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THE ROLE OF THE VICTIM IN THE CRIMINAL PROCESS

By

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DECLARATION

I, MUKABAGWIZA Edda declare that the work presented in this dissertation is original. It has never been presented to any other University or institution for an academic award. Where other persons` works have been used, references have been provided. It is in this regard that I declare this work as originally mine.

Signed.....

Date.....

MUKABAGWIZA Edda

APPROVAL

I hereby certify that I have supervised and hereby recommend for the acceptance the dissertation entitled “***The role of the victim in the criminal process***” in partial fulfillment of the academic requirements for the degree Master of Laws (LLM) in International Criminal Justice and the Law of Human Rights, at the University of Rwanda. This project has been submitted with my authority as the University supervisor.

Supervisor name: Dr. Evode KAYITANA

DEDICATION

This work is dedicated to my dear husband, Victor, and to my beloved children, Annick, Yannick and Elvis for their patience and support.

Blessings!

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Edda MUKABAGWIZA

LIST OF ACRONYMS

ADR: Alternative Dispute Resolutions

CDPC: European Committee on Crime Problems

CRC: Convention on the Rights of the Child

EU: European Union

ICC: International Criminal Court

ICTR: International Criminal Tribunal for Rwanda

ICTY: International Criminal Tribunal for the Former Yugoslavia

JORF: Journal Officiel de la République de la France

LLM: Master of Laws

MHPA: Milford Haven Port Authority

NPPA: National Public Prosecution Authority

NURC: National Unity and Reconciliation Commission

OG: Official Gazette

PVT: Department of Victims and Witness Protection

QUANO: Quaker United Nations Office

RIB: Rwanda Investigation Bureau

UK: United Kingdom

UN: United Nations

UR: University of Rwanda

US: United States of America

VLRC: Victoria Law Reform Commission

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ABSTRACT

Although many criminal justice systems are evolving and that new policies and new procedures are being adopted, the involvement of the victim in the criminal proceedings still matters since the victim's issues need to be taken into consideration.

The current evolution on the victim participation in the criminal process creates different opinions among the criminal law experts. Some legal proponents second the fact that the victim should be given more space in the criminal processes than only appearing therein as witnesses, while others argue that it is not very easy to identify the place of the victim in criminal process, whereas others qualify that place as ambiguous.

As the victim presents different repercussions from the criminal offense (physical, material or even psychological), his/her involvement in the criminal process will impact on the way all the process is conducted and will certainly result into victim satisfaction as a model of criminal justice.

There would be no goals of criminal justice if the latter set aside the role of the victim within the criminal justice processes, his or her interest, rights and legal protection. The victim has not only to be represented by the public prosecution but has also to be a key role player in the process all along to ensure that he or she be gratified with the ends of criminal justice.

The criminal justice has to engage the victim participation in the criminal process in virtue of ensuring fair trial, and the victim impact statements and victim impact evidence in criminal trials. It has also to cater for the victim rights during the criminal process and most particularly, the special considerations of the rights of the child victims.

KEYWORDS: Crime victim, victim satisfaction, criminal process, criminal justice, criminal proceedings, participation of victim, children victims.

CHAPTER 1

GENERAL INTRODUCTION

1.1 Contextual background

The participation of the victim in the criminal justice process has been the subject of much public and university debates from 1960s and early 1970s. The debate focuses on the rights of both defendants and victims in the criminal justice process, where the former enjoy all the rights while latter have no rights or their rights are very limited to those of witnesses. The theorists' discussions bring in aspects of fairness, respect and dignity for victims that should be considered since the injuries of the victim are results of the defendant's violation of the law. The consideration of victim's participation during the prosecution avoids inequities and protects the victim from being re-victimized during the process.¹

For years, the due process and crime control models have dominated the criminal justice system as they focus on finding guilt and controlling crime. Both models are criticized of just focusing on one hand, on the protection of the defendant's rights and on the other hand, on punishing the guilty defendant aiming at controlling the crime and protecting the society in general, but leaving behind the victim's involvement.

In late 20th century, some movements in favour of victims' rights in the criminal justice process started. Some perceptions were brought out to different discussions, international and national, as well as in the European Union and in the United Nations.²

¹Stickels JW, *Victim Satisfaction-A Model of the Criminal Justice System* (PhD-dissertation, University of Texas at Austin, 2003), p.2.

² As the Report on the Standing and Rights of Victims in Criminal Proceedings showed (European Committee on Crime Problems "Report on the Standing and Rights of Victims in Criminal" CDPC (2010) 16, p.3 accessed at <https://rm.coe.int/168070c7e4> [05/11/2020]), the rights of victim in criminal proceedings have been also a subject of discussion for a long time in the Council of Europe, in the European Union and in the United Nations. The discussions led to significant developments in the legislation and practice of some Member States.

International instruments on the subject have been adopted: UN Resolution 40/34 of 29 November 1985 on the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. At European level, two important instruments have contributed much to improving the rights of victims: a resolution 77/2735 of September 1977 by the Council of Europe on the guiding principles of compensation by the State for victims of

The changes are being addressed by some criminal justice systems, to address victim's issues in criminal policy and procedure, and victim's inputs are becoming a significant part of all aspects of the criminal justice system. Some legislations are providing a victim space in prosecution and so they can attend hearings and discuss the case with the prosecutor.

In the same spirit, in the 1990s the U.S. Constitution was amended to grant specific constitutional rights to victims. The amendment was initiated by Senator Feinstein who clearly demonstrated how the U.S. Constitution contained more specific inalienable rights for persons accused of crimes but had no rights as fundamental to the victim of crime.³

In France also, the victim's rights have been reconsidered and are at the heart of the criminal process. There have been discussions and publications on the subject and attention was put on the rights of the crime victim that would increase her participation in the criminal trial. Some studies on the subject have been developed. Some amendments of the laws have been proposed in favor of the victim of crimes. Some legal provisions have been modified and confirm the rights of the victim to safeguard her interests before the conclusion of the criminal trial.⁴

However, the place of a victim in the criminal process still requires the attention of legislators across the world. The criminal justice systems need to put in place some measures to recognize and protect the rights of a victim.

The discussions that went on since 1970s have sought to improve the rights of a victim in criminal justice process. The criminal justice process has evolved and the place of the victim improved. Some justice systems have made amendments to enable a victim have more place in criminal proceedings, and now victims are considered as the third party in the criminal process. This brings the crime victim between two extremes; she would not have a complete

intentional acts of serious violence, and Convention of November 24, 1983 which obliges to provide for a state compensation system for certain victims of criminal offenses. The European Union, through Tampere European Council of 15-16 October 1999, highlighted the need to establish minimum standards for the protection of victims of crime. On March 15, 2001, the Council of the European Union adopted a framework decision on the status of victims in criminal proceedings.

³ Stickels, *Supra* note 1, p.3.

⁴ Lamau P, *La place de la victime dans le procès pénal* (Master-thesis, Université Pantheon-Assas, 2010) p.17-18.

and total control over the prosecution nor, would she be forgotten in the process and only come in as a witness.

In Rwanda, the rights of a crime victim have improved, institutionally and legally. There are some provisions that require the investigators and the prosecutors to inform the victim about the progress of the trial, as for example in the case of plea bargaining. The victim may participate in criminal matters as a witness, as a civil party and as a private prosecutor. However, there is still much to improve in terms of the rights of the victim in criminal hearings.

Whatever participation the victim might have in the criminal justice process, what matters would be the kind of relationship existing between him/her and the trial participants and the impact of that relationship on the criminal trial.⁵

1.2 Problem statement

The movement to improve the victim's rights and debates on the topic led several criminal justice systems adopt new laws on criminal procedure or revision of existing laws to allow the victims to participate in the criminal process.

In France, when the movement to increase the rights of crime victims was raised, the criminal action had been managed by the public servants assigned for that on behalf of the community since the 16th century⁶. The civil action, which belonged to the victim, was for the reparation of the damage caused by the offense. Later on, in the 18th century, the criminal action took on two roles: reparative and punitive. The same treatment was found in the criminal process in Belgium.

In general, the place of the crime victim in criminal matters depends on the criminal justice system of a country. In common law countries for example, the crime victim appears as a witness called by the prosecution.

The private prosecution in English Law allows the victim to initiate proceedings by taking the case to a criminal court but the victim's rights are less important than in France. However, in Great Britain, the victim will be granted compensation in the criminal trial.

⁵ Stickels, *Supra* note 1, p. 9.

⁶ Lamau, *Supra* note 4, p.19-21.

The criminal justice system itself has an ultimate goal of punishing the persons who are convicted of crimes so that crime can be controlled and the society protected against criminals. The community needs to be guaranteed with peace and security, and live with confidence that its people enjoy their rights. This is the reason why the government comes in and punishes those who violate the rule of the society, to set standards that whoever doesn't respect the rights of others faces the wrath of the law, so that no one else does the same. There are two important elements of the retributive approach to punishment: the punishment reinforces the law and the one who commits a crime must be punished. This explains why the prosecution administered by the public authority is more preferred than the individual prosecution which would be perceived mainly as a revenge. The society being at the center of punishment of crimes has some advantages: it discourages and rehabilitates the offender, it refrains others from committing crimes, it restores proper social relations and structures.⁷

During the past few years, the development has shown that including the crime victim in the process of criminal justice is worth it. Several states⁸ in the US and the US Government went even beyond and offered to the crime victim an opportunity to be heard during the sentencing phase of the trial. This had a significant impact in capital murder trials for example in the U.S Supreme Court. Different experts have analyzed the impact of the victim's participation in the criminal process, especially in the punishment decision and found that for some, the support of death penalty was motivated by a desire of revenge that Professor Bohm described as retribution "with a strong visceral component".⁹

Others admitted that recognizing the rights of victims is also recognizing their status, their security and their emotional feelings such as revenge, fear, and guilt. These goals were discredited, because the victim's goals in participating in the criminal process were considered along with the society's goals. The concerns of the victim and the society and the individual defendant were all to be considered during the sentencing phase.

⁷ Stickels, *Supra* note 1, p 26-33.

⁸ For instance, Texas gives crime victims "the right to provide pertinent information to a probation officer conducting a pre-sentence investigation concerning the impact of the offense on the victim..." (Art. 56.02§5 Texas Code of Criminal Procedure, 1989); Stickels, *Supra* note 1, p. 26-33.

⁹ Stickels, *Supra* note 1, p. 26-33.

The victim's emotions first provide information that helps the society and the defendant who violated the rule of the society. The community takes advantage of victim participation in the criminal process and thus moderates the victim's emotions.

In case the crime victim intervenes only as a witness in a criminal trial, you wonder if she will not be re-victimized. When a crime is committed and causes injuries to the victim, surely this leaves physical, moral and sometimes psychological damages that need to be handled. Some behaviours or attitudes of people who are supposed to intervene may even offend more the victim and so find herself in re-victimisation. The involvement of the victim in the whole process also can influence the proceedings. For the victim is given a role in the prosecution, it should be clear how she will fit into a criminal prosecution and how the criminal justice system understands her participation. Care must always be taken to ensure that the involvement of the victim does not unduly influence the prosecution.

The two classical models of criminal justice that have been developed for years in the history were mainly focusing either on the rights of the defendant or on controlling crime so that people would be discouraged from committing crimes. The due process and crime control models don't allow the victim to get involved in the prosecution. Being injured by the defendant, the victim would feel much more party to the prosecution in the criminal process, if she is integrated from the beginning of the proceedings to the pronouncement of the sentence. What would happen if the victim was given the same attention in the criminal process as the defendant? She could actually give some information that the defendant can hide about how the crime was committed. She can also be satisfied by the efforts of the prosecutor to defend her case and heal through the proceedings. Can this bring people to understand better the role of each party to the criminal process? Or can it improve the way criminal justice is managed?

This dissertation revisited the role of victims in the criminal justice system and analyzed whether the system would not focus only on the defendant but also on the victim. In the light of the above analysis, this study is giving credit to the victim satisfaction model, a new model of the criminal justice system. This model opens the door to the victim during the criminal proceedings and encourages the practitioners to take her as a third party to the prosecution.

Indeed, the topic has been discussed in the last 20 years, and many experts have written on the place of the victim in the history and how it evolved in the criminal justice.¹⁰ This study is focusing on the present and future of the role of the victim in the criminal process and is answering the following questions:

- 1) Is the role of the victim a mere witness in the criminal process enough to satisfy her needs and the needs of the process?
- 2) Does the crime-victim have any further role to play in the criminal process under the relevant law and practice in Rwanda?
- 3) What are the reforms needed in the Rwandan criminal procedure to allow the victim to play a useful role?

1.3 Objectives of the study

The objectives of this dissertation are the following:

- To examine the role of the victim within the criminal justice system, what the laws are providing for them and how their rights are enforced and protected.
- To examine the question of whether the victim should have a place in the criminal trial.
- To explore the ways through which all the victim's needs regarding the consequences of the offense (physical, material or even psychological), should be addressed in the criminal trial.
- To investigate how Rwandan law balances the interests of the victim against the other interests that compete in the criminal process.

¹⁰ Some examples: Ashworth A "Victims' rights, defendants' rights and criminal procedure" in Crawford A, Goodey J, *Integrating a victim perspective within criminal justice*, 1st Ed. (Routledge, 2000); Beloof D "The third model of criminal process: the victim impact model" 2 *Utah Law Review* (1999) pp 289–330, Dignan J *Understanding victims and restorative justice* (Open University Press, 2005); Klug F "Human rights and victims" in Cape E, *Reconcilable rights? Analysing the tension between victims and defendants*, (Legal Action Group, 2004).

1.4 Research methodology

In order to achieve the objectives of this study, different techniques and methods were used. The documentary technique was used in collecting data from different written documents relevant to the topic including law texts, books, journal articles, annual reports, international instruments, theses and dissertations, etc... The exegetic method helped to interpret the various law materials. The analytic and comparative methods were used for analysis and comparisons of different elements of data collected. The synthetic method finally helped in regrouping the collected data in a coherent manner and drawing the recommendations.

1.5 Structure of the study

This study is structured into 4 chapters. Chapter one is this General Introduction. Chapter two, contains a review of the relevant concepts in this study. Those concepts constitute the theoretical foundation on which the whole discussion on the issue of the role of victim in the criminal process is based. In addition, this chapter discusses and analyses the various interests that compete in the criminal justice and examines some of the models existing in the criminal justice system vis-à-vis the victim's rights.

Chapter three analyses the problem as stated in the first Chapter i.e., the place of the victim in the criminal process. This chapter plays a critical role as it assesses, explains and discusses the findings on the place of the crime victim in the criminal matters. Mainly, this chapter examines the rights of the victim within the criminal process and the prerogatives granted to her at different levels of the criminal trial. The comparison is made all along the examination between a common law country and a civil law country and the Rwandan system as well.

Chapter four concludes the study and makes some recommendations. The first part of the conclusion discusses the impact of having the crime victim as third party in the criminal process. The recommendations that constitute the second

part of the conclusion focus on the actions that need to be applied in any justice system, particularly in Rwanda. This part of the conclusion takes into consideration the importance of victim satisfaction in the criminal justice system and draws some recommendations on how the laws would be improved to introduce the rights of the victim in the criminal process.

CHAPTER 2

CONCEPTUAL AND THEORETICAL FRAMEWORK

2.1 Introduction

In order to put this study in context and for the purpose of clarity and better understanding, it is important to provide the full meaning of some concepts which will guide the substantive discussions in the next chapters. These concepts are: criminal justice, criminal action, civil action, reparation and crime victim.

This chapter helps also to understand different models existing in the criminal process whose various interests compete such as to find a balanced approach that would lead to punishment of criminals and crime prevention, due process, the victim's rights and the need of the society to move forward.

The consideration of all the models has brought us to understand each one without excluding others or accepting some as the only legitimate positive, normative, or discursive guide to the criminal process. Distinguishing them from each other helps to analyze their values and the way that people understand the criminal justice.

2.2 The concept of criminal justice

Criminal justice is defined as the justice that manages how to handle the crime in order to protect the society and assure peace and security among the people. It aims at putting in place some measures that lead to crime prevention or crime reduction. One of its objectives is to bring the criminals before justice and rehabilitate those who violate laws or undermine the human dignity.¹¹

Criminal justice in general, is composed of norms and procedures and decisions that mainly focus on the implementation of laws and identifies the crime suspects and the punishment relating to the violation of rules.

All the 3 organs of the government (the Legislative, the Executive and the Judiciary) work together to strengthen the governance system among other norms, institutions and processes of criminal justice administration. The norms

¹¹ Daly K, *Aims of the Criminal Justice*, (Griffith University, 2003), p.2.

put together determine what to respect (dos and don'ts) and imperatively set a line of conduct that serves the whole society to maintain order, security and peace in the society. The norms constitute the criminal code which also builds a system which has principles, structure (participants) and effects.

The criminal justice system is composed of distinct institutions which are interdependent and whose complementary operations aim to strengthen the rule of law and maintaining security and peace within the society. Its institutions enforce the criminal law.

The criminal-justice system is characterized by three main parts:¹² Law enforcement agencies, courts and correctional facilities

Some may add the law-makers as another component, as they play an important role of defining the crimes and determining punishments towards certain behaviours which break a law. When the law is unfair then the justice cannot be well administered.

All institutions concur to the same aims which are:

- (1) "to prevent and reduce crime, especially violent crime, and help victims;
- (2) to ensure that those suspected, accused, and convicted of crimes are dealt with fairly, justly, and with a minimum of delay;
- (3) to punish those found guilty in a suitable manner and where possible, discourage further offending; and
- (4) to achieve these aims as economically, efficiently, and effectively as possible".¹³

Reducing crime is done in different ways:

- (1) through criminal proceedings carried from investigation when a crime is committed to sentencing when the trial is closed;
- (2) through crime control, where actors eliminate the conditions that produce criminality;

¹² Pradel J, *Procedure Penale*, 11th ed, (Cujas, 2022/2003), p.179-180; Siegel LJ, *Introduction to Criminal Justice*, 20th ed, (Wadsworth, 2008), p.7.

¹³ Daly K, *Supra* note 11, p.3-4.

(3) through crime prevention, and

(4) through doing justice.¹⁴

Criminal justice deals with the transgression against the criminal law and helps to determine the intention, the responsibility or the culpability, and the desert. The criminal process defines the consequences of the crime and what the criminal, the victim and the society deserve.¹⁵

After the establishment of the responsibility, the offender receives his/her punishment or correction, commonly known as corrective justice. The corrective justice focuses at the same time, on the outcome that would satisfy the crime victim and on the retribution for the society. In that case the guilty are held responsible for the damage caused so that the victim and the society are compensated in terms of reparation for the damage caused. It is understandable that when the criminal is not punished, justice is not achieved, and the victim will not be satisfied.¹⁶

The criminal justice varies depending on the context of a society or a country and changes over time considering the progress in social, economic or political relations.

To make it more efficient and more focusing on integrity of institutions, it is important that the criminal justice system not only looks for the instrumentality of its agencies but also the normative aspect of justice for the parties in a criminal process.¹⁷

2.3 The concept of criminal action

The criminal action is a public action exercised by the state through the prosecutor or magistrate in the name of the society.¹⁸ The criminal action is exercised with the purpose to pursue the suspect of an offense in order to punish the criminal acts committed against public order. Its purpose is to punish the wrongdoings or crimes against the social order, the attacks against

¹⁴ Robinson M & Williams M, *The Myth of a Fair Criminal Justice System*, (Appalachian State University, 2008), p. 2-6.

¹⁵ Alemika EO *et al*, *The theory and practice of the criminal justice in Africa*, (African Human Security Initiative, 2009), p. 11-12.

¹⁶ Robinson, *Supra* note 14, p.5.

¹⁷ Alemika, *Supra* note 15, p.12.

¹⁸ Law n° 027/2019 of 19/09/2019 Relating to the Criminal Procedure (OG n° Special of 08/11/2019).

peace and security in the society, and in general the violation of the law. The action belongs to the officials charged with that responsibility on behalf of the state/the people. However, this action can also be introduced by the victim, under the conditions determined by the law. In this case, the civil action replaces the public action and leads to compensation of the damage suffered.

The Rwandan law on criminal procedure defines a criminal action as an action, instituted by the public prosecution, filed on behalf of the public before criminal courts and aimed at punishing the offender. It however allows to the aggrieved person, to institute a criminal action through a private prosecution under certain restricted circumstances.¹⁹

The offense as a violation of social order leads to the action exercised by the public prosecution for a criminal sanction, in the name of the society. That is a public action.²⁰

Many criminal justice systems initiate the public action in three possible methods:

- the individual reports to the prosecutor a crime that has been committed and the prosecutor opens the file and starts the proceedings;
- the victim exposes the crime committed to the judge and claims also reparation;
- prosecution ex officio by the competent officials, for the most serious offenses.

This shows that we have 2 main actors in the process: the prosecutors and the victim. However, the victim comes in for the civil action and indirectly calls for prosecution. The victim would not give up even if the civil action is extinguished.

The criminal action applies equally to all suspects of crime in general, except in case of immunities where the public action cannot be exercised, the protection

¹⁹ Idem, art 3,1 & art.4..

²⁰ Pradel, *Supra* note 12, p.174.

of a category of persons and where the responsibility cannot be established (family, judicial or political immunities).²¹

Different causes can end the criminal action.²² The death and the prescription are common causes that stop the prosecutor from pursuing the criminal action. Amnesty, the repeal of the criminal law, mediation and withdrawal of the complaint constitute also the reasons for which the criminal action can be terminated. Some of them are natural causes (death & prescription), others are voluntary such as the decision of the legislator (amnesty & repeal of the criminal law), and some particular such as mediation or withdrawal of the complaint.

Criminal law handles dangerous or harmful actions to society with the objective to prevent crime and punish the criminals who violate the law. Criminal law is in contrast with the civil law which governs transactions and grievances between individual citizens or legal entities. Civil proceedings are non-criminal and they pursue an inquiry into private rights and conclude with remedies, as compensation for the wronged party.

Criminal proceedings terminated due to the death of the offender, expiry of prescriptive period of the offence, if amnesty is granted, if a law is repealed or if a judgment on the action becomes final.²³ Criminal action may also be terminated if the suspect accepts to pay a fine without trial or if the plaintiff accepts to withdraw the claim as may be specified by law.

Under Rwandan law, except offences that are not subject to prescription as provided by law, criminal action for other offences lapses:

1° after a period of ten (10) years for felonies;

2° after a period of three (3) years for misdemeanors;

3° after a period of one (1) year for petty offences.²⁴

²¹ Pradel, *Supra* note 12, p.184.

²² *Idem*, p.189-213.

²³ Art 5 Law n° 027/2019 of 19/09/2019, *Supra* note 18.

²⁴ *Idem*, art.6.

2.4 The concept of civil action

The civil action which is developed in this study is that one in the criminal proceedings. This is normally defined as an action that occurs in the process of determining the compensation for damage caused by an offense.

Victim offences generate a moral or material prejudice to the victim, and they constitute a cause of action which may be acted upon by the latter in order to obtain reparation, either by compensation or establishment of the proof of guilt, either for the reparation of the damage caused by the crime.²⁵

The civil action generally is a non-criminal action which concerns private rights and remedies, resulting from transactions and grievances between individual citizens and juristic persons. Civil actions mainly occur when there is a breach of contract, divorce and its effects towards the spouse and children, and real estate matters. In common law, they may also be from an act or omission that causes loss, injury or harm to another (tort) and results in legal liability for the person responsible of the act. The civil action doesn't aim to punish the defendant but to compensate the plaintiff.

The civil action in its nature ends in reparation, either through compensation or restitution. This means that there must be damage to claim reparation. It is also an action with a repressive purpose since it leads to the public action if the prosecutor has not initiated the public action. It can also lead to restitution, which has two meanings: ordinary delivery to the owner of the thing of which he/she had lost possession by the effect of the offense and a measure that puts an end to a situation raised by the offense. There may be a third form of reparation which occurs when the decision of conviction is published due to the request of the victim.

Only the victim can claim reparation of damage. Neither the judges nor the public prosecutors have the capacity to initiate the civil action. The judges can only decide on damages if the victim has expressly requested it. The prosecutors don't have the capacity to introduce the civil action. The victim acts only under certain conditions which sometimes vary depending on whether the victim is a physical or moral person.²⁶

²⁵ Pradel, *Supra* note 12, p.174.

²⁶ *Idem*, p.233-234.

According to Denisa Barbu, the civil action is:

- a) a private action, being exercised by a person who has suffered injury from crime;
- b) a voluntary action, being left to the discretion of the injured person pursuit;
- c) a heritage action can be exercised against both the accused and the person civil responsible, of their heirs, of their successors in title;
- d) a divisible action, whereas the person aggrieved (injured) may request the liability of one or more persons, who participated in producing the injury;
- e) an available action, whereas the injured person may renounce to the exercise of the action.²⁷

The victims personally or those assisting them introduce an action because of the harm they were inflicted when the offense happened. The civil action may be introduced at the same time as the criminal action or separately before the civil judge. Once the responsibility of the offender is determined and the reality of the damage caused by the offense and all the material, bodily or moral damages established, the victim looks for the compensation or restitution before the competent judge.²⁸

The civil action belongs to the person who suffered the damage and who expresses his/her claims so that the accused person discusses on them.

The civil action to be exercised must cumulatively meet the following conditions:

- 1) an offense that caused a material or moral damage;
- 2) a direct or indirect causal relation between the deed and injury;
- 3) the damage must be certain and not repaired;
- 4) the damage has not been repaired;
- 5) a request for a civil action from the competent individual with legal entities;

²⁷ Barbu D "Some Aspects Concerning the Civil Action in the Criminal Proceedings", World Lumen Congress (2016), p.101.

²⁸ Tadrous S, *La Place de la Victime dans le Procès Pénal*, (Phd-thesis), Université Montpellier I, 2014), p.21-22.

6) solving the criminal process by the civil action within it in a reasonable time.²⁹

A civil action may be excluded because the crime did not necessarily cause a material or moral prejudice. The link between the crime committed and the damage caused is also very crucial. The damage must exist, what assures on its certainty, beyond doubt. If the damage must be repaired and that the person injured is willing, the latter will act as the civil party.

A civil action can freely be dropped by the victim if the latter is not interested by compensation or restitution. The extinction of a public action leads also to the extinction of the civil action. Thus, the two causes of extinction of the civil action are the will of the victim and its prescription.

The Rwandan Law n° 027/2019 of 19/09/2019 relating to the Criminal Procedure defines a civil action as an action filed to seek compensation for damages caused by the offence. The action solely intends to seek civil damages. It may be instituted by any person aggrieved by an offence. The person may be natural or legal, whether public or private or any other person authorized by law. However, legally constituted organizations whose mission is to defend victims of offence or competent government institutions entrusted by law may act on behalf of the victim to institute a civil action.³⁰

A civil action can be instituted against the principal offender, co-offender, accomplice, any other person with civil liability or against the offender's heirs. Under Rwandan law, a civil action arising from a criminal offence prescribes after a period of five (5) years from the date on which the offence was committed. However, if the prescription of a civil action is due before the prescription of the criminal action, the civil action prescribes at the same time with the criminal action.³¹

The Rwandan law provides that a civil action cannot be instituted before a criminal court if the prescription period of the criminal action expired. However, if a civil action was instituted before a criminal court, the court may continue to hear the civil case even if the prescription period of the criminal action expired while the action was still pending in the court. This may happen for instance

²⁹ Barbu, *Supra* note 27, p. 99-101 & Pradel, *Supra* note 12, p.234-238.

³⁰ Art 3 & 10, Law n° 027/2019 of 19/09/2019, *Supra* note 18.

³¹ *Idem*, art 11 & 12.

when the defendant died, the offence is no longer punishable under the law, or when the amnesty was granted. When the victim waives off a civil action, it does not discontinue prosecution.³²

2.5 The concept of reparation

Reparation consists of considering the damage caused to a victim of a criminal offense, all the suffering occurred and, it consists of taking care of the victim or his/her relatives with a purpose of reintegration.

The damage caused may manifest in different ways; a direct harm and trauma or social and emotional isolation and exclusion overtime. This may:

- have effects on capacity to relate to others;
- create consequences on the family relationships;
- break the previous networks of support or even;
- interrupt the life plan and;
- change the living conditions of the victims.

The reparation has 3 main objectives that concur in order to respond to the consequences of violence that affects victims. Those objectives are to:

- Restore the dignity of victims;
- Create conditions for reintegration;
- Re-establish civic trust.³³

The source of reparation may be administrative or may come from the judicial decision. When it is administrative, the assessment of the harm is less detailed with lower standards of proof. In case of a massive crime, a political decision also may address material or moral reparation.

The judicial decision may also lead to reparation. This will call for the victims or their representative to introduce a claim to the judge, with high standard of evidence that prove the harm caused by the offense. This will help to identify causes and establish liability.

The full effective reparation should include the following aspects, which are connected and interlinked:

³² Idem, art 13 & 14.

³³ Bikisha D, *Transitional Justice*, UR, School of Law,(2019), p.24

1. Restitution: Its objective is to reconstitute what was taken or damaged (*status quo ante*). The restitution tries to re-establish, as much as possible, what was damaged in the status prior to the violation.
2. Compensation: This kind of reparation comes in when replacement or recovery is not possible. It tries to quantify the harm caused by the pecuniary or non-pecuniary losses. The money comes in to substitute the status that could not be replaced or recovered. Support services are always included in this form of reparation, because money cannot be sufficient to compensate the victims. This applies for instance for victims with psychological consequences (rape).
3. Rehabilitation: it aims to rehabilitating the victim by providing the social services needed as medical and post trauma or psychological care, and legal services.
4. Satisfaction and guarantees of non-recurrence: It refers to the recognition of victims and the State responsibility. The guarantees of non-recurrence assure that the Government and its stakeholders commit to protect the victims and take measures to avoid the risk of repetition.³⁴

2.6 The concept of crime-victim

The notion of victim needs also to be well defined, because it is essential within the framework of this study. Though the original term is latin and from ritual traditions,³⁵ the common denominator of the “sacrifice” has a meaning of a person suffering from a prejudice caused by the acts of others. . The word "victim" was therefore not often used before the 15th century. The criminal law often used the expression "civil party", rarely the word victim or witness to designate the “victim” in the context of criminal proceedings. Currently, the victim is legally considered as the person "who personally suffers harm as opposed to the one who causes it". This damage consists of an injury suffered in his/her physical integrity, in his/her property or in his/her feelings, giving rise to a right to compensation.³⁶

³⁴ Milqet J “Strengthening Victim’s rights: from compensation to reparation” (European Commission, 2019), p.3-4 accessed at <https://www.france-victimes.fr/index.php/docman/grand-public/textes-et-rapports/2419-strengthening-victim-s-rights-from-compensation-to-reparation-jmilquet-r> [05/11/2020].

³⁵ victima in latin originally defined "beast offered in sacrifice to the gods", then "that which is sacrificed", "literally and figuratively".

³⁶ Tadrous, *Supra* note 28, p.22-24.

According to the statute of the International Criminal Court, the term victim “means any natural person who has suffered harm as a result of the commission of a crime within the jurisdiction of the Court”.³⁷ It can also be “any organization or institution including property devoted to religion, education, the arts, sciences or charity, a historic monument, a hospital or any other place or object used for humanitarian purposes that has suffered direct damage”.³⁸

In 1985, the United Nations, in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, had broadly defined the victims as: “persons who, individually or collectively, have suffered harm, including injury to their physical or mental integrity, mental suffering, material loss or serious violation of their fundamental rights as a result of acts or omissions that violate the criminal laws in force in a given jurisdiction, Member State, including those which proscribe criminal abuse of power”.³⁹ The Framework Decision of the Council of the European Union on March 15, 2001, also has given a very similar definition which presents the victim as “the person who has suffered harm, including injury to his physical or mental integrity, moral or material loss, directly caused by acts or omissions which infringe the criminal legislation of a Member State”.⁴⁰

According to the European Directive of October 25, 2012, which combined both definitions as presented above, the victim includes “any natural person who has suffered harm, including injury to his physical, mental or emotional integrity or material loss, which has been directly caused by a criminal offense”.⁴¹

According to the definition provided by the Oxford Advanced Learner’s dictionary, a victim is a “person who has been attacked, injured or killed as the result of a crime, a disease, an accident”. The definition of victim always relates to the victimology, the “study of the victim, the offender and the society”

³⁷ Rule 85, Rules of Procedures and Evidence, International Criminal Court, (2nd ed, 2013).

³⁸ Ibidem.

³⁹ UN General Assembly, “Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power”, A/RES/40/34 (1985), art 1 accessed at <https://www.refworld.org/docid/3b00f2275b.html> [15/11/2020].

⁴⁰ Council of the European Union, “Council Framework Decision Of 15 March 2001 On The Standing of Victims In Criminal Proceedings (2001/220/Jha)”(2001), art 1.

⁴¹ European Parliament, “Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA” ,(2012), (9) accessed at <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32012L0029> [20/11/2020].

or study of why certain people are victims of crime and how lifestyles affect the chances that a certain person will fall victim to a crime.⁴² At the domestic level, the term victim also includes the immediate family or dependents of the direct victim, and others who directly or indirectly suffered from the harm caused.

Victim is also defined as “an individual, or groups or bodies such as an organization or social grouping of people, who is harmed or damaged by someone else and whose harm is acknowledged, and who shares the experience and looks for, and receives, help and redress from an agency”.⁴³

This study will explore the victim as a person who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions, offences that constitute gross violations of criminal laws, briefly victims in criminal proceedings.

2.7 The various interests that compete in the criminal process

In a society where crimes are committed, there is a need of punishments in order to safeguard the interests of the victim and of the society. To achieve that, different models have been developed and advocated for.

It is in 1964 that Herbert Packer published "Two Models of the Criminal Process" which models have much success and could last until today, where they describe important facets of the practice and politics of criminal justice.⁴⁴ Packer's philosophy was a product of the period of 1960s, where he believed that in United States the criminal process "was being turned from an assembly line into an obstacle course".⁴⁵

As Kent Roach commented that, with the crime control model, most cases end in guilty pleas or prosecutorial withdrawals whereas with due process model, the cases that go to trial and are appealed, were the most influential. This shows that the crime control model was based on societal interests in security

⁴² N'DRI MK, *Critical Analysis of Victims' Rights Before International Criminal Justice*, (LLM-Thesis, University of Pretoria, 2006), p.6-8.

⁴³ N'DRI, *Supra* note 42, p.8.

⁴⁴ Roach K "Four Models of the Criminal Process" 89 *Journal of Criminal Law and Criminology* (1999), p.671.

⁴⁵ *Idem*, p.672.

and order, while the due process model was based on the primacy of the rights of the individual in relation to the state.⁴⁶

Time has passed and Packer's models were criticised and they revealed some inadequacy in describing the law and the politics of criminal justice. The models were designed in a way that didn't encourage creative thinking about criminal justice. In so being impoverished, they could not cover new knowledge about crime victimization and new concerns about crime victims. So it was realized that crime victims and other potential victims like women, children and minorities were disadvantaged and left behind in the process of criminal trial.⁴⁷

Models are very useful and have different purposes which help to deal with the complexity of the criminal process. They give some details which help practitioners understand some principles, common themes and trends. Models provide different ways of thinking which may influence the criminal procedure. Models present different ideas developed throughout the criminal justice.⁴⁸

Some other models evolved since Packer wrote and considered some other crimes that victims do not report, or some crimes that involve "consensual transactions" like abortion, incest, bigamy, gambling, public drunkenness, homosexuality, narcotics, pornography, and prostitution. That is how victim satisfaction and restorative justice models were developed, where crime victims and their supporters are brought together with offenders and their supporters.⁴⁹

The more principle of judicial integrity, best interest of the child and public interest were developed and applied, the more they influenced the criminal justice. In so being considered, those principles become also new models in the criminal process.

The models presented here may not be the only ones in criminal justice; they are not excluding others that are being developed by other scholars or researchers. They neither can be accepted as the only ones that would guide to the criminal process.

⁴⁶ Ibidem.

⁴⁷ Idem, p.692-698.

⁴⁸ Idem, p.671.

⁴⁹ Idem, p.685.

Their presentation and discussion in this work will show which interests they compete in the criminal process.

2.7.1 Crime control model

Every society needs peace and security among its people. However, the way people conduct themselves may lead to commission of crimes and the Government will need to protect its people and maintain order by punishing the criminals.

The crime control model refers to “a theory of criminal justice which places emphasis on reducing the crime in society through increased police and prosecutorial powers. Crime control prioritizes the power of the government to protect society, with less emphasis on individual liberties”.⁵⁰

The crime control model is known as a conservative approach to crime that seeks for the protection of the society from criminals by putting in place laws, regulations and institutions that allow to punish criminals and to do justice. The society’s interest is to suppress crimes. This is in contrast with due process model which is a liberal approach to criminal justice and that considers more civil liberties.

What matters in the crime control model is the value system that emphasizes on the repression of criminal conduct which is by far the most important function to be performed by the criminal process. The law enforcement must bring criminal conduct under tight control to maintain public order.⁵¹ The criminal system must be efficient, which means, it must have the capacity to apprehend, try, convict, and dispose of a high proportion of criminal offenders whose offenses become known, even though the criminal process might require enough personnel in police, prosecution and in judiciary.⁵²

This value of the crime control model is emphasized by Taylor Christopher William where he presents the repression of criminal conduct as a fundamental element and the central function of the criminal justice system.⁵³ He joins

⁵⁰ UsLegal “Crime control (definition)” <https://definitions.uslegal.com/c/crime-control-model/> [15/06/2020].

⁵¹ Packer H.L “Two Models of the Criminal Process” 113 *University of Pennsylvania Law Review* (Nov., 1964), p.9.

⁵² *Idem*, p.10.

⁵³ Taylor C. W *Detectives and disclosure: an analysis of the implementation of the disclosure provisions of the criminal procedure and investigations act 1996 by cm officers, based on a*

Packer and emphasizes on the largely informal and intuitive early investigative process, rather than the subsequent judicial proceedings. Both authors note that the model's success is determined, not by the quality of justice administered, but by the volume of cases apprehended and, most importantly, the high rate of convictions.⁵⁴

In order to have good results and have a big number of apprehensions and convictions, the police is supported by the Government which guarantees confidence in its investigation and maximum discretion in its operations. The best equipment of the police helps in identifying the guilty and the innocent.

The crime control model underscores an informal "presumption of guilt" where the police conducts investigation with already a decision made that there is sufficient evidence to charge. It finally becomes a prediction of outcome which renders the rest of the criminal justice system largely perfunctory. This is in contrast with due process model which guarantees the presumption of innocence.⁵⁵

The law enforcement highlighted by the crime control model implies interrogation in a police station, examination and cross examination process in a court, judicial and extrajudicial processes which lead to determination of probable innocence or guilt.

For all practical purposes in crime control model, the defendant is a criminal. Just because the assembly line cannot move fast enough for him to be immediately disposed of is no reason for him to go free.⁵⁶ The efficiency of this model, with large numbers, is based in the presumption of guilt.

Some advantages and disadvantages would be drawn from this model. The crime control model aims to an effective and efficient criminal justice system. . With its ability to go through all processes quickly, because of enough and well equipped personnel, it needs less time to handle criminals. The more the law

study of operational procedure in two police force areas (PHD-thesis, Durham University, 2002), p.14.

⁵⁴ Packer H.L, *supra* note 51, p.10 & 11.

⁵⁵ Taylor, *supra* note 53, p.15.

⁵⁶ Packer H.L, *supra* note 51, p.11 & 12.

enforcement is applied, the more a big number is apprehended, the more there is a crime free atmosphere and comfort among the community.⁵⁷

Over the years, the crime control model has been criticised of mischarges of justice, abuse of power or erosions of civil liberties. The presumption of guilty can cause false prosecution and once the accused is found innocent, the cost would be high.

The crime control model is good for public order and security for the society to remain safe. When applied, it creates comfort and tranquillity to the community. However, under this model, controlling crime is more important to individual freedom. The punishments for criminals within this process are much more severe and the model doesn't consider the rights of the criminal. This model is not favourable to the human rights, the individual 'liberties are easily violated. The crime control model and the due process model can be merged and balanced to work together, as Shanell Sanchez says.⁵⁸

2.7.2 Due process model

A due process model is defined as “a type of justice system which is based on the principle that a citizen has some absolute rights and cannot be deprived of life, liberty, or property without appropriate legal procedures and safeguards. Due process involves both procedural and substantive aspects.”⁵⁹

The due process model has been for years opposing the crime control model which is based on the assumption of absolute reliability of police fact-finding and treats arrestees as if they are already found guilty.⁶⁰

As Professor Packer H. makes it clear, these models should not be labelled good or bad.⁶¹ They rather try to abstract two competing separate value systems that need attention in the criminal process. The two models merely constitute a convenient way to talk about the operation of a process that involves two value systems and whose normative future likewise involves a series of resolutions. The difference between the two models resides in their

⁵⁷ Sanchez S “The Crime Control and Due Process Models” in Burke A S *et al*, *Introduction to the American Criminal Justice System*, p.36 (Open Oregon) <http://oer.iain-padangsidempuan.ac.id/files/original/539c591be7678c7d99c71fb83fa79a02.pdf> [30/06/2020]

⁵⁸ Burke A, *supra* note 57, p.37.

⁵⁹ USLegal “Due Process Law and Legal Definitions” <https://definitions.uslegal.com/d/due-process-model/> [31/03/2019].

⁶⁰ Packer H.L, *supra* note 51, p.14.

⁶¹ *Ibidem*.

rules of conduct and also in the sanctions ahead. Both models help to understand the relationships between the civil and moral ideologies of law and justice within societies.

Due process model focuses on the protection of citizens, mostly on individual rights. Although societies need to enforce laws and put in place all mechanisms necessary to maintain public order and community safety, the state authority must respect certain rules and procedures even if a person is guilty. The individual's rights and freedoms must be protected. People must be protected from arbitrary and excessive abuse of power by the government. These limitations towards the government secure the conviction of the accused, protects citizens against the misuse of the enormous power of the government. Further scrutiny remains necessary or at least must be available because of possibilities of human error.⁶² The central premise in due process model is the presumption of innocence. This means that through the due process model, regardless of overwhelming evidence against the accused, the presumption of innocence of the accused will prevail and the defendant will be treated as if he or she were not guilty of the charges.

The due process secures the conviction of the accused because it protects him or her against the misuse of the enormous power of the government during the prosecution process. As the due process model mainly focuses on the presumption of innocence, it makes sure that the accused person gets the best opportunity to prove his or her innocence, and proving his/her guilt is essential to keep the government in control.

The due process model believes in the rights of the defendants and refers to procedures and safeguards to ensure that their life, liberty or property are protected. Once the person is arrested or accused, the society maintains reliability and integrity in the legal process and makes sure that reliability and integrity are not corrupted by speed and efficiency.

The due process model is more concerned with the process of criminal justice than the outcome. This is confirmed by many people who say that "it is better that a guilty person should escape the punishment of justice than an innocent

⁶² Ibidem.

person be wrongfully punished”.⁶³ Wash & Hemmens affirmed that in certain cases guilty individuals have gone free due to technicality violations in the rules that officials are subject to.⁶⁴

The crime control and due process models have influenced societies in dealing with criminal process. A country/society can use both models and even it can have its own model based on the principles of the two models according to its ideologies or beliefs regarding crime and justice.

The due process model in criminal cases is more protective of the accused’s human rights as it ensures that there is fair trial from the beginning to the end or to final judgement. It ensures that the procedures are fair, that the accused person is not subject to cruel and unusual punishment, which will prevent an innocent person to be wrongly convicted. It protects the accused person from being considered as guilty before even he/she is convicted. That is why he/she is given the opportunity to enjoy all the fundamental rights as provided by the Constitution and other national laws. Those are the rights that the State authority should respect all along the procedures.

2.7.3 Judicial integrity model

In a country where the rule of law and democracy are principles, the judiciary is established and endowed with rights and duties. To achieve its goals, the judiciary must act professionally in the public interest. For that, persons whose intentions are aimed at the public interest and whose deliberations adequately reflect the purposes of the institution, in other words, persons who are of integrity are needed. Thus, integrity appears as the norm that judges are to be of the right professional character.⁶⁵

Judicial integrity inspires trust in accepting the power of judges which impacts the lives of individuals. People need to trust the judges in their deliberations and accept their final reasoning because they know about law and the application of rules.

⁶³ Anon “Criminal Justice”
<https://www.pearsonhighered.com/assets/samplechapter/0/1/3/3/0133024334.pdf>
[05/04/2019].

⁶⁴ Idem.

⁶⁵ Soeharno J “Is judicial integrity a norm? An inquiry into the concept of judicial integrity in England and the Netherlands” 3 *Utrecht Law Review* (2007) p.17.

The integrity of judges goes hand in hand with their impartiality and their independency. Judges' behaviour and appearance must be with the utmost degree of propriety to avoid that the public confidence in the judiciary be diminished.

Therefore, the Code of Judicial Conduct, in many countries, directs that a judge shall respect and comply with the law, and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.⁶⁶

This is the reason why, a person in a trial can disqualify a judge who becomes partial from presiding over a case. In many countries, the Code of Judicial Conduct requires a judge to be impartial in presiding over any proceeding to avoid being questioned and disqualified. This means that judges are expected to avoid not only actual partiality, but the appearance of it as well. This is because the appearance of a judge who is not impartial calls for non-confidence of the public, which is negative to the justice system. Judges are called to apply law equally or impartially to all persons, without personal bias or prejudice towards individuals and to extend the law uniformly and consistently to all persons. Judges should avoid racial bias, gender bias and bias based on ethnic or religious background, national origin, disability, age, socio economic status, which have no place in the judicial process.

Any kind of bias may operate to improperly predetermine the outcome of individual cases and deny a litigant the right to have his or her case decided on the basis of the evidence presented at trial.⁶⁷

In some countries, the judicial integrity model is as much important as crime control model. In other words, the interest to safeguard the image of the judiciary is as considered as the interest for the State to suppress crime.

Thus, a judge would not hesitate to permanently terminate an ongoing criminal case or to nullify completed proceedings if the behaviour or conduct of investigators or prosecutors is such that the image of the judiciary will be tarnished if the prosecution is allowed to proceed or the judgment is not revoked.

⁶⁶ Sharman J M, *Judicial Ethics: Independence, Impartiality, and Integrity* (Inter-American Development Bank 1996), p.8.

⁶⁷ Ibidem.

In the same context, Bloom explains that the concept of judicial integrity may be described as the role of the judiciary in leading by example.⁶⁸ If there is an official action with a certain kinds of offensive, a court will invalidate or rectify it on the grounds of judicial integrity. In so doing, judges act as a beacon or a symbol to society for ensuring lawful acts by the forces of government, so that, on a public relations level, the court not only be regarded as a symbol of lawfulness and justice but also the court does not appear to be allied with bad acts or associated with illegal actors.

The present author would say that the exclusionary rule comes in the context of the judicial integrity. 'The exclusionary rule is a rule which excludes real, documentary and oral evidence unconstitutionally obtained by those officials who are responsible for the prevention, detection, investigation and prosecution of crime'.⁶⁹

When a judge excludes an evidence obtained in an unlawful manner, he/she is in one or other case protecting not only his/her person but also the profession, because the judicial integrity increases the confidence of people to justice. If an accused has been compelled to provide evidence against himself/herself or if the evidence had been obtained by duress from an accused, those cases are examples of unlawful obtained evidence. Although exclusionary rule is not absolute, the argument in its favour is based on the belief that the truth need not and should not be ascertained at all costs because there are higher values in the best interests of which illegally obtained evidence should in principle not be admitted.⁷⁰

2.7.4 Victim satisfaction model

The "Victim Satisfaction Model is a new model of criminal justice system which proposes that one of the primary purposes of the criminal justice system is to attempt to achieve victim satisfaction during the course of the prosecution. This model explains the reality on the involvement of a crime-victim in criminal prosecutions.⁷¹

⁶⁸ Bloom R M "Judicial Integrity: A Call for its Re-Emergence in the Adjudication of Criminal Cases" 84 *Journal of Criminal Law and Criminology* (1993), p.464.

⁶⁹ Van der Merwe & Jur B "Unconstitutionally obtained evidence: towards a Compromise between the Common law and the Exclusionary Rule" *Stellenbosch Law Review* (1992), p.175.

⁷⁰ *Idem*, p.184.

⁷¹ Stickels, *Supra* note 1, p.1.

Normally crime victims suffer psychologically from the crime itself. The victim is injured by the crime, while the defendant is the one that violated the law. However, before the 1960s, you would find that criminal defendants had all the rights in the justice system while the victims had little or no rights; which was not fair. This was sensitive through the due process and crime control theories, where there was the lack of victim involvement in the prosecution and the justice system. The result was that the victims were finally forgotten during the prosecution to the extent that they could be 're-victimized' during the trial and excluded from discussions about the case.

The rights of victims have been discussed and defended in various fora and by some authors who tried to find a solution for these inequities in providing victims the right to participation in the prosecution and the right to be actively involved in important decisions about the prosecution.⁷²

Since 1960s, things have changed, the victims' issues have become important in the justice system and many States have enacted victim rights legislations that provide an opportunity to victims to participate in a criminal process, either by attending hearings or discussing the case with the prosecutor.⁷³

To emotionally recover from victimisation is an important process which depends on how the victims are treated by the criminal justice system. Maarten Kunst and colleagues proved how a number of procedural rights have improved the active or passive participation of crime victims in criminal proceedings since the 1960s and ensured respectful treatment by criminal justice professionals.⁷⁴

The involvement of victims in criminal proceedings may also be quite stressful because of the possible confrontation with the crime and the offender and, in such cases they cannot highly unlikely benefit from participation at all. The crime victims who do not fear confrontation with the crime or the offender procedural rights will benefit from that if such rights are correctly enforced by criminal justice professionals during the trial. This means that if it is not the case, victims may feel secondarily victimized by the criminal justice system which would negatively interfere with the victim's emotional recovery. Some

⁷² Idem, p.2.

⁷³ idem, p.3.

⁷⁴ Kundst M *et al*, *Victim Satisfaction with the Criminal Justice System and Emotional Recovery*, (Sage Publications, 2014), p.1.

would say that satisfaction with the criminal justice system may contribute to crime victims' emotional recovery, because it represents a victim's affective response her cognitive evaluation of the performance of that system in her case.⁷⁵

The interests of the crime victims may conflict with the crime control, if for example the victim receives timely compensation and doesn't want to proceed to criminal trial. Why should a prosecutor insist on prosecuting such case? The same reasoning would apply if the prosecution would destroy the family life of the victim.

The victim satisfaction model gives to crime victims opportunity to terminate criminal proceedings, if that better serves their "interests". The difference between this model and Packer's two models is that the victim satisfaction model focuses on the victim while the crime control and due process models focus on the defendant and make sure the latter who commits the act that harms someone, is prosecuted, convicted, and punished. The primary value of the 'Victim Satisfaction Model' is that even though the victim may not completely be happy with the result of the prosecution, the attempt to satisfy the victim should be the primary determinant of the direction of the prosecution.⁷⁶

The rights of the victims in the criminal process are being improved in different criminal justice systems of countries. This will be well developed in the Chapter 3. Victim's satisfaction nowadays is influencing the criminal justice system.

2.7.5 Best interests of the child model

The Section 3(1) of the Convention on the Rights of the Child promotes the best interests of the child as a primary consideration in all actions concerning children.

The best interest of the child model consists of "the range of the rights, the needs, and the interests of the child." The holistic interpretation endorsed by

⁷⁵ *Idem*, p.2.

⁷⁶ Stickels J W, *supra* note 1, p. 123.

the UN Committee states that, when considering the best interest of children, all their rights and interests must be taken into account.⁷⁷

In criminal justice, all actions where children are directly, or indirectly, involved or affected by the justice system, the best interests of the child should also be a primary consideration. Therefore, to ensure that the best interests of the child are considered, in every action taken, there must be reflection on how the action will impact on a child, or groups of children.

For his/her best interests, there is a need of protecting child's well-being and development. Therefore, a State has a duty to provide its protection through different measures and protections such as protecting a child from harm, inspecting facilities where children are held or legislating against the use of corporal punishment, but also taking a more active approach and means implementing actions to enable a child's healthy development.⁷⁸

In criminal justice, both categories of children, those authors of crimes and those who are victims of crimes need to be protected by the law.

Children whose parents are imprisoned because of the crimes they committed find themselves also victims of that situation. However, they are sometimes forgotten by the criminal justice systems.⁷⁹

Concerning the juvenile justice, it is a rationalization of those who make decisions, justifying their judgments on what may be the future of the child. The judge facing the minor tries to find the best solution to the personality of the child.

A minor as, a person in training and fragile in essence, must be subject to specific protection either during the trial itself or for the future. The trial must not

⁷⁷ UN Committee on the Rights of the Child (CRC), "General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration", CRC /C/GC/14, (29 May 2013) accessed at: <https://www.refworld.org/docid/51a84b5e4.html> [13/07/2020].

⁷⁸ Penal Reform International, and United Kingdom "Protecting Children's Rights in Criminal Justice Systems: A Training Manual and Reference Point for Professionals and Policymakers." (2013), p.14 accessed at <https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=268978> [05/11/2020].

⁷⁹ Millar HA & Dandurand Y "The Best Interests Of The Child And The Sentencing Of Offenders With Parental Responsibilities" *Criminal Law Forum* (2017), p.227& Robertson O "The Impact of Parental Imprisonment on children" (QUNO 2007), p.7 https://www.quno.org/sites/default/files/resources/ENGLISH_The%20impact%20of%20parental%20imprisonment%20on%20children.pdf [15/11/2020].

jeopardize the future of the juvenile offender. The primacy of education over repression has procedural implications which profoundly modify the content of the general interest in this specific procedure. The interest of a minor implies derogations from the procedural provisions in order to protect a child, either by avoiding a worsening of the shock resulting from contact with the justice, or by countering an excessive social stigmatization. The protection of a minor during the trial implies essential exceptions to the ordinary rules for the conduct of the trial because of the actor's vulnerability and even more the risk of disruption of the latter. For identical reasons, a minor can be excluded from his/her own trial. It is possible for him/her not to appear and to remain represented. Being a subject of law but minor, his/her protection is reinforced by some guarantees because of his/her vulnerability and his/her age.

From a more institutional perspective, it should be stressed that the number of children before the courts, which are already overloaded, is limited or reduced. Rwandan legislation has also such kind of legal provisions protecting children, authors or victims of offenders 'crimes.'⁸⁰

The need for a public order well organized and the protection of victims appear to be paramount, so that the technique used cannot be explained solely by the interests of the minor.

In case of children victims of crimes, much need to be known so that they may also be protected by law. Although children are rarely consulted, they would have much information to share, they need to be listened to in order to find long-lasting solutions on crime prevention.

When there an abuse or victimization of a child, the crime is reported to the authorities in charge and the prosecution starts the investigation process. Most of time, the children will find themselves in a situation in which they are not familiar: offices, courts,.. Specific laws, legal provisions and measures are necessary to handle very well the cases where victims are children. These measures will protect them from psychological harm, intimidation of the offender, or any other harm they may have during the criminal proceedings.

⁸⁰ Legal provisions for mitigating circumstances in case of minority age (article 54 of the Law n° 68/2018 of 30/08/2018 determining the offences and the penalties in general (OG n° Special of 27/09/2018); child defilement is also punished by article 133 of the same law. For the best interest of the child, the Law n° 71/2018 of 31/08/2018 relating to the protection of the child (OG n° 37 bis of 10/09/2018) was adopted.

The principle “the Best Interests of the Child” is a competing model in the criminal process and it may sometimes triumph over crime control.⁸¹ This is developed more in the Chapter 3.

2.7.6 Restorative justice model

“Restorative Justice” model is another new competing model in the criminal process whose objective is to reconcile neighbours, families in order to reconstruct the broken bonds.

Restorative justice has been a common form of justice around the world for centuries. Instead of locking criminals up and increasing their numbers in prisons, a restorative justice system encourages them to make amends for their crimes and change their ways going forward. It is quite different from the punitive system which sees crime as a breaking of rules, crime control model, but instead sees crime as an act of harm.⁸²

Contrary to the punitive model where the dispute appears between the accused and the state, and the victim remains passive, in a restorative system, all parties are invited to the table and the court’s proceedings and the justice process involve them.

When possible and agreed on, together on the table, both parties, the perpetrator and the victim, discuss the crime and its effects, and conclude on the way forward.

When convicted, the criminal makes amends through the process of apology and restitution instead of being incarcerated. This helps them to reintegrate their community which also continues to help the criminal change his or her ways.⁸³

The restorative justice is practiced by sharing circles or mediation between victim and offender. People can also do it face to face in conferences which bring together victims, offenders, their families, friends, and other community members. This interest to reconcile persons and families becomes very prominent in cases where relatives are concerned (parents and their children,

⁸¹ Kayitana E, *Criminal Processes UR*, School of Law (2020), Lesson 3, p.7.

⁸² Walden University, *The Role of Restorative Justice in a Criminal Justice System*, Online Bachelor Program <https://www.waldenu.edu/online-bachelors-programs/bs-in-criminal-justice/resource/the-role-of-restorative-justice-in-a-criminal-justice-system> [03/07/2020].

⁸³ Idem.

spouses and brothers and sisters), neighbours and friendly families. Restorative justice can occur any time after the harm happened or after the crime is committed. This means throughout the criminal justice process, from pre-arrest to post-sentence, but also in prisons, therapeutic facilities, and communities.

Those who defend the restorative justice model argue that there should be no reason, when the families of the victim and of the aggressor have met, talked and reconciled, that the prosecutors insist on a criminal trial, basing only his/her defence on the abstract, vague and obsolete idea that "crimes are committed against the society as a whole". They stand on the fact that many crimes are committed against the actual victims, not the society in general.⁸⁴

Restorative justice is much more human model dealing with crime, an effective value competing with crime control because it leads more to healing which punitive systems do not.

2.7.7 Public interest model

Criminal procedure like many other laws is set to provide public interest but also protects individual rights. Therefore, it balances the public interest and individual interest.

As presented by Bessler J, three complimentary definitions of "public interest" would guide the way we understand this:

1. The "public interest" should be defined as those interests people have in common as members of the public. This meets the Rousseau's way of thinking, that government must serve the shared interests of the people and that "it is on the basis of this common interest alone that society must be governed." (Brian Barry).
2. The "public interest" should be defined as "the sum of the interests of the several members of the community who compose it." (Jeremy Bentham).
3. The public interest as a moral concept judged by values such as "promote justice" or "maximize human freedom." This comes from Aristotle, who wrote that "the good in the sphere of politics is justice, and

⁸⁴ Kayitana, *supra* note 81, p.9.

justice consists in what tends to promote the common interest." (Richard Flathman).⁸⁵

The public interest of a community is safeguarded by the public prosecution, through "public prosecutors" who are public authorities and who, on behalf of society and in the public interest, ensure the application of the law where the breach of the law carries a criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system.⁸⁶ This is done to ensure that the public order is maintained and the crime is controlled and the community safe.

In case of committed crime, the same responsibility calls the public prosecution to initiate a prosecution and take the necessary measures accordingly. You will find the case taken to the courts for justice. In some cases, the prosecution will discontinue the file or will even not prosecute because in public interest, it has found that the repression would not be the solution to the goof of the society.

The case of immunity (Presidential, Parliamentary or diplomatic), amnesty and pardons are good examples where the prosecution will stop or will not be initiated. This subject has been discussed in the Chapter 3.

The criminal justice will always rely on different models. For the protection of the society and its public order and safety, there will always be a need for repression and worst cases that need responses will still exist. The prosecution of criminals will always conflict with their rights to be protected. Much will depend on the consideration that is given to the crime prevention, the victims' rights and the need of the society to move forward.

In the past, crime control and due process models were important and necessary in criminal justice, but not sufficient enough to prevent crimes and to protect the society against wrong doing. Victims' rights emerged in recent years as the new model to legitimate crime control. It provides crime victims and offenders, their families and communities, a greater role in reconstruction reunification.

⁸⁵ Bessler J, *The Public Interest and the Unconstitutionality of Private Prosecutors* , (University of Baltimore School of Law, 1994), p. 560.

⁸⁶ Council of Europe, "Recommendation Rec(2000)19 of The Committee of Ministers To Member States on The Role of Public Prosecution in the Criminal Justice System" (06/10/2000), art 1.

Therefore, the new models are giving space to the victims of crime, the public interest and judicial integrity. The victims of crime have little real decision-making power in punitive models, where prosecutions and punishment are highlighted. They are only informed and consulted. The situation will be reversed in the worlds of crime prevention and restorative justice. The victims and potential victims of crime find more decision-making power and less opposition.

The exploration in the next chapter has helped to understand how the participation of the victim in the criminal process is not only a healing process to the victim, but also an informative process to the actors in a criminal trial.

CHAPTER 3

ANALYSIS OF THE PLACE OF THE VICTIM IN THE CRIMINAL JUSTICE PROCESS

3.1 Introduction

As stated in the problem statement, this study is concerned with the question as to how Rwandan law balances the interests of the victim against other interests that compete in the criminal process. This chapter is divided into seven sections. The first section discusses the victim's involvement in the criminal trial. The second, the third and the fourth sections analyze respectively the place of the victim as a witness, as a civil party and as a private prosecutor. The last three sections discuss the role of the victim within the three criminal justice models which are the restorative model, the best interests of the child model and the public interest model respectively.

3.2 Victim involvement in the criminal trial

As H el ene Duffuler-Vialle explains, from the classical Grece to the Middle Ages, the victim was involved in the criminal trial through private prosecution based primarily on revenge.⁸⁷ During that period, there was not yet distinction between criminal action and civil action as it is today. The compensation was the money paid to the victim or corporal punishment on the person who offended her.

From the 13th century, the victim has been gradually limited to claiming compensation as the accusatory procedure was phasing out to leave place to the inquisitorial procedure where the prosecution appeared to conduct the criminal action. The victim could no longer cite the accused person but was given the right to make a simple complaint to the judge.

Nowadays, attention has refocused on the role of the victim in the criminal process. From the 1950s, the victim was the center of discussion and some justice systems⁸⁸ of countries gave her an active position in the criminal trial. Some think that taking into consideration the victim's interests in the criminal process regarding the offense that caused her suffering, means giving him/her a place in the criminal process.

The example is in Europe, where in 1977, the Council of Europe adopted a resolution on the compensation of victims of criminal offenses, and on 24 November 1983, it adopted the convention concerning only the compensation of victims of violent crimes and especially for cases where the perpetrator is unknown or without resources. France has been among the first countries to implement the resolutions and the convention at the national level and on July 8, 1983 a law strengthening the protection of victims was adopted.⁸⁹ This law and other related laws improved the place of the victim in the criminal process and the victim is given a privileged place in the procedure. The authority is required to ensure the information and the guarantee of the rights of victims during all criminal proceedings.

⁸⁷ Duffuler-Vialle H, *La Nouvelle Place de la Victime au sein du Proc es P enal*, (Centre d'Histoire de Recherche 2016), p.19.

⁸⁸ French Ministry of Justice, "Circulaire du 29 septembre 1999 relative   la politique publique d'aide aux victimes d'infractions p enales (JORF no 227 du 30/09/1999) accessed at the Ministry's Office [01/12/2020].

⁸⁹ Duffuler-Vialle, *Supra* note 87, p.36.

Once an offense is committed, the first interaction between the victim and the police marks the victim's journey through the criminal justice system.⁹⁰ As the one who suffered from the offense, the victim needs to be treated with respect and provided with information and support in relation to the criminal trial process, until the finalization of the criminal proceedings.

However, all victims of crimes don't report to the police. Some people (family, community and religious groups) or some reasons (distrust of the police, the justice system or other barrier) may discourage or impede victims from reporting crimes committed against them. Though some domestic cases are not reported as well, the community policing is playing a big role in containing and controlling the crime through mediation and conciliation.⁹¹

According to Aurélien-Thibault Lemasson, there are three theoretical models that show the place of the victim in criminal proceedings:

1) The victim is excluded from the criminal trial and appears only as a witness. This model is found in countries with the Anglo-American legal system.

2) The victim intervenes as a civil party that claims the damages caused by the offense committed. In this case, the civil action is added to the criminal action or comes later, when the criminal action is ended. This model predominates in countries with continental law (Spain, Portugal, Italy, Germany, Nordic countries)

3) The victim is the main party to the criminal proceedings. In this case, she has an important place in the proceedings. The victim can initiate the trial and take the place of the prosecution. (France, Belgium).⁹²

Hélène Duffuler-Vialle and some other authors like Geneviève Giudicelli-Delage, Christine Lazerges, Brenes Varga and Poletti⁹³ showed how legal debates throughout Europe focused on the role of the victim. The Civil Law system of justice gives greater recognition to the interests of victims than the

⁹⁰ Victoria Law Reform Commission "The Role of Victims of Crime in the Criminal Trial Processes" (2015), p.4 accessed at https://www.lawreform.vic.gov.au/sites/default/files/VLRC_Victims_of_Crime_consultation_paper_for_web_0.pdf [17/11/2020].

⁹¹ Ministry of Justice, "Part II: Criminal Justice Policy and Policy Actions"-Draft (2020), Kigali, p.12.

⁹² Duffuler-Vialle, *Supra* note 87, p.28

⁹³ Victoria Law Reform Commission, *Supra* note 90, p.4.

common law system does. It recognizes victims as civil party, which means that they play an important role in the proceedings and can ask for damages. They can also privately initiate a prosecution. In Common law system, the victims would only appear when the prosecutor or the defense wishes to. In this system, victims have no independent status, no standing in court, no right to choose counsel, no right to appeal, no control in the prosecution of their case or voice in its disposition, because the legal process is between the defendant and the State.⁹⁴ The victimization in English criminal proceedings remains passive but omnipresent.

Under the Code of Criminal Procedure in France, nowadays the victim has an important role in the criminal trial, contrary to the past where the victim only appeared in the trial for claims of damages she suffered as a result of the offense. The question of guilt or penalty was a vertical relationship between the State and the litigant. The current role of the victim places her between the criminal and the prosecution and also between her and the criminal and must avoid either too much presence or an absence to maintain a well-balanced trial.

As H el ene Duffuler-Vialle explains, the purposes of the new rights of victims are: being informed, being assisted or accompanied, access to justice, benefit from an effective investigation, being protected (attacks on the dignity of the victim are now penalized), being taken care of, being compensated, being treated competently, exercise one's choices freely.⁹⁵

Today, the victim benefits from rights and procedural guarantees allowing her to intervene in the dispute between her and the offender.

Though there are still areas to improve, since 2019 the Rwandan Law on criminal procedure⁹⁶ has made some progress about the rights of the victims. Article 16 of the law gives powers to the investigators in their duties of investigation, to receive complaints and documents relating to offences. This marks the first interaction between the victim of crime and the public officer in charge of detecting offences and preliminary investigations. Investigators can also practice on their own motion or under instructions of public prosecution in accordance with the fact that the offense committed has caused damage to the

⁹⁴ N'DRI, *Supra* note 42, p.10.

⁹⁵ Duffuler-Vialle, *Supra* note 87, p.32.

⁹⁶ Law n  027/2019 of 19/09/2019, *Supra* note 18.

society. If the organ in charge of investigation is seized and rejects the complaint or refuses to conduct investigations without any justification, the claimant may directly file the complaint with the public prosecution. In that case, the public prosecution may conduct preliminary investigations after verifying whether the organ in charge of investigation was seized and failed to act. The public prosecution may also conduct preliminary investigations in case it believes there are subjects that had to be investigated but were not investigated.⁹⁷ Filing a case can be done orally or in writing and ends in a written statement on which the complainant affixes his/her signature or fingerprint.⁹⁸

The law also allows the victim to bring her action before the civil courts and seek compensation for the damage she has suffered from the offense committed. In that case, the criminal and civil proceedings are initiated in parallel or jointly. The criminal procedure recognizes the victim also as a witness and determines how he/she proceeds. The victim can also seize a court, and in this case the interest which motivates his/her action is purely private and is therefore called civil action in opposition to public action exercised by the public prosecution for the defense of the general interest. That action also is called private prosecution. It has existed for a very long time because the possibility for the victim to bring his action before the criminal courts was also espoused in Code of Criminal Procedure since 1963. The Rwandan law also recognizes the victim as a civil party, where he/she brings his/her claim alongside the criminal action to seek compensation.

The criminal process is indeed a challenging moment for the victim. This is why he/she needs to be supported legally and morally. He/she may be supervised and may receive legal aid. Some justice systems in different countries have made an important improvement with regard to the right to information and support for victims during criminal proceedings. Victims have the right to protection, right to participation in criminal proceedings and the right to reparation. Though some have increased procedural rights of the victim, there are some others who still argue for a limited place for the victim within the criminal process.

⁹⁷ Idem, Art.17.

⁹⁸ Idem, Art.18.

A study that proposes a new criminal policy⁹⁹ in Rwanda, makes consideration of the needs of the victim to be a concern at every stage of the criminal justice system. From the moment when a crime is reported, support for the victim either from the family, the community or a social agency and his/her protection needs to be ensured. The study also is proposing to keep the victim informed of developments right from the investigation throughout the trial process. It also recognizes that during the investigation or at the prosecution level the victim may contribute to the process either by providing the extra information that may help to fill in the gaps in the investigatory information gathered or to acquaint them (investigators or prosecutors) with a proper feel of the crime's impact for a better prosecution of the suspect.¹⁰⁰

The involvement of victims in the criminal trial helps them to speak out and the information they share contributes to the whole judicial process. Their participation contributes also to the healing process against the moral and psychological damage caused by the offence they suffered from. Their presence in the trial helps to identify the assets of the accused so that in case the latter is found guilty, their preservation would serve for reparation.

It is with interest that this research is conducted, to reflect on the place of the victim in the criminal process and to propose some reforms needed on the victim's legitimate status within the criminal process.

3.3 Victim as a witness

Any person having participated in the commission of an offence or a victim of offence may be heard as a witness.¹⁰¹

A witness is a person who is required to come to court to answer questions about a case. The answers a witness gives in court are called evidence. Before giving evidence, the witness promises to tell the truth.¹⁰²

The Oxford Learner's Dictionary¹⁰³ defines witness as a noun; "(also **eyewitness**) a person who sees something happen and is able to

⁹⁹ Ministry of Justice, *Supra* note 91

¹⁰⁰ *Idem*, p.15.

¹⁰¹ Art 48, Law n° 027/2019 of 19/09/2019, *Supra* note 23.

¹⁰² Anon, "Being a witness" [https://www.justice.gov.nt.ca/en/files/victim-services/Being Witness.pdf](https://www.justice.gov.nt.ca/en/files/victim-services/Being%20Witness.pdf), [26/11/2020].

describe it to other people, a person who gives evidence in court”; but also as a verb “to provide evidence of the truth of something, to see something take place, to show that something is true; to provide evidence for something”. The “see” shows that the emphasis is on sight, which leads to eyewitness.

According to the ICTY, a witness may be defined as a person who provides or is due to provide testimony before a Trial Chamber as a result of being called by the parties, or summoned by the Chamber to give testimony by deposition or video-conference link.¹⁰⁴ The Council of the European Union defines the term ‘witness’ as any person, whatever his or her legal status, who possesses intelligence or information regarded by the competent authority as being material to the criminal proceedings.¹⁰⁵

A crime victim is a witness required or called upon to describe her or his victimization especially in court proceedings.

As seen earlier, the victim in criminal proceedings is seen as a person who suffered harm, which may be physical or mental injury, emotional suffering, economic loss or substantial impairment of his/her fundamental rights. Individually or collectively, he/she may suffer from acts or omissions that constitute gross violations of criminal laws.

As also earlier introduced, the active role of the crime victim in the past was very minimum and the victims could rarely be involved in prosecutions or court process. In court he/she could only appear as a witness to a case brought in the public interest. For an offense caused, which was considered as a violation of public order, the conflict shifted from the victim and the accused to the defendant and the prosecution. The consequence was that the victim will claim only for compensation until the conclusion of a trial.

¹⁰³ *Oxford Learner’s Dictionary*,
https://www.oxfordlearnersdictionaries.com/definition/american_english/witness_1 accessed on [28/12/2020].

¹⁰⁴ Art 2, ICTY IT/200 Directive on allowance for witnesses and expert witnesses.

¹⁰⁵ Council Resolution of 23 November 1995 on the protection of witnesses in the fight against international organized crime, EU Doc OJ C 327, 07/12/1995, p.5.

As the rights of victims are nowadays increasing in criminal matters, the significant role of the victim as a witness to provide evidence has also improved.¹⁰⁶

In Rwanda as in many other criminal justice systems, the victim is considered more as a witness for the prosecution. He/she has information that would help the prosecutor and the judge to analyze the case and enrich the proceedings for a fair trial. The victim witness can play role at all different stages of the trial, from the investigation to the end of the trial, and during the sentencing stage. That is why he/she needs protection throughout the judicial process. A special unit for victims' protection has been created in the National Public Prosecution Authority.

To protect victims and witnesses from being (re)traumatized during the judicial process, protective measures and security arrangements, counselling and other appropriate assistance for witnesses and victims are necessary to be provided. Appropriate measures must be taken to protect the privacy, dignity, physical and psychological well-being, and the security of victims and witnesses, especially when the crimes involve sexual or gender violence.¹⁰⁷ The International criminal justice is good in these procedures.

The issue that needs to be developed is the protection of victims and witnesses after the proceedings. Is the protection extended even after the conviction of the accused against whom they testified? Some of the witnesses before the ICTR were killed sometimes before testifying. How can this be avoided in the future?¹⁰⁸

Many criminal justice systems in different countries have not yet integrated the victim at all stages of the criminal process. In France the victim enjoys this right during the whole process. The Rome Statute also allows victims to participate in the court proceedings in several ways and at different stages in order for them to represent and pursue their own interests. This experience should serve to inform other judicial systems of that level of involvement of the victim as it has been proven that there is no threat to the rights of the accused and to a fair

¹⁰⁶ Davies P & Cook IR, *Victims, Witnesses and the Criminal Justice System* ([Northumbria University, 2020](#)), p.9.

¹⁰⁷ Art 68 Rome Statute of the International Criminal Court (ICC) & 87 and 88 of the Rules of Procedure and Evidence.

¹⁰⁸ N'DRI, *Supra* note 42, p.39-40 & Victoria Law Reform Commission, *Supra* note 90, p.54.

and impartial trial.¹⁰⁹ In common law systems, contrary to the civil law systems which seem to be victim friendly, victims are rarely involved in criminal proceedings; they are only seen as witnesses.

In Rwandan criminal procedure a prosecutor, through administrative entities by court bailiffs or security organs, can summon any person whose testimony he or she considers relevant to appear by issuing a summons or a warrant to appear (art.32). Then the witness gives testimony under oath on things that he/she is assumed to have clarification (art.45). He/she is interrogated without the presence of the suspect. Under oath, he/she swears to tell the truth and to face the penalties or rigors if he/she lies and fail to honor the oath (art.47).

A minor aged under fourteen (14) years is qualified to testify as an adult. A minor aged under fourteen (14) years gives testimony without taking an oath but the court ruling cannot solely rely on his/her testimony unless it is supported by other corroborative evidence (art.49).

Except a minor aged under eighteen (18) years (art.54), a victim witness can be confronted to the offender or to other witnesses by the investigator or a prosecutor and the confrontation is subject to a statement (art.52). Victim witnesses may appear on their own initiative if they feel that the information they have may help the justice to proceed.

Article 54 enumerates the rights of the victim during interrogation that must be respected in order to protect his/her privacy, such as: to be interrogated in the presence of a trusted person of his or her choice, to be informed of one's right to remain silent, to be informed about the legal provisions which concern him or her, to be protected if he/she expresses concern for his or her safety or, if relevant organs consider that his/her safety may be compromised.

During the preliminary hearing that precedes the trial of the case, the following matters regarding the witnesses must be examined (art.125): security of witnesses; the number of witnesses, their role, their location and the means of application in their communication; confirmation of witnesses that require protection and to put in place security strategies for the authorized parties; confirmation of the number and identity of witnesses expected to be summoned by the public prosecution and those to be summoned by the defendant; to

¹⁰⁹ Idem, p.34.

agree on arguments of the case, their supporting evidence and the legal provisions of both parties on each argument; to agree on the time each party will utilize in explaining every item and to hear its witnesses; to inquire from both parties the time when hearing the case in merits would commence and end; admission of testimony from the person who will not be present during the hearing and such testimony can also be recorded through audio-visual format.

It is during the hearing that sometimes the victim witness testifies to the judge. The judge can, at any time, during presentation of evidence and examination of witness ask questions that can assist him or her to understand his/her submissions and to examine whether the evidence and his/her legal basis are understood in a clear and similar manner, whether on the side of the judge as well as on the side of the parties (art.127).

Given the importance of their role in criminal justice, it is recommendable to provide as much protection and support to victims in their role as witnesses as possible. Policies should allow the set-up of different measures and support services that would ensure that victims are treated with fairness, respect and dignity.

3.4 Victim as a civil party

A crime has different effects to the victim and they can last for a long period. Besides physical injury, crime can cause deep and lasting trauma to the victim and the victim's family.¹¹⁰ The effects may be psychological injury, emotional harm, physical injury and financial loss.

The victim as civil party appears mostly in civil law system which operates an inquisitorial process. This role helps the victim to claim for compensation against the offender. In order to be a civil party, a victim must be eligible to become a civil claimant, notify the court and the prosecution of his/her intention to make a claim for compensation and must appear in court and substantiate his/her claim, orally or in writing, by providing evidence to the court of the damage caused as a result of the offence.¹¹¹

¹¹⁰ The following link has some educative examples on victim impact statements and some examples show how victims have been affected by crime: <https://law.lclark.edu/live/files/30420-online-resources-victim-impact-statements>.

¹¹¹ Victoria Law Reform Commission, *Supra* note 90, p.40.

The criminal prosecution may be held in parallel or closely aligned with a civil action by the victim. The victim has the possibility to act as “a civil party” either at the time of the filing of the complaint or throughout of the instruction. This is optional. In that case, the public action goes parallel with the civil action; this means that two trials are being handled at the same time. The civil party, which defends the civil interests of the victim at trial, only pleads on the damage and reparation. The judge will also have to rule on both, the sentence and the damages, respectively on the criminal and the civil.

In Rwanda as in many other civil law systems, if the victim wishes it, a parallel process to the criminal investigation can proceed with the assistance of the investigator and prosecutor. The two processes have different burdens of proof. The Rwandan Law n° 027/2019 of 19/09/2019 Relating to the Criminal Procedure in its article 23, also allows to the victim of the offence to prosecute before the court, and in that case he would be a civil party.

The associations with the statutes to assist victims of offenses can also become a civil party in criminal trial and claim compensation on behalf of the victim.

The victim can initiate the public action either by the complaint transferred to the public prosecutor, who decides whether or not to prosecute; either by summoning the victim directly to the competent court. During the whole process of the investigation, the victim has the possibility to play the role of the civil party. The victim may decide to disappear completely from the criminal proceedings and remain only a witness or just passive. He may also decide not to seek compensation or to only bring the civil action before a civil court.

During the investigation process, the rights of the victim, as a civil party, have a little bit improved. When the prosecutor receives the file, for the offences punishable with imprisonment less than two (2) years, he or she may initiate formalities for negotiations between the suspect and victim if he or she believes that it is the sole procedure to remedy the victim, nullify the consequences of the offence and facilitate rehabilitation of the offender. The prosecutor also may summon the victim of offence in order to help him or her negotiate with the suspect about the amount of the compensation and so impose a fine without any proceedings. In case of disagreement, the victim of the offence files a claim

of compensation to the competent court. In any case the prosecutor decides of the closure of the file because of lack of evidence, the victim of the offence has the right to be informed within thirty (30) days from the day the decision is taken.¹¹²

When the offence is punishable by a fine, the prosecutor can ask the suspect to choose between being brought before the court or paying a fine without trial. If the suspect decides to pay the fine without trial, the criminal action against the suspect is discontinued and the decision is notified to the victim.

Although this innovation reduces the number of cases to be introduced to the court, it should involve the victim before the process starts instead of the victim only being notified of the decision.

The plea bargaining also introduced in the criminal procedure at the end of the suspect's interrogation, allows the prosecutor to propose a plea bargaining agreement with the suspect. However, it should not prevent the victim of the offence from getting information on the prosecution file and from contributing to the explanation on the commission of the offence. Through the plea bargaining, the prosecution obtains all the necessary information in the prosecution of the offence and gets to know other persons involved in the commission of the offence and in return, the suspect receives some benefits. The prosecutor undertakes to make concessions to the suspect in relation to charges against him or her and the penalties that he or she may request. During investigations, a suspect who enters into plea bargaining with the prosecution may be prosecuted while free.¹¹³

In some countries (France), the civil party can get involved in some acts which they deem necessary like hearing witnesses, transport to the scene of crime, etc. Whenever the investigator decides not to grant this request, he must justify his decision. Some would agree that the civil party can influence the investigation.¹¹⁴

¹¹² Art 24, Law n° 027/2019 of 19/09/2019, *Supra* note 18.

¹¹³ *Idem*, art 26..

¹¹⁴ Anon « La victime dans le procès pénal »

<http://www.normalesup.org/~saurin/genepi/victimes/Productions/Dossier/dossier.pdf>
[10/11/2020].

Other rights are manifested in allowing the civil party to take actions aimed at establishing the nature and extent of the damage. The investigator therefore is entrusted to go beyond the criminal sphere and also consider the civil interests of the victim.

The right to be informed on the progress of the investigation is very key as it helps victims to be updated on the status of the file.

The justice systems where the victim's rights have been strengthened allow to their lawyers, during the proceedings, to directly ask questions to the defendant, to the civil party, to the witnesses, and to all the persons brought to the bar. This places all the parties on an equal level during the proceedings. This innovation has changed the debate a lot, especially in inquisitorial system, as before, the parties could only ask questions through the chair. This procedure recognizes a greater role of the civil party and it increases particularly his/her possibilities to intervene in the trial.¹¹⁵

With these developments the criminal action remains separate from the civil action, and allows the civil parties to only focus on the question regarding the reparation of the damage and not on the criminal sanction. Civil party would see the perpetrator's sanction as a better psychological remedy than simple financial compensation and would find relief in the fact of being recognized, or in the feeling of having his/her part in the sanction depending on the psychology or the personality of the victim.¹¹⁶

After the trial, the civil party appears only when it comes to appeal against the decision with regard to his/her civil interests, mainly the amount of damages. The reference to the victim also intervenes in the execution of the sentence, where in some countries, the law may allow the exemption or postponement of the sentence if the full payment of damages is done.

In the Rwandan criminal procedure law, when the public prosecution is seizing the court, it must include in the file a statement notifying the civil parties, if any, that the claim was lodged to the court.¹¹⁷ The prosecutor also, while preparing an indictment, is required to include a statement on interrogation of the victim of

¹¹⁵ Idem..

¹¹⁶ Ibidem..

¹¹⁷ Art 92, Law n° 027/2019 of 19/09/2019, *Supra* note 18.

the offence on whether he/ she intends to apply for civil damages.¹¹⁸ The article 190 and 191 allow to the parties to appeal to civil matters. The acquittal of the accused in the first instance is not an obstacle for the civil parties to seek damages on appeal. If the civil party appeals, the appellate court re-examines the entire case on the merits.

3.5 Victim as a “private prosecutor”

Although powers to prosecute before criminal courts belong to the public prosecution which institutes a criminal action aimed at punishing the offender, the victim of the offence, an aggrieved person may prosecute before the criminal court as prescribed by Law (art.3,1, art.4 & art.23) by way of private prosecution (citation directe).

3.5.1 Private prosecution (*citation directe*)

The Rwandan criminal procedure law allows an individual, an aggrieved person to bring a case before the court as a private prosecutor (art.95) and, considering that an offence of contempt of court is committed, the court may on its own initiative take up the case. Private prosecution is carried out when the victim of an offence files a claim in a criminal court demanding that the offender, his or her co-offender or accomplice be punished and be ordered to pay damages proportional to the injury caused (art.118). A private prosecutor must clearly indicate acts the defendant is accused to have committed to enable him or her to properly prepare his or her case expeditiously, even aggravating circumstances (art.119).

As stated in article 120, private prosecution takes place when the public prosecution has received the file and didn't take any action for a period of three (3) months for petty offences and six (6) months for misdemeanors and felonies, or when a criminal case file is finally closed without further action. When the court is seized, it notifies the public prosecution with an obligation to get involved in the case.

In Australia, a private prosecution is a proof that the public prosecutor decides not to proceed with the criminal case file or that the victim is not satisfied with the prosecutor's decision to accept a plea of guilty to lesser charges.

¹¹⁸ Idem, art 93.

Throughout the criminal process, the prosecution has two key decisions to take; whether to continue or discontinue a prosecution, whether to negotiate a plea agreement with the accused rather than continue to trial. Whatever decision may be taken, the victim must be informed.

The role of the victim in private prosecution is inherently linked to the role and duties of the prosecutor. The victim of crime can report the crime to the police or following a report, he/she can make a statement to police. The investigator may charge an accused and then proceed to prosecution. Sometimes when the prosecution is discontinued, the victim may still want his/her justice needs to be fulfilled. He/she may also wish the prosecution not to proceed. However his/her personal interests are secondary to the public interest in the state prosecuting and punishing criminal activity.¹¹⁹

Some victims may have been discouraged to report the crime by family and other community members because of the attitude of those to whom an offence is reported. The prosecution represents the State not the crime victim, nor the Government or the police, and acts in public interest, that is why the assessment of evidence, the law and the public interest is very key to charge a suspect. However, the prosecution must ensure that the concerns of the victim are given appropriate consideration.¹²⁰

Private prosecution accelerates the procedure as it brings quickly the criminal to the court without going through the judicial information and investigation. It is very clear that the victim cannot use private prosecution if he/she doesn't know the identity of the perpetrator. The only thing to do in this case is to file the complaint to the public prosecution. For a successful private prosecution, the victim must also ensure that he/she has sufficient evidence against the perpetrator.

Private prosecution is possible for petty offenses and misdemeanors and the competent court is that of the place where the offense was committed or that of the domicile of the offender.¹²¹ Some countries in Europe, Africa, Asia, Australia and North America, allow companies to institute private

¹¹⁹ Victoria Law Reform Commission, *Supra* note 90, p.58.

¹²⁰ *Idem*, p.45.

¹²¹ Art 120, Law n° 027/2019 of 19/09/2019, *Supra* note 18.

prosecutions.¹²² The Rwandan legislation doesn't specifically prevent that right from companies or organizations.¹²³

To make sure that the private prosecution file is well prepared, the victim on his/her own or with the support of a lawyer, incorporates different elements. He/she must include in the file of the identity of the accused, a complete presentation of the facts, the nature of the offense and a reminder of the law that punishes the offense. In the same document, he/she must mention the claim for compensation, the identity of the civil party and the nature of the court. The date, place and time of the hearing are also indicated.

The criminal procedure law indicates how the offender is communicated about the private prosecution and how he/she intervenes and at the end of the hearing, the judge delivers his/her judgment. The judgement will either convict the perpetrator found guilty of the offense, will determine the sentence and the victim will be compensated, or the judge will consider that the private prosecution was abusive, the accused is then released and the victim can be sentenced to repair the damage caused to the accused.

Some of the advantages of the private prosecution is that it is much faster (it is issued without waiting for the feedback from the prosecution), much simpler (it is directly referred to the court) and less expensive (it avoids the whole phase of the instruction). The risk of paying a fine if the private prosecution is found abusive should also be avoided. Private prosecution can also discourage corruption and partiality as has shown the "Saffron Hill Murder" case¹²⁴ or its intent may pressure public officers to initiate a public prosecution.¹²⁵

¹²² Mujuzi JD "Private prosecutions and discrimination against juristic persons in South Africa: A comment on National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development & Another" 15 African Human Rights Law Journal (2015) p.582 accessed at <http://dx.doi.org/10.17159/1996-2096/2015/v15n2a17> on 15/11/2020.

¹²³ The definition given to "victim" doesn't allow to understand that companies or organizations are not provided with the right to private prosecution.

¹²⁴ This case from the 1860s shows how much the private prosecution can be useful. In the Golden Anchor pub in Clerkenwell, London, on the afternoon of December 26, 1864, there was a murder. Despite the protests of witnesses, Mr Pellizoni was arrested and identified as the attacker. The evidence of a murder weapon that was found away from the incident was suppressed by the police and Mr Pellizoni was convicted and sentenced to death. The witnesses knew he real murderer was Mr Mogni, who had allied with the patrons. They then introduced a private prosecution against Mogni who had confessed to wielding the knife. His conviction led to Pellizoni's release. This avoided a grave miscarriage of justice that could happen and discouraged such kind of corruption and partiality. If not for the right to bring a private prosecution against such corruption and partiality, a grave miscarriage of justice would

Some disadvantages also are presented as follows:¹²⁶

- 1) private prosecution must be carried out or conducted as the law stipulates, otherwise any omitted mention or a deadline not respected would call for nullity;
- 2) an amount set by the court is deposited by the victim in order to be able to pay the fine whenever the private prosecution is found abusive. The demand may not be accepted if the deposit is not done;
- 3) complete evidence gathered by the victim because if there is no conviction there will be the risk of an acquittal.
- 4) if the identity of the accused is not known, the private prosecution would not be receivable;
- 5) several hearings will be useful before the case is ready to be argued;
- 6) financial consequences in case the complaint is dismissed, the victim who initiated the private prosecution will repair the damage caused to the accused;
- 7) a risk of the victim to being prosecuted for the false accusation if the case is dismissed.

Private prosecution is an expression that the victim is interested that the suspect be prosecuted or tried. That is why when the prosecution doesn't prosecute, the victim prefers to directly take the case to the judge. In some cases, the victim is not interested in the prosecution and chooses not to report the crime or not to testify where needed.

3.5.2 Prosecutions not in the interests of the victim

As we have seen earlier, the public prosecution acts in the name of the State, the community and prosecutes in order to restore the public order, to bring back security and peace in the community. The punishment given to the offender when found guilty, not only facilitates his rehabilitation but also is aimed to

have occurred. (See Edmonds T & Jugnarain D "Private Prosecutions: A Potential Anticorruption Tool in English Law" Legal Remedies for Grand Corruption (2016), p.5).

¹²⁵ The Sea Empress oil spilled off the Pembrokeshire coast in 1996 would be a good example. Friends of the Earth, a global activist group put the pressure to the Environment Agency to prosecute, or that if not they would introduce a private prosecution. This pressure has influenced the Agency's decision to commence a public prosecution against Milford Haven Port Authority (MHPA). (See Edmonds, *Supra* note 127, p.6).

¹²⁶ Anon « Les avantages et les inconvénients de la citation directe » <https://www.legavox.fr/blog/maitre-haddad-sabine/citation-directe-avantages-pour-inconvenients-6740.htm> [15/11/2020].

discourage others to commit crimes. The crime control is one of the objective even though victim satisfaction also remains into consideration.

While pursuing a case, the prosecution represents the victim and tries to satisfy the victim by resolving the case in trial. In many cases the victims of crimes report themselves to the prosecution seeking for justice to be done. They remain active and give the information needed in order to find or convince the suspect. However, in other cases, the victims of crimes may decide not to report the crime, or may seek to have a prosecution discontinued. This is manifested in different kind: silence, absence in the process, disappearance or clear statement that the victim refuses to press charges. Different reasons could justify this such as fear, wanting to move on, forgiving the offender, or because they would prefer an outcome not available through the criminal justice system.¹²⁷ The domestic violence is mainly that kind of prosecutions that are not in the interest of the victim.

Some attitudes would show that the victim is unwilling to prosecute:

- a victim who keeps silence when the police officer calls out to take a domestic violence call;
- when despite the officers' presence, the violence continues to intimidate the victim;
- when there is a risk of harm or attack to the officer when attempting to take the suspect into custody.

Some cautions need to be taken during the investigation or the prosecution:¹²⁸

- there should always be a minimum of two officers on each domestic violence investigation;
- immediately upon arrival, officers should separate the parties in question so that they cannot see or hear one another;

¹²⁷ Miranda RB, *Domestic Violence And Social Norms: Attitudes And Practices Of Criminal Justice And Health Workers In Norway And Brazil*, (Masters Thesis, University of Bergen, 2018) p.53-55.

¹²⁸ Jeremy Nikolow "The Challenges of Domestic Violence Investigations" <https://inpublicsafety.com/2015/10/the-challenges-of-domestic-violence-investigations/> [26/11/2020].

- having the parties face away from each other at a distance while the officers face them so they can keep everyone in their direct or peripheral line of sight;
- investigations should take place away from areas that contain potential weapons (e.g. kitchens, garages with tools, and extremely cluttered areas where weapons could be hidden). When feasible, each party should be checked for weapons;
- It is important for officers not to make assumptions about who is the victim and who is the perpetrator. Often times, the person who initially appears to be the victim ends up being the offender. Officers should respectfully treat all involved parties with a high level of caution;
- officers are typically required to give victims information on the various services afforded to them by law that provide victim compensation, counseling services, domestic violence shelters, sexual assault treatment, legal assistance, relocation services, and many other victim assistance programs.

Despite the victim's wishes to discontinue the prosecution, the decision to continue may be taken, especially in the context of family violence. The European Court of Human Rights concluded that these circumstances could be justified because of the risk family violence poses to the victim's health and rights and the need to prevent further crime. The reluctance of the victims to cooperate with the investigation may come from the fear of retaliation by the offender, fear of being stigmatized within their family and community (self-blame, feeling of shame and embarrassment) or fear of losing economic support and opportunities when the offender is the only one who feeds the family, fear of not being believed or of being blamed, feelings of confusion, fear of psychologically reliving the incident, or a reluctance to acknowledge the incident ever occurred particularly when sexual assault was involved.¹²⁹

Some victims show no interest to report crimes because they didn't receive appropriate support, or they just conclude by themselves that the incident is less important to be reported. They instead look for advice or support from

¹²⁹ Phillips J *et al*, *Domestic violence: issues and policy challenges*, 2015-16 Research Paper Series (Parliament of Australia, 2015), p.7.

family members, friends or community services. When cases involve relatives, families of the victim and the aggressor can meet, talk and reconcile. One would wonder why the public prosecution would insist on prosecuting if the concerned parties, especially relatives, are reconciled. Does this approach appropriately protect or potentially disempower victims? Some crimes between spouses, family members, are likely to be committed against victims than the community.

The support services and, some cautions by the officers during the investigation, are very crucial in dealing with emotional and psychological interventions and would encourage the victim to speak out and disclose what happened when it comes to reporting to judicial authorities.

3.6 The victim and the restorative model of criminal justice

“A restorative process is any process in which the victim and the offender and, where appropriate, any other individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator”.¹³⁰

Restorative justice leads to the reconciliation between the victim of crime and the perpetrator for the benefit of victims, defendants and the community, with aim to reconstruct the broken bonds when the crime was committed. At the same time it encourages the criminals to recognize their responsibility in committing crimes and reconcile with the victim.

It is clear that the restorative justice comes after retribution and before rehabilitation. It focuses more on the damages caused by the offense, on the impact of the crime on the relations between people and on the reparation of the damage caused. Through the restorative justice, the human dignity of the victim is recognized, contrary to the retributive justice that reinforces the conflict between the author of the crime and the victim to whom he owes compensation/reparation.

With restorative justice, the place of the State should be avoided because it is the person offended and the criminal who are concerned. The parties go deep in the origin of their dispute, they themselves become actors in the settlement of their conflict, making them responsible, taking ownership of the criminal

¹³⁰ Penal Reform International, *Supra* note 78, p.15.

matters. The victim receives explanations, express his suffering, and the criminal recognizes his wrong doings, asks for forgiveness and pays the compensation. Through all this the parties regain fairly human dignity and so rebuild social cohesion between them and their families.¹³¹

Through the restorative justice, parties and the community come together, it is a face-to-face meeting between the victim, the offender and members of the community. During this meeting, the parties speak out about their perspectives of the crime and express their concerns and feelings. It helps them to develop an understanding of the crime, of each other and what is needed to reconcile. In this meeting the offender agrees on how to make reparation. Reparation can be financial (if the offender pays money), social (if the offender pays a service to the victim or a service to the community) or any other kind of reparation agreed upon by the parties. The reparation reduces the pain and suffering that the victims have endured. Involving the victim in this process gives him/her the opportunity to understand the offender's motivation for committing the crime, to express her/his needs and determine how those needs would best be met. As the crime has effects to everyone, there is a need of finding solutions together for a better reparation and sustainable harmony among communities. Restorative justice actively involves also community members and they participate in order to achieve justice. They support the victim and ensure that the offender makes amend. This process benefits also to the community as it brings back the harmony and peace among the community members, and reminds them not to commit crimes.

Most of restorative justice cases arise in domestic criminal law where cases are diverted to mediation or other reconciliation processes. Mediation is much more used as part of restorative justice. Concerning international human rights principles, mediation should never be used in criminal matters without the consent of both parties. Victim and offender participate in restorative processes or accept restorative outcomes. Victim-offender mediation appears to reduce recidivism, more likely juvenile recidivism, to increase satisfaction with justice process, to reduced post-traumatic stress symptoms, to reduce crime victims' desire for violent revenge against their offenders and the costs of criminal justice. Studies have indicated that juvenile offenders in restorative justice

¹³¹ Duffuler-Vialle, *Supra* note 87, p.72.

conferencing are less likely to reoffend than peers in a traditional diversion program, girls and youth with few prior offenses are more beneficiaries than boys and youth with more prior offenses.¹³²

The Rwandan criminal procedure provides also for mediation and gives the prosecutor the right to initiate formalities for negotiations between the suspect and victim if he or she believes that it is the sole procedure to remedy the victim, nullify the consequences of the offence and facilitate rehabilitation of the offender. Such negotiations cannot happen to offences punishable with imprisonment exceeding two years. However, when the suspect is a minor, the negotiation can also apply to the offences punishable by a maximum term of imprisonment of five years.¹³³ The prosecutor can also impose a fine without any proceedings. If there is a victim of the offence who may ask for compensation, the prosecutor summons him or her in order to help him or her negotiate with the suspect about the amount of the compensation. It is in case of disagreement, that the victim of the offence files a claim of compensation to the competent court.

Restorative justice is more common in Common law countries and today is being developed also in some French-speaking countries.

Although restorative practices can benefit victims from diverse backgrounds in the criminal process, it is also recognized that restorative justice practices may not be suitable in all circumstances. They may need other alternatives for more serious crimes. Some may not necessarily provide emotional reparation for some victims, may risk further emotional harm, and may not fit in the individual victim's justice needs and interests.¹³⁴ The Rwandan model also considers that there are crimes for which such mediation practices should be avoided.

As Tony F. Marshall says, although some people may conceive of Restorative Justice as applicable only to minor offences, practice has shown that it would also work well with serious crimes, especially in terms of victim benefits, but also in terms of prevention.¹³⁵ Exceptionally, the Rwandan choice to deal with the cases of genocide against Tutsi during the aftermath of genocide is a good

¹³² Walden University, *supra* note 82.

¹³³ Art 24,3, Law n° 027/2019 of 19/09/2019, *Supra* note 18.

¹³⁴ Victoria Law Reform Commission, *Supra* note 90, p.43-44.

¹³⁵ Marshall TF, *Restorative Justice An Overview*, (London, 1999), p.8-9.

example. Rwanda has gained a great deal of experience in dealing with victim trauma and effecting reconciliation between victims and perpetrators. The transitional justice led to Restorative justice as a political choice. The Rwandan model contributed to the conciliation of the victims, the perpetrators and the community as a whole. It has been proved¹³⁶ that the Gacaca Courts system process has contributed to the restoration of unity, reconciliation and peace in the country.

It helped to disclose the truth on the events of genocide against the Tutsi (From Oct.1990-Dec 1994), to speed up genocide trials on a less expensive budget, to eradicate the culture of impunity, to reconcile and strengthen unity among Rwandans and to prove the Rwandan Society's capacity to solve its own problems.¹³⁷

The Gacaca Courts system left also a commendable legacy that has improved the criminal justice system. This is the case of:

- (1) introduction of the community service in the penal code as a possible sentence to some offenses;
- (2) introduction of Mediation system (Abunzi);
- (3) experienced volunteers in Alternative Dispute Resolutions (ADR) and local leadership;
- (4) maximizing appeal levels in ordinary courts;
- (5) culture of confession and pleading guilty;
- (6) rebirth of other home-grown solutions such as umuganda, ubudehe, itorero, ingando, ndi Umunyarwanda, kwiha agaciro...;¹³⁸
- (7) arguments for restorative justice in ordinary judicial system;

Restorative Justice works more morally and looks like a moral punishment which leads to "psychological reparation" of the victim. Restorative justice therefore remains complementary to the retributive justice. It gives credit to

¹³⁶ National Unity and Reconciliation Commission (NURC) "Rapport Annuel" (2011) accessed at NURC Office on 24/11/2020.

¹³⁷ Bikesha, *Supra* note 33, p. 63.

¹³⁸ Art 11, Constitution of the Republic of Rwanda of 2003 Revised in 2015, (OG no Special of 24/12/2015).

reparation and rehabilitation instead of retribution and punishment. It encourages the criminal to acknowledge the impact of the harm caused to the victim, to resolve conflict and to take opportunity for reparations. Restorative justice reaches a consensus regarding an appropriate sanction or consequence. At the same time, it heals the victim or community and ensures the reintegration of the offender.¹³⁹

3.7 The victim and the best interests of the child model of criminal justice

Concerning the justice for children, one of the principles is that “in all actions where children are directly, or indirectly, involved or affected by the justice system, the best interests of the child shall be a primary consideration”.¹⁴⁰

Therefore, whatever action taken, its impact on a child or groups of children should be analyzed to ensure their best interests are met. This principle is also interlinked with others like: protection, the right to be heard and non-discrimination and is also connected with any conflicting human rights.¹⁴¹

In criminal justice, we have two kinds of children who need protection: those who are directly responsible of crimes and others who are victims of other offenders’ actions.

A child victim or witness, if it is deemed necessary, can be heard in judicial proceedings in line with his/her best interests. This means that he/she can participate in the justice process, in accordance with measures and safeguards taken to protect him/her from intimidation, reprisals or secondary victimization. When pursuing the case, the prosecution always gives priority to the child’s best interest.

Some international standards have been put in place to help practitioners give due weight and consideration to child’s views according to his/her age and capacities. Biological age only doesn’t count to determine the level of understanding, the maturity or the ability of a child. His/her views are assessed case by case to give consideration to his/her testimony and evidence. Some justice systems don’t allow children to testify at a trial, some other systems, like

¹³⁹ Penal Reform International, *Supra* note 78, p.14.

¹⁴⁰ Art 3, Convention on the rights of the Child, UN General Assembly, (1990).

¹⁴¹ Penal Reform International, *Supra* note 78, p.14.

in UK, give a competency test to decide whether or not a child's testimony can be admitted.¹⁴²

Being a victim of or witness to a crime can have negative effects on the child in different ways: difficult in schooling, negative change in family relationships, ability to communicate, and change of behavior in general. A UK study has shown that children participating in the judicial process can experience pre-trial stress in the form of panic attacks, self-harm, flashbacks, bed-wetting, eating or sleep disorders, depression and loss of confidence.¹⁴³

Hayli Millar and Yvon Dandurand recognize another situation of children victims, those whose parents are facing criminal sanctions. They confirm how parental imprisonment is a concern in criminal justice that affects the children and yet, these effects are rarely considered in criminal justice processes.¹⁴⁴

Children of imprisoned parents are often described as the forgotten victims of imprisonment especially since they are not considered or consulted at all stages of the criminal justice process, and so their rights, needs and best interests are overlooked or actively damaged.

According to Oliver Robertson¹⁴⁵, there are always strong reactions in the children in case of imprisonment, or even arrest of a parent. They may be sadness, anger, worry and a sense of loss. They vary between different children according to the context in which children are used to live in. Even within cultural and penal contexts, prison effects on family members are likely to differ according to prior relationships, types of offence, social support systems and other socio-demographic factors.

The impact of parental imprisonment on children can be sensitive and long-lasting. Discrimination, stigmatization, trauma, fear, shame, guilt and low self-esteem are most results of parental imprisonment. This may lead to withdraw, increased health problems (physical or mental) and regressive behavior such as bed-wetting, suffer worsening performance and attendance rates at school or display increased aggression, antisocial or criminal tendencies.

¹⁴² Idem, p.62.

¹⁴³ Idem, p.61.

¹⁴⁴ Millar, *Supra* note 79, p.227 & Robertson O, *Supra* note 79, p.7.

¹⁴⁵ Robertson O, *supra* note 79, p.9-11.

However, parental imprisonment is not always a negative experience for children. The child's life can become better after parental imprisonment because the victim is protected from the domestic violence or child abuse, and the child is away from a bad relationship with the parent. In such case, when that parent is not around, their children's lives may be more stable or manageable. Even though the imprisonment of a parent is sometimes felt as a relief that he/she is no longer able to hurt his/her children, the feeling of loss will always remain. That role has to be played by someone else, which is a big challenge.

The best Interests of child (of the suspect or of the victim) is very key in the criminal process. A female suspect who is pregnant may be released because the child will need the wellbeing and protection. In the same context, if the children of the victim depend on the suspect providing for them, this factor may determine whether the suspect is provisionally detained or released. This also may impact on the type of sentence to be imposed or whether the sentence of imprisonment is suspended or not.

When a child is a victim of a crime, the justice system provides for the way it should be handled. In some countries child helplines are set up to allow a child to report a crime or abuse more easily, and to enable them to be referred to appropriate services, and where necessary, the police. These services will help the child (victim or witness) in case of psychological stress when officially reporting and recounting crimes, especially crimes of sexual abuse or where the perpetrator is a family member. Some child concerns need to be addressed to encourage reporting the crime: harm or reprisals from the perpetrator, being blamed or rejected for reporting the crime, not being believed, or negative parental or community reactions, manipulation by the perpetrator and a lack of control for the victim.¹⁴⁶

A child victim or witness of criminal offense may face serious consequences physically, emotionally and psychologically and this may impact on its development and well-being and can have a negative effect on their relationships with others. Such children may be exposed to abuse or

¹⁴⁶ Penal Reform International, *Supra* note 78, p.62-63.

exploitation in the future. It is very important to provide much and possible assistance to mitigate these consequences and facilitate their rehabilitation.¹⁴⁷

Cases where a child victim or witness is involved and handled with a particular attention: investigation carried out without delay, strict time frames. The dignity and integrity of a child victim or witness of a case must be safeguarded at all stages of investigation and preparation.¹⁴⁸ Secondary victimization, fear of harm by the perpetrator, a fear of not being believed and feelings of self-blame are issues to avoid in communicating with and interviewing the child which should be done through a child friendly delicate approach.¹⁴⁹

A child-friendly, well-run trial has a positive or empowering effect on a child victim or witness, contrary to a long waiting period for trial which can be stressful for him/her, especially those of a younger age or those who are experiencing harassment from perpetrators. When the perpetrator is a family member, the child is at a higher risk of being pressured to amend their testimony.

During the proceedings, measures including supervision,¹⁵⁰ should allow the questioning and cross-examination of the child victim or witness in a child-sensitive manner to protect him/her from intimidation and any other harm. The cross-examination of a child is mostly found in common law countries.

When the trial or the case is closed, it is good to thank and inform the child that his/her testimony was important in the justice process, and also inform him/her about the outcome of the case. It is very useful to inform the child victim or witness some days before about the upcoming release of the perpetrator to give time to the child and the family to set up precautionary measures.

¹⁴⁷ Ibidem..

¹⁴⁸ UK legislation allows for the provision of Court Witness Supporters for vulnerable groups of witnesses, including children. Their support can be emotional, medical, educational or social. The support helps the witness to get used to the environment and to the court proceedings. However, they must respect rules and avoid allegations of coaching the witness. (See Penal Reform International, *Supra* note 78, p.68).

¹⁴⁹ In Norway, there are special locations for trial for children victims or witnesses. Questioning can be handled separately from the sitting of court and in a location that would make the child comfortable to give the best evidence and to be protected from harm. (See Penal Reform International, *Supra* note 78, p.68).

¹⁵⁰ The South African Criminal Law Amendment Act, provides for children intermediaries to protect them from undue mental stress or suffering if they appear and testify before the court. (See Penal Reform International, *Supra* note 78, p.69).

In Rwanda,¹⁵¹ some legal provisions recognize to the child victim of offense, the privacy that needs to be respected and protected at all stages of the criminal process. Harassing a child or imposing severe punishments on him/ her is an offence and punishable by laws. If the offence results in the child's disability, the penalty is more severe and it turns into life imprisonment, if the offence results in death of the child. The law also protects a child from sport activities that are harmful to his or her health.

Children can also be witnesses in a trial. A minor aged under fourteen years is qualified to testify as an adult but his/her testimony must be supported by other corroborative evidence. He/she gives testimony without taking an oath but the court ruling cannot solely rely on his/her testimony.¹⁵²

A child is protected from a parent or any person or a guardian who uses, entices, incites, and engages a child into a habit of begging commits an offence. If the child engaged into beggary has a physical or mental disability, the applicable penalty becomes more severe.

For the child victim of sexual abuse, the Rwanda Investigation Bureau (RIB) has established the Child and Gender Protection Unit, "Isange one stop center" which creates a friendly environment where the child victim will openly report. The center ensures confidentiality in reporting sexual abuse at the RIB station. In addition, it has developed mobile offices that are separate from the police office, to facilitate more confidential and child-friendly interviews, and to encourage the reporting of offences.

The reparation is an important symbolic message to the child as it recognizes the harm/damage caused by the offense. The reparation can be financial, medical and psychological. It recognizes that a certain level of justice is achieved. Restorative justice is also possible to address the damage caused by the crime, however it should only be used where deemed appropriate and in the child's best interests.¹⁵³

¹⁵¹ Art.23-27, Law n°71/2018 of 31/08/2018 Relating to the Protection of the Child, (OG no.37 bis of 10/09/2018).

¹⁵² Art 49, Law n° 027/2019 of 19/09/2019, *Supra* note 18.

¹⁵³ Penal Reform International, *Supra* note 78, p.70.

3.8 The victim and the public interest model of criminal justice

Criminal justice systems and prosecution services are normally there to serve the "public interest" and the common good. With the aim of protecting public interests, the public prosecution is independent while exercising its responsibilities. The public interest is defined by law and the prosecutors have to perform their duties within the framework of the law. The focus of the public interest is closely linked to the rule of law and respect of human rights.

Public interest in criminal justice is ensured by the public prosecution on behalf of society where a violation of the law calls for a criminal sanction, in respect of the rights of the individual and the necessary effectiveness of the criminal justice system.¹⁵⁴ This is done to maintain public order and to have a more organized State where crime is under control.

It's up to the public prosecutors, while implementing national crime policy, to decide whether to initiate or continue prosecutions; to conduct prosecutions before the courts or to appeal or conduct appeals concerning all or some court decisions.

Faustin Helie has shown that in so doing, two kinds of public interest, sacred and very important, are highlighted and so protected: general interest of the society which aims to the crime control, and the interest of the accused, which is at the same time social and seeks the protection of the accused's human rights.¹⁵⁵

In its discretion, the public officer may decide to continue or discontinue a prosecution. The following factors are taken into consideration:

1. the seriousness of the offence, including whether it can only be tried on indictment
2. the personal circumstances of the victim and offender, including any particular vulnerability of the victim
3. the prevalence of the offence and the need for deterrence

¹⁵⁴ Council of Europe "The role of Public prosecution in Criminal Justice System" (October 2000), p.4 accessed at <https://rm.coe.int/16804be55a> [26/06/2020].

¹⁵⁵ Bossan J, *L'Interet general dans le proces penal* (PhD-thesis, Universite de Poitiers, 2007), p.17.

4. the availability of alternatives to prosecution
5. whether the alleged offence is of particular public concern
6. any entitlement of the victim to compensation, reparation or forfeiture if prosecution action is taken
7. the attitude of the victim to a prosecution.

3.8.1 Immunities

The interest of repression is eminently beneficial to society. Although it helps to ensure a certain stability of the social contract, it is not absolute in nature. Repression is not always a solution to societal well-being. There may be legal obstacles that do not necessarily have the same effect. Immunities simply stop prosecutions or even procedural techniques lead to extinguishing them.

Some immunity lead to disappearance of the legal element, others will prohibit prosecution. The general interest may not necessarily focus on the repression but lead to other interests that can stop the prosecution of crimes, and the interests that can defend the state or the social structure.

The interest of repression is sometimes challenged by other public interests designed to protect the State. This can be through political immunities (presidential and parliamentary immunity) that come to defend the office through the holder or in diplomatic relations.

As Jerome Bossan¹⁵⁶ explains, the president of the Republic cannot be considered any citizen. The presidential immunity finds its essence in his mandate and has triple justification. The first is inherent to the function itself as stipulated by the Constitution, as the guarantor of functioning of public authorities and the continuity of the state. The second is the principle of separation of powers. The third is the result of universal suffrage in the presidential election.

The parliamentary immunity is not a favor to members of Parliament but is there to protect the Parliament as institution. It is therefore an exception to equality before the criminal law. Absolute immunity protects the member's

¹⁵⁶ Idem, p.78.

"opinions or votes" while performing his duties. It is primarily aimed at protecting the freedom of expression of representatives of the Nation in parliamentary proceedings. This immunity shall be waived when the offence is committed outside the parliamentary proceedings.

Diplomatic immunities also contribute to the protection of the state. They necessarily stop repression in the name of the public interest.

3.8.2 Amnesties

Amnesty is also one of the causes of the extinction of the interest of repression. Amnesty¹⁵⁷ is defined as "an extraordinary legal measure whose primary function is to remove the prospect and consequences of criminal liability for designated individuals or classes of persons in respect of designated types of offenses irrespective of whether the persons concerned have been tried for such offenses in a court of law". In other words, amnesties can grant immunity from criminal prosecution, civil actions, or both, if such are the conditions agreed upon by the parties.

The legislator determines that certain acts will be removed from their nature of offence. It is therefore a matter for parliamentarians to determine the different interests involved and to conclude that repression will remain or removed in the public interest.

Amnesty serves traditionally commendable goals that are essential to society. When it comes to the aftermath of major crises, amnesty is aimed at union, national reconciliation or the internal pacification. In these cases, the repression becomes contrary to the interests of society and the effect of amnesty is to defeat it.

Although among recent peace processes is the use of amnesty agreements as a mechanism to restore the rule of law, peace and bring democracy back to the country, the International community and human rights organizations are critical of States that opt not to pursue the perpetrators of massive violations of human

¹⁵⁷ Uribe C "Do Amnesties Preclude Justice?" 21 *International Law, Revista Colombiana de Derecho Internacional* (2012) accessed at http://www.scielo.org.co/scielo.php?script=sci_arttext&pid=S1692-81562012000 [26/06/2020].

rights, especially when they foreclose effective legal remedies for crimes such as genocide, war crimes and crimes against humanity.¹⁵⁸

The Rwandan law also recognizes amnesty and presidential pardon in the law determining offences and penalties in general. Amnesty is defined as a pardon granted in the general interest and for the benefit of convicted persons in respect of the offences they have committed (article 68). Both amnesty and presidential pardon extinguish all principal and accessory penalties pronounced as well as consequences of the offence, except the damages resulting from the court decision imposing the penalty and civil action arising out of the offence (articles 69, 70, 72).

Under the public interest model, the provision of 145(2) of the Constitution empowers the Minister of Justice to enjoin the Prosecutor General to refrain, in public interest, from investigating or prosecuting an offence. The institution of Gacaca jurisdictions, abolition of death penalty were taken in the same spirit, because it would have been decided otherwise if the crime control model were the only one chosen. But the public interest dominated and, though the measures were hard to accept, they contributed a lot to the nation building and especially to the unity and reconciliation of Rwandans.

For public interest, countries can choose to refrain from prosecuting some criminals and keep silence on the crimes they know were committed, or opt for truth and reconciliation processes. They may opt for criminal prosecution with reduced penalties (ex. Gacaca process), providing amnesty for offenders (cases in Burundi) or establishing truth and reconciliation Commission (like in South Africa).

The Public interest model, contrary to the crime control model, would keep the society moving forward.

In the situations as described above, you would wonder the fate of the victim. What the law provides for him/her? Being both treated by International law, is there a conflict between the diplomatic immunities and privileges and human rights? Which international rule should prevail in case of conflict? The diplomatic immunity prevails. Therefore, the offender cannot be prosecuted and so the essential element of sanction, retribution, cannot be applied. Another

¹⁵⁸ Idem.

issue arising from the diplomatic immunities is that the offender cannot pay any reparation/compensation. In order to avoid tension between the citizens of the host country and the accredited persons, some reflection need to be done not on the inability of a host state to punish the protected offender, but on the lack of effective prevention before the offense is committed, and to the inability of the receiving state to ensure satisfactory remedy.¹⁵⁹

Back in the past, we can remind some cases of abuse of immunities, which would attract the practitioners' attention for future consideration:

1. Right to life – In April 1984, an unidentified person (or persons) fired at the victims through the windows of the Libyan embassy and killed a British Police Constable and wounded eleven Libyan dissidents outside the Libyan embassy in London. The killer(s) could not be prosecuted and punished by the British legal system. Likewise, he/she could not be forced to compensate the victims' families.¹⁶⁰
2. The rights of some diplomats' servants were abused in different ways: interminable hours of work seven days a week, for little or no wages, some were abused physically or sexually, others were not catered for places to sleep or eat, and could sleep on floors and eat table scraps. To make sure they would not escape, some of them, their passports were withheld by their masters.¹⁶¹ The diplomatic immunity, being an exception to the general international law principle of territorial jurisdiction, could not allow these cases to be taken to the domestic jurisdictions of the host countries. However, where diplomatic immunity is not available, like in some cases, justice can be done and human rights respected. A Princess from a Kuwaiti Royal Family in London (1985), who kept two women as slaves, was sentenced to six months in prison suspended for two years and was ordered to pay £2,000 in fines, costs and compensation to the maids.¹⁶²
3. In 1982, a the Brazilian ambassador' son shoot somebody in a Washington night club, and the victim never fully recovered from his wounds and

¹⁵⁹ Ben-Asher D, *Human Rights Meet Diplomatic Immunities: Problems And Possible Solutions*, (Harvard Law School, 2000), p.17-18.

¹⁶⁰ Idem, p.17.

¹⁶¹ Idem, p.18.

¹⁶² Ibidem.

underwent psychiatric treatment.¹⁶³ The diplomatic immunity couldn't allow the American jurisdiction to handle the case.

4. The Mexican ambassador to the UN found, in a diplomatic parking, a non-diplomat New York City man who had parked for five minutes. He smashed the window of the non-diplomat's car and pointed a gun at his head. No charges were brought against the ambassador because of the diplomatic immunity.¹⁶⁴
5. The school officials realized that a 9-year-old child of an attaché of the mission of the Republic of Zimbabwe was badly beaten. The child was reported to have been severely beaten and suffered repeated violence from the parent. They sent the child to a foster home and the diplomat remained unpunished.¹⁶⁵
6. A US diplomat in London who whisked his two daughters to the US pleaded diplomatic immunity even though the English High Court ruling had granted custody of the children to his German wife. The diplomat didn't bring back to Britain the girls, aged 10 and 13, and he was not punished.¹⁶⁶

The cases cited above are good examples to attract our attention and need to think of the fate of the victims in case the public prosecution decides or is allowed by law to not prosecute. If the cases like these are kept silent and not prosecuted, some of the objectives of prosecution aimed to crime control, maintaining the societal public order will not be met.

¹⁶³ *Idem*, p.19.

¹⁶⁴ *Ibidem*.

¹⁶⁵ *Ibidem*.

¹⁶⁶ *Ibidem*.

CHAPTER 4

CONCLUSION AND RECOMMENDATIONS

4.1 General conclusion

The discussion about crime victims has passed almost a half century showing that criminal defendants have all the rights in the justice system while the victims of crime have little or no rights. The writers on this subject have criticized the fact that the victim who was injured by the crime has been forgotten in the prosecution process, while the accused of violation of the law was given a preferential treatment.

Many countries have realized that the victims' issues are important in the justice system and improved their legislations to include those rights. The legislations allow the victims to participate in the prosecution through attending hearings and/or discussing the case with the prosecution. It has been proven that, although prosecutors' interest is to bring criminals to justice, crime victims likewise have strong interests in being protected, listened to and involved in the criminal justice process.

The participation of the victim in the criminal process is free, and she decides herself on what to say and how to say it, with sometimes the support of a representative. When the victim is involved in the criminal process, it gives her the opportunity to seek the truth and at the same time to heal, because it is said that the conviction/the sanction of the offender reduces the pain/suffering of the victim, and is another form of reparation. On the other side, the State, through public prosecution, redresses the damage done to the society as a whole.

One of the innovations brought to victims' rights in the criminal process has been the presentation of the victim impact statement and victim impact evidence. This is a testimony where the crime victim tells the details about what happened and the effects of the crime on herself and on her family. This presentation is very critical to the judges and juries and helps them to understand the harm caused by the criminal act and all the surroundings of the case. Some would criticize the testimony as if it helps the prosecution and harms the defendant and so could result in a violation of the defendant's right to

a fair trial.¹⁶⁷ This statement helps also the judge and the prosecution when deciding whether to accept or reject a plea agreement.

The U.S.A and France are good examples for having improved crime victim's rights in the criminal process. The laws enacted show that a consensus has developed around those countries on certain core victims' rights: the right to notice of court hearings, the right to protection from harm, the right to be notified about bail, the right to the prompt return of property, to attend court hearings, to be heard at appropriate court hearings, to proceedings free from unreasonable delay, to consideration of the victims' safety during the process, and to restitution.¹⁶⁸ The challenge is ensuring that these core rights are fully and effectively implemented.

We all agree that the whole society benefits from a criminal punishment to the criminal defendant as a retribution and control of crime. Some would wonder if the involvement of the victim in the criminal justice system would not encourage her to revenge through her decision-making authority. Another question is whether the society would agree with this way of doing which may influence the decision in the criminal justice system. Although the crime committed to one victim is a danger to the whole community, none can prevent the victim from personally suffering from the damage caused by the crime. None can neither retain her emotions or feelings even during the criminal process. This cannot be a reason to exclude the victim in the criminal process when her input could even help to understand the impact of the crime on her or on the family. The prosecution should be able to control crime but also to satisfy the victim. Therefore, the criminal justice system should have all mechanisms needed to be in control of emotions of all parties involved so that none of them would negatively influence the decision of the prosecutor or the judge.

In the criminal process, the prosecution represents the victim on behalf of the society, and the prosecutor manages the criminal case with the goal of satisfying the victim. Therefore, the victim should evolve into a party to the prosecution and be much more involved in the criminal trial.

¹⁶⁷ Stickels, *Supra* note 1, p.5.

¹⁶⁸ Cassell PG, *Crime Victims' Rights*, (University of Utah, 2017), p.1.

The following recommendations would improve the Rwandan criminal justice system in terms of the victims' rights.

4.2 Recommendations

In the past, crime victims have played an active role in the criminal matters, they used to take the case to the Chiefs where the criminal got punishment and was asked to pay compensation. The crime victims could even bring their own private prosecutions. At a certain time, things changed and the prosecution was put in the hands of the State which had the role to prosecute and ask the judge to punish the criminal. This was done in order to protect the community as whole against criminals, and could serve for retribution and prevention at the same time. That is how the public prosecution displaced the victim and during the 19th century, the latter was appearing in the criminal process mainly as a witness, if not forgotten at all.

The 20th century has seen the defenders of crime victims with strong arguments that show that the victim who is actually the main injured by the crime committed would not be the one to be excluded or forgotten in the criminal trial. The little or shy space she was given in some proceedings should be reconsidered and involve the victim much more at all stages of the trial.

Some countries have already improved their legislation where the victim now has an important role from the beginning of the investigation till the end of the trial or decline of the prosecution. The Rwandan criminal procedure improved also and is considering the rights of the victim in some trial proceedings. However, as projected in the draft criminal policy which is currently being discussed, the consideration for the victim should have greater formal recognition in the process of prosecution.

The following are recommendations to how the rights of the victims should be improved.

4.2.1 Concerning the rights of victims in general

(1) The right to notice of court hearings

This is being recognized by many justice systems. The victim and her family have the right to know about any prosecution or hearing. This will help them to follow the progress of the criminal case and will contribute to their healing. This

should not even be complicated as informing is becoming easier with the new electronic technologies. The number and the location of victims should not be obstacles to getting information.

(2) The right to attend court hearings

The victim has the right to be present during the proceedings and the right to attend them. Being injured by a crime is something that marks the life of the victim. It is then in her interest to attend the criminal proceedings except when they are closed. This may also facilitate a healing process for the victim who was psychologically damaged. Being in the courtroom with the criminal may be hard to the victim. However, the solution is not to exclude her, but to let her choose what is good for herself.

(3) The right to be heard at relevant proceedings

Many justice systems including that of Rwanda recognize this right to victims. Victims may be heard as witnesses all along the criminal proceedings. In our system, it is not obvious. The victim is heard when the prosecutor or the judge decides so. The victim participation may add some more inputs on the information gathered and it is a healing process too as the victim feels considered. The victim should be heard in any proceeding such as release, bail hearing, plea bargain, sentencing, adjudication, prompt return of property, etc... None of these rights gives victims the ability to veto the decision of the prosecutor or of the judge.

It is clear that the victim will need first to be informed about the court proceedings: the decision and its motivation to prosecute or not to prosecute after investigation, the victim impact assessment at the time of sentencing is very useful to the prosecutor or the judge and has a powerful effect to the convicted offender or the Court. This would help the judge to deeply understand the retributive gravity of the offence and to decide whether a compensation and reparation order should be made.

(4) The right to proceedings free from unreasonable delay

The proceedings should avoid unreasonable delay. The victim has the right to a speedy trial which gives a final conclusion in a reasonable time. A speedy trial

benefits to all: the victim, the defendant, the judicial system and the community in large. When the trial is over, it is easy for the victim for healing.

(5) The right to notice of release or escape of the accused

A defendant may threaten the victim to silence her and avoid justice or a convicted offender may attack the victim for revenge, that is the reason why the victim needs to be informed when the former is released or when he/she escapes from custody.

(6) The right to consideration of the victim's safety

The crime victim needs to be protected from the accused all along the criminal proceedings. The victim's safety needs to be considered during court proceedings in order to cover all the concerns regarding for example release or bail of a suspect. In that case, the victim will be protected from harm. However, this consideration doesn't give the victim the veto over the decisions of the prosecutor or the judge. The Rwandan Criminal justice should ensure that there are sufficient and effective mechanisms in place for the victims' welfare and protection, particularly the safety and the medical needs of the victim. This would encourage the victim to freely help in the investigation process without fear by furnishing reliable and credible information that inculpates the suspect.

(7) The right to protection of privacy and dignity

The victim has interests in the protection of her privacy and dignity. This is more critical in cases of sexual assaults. So, legal provisions should guarantee the right to such protection to avoid unnecessary invasions of privacy and insults to dignity.

(8) The right to reparation

Different justice systems recognize the right of the victim to reparation (moral or material). Different forms of reparation need to be taken into account: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.¹⁶⁹ It would be another form of injustice if the victim's compensation were not given attention during the proceedings or at the conclusion of the trial. Through the Rwandan experience, it was possible to realize that the system,

¹⁶⁹Walden University, *supra* note 82.

which relies only on the offender for compensation, would have some limitations.¹⁷⁰ We should note that some offenders are hardly identifiable or if identified are unable for some reasons to provide any form of compensation and so some victims of crime are unable to get any compensation. In that situation, the use of other forms of reparation is necessary. This should be included in the criminal procedure code. In cases where compensation is possible, we would recommend a contract between the offender and the victim which will help the officers in case of non-execution.

(9) The right to legal representation

Crime victims should have legal representation during some or all the stages of the criminal trial process to avoid that their rights or interests be affected.

Although there are institutions in charge of the protection of the victims and witnesses, they still need to be legally protected hence enacting legislation concerning protection of witnesses and victims of offences is critical.

4.2.2 Concerning the rights of the children victims

Although there are legal provisions on children victims or children witnesses in a trial;

1. There is still a need of improvement in the Rwandan criminal procedure on how to take statements from a child and to give the child greater protection. The proposal given in the draft criminal policy should be encouraged as it would improve the following in practice:¹⁷¹
 - a) interview or interrogation should take place with the child's nearest relative, legal representative or the child guardian;
 - b) Interviews of child witnesses under 14 should normally be undertaken out of uniform and if in court, with counsel and judge not robed;
 - c) An interrogator or judge should have power to convene the court or at the office or other suitable place such as home or nursery to take a child's evidence;

¹⁷⁰ Sasaki K and Muvunyi S, *The Gacaca Justice: the Challenge of Economic Reparation in Post Genocide Rwanda Home Grown Solutions*, PIASS Publications Series No 12, p.47.

¹⁷¹ Ministry of Justice, *Supra* note 91, p.40-41.

- d) A judge should have power to admit in evidence a video interview of a child witness which has been conducted in accordance with these principles;
 - e) Use of anatomical toys or other aids may be used to assist a child's answers if the interviewer has been trained in their use;
 - f) As direct examination and cross-examination are prohibited towards children, all questions in court should be asked by the judge, counsel may submit questions;
 - g) The judge or interrogator may seek assistance from a child guardian in framing questions to a child;
 - h) Public Prosecution should have access to a child witness expert through the department of victims and witness protection (PVT).
2. The Rwandan criminal justice system needs trained child investigators and prosecutors on child specific protocols, who will also work in close collaboration with judges;
 3. In the courtrooms, should be adapted facilities for children to enable a favourable environment for children victims of crimes;
 4. Given that Rwanda has a big number of children under age of 18, it is critical that significant effort is invested to sensitize the population and the children in particular, on laws relating to children;

Although there are laws and legal provisions that protect children, there is still a need for further legal guidance on how to protect children victims and children witnesses. Enacting a specific law on this particular matter would be an adequate response to the recommendation of the Economic and Social Council in its Resolution 2005/20 of 22 July 2005,¹⁷² which invites Member States to draw, where appropriate, on the Guidelines annexed to that resolution in the development of legislation, procedures, policies and practices for children who are victims of crime or witnesses in criminal proceedings.

¹⁷² Office Des Nations Unies Contre La Drogue Et Le Crime, « Justice dans les affaires impliquant les enfants victimes et témoins d'actes criminels. Loi type et commentaire », Nations Unies, NewYork, (2009).

BIBLIOGRAPHY

LEGISLATION

1. Rwandan legislation

- 1) Constitution of the Republic of Rwanda of 2003 Revised in 2015, (OG n° Special of 24/12/2015).
- 2) Law n° 68/2018 of 30/08/2018 determining the offences and the penalties in general (OG n° Special of 27/09/2018).
- 3) Law n° 71/2018 of 31/08/2018 relating to the protection of the child (OG n° 37 bis of 10/09/2018).
- 4) Law n° 027/2019 of 19/09/2019 relating to the Criminal Procedure (OG n° Special of 08/11/2019).

2. Foreign legislation

- 1) Texas Code of Criminal Procedure (1989).
- 2) Circulaire du 29 septembre 1999 relative à la politique publique d'aide aux victimes d'infractions pénales (JORF no 227 du 30/09/1999).

3. International and regional instruments

- 1) Convention on the Rights of the Child (1990)
- 2) Council Framework Decision 2001/220/Jha on The Standing of Victims In Criminal Proceedings (15/03/2001)
- 3) Council Resolution of 23 November 1995 on the protection of witnesses in the fight against international organized crime, EU Doc OJ C 327 (7/12/1995)
- 4) Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (25/10/2012).

- 5) ICTY IT/200 Directive on allowance for witnesses and expert witnesses (25/11/2010).
- 6) Recommendation Rec(2000)19 of The Committee Of Ministers To Member States on The Role of Public Prosecution in the Criminal Justice System” (06/10/2000)
- 7) Rome Statute of the International Criminal Court (ICC)
- 8) Rules of Procedures and Evidence of International Criminal Court (2013)

II. CASE LAW

1. Foreign case law

- 1) *United States v. Russell Erxleben*, No. A-99-CR-245 LY.(25/04/2015)

III. LITERATURE

1. Books

- 1) Alemika EO *et al*, *The theory and practice of the criminal justice in Africa*, (African Human Security Initiative, 2009).
- 2) Ben-Asher D *Human Rights Meet Diplomatic Immunities: Problems And Possible Solutions* (Harvard Law School, 2000).
- 3) Bessler J *The Public Interest and the Unconstitutionality of Private Prosecutors* (University of Baltimore School of Law, 1994).
- 4) Sanchez S “The Crime Control and Due Process Models” in Burke A S *et al*, *Introduction to the American Criminal Justice System*, (Open Oregon)
- 5) Cassell PG *Crime Victims' Rights* (University of Utah, 2017)
- 6) Daly K *Aims of the Criminal Justice* (Griffith University, 2003)
- 7) Davies P & Cook IR *Victims, Witnesses and the Criminal Justice System* (Northumbria University, 2020)
- 8) Duffuler-Vialle H *La Nouvelle Place de la Victime au sein du Procès Pénal* (Centre d’Histoire de Recherche, 2016)

- 9) Kundst M *et al Victim Satisfaction with the Criminal Justice System and Emotional Recovery* (Sage Publications, 2014)
- 10) Marshall TF *Restorative Justice An Overview* (Home Office Research, Development and Statistics Directorate, 1999)
- 11) Phillips J *et al Domestic violence: issues and policy challenges* Research Paper Series (Parliament of Australia, 2015)
- 12) Pradel J *Procedure Penale* 11th ed (Cujas, 2002/2003)
- 13) Robinson M &Williams M *The Myth of a Fair Criminal Justice System* (Appalachian State University, 2008)
- 14) Sasaki K and Muvunyi S *The Gacaca Justice: the Challenge of Economic Reparation in Post Genocide Rwanda Home Grown Solutions* (PIASS Publications Series, No 12)
- 15) Sharman J M, *Judicial Ethics: Independence, Impartiality, and Integrity* (Inter-American Development Bank, 1996)
- 16) Siegel LJ *Introduction to Criminal Justice* 20th ed (Wadsworth, 2008)

2. Journal articles

- 1) Bloom R M., "Judicial Integrity: A Call for its Re-Emergence in the Adjudication of Criminal Cases" 84 *Journal of Criminal Law and Criminology* (1993), pp. 47-80.
- 2) Packer H.L., "Two Models of the Criminal Process" 113 *University of Pennsylvania Law Review* (1964), pp.1-68.
- 3) Roach K "Four Models of the Criminal Process" 89 *Journal of Criminal Law and Criminology* (1999), pp. 671-716.
- 4) Soeharno J "Is judicial integrity a norm? An inquiry into the concept of judicial integrity in England and the Netherlands" 3 *Utrecht Law Review* (2007), pp. 8-23.
- 5) Uribe C "Do Amnesties Preclude Justice?" 21 *International Law, Revista Colombiana de Derecho Internacional* (2012), pp.297-359

- 6) Van der Merwe & Jur B “Unconstitutionally obtained evidence: towards a Compromise between the Common law and the Exclusionary Rule” *Stellenbosch Law Review* (1992), pp. 173-206

3. Theses and dissertations

- 1) Bossan J, *L'Intérêt Général dans le Procès Pénal* (PhD-thesis, Université de Poitiers, 2007)
- 2) Lamau P *La place de la victime dans le procès pénal* (Master-thesis, Université Pantheon-Assas, 2010)
- 3) Miranda RB *Domestic Violence And Social Norms: Attitudes And Practices Of Criminal Justice And Health Workers In Norway And Brazil* (Masters Thesis, University of Bergen, 2018)
- 4) N'DRI MK *Critical Analysis of Victims' Rights Before International Criminal Justice* (LLM-Thesis, University of Pretoria, 2006)
- 5) Stickels JW *Victim Satisfaction-A Model of the Criminal Justice System* (PhD-dissertation, University of Texas at Austin, 2003)
- 6) Tadrous S *La Place de la Victime dans le Procès Pénal* (Phd-thesis, Université Montpellier I, 2014)
- 7) Taylor CW *Detectives and disclosure: an analysis of the implementation of the disclosure provisions of the criminal procedure and investigations act 1996 by cm officers, based on a study of operational procedure in two police force areas* (PHD-thesis, Durham University, 2002)

4. Course notes

- 1) Bikesha D, *Transitional Justice* UR, School of Law (2019)
- 2) Kayitana E, *Criminal Processes* UR, School of Law (2020)
- 3) Walden University, *The Role of Restorative Justice in a Criminal Justice System* Online Bachelor Program

5. UN reports

- 1) UN Committee on the Rights of the Child (CRC) “General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration ” CRC /C/GC/14 (29 May 2013)

6. Other reports and documents

- 1) Anon « La victime dans le procès pénal »
<http://www.normalesup.org/~saurin/genepi/victimes/Productions/Dossier/dossier.pdf> [10/11/2020]
- 2) Edmonds T & Jugnarain D “Private Prosecutions: A Potential Anticorruption Tool in English Law” Legal Remedies for Grand Corruption (2016) accessed at <https://www.justiceinitiative.org/publications/private-prosecutions-potential-anticorruption-tool-english-law> [05/11/2020]
- 3) European Committee on Crime Problems “Report on the Standing and Rights of Victims in Criminal” CDPC (2010) 16, accessed at <https://rm.coe.int/168070c7e4> [05/11/2020]
- 4) Jeremy Nikolow “The Challenges of Domestic Violence Investigations” accessed at <https://inpublicsafety.com/2015/10/the-challenges-of-domestic-violence-investigations/> [26/11/2020]
- 5) Milqet J “Strengthening Victim’s rights: from compensation to reparation” (European Commission, 2019) accessed at <https://www.france-victimes.fr/index.php/docman/grand-public/textes-et-rapports/2419-strengthening-victim-s-rights-from-compensation-to-reparation-jmilquet-r> [05/11/2020]
- 6) Ministry of Justice “Part II: Criminal Justice Policy and Policy Actions”-Draft (2020), Kigali accessed at the Ministry’s Office [01/12/2020]
- 7) Mujuzi JD “Private prosecutions and discrimination against juristic persons in South Africa: A comment on National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development & Another” 15 African Human Rights Law Journal (2015) p.582 accessed at <http://dx.doi.org/10.17159/1996-2096/2015/v15n2a17> on 15/11/2020

- 8) National Unity and Reconciliation Commission (NURC) "Rapport Annuel" (2011) accessed at NURC Office [24/11/2020]
- 9) Penal Reform International and United Kingdom "Protecting Children's Rights in Criminal Justice Systems: A Training Manual and Reference Point for Professionals and Policymakers" (2013) accessed at <https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=268978> [05/11/2020]
- 10) Robertson O "The Impact of Parental Imprisonment on children" (QUNO 2007) accessed at https://www.quno.org/sites/default/files/resources/ENGLISH_The%20impact%20of%20parental%20imprisonment%20on%20children.pdf [15/11/2020]
- 11) Victoria Law Reform Commission "The Role of Victims of Crime in the Criminal Trial Processes" (2015) accessed at https://www.lawreform.vic.gov.au/sites/default/files/VLRC_Victims_of_Crime_consultation_paper_for_web_0.pdf [17/11/2020]

7. Internet sources

- 1) Anon, "Being a witness" [https://www.justice.gov.nt.ca/en/files/victim-services/Being Witness.pdf](https://www.justice.gov.nt.ca/en/files/victim-services/Being%20Witness.pdf), [26/11/2020]
- 2) Anon "Criminal Justice"
- 3) <https://www.pearsonhighered.com/assets/samplechapter/0/1/3/3/0133024334.pdf> [05/04/2019]
- 4) USLegal "Crime control (definition)" <https://definitions.uslegal.com/c/crime-control-model/> [15/06/2020]
- 5) USLegal "Due Process Law and Legal Definitions" <https://definitions.uslegal.com/d/due-process-model/> [31/03/2019]

8. Conference lectures and seminar materials

- 1) Barbu D "Some Aspects Concerning the Civil Action in the Criminal Proceedings" Paper presented in World Lumen Congress (2016)

- 2) Millar HA & Dandurand Y “The Best Interests of The Child And The Sentencing Of Offenders With Parental Responsibilities” Paper presented in Criminal Law Forum (2017)

IV. UN DECLARATION

UN General Assembly, “Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power” A/RES/40/34 (1985) accessed at <https://www.refworld.org/docid/3b00f2275b.html> [15/11/2020]

V. DICTIONARIES

- 1) Oxford Learner’s Dictionary

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