

Justice in the Practice of International Criminal Tribunals, in the Context of the Tasks of Contemporary International Humanitarian Law

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Abstract

Transitional justice, which today has become a widespread and very useful concept, which allows the transition from an authoritarian system to the rule of law, which aims to establish a democratic regime that respects human rights - and what is important not at the level of declarations and applicable methods, but, first of all, this must become the philosophical basis of his daily life. The purpose of transitional justice is to restore the dignity of the victims, to establish mutual trust between the antagonistic groups, to favor the institutional exchange necessary for a new relationship within the population that will allow the establishment of a state of law, including through an effective control of the practice of total or partial impunity. The various constitutive elements of transitional justice generally combine reparative measures of restorative justice (Truth and Reconciliation Commissions), meanwhile establishing parallel mechanisms of punitive justice (especially in relation to the main responsible or direct executors of the most serious crimes).² On the other hand, transitional justice claims to reform the institutional system, restoring the primacy of law and ensuring the functioning of judicial institutions for the future, fighting in the meantime against impunity for the crimes committed during the previous period. In this sense, transitional justice pursues a multiple goal within the framework of an end to a conflict, in which other imperatives are imposed on government officials - the disarmament of combatant forces, the restoration of citizens' security, the compensation of victims and the restoration of the economy of devastated societies. After being neglected for a long time, the victim is at the center of current political concerns and is the object of a constantly growing interest, mainly in the criminal field and not in social discourses.³ But this phenomenon, positive from some aspects, is not without problems and arouses controversial debates among researchers and actors of the criminal world. This imposition of the victim seems to exist not only in the criminal system, but also in the current socio-political terrain. This predominance is observed in many Western states, lately becoming dominant to some extent both in international criminal law and in international humanitarian law, being taken into consideration the burden of victims in the status granted to them in armed conflicts. The participation of victims in the criminal procedure is generally a recent phenomenon, which seems to be far from being accepted. Victims played and play a secondary role in the tribunals previously established by the International Criminal Court (ICC).⁴ They were considered only as a means in the de facto absence of a participation or compensation system. Under the influence of strong pressures, the tendency to take into account the opinions and concerns of the victims, including admission in the criminal procedure, became visible in national and international law, and with the involvement of non-governmental organizations and states, the basis of a system was laid that provides for a relatively broad participation of victims in ICC trials. Even if its modalities are still the subject of harsh discussions, it is generally recognized that it is an important and useful tool that would allow victims of serious violations of human rights and international humanitarian law to be heard and to hope for possible reconciliation.⁵ The evolution of the process of increasing interest in victims is the result of political, social and legal tensions that started in the 1960s, with the implementation of state policies regarding victim compensation and the development of victim defense associations, being influenced by the social movement that opted for civil and women's rights. We find that taking the victim into consideration in social and penal policies has progressed in a meteorological manner. National and international investigations allowed taking into account the victims' dissatisfaction with the criminal system, which led to a genuine experience of secondary victimization, which has as a general consequence the tendency of a weak denunciation of the criminal acts to which they were subjected. They also emphasized the diversity and extent of trauma suffered by some victims, especially after going through interpersonal violence, such as rape or family violence. In addition, towards 1950, a new discipline had developed, a component of criminology, but which very quickly became autonomous - victimology. This field of research focuses on the study of the victim, on his psychological and physical reactions to the sustained achievement, but also on his experience of relying on the act of justice and society in general. These various findings gave rise to state structures

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² For a definition of transitional justice, see: Alex Boraine, *La justice transitionnelle: un nouveau domaine*, Coloqueto Repair les effets du passe. Reparations et transitions towards democracy, Ottawa, Canada, 11 March 2004, available online: www.idrc.ca/uploads/user-S/10899187131Discours_d'Alex-Boraine.dco, consulted on 18.10.2023; Marc Freeman, Dorothe Marotine, *Qu'est-ce que la justice transitionnelle?*, International Center for Transitional Justice, 19 November 2007, available online: <http://www.ictj.org/images/contents/7/5/752pdf>, consulted on 18.10.2023; Reflections of Juan Mendez in the Amicus Curiae presented before the Constitutional Court of Colombia regarding Law 975 on Justice and Peace, analyzing, starting from various experiences, the requirements of transitional justice, January 17, 2007, available online: <http://www.Americas/Colombia/colombia.justicebrief.spa.pdf>, consulted on 18.10.2023.

³ See for example: Robert Zauberman, *La victime, usager de la justice pénale*, in Michel Chauviere et Jacques Godbout (eds.), *Les usagers entre marché et citoyenneté*. Paris. L'Harmattan. 1995, p. 73.

⁴ See for example: Rafaëlle Maison, *La place de la victime*, in Hervé Ascensio et al. (eds.). *Droit international pénal*. Pedestrians. Paris, 2000, p. 142.

⁵ Antoine Garapon, *Des crimes qu'on ne peut ni punir ni pardonner: pour une justice internationale*, Édition Odile Jacob, Paris 2002, pp.161 et seq.

to help victims, which have spread throughout the world. The victim thus became a political stake.⁶

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1. Introduction. Increased interest in victims

The legal status of the crime victim has imposed significant changes in most national criminal systems, but especially in international criminal law. These developments contributed to the creation of a genuine social status of the victim, which reflects the expectation of recognition of his social status. On the national level, criminal law operates, after several decades, with a significant transition - from a classic view of the victim in the process, perceived as a creditor of damages and interests to a person who suffers, towards a concept that provides that the suffering must be taken into consideration.⁷ The objective of the criminal procedure is no longer the conviction of the perpetrator, if he is found guilty, and the defense of public order, but equally it is the end of the suffering of the victims and their assistance in the rehabilitation process. This rehabilitation is often considered as a transition from the recognition of the mistake of the perpetrator of the aggression and, as a consequence, of his guilt, to the recognition of the suffering of the victims by the judicial courts and by the society as a *whole*.⁸ However, the criminal process cannot have a therapeutic end, because it does not have the resources and was not designed to take into account the interests of the victims.⁹ In international law, the level of recognition of the importance of victims, including their rights, has increased, which meanwhile is quantified more at the political or humanitarian level than at the criminal level. This is the first criterion in considering the victim by the international community without contesting the 1985 United Nations Declaration on the Fundamental Principles of Justice, regarding victims of crime and victims of abuse of power. Based on this Declaration, numerous decisions and recommendations were formulated at the international¹⁰ and European level,¹¹ which

⁶ Sebastian Roché, *Les victims: from the community to the assurance en passant par l'Etat*, „Déviance et Société”, Vol. 19, No. 4. 1995, pp. 357-370.

⁷ Xavier Pin, *Les victims d'infractions. Definitions and issues*, "Archives de politique criminelle", Vol. 28, 2006, pp. 49-72.

⁸ Mina Rauschenbach, Damien Scalia, *Victims and international criminal justice: a vexed question?*, „International Review of the Red Cross”, Vol. 90 No. 870, June 2008, p. 444.

⁹ Cesoni Maria Louisa, Rechtman Richard. *The psychological repair of victims: a new function of pain?*, „Revue de droit pénal et de criminologie”, Vol. 2, 2005, pp.158-178.

¹⁰ For example: UN Office on Drugs and Crime (UNODC) published *Guide for Policy Makers on the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1999) in the purpose of promoting and controlling the application of victims' rights in the national criminal systems. Another example: *Handbook on Justice for Victims on the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1999). The "Commission on Crime Prevention and Criminal Justice" was created to implement the United Nations Declaration of 1985. An intergovernmental group of experts, mandated to develop a data collection tool on United Nations standards and norms relating to the problem of victims, was created by the Economic and Social Council through its resolution 2003/30 of July 22, 2003. For the results of the work of this group, see document E/CN.15/2007/3, available online: <https://undocs.org/Home/Mobile?FinalSymbol=E%2FCN.15%2F2007%2F3&Language=E&DeviceType=Desktop&LangRequested=False>, consulted on 18.10.2023.

¹¹ See the Convention of the Council of Europe on the compensation of victims of crimes adopted on November 24, 1983. See also the recommendations of the Council of Europe R(85) 11 of June 25, 1985 on "the position of victims in criminal law" and R(87) 21 of 17

contributed to placing the problem of victims at the center of the debates and concerns of the international community. A draft of the Convention on the Rights of Victims is currently being studied by the United Nations. International criminal law, referring to victims' access to international justice mechanisms, also reflects their recent position - it was recently enshrined in the ICC Statute. Until then, the victims were recognized only as witnesses, and the only possible reparation was the recognition of the international crime/crime and as a result – the sanction applied.

What status should be recognized for the victim in order to guarantee optimal reparation, while also respecting the rights of the accused? If we want to grant adequate reparation to the victim, we must know the nature and extent of the expectations, but also of the real needs that they express in relation to the penal system.

The victims expect from this system not only a result (punishment and compensation for the damage), but also the formal aspect (respect for the victims, information, participation).¹² Referring to the needs of the victims, we can highlight the fundamental ones, which refer to the criminal procedure:

- 1) Let their voices be heard;
- 2) To be treated with respect and at fair value;
- 3) Participation in the examination of own cases;
- 4) Obtaining information regarding the progress and results of own cases;
- 5) Obtaining a material and emotional reparation.¹³

The victims usually appear as claimants of retribution (sentence to a punishment), rehabilitation, restoration, as well as the neutralization of the car. Meanwhile, the objective of retribution may be important to victims, given that they seek first and foremost restitution or compensation, including the opportunity to restore, heal, and avoid further victimization.¹⁴

In criminal proceedings, victims seem to be more satisfied when they are informed of real progress, whether they have the opportunity to participate actively in the process, for example, by expressing their views on its progress.¹⁵ The research that was carried out in the European legal systems indicates that most of the victims are not satisfied with the experience accumulated in the penal system, that it does not meet their needs.¹⁶ Or, the victims expect that their participation, provided for in various criminal systems, will have a reparative force for them and most national and international criminal systems recognize a form of participation for the victims. In some *common law* systems, victim participation has taken the form of "Victim impact statements (VIS)" or "Victim statements of opinion (VSO)". They can make their voices heard and invoke during the process the consequences of the criminal act for the victims and express the desire for them to be vindicated. In Belgium and Canada, for example, there are such VSOs, which allow victims to intervene in the execution phase of the sentence (parole).¹⁷

But these developments do not cover all the victims' expectations. The increased participation of victims in the criminal treatment of their case does not always improve their perception of the criminal system and does not seem to add emotional, psychological or financial benefits to them. For the sake of the victims, it is preferred that they are not involved and let the judge make the decision regarding the determination and application of the punishment; sometimes victims want to limit themselves to presenting their point of view during the trial.¹⁸ This indicates that a very significant involvement of the victim in the criminal system may not be the most correct path for the healing and

September 1987 regarding "assistance to victims and prevention of victimization". See also the "Framework Decision of the Council of the European Union of 15 March 2001", published in the *Journal officiel des communautés européennes*. See also R(2006)8 of the Committee of Ministers of the member states adopted on June 14, 2006 during the 967th meeting of Deputies/Ministers.

¹² Mina Rauschenbach, Damien Scalia, *op. cit.*, p.444.

¹³ *Ibid*, p. 445.

¹⁴ *Idem*.

¹⁵ *Idem*.

¹⁶ *Idem*.

¹⁷ *Idem*.

¹⁸ Opinions expressed by experts participating in the round table *Vérité, Réconciliation et Justice dans les transitions démocratiques*, led by Professor Xavier Philippe, that took place on March 23-24, 2010, in Aix-en-Provence, in the premises of ILF – GERJC – Université Paul Cézanne, Aix-Marseille III.

reparation that she expects.

In principle, we must say that the right to be an actor in the criminal trial and to take the floor is a reparative one for the victim. In the opinion of some experts, the victims who could not benefit from psychological and social help outside the judicial system, are the ones who then demand that the punishment be applied to the author of their suffering.¹⁹ The real risk of repeated/secondary victimization can be the consequence of a cynical, arbitrary and non-empathetic treatment for the victim, the rebirth of his experience can be traumatic and suffering can occur as a result of the testimony and interrogations to which he is subjected. In some cases, the victim may face an author who expresses no interest in his acts, who does not recognize the tortures he caused them and who may even go so far as to deny his actions, in order to blame the victim.

Following these findings, we can ask ourselves what the role is given to the victim in a system that did not aim to take into account her sufferings and that cannot have the reparative force attributed to her in an erroneous formula. In order to answer this question, we must from the very beginning determine what the real needs are expressed by the victims towards the penal system, what is the specific experience of the judicial treatment to which they are subjected and what are the susceptible factors of power that influence positively or negatively this experience and can improve their situation.

Next, we will refer to the ways to solve this problem within the ICC, which we are sure will influence this process at the national level as well.

2. General provisions regarding the regime of victims' participation in the International Criminal Court

The wording of the provisions reflecting the participation of victims in the founding documents of the ICC indicates that the drafters intended to leave a wide margin of maneuver to the judges to effectively structure the system of victims' participation before the Court. In the meantime, a general and often less coherent formulation imposes a series of substantive and procedural legal questions. The first decisions adopted by the preliminary Chambers reflecting the problems of the victims, provide a first idea regarding the complexity of the subject, including the importance of a future commitment established by common agreement between the structures of the ICC for a future evaluation. Article 68(3) of the Rome Statute (the fundamental provision concerning victims) establishes the basic rule for the participation of victims in proceedings: "Where the personal interests of victims are affected, the Court must allow their views and concerns to be presented and considered at the stages of the procedure to be determined appropriate by the Court and in a manner not prejudicial or inconsistent with the defendant's rights and a fair and impartial trial. Such opinions and concerns may be presented by the legal representatives of the victims if the Court deems it appropriate, in accordance with the Rules of Procedure and Evidence".²⁰

Article 68 of the Rome Statute is supplemented by a relatively complex regime of provisions that shed light on what it means to "allow their views and concerns to be presented and examined". Some of these provisions are included in the Statute, while most of them appear in the Rules of Procedure and Evidence (RPP) of the ICC²¹, given that rule 85 contains the definition of the victim and follows rules that regulate participation, legal representation, notification, as well as other essential procedural matters. It is obvious that this regime contains numerous uncertainties that still need to be studied by the Court in the interpretation of the Statute and the RPP. Some of them will be the subject of the decisions of the judges of the Pre-Trial Chambers I and II and sometimes of the Appeals Chamber after the first important decision regarding the victims of January 17, 2006, in which the Pre-Trial Chamber I²² admitted that a group of addressees could participate as victims in

¹⁹ Idem.

²⁰ In Romanian available at: <http://translate.google.com/translate?hl=ro&langpair=en%7Cro&u=http://untreaty.un.org/cod/icc/statute/romefra.html>, consulted on 18.10.2023.

²¹ In Romanian available at: <http://translate.google.com/translate?hl=ro&langpair=en%7Cro&u=http://www1.umn.edu/humanrts/instree/iccrulesofprocedure.html>, consulted on 18.10.2023.

²² January 17, 2006, Decision on requests to participate in the procedures VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101, available online: http://www.icc-cpi.int/library/cases/ICC-01-04-101_French.pdf, consulted on 18.10.2023.

the investigation procedure regarding the situation in the Democratic Republic of the Congo (DRC) - later "victims of the situation".²³ Despite the considerable number of decisions adopted in relation to the situations that are the subject of an investigation, as well as the case *Le Procureur v. Thomas Lubanga Dyilo* (subsequently *the Lubanga case*),²⁴ numerous procedural and substantive issues that reflect the participation of the victims remain unresolved, such as: what do we mean by "personal interests" of a victim, "views and concerns" exposed, what are the requirements regarding these presentations and which stages of the procedure can be considered necessary for the participation of victims. The issue of victims' participation at the investigation stage, its consequences for the balance of interests, as well as the general issues related to damages and incompatibility with the rights of the defense and the principles of a fair trial will still have to be resolved. In addition, some practical issues such as the legal representation of victims, the collective participation of victim groups, the form and methods of presentation, problems related to the criteria for establishing evidence and many other points will have to be evaluated more precisely.

3. Diversity of participation regimes

The structure of the Statute and the RPP, supported by rule 92(1) of the RPP, let us expect that the drafters have established various systems of victim participation. At least two of them are easily identified - which reflect the institution of "representatives" and the submission of "observations" to chapter II of the Statute and participation *stricto sensu*, the general norm, by article 68(3) of the Rome Statute and rule 89 of the RPP.

The first system of participation in Chapter II of the Rome Statute, composed of the provisions of Article 15(3) (authorizes the Prosecutor to initiate investigations on his own initiative) and Article 19(3) (disputes the jurisdiction of the Court or the admissibility of cases), takes effect too early, at a crucial stage, when the launch or continuity of the proceedings is at stake. Article 15 of the Rome Statute seems to be the logical consequence of the investigation started by the Prosecutor on his own initiative, when the victims are an important source of information. Regarding Article 19(3) of the Rome Statute, the observations of the victims are essential for the evaluation of challenges to the jurisdiction of the Court, or the admissibility of a case monitored by the state or the defense, if they present a more objective point of view, they are not dictated by neither political nor personal interests. No formal application procedure is necessary for this form of participation, which consists of submitting observations and contacting representatives. The second participation system appears more complex and allows for wider participation. It is based on the provisions of article 68(3) of the Statute and rules 89 et seq. of the RPP, as well as the Court Regulation. The application procedure described in rule 89 of the RPP begins with a written application submitted to the Registrar, who sends a copy of the application to the Prosecutor and Defense. They have the right to respond within a deadline set by the competent Chamber. The chamber can accept the request and stop the procedure in question, including the participation methods, or reject the request, if it considers that the author is not a victim or that the conditions set in paragraph 3 of article 68 of the Statute are not met. If an application has been rejected, the appeal against the decision is not allowed, but the addressee can submit a new application at a later stage of the procedure.

Finally, a specific victim participation system was established for the reparation procedure under Article 75 of the Rome Statute. In the ICC system, reparations include restitution, compensation and rehabilitation. The inclusion of a possibility to obtain reparation for victims, similar to the procedures for claiming damages-interests known in civil law systems, is considered revolutionary in international criminal law. Being integrated into the ordinary procedure, it constitutes a form of additional civil procedure in the criminal process. These differences in procedure are, among others,

²³ For example in: Prosecution's Reply under Rule 89(1) to the Applications for Participation of Applicants a/0106/06 to a/0110/06, a/0128/06 to a/0162/06, a/0188/06, a /0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06 and a/0224/06 to a/0250/06, 25 June 2007, ICC-01/04-346, available online: http://www.icc-cpi.int/library/cases/ICC-01-04-346_English.pdf, consulted on 18.10.2023, p.11 et seq.;

²⁴ ICC-01/04-01/06, available online: http://www.icc-cpi.int/library/about/newsletter/10/fr_03.html, consulted on 18.10.2023.

highlighted in the regime of the distinct procedure,²⁵ establishing a "repair procedure", the specifics of which will be addressed below.

4. Victim, part of a situation or a case

A controversy opposed the Pre-Trial Chambers and the Prosecutor on the subject of the possibility for the victims to participate already in the investigation phase of a situation - as it appears from the position of the Pre-Trial Chamber I in its decision of January 17, 2006 - or only at a later stage of the procedure - as it claims the prosecutor.

The distinction between the stage of the "situation" and that of the "case" is not directly mentioned in the founding documents of the ICC, it emanates from the structure of the Statute. For example, Article 13 of the Statute, defining the mechanisms for blocking the exercise of the ICC's powers, mentions a situation that may include one or more crimes defined in Article 5 of the Statute. Article 14 of the Statute, which reflects the submission of a situation by a state party, mentions "a situation in which one or more crimes have been committed". Article 15 of the Statute does not refer to a "situation" but to a "case", while the use of the term "case" in the context of the *proprio motu* inquiry authorized by Article 15 appears to be misleading. While a "situation" is generally described in terms of temporal and territorial parameters and may include a large number of incidents, presumed culpable and thus potentially indictable acts, a "case" denotes an incident with one or more specific suspects, occurring in a situation that is the subject of an investigation and providing the place for prosecutions as a result of issuing an arrest warrant. The preliminary chamber claimed, following an in-depth textual, contextual and theological analysis of the Statute and the relevant rules, that the participation of the victims at the level of the situation was not excluded and "as such, it did not give the impression that the investigation did not present the level of integrity and objectivity of the request and did not contravene the fundamental principles of effectiveness and security". The prosecutor, for his part, accepting the definitions of the terms "situation" and "case" given by the preliminary Chamber, emphasized that the defining elements of a victim according to rule 85 of the RPP must be read in context with article 68(3) of the Statute in order to qualify a person as victim. He stated in all his conclusions that allowing the general participation of victims at the level of the situation has no basis in the Statute.²⁶ This is why a qualification in two types is favorable, at the beginning through the general qualification of the victims according to rule 85 of the RPP, followed by an evaluation, which aims to determine whether the victim's personal interests are directly reached by the procedure he wants to participate. This personal interest must be judicially recognized and directly related to a specific point of the procedure, which is generally not the case at the level of investigation regarding a situation. The preliminary chamber, anyway, considers that the victim's personal interests were generally targeted at the investigation stage, since the participation of the latter could serve to establish the clarity of the facts, sanction the perpetrators of the crimes and finally - the request for reparations for the damage caused.

This decision, which seems to be correct from a purely technical point of view, also addresses some problems: firstly, because it can affect the rights of the suspect/accused, the independence of the investigation and, what seems to be more important – the speed of the procedure as a whole or. Second, because the Pre-Trial Chamber did not define the procedural rights of victims. Moreover, a formal participation of the victims at this stage is unlikely and brings some advantage, especially since it is expressly provided for at the crucial moment of the authorization of the investigation, in case the jurisdiction of the Court is engaged at the initiative of the Prosecutor according to Article 15(3) of Statute. In relation to other trigger mechanisms (submitted by a state or by the Security Council according to Article 13 a) and b) of the Rome Statute), the control mechanism provided for

²⁵ This procedure is provided in particular in Sub-Section 4 of Section III of the RPP; equally in articles 76(2) and 82(4) of the Statute and, among others, in rules 91(4) and 153 of the RPP.

²⁶ Prosecution's Observations on the Applications for Participation of Applicants a/0004/06 to a/0009/06 and a/0016/06 to a/0046/06, August 22, 2006, ICC-01/04-01/06-345, available online: http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-345_English.pdf, consulted on 18.10.2023, par.10.

by Article 53 of the Rome Statute provides for the participation of victims based on rules 92(2)²⁷ and 89 of the RPP. Contrary to Article 15, Article 53 of the Rome Statute applies to all trigger mechanisms. This article provides not only the evaluation of the competence of the Court and the admissibility of the case, but equally the examination of the case if an investigation or prosecutions serve the interests of justice, including the interests of the victims. The notion of "interests of justice" remains vague; it is possible to imagine situations where an investigation will put victims in extreme danger and prevent witnesses from cooperating with investigators. Meanwhile, such a scenario seems possible in any investigation conducted by the ICC. As a result, the Prosecutor's Office was forced to conduct most of its investigations into the situation in Darfur outside of Sudan.²⁸ The pre-trial chamber did not reveal why the participation of the victims was necessary before these decisive proceedings. We can talk about its potential advantages, in particular the opposition to too much latitude of the Prosecutor, the improvement of the fairness of the investigation and the pressure exerted on the Prosecutor to start an investigation, to materialize in the absence of formal supervision by the Pre-Trial Chamber, according to the provisions of the articles 15 and 53 of the Statute. On the contrary, the disadvantages of a quick participation of the victims also seem to predominate: the Prosecutor affirmed at fair value that the Court's appeals, which could be better used for a wider participation of the victims in the procedure, are needlessly wasted by dealing with a large number of addresses before the procedure was launched. A simple calculation carried out on the subject of the decisions of the Pre-Trial Chamber adopted in the *Lubanga* case clearly demonstrates: out of the total of 45 decisions adopted by the Pre-Trial Chamber from the moment the arrest warrant was issued in February 2006 until the case was sent to the First Instance Chamber in September 2007, 20 decisions (13%) directly referred to the participation of victims (without taking into account decisions regarding protection issues).²⁹ Moreover, allowing the victims to participate at the level of the situation, without knowing if they have anything to do with the subject of the investigation or the cases that have already started, may have the consequence of not accepting the largest part of the "victims of the situation" in a concrete case held before the ICC - either because the specific incident in relation to which they became victims will not be the subject of an investigation in any case, or because it will not be the subject of a specific case either. These people therefore find themselves, following some expectations and hopes, a fact that can constitute a danger for their security without obtaining any advantages. Such a situation was created in relation to a group of victims, whose participation was accepted by the historic decision of January 17, 2006: they did not meet the conditions to benefit from the status of victims for the *Lubanga* case.³⁰ The second argument brought by the Prosecutor - barrier to the objectivity and independence of the investigation - seems to be equally significant, especially because of the risk of exploiting the victims and their needs at the end of the political process and the temptation to manipulate the investigation. Another major inconvenience can be the imbalance created between the interests of the victims and those of the accused by the participation of the victims before the existence of a case, given that obviously no solid defense is possible, even if an ad hoc defense counsel is appointed, so as it happened in the DRC situation.

The Appeals Chamber³¹ unfortunately mentioned, on the occasion of correcting the direction adopted by rejecting the Prosecutor's request, to proceed to an extraordinary examination of the decision of the Preliminary Chamber regarding the refusal of the right to appeal the decision of

²⁷ The rule in question is formulated as follows: "In order to allow them to apply to participate in the procedure in application of rule 89, the Court shall notify the victims of the decision of the Prosecutor to initiate the investigation or not to initiate the prosecution based on article 53".

²⁸ See: Appeal filed by the Prosecutor under Article 58-7, February 27, 2007, ICC-02/05-56, available online: http://www.icc-cpi.int/library/cases/ICC-02-05-56-tFR_French.pdf, p. 30.

²⁹ Elisabeth Baumgartner, *Aspects of victim participation in the proceedings of the International Criminal Court*, „International Review of the Red Cross“, Vol. 90, No. 870, June 2008 p. 414.

³⁰ See: Decision of Pre-Trial Chamber I regarding the requests to participate in the procedure presented by Addressees VPRS 1 to VPRS 6 in the case *Le Procureur v. Thomas Lubanga Dyilo*, June 29, 2006, ICC-01/04-01/06-172, available online: http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-172_French.pdf, consulted on 18.10.2023.

³¹ The decision regarding the Prosecutor's Appeal to obtain the extraordinary examination of the decision adopted on March 31, 2006, by which the Pre-Trial Chamber I rejected a request for authorization to interject the appeal, July 13, 2006, ICC-01/04-168, available online: http://www.icc-cpi.int/library/cases/ICC-01-04-168_tFrench.pdf, consulted on 18.10.2023.

January 17, 2006, for purely procedural reasons - from the point of view from a strictly legal point of view, his considerations being correct³².

4.1. Analysis of specific situations in which the establishment and exercise of transitional justice was prevented

The study will try to clarify whether the end of an armed conflict provides the necessary and sufficient conditions to allow the implementation of transitional justice measures. To answer this question, we will examine the imperatives of the process of disarmament, demobilization and reintegration to the demands of transitional justice, taking the *Congo case as an example*.

The Democratic Republic of Congo (DRC) experienced one of the longest dictatorships on the African continent. Marshal Mobutu came to power 1965, a only to lose it during the "liberation war" in which Uganda and Rwanda participated in 1996-1997. This war, as well as the next one, started in 1998, will cause, according to sources, from 3 to 4 million deaths in addition to the victims of the Mobutu regime's repressions.³³

At the moment, if the disarmament operations allowed the treatment of approximately half of the combatants, then in terms of justice, the balance sheet of the transition is practically empty. The project of an international tribunal for the DRC was not realized, the International Criminal Court (ICC) started a trial against a single accused, the Truth and Reconciliation Commission provided for by the Global and Comprehensive Agreement was unable to assume its role in reparation measures in the interest of the victims³⁴.

In DRC, as shown by the Second International Conference on Disarmament, Demobilization and Reintegration (DDR) and Stability in Africa held in Kinshasa between June 12-14, 2007, the imperatives of DDR processes explain the lack of progress in transitional justice.³⁵

As a result, in order to allow the disarmament, demobilization and reinsertion of over 300,000 combatants, the guarantees of impunity for military personnel are not sufficient, in addition to this, the necessity of their integration is also imposed, including for the purpose of obtaining a guarantee of laying down their arms.³⁶

In such a context, DDR operations not only do not contribute to the effectiveness of transitional justice (the refusal to transmit the information obtained in this framework to allow will only be an elucidation of the violations committed), but represent a double obstacle.

On the one hand, they (the operations) do not allow justice to deal with the cases of the past, and on the other hand, they create a deep sense of injustice among the victims, who find that the international community not only supports the impunity of the perpetrators, but enshrines a real obstacle as a consequence of the reintegration of the main people responsible for violating human rights, ensuring them high-level positions within the law enforcement forces in full process of reorganization, and this international community, for its part, is not able to provide adequate compensation to the victims.

It is not about denying military necessities. DDR operations in war situations similar to those that destroyed the DRC during the 90^s of the 20th century are necessary and extremely complex. In

³² Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appel, 25 April 2006, ICC-01/04-141, available online: http://www.icc-cpi.int/library/cases/ICC-01-04-141_English.pdf, consulted on 18.10.2023.

³³ The Population Data.net center conducted two studies in the "International Rescue Committee", respectively from April 2003 and December 2004, which reflect the number of victims of war since the end of the 20th century 90^s. The first balance was 3.3 million dead, the second – 3.8 million. available online: http://www.populationdata.net/humanitaire/guerre_bilan_rdc2004.html-26k, consulted on 18.10.2023.

³⁴ On March 8, 2010, the First Instance Chamber III of the ICC decided to set July 5, 2010, as the opening date of the trial in the case of Congolese Jean-Pierre Bemba Gombo, ex-vice-president of the PRC, accused of committing crimes against humanity on the territory of the Central African Republic in period 2002-2003, available online: <http://www.un.org/apps/newsFr/storyF.asp?NewsID=21393&Cr=Bemba&Cr1=>, consulted on 18.10.2023.

³⁵ Final report from the Deuxième Conférence Internationale sur le DDR et la Stabilité en Afrique. Kinshasa, Democratic Republic of the Congo. 12-14 June 2007, available online: http://www.un.org/africa/osaa/reports/DDR_French%20unedited.pdf, consulted on 18.10.2023.

³⁶ Idem.

the absence of such operations, the conflict will drag on for decades and will end by addressing the issue of the very existence of the state in the exercise of its essential functions, as is currently the case in Somalia. The question that is asked in the given case is whether in reality transitional justice offers an alternative in such a context?

In the DRC, even the right to the truth seems inconceivable at the moment, meanwhile the priority is focused on the needs of disarmament.

5. Geopolitics, selective justice and refusal

5.1. The Great Lakes Region

An even more negative balance is *the case of Burundi*. Despite several acts of genocide (1966-1971 and 1993) documented among others in the report prepared by B. Withaker³⁷ for the sub-commission on human rights (1984), in those of the Special Report on Burundi,³⁸ as well as in the documents of the Security Council,³⁹ the transaction towards a return to peace was not accompanied by some effort of justice - retributive or restorative - to deal with these particularly serious violations.⁴⁰

In neighboring Rwanda, the 1994 genocide on the contrary, thanks to pressure from international public opinion, and not only from the institutions of the United Nations and the African system, in addition to shaking the international community as a whole, also became the subject of an ad hoc tribunal empowered to judge those responsible for massacres and other serious violations that took place in this context. Among other things, the Rwandan justice resorted to the traditional local courts to try the people who were involved in committing the crimes of genocide.

We can regret the fact that the United Nations did not accept the overall treatment of the situations in Burundi and Rwanda within the same court.

In principle, an act of genocide should not be accepted in any form as a response to another act of genocide, Tutsi victims massacred by Hutu in Rwanda should not be put on a scale with Hutu victims massacred by Tutsi. It is shocking that acts of genocide occurred in two neighboring countries, which had identical or similar causes, while one was the object of a legitimate reaction, and the other was ignored.

This difference in treatment by the international community is explained neither by the scale of the massacres, nor by their character, but by geopolitical considerations, which led some powers, especially the US, to insist that the Rwandan genocide be treated outside the examination of the Burundian genocide or of the crimes committed by Kagame's army.⁴¹ This discrimination in treatment can only lead to new tensions in the region. In principle, if, despite all the imperfections of the Arusha tribunal and the "gacaca" tribunals, we can estimate that an effort on the part of justice has been made in Rwanda, a fact that will have to help a transition towards a society with increased respect for right,

³⁷ Rapport Whitaker, *Revised and updated report on the question of the prevention and punishment of the crime of genocide*, United Nations Economic and Social Council Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Session 38, point 4 on provisional agenda, E/CN.Sub.2/1985/6 – 2 July 1985, available online: http://www.armenian-genocide.org/Affirmation.169/current_category.6/affirmation_detail.html, consulted on 18.10.2023.

³⁸ The first report on the situation of the rights of the citizens of Burundi, presented by the Special Rapporteur M. Paulo Sérgio Pinheiro, according to UN Commission Resolution 1995/90 E/CN.4/1996/16/Add.1, 27 February 1996, available online: <http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/2d35229e1d2dbbfe802566a3003642e2?OpenDocument>, consulted on 18.10.2023.

³⁹ The Security Council wanted to establish the facts of the events that occurred in Burundi by the preparatory commission (Report S/1995/157 of May 20, 1994); a mission (Report S/1995/163 of March 9, 1995) and an investigative mission (Report S/1996/682). The latter, in her conclusions, states that she has accumulated sufficient evidence to establish that acts of genocide were perpetuated against the Tutsi minority, among other things she established that elements of the Burundian army and gendarmerie and Tutsi civilians triggered a massacre of men, of Hutu women, children, but even if they admit that they did not make any effort to stop and retaliate against such acts, according to her - due to the impossibility of obtaining evidence that would confirm the fact that the repression was planned or ordered, available online: <http://www.tutsi.org/onu.html>, consulted on 18.10.2023.

⁴⁰ M. Paulo Sérgio Pinheiro, *report cited*.

⁴¹ Florence Hartmann, spokesperson for Carla del Ponte at the International Criminal Court between 2000-2006, in the work: *Paix et Châtiment, Les guerres secrètes de la politique et de la justice internationales*, Flammarion, September 2007, discloses the role played by the States United in the release from prosecution in 2003.

forgetting the situation in Burundi cannot only strengthen the feelings towards the Hutu victims in that country by the fact that the violations committed against them are not appreciated by the international community as being as serious as those committed by the Tutsis in Rwanda.

The international community's refusal to treat the crimes committed in Burundi according to their gravity has seriously affected the development of this society.

5.2. Asia

In Cambodia, the genocide⁴² or self-genocide⁴³ as some define it, which was triggered between 1975 and 1978 by the Khmer Rouge, did not end until the Vietnamese intervention in December 1978. According to the generally accepted assessments, these massacres totaled a number of deaths representing a third of the country's population. The issue of justice was "forgotten" based on several factors.

For 14 years, the USA, China and their allies, based on a refusal to change the regime following a foreign intervention, allowed the artificial survival of the Pol Pot regime, making any international action impossible. The documented situation in the People's Republic of Kampuchea was not taken into account by the international community during the entire period, moreover, the Khmer Rouge ambassador to the UN condemned the violations committed by the "Vietnamese invader".⁴⁴ In 1979, the Human Rights Commission refused to look into the massive violations committed by the Khmer Rouge and which lasted for more than a decade, international institutions systematically refusing to prosecute those responsible for this genocide.

In the next phase, the negotiations in the interest of restoring peace took place in 1989 and which claimed to involve the Khmer Rouge in the debate process, which obviously excludes any reference to the crimes against humanity committed by them. Only with the conclusion of the Paris Agreement in 1991 was reference made to the policies and practices of the past.

Two attempts to proceed with a trial of the atrocities committed during the Pol Pot era have collided with previously unseen difficulties.⁴⁵ The revolutionary people's court that tried Pol Pot and Ieng Sary in 1979 appears as a justice imposed by the Vietnamese liberator/invaser and did not evoke an adhesion and recognition from the Cambodian population.

In 2003 the UN and the government of Cambodia decided on a proposed process for agenda 2007. The proposed system was that of a tribunal composed of 17 Cambodians and 8 internationals.⁴⁶ They are empowered to prosecute violations of Cambodian criminal law, human rights and humanitarian law.⁴⁷ In principle, the judgment risks being limited to the last survivors, given that the main responsible, including Pol Pot, are dead. Only five accused were arrested. Another argument is that despite an enormous responsibility for the atrocities committed 30 years ago, the respective process appears as a selective one, having as "symbols" people who "survived". The selectivity of the authors and the fact that they will be tried for crimes committed against the victims of the previous generation constitute two elements that are in contradiction with the goals pursued by the transitional justice which claims to treat the legacies of the past in their entirety and with as much delay as possible.

⁴² Referring to the definition of genocide, we note that the relevant articles in the Convention allow us to establish in a precise manner the case in which this qualification can and must be mentioned. Anyway, in practice, the recognition or non-recognition of genocide is based more on political than legal considerations.

⁴³ Gerard Chaliand, Jean Lacouture, Andre Versaille, *Voyage dans le demi-siècle: Entretiens croisés avec André Versaille*, Editions Complexe Bruxelles, Paris 2001, p. 75 et seq. Lacouture confirms that he was the first to use this concept, but also indicates its ambiguity.

⁴⁴ Raoul Marc Jennar, *Late and selective justice*, Le Monde diplomatique. Archives, October 2006, available online: <http://www.monde-diplomatique.fr/2006/10/JENNAR/14006>, consulted on 18.10.2023.

⁴⁵ See: Center de droit international de l'Université libre de Bruxelles, *L'intervention du Vietnam au Kampuchea en 1978-1979 pour une compilation de la position des Etats*, available online: <http://www.ulb.ac.be/droit/cdi/Site/Vietnam%20Kampuchea%201978-1979.html>, consulted on 18.10.2023.

⁴⁶ Information on the composition and jurisdiction of the Extraordinary Chambers of the Court of Cambodia available online: <http://www.eccc.gov.kh/french/default.aspx>, consulted on 18.10.2023.

⁴⁷ See: Vitalie Gamurari, Alexei Barbăneagra, *War Crimes*, Ed. Reclama SA., Chisinau, 2008, p. 217-227.

6. Conclusions

One of the pressing issues related to the victims' participation regime at the ICC is establishing the balance between the victims' interests and other criminal procedural interests. I previously stated that this participation compromises the balance between prosecution and defense, a fact that goes against the right of the suspect or the accused to a fair and speedy trial, as well as the interest of the Prosecutor to present the evidence and to present the victims as witnesses. In addition, the participation of victims, as a rule, if it is accompanied by protective measures, can increase the public interest in a public hearing, which aims to provide the possibility of verification without hindering the administration of justice. Among others, there are other interests, specific to the ICC as a body created by a treaty, it is about those of the party states – the speed of the procedures and the limitation of expenses. As I mentioned before, the rapid participation of the victims in the investigation phase may go against the interest of the Prosecutor to conduct an investigation objectively, impartially and confidentially. The balance between these competing interests must be taken into account by judges when granting access to victims, especially when defining the scope and modalities of their participation. The problem of the balance of interests can equally be viewed in a broader context when addressing general aspects of the objectives that regulate the institutions of correction and sentencing in international criminal law.

The participation of victims imposes another important issue that must be taken into consideration – knowing how to treat victims who could be key witnesses, an issue that seems to be quite pertinent in international criminal law procedures, which, to a large extent, depend by the testimonies of the victims. While the *ad hoc* Tribunals have only to deal with the problem of excessive instrumentalization of victims by the parties, the ICC will face a much more complex dilemma – to accept victims who have an interest in participating as witnesses in the proceedings. Neither the Statute nor the RPP prohibit victims from participating in the testimony procedure. However, a person who participates as a victim in the ICC proceedings could be excluded from the witness list, in particular because of the quasi-party position, which is similar to that of a civil party in the civil law system, because of the impact it has in relation to the guarantees of a fair trial. Establishing that the "broadened" rights of participation are reserved for victims' representatives, as we mentioned, we can assume that a victim's personal commitment does not reach that level that would make his participation incompatible with the role of witness. However, even if victims can be heard as witnesses, their testimony could be somewhat weakened by some aspect of partiality and by the vested interests they obtain in the outcome of the procedure, namely reparations. Consequently, the strong opposition from the Prosecutor's side in relation to the quick and important participation of the victims, gradually becomes clear.

However, a gap remains between victims who participate in an ICC procedure and those who do not. Another factor taken into consideration in the chapter of this selective subject is that of the protection of the victims. We note that at the moment only procedural measures have been taken by the Court to protect the victims, although its system also provides means of protection outside the Court. If we consider that the security in the regions where the ICC investigations take place remains extremely unstable and unsafe, including during the investigation, the fact of selecting some victims or some witnesses could cause inequalities and problems, not only for those who need to be protected, but equally for the others. One of the solutions proposed to compensate for the high degree of selectivity inherent in international criminal jurisdiction was the association with other mechanisms of transitional justice, such as those of truth commissions, serving as an example the case of Sierra Leone.⁴⁸

And finally, let's not forget that prosecution is considered the best way to fight impunity. This idea is widespread, even if it is not unanimously accepted, given that in international criminal law only a small part of criminals are tried and that this was one of the causes of the creation of international criminal tribunals for the former Yugoslavia and Rwanda, as well as the establishment

⁴⁸ See: Vitalie Gamurari, Alexei Barbăneagra, *op. cit.*, pp. 227-235.

of the International Criminal Court.

In principle, the social reconstruction and restoration so necessary for a transition from a situation of internal conflict to a sustainable and stable socio-political framework, often implements multiple forms of justice that include the objective of retribution through reparation, contribute to the resolution of the conflict between the parties involved. In this way, democracy and sustainable peace, in a society emerging from a conflict, require not only a vindictive justice, but also the reconciliation between the victims, between the perpetrators and the society through the forms of restorative justice.⁴⁹ The restoration of the legal regulation is essential so that the victims, the perpetrators and the community *as a whole* can rebuild the society in which they live on new foundations.

This study, which is just the beginning of an extensive analysis that will reflect the ways and methods of applying transitional justice in post-conflict societies, will allow us to try to address, first of all, the problems of the victims of these conflicts, including the forms of reparation, thus giving the RIGHT the opportunity to promote its main objective - *ensuring and promoting fundamental human rights and freedoms*.

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