JUDICIAL ADVANCES IN COMBATING SYSTEMATIC AND GENERALISED ABUSES ON HUMAN RIGHTS

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Abstract

Managing systematic and generalised abuses on human rights continues to animate the academic world, practitioners, the civil society but also the public at large. People have resorted to amnesty, to criminal trials specific to the classic/traditional justice, to instruments of transitional justice such as Truth and Reconciliation Commissions, focusing on the rehabilitation of victims, on reparation policies, on reconciliation.

The present paper, based on desk research, intends to show the manner in which international practices in the field of criminal justice and that of transitional justice regarding managing abuses perpetrated by certain political regimes have evolved. Thus, it will be observable how the retributive practices of criminal justice, focused on the punishment of those guilty, have been complemented by the restorative practices of transitional justice, which offer a particular attention to the victims. In the initial stages, military/international tribunals and international criminal courts that focused on retributive measures were established. Subsequently, the creation of the International Criminal Court shows how managing past abuses demands conjugated, complementary solutions, namely both consolidating the classic/traditional act of justice and applying the instruments of transitional justice. To this end, art. 75 of the Rome Stature introduces the notion of compensation as a reparatory measure and art. 79 establishes the creation of the Trust fund in support of victims. Hybrid tribunals (Lebanon and Cambodia) consolidate the path opened by the International Criminal Court giving a central role to victim reparations, to consolidating justice and national reconciliation.

Keywords: *transitional justice, restorative justice, International Criminal Court, Inter-American Court of Human Rights, International military tribunals, International criminal courts, Hybrid tribunals, Amnesty.*

1. Introduction

As the change in political regimes and, as a result, of the transitional processes intensified at the international level, restorative mechanisms, specific to *transitional justice*, have developed as well alongside the criminal instruments specific to retributive justice. Together with traditional justice, which sanctions the everyday, a transitional justice (TJ) that sanctions the exceptional[1] has developed as well over the past decades. If the former is easily identifiable, the same cannot be stated about the latter.

In the report of the UN's secretary general, *transitional justice* is defined as encompassing the various processes and mechanisms put into practice by a society in order to cope with the abuses *committed in the past with the purpose of establishing the responsible parties, to administer justice and to allow for reconciliation*.[2] In the present paper it is considered that transitional justice is a type of justice adapted to the unique conditions of societies that are in the process of transformation and that have lived through systematic and widely spread abuse of human rights. Most of the problems that result from past abuses are often very complex. Transitional justice proposes a set of punitive, reparatory, historic, administrative, and constitutional measures whose function is to delegitimize at all levels the leadership from the old regime and to legitimize the new one, which takes on the changing and democratization of societies.

A first observation refers to the purpose of the mechanisms of transitional justice, namely: punishment of the guilty parties, recognition of abuses, reconciliation between the sides previously in conflict, proposal of programmes for reparations, public apologies, memorials, building democratic institutions for the prevention of such abuses, etc. No matter the targeted purpose, these aforementioned mechanisms have the same aim: activating and mobilizing resources existing at the level of the social and political systems in order to build a new type of society. According to Pablo de Greiff, *the criminal justice represents an endeavour against those guilty, without directly focusing on the victim.* This is the novelty element of the transitional justice, focusing on victims and proposing a set of measures for reparations of a material and/or symbolic nature. Moreover, transitional justice is characterised by flexibility, which implies an adaptation according to the socio-historic context, proposes meetings between victims and oppressors, public hearings, in order to practice forgiveness.

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[1] Christine Bell, *The "New Law" of Transitional Justice*, paper presented at *Building a Future on Peace and Justice* Conference, Nuremberg, 25-27 Juin 2007.

[2] UN Secretary General," The rule of Law and Transitional Justice in Conflict and Post-Conflict Societies", S/2004/616, p. 4.

Transitional justice is based on the presumption that finding the truth about the abuses committed and recognising it at the official and public level lead to the rehabilitation of the victim.

The second observation targets the relation between the classic/traditional justice and the transitional one. In certain cases, especially after the founding of the International Criminal Court, confusions can be created regarding the role that each of the two types of justice exercise during *periods of transition*. Both the classic criminal justice and the transitional one (especially the Truth and Reconciliation Commissions) carry out investigations on the actors responsible for the abuses committed during the old regime, thus contributing to the recognition of the sufferings and losses perpetrated on the victims. Furthermore, they intend to prevent and block similar abuses from being committed, they propose reparation packages for the victims and have as a desideratum the accomplishment of reconciliation. It could be believed that the line between the two types of justice is not clear and, thus, there could be overlaps in accomplishing the tasks by public institutions.

For more clarity, a position can be mentioned, namely that of Claude Jorda, the former president of the International Criminal Court, who argues, in one of his interventions in the Hague in 2001, in favour of founding a transitional justice mechanism, namely a Truth and Reconciliation Commission in Bosnia Herzegovina. Jorda states that the actions of such a commission could *complement* and even *consolidate* the actions of the International Criminal Court in its mission of accomplishing reconciliation.[3] The Truth and Reconciliation Commission could be, according to Jordan, a setting where those who resorted to reprehensible acts could be interrogated and they could confess to the abuses committed, which would mean a step forward in them recognizing the sufferings of the victims. Moreover, the Truth and Reconciliation Commission represents a setting where, based on the victims' testimonies, reparations are proposed for the losses they suffered, a setting where the pattern of past violent actions, the historic, political, sociological and economic causes of systematic and generalised abuses could be analysed so that to prevent the repetition of similar situations. Last but not least, the Truth and Reconciliation Commission represent a setting for dialogue and collective debates that generate information for configuring the conflict's memory.

2. Argument

2.1. Amnesty

A first approach[4] in managing systematic and generalised past abuses focused on amnesty and amnesia, the practice of forgetting being the proposal for repairing the abuses committed by certain repressive regimes. *Recalling the crimes committed as well as their perpetrators was considered as damaging for the objective of national unity*.[5] Despite that, during the last decades, the international system has equipped itself with a legal basis and mechanisms against impunity, researchers have found a tendency to increase the number of amnesty acts at a global level. This is deduced from the information presented in the database regarding amnesties (Amnesty Law Database 2017) created by Louise Mallinder, where it can be observed that the approximate number of amnesties after World War II had a tendency to increase reaching 600 such laws in the past years.[6] Amnesty was and still is considered by some newly installed governments as the condition to start "a new page in the national history". In certain cases, taking responsibility and/or the criminal prosecution of those responsible of past abuses were not even brought into discussion. To this end, it is worth mentioning the former military dictatorships of Latin America – Peru, Chile, Argentina, Uruguay – which, in the context of the transition towards democracy, adopted amnesty laws, thus choosing the path of impunity. Professor Louise Mallinder also coordinates, together with his colleague Tom Hadeen, the project entitled *Belfast Guidelines*.[7] This guide examines the legality and legitimacy of amnesties in states that went through periods of transition either from a certain type of regimes - authoritarian, totalitarian- to a democratic one, either from periods marked by armed conflicts and humanitarian crises to political and social stability.[8]

However, the jurisprudence of the Inter-American Court of Human Rights (IACHR) acted as a

[3] *Le Tribunal Pénal International et la Commission vérité et conciliation en Bosnie-Herzégovine*, Communiqué de presse, available at http://www.icty.org/fr/press/le-tribunal-pénal-international-et-la-commission-vérité-et-conciliation-en-bosnie-herzégovine, accessed March 2022.

[4] William Rasch, *Justice, Amnesty and the strange lessons of 1945*, Ethics & Global Politics, 2010, 3(3), pp. 239-254.

[5] Pierre Hazan, *Les dilemmes de la justice transitionnelle*, Mouvements, 2008, 1 (53), pp. 41-47.

[6] Louise Mallinder, *Atrocity, Accountability, and Amnesty in a 'Post-Human Rights World'?*, Paper Series, 09/2017, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3051142, accessed March 2022.

[7] University of Ulster, Transitional Justice Institute, *The Belfast Guidelines on Amnesty and Accountability*, available at https://www.ulster.ac.uk/__data/assets/pdf_file/0005/57839/TheBelfastGuidelinesFINAL_000.pdf, accessed March 2022.

[8] In order to get a different perspective on the subject, it can be consulted Elena E. Ștefan, *Legalitate și moralitate în activitatea autorităților publice*, in Revista de Drept Public, 2017, 4, pp. 95-10.

regulatory system. For instance, the *Barrios Altos*[9] and *La Cantuta*[10] cases against Peru make reference to the massacres from 1991 and 1992, respectively, ordered by the then acting president, Fujimori, and executed by paramilitary groups. Despite the fact that the enforcers and the coordinators resorted to acts of torture, to arbitrary executions, they were exonerated from responsibility, on the basis of the Amnesty Laws no. 26479 and no. 26492 adopted in 1995. In the case of *Barrios Altos v. Peru*, the Inter-American Court of Human Rights considered that the adoption of the Amnesty Laws is incompatible with its spirit and principles, with the legal obligations on the part of the Republic of Peru according to art. 1 (1) and 2 of the American Convention on Human Rights (ACHR).[11] The Court also decided that the rights of the victims were violated as follows: *the right to life* according to art. 4, *the right to humane treatment* according to art. 25, *the right to judiciary assistance and protection* according to art. 25, *the right to truth* according to art. 8 and 25. [12] Thus, the IACHR concluded that the amnesty laws adopted in 1995 *do not have judicial effects* and, as a result, they cannot obstruct the investigations, the identification and the punishment of those responsible in this case. [13] In the *La Cantuta v. Peru* case, the Court considered that the state consecutively violated the victims' right to juridical personality according to art. 3, to life according to art. 4, to humane treatment according to art. 5 (1), to personal freedom according to art. 7, to an equitable trial according to art. 8 (1), to judicial protection according to art. 25 of the Convention.[14] On the basis of art. 63 (1) of the ACHR, the Court decided a set of material and symbolic reparatory measures for the families and descendants of the victims: the payment of the sums of money according to para. 214, 215, 246, 248, 250, 252; free access to health services and other necessary treatments, including psychological ones; the publishing of the results and the dissemination of the truth regarding the abuses committed within 6 months from the publications of the Court's reasoning, public apologies towards the victims' families, celerity in the unfolding of criminal proceedings.[15]

In the *Almonacid Arellano et al v. The Republic of Chile* case,[16] the Court found that the killing, in 1973, of the professor who was a supporter of the Communist Party by the police forces of the Pinochet regime, is a crime against humanity. The Court showed that not starting the criminal prosecution of the perpetrators proved the state's failure in fulfilling its responsibilities stipulated in art. 1(1) and art. 2 from the ACHR. As a result of implementing the Amnesty Law no. 2191/1978, the state *violated* the right of victims to judicial guarantees according to art. 8 (1), to judicial protection according to art. 25 from the ACHR.[17] The Court found that the Amnesty Law *lacks judicial effects* and *decided on the giving of reparations* according to paragraph 164, the publishing of the acts and the operative part of the decision in a widely circulated newspaper so that they would be known to the public, the continuation of investigations and criminal prosecution of those who are guilty of committing the acts.[18]

In Argentina, the Amnesty Laws 23492/1986 and 23521/1987, respectively, have blocked for many years the investigation of crimes and abuses committed between 1976 -1983 during the military dictatorship. Uruguay, in turn, adopted the Amnesty Law no. 15848/1986 with the purpose of exonerating those responsible of committing abuses, arbitrary executions during the military dictatorship between 1973-1985. The IACHR drew the attention of the two countries onto the evident inconsistency between the Amnesty Laws and the states' obligations to respect human rights.[19] In 2005, the Supreme Court in Argentina annulled the Amnesty Laws, thus marking a victory against impunity. To this end, Miquel Vivanco, the director of the Human Rights Watch in the region, concluded that: *no matter how much time passes, the laws that block the act of justice in the cases of severe abuses of human rights represent a barrier in the path of any democratic government*.[20] Despite the shy efforts

[9] *Case of Barrios Altos v. Peru*, Inter-American Court of Human Rights, Judgment of March 14, 2001, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf, accessed March 2022.

[10] *Case of La Cantuta v. Perú*, Inter-American Court of Human Rights, Judgment of November 29, 2006, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_162_ing.pdf, acccessed March 2022.

[11] *American Convention On Human Rights*, Adopted at The Inter-American Specialized Conference On Human Rights, San José, Costa Rica, 22 November 1969, available at Https://Www.Cidh.Oas.Org/Basicos/English/Basic3.American%20convention.Htm, accessed March 2022.

[12] *Case of Barrios Altos v. Peru, op. cit.*, pp. 13-14.

[13] *Ibidem.*

[14] *Case of La Cantuta v. Perú, op. cit.*

[15] *Ibidem.*

[16] Case of Almonacid-Arellano *et al v.* Chile, Inter-American Court of Human Rights, Judgment of September 26, 2006, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_154_ing.pdf, accessed March 2022.

[17] *Ibidem*.

[18] *Ibidem*.

[19] *Inter American Court of Human Rights*, Report 29/92, Uruguay, https://www.cidh.oas.org/annualrep/92eng/Uruguay10.029.htm, consultat martie 2022; Report 28/92 Argentina, available at https://www.cidh.oas.org/annualrep/92eng/Argentina10.147.htm, accessed March 2022.

[20] *Argentina: Amnesty Laws Struck Down, Supreme Court's Long-Awaited Ruling Allows Prosecution of 'Dirty War' Crimes,* available at https://www.hrw.org/news/2005/06/14/argentina-amnesty-laws-struck-down, accessed March 2022.

at the official level, Uruguay still continues the *path* of impunity, with over 50% of the population voting against in the two referendums -1989 and 2009- organised to revise the Amnesty Laws.[21]

In Europe, Spain, for instance, adopted in 1977 the Amnesty Law with the initial purpose of refining former political detainees from the Franco governing period. In its final form however the law became an instrument that offered immunity to all perpetrators of abuses on human rights before 1976. Since the law is still in use, it has blocked the legal investigations into the abuses widely committed during the civil war (1936-1939) and under the dictatorial regime led by General Franco (1939-1975). The complexity of the situation comes from the fact that the Amnesty Law was and still is considered an indispensable step, useful in the transition process of a country towards a democratic system.[22] Spain was invited by human rights organizations, by the UN Human Rights Committee, to revise its Amnesty Law and *to respect* the treaties it has adhered to.[23] In 1977, Spain ratified the International Covenant on Civil and Political Rights, which states in art. 2(3) that *each State Party undertakes to ensure that any person whose rights or freedoms ... are violated shall have an effective remedy*.[24] The UN Human Rights Committee has solicited Spain in 2008 to abrogate the amnesty law underlying in paragraph 9 *that the statute of limitation does not apply to crimes against humanity*.[25] Based on art. 3 of the Convention, the ECHR supports, as a general principle,[26] that *no one should be subjected to torture or to inhuman or degrading treatment or punishment*.[27] Victims' organizations, the civil society, *third generation* Spaniards familiarised with human rights and international law norms[28] are joining, in turn, the trend regarding the revision of the Amnesty Law.

Starting with the 2000s, there have been a series of -quite fragmented- attempts to reposition the traumatic past and to offer victims rightful reparations. Although without satisfying results for victims' associations regarding its implementation, *Law 52/2007*,[29] known also as the *Collective Memory Law*, has been the most encompassing attempt to approach the repressive past by bringing to the forefront the reparations, the exhumation of collective burial grounds, the removal of Francoist symbols, and the access to archives. In 2011, following the approval of the Exhumation Protocol, the descendants have the right to receive financial support to this end. In 2018, the new government announced that it would take responsibility for the victims of the dictatorship and of the civil war, and it launched a plan for the creation of a Truth and Reconciliation Commission, whose central purpose will be to investigate the crimes against humanity committed during the Franco regime.[30]

2.2. International military tribunals

Another step in managing serious abuses of human rights was the creation of International Military Tribunals. The Nuremberg Tribunal has as a legal basis the *Nuremberg Charter* (The Charter of the International Military Tribunal) and it was created at the initiative of the allied countries from World War II, in 1945, in a historic context that demanded the punishment of war crimes. Thus, the Nuremberg Tribunal intended to punish those who committed

[21] Daniel Soltman, *Applauding Uruguay's Quest for Justice: Dictatorship, Amnesty, and Repeal of Uruguay Law no. 15.848*, Washington Global Studies Law Review, 2013, 12(4), pp. 829-848.

[22] Paloma Aguilar & Clara Ramírez-Barat, *Past Injustices, Memory Politics And Transitional Justice In Spain*, Institut Europeu de la Mediterrania, in Monografia *The Arab Transitions in a Changing Word*, Barcelona, 2016, available at https://www.iemed.org/publicacions/historic-de-publicacions/monografies/sumaris-fotos-monografies/memory-politics-transitional-justice-aguilar-paloma-ramirez-barat-clara.pdf, accessed March 2022, p. 70.

[23] Natalia Junquera, *The government should withdraw the Amnesty Law*, United Nations Special Rapporteur Pablo de Greiff discusses his findings after visiting Spain, 04.02.2014, available at https://english.elpais.com/elpais/2014/02/04/inenglish/1391516749_219836.html, accessed March 2022.

[24] *International Covenant on Civil and Political Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with art. 49, available at https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx, accessed March 2022.

[25] United Nations Human Rights Committee, Nineteen fourth session, 2008, *Consideration Of Reports Submitted By States Parties Under Article 40 Of The Covenant, Concluding observations of the Human Rights Committee Spain*, CCPR/C/ESP/CO/5 5 January 2009, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FESP%2FCO%2F5&Lang=en, accessed March 2022.

[26] Elena Ștefan deals also with the notion of principle in the paper: Elena E. Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ,* Pro Universitaria Publishing House, Bucharest, 2013, pp. 63-64.

[27] European Convention on Human Rights, available at https://www.echr.coe.int/Documents/Convention_ENG.pdf, accessed March 2022; Yasha Maccanico, ECtHR: Spain guilty of not investigating allegations of torture in incommunicado detention, available at https://www.statewatch.org/analyses/no-272-echr-spain.pdf, accessed March 2022.

[28] Paloma Aguilar & Clara Ramírez-Barat, *Past Injustices, op. cit.*

[29] Ministerio de Justicia, Ley de la Memoria Historica, Ley 52-2007, available at http://www.exteriores.gob.es/Consulados/MIAMI/es/ServiciosConsulares/Paginas/Preguntas-frecuentes---Ley-.aspx, accessed March 2022; *Law 52/2007, of December 26th, to recognise and broaden rights and to establish measures in favour of those who suffered persecution or violence during the Civil War and the Dictatorship*, available at http://learning-from-history.de/sites/default/files/book/attach/ley-de-la-memoria-historica.pdf, accessed March 2022.

[30] Stephen Burgen, *Spain launches truth commission to probe Franco-era crimes*, available at https://www.theguardian.com/world/2018/jul/12/spain-to-establish-truth-commission-for-franco-era-crimes, accessed March 2022.

crimes against peace, war crimes, and crimes against humanity defined according to the Charter,[31] and also known as *delicta juris gentium*. Moreover, in January 1946, having as a legal basis the *Charter for the International Tribunal for the Far East*,[32] the Tokyo Tribunal, also known as the International Military Tribunal for the Far East, was established. The main purpose was the punishment of those guilty of crimes against peace in the Far East, whether individually or as member of some organizations.

The trials that took place in these ad-hoc military tribunals fulfilled on the one hand the classic functions of criminal law such as punishing the guilty, consolidating the respect for the law, preventing other similar acts in the future, and, on the other hand, they had as an effect a tendency to "judicialise the past". *A first aspect* addressed in the international literature as a result of the Nuremberg and Tokyo trials can be found in the question: *after which law should those responsible of crimes be judged*? For some researchers, among which is Fuller Lon,[33] the law in effect at the moment when the acts were committed is not legally binding since it lacks a moral foundation. On the other hand, Hart Herbert,[34] following the thesis of legal positivism, opposes this perspective, stating that *the order of law* implies as well *the recognition of the previous law*. The history of the Nuremberg and Tokyo tribunals raises issues regarding both the principle of the retroactivity of the law and the one entitled *nulla poena sine lege -no penalty without law-*. *A second aspect* is related to the difficulty in establishing the hierarchical chain of responsibilities, as well as the lack of bureaucratic resources that make it impossible to try all those who participated in abuses and massive violations of human rights. Under these conditions, the selection of the acts to judge is considered by some researchers as being arbitrary and unjust. On the other hand, *judicial inaction* would disqualify the very idea of *the order of law* and it would undermine *the judicial culture*.

The activity of the two tribunals did not focus on the victims, on reparatory measure, on reconciliation or on the national socio-political particularities. This means that this type of justice does not have the characteristics of a restorative justice specific to transitional justice. In fact, the moment these tribunals were created, there was no notion of transitional justice. Restorative justice addresses the victims in the social context, it is oriented towards the community, towards the reconstruction of societies through reconciliation, while retributive justice focuses especially on trials and punishing the guilty.[35]

2.3. International Criminal Tribunals

An evident progress of international criminal justice is the establishment of International Criminal Tribunals. In 1993, the UN Security Council decides to establish the Tribunal for the former Yugoslavia. *The International Criminal Tribunal for the former Yugoslavia* (ICTY) was created as a result of the UN Security Council's 1993 Resolution 827, in accordance with Chapter VII of the UN Charter, with the purpose of "punishing those responsible for serious violations of the international humanitarian law, committed in former Yugoslavia."[36] On the basis of *ratione loci* and *ratione temporis* competences (art. 8 from the Statute), the ICTY takes upon itself to judge the acts that took place on the former Socialist Federal Republic of Yugoslavia's land, air, or territorial waters, starting with January 1991. In 1991, as the dissolution of Yugoslavia happened, the states' intentions to attain independence resulted in wars, acts of torture and serious violence, arbitrary executions, significant losses of human lives, the creation of concentration camps, as well as systematic and organised actions to eliminate ethnic groups.[37]

The statute[38] mentions that the ICTY had the jurisdiction to investigate, indict and judge according to art. 2 the individuals who resorted to serious infractions according to the Geneva Convention,[39] who violated war laws and practices (according to art. 5). According

[31] *Nuremberg Charter* (Charter of the International Military Tribunal), 08.08.1945, London, available at https://ghum.kuleuven.be/ggs/events/2013/springlectures2013/documents-1/lecture-5-nuremberg-charter.pdf, accessed March 2022.

[32] *Charter for International Military Tribunal for Far East*, 19.01.1946, available at https://www.un.org/en/genocideprevention/documents/atrocitycrimes/Doc.3_1946%20Tokyo%20Charter.pdf, accessed March 2022.

[33] Stephanie Paton, *The Inner Morality of Law: An Analysis of Lon L. Fuller's Theory*, Glasgow University Law Society, available at https://unilaglss.wordpress.com/2015/03/10/the-inner-morality-of-law-an-analysis-of-lon-l-fullers-theory/, accessed March 2022.

[34] Hart Herbert, *Law, Liberty and Morality*, Oxford University Press, 1963; *Positivism and the Separation of Law and Morals*, Harvard Law Review, 1958, 71(4), pp. 593-629.

[35] Linda M. Keller, *Seeking Justice at the International Criminal Court: Victims' Reparations*, Thomas Jefferson Law Review, 2007, 29(2), pp. 189-219.

[36] United Nations Security Council, Resolution 827, adopted by the Security Council at its 3217th meeting, on S/RES/827 (1993) 25 May 1993, available at http://unscr.com/en/resolutions/827, accessed March 2022.

[37] Juliya Bogoeva, *The War in Yugoslavia in ICTY. Judgements: The Goals of the Warring Parties and Nature of the Conflict*, FICHL Occasional Paper Series, Torkel Opsahl Academic E Publicher, Brussels, available at http://www.toaep.org/ops-pdf/5-bogoeva, accessed March 2022.

[38] *Updated Statute Of The International Criminal Tribunal For The Former Yugoslavia*, available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf, accessed March 2022.

[39] *Geneva Convention Relative To The Treatment Of Prisoners Of War Of 12 August 1949*, availble at https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.32_GC-III-EN.pdf, accessed March 2022.

to the information supplied by the ICTY official website, until it was officially closed in December 2017, there were over 1000 people interrogated and 136 sentenced within the ICTY.[40] In the case of Radislav Krstic,[41] the Court decided, for the first time in Europe, the conviction of the accused for genocide and complicity to commit genocide in Srebrenica where, in 2005, over 7000 Muslim Bosnian boys and men were executed by Bosnian Serbs.[42] Starting with 2003, the ICTY has intensified its cooperation with local judges and courts from former Yugoslavia.

The International Criminal Tribunal for Rwanda (ICTR) was created based on Resolution 955, adopted by the UN Security Council, in November 1994, at the request of the Rwandan government.[43] The Security Council decided the establishment of the ICTR as a result of the genocide that took place between April-July 1994, when the forces of the Hutu ethnic majority instigated, resorted to acts of extreme violence and killed 800.000 Tutsi ethnic individuals but also Hutu civilians who opposed the cruelty acts.[44] According to art. 1 from the ICTR Statute, the main purpose was to punish those responsible for the genocide and for other serious violations of the international humanitarian law committed on Rwandan territory and in the surrounding areas, between 1 January 1994 and 31 December 1994.[45] Moreover, the ICTR had the jurisdiction to investigate, indict, and convict people who committed genocide as defined in art. 2 from the Statute, crimes against humanity according to art. 3, violations of art. 3 from the Geneva Convention according to art. 4 from the Statute. Until it officially closed in 2015, 93 individuals were indicted under its jurisdiction of which 62 were convicted.[46]

A first observation would be that establishing ad-hoc tribunals proved to be the adequate response in areas where the flawed political leadership and/or conflicts destabilized the justice system and the resources necessary to the independent carrying out of its activities. The functioning of the two ad-hoc international criminal tribunals for the former Yugoslavia and Rwanda marked a progress of the criminal justice in combating impunity and in discouraging some similar behaviours and acts. The doctrine itself points out that: "The need for normative regulation of behaviors is undoubtedly a social imperative (…)."[47]

Second of all, it is noticed that the activity of the tribunals focused on establishing the impartial, judicial truth, based on material evidence, on a selection of relevant acts with the purpose of establishing criminal responsibility and punishing those guilty.

It is well-known that the role of a criminal court is not to establish social truth, historic, sociological, or political causes that are at the basis of conflicts and abuses. Leaning towards this *social truth* represents a prevention measure for such acts to not be repeated, but also an important factor in the rehabilitation of victims and in the reconciliation process.

All of the above show that the activity of ad-hoc tribunals concentrated especially on punishing those guilty. The resolutions/statutes that were at the basis of the functioning of the ad-hoc tribunals for the former Yugoslavia and Rwanda do not contain references to reparatory measures for the victims or to the reconciliation of the sides found in conflict.

2.4. The International Criminal Court (ICC)

Unlike the previously presented ad-hoc courts, the *International Criminal Court* (ICC) represents the states' decision to create a permanent international criminal court. The ICC began its activity in 2002, once its founding document, *The Rome Statute* of the ICC (RSICC), which was approved by the UN General Assembly in Rome, 1998, came into effect.[48] Art. 4 of the Statute mentions that the ICC *must have the judicial and legal capacity to exercise its functions and to fulfil its objectives*. On the basis of the *Nulla poena sine lege* principle (art. 23) the person convicted by the ICC can be punished only in accordance with the Rome Statute. The ICC's jurisprudence is limited according to art. 5 to *the most serious crimes of concern for the international community as a whole*; genocide as defined by art. 6, crimes against humanity as defined by art. 7, war crimes as defined by art. 8, crimes of aggression as defined by art. 8 bis.

[40] United Nations, International Criminal Tribunal for the Former Yougoslavia, available at http://www.icty.org, accessed March 2022.

[41] ICCY, *Prosecutor v. Radislav Krstic*, Judgement 19.08.2004, availble at http://www.icty.org/x/cases/krstic/acjug/en/, accessed March 2022.

[42] Juliya Bogoeva, *The War in Yugoslavia op. cit.*, pp. 14, 62; ICTY Remembers: The Strebrenica Genocide 1995-2015, available at https://www.irmct.org/specials/srebrenica20/, accessed March 2022.

[43] Resolution 955 (1994), *Establishment of an International Tribunal and Adoption of the Statute of the Tribunal*, S/RES/955(1994), adopted by the Security Council at its 3453rd meeting, availble at http://unscr.com/en/resolutions/955, accessed March 2022.

[44] Human Rights Watch, *Numbers*, available at https://www.hrw.org/reports/1999/rwanda/Geno1-3-04.htm, accessed March 2022.

[45] United Nations, *Statute of the International Criminal Tribunal for Rwanda*, available at https://www.legal-tools.org/doc/8732d6/pdf/, accessed March 2022.

[46] Unuted Nations, International Residual Mechanism for Criminal Tribunals, The ICTR in Brief, available at https://unictr.irmct.org/en/tribunal, accessed March 2022.

[47] Elena E.Ștefan, *Aspecte de drept comparat privind jurământul șefului de stat*, Revista de Drept Public, 2020, 3-4, p. 91.

[48] International Criminal Court, *Rome Statute of the International Criminal Court*, available at https://www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf, accessed March 2022.

The Rome Statute was signed by 137 states, but only 118 of them ratified it.[49] For instance, Burundi decided to withdraw in 2017 as a result of the ICC's proposal for the investigation of the repressive manner in which the government responded to the opposition protests that began in 2015. In 2019, the Philippines resorted to the same strategy as a result of the ICC's intention to investigate the governmental abuses in the war they had declared to the drug cartels. On the basis of *art. 75* of the RSICC, the Court is authorized to dispose reparations for the victims. After consulting the statistics, it can be observed that in four of the 27 cases judged by the ICC since it was established,[50] reparations have been proposed for the victims: the Al Mahdi case (Mali),[51] the Katanga case (Democratic Republic of Congo),[52] the Lubanga case (Democratic Republic of Congo),[53] the Gombo et al. case (Central African Republic).[54]

The ICC materialises the effort of the international community to continue combating impunity. Moreover, its permanent nature sends to the idea of a code of conduct for states and invites the redefinition of a new international ethic. Relevant for the present study is the manner in which the ICC has chosen to position itself in relation to victims' rehabilitation.

A first observation would be that the ICC legislates a limited series of crimes found under its jurisdiction, generically called serious infractions that affect communities as a whole: genocide, crimes against humanity, war crimes and aggression. At the community level however, the local population confronts itself with an entire series of other infractions.[55] For instance, even though the victims of sexual abuses gave testimonies before the Court, these types of convictions are few due to a lack of conclusive evidence and as a result of the strict selection of the accusations.[56] According to statistics,[57] it can be observed that only in the Bemba case were convictions for crimes against humanity made for murder and rape, war crimes of murder, rape and acts of dilapidation done between October 2002 and March 2003, by the Movement for the liberation of Congo, whose commander he was. In 2018, the ICC's Appeal Court annulled the decision as a first conviction by the Trial Chamber III from 2016, acquitting Jean Pierre Bemba Gombo of accusations of war crimes and crimes against humanity.[58]

A second observation refers to the novelty element that the Court proposes. Art. 75 from the ICC Statute makes reference to *reparations* in favour of victims, reparations that can take the form of restorations, compensations or rehabilitations. The victims are defined, according to art. 85 from the ICC Statute, as individuals who have suffered a prejudice as a result of the commission of any infraction that is under the Court's jurisdiction. The Court has the jurisdiction to establish the prejudice caused and it can also pronounce a rule that indicates reparation against a person who has been convicted. In para. 2 it is mentioned that in case of need, the compensation allocated from the *Trust fund in support of victims* provided in art. 79. *The Trust fund in support of victims* is mandated by the Rome Statute, art. 79 and created in 2004 by the assembly of member states. The fund has a mandate to implement reparatory programmes for the victims of infractions under the *ratione materiae* jurisdiction of the Court and it also offers the material, psychological, and physical support for victims and their families. The resources come from fines, confiscated goods, and voluntary donations from member states or from non-state actors. The criticism is related to the ambiguities of both the Statute and the Procedure Regulation regarding reparations' processing, structural deficiencies, and legal gaps that affect the revendication claims from the victims and the implementation of reparations.[59] In regards to the supplementation for the Fund for victims, it is

[49] *United Nations Treaty Collection*, Chapter XVIII, Penal Matters, available at https://internationalcriminalcourtnashie.weebly.com/signatories-of-the-rome-statute.html, accessed March 2022.

[50] International Criminal Court, Cases, available at https://www.icc-cpi.int/cases, accessed March 2022.

[51] ICC, Situation In The Republic Of Mali In The Case Of The Prosecutor V. Ahmad Al Faqi Al Mahdi, No.: ICC-01/12-01/15, available at https://www.icc-cpi.int/CourtRecords/CR2017_05117.PDF, accessed March 2022.

[52] *Situation In The Democratic Republic Of The Congo In The Case Of The Prosecutor V. Germain Katanga*, Case No.: ICC-01/04-01/07, available at https://www.icc-cpi.int/CourtRecords/CR2017_05121.PDF, accessed March 2022.

[53] Situation in the Republic Democratic of the Congo, The Prosecutor v. Thomas Lubango Dyilo, 01/04-01/06, available at https://www.icc-cpi.int/CaseInformationSheets/LubangaEng.pdf, accessed March 2022.

[54] ICC, *Situation In The Central African Republic In The Case Of The Prosecutor V. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, FidèLe Babala, Wandu And Narcisse Arido*, No.: ICC-01/05-01/13, available at https://www.icc-cpi.int/CourtRecords/CR2016_18527.PDF, accessed March 2022.

[55] See also Elena E. Ștefan, *Delimitarea dintre infracțiune și contravenție în lumina noilor modificări legislative*, in Dreptul, 2015, 6, pp. 143-160.

[56] Luke Moffett, *Meaningful and Effective? Considering Victims' Interests Through Participation at the International Criminal Court*, Criminal Law Forum, 26(2) (2015), pp. 255-289.

[57] International Criminal Court, Cases, *op. cit.*

[58] International Criminal Court, Situation in central African Republic, The prosecutor v. Jean Pierre Bemba Gombo, case Information Sheet, ICC-01/05-01/08, available at https://www.icc-cpi.int/CaseInformationSheets/bembaEng.pdf, accessed March 2022.

[59] Marc Henzelin, Veijo Heiskanen & Guenael Mettruax, *Reparations to victims before the International Criminal Court: Lessons from international mass claim processes*, Criminal Law Forum, 2006, 17(3-4), pp. 317-344.

considered as uncertain the procedure of recovery of goods from those convicted and, in addition, the idea according to which sums for multiple victims could be covered from the conviction of only one person is unsustainable.[60]

However, what is relevant for the present study is that both the Rome Statute and the creation of the ICC represent progress in pacing the concept of reparatory justice. In other words, recognizing the sufferings and losses the victims were subjected to, their participation in the trial to find the truth, and in the one to obtain reparations, the reparations in themselves, the creation of the Trust fund for victims, all of these represent an approach different from the previous mechanisms of international criminal justice. The ICC thus combines classic, retributive justice with the reparatory, restorative one, marking a step toward victims' rehabilitation, by proposing reparatory measures.

2.5. Hybrid tribunals

Another stage in trying to manage abuses was the creation of hybrid tribunals. A first category of such tribunals are the ones that function as independent jurisdictions and that operate outside the internal justice system. To this end, it is worth mentioning the *Tribunal for Sierra Leone*, which functioned between 2002 and 2013 as a result of the adoption of the UN Security Council Resolution no. 1315/2007.[61] According to the statute,[62] the Tribunal had the jurisdiction to punish the individuals responsible for serious violations of international humanitarian law and of internal law, starting with 1996 and during the civil war that took place between 1991 and 2002. A novelty was that it functioned in the very country where the abuses took place and it also distinguished itself through its fieldwork.[63]

Another such hybrid court is the *Special Tribunal for Lebanon*, created after Resolution 1757/2007[64] of the UN Security Council, with its headquarters in Leidschendam, The Netherlands and its fieldwork bureau in Lebanon. Its jurisdiction according to the statute[65] consists in investigating and punishing those responsible for the 2005 killing of former Prime Minister Hariri and other 21 persons.[66] According to art. 2 from the Statute, the Tribunal implements the criminal investigation and punishment of terrorist acts, infractions against life and personal integrity, etc.

Another category of hybrid tribunals is that of those integrated in the national justice system, but with international personnel. *The War Crimes Chambers in Bosnia* were founded through the Court's Law in 2002[67] and started functioning starting with 2005. They are parts of the criminal division of the State Court in Bosnia and Herzegovina and have as a purpose the investigation of serious violations of international humanitarian law on national territory (the defendants who were not judged by the International Criminal Tribunal for former Yugoslavia), the reconstruction of the Bosnian judicial system, as well as post-war reconciliation.[68]

In turn, the *Extraordinary Chambers in the Courts of Cambodia* (also called the Khmer Rouge Tribunal or the Cambodia Tribunal) function on the basis of an accord between the UN and the Cambodian government.[69] This hybrid tribunal where Cambodian and international judges are active was created in 2003 and has exclusive jurisdiction on judging crimes committed by the Khmer Rouge communist regime between 1975 and 1979 when over 1,7 million people lost their lives as a result of reprisals, torture, executions, or lack of food.[70]

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[60] Luke Moffett, *Reparations for victims at the International Criminal Court: A New Way Forward?*, The International Journal of Human Rights, 2017, 21 (9), pp. 1204-1222.

[61] United Nations Security Council, Resolution 1315, S/RES/1315(2000), adopted by the Security Council at its 4186th meeting, on 14 August 2000, available at http://www.rscsl.org/Documents/Establishment/S-Res-1315-2000.pdf, accessed March 2022.

[62] Legal Tools Database, *Statute Of The Special Court For Sierra Leone*, available at https://www.legal-tools.org/en/doc/aa0e20/, accessed March 2022.

[63] Rachel Kerr & Jessica Lincoln, *The Special Court for Sierra Leone Outreach, Legacy and Impact*, Final Report, 2008, p. 16, War Crimes Research Group, Department of War Studies, King College London, available at http://www.rscsl.org/Documents/slfinalreport.pdf, accessed March 2022.

[64] United Nations Security Council, *Resolution 1757 (2007)*, S/RES/1757 (2007), adopted by the Security Council at its 5685th meeting, on 30 May 2007, available at https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Chap%20VII%20SRES%201757.pdf, accessed March 2022.

[65] Attachment at the S/RES/1757 (2007), Statute of the Special Tribunal for Lebanon, available at https://www.stl-tsl.org/sites/default/files/documents/legal-documents/statute/Statute_of_the_Special_Tribunal_for_Lebanon___English.pdf, accessed March 2022.

[66] Attachment at the S/RES/1757 (2007), *Statute … op. cit.*

[67] *Law On Court Of Bosnia And Herzegovina*, consolidated Version, Official Gazette of Bosnia and Herzegovina, 49/09, available at https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.48_Law_on_Court_BiH_-_Consolidated_text_-_49_09.pdf, accessed March 2022.

[68] *Law On Court Of Bosnia And Herzegovina … op. cit.*

[69] *Agreement Between The United Nations And The Royal Government Of Cambodia Concerning The Prosecution Under Cambodian Law Of Crimes Committed During The Period Of Democratic Kampuchea*, available at *https://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf*, accessed March 2022.

[70] Extraordinary chambers in The Courts of Cambodgia, Introduction to the ECCC, available at https://www.eccc.gov.kh/en/introduction-eccc, accessed March 2022.

A first aspect is related to the fact that the activity of such courts "moves" the judicial process and the uncovering of the truth from the international level to the local communities. As arguments for this there are: the integration of these hybrid courts in the national law systems; the trials taking place at the national level; inserting laws in their statutes as they are defined in national systems; focusing on the desiderata such as consolidating judicial systems and reconciliation. This *movement* towards national settings represents a plus on behalf of hybrids courts in comparison to the ICC, whose international procedure was not conceived to correspond to national courts of the states where its investigations were taking place. *Another relevant aspect* aims to encourage the victims' participation in the trial, which leads to the idea that the victim becomes a subject whose values and interests can contribute to obtaining conclusive results. According to art. 17 of the Statute of the Lebanon Court, the victims/legal representatives have the right to be present throughout the trials in order to express their points of view, in the case where their interests are affected.[71] In turn, the Extraordinary Chambers in Cambodia do not abandon the desiderata stipulated in the founding accord, namely justice for the victims, consolidating justice and national reconciliation. To this end, the victims have an important role in the legal proceedings: they can file complaints with the prosecutors that take their interests into consideration; they can bring a civil action to obtain collective and moral reparations.[72]

3. Conclusions

Managing abuses on human rights imposes on the one hand, measures at the international community level and, on the other hand, measures at the state level. If they choose the path of impunity, the states *do not guarantee* the material and moral reparation of the victims for the prejudices created. Furthermore, they do not guarantee prevention methods that would have the role to combat the reappearance of similar abuses.

In addition, the present study has shown how, at the international level, there were a series of retributive and/or restorative justice mechanisms that were applied, which are part of an ample effort to end impunity. The mechanisms that promote traditional retributive justice focus on the punishment of those guilty, on imposing punishments proportional with the seriousness and nature of the infractions committed. In this perspective, justice is done when the perpetrators are appropriately punished, since they violated the laws that ensure judicial order. On the other hand, restorative justice complements retributive justice since it focuses on exceptional situations when communities suffered from systematic and generalised abuses. These abuses cannot be reduced *only* to the punishment of perpetrators. Such justice proposes equally focusing on reparatory measures for the victims and on the public recognition of the sufferings to which they were subjected, since the abuses committed in the past caused social fractures and have affected the moral unity of the society. The reparation for those affected has multiple forms: the *return* to the situation previous to the abuse, *compensation* for the material losses and the suffered pain, medical, psychological, legal, and social *rehabilitation*, as well as *insuring the moral guarantee* that violations of human rights will not be repeated.

Even though, as the present study shows, the legislation and practices in the field have been consolidated at the international level, the reparatory measures for the victims are/should be the result of the initiatives adopted by executive and legislative powers of governments, which often comes together with delays in being established and implemented.

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[71] Attachment at the S/RES/1757 (2007), *Statute … op. cit.*

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