

Episode 5 (February 2021) Spotlight on France

Welcome to *Justice Visions*, the podcast about everything that is new in the domain of Transitional Justice. *Justice Visions* is hosted at the Human Rights Centre of Ghent University. For more information visit Justicevisions.org.

Tine:

Welcome to *Justice Visions*. My name is Tine Destrooper and I am the project lead of Justice Visions, a research program at Ghent University's Human Rights Centre. And I'm also a regular host of this podcast. And in this season of the podcast, we have been zooming in on specific cases of transitional justice, where interesting things are happening from Chile to Syria to Cambodia. But the case that we'll be talking about today, shows that transitional justice is also relevant, or could potentially be relevant, for European countries, because we will be talking about France. It may sound odd for a podcast about transitional justice, about victim participation, but we'll be talking about a case that most listeners are familiar with, which is the Charlie Hebdo trial, and why we need to talk about those trials in the podcast here today, I will tell you in a second, but first I want to introduce our guests for today.

And we have two guests who followed the trial quite closely. And the first guest is [Kerstin Bree Carlson](#), who used to be a practicing lawyer, but is now an associate professor of law at the [University of Southern Denmark](#). Welcome Kerstin.

Kerstin:

Hi.

Tine:

And also with us is [Sharon Weill](#), who is an Assistant professor at [the American University of Paris](#) and an associate researcher at [Sciences Po Paris](#). She is a part of the multidisciplinary research group doing [ethnography](#) on terror trials in France for the Ministry of Justice. Sharon, welcome.

Sharon:

Hello, hi.

Tine:

I know I'm not doing your expertise much justice with this very brief introduction. We'll post links to the work that you do in the show notes on the website. Because right now I'm just being brief because there's so much to talk about regarding the Charlie Hebdo trial. And Kerstin, I'm going to start with you. I want to first ask you if you can say a bit more for those listeners, especially those who are not so familiar with the case, about the trial, about why we need to talk about it today also.

Kerstin:

I think I could maybe say a little something about why I think this is so important for transitional justice, but then I'd want to hand over to Sharon maybe to talk about the

trial because she actually observed it sort of from the beginning to the end. She was there at the beginning and it went on for three and a half months. But from my position, the Charlie Hebdo trial is interesting as a transitional justice question because it's specifically doing what we imagine courts and adjudication can do in a transitional justice context in other countries. So a big part of what courts and transitional justice mechanisms that are judicial for other countries are designed to do, is to make a story. The legitimacy, the power of a court is to come in and create one narrative to say what happened.

So for example, in Bosnia, when a court was proposed for Bosnia, there was a real idea that somehow this court could look at history and historians went and actually testified before the court. The court then could dig up facts and then in a heightened and very contentious nationalized set of circumstances that a neutral objective exterior court could somehow say what the truth of Bosnia was. Was this a genocide, was it not? How many people were killed? Who was most to blame? How should we understand these acts? And those are of course, really complex questions and they were left to a court. There was really this idea that a court could somehow do what politics couldn't do.

So what I think is so interesting about the Charlie Hebdo case is I find a lot of those same ideas are present here. So here we have something, which is, there's no question really about what happened, but there are a series of questions about how we should understand it. And I find it really significant that once again, a court has been tasked with coming forward and telling us here's where you should look to understand this big social problem.

Tine:

There's so much that I will want to pick up on a truth-seeking function, on the communicative function, on what we can learn from TJ (transitional justice), but indeed maybe it's good, Sharon, if you could say a little bit more about what these trials are about exactly and how they are proceeding or have proceeded in December of last year.

Sharon:

As in all criminal trials in France, the victims have a very important role during the entire trial. They are civil parties, and they can ask certain witnesses to come or they themselves can interrogate the witness and the accused. This function is available from the arrest and the investigation stages all the way until the trial itself. So in this sense, and this is in all criminal trials in France, you have the victims that are a very important part of the proceedings.

This is especially interesting from the transitional justice point of view. It's not only about being a victim with a passive role, but they have a real active role.

Now, what was particular in this specific trial, is that we are talking about a trial of mass violence with many many victims. We didn't have one or two victims as in normal trials. But we had 200 civil parties, including the persons that were directly attacked or the ones present in this time, but they could be also the family, et cetera. Whoever had a direct injury from the acts.

So in this case, we had 200 civil parties, with 19 lawyers of the victims. This made the trial a very, very big platform for the victims, which is not the usual case. Therefore we could observe in this trial two distinct processes that took place. On the one hand, we have this what you could call the truth commission aspect, where we have all this participation of the victim. And the second process in parallel was the criminal responsibility trial. So the first process was the victim platform and it took place during

the first months where we heard their testimony. We lived everything again with the victim, through very strong testimonies.

By the way, when I'm saying victims of course they're not all the same. You could identify three major groups. First the victims from the attacks in the newspaper editorial room, who included very intellectual and engaged leftist people. Then you have the group of the victims of the police. And lastly, the victims of the Jewish community.

So you could identify these three groups. But even within these three groups, every person has his own way of dealing with this trauma. So during this entire month we were completely absorbed by their story, their narrative, their experiences. It was very, very strong. Sometimes it was the first time for them to deliver the story after all these years, and it was incredibly powerful. So this is what we had during the first months. And then afterwards, started the fact-finding part of the trial, in which the prosecutor and the judges aimed to establish the criminal responsibility of the accused. So there was a kind of dissonance between the victims statements and the trial. But it was very important for victims to come to the trial and to have this platform, *à la court d'assises*, which is a very symbolic place in France. You have all those judges that are here to listen to you. So it was a very important moment to tell the story, to reconstruct the event, to look for the truth, to be listened to, memorized and even filmed in this trial.

Tine:

This is great. And I want to return to this idea of a truth commission and a justice function in a way being combined into one institution. But if I can I want to just, Sharon, stay for a bit longer with this idea that you're pointing out of there being 200 victims, 19 lawyers, which is also something in classical TJ (transitional justice) cases, we see being so problematic. It's also the case in the Khmer Rouge tribunal, where you had this mass victimization and people could also act as civil parties. And I'm wondering what that looked like, or if you know anything about victim's experiences of their participation, because very often we say, you know, this is supposed to be empowering and it's supposed to, you know, give people a sense of justice, but I can also imagine if you've got 200 civil parties, represented civil parties, that this might not be the most empowering experience for victims. Is there anything that we know about how victims have experienced their participation?

Sharon:

I did not directly interview the victims. So what I can say is that during this time we had another three terror attacks in parallel to the trial. And these were very, very tough and challenging experiences, especially for the victims who agreed to come and give testimony. Not everyone agreed to give a testimony and the fact that you are ready to come and to expose yourself, this was really challenging that they were faced again with this violence outside the courtroom. Some of the witness were still afraid that something would happen to them, and some even had police protection. So I think the fact that there were these terror attacks in parallel to the trial, was very hard for the people who were involved.

Another quite complicated situation in the trial was the fact that the main accused, the main perpetrators were not present, as they were dead. And then three of the main leaders of the group are still in Syria and were therefore tried in absentia. So the ones that were present in the courtroom, the eleven accused, did not possess a very high level of responsibility. They were like the men who sold the car. So the entire trial was about whether or not they knew the perpetrator.

So in this sense, there was a very big gap between the hard testimony that we heard of the victims, and the actual accused that were here. So I can imagine that this was not easy for the victims who came and watched the trial from the beginning, because we were not dealing with the main perpetrator.

Tine:

I just want to pick up on one thing that you're mentioning, and I know Kerstin that this something that you also write about, this complete discrepancy between the size of the crimes that have been committed on the one hand, and also the fact that perpetrators are dead or in Syria and are tried in absentia. And then, on the other hand, those who are actually there in the dock and who are, in many ways, not directly related at least to the crimes that have been committed and that we're talking about. And I wanted to ask you what you think that does to our understanding of accountability from like a criminal justice perspective. What does it mean for accountability that this process is organized in this specific way?

Kerstin:

I am wondering, maybe Tine, if it makes sense to just sort of say for people what the actual trial was about, like what are these terror acts? Back in January of 2015, the entirety of Paris ground to a halt, or France ground to a halt, because first these two brothers, both of whom had trained in a Yemeni ISIS camp, right? Highly trained militarized, radicalized brothers who'd been in jail, who were followed by the French state, who were part of an association that had been threatening Charlie Hebdo, which had published the Muhammad cartoons back in 2006, those cartoons that were first published in Denmark in 2005, they had added on. Those brothers took machine guns and went to the offices of Charlie Hebdo and murdered eleven people.

And then they got out. The police got there. They managed to shoot more policemen. They got away. They stole the car and they were on the run for two days before being killed in a shootout. And so for three days that terror act had happened and we didn't know where are these guys, right, they hit in the woods. So I think people may remember where you were when you heard about that, but certainly every French person knows what that is. Then one of their friends in conjunction with that attack, probably aiming at a Jewish school, but then stymied by an accident. There was a policeman on site. He killed that police woman and didn't enter the Jewish school and then went to a kosher supermarket and took hostages and appears to have tried to blow it up. But then his explosives didn't go off. And he also died in a shootout with police and he was friends with these two brothers.

So those are the three perpetrators of these connected terror attacks. And so the people who are now testifying, so you have the survivors of Charlie Hebdo and everyone connected because Charlie Hebdo of course, had been threatened for a decade or more, right? So there had been this kind of this death threat that Charlie Hebdo was under. And what Sharon just mentioned that during the trial itself, more murders and other attempted murders were carried out at the previous offices of Charlie Hebdo and a school teacher teaching the Charlie Hebdo question, the question of, can we print these images of Muhammad, that school teacher was murdered. So there are these kinds of live social forces that are going on at the same time and are not simply in the past, right? They are still really in contestation. And, but that's also a very complicated set of facts.

So you have a large victim group. But then in addition, you have really sort of tricky juridical facts and the criminal justice side is really problematic. We found almost nothing out about - the trial is called the trial of Charlie Hebdo, but we know very little

after the trial of what happened with the French state? They were in French prison. They were radicalized. They'd been trained. They got weapons. Where did their weapons come from? We don't know. Why didn't they continue to be followed? We don't know, right? So all of these questions about these very effective military murderers, we didn't find out much of that.

So it's called Charlie Hebdo. The victims got a chance to speak, but the criminal responsibility, right? The idea that there are dangerous armed people in our midst who can carry out this kind of violence. How did that come be? Who's responsible for taking care of that? We don't have great answers. And that, I think, again, from the point of view of courts as windows of information, becomes problematic.

The eleven people who were on site were mostly connected to this third murder, the one who was probably aiming for the Jewish school and who instead murdered a police person and then took hostages and murdered people in the Jewish supermarket. And there the people connected to him. So the person who got the highest sentence, Ali Polat, who got a 30 year prison sentence, who was found guilty of complicity, he appears to have been *friends* with this person.

And so the real question was how much did Ali Polat know about how radical and violent his friend was? So if his friend had an ISIS flag in the house and Ali Polat, the defendant has seen the ISIS flag, how are we supposed to understand what he knew, Ali Polat? Like, what's his criminal responsibility? And for me, at least, I found those answers really dissatisfying, especially because Coulibaly, the murderer, had been in prison and he had been followed by the French terror services. And they had stopped because they said, well, there's not so much sign of radicalization. So again, for me, there are sort of problematic questions about responsibility. So when the state doesn't follow up on its threats and then we push that question on to citizens and we ask a citizen, what should you have known? And in the event, this person, you know, who has all sorts of crazy, whatever ideas actually does something violent, you will find yourself facing a 30 year charge. That I find very problematic and actually threatening for all of us. I think we should all be worried about that.

Tine:

This is really fascinating. And it also goes to the point that Sharon was just talking about, there's so much that we do not know, and that we have not found out. But then there's also all these things that all these voices that we have heard. And I think this brings us back to this discussion about what was the actual function of this process? Was it a function related more to criminal justice and to criminal accountability? Or was it a function more related to truth seeking? And maybe there, Sharon, I want to pick your brain a bit further again, because you called that the truth commission element or the truth-seeking element and I wanted to ask, if you could say a bit more about how this function of like a classical truth commission may have interfered with some of the more core functions of a criminal justice process and how those two related to each other in this process. And maybe also if one hampered the other, because from what I'm hearing from Kerstin, is also that this whole criminal accountability function wasn't taken up as seriously as it should have been. And I wonder to what extent that has been a consequence of there being so much attention more for the truth-seeking function?

Sharon:

I know that with Kerstin, we have had this discussion because she is a common law lawyer, and I think that if you look at the essence of criminal trials in France, it is not

necessarily the same approach as in common law countries, which seeks essentially for criminal responsibility.

As I said, here in France, as in all civil law countries, the role of the victim is built within the criminal procedure. So the fact that the victim can participate, that they can question the perpetrator, that they have a connection with the trial, this is a basis of the criminal procedure. So I think that from the beginning, there is a different conception of what the purpose of the trial is and what and who it serves.

And I think that in any criminal procedure in France, the question of rehabilitation of the victim is also *la raison d'être* of the trial. It's not only about criminal repression. So this is the first layer of the answer. Then on top of this, because in this trial we had so many victims, and because it was a political trial, it was much more accentuated. When I say it was a political trial, it's not because the judges are not independent, but it was because the trial dealt with a very sensitive question, which was at the heart of the political debate: terrorism, jihadism, people going to Syria, etcetera.

So this trial represented a question which is even bigger than the act of terrorism in itself, because after the terrorist attack on Charlie Hebdo, we had many systematic changes in France. So in this sense, I'm saying that it's a political trial, a trial with a lot of interest and we could see how people were following and interested in this trial. The media was following, not only in France but also from abroad, and therefore the platform of the victim was inherently expanded. And here we reach the central question, how do we integrate this healing process, this truth commission component, into a criminal responsibility trial without damaging the presumption of innocence.

So again, the healing process is not a byproduct. This is one of the purposes of the trial, for the victim to be there and to participate for their own reconstruction. So how do you do this when we have so many victims and how do we keep the presumption of innocence, the rule of law procedure, standard of equality of the arms, et cetera.

Because when you have so many victim testimonies, it might become inherently unbalanced. So this is something to think about. How can we merge those two goals when we have so many victims? By the way, as an observer, I was worried when I watched the trial, what will the judge do? Because for the judge, it's an incredibly difficult position because on the one hand, it is a criminal trial therefore they are bound by the principles of impartiality, independence, rule of law, et cetera. And on the second hand, the judges are aware of the fact that it is a political trial and it's a politically sensitive question. They know, that everyone is following the decision of the Court. So, for example, would they be able to acquit people in this kind of trial?

So it was a big test for the judges. And at the end of the day, I think they did a good job. And the criticisms that Kerstin raised are more related to the investigation phase, which is before the trial phase, and it's not necessarily related to the trial judges themselves, because they acquitted half of the accused from terrorism allegations.

So it means that there were very strong, the judges, in such a trial to say that this investigation was a crap. So for me, this trial was also a victory for the judges. As they really succeeded not to fall into this trap.

Tine:

That's very interesting. And also what you're saying about the media being so present and the public eye being so present, that's also something that struck me, is that this whole trial basically was filmed, right? And maybe Kerstin, if you can say something what you think inspired that decision. Because to me, it seems that this was very much about having that societal and political impact and about-very explicitly sending a

message, right? And if you could say something about what you feel is the message that they were trying to send there?

Kerstin:

French trials are not transcribed. They're not usually filmed. So in fact, what happens, everything is based on this dossier. It's written, and then there are submissions they're also written, and then you have something that comes, but the judgment is, the judge will say what they say, and then there's a pretty, relatively short judgment. So again, trained in the common law for me, it's shocking that the mechanisms within the trial get lost, right? That you have a series of conversations and that something is extracted. Usually there'll be a conversation, and then the judge will summarize what that is. And then that gets written up, right? And that process of summary has always shocked me, coming from a different system. So not only was it recorded, we have no idea who will have access to those recordings, right? It's not like it was recorded and come see this trial, right? It was recorded. Someone has it. And we'll see. And it was also, journalists live tweeted it. And it was really also interesting for me to follow. Like when I went back over my notes, what I found shocking then to go into my, like the live tweeter who had everything and she didn't always live tweet the thing that I found was most right. So there's all sorts of interesting sort of ethnographic moments that you can take from the experience of watching this trial. But I think a lot of that was speaking to what Sharon was saying, that there's an assertion, this is a very serious crime. We're taking this very seriously. This says something about what it means to be French. And we're going to bring all of the capacity and technicality of the French state to bear, including recording this for posterity.

But to me, to my mind at least there's something rather dangerous about that, because of course, it's true, there are problems in the investigation, but when civil law judges explain the civil law to me as a common law lawyer, they always tell me that the strength of the civil law is that you have several chances to rectify problems. So yeah, you have an investigation and then you go, and I've had an interview with a civil law judge, someone in Senegal, who had worked at every level. And he said, well, since I've worked at every level, I can tell you about my different roles at every level. And he said, as a judge, when the investigation came to him, he read it and then he set it aside and he did his own rethinking. Does this meet the criteria?

And so half the terrorism adjudications or charges are thrown out, but the lowest sentence was four years. So at no point in time, was there a recognition of, you got picked up because we had no one else, which was really my impression of a lot of these defendants and the reason: we had to have someone, because it was so serious. And I find that such a big problem that I'm unwilling to give the judges credit for that. But maybe Sharon, you have something to say with the recording or how those things work from your position having watched so many of these.

Sharon:

Okay. So about the record. So they decided to do it because of the importance of the trial. So it can just show us again how much importance it was given because previously only very few trial were filmed, mainly regarding the Nazi trial or really mass violence trial. So in this way, they put it on the level of international crime trial actually. So here, we have this link between terrorism, international crime and transitional justice.

Usually in France, you don't have transcription and you don't have anything. So if you want to know what is going on in trials, you need to be there. So in this sense, it was interesting that they filmed this, but it will be available for the public only in 50 years.

Tine:

I have about 27 more questions on my wishlist, but I think I'll have to park them for some later moment, but what I would like to do as a kind of wrap up question is to look towards the future. And I'm going to propose to do that in two ways. Because on the one hand there's more trials coming up. There's the Bataclan trials, and there's the trials for the attack in Nice. And then I maybe want to link that to something Kerstin that you said at the very beginning, which was about why are we talking about these cases, through the lens of transitional justice. And so what I want to ask you is if we think forward about these two trials coming up, is there anything in the field of transitional justice where we could say, you know, there's opportunities for lesson learning here. There's stuff that we can take from past cases of transitional justice that tells us something about what we should and what we should not do in these at least two more trials coming up.

Kerstin:

Yeah. I think I share Sharon's feelings about this. I think we both agree that there's a problem of asking the court to do too much here. So, I think, trying to separate, and I know this goes against everything that is held dear, but separating the notion of the truth commission and what we want to understand about what people suffered in a terror attack, from the very narrow question of criminal responsibility, because I also see in international criminal law that expanding criminal responsibility, in my opinion, has not gotten us anywhere good juridically, right? So when you look at international criminal law, you look at how it was that the ICTY managed the question of, can we tie this defendant to this criminal act? They made a shortcut, joint criminal enterprise, which in the Hague they call 'just convict everybody'.

And it is problematic, right? And I think that's something that international criminal law is still dealing with. You just had a big acquittal before the ICC that ran into exactly this problem in the appeals chamber, that this law is not solid law. And the last thing you want is to inherit those problems domestically, right? So I think that having narrow questions about what criminal responsibility consists of... And that's not really a transitional justice answer, I think the transitional justice answer has to do with a larger question of how we look at terrorism, how we look at radicalization, right, and how we think about the legitimacy of who's marginalized. So what was really striking to me from the Charlie Hebdo trial was the ways in which the prosecutor actually put the question of one defendant's, pork-eating proclivities towards the question of how radical he was or was not, and how much he should have understood about how radical Coulibaly was. And those are super dangerous, rather racist, Islamophobic. How you want to fill in. And my sense of what transitional justice does is, it challenges those kind of knee jerk biases. Transitional justice asks us to think. And here I look at the work that's being done in Colombia, right? These are long time enmities, right? How do you sit down with the unacceptable, illegitimate, other, and try and build peace together? And to me, that's the most like stark and moving part of transitional justice, is a method for doing that. And in successful cases, that happens. How might we think about what we're demanding of these, what now in Europe is called the suspect community, which is Muslims, right? Which mosque did you go to? Those are really problematic questions and criminal justice trials that further those questions, are taking us away from where transitional justice would lead us.

Sharon: (36:45)

I think this can work when we have victims speaking in a criminal procedure against the highest responsible. Like the Eichmann case, where you have the number one, or the

number two, the leader, the one who had the idea who are prosecuted. Then it can work, and there it's ok if the trial becomes a platform for victims because we are not truly obsessed with the question of presumption of innocence, because things are quite clear. But in this trial, in the Charlie Hebdo, what was bad from this point of view was that it wasn't obvious that those people accused are responsible for anything at all? So, it wasn't good, not for the victim and not for the accused, to be caught in this trial. So in this sense, I completely agree with Kerstin. Therefore, I would propose that if we keep them together, and I think it's a good idea to have victims as part of the criminal procedure, but then we must have a really high level of responsibility on trial. It cannot be trials against the one who stole the car. It should be trials against people with the highest level of responsibility.

Tine:

We should continue this conversation. And there will be other occasions when we can actually continue this conversation. For our listeners, what I will add is that if you do want to come into the conversation as well, that's very possible on our website, justicevisions.org. If you do have ideas about cases that we should be talking about in next episodes, that's also possible. We will be back next month with a new episode, and we're very much looking forward to that. For now, I just want to thank you, Kerstin and Sharon, so much, for sharing these insights and also for leaving us with so many cliffhangers that we really have to return to in a later episode, thank you so much.

Kerstin/Sharon:

Thank you.

This was Justice Visions. To relisten to this episode, or to browse our archive, visit our website, Justicevisions.org, or subscribe now by a Spotify or Apple music, Justice visions is made possible through generous funding of the European research council. The podcast is produced by Wederik De Backer. You heard the voices of Tine Destrooper, the Justice Visions researchers, and our guests.