénale internationale et l’ex-Yougoslavie*, Paris, Éditions de l’EHESS, coll. En temps et lieux, 2009

One of the most significant legal developments since the end of World War II has been the evolution of international criminal justice. The military tribunals of Nuremberg and Tokyo, which were created to try the most notorious Axis war criminals in Germany and Japan, laid the groundwork for the creation of a body of law and a number of legal institutions dedicated to the prosecution of crimes against humanity. Major changes took place in the 1990s. New international courts were created in the wake of, or in parallel with, democratic transitions in South America and former Eastern Bloc countries. The most visible of these include the international tribunals created by the UN Security Council to deal with the former Yugoslavia and Rwanda (on May 25, 1993, and November 8, 1994, respectively), along with the

International Criminal Court. Meanwhile, the creation of these new judicial venues was accompanied by other innovations, which in some cases complemented them and in others competed with them. These range from the development (partially blocked) of universal jurisdiction to the creation of mixed courts in Kosovo and Cambodia and the institutionalization of new practices such as *gacaca* in Rwanda.

These developments spurred study and controversy in the intellectual as well as the political arena. The debates were impassioned, all the more so because, as Sandrine Lefranc showed in a recent special issue of *Droit et Société*, the new judicial institutions were largely promoted by political actors already committed to the ideas they embodied. If the ensuing debates revealed a variety of scholarly and political differences, they also proved to be quite sensitive because they involved the representation, denunciation, and in some cases denial of some of the greatest crimes of the twentieth century. A comparison of several recent works on the subject brings this point out clearly.

Victors' Justice?

A recurrent criticism of the use of judicial or para-judicial methods to deal with historical crimes is that they amount to an application of “victors’ justice.” Whether at Nuremberg or The Hague, judgments of this type have been denounced both by the defendants and by more detached observers for their lack of impartiality, insofar as they serve the triumphant party in a conflict. Critics allege that victors’ justice confuses justice with vengeance and merely ratifies political and military victory. This type of criticism, though not new, has recently come back into vogue, especially in regard to the new institutions of international criminal justice. It has also been directed against certain judicial consequences of the wars in Iraq and Afghanistan (such as the trial of Saddam Hussein and the military tribunals in Guantanamo). A radical version of this critique can be found in *La justice des vainqueurs. De Nuremberg à Bagdad* by the Italian philosopher Danilo Zolo. Zolo offers an uncompromising attack on contemporary international criminal law, weaving philosophical exegesis and legal commentary into what is ultimately a highly political critique of a system denounced as imperial and, broadly speaking, at the service of the American superpower.

Zolo's work is open to criticism on many counts, but two points stand out. First, one of his main strategies is to show, by way of a critique of the institutions of international criminal justice, that international law is in contradiction with its own principles. Accordingly, the argument is often couched in purely juridical terms, with a great show of scholarship, combining quotations from Latin with analyses of the various conventions and statutes that form the basis of modern international law, along with references to criticisms of the Nuremberg trials by the great jurist Hans Kelsen. Although the author is a philosopher, his many references to legal texts, coupled with numerous expressions of gratitude to the Italian jurist Cassese, give the appearance of combing a radical – and eminently political – critique with a solid technical foundation in the law. To put it in a nutshell, the work portrays victors' justice as a weapon wielded against America's enemies, whose crimes are always placed between scare quotes (Slobodan Miolsevich is accused of "ethnic cleansing," for example), while those whom the author regards as real criminals, without scare quotes, go unpunished: namely, the United States, NATO, and their allies. Typical of this reading is the absence of the term "genocide" to denote what took place in Bosnia and Rwanda, whereas the conflict in Palestine is several times described as "ethnocide" (without quotes). Zolo also seems to believe that the only victims of massacre in the former Yugoslavia were those who died in NATO bombing raids.

Although the thesis of the book is simplistic, and reading it is often an uncomfortable experience (the back cover ends with a quote from Adolf Hitler¹), it is nevertheless representative of a strong critique of international criminal tribunals that is shared by many people, including some who defend the accused within these very institutions. Like these lawyers,² Zolo proceeds by taking the sponsors of the new judicial institutions at their word and taking advantage of the new arena for adversarial proceedings that they open up. In this arena, the charges against the accused can be challenged, and so can the prosecution's entire historical narrative. Unlike the human rights advocates who draw most of the attention of scholars working on these courts, defense lawyers and politically motivated commentators such as Zolo can take advantage of the symmetrical structure of an adversarial proceeding to propose an alternative narrative, which is presented as neutral because the law allows it. The tables are thus turned, and

¹ "When you launch and prosecute a war, what matters is not legality but victory."

² Always lawyers for the defense, since civil parties are not represented in the Yugoslavian and Rwandan tribunals, in contrast to the Cambodian tribunal and the International Criminal Court.

the accusers are denounced for politicizing the judicial arena, whose promoters (and the prosecutors and staffs who allegedly represent them) are said to be using it for their own purposes, against which an “alternative” vision is provided. Because the defendants are guaranteed the right to be represented by attorneys, and because the courts take the principles of law seriously, these attacks on the liberal underpinnings of international legal institutions are allowed, even if it means that defense lawyers in The Hague or Arusha support their clients’ denial of genocide, or, as in Zolo’s case, attack the universal rights of man as “humanitarian fundamentalism.”

The “turning of the tables” on which the work is based is effective (despite the similarity with the defense attorneys’ purpose of making a radical critique of judicial institutions) insofar as it focuses on one essential feature of post-massacre justice, which Mark Osiel has brought to light. In his *Mass Atrocity, Collective Memory, and the Law*,³ Osiel notes that one purpose of such institutions is to shape the memory of events (national memory in the cases he studied), and that the nature of the exchanges in court, in the form of a dialogue, allows several different narratives to be heard before a verdict is reached as to a final interpretation (which in his view can help foster the emergence of a liberal consensus). The more radical opponents of international criminal courts take this feature of such institutions quite seriously, more seriously perhaps than the sponsors themselves. Their goal is to take advantage of the judicial arena, whether in court itself or in writing about the proceedings, to construct an alternative memory presented as symmetrical with the official one, in which the alleged crimes of the accused are contrasted with the crimes they attribute to the accusers (e.g., by comparing the bombings of Hiroshima, Nagasaki, and Dresden to the war crimes of the Nazis and the Japanese). They thus capitalize on one of the flaws of the international tribunals to which Osiel draws attention, and which Judith Shklar had already identified in the case of the Nuremberg trials: namely, their claim to neutrality, despite their obviously political nature and implications.

Such criticisms of so-called victors’ justice, of which Zolo’s is just one of the more recent examples, range from out-and-out negationist denials of genocide to less patently false analyses. The latter call attention to the way in which the inherent asymmetry of international courts, and

³ Mark Osiel, *Mass Atrocity, Collective Memory, and the Law*, New York, Transaction Publishers, 1997.

in particular their lack of jurisdiction over agents of the great powers (especially members of the UN Security Council), undermines the legitimacy of these institutions. Unfortunately, these high-flown critiques all too often neglect to ask how the decisions of the courts affect the populations involved. This oversight is addressed in part by another recent book.

An Empirical Approach

Edited by two philosophers, Isabelle Delpla and Magali Bessone, *Peines de guerres. La justice pénale internationale et l'ex-Yougoslavie* stands out for the originality and interest of its empirical approach. Indeed, the contributors to this volume see criminal justice in terms of the tension between the universality of its aspirations and the contingency of its achievements. Unlike the critics of “victors’ justice,” they try to find links between what is happening on the ground in the republics that constitute the former Yugoslavia and what is happening in the international courts. To do so, they focus on a number of different aspects of the situation and draw upon the work of scholars from many countries, including the former Yugoslavia itself. Theirs is an in-depth historical approach. In particular, they look at earlier post-conflict trials in this same region, especially after World War II (Josef Krulic, “Les procès Milhailovic et Stepinac de 1946 au regard des critères du procès équitable”), and they show that the international court dealing with Yugoslavia is working with well-understood principles, as we see in Xavier Bougarel’s study of the uses of the term “genocide” in Communist Yugoslavia (“Du code pénal au mémorandum. Les usages du terme génocide dans la Yougoslavie communiste”). Despite the influence of concepts and ideas drawn from earlier contexts, the court has also helped to reveal and even serve as a catalyst for social relations, touching on both gender (Élissa Helms, “Justice et genre. Mobiliser les survivantes des guerres bosniaques”) and the place of victims in society.

Victims are the subject of several of the papers in this volume (such as Christian Moe, “La justification du statut de victime: La réception du TPIY par les musulmans de Bosnie-Herzégovine”). Isabelle Delpla (“Catégories juridiques et cartographie des jugements moraux. Le TPIY évalué par victims, témoins et condamnés”) investigates the way in which Bosnians understand the role of the International Criminal Court for Yugoslavia. The institution, seen for

once from the standpoint of those of whom it speaks,⁴ is described as nuanced and complex. Bosnians seem to place greater credence in it than in the local courts. Although they do not idealize it, they are interested in the judgments it renders. Delpla shows how references to human rights are interpreted and acted upon on the ground. The impact of the trials as described here is different from the way in which it is generally understood by academic legal scholars or agents of the judicial system: “Bosnians pay more attention to arrests and sentences than to the details of trials at the ICCY” (p. 275). This is especially true in regard to guilty pleas, since, in moral terms, confession of crimes is seen as an aggravating rather than an extenuating circumstance, particularly where bargaining for a reduced sentence is involved. The research also looks at the way in which decisions of the international tribunal are interpreted locally. Delpla shows that the victims are mainly interested in the sentences meted out for crimes against themselves personally and derive no solace from the fact that other criminals are punished for comparable crimes.

The essays in this volume thus counter the detached image of a disembodied victors’ justice. This does not necessarily enhance the position of international institutions: on the contrary, they are subjected to critical scrutiny, but the scrutiny is scientific and analytical rather than the expression of an *a priori* political judgment. It is worth noting, moreover, that one of the two most critical papers in the volume is by a former magistrate of the court, Wolfgang Schomburg (“Sur le rôle de procédures dans l’établissement de la vérité”). Some of his criticisms echo the remarks of Magali Bessone (“Apories de transparence au TPIR”). She looks at one of the court’s claims (to show how justice is rendered by aiming for total transparency) and shows how the court, in so doing, simultaneously exposes its own limitations, thereby opening its flank to criticism (as shown in part one).

The Construction of an Audience

International criminal courts thus become caught up in their own ambitions, in that the necessity to keep faith with their principles comes into conflict with diplomatic pressures, political manipulations, conflicting memories, and contradictory legal goals. The principles at

⁴ Unfortunately, little work has been done on this question. What work there is tends to rely on literary accounts, especially in the case of Rwanda, such as the books of journalist Jean Hatzfeld, excerpts from which are often substituted for eyewitness interviews. This is the case, for instance, with the article by Valérie Rousoux, “Réconcilier: ambition et piège de la justice transitionnelle. Le cas du Rwanda,” in Dossier “À l’épreuve de la violence ...”, *op. cit.*, pp. 613-634.

stake are all the more fragile because they are under constant scrutiny by opponents and observers who may not share the same values as the courts but cannot help noticing the discrepancy between law and reality, a discrepancy that is inevitable but whose moral import grows in proportion to the seriousness of the crimes on trial. The weakness of modern international criminal institutions stems not only from their more obvious shortcomings (such as neglect of basic rights in trials stemming from the wars in Afghanistan and Iraq) but also from their failure to win support from beyond the groups of legal scholars and activists that work with them and monitor their actions. To win such support, the courts need to build an audience, and only a truly international audience constituted as a political subject will suffice as an interlocutor. Otherwise, the courts' claim of neutrality and procedural liberalism will leave them open to more radical critiques and encourage skepticism as to their effectiveness.

Given the importance of the issues at stake, it would seem essential to call upon the human and social sciences for assistance in understanding the complexity of the many disparate forms that the aspiration to a universalistic humanism may take. Subsequent research will perhaps need to consider the difficulty of achieving objectivity in this type of investigation. In terms of social science epistemology, we need a better understanding of the role of the emotions in studying the history of the twentieth century's worst crimes against humanity, whether in the first or the second degree (by way of study of the international criminal courts). The investigator's reflection on his own practice (as discussed in a number of recent essays⁵) may well tell us something important about the significance of these institutions themselves, of which social scientists constitute one important audience.

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⁵ For an overview, see Guillaume Mouralis and Liora Israël, "Le chercheur en sciences sociales comme acteur du procès?" *Droit et société* no. 45/2000, pp. 159-175, and for the case of Yugoslavia, see Vladimir Petrovic, "Les historiens comme témoins experts au TPIR," and John B. Allock, "Le praticien des sciences sociales en qualité d'expert et de témoin," in *Peines de guerre, op. cit.*, pp. 119-136 and 137-150.