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ORIGINAL ARTICLE

INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

The French Bataclan Trial as a judicial experiment: What lessons for the prosecution of mass crimes?

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Abstract
Although criminal trials are primarily designed to repress individual acts, a new role has emerged in the era of French jihadist trials. They have transformed into a 'forum' giving voice to different actors to comprehend the phenomenon in all its complexity, as in truth commissions: defendants presented their path to radicalization, victims related their trauma, experts situated jihadism in a socio-political context, and security forces disclosed their work. Aligned with forms of justice, which seeks to return control 'stolen' by professionals to the parties involved, they also place significant emphasis on emotions, in contrast to the cold, impersonal authority of conventional law, which relies on legal rhetoric, justified to maintain neutrality and impartiality.

Employing an ethnographic approach, we examine this trial as an experiment that challenges the way justice is administered after mass violence. Our premise is that this judicial experiment can propose a new paradigm for the prosecution of mass crimes, in line with contemporary new mechanisms that more effectively incorporate restorative objectives. It could serve as inspiration for procedures in international courts by attributing space to the direct participation of both the victims and the defendants, basing the procedure on narrative rather than strict legalistic rules, and engaging with social science expertise.

Keywords: court ethnography; international criminal justice; mass crimes prosecution; restorative justice; terror trials

1. Introduction

On 13 November 2015, terrorist attacks hit the *Stade de France*, cafés, and the Bataclan concert hall in Paris, resulting in 130 deaths and hundreds of injuries, and a major shock for French society.[1] These attacks can be seen as France's 9/11 and a turning point in its counterterrorism policy: a state of emergency was introduced for two years, with counter-terrorism laws and practices being driven by a preventive and surveillance logic.[2] Six years later, the 'Bataclan trial'

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[1]The 13 November 2015 attacks targeted multiple locations in Paris and Saint-Denis, not just the Bataclan theater. Therefore, the term 'Bataclan trial' is not entirely accurate and is contested by many of the victims. However, we have chosen to use it here because it is widely used in English sources. It is important to note, however, that the trial concerns the individuals accused of involvement in the various attacks committed on that day.

[2]The number of trials against French individuals involved in armed groups on the Iraqi Syrian front has reached a level unprecedented in French criminal justice: terrorism has become a phenomenon of mass prosecution. Charges largely rest on broad definitions of complicity ('association for wrongdoing in relation to a terrorist enterprise') and focus on the prediction of dangerousness as much as actual acts (French Criminal Code, Art. 421-2-1). There is no requirement that the

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was designed to be held as a historic trial, with an explicit socio-political role.[3] The French President asserted that the trial was the response of the French nation to the 'barbarians',[4] while the prosecutor's office strictly applied a rigorous prosecution policy.[5] The trial was exceptional in several aspects: its long duration (over ten months); the complexity and volume of the investigation file (one million pages); the intensive participation of victims – consisting of over 2,300 civil parties and their 400 lawyers; the high level of responsibility of some of the accused; and the estimated cost of 60 million euros including expenses related to the state's representation of civil parties. Hundreds of professionals were involved in the daily work on the case.

Although it was exceptional, the trial was also performed as everyday justice, with standard French criminal procedure and judicial routine.[6] To accommodate a large audience – including journalists, lawyers, victims, security professionals, and researchers – a temporary courtroom was built within the courthouse (Figure 1). There was a dedicated video infrastructure, and the general public had access to other courtrooms designated for public broadcasting.[7] Security was significantly reinforced, with 1,000 police officers assigned to ensure safety, and access was controlled. Remarkably, the trial took place in the city centre, while tourists continued to visit the chapel in the courthouse courtyard and enjoy coffee unaware that the trial was in progress.

In the article we show that although criminal trials are primarily designed to repress individual acts, a new role has emerged in the era of French jihadist trials.[8] They have become a 'forum', giving voice to

individual contributes materially to the commission of the terrorist act, nor that the terrorist plan is executed. It was argued that this framework challenged some of the very foundations of criminal law as it replaced the idea of repression with an uncertain notion of pre-emption. See S. Weill, 'French Foreign Fighters: The Engagement of Administrative and Criminal Justice in France', (2018) 100 *International Review of the Red Cross* 211; S. Hennette-Vauchez, 'The State of Emergency in France: Days Without End?', (2021) 14(4) *European Constitutional Law Review* 700. For the impact of the 'War on Terror' on other democratic contexts see R. Abel, *Law's Wars: The Fate of the Rule of Law in the US 'War on Terror'* (2019); A. Vedaschi and K. Lane Scheppele (eds.), 9/11 and *the Rise of Global Anti-Terrorism Law: How the UN Security Council Rules the World* (2021).

[3]S. Lindeperg, 'V13, un procès pour l'histoire?', *L'histoire*, May 2023, 58; V. Hayaert, 'Friday the 13th: The Symbolic Power of Trials on Countering Terrorism with Democracy', (2023) 5 *Law, Technology And Humans* 121. On the relation between politics, justice, history, and memory see H. Rousso, *Juger le passé: Le procès Eichmann* (2016), 197. H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963); K. McEvoy, L. Mallinder and A. Bryson, *Lawyers in Conflict and Transition* (2022); K. Heller and G. Simpson (eds.), *The Hidden Histories of War Crimes Trials* (2013); J. Jackson, *France on Trial: The Case of Marshal Pétain* (2023); L. Sadat Wexler, 'The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again', (1994) 32 *Columbia Journal of Transnational Law*, 289. In the context of the prosecution of terrorism, specific challenges are at stake: B. Saul (ed.), *Research Handbook on International Law and Terrorism* (2020).

[4]'Tribute of the President of the Republic to the Victims of Acts of Terrorism', 11 March 2023, available at www.elysee.fr/front/pdf/elysee-module-20957-fr.pdf.

[5]A. Mégie, 'Le parquet national antiterroriste. La fabrication d'une "figure expert" de la lutte contre le terrorisme en France', 2023/3 (12) *Gouvernement et action publique* 127.

[6]The trial was held before the French Court of Assize specially composed for terrorism cases. This court does not include a jury as it is the case for regular Assize trials; instead, its bench is consisted of a presiding judge and four assisting judges. For a detailed background on French criminal procedure see R. L. Lerner, 'The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour d'Assises', (2001) *University of Illinois Law Review* 791; A. Garapon and I. Papadopoulos, *Juger en Amérique et en France* (2003); C. Besnier et al., *Les filières djihadistes en procès, Approches ethnographiques des audiences criminelles et correctionnelles* (2019).

[7]Filming the trial, among other 'historic' terrorism trials, was a notable exception to the French approach of the 'orality of the debate', where there is no transcription. However, this film was not broadcast to the public and will remain in the archive, not easily accessible to the public. It should be noted that, until recently, only 14 trials were 'filmed for history' since 1987, mostly related to the Second World War and the Tutsi genocide in Rwanda. For further analysis of the courtroom see Hayaert, *supra* note 3.

[8]There have been three major terror trials in France involving alleged perpetrators of mass terror attacks. In addition to the 13 November 2015 attacks that we examine in this article, these trials include: the attacks in January 2015, targeting the satirical cartoonists of Charlie-Hebdo, and the 14 July 2016 attack in the city of Nice. These trials have all endeavoured to give an important role to victims and experts. Previous trials prosecuted mainly 'returnees' or 'absentees' (presumed dead in Syria) for joining terror groups. See S. Weill, 'Engaging With Court Research: The Case of French Terror Trials', (2023) 13 *Oñati*

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Figure 1. Photo of the courtroom, 13 June 2021, taken by Romane Gorce from the control room.

different actors in order to reconstruct a socio-historical phenomenon in all its complexity, as we have seen with truth commissions in post-conflict countries.[9] These trials have become a space where the defendants recount their path to radicalization, the victims relate their trauma and expectations, the experts situate the phenomenon in a political, social, and medical context, and the police and security services expose their work and their difficulties. The rich narratives exposed by the different stakeholders, and most notably by hundreds of victims, are at the centre of this organic process, which is being constantly developed by the actors themselves. Aligned with forms of justice, which seeks to return control 'stolen' by professionals to the parties involved,[10] they also place significant emphasis on emotions, in contrast to the cold, impersonal authority of conventional law, which relies on legal rhetoric, justified to maintain neutrality and impartiality.[11]

If we refer to Emile Durkheim's opposition between the restitutive right to rebalance relations between individuals, arbitrated by professionals, and the repressive right to recall norms and reconstitute social cohesion,[12] the trial was not the staging we might have expected of the shared

Socio-Legal Series S225; S. Weill et al., *Terror on Trial, an Ethnography of French Courts* (Cambridge University Press, forthcoming).

[9]Truth commissions are *ad hoc* institutions created in nearly 50 countries affected by mass violence over the past forty years. Members are drawn from civil society and include academics, clergy, psychologists, etc., whose proceedings are detached from the judicial system. They are tasked with establishing the facts, hearing the victims, and proposing reparation measures to effect a 'reconciliation' of the country. See S. Lefranc, *Comment Sortir de la Violence ? Enjeux et Limites de la Justice Transitionnelle* (2022); P. Hayner, *Unspeakable Truths. Confronting State Terror and Atrocity* (2002); E. Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies. The Impact on Human Rights and Democracy* (2010).

[10]N. Christie, 'Conflicts as Property', (1977) 17 *British Journal of Criminology* 1; J. Braithwaite, 'Restorative Justice and De-Professionalization', (2004) 13(1) *The Good Society* 28; S. M. Olson and A. W. Dzur, 'Revisiting Informal Justice: Restorative Justice and Democratic Professionalism', (2004) 38(1) *Law and Society Review* 139.

[11]P. Bourdieu, 'La Force du Droit. Éléments pour une Sociologie du Champ Juridique', (1986) 64 *Actes de la Recherche en Sciences Sociales* 3; L. Dahlberg, 'Emotional Tropes in the Courtroom: On Representation of Affect and Emotion in Legal Court Proceedings', (2009) 3 *Law and Humanities* 175; S. Bergman Blix and Å. Wettergren, *Professional Emotions in Court: A Sociological Perspective* (2018).

[12]'Its real function is to keep social cohesion intact by maintaining the vitality of the common conscience. Denied so categorically, it would necessarily lose its energy if an emotional reaction from the community did not compensate for this loss, and the result would be a slackening of social solidarity.' E. Durkheim, *De la Division du Travail Social* 76 (1994 [1893]).

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emotions of a France stunned by the attacks, and reaffirming its 'repressive' solidarity with 'monsters'. While these national sentiments were asserted by the media, the trial was more a forum for the expression of disparate, and for the most part unexpected, individual, and collective emotions – as we shall see, when referring to the appeal for benevolence made by many of the victims, or the efforts to explain or even apologize made by some of the defendants. Nor was the Bataclan trial the political spectacle staged by the state – a 'penal ceremony' in Michel Foucault's terms –[13] it could have been. The trial has borrowed from these three logics and articulated them.

In more contemporary and renewed terms, the Bataclan trial represents forms of justice that seek alternatives to merely repression and penal retribution. Two such forms are transitional justice, applied after mass political violence, and restorative justice, used after various forms of violence including juvenile delinquency, family and sexual violence, and even terrorism in the Basque country.[14] Instead of solely punishing individuals, these approaches emphasize collective reflection on the crime's meaning, reparation, and reconstitution of the social bond. These objectives were explicitly claimed during the Bataclan trial, representing a hybridization of criminal and restorative justice. Like, for example, the *Jurisdicción especial para la paz* (Special Jurisdiction for Peace) in Colombia,[15] it is emblematic of efforts to build justice 'for the victim'. But this trial was not conducted as an independent process outside the framework of the criminal justice system, as truth commissions are, nor was it conducted by an *ad hoc* mechanism. It was an integral part of the criminal justice system. This trial thus appears as an experiment that renews penal law 'from within', opening an avenue to reflect on the lessons that can be learned within the wider field of transitional/transformative justice.[16]

In this article, we explore the Bataclan trial and the innovations contributing to ongoing discussions about the transformation of criminal justice in cases of mass crimes. Employing an ethnographic approach, we examine this trial as an experiment that challenges the way justice is administered after mass violence. Our premise is that this judicial experiment can propose a new paradigm for the prosecution of mass crimes, in line with contemporary new mechanisms – often *ad hoc* or non-judicial – that more effectively incorporate restorative objectives. It could serve as inspiration for procedures in international courts, such as the International Criminal Court (ICC), by attributing space to the direct participation of both the victims and the accused, basing the procedure on narrative rather than strict legalistic rules, and engaging with social science expertise.

After a short section on methodology (Section 2), we analyse three dimensions of the trial that emerged during the proceedings: the *truth commission pillar* (Section 3), which includes the testimonies of hundreds of civil parties/victims; the *socio-political context pillar* (Section 4), which aims

[13]M. Foucault, *Surveiller et Punir. Naissance de la Prison* (1975), 55. See also O. Kirchheimer, *Political Justice: The Use of Legal Procedure For Political Ends* (1961). On the political use of terrorist trials see also B. de Graaf and A. P. Schmid, *Terrorists on Trial. A Performative Perspective* (2021).

[14]A. J. Olalde, 'Restorative Encounters in Terrorist Victimization in Spain: Theoretical Reflections and Practical Insights from Social Work', (2014) 4(3) *Oñati Socio-legal Series* 404; M. Kim, 'Transformative Justice and Restorative Justice: Gender-Based Violence and Alternative Visions of Justice in the United States', (2021) 27(2) *International Review of Victimology* 162.

[15]The Colombian *ad hoc* mechanism was created following the peace agreement with the FARC and the State of Colombia in 2016 and operated with the financial support of the international community since 2019. For a review of its first years of work see K. Ambos and S. Peters (eds.), *Transitional Justice in Colombia: The Special Jurisdiction for Peace* (2022). With a specially composed restorative mechanism, the court has started legal procedures of 11 'macro cases', involving hundreds of thousands of victims. As a civil law country, the centrality of the victims within the legal procedure was a part of its legal culture, but this mechanism went a few steps further in its restorative approach. The court recognized as a civil party the territories where native communities live and were displaced. See A. V. Huneeus and P. Rueda-Saiz, 'Territory as a Victim of Armed Conflict', (2021) 15 *International Journal of Transitional Justice* 210.

[16]For the advocates of 'transformative justice', 'transitional justice' often perpetuates existing power dynamics. Transformative justice aims to instigate more radical changes, emphasizing a broader approach to justice from 'below', looking into deeper social and structural dimensions, and promoting the rights and interests of marginalized communities. See P. Gready and S. Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice', (2014) 8(3) *International Journal of Transitional Justice* 339.

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to understand why and how such events occurred; and the *criminal responsibility pillar* (Section 5), which includes a slow process of investigation into the personality of the defendants and establishment of the facts, enabling the assignment of criminal responsibility and the imposition of penalties. This analysis allows us to raise fundamental questions on the role of a criminal trial of such magnitude and to reflect on the lessons that can be drawn for other mass crimes trials.

2. Trial ethnography: Why does it matter?

Transnational legal research tends to produce research that overlooks the routine and local management of justice. It moves too quickly from the local to the trans/global without taking the necessary resources and time to investigate local practices. It seems that there is a growing need to 're-localize' studies into their geographical space, and to analyse the trans/national from 'within' through a bottom-up approach based on prolonged localized ethnographies.[17] In this vein, our analysis builds on extended localized research aiming to examine interconnections within a trans/global legal order, as well as the management of everyday justice.

As opposed to legal research on terrorism, which focuses essentially on the study of legislation and precedents of eclectic cases, we consider the social interaction of the actors and the empirical context of judicial practices.[18] Narratives and interactions often remain outside the text of case law; by contrast, trial observation facilitates a nuanced understanding of how the law is made by the different protagonists. Our approach looks at the role of the courts through a bottom-up perspective, as performed and shaped within the judicial scene at a local level. It focuses on the courtroom scenes themselves; it echoes methods employed by new legal realism scholars and international sociologists.[19]

Our principal method of investigation was an ethnography of terror trials, conducted through semi-participant observation. As a part of a pluri-disciplinary research group, we followed the trial daily, having been accredited to observe it from within the courtroom. Being immersed in courtrooms transformed us into part of the judicial scene. This immersion allows for the informal collection of data, obtained by discussions in the cafeteria, public benches, and corridors with lawyers, journalists, and the families of the accused and victims. All those moments bring a deeper and more nuanced understanding, not only of the law and its implementation in its socio-political context and cultural setting, but also of how the law can be seen through the lens of routine and the banality of human interaction.[20] After the trial, we conducted semi-structured interviews with judges, lawyers, and prosecutors and a questionnaire survey of 180 victims/civil parties. The exchanges with the judicial actors continued while we presented our observations in conferences we organized with their participation.[21]

[17]See for example N. Palmer, 'International Criminal Law and Border Control: The Expressive Role of the Deportation and Extradition of Genocide Suspects to Rwanda', (2020) 33(3) *Leiden Journal of International Law* 789; S. Lefranc, 'A Tale of Many Jurisdictions: How Universal Jurisdiction is Creating a Transnational Judicial Space', (2021) 48(4) *Journal of Law and Society* 573; M. F. Massoud, 'The Search for Universal Laws', (2022) 47(3) *Law & Social Inquiry* 1069; R. Mustafina, 'Turning on the Lights? Publicity and Defensive Legal Mobilization in Protest-Related Trials in Russia', (2022) 56 (4) *Law & Society Review* 601; S. Weill, 'Transnational Jihadism and the Role of Criminal Judges: An Ethnography of French Courts', (2020) 47 *Journal of Law and Society* S30.

[18]R. Cotterrell, 'What Is Transnational Law?', (2012) 37(2) *Law and Social Inquiry* 500; B. Dupret (ed.), *Law at Work: Studies in Legal Ethnomethods* (2015).

[19]See, for example, S. Talesh, E. Mertz and H. Klug, *Research Handbook on Modern Legal Realism* (2021).

[20]B. Latour, *The Making of Law. An Ethnography of the Conseil d'État* (2010); M. Feeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Court* (1979); I. Kohler-Hausmann, *Misdemeanorland: Criminal Courts and Social Control in an Age of Broken Windows Policing* (2018).

[21]Following the Bataclan trial we organized a major conference at Sciences Po Paris on November 2022, with the participation of the presiding judge: 'The Bataclan Trial Seen by the Social Sciences: An Ethnographic and Multidisciplinary Approach', program available at www.sciencespo.fr/fr/evenements/le-proces-v13-vu-par-les-sciences-sociales-une-approche-ethnographique-et-pluridisciplinaire.

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3. A criminal trial or a truth commission? The trial as an expression of restorative and retributive justice

The Bataclan trial, although fundamentally repressive, was strongly reminiscent of other scenes, particularly of truth commissions, which, at the end of dictatorships and civil wars, propose not penal sanctions but 'truth', listening to the victims, and sometimes 'reconciliation'. In South Africa, Peru, East Timor, and other countries among the 50 or so that have set up a truth commission, men and women chosen for their integrity and not their legal skills have warmly welcomed the victims. They listened to victims' accounts of the violence they or their deceased loved ones experienced, and then thanked them. The victims' stories became the subject of reports that were officially submitted to the country's authorities.[22] Like these transitional justice institutions, French justice is striving to give more place to the victims of terrorist violence. Yet, what differentiates the Bataclan trial from other mechanisms is that the victims' narratives are placed within the criminal procedure.[23]

The first five weeks of the trial were devoted to the victims/civil parties. In French criminal law procedures, victims have the right to participate as civil parties, and their civil claims for reparation are integrated into the criminal procedure.[24] However, the number of civil parties participating in this trial is smaller, and their role strictly circumscribed: they are as witnesses contributing to the determination of the perpetrators' guilt, and not victims exposing their past and present suffering. The request to be recognized as a civil party can be made at any time from the start of the investigation until the end of the trial. Civil parties' lawyers are granted extensive rights such as the right to access the investigation file, the right to summon witnesses and request specific investigative measures, the opportunity to question the accused and witnesses during the trial, the ability to present oral depositions and to submit their view on the guilt or innocence of the accused.

In contrast to international criminal trials held before *ad hoc*/hybrid tribunals originating in civil systems such as in Cambodia or Senegal,[25] victims were not compelled to be represented by victims' associations. Each victim/civil party had the freedom to select their own lawyer and decide whether to be represented by a victims' association. Legal aid, estimated at 50 million euros, was fully funded by the state.[26] As a result, out of 2,300 registered civil parties, represented by over 400 lawyers, 397 victims provided deposition before the Court, averaging 12–18 testimonies per day. This marked a shift from a criminal justice system that only examines the responsibility of a few defendants to a restorative justice system that listens to several hundred victims.

3.1 The sociology of the victims and legal boundaries: Who are the civil parties?

Despite the diversity of their experiences, the sociological profiles of the victims were relatively homogeneous, significantly influencing the trial's ambiance. They set its tone. They were mostly young people who went out on a Friday night in east Paris, a left-wing part of town, just as they did many other weekends, to hang out in bars and watch a heavy metal concert. Tattoos and black T-shirts paying tribute to one rock band, or another, replaced the usual formal dress code and helped

[22]See Lefranc, Hayner, and Wiebelhaus-Brahm, note 9, *supra*.

[23]Another contemporary example is the Colombia Special Tribunal for Peace. See note 15, *supra*.

[24]Victims' reparations are guaranteed through the 'The Victims of Terrorism and Other Offenses Guarantee Fund'. It is funded by a 6.5 Euro tax (as of 2024) collected through mandatory house insurance.

[25]A. Werner and E. Marchand, 'Supporting Victims at Trial: Civil Parties' Perspective', in S. Weill, K. Seelinger and K. Carlson (eds.), *The President on Trial, Prosecuting Hissène Habré* (2020), 125; J. V. Trujillo, 'The Collectivisation of Victim Participation: The Case of Colombia's Special Jurisdiction for Peace', in Ambos and Peters, *supra* note 15, at 161; C. Sperfeldt, *Practices of Reparations in International Criminal Justice* (2022).

[26]Legal aid is granted for the representation of each civil party at a rate of 1,000 euros per day. Several lawyers represented large groups of clients, numbering in several dozens, leading to criticism of the imbalance in the payment of legal aid to defence lawyers.

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ease the rigorous ritual associated with criminal proceedings.[27] A large proportion of them are university graduates,[28] holding common values of freedom, critical spirit, and hedonism. They often display their critical position towards the state and a French society considered conservative and closed.

Yet, this community of victims was challenged during the trial. This reminds us that the individual and collective victim is always constructed; we are not victims, we become them, in the course of interactions with labelling institutions and other victims.[29] The court was a privileged agent both of the ratification of established public hierarchies (between Bataclan and the rest) and of their re-examination, based in particular on the proposals of the Prosecution and their contestation. Divisions emerged when judges applied legal boundaries that are otherwise questionable. To be legally recognized as a civil party, victims need to prove a *direct* link between the crime and the harm. The Public Prosecutor's Office had frequently recalled since the trial opening that a distinction should be made between the status of civil party and that of victim, using mainly a criterion of being directly exposed to the crime. The French Supreme Court introduced a distinction between a 'direct victim' – *targeted* by the terrorists – and an 'unfortunate witness'.[30] These legal categories created moments of tension and uneasiness in the courtroom when lawyers asked the judges to grant their clients the legal status of civil parties. In court, we heard the case of a person who came down from his flat to assist the injured after he had heard the shooting. The judges did not grant him civil party status. Such exclusions fueled a feeling of illegitimacy, creating a violent dichotomy between legal and sociological definitions of 'victim'. 'It is clearly hyper-violent to be challenged in this way', confided a victim who was recognized as a civil party.[31]

There were also divisions among the civil parties themselves. The relatives of the dead did not have the same views as the survivors. The latter were distinguished according to the seriousness of their injury and its physical or psychological nature. The experience of the attack was also a distinctive fact, as shown, for example, in the testimonies of the 11 hostages in the balcony in the concert hall, or the police officers who risked their lives while intervening. While security forces are more accustomed to the image of strength than the weakness evoked by the word 'victim', the trial changed their discourse. Some testified that they had never recovered from what they saw that night.

3.2 The courtroom as a space to express emotions

The victims' depositions triggered intense emotional moments, normally excluded, or regulated by the judicial procedure. The restorative process gave a central place in the trial to the figure of the traumatized victim, in whom everyone recognized themselves.

[27]Laugerud and Langballe describe the PCs' respect for judicial formality in the Breivik trial, their fear of becoming emotional: S. Laugerud and Å. Langballe, 'Turning the Witness Stand into a Speaker's Platform: Victim Participation in the Norwegian Legal System as Exemplified by the Trial Against Anders Behring Breivik', (2017) 51(2) *Law & Society Review* 227, 241–3.

[28]Eighty % of the 180 respondents to the research group questionnaire.

[29]I. Hacking, 'The Making and Molding of Child Abuse', (1991) 17(2) *Critical Inquiry* 253; S. Antichan, S. Gensburger and P. Jarroux (eds.), *Victimes et associations de victimes dans les procès des attentats de janvier 2015, de novembre 2015 et de Nice le 14 juillet 2016* (2023), Report for IERDJ, available at ierdj.fra1.digitaloceanspaces.com/media_library/2023/10/19.29_VICTIMES_ATTENTATS_rapport-.pdf.

[30]While ruling on the inadmissibility of providing the status of civil party to a person who, while witnessing the killing on the terrace, fled for their life, the French Supreme Court states that this passer-by 'did not find himself in the path of the terrorist shots, which were aimed at the "La Belle Équipe" restaurant, but was an *unfortunate witness* to these facts', Decision of the French Cassation Court, Criminal Chamber,15 February 2022. In general, as noted by Alix, the conditions for admissibility of civil party actions have been slightly broadened to include 'victims by implication', certain legal entities, and relatives of non-deceased victims. See J. Alix, 'La Cour de cassation redessine les contours de la constitution de partie civile des victimes d'attentat terroriste', (2020) *AJ pénal* 143.

[31]S. Antichan et al., 'La "grande famille" des victimes des attentats du 13 novembre 2015', 2021, available at aoc.media/analyse/2021/12/07/la-grande-famille-des-victimes-des-attentats-du-13-novembre-2015/.

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3.2.1 Healing, rehabilitation, and memory

Testimonies were largely devoted to describing the suffering endured during and since the attack and the difficult mourning of loved ones was at the centre of the narratives. The restorative ambition endorsed by the court tended to transform it into a therapeutic space. Testimonies often took the form of homage to the dead: photographs of the dead at different moments in their lives, praise for the dead person, accounts of the burial ceremonies. All these elements are unusual in a court of law.

The criminal justice system broke with the principle of strict neutrality by showing great benevolence, as evidenced by the presiding judge's frequent warm words towards the victims. The coldness of the judicial procedure was abandoned, opening the door to emotions,[32] and tears flowed abundantly. In later discussions we had, judges affirmed that they were crying. One said she was happy that she had to wear an anti-Covid mask, so no one could see her tears.[33]

Even if these testimonies did not contribute significantly to factual reconstruction of the events, they did allow the civil parties, after six years, to complete the puzzle: the course of their evening, the identity of the people killed next to them or of those who reached out to them. The accumulation of these individual stories formed a collective narrative of shared trauma. A sensitive question timidly raised by one witness sometimes turned into a shared inquiry, illustrating a language that, as the hearings progressed, became a common thread among the community of victims. While not all victims were present every day, several hundred listened to the hearings via a web radio station. This remote listening fostered cross-referencing effects and mimicry: the words spoken by some were echoed and occasionally quoted by others.

The 126-page verdict, which provided very limited insight into the hearings, nonetheless recognized the traumatic state of the civil parties. The heavy sentences are justified by the suffering of these 'innocent victims'.

The testimonies of 397 civil parties, whether injured, shocked or mourning the loss of a loved one, as well as police officers, first responders to the crime scenes, such as the doctors of the RAID and BRI police forces, highlighted both the horror of the crime scenes discovered, comparable to scenes of war with dramatic ballistic injuries, and the immensity of the psychological damage persisting more than six years after the events, which may have contributed to the suicide of two of the civil parties after the events.[34]

3.2.1 The need to understand and to exchange with the accused

The participation of victims in the trial is often analysed as an opportunity for confrontation and empowerment of the victims in the face of diminished perpetrators.[35] However, beyond being a platform for dialogue among victims, the trial also evolved into a potential meeting place for the accused.

Civil parties tried to engage in a dialogue, with a view to rehumanizing those who 'are not monsters', while one might have expected, from the perspective of a 'repressive' trial in the sense of Durkheim, they designate monsters and barbarians. Sometimes victims chose to address a question directly to the accused, which led to spontaneous exchanges between the parties. The defendants, often binational, appeared less as an 'enemy within'. They were, rather, perceived by many as young people from the suburbs, children, or grandchildren of North African immigrants, who have not

[32]See Bergman Blix and Wettergren, *supra* note 11; T. Maroney, 'Empirically Investigating Judicial Emotion', (2019) 9(5) *Oñati Socio-Legal Series* 799.

[33]This was told to us during a conference that we organized at the National School of Judges a few months after the end of the trial.

[34]Specially Composed Assize Court of Paris, Ruling, 29 June 2022, at 101.

[35]See Laugerud and Langballe, *supra* note 27.

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found their place in society and whom the state failed to educate.[36] The prevalence of the failed education and integration issues in the civil parties' depositions is striking. The values of secularism and tolerance were prominent among the civil parties, shaping their inclination to challenge a narrow religious interpretation of the terrorist acts they endured. While the trial took place within the realm of criminal justice, there were alternative narratives to that of criminal repression.

A few defendants spoke of how difficult it was to listen to the victims' testimonies. They noted that most of them had been imprisoned for several years in complete isolation, and now suddenly they found themselves in a courtroom every day, sharing seats with their co-accused, talking with their lawyers, and listening to six–seven hours a day of victims' testimonies. When the defendants were questioned later in the proceedings, they went on to say that they had decided to talk because of a look in a grieving mother's eyes, or because of a specific question raised by a victim. This was the case with Sofien Ayari, who remained mostly silent but attempted to explain why he had travelled to Syria.[37] The defendants' last words were addressed to the victims. They expressed their remorse, offered their 'apologies' – including Abdeslam, the only surviving direct participant in the attacks, who regretted having used words that were 'a bit harsh' like telling a Muslim victim she had been hit without being targeted – or condemned the attacks, wishing that the victims are able to 'turn the page, rebuild their lives' (Mohamed Abrini) or 'overcome the difficulties they face every day' (Sofien Ayari).[38]

Several civil parties even wished to exchange directly with the three defendants, who were not detained until the end of the proceedings. These three defendants came in and out of the courtroom, like the public, and in the breaks they were smoking cigarettes on the same stairways. One civil party, who had a conversation with them in the courthouse yard during a break, told us how significant it was for him, as he had previously considered the defendants only as being terrorists. This kind of interaction can be transformative and potentially contribute to reconciliation efforts. One of the victim associations even organized a visit to the Bataclan with these defendants. However, not all civil parties had the same attitude. When the accused tried to ask forgiveness and shake hands with the victims in a spontaneous gathering that took place in a nearby coffee shop on the day of the verdict, we observed that some were shocked by this closeness.

As long as the rights of the defence and the presumption of innocence are respected, this experience demonstrates that a justice approach embracing large-scale participation of victims can function effectively, suggesting that courts need not fear being overwhelmed by an influx of victims.[39]

[36]'(The terrorist) addresses us like a buddy. I come from the suburbs, we could have played soccer together' (a survivor among the Bataclan hostages, 19 October). A survivor of the restaurant 'Petit Cambodge' attack spoke of the resemblance between a killer and one of his friends (30 September). A man wounded at the Stade de France made a similar comment, after having specified that he is himself a practicing Muslim: 'The guys in the box are the same as in the suburbs, and our thoughts are with their parents' (26 September). Field notes.

[37]In his words: 'I didn't want to speak out, I thought it was pointless, and I changed my mind. There were the five weeks of testimonies and the question of this mother who had lost her daughter. She looked like my mother. She said [about the defendants]: "When they were 2 years old, I could have taken those little ones in my arms. But what made them turn out like that?". So the least I can do is answer that question. I thought I owed her that.' (Cited in 'Entretien avec Safya Akorri, avocate au barreau de Paris', (2023) 1(1) *Les Cahiers de la Justice* 101–9.

[38]This was reported in the verdict, but in a very limited way: 'Indeed, during the debates, he (Abdeslam) asserted and claimed his status as a fighter for the Islamic State, asserted that the acts committed in the name of the Islamic State were legitimate, declared that he assumed responsibility for his actions while minimizing his involvement, thereby demonstrating the absence of any awareness of the seriousness of the facts, the absence of regrets and of any questioning, even if he was able to express that he had been touched by the testimonies of the civil parties' (see Verdict, *supra* note 34, at 122).

[39]See S. Weill and J. Sulzer, 'Droits des accusés et des parties civiles : deux exigences incompatibles?', (2021) 2 *Les Cahiers de la Justice* 351.

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4. The socio-political context and the state: What role for the social sciences?

The 'right to truth' has found a form of legal consecration at international level. As in post-conflict societies, the victims in the Bataclan trial are driven by the same quest for truth, where understanding the political and social motivations of the accused is essential for their rehabilitation.[40]

In seeking to understand, the civil parties called to the bar many *witnesses of context* –including members of the political establishment and security agencies, as well as sociologists, academics, and experts– to provide an informed background on radicalization, transnational jihadism, the war in Syria, and security policies. Thus, the role of the civil parties was not limited to the initial space dedicated to their own stories. They further shaped the trial through the witnesses they invited, creating a new and unprecedented aspect to the trial, that allowed experts to provide insights into the socio-political context in which the attacks occurred and to respond to the questions posed by the parties.

The former President of the French Republic, the minister of the interior, the head of security services, the prosecutor general, a social worker, and social sciences academics were all called to testify by the civil parties. While none of them could provide direct testimony about the defendants' actions, they were able to shed light on the socio-political context before and after the attacks. The court's decision to allow the testimony of political figures and experts in the quest for the 'truth' is one more illustration of the trial's similarity to truth commissions which attempts to explain the dynamics of violence.[41] These trials did not only try suspected terrorists, they also shed light on the workings of the state – in the same way that truth commissions often expose the involvement of entire state's apparatus in repression (in South Africa or post-communist Europe, for example).

4.1 Revealing truth or obscuring failures?

Trials establish a legal truth: They bring to light certain aspects and, at the same time, they obscure others. Access to terror trials and related information is often limited, both for the accused and for the public, depending on the political and legal system in which they take place. On the one hand, the trial is supposed to be transparent and accessible while, on the other hand, it is largely based on secret information provided by security agencies. This paradox, namely the public-secret dichotomy, is at the centre of terror trials which are supposed to be both a public forum for revealing information in a transparent and accessible fashion, while simultaneously safeguarding secrets. How is secrecy managed? What can we know and not know?

A court called upon to rule on the guilt of the individuals being tried cannot rule or allow the debate to focus on other facts, such as security failures.[42] It was the victims who wanted, and obtained, this question to be asked, by summoning senior officials who undertook to justify their results. The defence lawyers seized this opportunity to reintroduce the question of the foreign policy pursued by France. By bringing and questioning witnesses of context, the parties sought to expand

[40]P. Naftali, 'Crafting a "Right to Truth" in International Law: Converging Mobilizations, Diverging Agendas?', (2016) 13 *Champ pénal/Penal field*; Antichan et al., *supra* note 31; D. Salas and S. Weill, 'France et États-Unis. Deux Réponses au Terrorisme', (2021) 4288 *Revue Études*.

[41]While the defence objected to their testimonies on the basis that this would turn the judicial proceedings into a political trial, the judges decided to allow these witnesses of context to testify before the court. The objection was based on Art. 331 of the French Criminal Code of Procedure that requests that: 'Witnesses testify only as to the facts with which the accused is charged, or as to the character and character of the accused.'

[42]The failures of the security services were examined by a parliamentary commission of inquiry, which issued a report in the summer of 2016, criticizing the disorganization of the services, in constant competition and reform. This commission, which was unable to interview service agents, was nevertheless weak – particularly in view of the British initiatives. About the latter see assets.publishing.service.gov.uk/media/5a81ec68ed915d74e6234d7c/Attacks_in_London_and_Manchester_Open_Report.pdf and www.gov.uk/government/publications/mi5-and-counter-terrorism-policing-implementation-report-2017-terrorist-attacks.

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the boundaries of the typical context presented in terrorism trials, which had previously been dominated by the perspectives of the police and security agencies invited by the prosecutor. These had often presented a constructed top-down analysis, while using graphic power points to describe the hierarchy and networks of various jihadist groups, along with their connections with armed groups in Syria. In contrast, the Bataclan trial attempted, through different use of expertise, to explore not only the functioning but also the dysfunctions of the security services. In this context, Bernard Bajolet, former head of the French foreign intelligence service (*Direction générale de la sécurité extérieure*), acknowledged the error of his service in failing to consider the announcement of the preparation of the attacks by a close associate of its organizer, Abdelhamid Abaaoud. He said he was stunned by the scale of the attack. He even confessed to 'a sense of failure':

> Abaaoud has been on the radar since October 2013, but for us he is a jihadist like any other. It becomes clear when we see him dragging corpses around, in March 2014 (referring to ISIS videos) … At that time, we employed minimal means to locate Abaaoud. We were not successful.[43]

This questioning into the responsibilities of the state was conducted by civil parties. While the police and the health services were almost unanimously praised, the disorganization of the state when confronted with the attacks was strongly criticized.

Whether it was a move towards politicizing the trial or introducing a political component into the trial, the testimony of former President Hollande merits a closer look. The initial objection of the defence lawyers to the President's testimony, the contradictory debate on the question, and the deliberation time for the judges to decide on the matter, resulted in a delay of three hours, while the former President waited in the witness room. When he finally entered the courtroom his first words were:

- 'Bonjour, Mr. President.'
- 'Bonjour, Mr. President' replied the judge.

On this November afternoon, the court was transformed into a democratic forum with the opportunity to exchange highly critical views. Encircled by a room full of lawyers, victims, and journalists, the testimony of the former President lasted for four hours. Dozens of victims' and defence lawyers had the extraordinary opportunity, one by one, to ask their questions, any question, without censorship or guidance, and they received immediate answers from the former head of state.

Different themes emerged from the questioning. The first centred on the failure of the state's security policy: What had been done to protect the population and how effective was information gathering in the face of the threat of attacks in France? The adequacy of surveillance conducted by French and Belgian intelligence was questioned.[44] The second theme of inquiry revolved around geopolitics. It raised questions such as why France decided to intervene in Syria/Iraq, knowing that such military involvement could result in terrorist attacks. It also questioned how a democratic state like France could maintain a 'killing list' in Syria. Thirdly, and perhaps most intriguingly, questions by defence lawyers sought to explore how it was possible for a generation of young people to become so vulnerable that they embraced such violent propaganda and ideology. It also questioned what mistakes the state may have made in this regard.

[43]Field notes, 16 November 2021; ten lawyers questioned him following this testimony.

[44]'Do you think that there were holes in the intelligence system?

– There is necessarily a failure when there is an attack. How many attacks are prevented thanks to the services? Attacks that could have resulted in particularly atrocious figures … The terrorists were trained to kill, came to kill. I have been demanding of the services. I want you to know that all these services did everything they could.' At times, doubts arise: 'Have we done enough? Do we ever do enough? We had already put in a lot of resources as early as 2012 …' (Field notes, 10 November 2021).

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While the questions were challenging, provocative and thought-provoking, the former President remained in his official role, and most of his answers were predictable, excluding any attribution of responsibility to the education, security, and any state services.

4.2. The elephant in the (court) room

What has become of the 'educative state' since it was unable to prevent radicalization? – this question largely evacuated by the Court.[45] Indeed, the main absence at the trial was the establishment of social linkages with experiences of social exclusion, racism, post-colonialism, and radicalization, all of which have been well identified by leading sociologists in academic literature.[46]

While radicalization was presented almost solely through the prism of individual pathways, ideology, propaganda, and wrong choices, the expertise provided ignored the important role of existing social structures. Having historians and/or sociologists highlighting these social factors would have triggered a deeper understanding than what was provided by the political echelon present at the trial.

The only exception to this absence, was testimony from a social worker who specialized in radicalization and worked for many years in poor neighbourhoods in Belgium. As noted by the presiding judge that was of major importance for their understanding:

> With his testimony he enlightened us all – the court, the defense lawyers, the civil parties. ... For him, it was a phenomenon of hyper-violence seeking justification and legitimization, which they found in the form of radical Islamism, even though they knew nothing of the Coran. He gave us explanation ... which was very interesting because it went beyond a strictly religious explanation. (Presiding judge)[47]

The absence of further expertise, most notably academic, is related to the organic formation of the trial. Sociologists such as Professor Gilles Kepel and his student Dr. Hugo Micheron, were invited by the civil parties but they would deliver just another version of the security approach. Unfortunately, other sociologists with different viewpoints, more social and structural, who were invited by the defence lawyers, refused to come.

The position of social scientists in relation to their participation in trials is not a new debate.[48] In this trial, their refusals were based on different arguments. Olivier Roy's position is that he is studying a general social phenomenon, and, therefore, he is not able to provide testimony in a trial involving the criminal responsibility of individuals he does not know.[49] This stance is evidently rooted in a very stringent interpretation of what constitutes a criminal procedure. Refusals are also motivated by the fear of personal attacks within the academic community, of being the 'sociologists of terrorists', too quick to 'excuse' excluded people who have become radicals.[50] Farhad Khosrokhavar, a sociologist who has spent years conducting numerous interviews with jihadists in prison, would have been able to provide the court with a more nuanced approach. His refusal to testify was related to his view that his voice would not be heard. Although it is true that

[45]The notion of 'Educative State' originates in the French revolution: The revolutionaries envisioned of an educational state capable of taking in charge the children. See P. Canivez, *Éduquer le Citoyen?* (1995).

[46]M. Ali-Adraoui and O. Roy, *The Foreign Policy of Islamist Political Parties: Ideology in Practice* (2018); F. Truong, *Loyautés Radicales: L'Islam et Les "Mauvais Garçons" de la Nation* (2017); F. Khosrokhavar, *Le Nouveau Jihad en Occident* (2018); B. Conti, 'Trajectories of (Non)Radicalization in a French Prison', in H. Pilkington (ed.), *Resisting Radicalization? Understanding Young People's Journeys Through Radicalizing Milieus* (2023), 262.

[47]Verbatim of the round table at Sciences Po Paris on the 18 November 2022 (program available at www.sciencespo.fr/centre-etudes-europeennes/fr/node/38357.html).

[48]L. Atlani-Duault and S. Dufoix, 'Les Sciences Sociales Saisies par la Justice', (2014) 3 *Socio*. See also J. M. Hagedorn, *Gangs on Trial: Challenging Stereotypes and Demonization in the Courts* (2022); R. A. Caldwell, *Fallgirls: Gender and the Framing of Torture at Abu Ghraib* (2012).

[49]Olivier Roy's talk in two conferences organized at Sciences Po, Paris (November 2021 and November 2022).

[50]B. Lahire, *Pour La Sociologie: Et Pour en Finir avec une Prétendue 'Culture de l'Excuse'* (2016).

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the debate on this topic may be considered 'closed' in various circles, including academia, where there has been in recent years a witch hunt targeting leftist academics as '*islamo-gauchistes*',[51] and accusing them of sympathizing with terrorism, the situation in the trial was quite different. This was due to the openness of the judges to listening, and the sociological makeup of the victims, as described previously. Moreover, it appears that there might be a misunderstanding regarding the role of expert witnesses in civil law trials. In contrast to the common law system, when an expert witness is summoned in a civil law trial, they are considered the witness of the court itself rather than a witness for a specific party, regardless of who calls them. The court typically does not know who specifically called the witness.

It seems to us that the selection of expertise should not be left to the invitation of the parties. In mass crime trials, which have broader objectives than the repression of individual illegal acts, it seems essential to have sociological, historical, and political perspectives to understand the geopolitical context as well as the more local social structures that frame the crimes, facilitating the deciphering of the evidence and the identification of broader responsibilities, so that appropriate remedies, rehabilitation, and reparations can be provided. An interesting example for such practice is the Special jurisdiction (*Jurisdicción especial para la paz)* established in Bogotá, where no less than 100 social scientists (out of a thousand of employees) were hired as an integrated part of the tribunal in an effort to reconstruct the pattern of crimes, while placing the victims at the centre of the analysis.[52] In other places, social scientists were incorporated within judicial benches, and in prosecution offices, or as experts invited by the court to give testimonies.[53]

Why should justice be reduced only to the legal profession?

5. Criminal responsibility: The defendants

Osama Krayem, a Swedish/Palestinian man accused of being complicit, decided after a few weeks not to participate in the trial, maintaining his right to silence and refusing to appear in court. He justified his attitude in a letter read by his lawyer:

> I saw how the proceedings were going. And I have lost hope. I think that no one is looking for the truth, no one is here to understand. This trial is an illusion. I don't think that appearing in court will change anything about its outcome ...

Out of 20 defendants, only 14 were present in the courtroom. Those tried *in absentia* were five defendants presumed dead[54] and one who had not been extradited from Turkey. Half of the defendants were charged with very serious crimes for playing a major role in the attacks, including direct involvement and complicity. It was not obvious that these defendants would 'play the game' and participate in this justice project. For men who certainly know they are condemned to live part of their lives in prison, alongside other jihadists, what was the point of collaborating, of answering questions, particularly, at the risk of endangering their prison reputations? Indeed, the main defendant had remained silent and unco-operative with investigators for six years. In addition, many of the defendants were awaiting trial in other countries where they face very long sentences for their involvement in other attacks such as those at Brussels Airport or on the Thalys train.[55]

[51] P. Marlière, 'The "Islamo-gauchiste threat" as Political Nudge', (2023) 43(3) *French Cultural Studies* 234.

[52] Field research and interviews at the Special Jurisdiction for Peace, February 2019.

[53] J. Seroussi, 'How do International Lawyers Handle Facts? The Role of folk Sociological Theories at the International Criminal Court', (2018) 69(4) *British Journal of Sociology* 962; L. Holden, 'Cultural Expertise and Socio-Legal Studies. Introduction', in A. Sarat (ed.), *Cultural Expertise and Socio-Legal Studies* (2019), 1; Lefranc, *supra* note 17.

[54] A. Mégie, '"Maintenant on va juger les morts?!" Ethnographie des procès du terrorisme à l'épreuve des "présumés morts"', (2021) 1(121) *Cultures & Conflits* 15.

[55] Regarding these attacks see www.nytimes.com/2023/07/25/world/europe/brussels-terror-attacks-trial-2016.html; www.nytimes.com/2015/08/23/world/europe/thalys-train-attack-france-moroccan-suspect.html.

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And as foreigners, from Belgium, Pakistan, and Sweden, some of them were unfamiliar with the French legal culture. Yet, surprisingly, only two defendants disengaged from the proceedings, invoking their right to silence. The others answered the questions asked by the judges, the prosecutors, and the victims' lawyers.[56]

5.1 The 'slow justice' of the criminal procedure before the French assize court

French criminal procedures before the *Cour d'assises* are characterized by long temporality, and the oral nature of the debate. This implies that all experts and witnesses must present their testimony orally in the court. The presiding judge is required to read each document in the case file if they wish to reference it.

The presiding judge plays a very active role in directing the trial. The process is based on an inquisitorial principle: the presiding judge initiates their investigation based on the factual account compiled in the file by the investigative judge. This compilation involves gathering all the necessary evidence for the indictment, a process that can take months or even years. However, it is important to note that the assize trial bench is not bound by the conclusions of the investigative judge. The investigative file encompasses all the evidence and included, in this case, a 500-page indictment resulting from over five years of investigation.

The interrogation process in court consists of two main stages. The first is the investigation of the accused's personality. Understanding the facts within the context of the accused's personality is a distinctive feature of French court hearings. It is a significant phase of the trial, that provides the public with unique insights into personal stories and life trajectories. Often, family members or individuals who had close relationships with the accused come to testify. The second phase of the interrogation is the fact-finding process, which is the outcome of a lengthy, gradual, and collaborative effort in which the accused plays a central role. Police investigators and relevant witness will be called to testify as will the accused. The sequence of interrogations in the assize court proceedings typically starts with questions from the presiding judge, followed by the four assisting judges, the prosecutor, the lawyers representing the victims, and finally, the defence lawyers. This order provides an opportunity for the parties to present their questions in turn. The defence always has the final word.

This entire process creates a unique space in which the accused can (and is expected to) express themselves. They can do so freely with few procedural rules. The accused can, for example, stand and ask to talk, even when other witnesses or victims provide their depositions.

What emerged during the hearings was the banality, not of evil, but more modestly, of men: how, from a dreadful general portrait of jihadists, we were brought to differentiate the defendants, by being introduced to their person, their family relationships, their friendships, and their ideology (or the lack of it). How, from being a group of friends who regularly meet in a neighbourhood bar and specialized in small drug trafficking, they became part of one of the most dangerous jihadist cells in Europe and were connected to the leaders of Islamic state of Iraq and Syria (ISIS) fighters in Syria. The accused had to face their families and consider the impact of their actions on their own environment.

The extended duration of proceedings in the assize court can, in certain circumstances, shed light on the course of the case also for the accused, and evoke feelings of regret and a desire for rehabilitation. In the Bataclan trial, it allowed the defendants to hear the victims over several weeks. For Abdeslam's lawyers, this lengthy duration was fundamental because it allowed to reveal nuances, which might have otherwise been missed. The victims were able to address him directly, and the public was able to hear what he had to say and to try to understand his path to

[56]On this use of trials as platforms for propaganda or narratives of injustice see J. Choblet, 'Courtroom or Stage? Performance Versus a Fair Trial in the Paris Attacks Case', *ICCT*, 25 Mar 2022, available at www.icct.nl/publication/courtroom-or-stage-performance-versus-fair-trial-paris-attacks-case.

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radicalization and violence. It also allowed for unexpected developments, such as his asking for forgiveness from the victims.[57]

5.2 Reconsidering?

One of the psychiatrists with whom Abdeslam met, Dr. Daniel Zagury, who testified in court, explained that the defendant was in 'permanent oscillation between becoming the young man of Molenbeek or remaining the soldier; between openness and hardening'.[58] According to him, Abdeslam was at risk of a psychological collapse if he was to question his own radical ideology. This is because this ideology justified his actions and provided him with a righteous justification, a shield.

This shield remained present at varying degrees during the trial. At the same time, being confronted with the victims, being exposed to medical-socio-political experts, and being faced with their own family and familiar environment facilitated a space where the defendants could view their actions from a different angle. Here, the trial could contribute to the rehabilitation of the defendant and, more broadly, reconstitution of the social bond.

Many of the defendants, including those with a high level of involvement, answered most of the questions posed by the judges and victims, when they could have kept silent. Some of the defendants expressed how the victims' testimony influenced their willingness to talk. The courtroom provided a privileged space for this exchange: during the investigation, they were confined in isolation in prison, only interacting with security agents. However, during the ten-month trial, seven hours a day, they had listened to numerous victims and witnesses. Depending on the perspectives of the experts and witnesses, there was a potential risk of creating additional distance that might have led to a disengagement from the judicial process. This risk could materialize, if the experts of context were viewing the defendants as mere sociological objects manipulated by an external ideology, or if security service agents were portraying them as faceless figures within the matrix of a power hierarchy and network. To ensure the success of this process, an additional component was necessary.

The repressive stance of the prosecution and the demand for an exemplary sentence in the context of such an attack was not surprising. Yet, the line of demarcation between individual and collective responsibility, between direct participation, complicity, and support, was not always clear. The notion of complicity was transformed to broad understanding of direct participation, up to the prosecution's advancement of the 'interchangeability doctrine'.[59] The conviction of the main accused as a co-author of all attacks committed on 13 November 2015 in the various locations is based on an unprecedented extension of the notion of a 'single crime scene'.[60] This legal approach prompted the defence to argue that the fragmented examination of the facts, where all individuals involved were intertwined, may have established the overall coherence of the investigative file but did not effectively determine the individual responsibility of each accused. This, in their view, could lead to a form of 'impressionistic justice', as advocates Marie Dosé and Christian Saint Palais put it. The defence lawyers stressed that they were not pleading 'for history' but for the defence of their individual client.

[57]Field notes based on a discussion with his defence lawyers on the court stairs, 16 June 2022.

[58]Cited in B. Chesnelong, 'Un Procès pour l'exemple Justifier la Force Plutôt que Fortifier la Justice', (2022) *Revue Esprit* 91, 97, indicating that it was only during the trial that Salah Abdeslam agreed to meet with the two psychiatric experts appointed by the investigating judge.

[59]Camille Hennetier, the state prosecutor, said in her final statements: 'Salah Abdeslam is responsible as a co-author of all the attacks. He is the only survivor of the commandos. There is little doubt that the attacks were a single, coordinated, and simultaneous action by a group whose members were interchangeable.'

[60]For a legal analysis of the ruling and the failure to clearly distinguish between the categories see J. Alix, 'La Justice Antiterroriste aux Prises avec l'Imputation des Crimes de Masse', (2023), 2/2 *Revue de Science Criminelle et de Droit Pénal Comparé* 443: 'we move from the single scene of violence – unity of time, unity of place, unity of object – to a single scene of attack by considering that several massacre scenes committed in different places can constitute a single crime scene'. Yet only few critics 'were troubled by this double qualification – single attack scene and co-action – which perhaps reflects the idea that (French) criminal law is not suited to the attribution of mass crimes committed collectively'.

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Individual criminal responsibility is also the result of a social reality. If this social reality does not diminish the criminal responsibility of the defendants in a criminal trial, it can provide a contextual explanation for the victims, the society, and the defendants, a necessary element for any form of rehabilitation process. If the trial also intends to create a space for the accused to question their actions by highlighting their consequences on people's lives, then the state should also acknowledge its responsibility in enabling the evolution of this social phenomenon. The recognition of such a societal structure could allow the accused, without risking the so-called 'psychic collapse', to reconsider their actions. But this is only possible if their actions are understood not only as the result of their own individual and ideological choices, as strongly portrayed in the trial, but also, in part, as the result of societal realities constructed (or at least facilitated) by the state. However, this differentiated analysis of the defendants came up against the limits imposed by the legal construction of the terrorist act during the trial.

6. Conclusions: What are the lessons for prosecution of mass crimes?

> The sentences handed down appear to the Court to be necessary to punish extremely serious offences, sufficient to protect society, prevent the commission of further offences and restore social equilibrium.[61]

The Bataclan trial has, in its own way, become a memorial where the victims publicly exposed their suffering and their questions. The contribution of this 'historic' trial is supposed to respond to the 'duty to remember', but its contribution to creating a narrative that can be shared by all, at least shedding some light on the structural causes of terrorism, is less certain.[62]

After 148 days of hearings, during which 397 civil parties out of the 2,334 constituted were heard and 189 civil parties' lawyers and 30 defence council made closing statements, the verdict against the 20 defendants was rendered in a courtroom filled to capacity. It began with the judge declaring all defendants guilty.[63] While the hearings were deemed innovative, perhaps even representing a new model, the 126-page court decision was disappointing from many perspectives. Far from echoing the diverse voices expressed in the 'forum', the decision was largely aligned with the logic of the prosecution – in particular by relating the trajectories of all the accused to the same process of religious radicalization. Though, this trial presented an opportunity to account for complex trajectories and motivations. It linked together individuals motivated by the terrorist project and others driven to support them out of friendship, weakness, or opportunism. The trial hearings provided rich descriptions of the relationships of mutual obligation that bound the defendants together, portraying their lives as both ordinary and self-contained, both close to and distant from those of their fellow citizens, including Muslims. However, none of this appears in the court decision. The interpretation favoured was much simpler. The story told was that of individuals driven by ideologies of hatred and a process of religious radicalization, acting 'as one'. Such a discrepancy sparked criticism, including the unusual mobilization of 11 of the defence lawyers after their clients refused to appeal:

> The fate of twenty defendants was debated in forty-eight hours. These two days of deliberations resulted in the drafting of one hundred and twenty-six pages of motivation. The question arises: was there really room for debate in such a short space of time? ... Our

[61]See Verdict, *supra* note 34, at 111.

[62]S. Gensburger and S. Lefranc, *Beyond Memory. Can We Really Learn From the Past*? (2020); F. Faucher-King and G. Truc (eds.), *Facing Terrorism in France: Lessons From the 2015 Paris Attacks* (2022).

[63]Although a technical incident disrupted the video transmission, and the filming was cut, the judge continued to read the decision. A few days later, the judge was filmed again reading the verdict for the recording.

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> feeling is that these ten months of hearings have served no purpose in the final decision . . . It must be said that nothing seems to have been called into question.[64]

While the court decision may have been disappointing, the judicial experiment, both in its innovations and its limitations, shows how criminal trials could open their door to transitional and restorative justice approaches. Three main lessons can be learned.

6.1 Active participation of victims and defendants

Transitional and restorative justice mechanisms stress the importance of victims playing an active role in the justice mechanism, either individually or collectively. Beyond their own process of rehabilitation and reconstruction as active agents rather than passive victims, this role is also important for the rehabilitation of perpetrators. It allows perpetrators to connect faces and destinies to their actions, acknowledging the human repercussions of their acts. Creating a platform where the perpetrator can express themselves can help replace violence with oral expression.[65]

Through a continuous tension between the criminal norm and innovation, the Bataclan trial was characterized by a strong restorative dimension that is unusual, even when compared to international criminal justice, which often struggles to incorporate victims into the proceedings. Despite its rhetoric, the place of victims most notably before the ICC remains to a large extent theoretical.[66] It appears that civil law legal traditions are often better designed to achieve these goals, as its procedure already allows for victim participation and places a strong emphasis on orality. Consider, for example, the trial in Senegal of former Chadian dictator Hissène Habré for crimes against humanity,[67] the Special Court in Cambodia,[68] and the Special Jurisdiction for Peace in Colombia. All these mechanisms allowed for important victim participation, as they originated from civil law. Victims in these trials were regrouped in associations to facilitate their representation. In contrast, in the Bataclan trial everyone was free to choose his/her representation individually or collectively.

Victim participation is an essential component of a fair (restorative) trial. Allowing space for victims within the legal process, including accommodating their emotions and ensuring their active legal rights, does not necessarily conflict with the rights of the defence and the presumption of innocence. It is possible, as the Bataclan trial demonstrated to some degree, to find a balance between these two fundamental aspects of justice, by carefully crafting legal processes and procedures.[69] A trial can be both emotional and just: victim participation and defence rights are complementary rather than contradictory.

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[64]The defence lawyers in a collective opinion piece published in daily *Le Monde*, 18 July 2023, available at www.lemonde.fr/idees/article/2022/07/18/le-proces-des-attentats-du-13-novembre-n-a-pas-ete-exemplaire-et-les-droits-de-la-defense-ont-ete-malmenes_6135154_3232.html. This echoes the analyses of unfair and rough prosecutions of accused of terrorism: the trial of anyone labeled as terrorist, Robertson reminds us, cannot, by definition, be fair, but justice needs not to be rough. G. Robertson, 'Fair Trials for Terrorists?', in R. A. Wilson (ed.), *Human Rights in the 'War on Terror'* (2007), 169. See also, for a comparison, F. N.i Aolain and O. Gross (eds.), *Guantanamo and Beyond: Exceptional Courts and Military Commissions in Comparative and Policy Perspective* (2013).

[65]In other trials observed, defendants thank the court for being able to listen to them, to have the time to do so. See Salas and Weill, *supra* note 40.

[66]L. Walleyn, 'Victims' Participation in ICC Proceedings: Challenges Ahead', (2016) 16(6) *International Criminal Law Review* 995; T. Bachvarova, *The Standing of Victims in the Procedural Design of the International Criminal Court* (2017); L. Zegveld, 'Victims as a Third Party: Empowerment of Victims?', in Weill, Seelinger and Carlson, *supra* note 25, at 309.

[67]See Weill, Seelinger and Carlson, ibid.

[68]See Sperfeldt, *supra* note 25.

[69]See Weill and Sulzer, *supra* note 39.

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6.2 Narratives and emotions: Placing people, not rules, at the centre of the process

The legal procedure went beyond technical exchanges among lawyers; instead, it revolved around giving voice to the central figures in the trial. A restorative process inevitably affects the language habitually used by the courts. The court managed to achieve a delicate balance between adhering to standard legal procedures and allowing space for victims' and defenders' narratives, thereby moving criminal proceedings closer to the restorative approaches observed in truth commissions or restorative justice settings that facilitate face-to-face meetings between victims and offenders.

Our premise is that a trial can encompass both emotions and fairness. The emotions of victims and accused should gain their place within the justice process as they are an integral part of it.[70] Instead of attempting to conceal them by deeming them irrelevant or, worse, an obstacle to justice, it is better to allow their expression and take them into account, especially when dealing with such violent events. Emotions are a part of the reality, the *truth*, and both victims and perpetrators have a right to access (and express) that facet of the truth. This is not to suggest that the accused will not receive a fair trial in terms of establishing facts and legal responsibilities impartially. This is what judges do; they can make distinction between relevant and irrelevant considerations, while dealing with their own emotions.

6.3 Integrating social scientists in the legal procedures to understand the social context and political environment

It seems crucial in trials of such magnitude to include knowledge from social sciences, such as history, sociology, and criminology. If the trial aims not only to establish criminal responsibility of individuals but also situate such violence in a broader social framework – to understand its roots and structuring, and the possible roles of the state not only in managing violence but also reducing and preventing it – it is highly questionable whether trials should be left only to the legal discipline. Simplistic reading of actions while establishing 'legal truth'[71] could be enriched by a greater participation of social scientists. Their poor representation at the Bataclan trial can be explained by their refusal to respond to random invitations from (random) lawyers in a context where the social sciences are reductively seen as 'excusing' offenders. Here again, the criminal trials of mass violence could draw inspiration from the mechanisms of transitional justice. Truth commissions, for example, include academics from the outset – historians, psychologists, sociologists – as much or even more than jurists. In the Colombian Special Jurisdiction for Peace, 100 social scientists and experts are working within the court, with the pretrial judges, to construct the macro cases and the pattern of violence based on the victims' experiences. Why deprive the justice system of such a complementary perspective, when it must judge acts that are part of individual life histories as well as broader socio-political processes, on a national and international scale?

[70]Their emotions, *all* their emotions. The judges have in fact favoured the expression of certain emotions (traumatic suffering), to the detriment of others (anger). See S. Lefranc, 'Extraire les victimes de violences du marbre de leur trauma: Retour sur le proces des attentas du 13-Novembre', *AOC*, 10 June 2022, available at aoc.media/analyse/2022/06/09/extraire-les-victimes-de-violences-du-marbre-de-leur-trauma-retour-sur-le-proces-des-attentats-du-13-novembre/.

[71]In its decision, the court determined that Abdeslam did not detonate his explosive belt because it malfunctioned, and this was the reason for the failed detonation, rather than him being 'full of humanity', as he had claimed. However, the possibility that he simply did not want to kill himself or was afraid to do so did not appear to be considered in the court's decision.

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