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Crime Victims and the “Yo-Yo Effect” An Historical Investigation of Victim’s Participation in Criminal Proceedings¹

SUMMARY: 1. Introduction – 2. The role of crime-victim in ancient society - 3. Advancements in victim status from the Medieval until early modern period - 4. The Enlightenment and the marginalization of victim’s role in England in the 1800’s. - 5. Victims, Crimes and Punishment in Islam - 6. Victimization after II World War - 7. Victims’ role before ICTY and ICTR - 8. Conclusion

ABSTRACT: The investigation of the historical evolution of victims’ participation in criminal proceedings outlines to what extent the path of victims has been an issue subjected to what can be described like a “yo-yo effect”. Victim-centred approach to justice was the norm starting from the primitive social groups, at a later stage in the Roman criminal law tradition and up to the medieval Anglo-Saxon customs. During the 1700’s and 1800’s, the raise of Nation-State, matched with the Enlightenment theories on the social contract, led to a monopolistic administration of justice by the central government, turning victims from leading actors to marginalised parties of the criminal process. This model certainly applies the Nuremberg International Military Tribunal, which gave no attention to the role and rights of the victims and survivors in the formation of accountability mechanisms. The International Criminal Tribunals for Former Yugoslavia and Rwanda have done little to provide justice also for the victims of gross violations of human rights. The aim of the present study is twofold: firstly it intends to provide an ample historical precedent, which clearly shows that in the past victims had a primary role in the criminal proceeding, since the goal of criminal justice was to redress the wrong they suffered. Secondly, it attempts to prove that the cyclical marginalization of victim’s role within the criminal justice system was mainly led by political, ideological and economic justifications

KEYWORDS: Victims, Human rights, Victim-centred, Victims participation, Criminal proceeding

1. Introduction

The role and participation of victims in international criminal law as a response to gross violations of human rights represents a relatively new development. The traditional system of criminal justice was designed to involve two characters: the State, which had the task to punish a criminal act and the person who committed such offence, the offender. Conversely, now there is a broad agreement on the recognition of the victims, who are affected by criminal actions². This is a remarkable achievement since the Nuremberg International Military Tribunal, the first international criminal tribunal, dealt with the aftermath of the II War World in the absence of victims³. In fact, Nuremberg Tribunal, established in 1946 to prosecute war crimes, crimes against

¹ I would like to thank my supervisor, Dr Hakeem Yusuf, for the patient guidance, constant encouragement and valuable advice he has provided throughout the drafting of this article.

² J. Doak, *Victims’ Rights, Human Rights and Criminal Justice. Reconceiving the Role of the Third Parties*, Oxford and Portland: Hart Publishing (2008), p. 1.

³ T. K. Kuhner, *The Status of Victims and the Enforcement of International Criminal Law*, “Oregon Review of International Criminal Law” 6 (2004), p. 96.

peace and crimes against humanity, exclusively focused on perpetrators⁴. Nevertheless, the Nuremberg experience represents the decisive step to enter human rights in the international sphere, because the acknowledgment of such a large scale of victimization pointed out the need to recognize victims' rights in international law. This shift raised important issues concerning the nature of the criminal justice system. Specifically, the academic debate focused the attention on whether international criminal system should prefer either a retributive or restorative approach for the benefit of victims. A consequent question is to what extent and how the construction of victims' rights can fit a criminal justice system, which is traditionally conceived as a contest between two parties: the prosecution (generally the State) and the defendant⁵.

Looking back to the evolution of victims' role throughout history, starting from the early social groups, it can be observed that law systems paid attention to the needs and expectation of crime victims and their kin. The original rationale behind this policy was to prevent endless individualised vindications and further dissolution of the society⁶. However, the historical reconstruction provided in this article demonstrates that victims' participation in criminal proceedings can be seen as a pendulum, which swings from an far-reaching acknowledgment of victims' procedural rights, as a party of interest in trial, to the complete marginalization and exclusion of the victims from the investigation and prosecution, until the loss of any standing at trial stage. The purpose of this study is twofold: first to show that this oscillation of the victim's role in the criminal proceeding represents an historical pattern, which occurred cyclically over the centuries, and secondly, that behind the exclusion of the victim there were hardly legal reasons, but mainly political, ideological and economic justifications.

The first section examines the position of victim who suffered a personal harm in primitive western society. Criminal justice system was largely based on kinship ties and forms of punishment like blood-feud or pecuniary compensation. Law of compensation reached its highest level with Roman law. In this system of responsibility blood-feud disappeared, replaced by financial compensation. The second section focuses on the mediaeval period in England and explores the *bót* and the *werigild* systems developed by of the Saxons in the 11th century. During the 13th century these systems were gradually supplanted, in a first moment, by the appeal of felony and the writ of trespass and subsequently by the indictment of felony and indictment of trespass. This development shows to what extent the power to prosecute moved from victims, who lost their role as private prosecutors, to the State. The third section addresses the Enlightenment political theories on the origin of society and legitimation of the power of the State over the individuals. The contribution of the main philosophers of the Enlightenment, such as Hobbes, Locke and Beccaria, is noteworthy because provided a strong ground to justify and legitimate the increasing monopolistic role of the central State in the administration of the justice criminal system. These political theories reshaped the concept of the nature of crime

⁴ M. Bachrach, *The Protection and Rights of Victims under International Criminal Law*, "The International Lawyer" 34 (2000), p. 7.

⁵ J. Doak, *Victims' Rights, Human Rights and Criminal Justice. Reconceiving the Role of the Third Parties*, Oxford and Portland: Hart Publishing (2008), p. 1.

⁶ J. A. Wemmers, *Where Do They Belong? Giving Victims a Place in the Criminal Justice Process*, "Criminal Law Forum" 20 (2009), p. 395.

and the purpose of criminal prosecution. The crime became an offence against the State and the judicial function turned to be a mean to protect the interest of the community, regardless the individual rights of the crime victims.

The forth section explores the early Islamic criminal law system. It focuses on *Qisas* crimes, which delineate specific categories of crimes against physical integrity and moral dignity of individuals. The active role of victim, who has plenty of opportunity for rehabilitation, restoration, satisfaction and reconciliation, is noteworthy in the Islamic system. The fifth section brings into focus the period following the end of World War II. The large-scale victimisation highlighted the need for recognizing victim's rights before the international *fora*. However, early international criminal courts, such as the Nuremberg International Military Tribunal gave no attention to the role and rights of the victims and survivors of international crimes in the formation of accountability mechanisms. It was only starting from the 1960's that victim's rights movements rose, campaigning for the enhancement of the role and rights of crime victims in criminal proceedings. The sixth section deals with the experiences of the International Criminal Tribunals For Former Yugoslavia (hereafter ICTY) and the International Criminal Tribunals For Rwanda (hereafter ICTR). The ICTY and ICTR did not focus only on the prosecution of war criminals, but they took into consideration victims' concerns. Although in the legal framework of both the ICTY and ICTR the references to victims are quite limited, however a first positive move was made in this regard. Both the Statute of the ICTY and ICTR, introduced a number of innovative and progressive measures to assist and protect victims of gross violations of human rights.

2. The role of crime-victim in ancient society

Victims' participation finds its roots in the earliest societies and in many early religious traditions. Legal systems throughout history have provided different fora for the adjudication of victims' claims, but they had in common the idea that victims' involvement in the process of settling disputes prevented any individualised vindication and, above all, further disturbances of peace⁷. In primitive Western societies, in the absence of a central State authority, political institutions were largely based on family ties. Considering that the bond of blood was the strongest and most sacred bond, the family, rather than the individual, was the unit of ancient law. Men and women were grouped together into mutually exclusive clans, where all members of each clan were in fact or in fiction bound to each other by the tie of blood⁸. A fundamental legal principle was redress of wrong and the tribe provided the enforcement of the remedy⁹. A person who suffered a personal harm or a material damage had the possibility to start an action against the offender and forms of punishment like blood-feud or pecuniary compensation were common practices.

⁷ M. Cherif Bassiouni, *International Recognition of Victims' Rights*, "Human Rights Law Review" 6 (2006), p. 207.

⁸ F. Pollock and F. W. Maitland, *The History of English Law Before the Time of Edward I*, Vol. 2, Cambridge: Cambridge University Press (1898), p. 240.

⁹ M. Cherif Bassiouni, *International Recognition of Victims' Rights*, "Human Rights Law Review" 6 (2006), pp. 206-207.

Victims and their families were guided by the need to safeguard their social power and to prevent future crimes¹⁰. It can be affirmed that the victim's relationship with the offender reflected the struggle for survival. Because of this need of preservation, criminal justice system and especially the punishment meted out was mainly aimed at revenge, in order to impose on offenders or to their families the same damage suffered by the victim, rather than by the concept of criminal liability for a criminal action¹¹.

The firm establishment of the first tribes set up a more complex social structure where the kindred held the power. An offence against the individual was an offence against his clan or tribe. The whole clan took over the individual and of his/her family and the offender's position was likewise projected onto his/her own whole clan. The criminal justice systems still reflected a struggle for survival, but, instead of focusing only on the preservation of victim's existence, offenders and their families were held responsible for endangering also the existence of the whole tribe¹².

When the material culture reached a higher level of development, goods started to be considered as a compensation for physical and material harm. The concept of awarding damages to victims can be found in the ancient Code of Hammurabi (1750 B.C.), which introduced the principle of compensation for victims¹³. It was notorious for its deterrent cruelty. When the offender paid for his/her crimes with "an eye for an eye, a tooth for a tooth", s/he paid as an object of victim's revenge, rather than in compensation for the victim's injury¹⁴. The Code of Hammurabi was a blend of civil and criminal stipulations presented in an unorganized manner, which emphasized the idea of deterrence through the cruel severity of the punishment¹⁵. The Code of Hammurabi reflected the flexibility of systems of social control and the general goal to accommodate victims' interests¹⁶. Although it was already clear that controlling crime was a mean of good governance by the king, in fact, in the centre of criminal justice there was the victim. The latter was entitled to choose either to bring the offender before a court of justice, or to bear the loss with compensation¹⁷.

In the same way, in the primitive Roman system the original redress for a crime was personal vengeance. It is rather difficult to retrace a clear and comprehensive framework of the early criminal justice system, because only few written records of the origins of Rome survived up to the present days, and the histories about it, written

¹⁰ S. Schafer, *The Victim and his Criminal. A study of functional responsibility*, New York: Random House (1968), p. 8.

¹¹ S. Schafer, *The Victim and his Criminal. A study of functional responsibility*, New York: Random House (1968), pp. 8-9.

¹² *Ibidem*, p. 9.

¹³ G. Greco, *Victims' Rights Overview under the ICC Legal Framework: A Jurisprudential Analysis*, "International Criminal Law Review" 7 (2007), p. 532.

¹⁴ S. Schafer, *The Victim and his Criminal. A study of functional responsibility*, New York: Random House (1968), p. 12.

¹⁵ *Ibidem*, p. 12.

¹⁶ G. F. Kirchhoff, *History And Theoretical Structure Of Victimology*, in S. G. Shoham, P. Knepper and M. Kett eds., *International Handbook of Victimology*, CRC Press 2010, p. 100.

¹⁷ *Ibidem*, p. 100.

during the republican and imperial period, are largely based on legends¹⁸. The early roman community was composed of several groups. These groups were called *gentes*¹⁹. The members of each *gens* descended from a common ancestor, from whom they acquired their family name.²⁰ The head of each family was the *pater gentis*, and he had absolute authority (*potestas*) over his family²¹. The representative of each *gens* elected a king and, according to the tradition, Rome was ruled by a succession of seven kings from 753 B.C., until 509 B.C., when the king Lucius Tarquinius Superbus was overthrown²².

The cohesion between the *gentes* was the result of a long process of integration and, in that time, the criminal justice system addressed namely issues relating to the surviving, increasing and expansion of the city²³. For this reason, the community rarely redressed for criminal actions as, generally, the prosecution of offenders was in the hands of the offended party²⁴. The crimes committed within the family were left to the *potestas* of the *pater familias*. In the case a single individual or a family was damaged or injured, the offended parties redressed the crime through blood feud, or the capture and imprisonment of the offender²⁵. But in some cases permitting the use of violence to redress a crime was too dangerous for the cohesion of the community, especially when numerous groups of citizens were involved²⁶. The solution was to give a different value to criminal acts. In very specific cases, the crime was considered as an offence to the community and to the *pax deorum*, the peaceful relations between the Gods and the *civitas*²⁷. Therefore, the State held necessary to undertake a repressive action to restore the public order and, since the “guardian” of the *pax deorum* was the King, he was legitimated to prosecute and punish whoever with his/her behaviour exposed the whole community to the fury of the Gods²⁸. The few testimonies, preserved since today, of the so called *leges regiae* show the traces of a criminal justice system based on sacred expiation of the crime. However, even if the content of these rules is essentially religious, there should not be any doubt about their normative value, as the *leges regiae* were enacted by the King, who was the highest priest and the political chief²⁹. But, it should be observed that the main goal of these rules was to restore the peace between the Gods and the community, while the safeguard of the public order was a secondary consequence³⁰. Besides giving a wide margin for

¹⁸ B. Santalucia, *Diritto e Processo Penale nell'Antica Roma*, Milano: Giuffrè Editore (1989), p. 1.

¹⁹ H. J. Wolff, *Roman Law: An Historical Introduction*, University of Oklahoma Press (1951), p. 23.

²⁰ W. Kunkel, *An Introduction to Roman Legal and Constitutional History*, Clarendon Press (1973), p. 7.

²¹ H. J. Wolff, *Roman Law: An Historical Introduction*, University of Oklahoma Press (1951), 23-24.

²² *Ibidem*, p. 25

²³ V. Giuffrè, *La Repressione Criminale nell'Esperienza Romana. Profili*, Napoli: Jovene (1991), 22.

²⁴ *Ibidem*, pp. 22-23.

²⁵ *Ibidem*, p. 23.

²⁶ *Ibidem*, p. 24.

²⁷ *Ibidem*, pp. 1 and 24-25.

²⁸ B. Santalucia, *Diritto e Processo Penale nell'Antica Roma*, Milano: Giuffrè Editore (1989), p. 2.

²⁹ B. Santalucia, *Diritto e Processo Penale nell'Antica Roma*, Milano: Giuffrè Editore (1989), p. 2; V. Giuffrè, *La Repressione Criminale nell'Esperienza Romana. Profili*, Napoli: Jovene (1991), p. 25.

³⁰ V. Giuffrè, *La Repressione Criminale nell'Esperienza Romana. Profili*, Napoli: Jovene (1991), pp. 25-26.

prosecution to the King, the *leges regiae* recognised the right to undertake a personal vengeance against the offender to the offended party³¹. The *Origines* by Cato, as it has been transmitted by Priscianus, confirms that the wrongful conduct causing harm, put the offender at the mercy of his victim³², *si quis membrum rupit auto os fregit talione proximus cognatus ulciscitur*³³. Cato stated that the most serious harms, different from murder, like injuries or bones fractures, subjected the offender to the violent reaction of the family of the offended³⁴.

A more significant example of criminal prosecution undertaken by the victim's family is the law of murder by the King Numa Pompilius³⁵, which stated *si qui hominem liberum dolo sciens morti duit, paricidas esto*³⁶. The meaning of the term *paricidas* and of the expression *paricida esto* are still object of a controversial debate³⁷, but the most successful interpretation among jurists and linguists suggests to translate the *lex Numae* as following: if a person with wrongful intent knowingly kills a free man, the offender has to be killed in compensation³⁸. This kind of archaic criminal justice reflected a demand of religious nature: the offender should have been prosecuted and punished because the crime broke the *pax deorum* and the "avenging kin" was the instrument of the community to satisfy the fury of the Gods. The kin of the victim had not only the right, but also the sacred duty to vengeance, because they were not allowed to receive any monetary compensation from the offender³⁹. Even if the *lex Numae* was still anchored to a religious concept, which characterised the social and cultural environment of that period, nevertheless, it represented a significant evolution of the roman criminal law: on the one hand, it turned voluntary murder into a crime not subject to monetary compensation⁴⁰. The punishment had to be meted out by the family of the victim in front of the whole roman people *in contione*⁴¹, as to say convened in assembly⁴². On the other hand, the *lex Numae* set a limit to the indiscriminate reaction of the victim's kin. They could kill the offender only if s/he intentionally murdered the victim⁴³.

In 509 B.C., the sweeping change from monarchy to a republican form in the

³¹ B. Santalucia, *Diritto e Processo Penale nell'Antica Roma*, Milano: Giuffrè Editore (1989), p. 2.

³² B. Santalucia, *Studi di Diritto Penale Romano*, Roma: L'Erma di Bretschneider (1994), pp. 3-4.

³³ Priscianus Caesariensis, *Institutio De Arte Grammatica*, ed. Hertz, 6, 254.

³⁴ B. Santalucia, *Studi di Diritto Penale Romano*, Roma: L'Erma di Bretschneider (1994), p. 4.

³⁵ *Ibidem*, p. 107.

³⁶ S. P. Festus, *De Verborum Significatu*, Stuttgart: ed. Wallace M. Lindsay (1913), p. 247.

³⁷ See P. Bonfante, *Storia del Diritto Romano*, Milano (1958); P. De Francisci, *Storia del Diritto Romano*, Milano (1943); G. Grosso, *Brevi Note sull'Antico Diritto e Processo Penale Romano*, in *Studi in Onore di Francesco Antolisei*, Milano: Giuffrè (1965); G. Bonfante, *Diritto Romano e Diritto Indoeuropeo*, in *Studi E. Betá*, Milano (1962); F. De Visscher, *La Formule «Parricida Esto» et les Origins de la Juridiction Criminelle Á Rome*, "Étude De Droit Romain", Paris (1931); S. Tondo, *Leges Reges et Paricidas*, Firenze: Leo S. Olschki Editore (1973).

³⁸ B. Santalucia, *Studi di Diritto Penale Romano*, Roma: L'Erma di Bretschneider (1994), p. 108.

³⁹ *Ibidem*, p. 107.

⁴⁰ B. Santalucia, *Studi di Diritto Penale Romano*, Roma: L'Erma di Bretschneider (1994), p. 110.

⁴¹ Asconius Pedianus, *Orationum Ciceronis Quinque Enarration In Corneliam*, eds. Clark, 71.

⁴² B. Santalucia, *Studi di Diritto Penale Romano*, Roma: L'Erma di Bretschneider (1994), p. 110.

⁴³ *Ibidem*, p. 110.

government of the *civitas* produced a clear division between religious and political functions, which were exercised by the king⁴⁴. The supreme religious office was conferred to the *pontifex maximus* and the political and military chief was the *magistratus cum imperio*⁴⁵. This latter was entitled to prosecute and punish the offenders, which with their crimes affected the interests of the community. However, the concern to set limits to the wide power of the *magistratus* and to prevent any possible degeneration into a dictatorship, led to the introduction of the *provocatio ad populum*, the appeal to the people, as a form of guarantee for the accused⁴⁶. In cases involving capital punishment, the defendant, by appealing to the *provocatio ad populum*, triggered the initiation of the *iudicium populum*⁴⁷, a trial by the people convened in *comitia centuriata*⁴⁸, the Assembly of the Centuries⁴⁹. Over the centuries, the right to the *provocatio ad populum* gradually grew and, by the beginning of the II century B.C., the defendant could call for the *iudicium populum* when the sanction for the crime was a fine as well. On the contrary, the reaction to criminal acts damaging the personal interest of a roman citizen was left to the individual, who initiated and conducted the criminal prosecution⁵⁰.

The general distinction between crimes affecting the community and crimes affecting the personal interest of a roman citizen was confirmed, in 449 B.C., with the introduction of the *Leges Duodecim Tabularum* (the Laws of Twelve Tables). This legislation, which was completed by a commission of Ten Men, called the *Decemviri*, and posted on twelve tablets of bronze in the Roman Forum, was the first code of Roman law and formed the core of the *mos maiorum*, the customs of the ancestors⁵¹. The *Leges Duodecim Tabularum* established which crimes affected the individual interest, rather than the community, and entitled victims to seek individualized justice against the offender⁵². However, in the system of the Twelve Tables was not always clear-cut what crimes were subjected either to public or private prosecution⁵³. A confirmation of that can be found in the commentaries of the Twelve tables by Roman jurists from

⁴⁴ B. Santalucia, *Diritto e Processo Penale nell'Antica Roma*, Milano: Giuffrè Editore (1989), p. 19.

⁴⁵ B. Santalucia, *Diritto e Processo Penale nell'Antica Roma*, Milano: Giuffrè Editore (1989), p. 19; V. Giuffrè, *La Repressione Criminale nell'Esperienza Romana. Profili*, Napoli: Jovene (1991), pp. 43-44.

⁴⁶ The *provocatio ad populum* had been regulated by three following laws. The first one enacted in 509 B. C. is the *Lex Valeria de provocatione*: Cicero, *De Republica*, 2.31.53-54; Cicero, *De Legibus*, 3.4.11 and 3.19.44; Livius, *Ad Urbe Condita*, 2.8.2; Dionysius Halicarnassensis, *Antiquitates Romanae*, 5.19.4; Valerius Maximus, *Facta et Dicta Memorabilia*, 4.1.1. The second law, voted in 449 B. C., is the *Lex Valeria Horatia*: Cicero, *De Republica*, 2.31.53-54; Livius, *Ad Urbe Condita*, 3.55.4-5. The third law, regulating the *provocation ad populum* is dated 300 B. C., is the *Lex Valeria*: Livius, *Ad Urbe Condita*, 10.9.3-5. See also B. Santalucia, *Diritto e Processo Penale nell'Antica Roma*, Milano: Giuffrè Editore (1989), p. 20; B. Santalucia, *Studi di Diritto Penale Romano*, Roma: L'Erma di Bretschneider (1994), p. 158.

⁴⁷ Livius, *Ad Urbe Condita*, 26.3.9 and 43.16.11.

⁴⁸ Cicero, *Pro Sestio*, 65; Cicero, *De Re Publica*, 2, 61; Cicero, *De Legibus*, 3, 11.

⁴⁹ B. Santalucia, *Studi di Diritto Penale Romano*, Roma: L'Erma di Bretschneider (1994), p. 158.

⁵⁰ V. Giuffrè, *La Repressione Criminale nell'Esperienza Romana. Profili*, Napoli: Jovene (1991), p. 43.

⁵¹ W. Kunkel, *An Introduction to Roman Legal and Constitutional History*, Clarendon Press (1973), p. 23; H. J. Wolff, *Roman Law: An Historical Introduction*, University of Oklahoma Press (1951), p. 55.

⁵² V. Giuffrè, *La Repressione Criminale nell'Esperienza Romana. Profili*, Napoli: Jovene (1991), p. 39.

⁵³ B. Santalucia, *Diritto e Processo Penale nell'Antica Roma*, Milano: Giuffrè Editore (1989), p. 42.

the classical period of Roman law (conventionally from the 27 B.C. to 235 A.D.)⁵⁴. For example, Gaius cast doubts whether the monetary sanction, established as a punishment for a crime, had to be paid by the offender either to the State or to the offended party⁵⁵.

Nevertheless, the rules of the Twelve Tables marked a transition from the ancient regime of personal vengeance to a system of monetary compensation, resulting from the agreement between the parties involved or set by a State-law for each crime.⁵⁶ For example, in case of *membrum ruptum*⁵⁷, when a person maimed another's limb, the redress was still the *talio*, retaliation, unless the parties agreed on an amount of money for compensation. Conversely, in case of *os fractum*⁵⁸ (broken bone), the composition, established by the law, was 300 Asses or 150 Asses, depending on whether the victim was respectively a free man or a slave⁵⁹. Similarly, the Twelve Tables outlined different circumstances of theft. When the thief was caught in the act of theft (*furtum manifestum*)⁶⁰, the owner could kill her/him lawfully only in two cases: first, if the thief committed a theft by night, and second, by daylight if the thief defended himself with a weapon and a neighbour witnessed the aggression⁶¹. When the thief was taken in the act of theft in circumstances different from the two described above, if s/he was a free man, s/he would have been flogged and enslaved to her/his victim, whereas, if s/he was a slave, s/he would have been flogged and then thrown from the Tarpeian Rock⁶². Nevertheless thieves can avoid these punishments if they reached an agreement with the victim⁶³. While in the crime of *furtum manifestum* the punishment, or the possibility to achieve an agreement, was in the hands of the victim, on the contrary, in the case when a thief is not caught in the act of stealing (*furtum nec manifestum*)⁶⁴ the composition is established by the Twelve Tables⁶⁵. In fact, the law stated that the thief had to pay to the victim an amount of money equal to the double of the value of the item stolen⁶⁶.

In the early stage of the republican period, the conflicts rising from crimes

⁵⁴ Ibidem, p. 43.

⁵⁵ Gaius in D. 44.6.3. See also B. Santalucia, *Diritto e Processo Penale nell'Antica Roma*, Milano: Giuffrè Editore (1989), p. 43.

⁵⁶ B. Santalucia, *Diritto e Processo Penale nell'Antica Roma*, Milano: Giuffrè Editore (1989), 40.

⁵⁷ Leges Duodecim Tabularum 8, 2 (= Festus, *Talionis* 496, 15-17); Gellius, *Noctes Acticae*, 20, 1, 14; Gaius, *Institutiones*, 3, 223; Pauli Sententiae, 5, 4, 6; Collatio Legum Mosaicarum et Romanarum, 2, 5, 5; Priscianus Caesariensis, *Institutio de arte grammatica*, 6, 13, 9.

⁵⁸ Leges Duodecim Tabularum 8, 3 (= Collatio Legum Mosaicarum et Romanarum 2, 5, 5).

⁵⁹ B. Santalucia, *Diritto e Processo Penale nell'Antica Roma*, Milano: Giuffrè Editore (1989), p. 40.

⁶⁰ Cicero, *Pro Tullio*, 20, 47 and 21, 50; Gellius, *Noctes Acticae*, 11, 18, 6-7 and 20, 1, 7; D. 9, 2, 4, 1; D. 47, 2, 55, 2; Leges Duodecim Tabularum 8, 12-13 (= Macrobius, *Saturnalia*, 1, 4, 19).

⁶¹ B. Santalucia, *Diritto e Processo Penale nell'Antica Roma*, Milano: Giuffrè Editore (1989), p. 40.

⁶² Ibidem, p. 41.

⁶³ Ibidem, p. 41.

⁶⁴ Gaius, *Institutiones*, 3, 183-188; Pauli Sententiae, 2, 31, 2; Gai Epitome, 2, 11, 2; Institutiones Iustiniani, 4, 1, 3-4.

⁶⁵ Gaius, *Institutiones*, 3, 190; Gellius, *Noctes Acticae*, 11, 18, 15; Leges Duodecim Tabularum 8, 16 (= Festus, *Talionis*, 158, 32-33).

⁶⁶ B. Santalucia, *Diritto e Processo Penale nell'Antica Roma*, Milano: Giuffrè Editore (1989), p. 41.

affecting the personal interest of a roman citizen were solved as a private matter outside the State's immediate interest⁶⁷. Victims proceeded against the offender by an ordinary civil action⁶⁸. Individuals initiated and conducted civil suits and, if they succeeded, they recovered compensation in the shape of money⁶⁹. The *legis action sacramenti*, the parent of all civil actions, including the action of delict, arose in this way, as a legal outlet for the impulse of personal vengeance⁷⁰.

During the II century B.C., Rome emerged from the wars of expansion as the new undisputed hegemonic power of the Mediterranean world, but, at the same time, post-war Italian peninsula was shaken by a climate of violent uprisings. This scenario marked the decline of the roman institutions of Rome, as the institutions of a small city-state were not up to the task of governing an empire⁷¹. The criminal justice system underwent a gradual change, since the trials by the people, which were the symbol of the city-state institutions, became obsolete⁷². Among the several factors which took into decline the *iudicium populi*, the most important ones were: the increasing number of trials under the its jurisdiction, its excessive duration and the degeneration of the popular assembly more and more influenced by demagogical issues⁷³. The first response to this crisis was a series of special commissions, which had the mandate to investigate and punish without the need to involve the Assembly of the Centuries to confirm the final sentence. The Assembly or the Senate only participated to the extent of establishing the commission⁷⁴. When in 171 B.C. the provincials of Spain addressed the Senate for redress against their governors, the Senate ordered a special commission, called a *quaestio*, made up by *recuperatores* appointed among the Senators⁷⁵. Afterwards in 149 B.C., the *Lex Calpurnia de repetundis*⁷⁶ established a permanent court of Senators as sworn jurors to deal with claims of provincial extortion, dealing not only with the reparations, but also with punishment⁷⁷. Therefore, when it came to try the most serious crimes, which jeopardize the public order, either the Senate or the *populus* started to set, by a specific *lex*, extraordinary courts of justice called *quaestiones*

⁶⁷ J. Doak, *Victims' Rights, Human Rights and Criminal Justice. Reconceiving the Role of the Third Parties*, Oxford and Portland: Hart Publishing (2008), p. 2.

⁶⁸ H. Maine, *Ancient Law*, London J. M. Dent & Sons LTD (1960), p. 217.

⁶⁹ M. C. Alexander, *Compensation in a Roman Criminal Law*, "University of Illinois Law Review" (1984), p. 522.

⁷⁰ W. D. Aston, *Problems of Roman Criminal Law*, "Journal of the Society of Comparative Legislation, New Series" 13 (1913), p. 216.

⁷¹ R. A. Bauman, *Crime and Punishment in the Ancient Rome*, London: Routledge (1996), p. 21.

⁷² B. Santalucia, *Diritto e Processo Penale nell'Antica Roma*, Milano: Giuffrè Editore (1989), p. 56.

⁷³ B. Santalucia, *Studi di Diritto Penale Romano*, Roma: L'Erma di Bretschneider (1994), p. 180; B. Santalucia, *Diritto e Processo Penale nell'Antica Roma*, Milano: Giuffrè Editore (1989), p. 56.

⁷⁴ R. A. Bauman, *Crime and Punishment in the Ancient Rome*, London: Routledge (1996), p. 21.

⁷⁵ O. F. Robinson, *The Criminal Law of the Ancient Rome*, London: Gerald Duckworth & Co (1995), p. 1.

⁷⁶ The text of the *Lex Calpurnia De Repetundis* got destroyed; however the *Lex Acilia Repetundarum* (123 B.C.), which survived in an inscription, is our major sources for the *repetundae* courts and for the jury-courts as a whole. Therefore, see *Lex Acilia Repetundarum* 1, 23, Fontes Iuris Romani Anteiustiniani, I, 84.

⁷⁷ O. F. Robinson, *The Criminal Law of the Ancient Rome*, London: Gerald Duckworth & Co (1995), p. 1.

*extraordinariae*⁷⁸. These extraordinary courts were constituted by a judge and a jury and had jurisdiction only on one specific offence, as defined in the statute that set up the court⁷⁹. The *quaestiones extraordinariae* gradually took the place of the complex and inefficient procedure of the *iudicia populi*⁸⁰. It became evident that, only by setting permanent courts of justice based on the model of the *quaestiones extraordinariae*, it was possible to face the needs of criminal justice⁸¹. During the II century, the *quaestiones extraordinariae* had been replaced by nine permanent courts of justice called *quaestiones perpetuae*⁸². Each one had the jurisdiction on one single crime: five courts had the jurisdiction on crimes connected with the administration of the *res publica* and the remaining four ones decided on the crimes affecting only the singular person⁸³. Every private citizen, who represented the public interest, was entitled to start the prosecution. The proceeding started with a *nominis delatio*⁸⁴, a charge filled to the judge by a private citizen⁸⁵. However, before making the formal accusation to the judge, the accusing party submitted an application, called *postulatio*⁸⁶, in order to have recognised his legitimation to bring an accusation. The judge had to verify whether the prerequisites demanded by the law, one of the most important was the honourability of the accusing party, were fulfilled⁸⁷. After this preliminary stage, it took place the formal presentation of the accusation, the *accusatio criminis*. The judge could accept it through the *nominis receptio*⁸⁸ and, afterward, he had to write the name of the defendant in the public official list of the accused, the *inscriptio inter reos*⁸⁹. Once appointed the member of the jury either by *editio*⁹⁰, that was the selection by the two parties of the jurors from an official list, or by *sortitio*⁹¹, a draw carried out by the judge, the trial stage was the next step⁹². During the hearing the accusing party and the defendant (who did not have to be represented necessarily by a lawyer), presented respectively evidence against the defendant and exculpatory evidence. After the parties gave their closing

⁷⁸ Livius, *Ad Urbe Condita*, 39, 41, 5; 40, 37, 4 and 40, 43, 2; Valerius Maximus, *Facta et Dicta Memorabilia*, 2, 5, 3 and 6, 3, 8. See also B. Santalucia, *Studi di Diritto Penale Romano*, Roma: L'Erma di Bretschneider (1994), p. 181.

⁷⁹ B. Santalucia, *Studi di Diritto Penale Romano*, Roma: L'Erma di Bretschneider (1994), pp. 181-182.

⁸⁰ B. Santalucia, *Diritto e Processo Penale nell'Antica Roma*, Milano: Giuffrè Editore (1989), p. 63.

⁸¹ B. Santalucia, *Studi di Diritto Penale Romano*, Roma: L'Erma di Bretschneider (1994), p. 185.

⁸² *Ibidem*, p. 185.

⁸³ *Ibidem*, p. 201.

⁸⁴ Cicero, *Divination in Caecilium*, 19, 63; Cicero, *In Verrem*, 2, 2, 38, 95; Cicero, *Ad Familiares*, 8, 6, 2.

⁸⁵ B. Santalucia, *Studi di Diritto Penale Romano*, Roma: L'Erma di Bretschneider (1994), p. 201.

⁸⁶ Cicero, *Divination in Caecilium*, 20, 64; Cicero, *Ad Familiares*, 8, 6, 1.

⁸⁷ B. Santalucia, *Studi di Diritto Penale Romano*, Roma: L'Erma di Bretschneider (1994), p. 202.

⁸⁸ Cicero, *In Verrem*, 2, 2, 38, 94; Cicero, *Ad Familiares*, 8, 8, 2; Valerius Maximus, *Facta et Dicta Memorabilia*, 3, 7, 9.

⁸⁹ Cicero, *De Domo Sua*, 20, 51; Cicero, *Pro Cluentio*, 31, 86; Cicero, *Philippicae*, 2, 23, 56. See also B. Santalucia, *Studi di Diritto Penale Romano*, Roma: L'Erma di Bretschneider (1994), p. 202.

⁹⁰ The designation of the judges by *editio* was established by the *Lex Aelia Repetundarum*, line 15.

⁹¹ The appointment of the judges by *sortitio* was ruled by the *Lex Cornelia Iudiciaria* in 81 B.C.; *Scholium in Orationes Ciceronis*, Gronoviana 335; Velleius Paterculus, *Historia Romana*, 2, 32, 3; Tacitus, *Annales*, 11, 22, 6.

⁹² B. Santalucia, *Studi di Diritto Penale Romano*, Roma: L'Erma di Bretschneider (1994), p. 202.

statements, the judge asked to the jury if they had sufficient elements to decide the case⁹³. If the answer was negative, the judge renewed the trial stage and the parties had to supply their case with new evidence. Otherwise, the deliberation phase began⁹⁴. Each juror had to write on a waxed table either A for *absolvo*, in case of acquittal, or C for *condemno*, in case of conviction⁹⁵. All the tablets were gathered in an urn. The judge, who did not have any right to deliberate, verified the result of the poll from the jury's ballots and declared the guilty of innocence of the accused⁹⁶.

The civil war following the murder of Julius Caesar, which brought Gaius Julius Caesar Octavianus to power in 27 A.D., marked the transition from the Republic to the Empire⁹⁷. When Octavianus, who was awarded the honorific title of Augustus by the Senate, founded the Principate, he concentrated the power in his hands, establishing an autocratic form of government⁹⁸. He created the conditions for a deep change in the administration of justice⁹⁹. The system of criminal justice was still based on the *quaestiones perpetuae*, but it can be easily understood the reasons why these permanent courts did not meet the favour of the new government¹⁰⁰. Firstly, the composition of the jury of the *quaestiones perpetuae*, made up by private citizens, and the method of selection, either by editio or by *sortitio*, did not allow to the emperor any interference¹⁰¹. Secondly, within this new social and political environment, the massive propaganda aimed to emphasize the figure of the emperor as the *pater patriae super partes*, therefore, encouraging the common citizen to trust more the emperor (or his representatives) than a panel of jurors¹⁰². Thirdly, Octavianus, in his attempt to reorder the society according to his authoritarian dispositions, set several new types of crimes, in order to prosecute and punish any form of offence or threat perpetrated against the emperor and his *auctoritas*. Thus, it would have been unwise to leave the prosecution of these new crimes that had mostly a political relevance, to the system of the *quaestiones perpetuae*, which could not be easily influenced¹⁰³. The elevation of the role of the emperor above republican institutions gave rise to an increasingly extensive interference of central power in the prosecution and punishment of crimes, causing an inexorable decline of the *quaestiones perpetuae*¹⁰⁴. The latter was replaced by a new procedure, in which the case was entirely tried and decided by the emperor, or one of his delegates, without the participation of a jury¹⁰⁵. This procedure was defined *cognitio*

⁹³ Ibidem, p. 203.

⁹⁴ V. Giuffrè, *La Repressione Criminale nell'Esperienza Romana. Profili*, Napoli: Jovene (1991), p. 71.

⁹⁵ O. F. Robinson, *The Criminal Law of the Ancient Rome*, London: Gerald Duckworth & Co (1995), p. 6.

⁹⁶ B. Santalucia, *Studi di Diritto Penale Romano*, Roma: L'Erma di Bretschneider (1994), p. 203.

⁹⁷ C. Gioffredi, *I Principi del Diritto Penale Romano*, Torino: Giappichelli (1970), p. 20.

⁹⁸ W. Kunkel, *An Introduction to Roman Legal and Constitutional History*, Clarendon Press (1973), pp. 47-48.

⁹⁹ R. A. Bauman, *Crime and Punishment in the Ancient Rome*, London: Routledge (1996), p. 50.

¹⁰⁰ V. Giuffrè, *La Repressione Criminale nell'Esperienza Romana. Profili*, Napoli: Jovene (1991), p. 96.

¹⁰¹ B. Santalucia, *Studi di Diritto Penale Romano*, Roma: L'Erma di Bretschneider (1994), p. 210; V. Giuffrè, *La Repressione Criminale nell'Esperienza Romana. Profili*, Napoli: Jovene (1991), p. 96.

¹⁰² V. Giuffrè, *La Repressione Criminale nell'Esperienza Romana. Profili*, Napoli: Jovene (1991), p. 97.

¹⁰³ Ibidem, p. 97.

¹⁰⁴ B. Santalucia, *Studi di Diritto Penale Romano*, Roma: L'Erma di Bretschneider (1994), p. 210.

extra ordinem, because it was developed outside the system of the *quaestiones perpetuae*, which represented the norm, the *ordo iudiciorum publicorum*¹⁰⁶. Contrary to the *quaestiones perpetuae*, which were characterized by adversarial procedure, the *cognitio extra ordinem* was based on the inquisitorial system¹⁰⁷. It was not necessary anymore the act of formal accusation by a citizen, because a magistrate initiated the prosecution on his own impulse. The citizens and, most importantly, the victims lost their procedural rights as private prosecutors. They could press charge, a *denuntiatio*, but at this moment victims were considered only as informers¹⁰⁸.

Besides the criminal procedure, the shift from the adversarial to the inquisitorial system affected also substantive criminal law. The category of crimes affecting private citizens disappeared. All crimes were included in the group of crimes affecting the interests of the community and, thus, subjected to public prosecution under the system of the *cognitio extra ordinem*¹⁰⁹. For instance, the crime of *furtum* and of personal injuries, which, as stated above, were prosecuted by the offended party, turned into crimes against the community and they were tried by the *praefectus urbi* or the *praefectus praetorio*¹¹⁰. In this way crime victims lost their rights to initiate and conduct the criminal prosecution and, moreover, their entitlement to obtain monetary compensation, because, under the system of the *cognitio extra ordinem*, the punishment essentially had an afflictive nature¹¹¹.

The analysis of the role of the victims in criminal proceedings in the roman experience provides the first example of a pattern that kept on repeating over the centuries. The centralisation of power, either in the hands of a single individual or in the hands of few ones, led to the monopole of the administration of criminal justice. The State took over the victims in the prosecution of crimes, preventing them from having any active role in the criminal process. In fact, as the roman experience teaches, when the emperors consolidated their power, crimes became an offence against him, who was the ultimate representative of the State. The emperor and his delegates became the arbiters of the disputes, turning prosecution of crimes into a function of the State.

3. Advancements in victim status from the Medieval until early modern period

In the 11th century, in the English criminal justice system victims occupied a key position. They had an active participatory role in the criminal process and were responsible not only for triggering the criminal procedure, but also for prosecuting offenders¹¹². The Anglo-Saxons elaborated a complex system of composition,

¹⁰⁵ Ibidem, pp. 210-211

¹⁰⁶ Ibidem, p. 211.

¹⁰⁷ B. Santalucia, *Studi di Diritto Penale Romano*, Roma: L'Erma di Bretschneider (1994), p. 223.

¹⁰⁸ Ibidem, p. 223.

¹⁰⁹ V. Giuffrè, *La Repressione Criminale nell'Esperienza Romana. Profili*, Napoli: Jovene (1991), p. 113.

¹¹⁰ Ibidem, p. 114.

¹¹¹ Ibidem, p. 115.

¹¹² J. A. Wemmers, *Where Do They Belong? Giving Victims a Place in the Criminal Justice Process*, "Criminal Law Forum" 20 (2009), p. 395.

consisting in monetary compensations to be paid to the victim by the offender to mitigate blood-feuds, which only caused endless revenge¹¹³. Composition was determined by the consequences of the offence, as the amount depended on the importance and the extension of the injuries and on the social position of the victim and his/her family¹¹⁴. Punishment, reparation, restitution and compensation were all represented in the composition in accordance with the value of the injured person. Every kind of blow or wound given to every kind of person had its price that was established by the community¹¹⁵. Offenders could buy back the peace that they had broken by settling not only with the victim, but also with the King. As the influence of State power over composition gradually increased, the King claimed a share of victim's compensation for his trouble in achieving reconciliation between the parties. One part of the composition called the *bót* went to the victim and the other part, the *wíte*, was paid to the King¹¹⁶.

The main feature of victim-criminal relationship was the pursuit of either revenge or satisfaction. In the system of composition, the injured party was allowed by law the option of either taking the money or taking the blood¹¹⁷. If the offenders refused or was not able to pay the monetary compensation demanded, which generally corresponded to the amount of damages and social value of the victim, they could lose the membership within their community. That meant that the offenders could not defend themselves against the revenge of the victim, or victim's family, because they lost the protection provided by their community¹¹⁸. Conversely, if the perpetrator's offer of monetary compensation or some other economic good wrongdoer was accepted by the victim, the latter was fully paid back for the damage suffered and the criminal procedure came to an end¹¹⁹. At the beginning only some small offences could be paid for, but gradually more and more offences became emendable. Murder, unless of an aggravated kind, was emendable and the *bót* for it was the *wergild*. Originally the *wergild* was the statutory sum that the wrongdoer had to pay for a man's death, but it evolved to include rape and other serious body injuries, which condemned the perpetrator to death or to pay a fine for the offences in consideration of age, sex and rank of the victim¹²⁰.

In England under the reign of Henry II (1154-1189), the system of the *wergild* and the *bót*, which was aimed to provide a resolution of private disputes between the victim and the offender, underwent a change. The King began a process of

¹¹³ S. Schafer, *The Victim and His Criminal. A Study of Functional Responsibility*, New York: Random House (1968), p. 15.

¹¹⁴ S. Schafer, *The Victim and His Criminal. A Study of Functional Responsibility*, New York: Random House (1968), p. 16.

¹¹⁵ *Ibidem*, p. 17.

¹¹⁶ F. Pollock and F. W. Maitland, *The History of English Law Before the Time of Edward I*, Vol. 2, Cambridge: Cambridge University Press (1898), p. 451.

¹¹⁷ *Ibidem*, p. 450.

¹¹⁸ S. Schafer, *The Victim and His Criminal. A Study of Functional Responsibility*, New York: Random House (1968), p. 18.

¹¹⁹ *Ibidem*, p. 16.

¹²⁰ J. A. Wemmers, *Where Do They Belong? Giving Victims a Place in the Criminal Justice Process*, "Criminal Law Forum" 20 (2009), p. 396.

centralisation of justice, as he gradually increased State structures, but his reform reached the highest point with the Assize of Clarendon in 1166. This royal decree enumerated a series of crimes, which fell under the jurisdiction of the King¹²¹. Thus, crime, from being a private matter involving the victim, turned into a threat to the social and public order¹²². Even though the Assize of Clarendon did not abrogate any victim's right of action, nevertheless it showed how the State gradually took over the role of the victim. Moreover, the new conception of crime that moved from the sphere of private law into a form of public law enforceable by the King's courts, caused the emergence of a distinction between crime and tort¹²³. This distinction was further developed by lawyers and judges in English King's courts between the 13th and 16th century. However, in the 12th century crimes and torts did not involve a difference between two types of wrongful actions, nor a distinction base on who could start a lawsuit. If victims preferred vengeance over compensation, they prosecuted the offender for a crime; conversely, if victims preferred compensation over vengeance, they brought an action for tort before the court¹²⁴.

Crimes and torts fell within the broader category of breaches of the King's peace and the King's court had the exclusive jurisdiction over each allegation of these kinds of breaches. The legal framework gave the victim the choice to start a lawsuit by different kinds of actions. Crimes could be prosecuted by two actions: appeal of felony and indictment of felony, whereas torts were remedied by writ of trespass and indictment of trespass¹²⁵.

The first action, appeal of felony was an ancient type of lawsuit that the victim, or the heir or the widow of a murdered victim, could bring for any kind of felonies, including homicide, rape, maiming, robbery, burglary, larceny and arson¹²⁶. Appeal did not mean asking a higher court to review the decision of a lower court, but it defined a lawsuit through which a victim formally asserted that the offender committed a felony breaching with his/her action, the King's peace. With appeal of felony the victim sought a punishment for the wrongdoer and, if the latter was convicted by King's courts, the sentence was death by hanging¹²⁷. A conviction for felony, beside death for the felons, meant also that their wife and heirs were deprived of any right of the inheritance. Felon's goods, chattel and lands were confiscated and given to the King and contracts made after the commission of the crime by the felon were invalidated.¹²⁸

¹²¹ J. Doak, *Victims' Rights, Human Rights and Criminal Justice. Reconceiving the Role of the Third Parties*, Oxford and Portland: Hart Publishing (2008), p. 2.

¹²² S. Schafer, *The Victim and His Criminal. A Study of Functional Responsibility*, New York: Random House (1968), p. 18.

¹²³ J. Doak, *Victims' Rights, Human Rights and Criminal Justice. Reconceiving the Role of the Third Parties*, Oxford and Portland: Hart Publishing (2008), p. 3.

¹²⁴ D. J. Seipp, *The distinction Between Crime and Tort in Early Common Law*, "Boston University Law Review" 20 (1996), p. 59.

¹²⁵ *Ibidem*, p. 60.

¹²⁶ F. Pollock and F. W. Maitland, *The History of English Law Before the Time of Edward I*, Cambridge: University Press (1898), p. 470.

¹²⁷ D. J. Seipp, *The distinction Between Crime and Tort in Early Common Law*, "Boston University Law Review" 20 (1996), p. 62.

¹²⁸ *Ibidem*, p. 62.

On the contrary, a victim who succeeded in proving the guilt of the offender before the court did not receive any monetary compensation or restitution. As the Year Book¹²⁹ stated, the main reason for victims to bring an appeal of felony before the King's courts was vengeance¹³⁰. This last statement is confirmed also by the fact that bringing an appeal of felony could be very dangerous for the victim's safety. The defendant who appeared before the court for the trial could choose proving his innocence through either the trial by battle or trial by jury. By trial by battle the defendant waggged battle with the defendant in a duel. Both the parties fought until one died or declared itself defeated. The defendant did not have the right to ask for trial by battle when he was caught red-handed with the stolen goods or standing by the murdered victim and holding the weapon stained with blood, when the plaintiff was a woman, or a person under twenty-one or older than sixty years, or he had been maimed¹³¹. With the second option, trial by jury, the wrongdoer put his case before a jury of twelve lawful men from the place where the alleged crime was committed. The victim ran a risk not only for the trial by battle, but also the trial by jury could put him/her in a troublesome situation if s/he lost the case. A plaintiff, who failed to prove the guilt of the defendant, could be punished by the same death penalty that the defendant would have suffered or by imprisonment until s/he obtained pardon or paid a fine to the king¹³².

The writ of trespass had in common with the appeal of felony that it was an action brought personally by the victim, but instead of prosecuting a wrong as a crime, it sought redress for the wrong as a tort¹³³. The word trespass was used in a very broad sense: it meant any sort of wrong starting from injuries to a slap on the face to diverting water onto someone's land. More generally, there was ground for a writ of trespass before the King's courts when a plaintiff affirmed that the wrongdoer committed an alleged wrong with force and arms against breaching the King's peace and he claimed damages for that¹³⁴. There was a partial overlapping between writ of trespass and appeal of felony, because victims of maiming, robbery, theft and rape could choose to undertake one of these two actions. That was particularly advantageous for the victim who suffered a felony, since s/he could bring a writ of trespass, avoiding the risk of facing a trial by battle against the wrongdoer, as regulated in the appeal of felony¹³⁵. Writ of trespass did not give the defendant the right to ask for a trial by battle as the trial relied exclusively on the jury. Both victim and the wrongdoer, if they did not want to appear before the court, could appoint attorneys to act in their behalf. The wrongdoers' conviction had two features: they had to pay compensation to the victim, generally an amount of money determined by the jury to cover the damages and they faced punished because with their actions they breached

¹²⁹ Year Books were reports written by lawyers of pleadings and arguments in notable cases in the King's court.

¹³⁰ D. J. Seipp, *The distinction Between Crime and Tort in Early Common Law*, "Boston University Law Review" 20 (1996), p. 63.

¹³¹ *Ibidem*, pp. 65-66.

¹³² *Ibidem*, p. 66.

¹³³ *Ibidem*, p. 60.

¹³⁴ *Ibidem*, p. 69.

¹³⁵ *Ibidem*, p. 69.

the King's peace. Offenders had also to pay a fine to the King, but the court could decide to imprison them until they paid or until the next session in the court¹³⁶.

In the late 13th century, the victims' role in initiating the prosecution and their right to restitution as the successful outcome of criminal proceeding started to fade¹³⁷. There was no legal reason behind this new trend. One of the main reasons for this shift was – in a society that became larger and more complex –, the increasing need of the State to regulate the behaviour of people and to punish offenders. The King did not prosecute wrongdoers for a desire of vengeance, but his interest was to punish whoever breached the King's peace and jeopardized the national security. From this view, the peace of the King was the peace of the whole kingdom¹³⁸. There was also a financial factor, because the offender, by paying compensation to the State and not to the victim, contributed to increase the power and the wealth of the King. Feudal barons and mediaeval ecclesiastical courts began this process by requiring the offender to forfeit property to them, rather than to their victims. Subsequently, with the development of the centralised State, the Crown tried to enrich itself through the appropriation of all payments arising from the criminal justice process. The economic interest of the State displaced the economic interest of the individual¹³⁹.

By the 14th century, the appeal of felony was gradually replaced by the indictment of felony. This latter was a new action, alternative to the appeal to felony, in which the local sheriff, as representative of the King, picked twelve jurors and made them swear to release a presentment on people suspected of committing felonies or trespass. The presentment was a written indictment, which was the outcome of a solemn enquiry by the jury and it put the alleged offender on trial at the King's suit¹⁴⁰. The victim did not bring any lawsuit; s/he only informed the sheriff that an alleged wrong was committed. At this point the sheriff was obliged to refer the accusation to the jurors, who decided whether to indict the wrongdoer or not. The victim was deprived of the right to initiate a lawsuit and of any control over the prosecution, but s/he did not run the risk to face a trial by battle or to pay a fine or be imprisoned if s/he lost the case¹⁴¹. The trial for indictment to felony was only trial by jury because it was at the King's suit and, obviously the King could not fight in a duel. The punishment for the offender was the same for of appeal to felony: death by hanging, forfeit of land and confiscation of goods that were given to the King. Just like the appeal, the indictment to felony did not award the victim with any monetary compensation or restitution of goods¹⁴².

In the 14th century local courts, such as country courts and later justice of peace,

¹³⁶ Ibidem, p. 70.

¹³⁷ J. A. Wemmers, *Where Do They Belong? Giving Victims a Place in the Criminal Justice Process*, "Criminal Law Forum" 20 (2009), p. 396.

¹³⁸ D. J. Seipp, *The distinction Between Crime and Tort in Early Common Law*, "Boston University Law Review" 20 (1996), p. 74.

¹³⁹ G. Davis, *Making Amends. Mediation and Reparation in Criminal Justice*, London; New York: Routledge (1992), p. 2.

¹⁴⁰ J. H. Baker, *An Introduction to English Legal History*, London: Butterworths (2002), p. 505.

¹⁴¹ D. J. Seipp, *The distinction Between Crime and Tort in Early Common Law*, "Boston University Law Review" 20 (1996), p. 70.

¹⁴² Ibidem, p. 73.

developed a new method called indictment of trespass. Similar to the indictment of felony, the lawsuit was brought in the King's name. The local jurors, after gathering information from the victims, the neighbours and also from their own observation and knowledge, could indict the wrongdoer, by making a presentment. If the defendants pled not guilty they went to the trial by jury¹⁴³. If they were convicted, the punishment included monetary fines to be paid to the King, short-time imprisonment, banishment from the town, flogging and public humiliation in the pillory. The jury could not award compensation or restitution for the damages suffered to the victims. The goal of this proceeding was not to provide compensation to victims, but to punish every trespass against the King's peace¹⁴⁴.

4. The Enlightenment and the marginalization of victim's role in England in the 1800's.

Many of the political theories on the origin and role of the State developed during the Enlightenment period deeply influenced the philosophy on crime and punishment. According to Enlightenment thinkers, the origin of the society and the legitimation of the power of the State over the individuals laid down in the social contract. The social contract theory stated that individuals renounced to some of their rights and subjected themselves to the authority of the State, in exchange for protection of their remaining rights. The first modern philosopher to develop the theory of social contract was Thomas Hobbes by his most influential book *The Leviathan*, published in 1651. The starting point for Hobbes to develop his theory of the social contract was that men in the "state of nature" had the rights to do whatever they wanted, because there was not any political authority over them to establish limits to their actions. In fact, according to Hobbes the "state of nature" is not pre-social, but pre-political, since it reflected the circumstances of human being before the establishment of a political authority¹⁴⁵. Men in the "state of nature" did what they needed to survive and considered the scarcity of resources to fulfil their needs, human condition is a war of everyone against everyone. Hobbes described the "state of nature" as:

such condition there is no place for industry, because the fruit thereof is uncertain, and consequently, not culture of the earth, no navigation, nor the use of commodities that may be imported by sea, no commodious building, no instruments of moving and removing such things as require much force, no knowledge of the face of the earth, no account of time, no arts, no letters, no society, and which is worst of all, continual fear and danger of violent death, and the life of man, solitary, poor, nasty, brutish, and short¹⁴⁶.

In these circumstances emerged the social contract, which established the commonwealth, as to say the "multitude so united in one person"¹⁴⁷. The social

¹⁴³ D. J. Seipp, *The distinction Between Crime and Tort in Early Common Law*, "Boston University Law Review" 20 (1996), p. 76.

¹⁴⁴ Ibidem, pp. 76-77.

¹⁴⁵ P. J. Steinberg, *Hobbes, Rousseau and the Modern Conception of the State*, "The Journal of Politics" 70 (2008), p. 597.

¹⁴⁶ T. Hobbes, *The Leviathan*, Published by BiblioBazaar (2008), p. 110-111.

¹⁴⁷ Ibidem, p. 149.

contract for Hobbes is a mutual agreement, through which the individuals transferred voluntary part of their rights to another. The agreement was not between the individuals and the authority constituted by the contract, but it was only between the individuals who decided to give up their rights in favour of the authority. The sovereign, as Hobbes defined the authority, is subjected only by the “law of nature”, that meant that he had to exercise his powers reasonably¹⁴⁸. The sovereign had an absolute power over the subjected, which had to obey him. They could resist to his authority only if the sovereign with his actions threatened the lives of the subjected. The sovereign was established by the contract to guarantee a safe and satisfying life, but if he could not fulfill these requirements anymore, the contract could be void¹⁴⁹.

In 1689, forty years after the publication of *The Leviathan*, John Locke formulated his political theory on the social contract, starting from the assumption that a “state of nature” existed between the individuals before the establishment of the civil society¹⁵⁰. However, in his *Two Treatises of Government*, Locke diverged from Hobbes, since the “state of nature” was not a state of perpetual war. In Locke’s “state of nature” all men were equal, since they have equal rights, and naturally free. Given that, all men had to be treated equally and nobody had the right to damage the others’ life, freedom or possession. According to Locke, the “state of nature” was not lawless or amoral. The law of nature was made up by two rights, the first one was the right of self-preservation and the second was the right of punishment. In accordance with the first, when the individual self-preservation is not in danger, s/he had to act in order to preserve the humankind. The second one, the right of punishment, presupposed that anyone could punish the offender who beached the law of nature. However, the law of nature was corrupted by the introduction of money. It brought about rivalries, ambition and pride among the individuals. When the individuals came to apply the law of nature, three important issues arose: the lack of a predetermined law, of an impartial judge and the absence of the power to enforce the punishments¹⁵¹. So in order to preserve their lives, liberties and what Locke defined with the term properties, the individuals gave up the two rights of the law of nature, not like Hobbes in the hands of a sovereign, but to the community. With the social contract the individuals consented to form a community, where people recognized and respected a common system of law, empowered a predetermined and impartial judge to try and punish the offenders¹⁵². When the community was formed, the civil society decided by majority to confer political power to the government. Locke did not specify what should be the ideal form of government. It could be monarchy, republic or aristocracy; it depended of the choice of the majority of the community¹⁵³. Once

¹⁴⁸ F. Pollock, *Hobbes and Locke: The Social Contract in English Political Philosophy*, “Journal of the Society of Comparative Legislation” 9 (1908), p. 109.

¹⁴⁹ P. J. Steinberg, *Hobbes, Rousseau and the Modern Conception of the State*, “The Journal of Politics” 70 (2008), p. 606

¹⁵⁰ S. Chadwick, *John Locke, the State of Nature and Terrorism*, “Critical Studies on Terrorism” 2 (2009), p. 439.

¹⁵¹ *Ibidem*, p. 440.

¹⁵² E. Clinton Gardner, *John Locke: Justice and Social Compact*, “Journal of Law and Religion” 9 (1991-1992), p. 358.

¹⁵³ J. Foa Dienstag, *Between History and Nature: Social Contract. Theory in Locke and the Founders*, “The

again, in opposition to Hobbes theory, the supreme power still laid in the hand of the people, since they were able to remove the government when it did not guarantee their lives, liberties and properties. Locke did not talk about a second contract between the society and the government, but contrary to the social contract, which established the community and it was once for all, the government was subjected to the constant control of the people¹⁵⁴.

The theories on social contract of Hobbes and Locke, even if they presented notable differences, provided a remarkable ground to justify and legitimate the increasing monopolistic role of the central State in the administration of the justice criminal system. Since every action undertaken by the State had as principal goal to guarantee the wellness of the society, the judicial function turned to be a mean to protect the interest of the entire community, regardless the individual rights of the victim of a crime.

The Italian philosopher Cesare Beccaria, with his classic book *On Crime and Punishment*, focused his studies on the proposal to reform criminal justice in a “centralized and rational system of justice that was equal for all and grounded in the rule of law.”¹⁵⁵ Beccaria, in order to justify the right of a central authority to punish an individual, drew on the social contract theory. The individuals, which in the state of nature lived in a brutal condition of war, decided to take part in the social contract and gave up “the least possible portion” of their freedom in exchange for security, wellbeing and protection of their interests¹⁵⁶. According to Beccaria, by mean of the social contract the members of society agreed on a set of rules, which the central authority applied equally to all individuals¹⁵⁷. When an individual committed an act that breached the social contract, s/he committed a crime, which damaged the entire society as a whole¹⁵⁸. As consequence of that, Beccaria argued the government right of punishment laid down in the nature itself of the social contract, because the State was set by the contractors in order to uphold the public good of the society that was damaged by the offender¹⁵⁹. The innovative feature in Beccaria’s work is the assumption that, since the system of criminal justice sprang from the social contract as a way to deter the dissolution of society, it had to safeguard the interests of the community and not to redress the damage of the victim¹⁶⁰. The goal of the criminal justice system was to deter the potential offender to commit a crime and to repay the society, which suffered damage because of a criminal action¹⁶¹. Thus, it is clear that

Journal of Politics” 58 (1996), p. 988.

¹⁵⁴ F. Pollock, *Hobbes and Locke: The Social Contract in English Political Philosophy*, “Journal of the Society of Comparative Legislation” 9 (1908), p. 111.

¹⁵⁵ C. Beccaria, *On Crimes and Punishment and Other Writings*, Cambridge: Cambridge University Press (1995), p. xii

¹⁵⁶ *Ibidem*, p. xx.

¹⁵⁷ D. B. Young, *Cesare Beccaria: Utilitarian or Retributivist?*, “Journal of Criminal Justice” 11 (1983), p. 319.

¹⁵⁸ *Ibidem*, p. 319.

¹⁵⁹ I. Kramnick, *The Portable Enlightenment Reader*, New York: Penguin Books (1995), pp. 20-21.

¹⁶⁰ W. F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: the Return of the Victim*, “The American Criminal Law Review” 13 (1975-1976), p. 655.

¹⁶¹ *Ibidem*, p. 655.

from Beccaria's point of view, whether there was a conflict between the interest of the society and the interest of the victim, the first had to prevail over the second, because the criminal prosecution was undertaken for social utility¹⁶². In the new system of criminal justice drew by Beccaria, the role of the victim was reduced to a mere witness. Victims were deprived of the right to initiate the criminal action and to prosecute the offender¹⁶³.

As we can see from what stated above, the theories developed by Enlightenment thinkers on the origin of society and State power, reduced the criminal justice system to a dispute between the State and the defendant. The idea of a centralized State, which undertook the legislative, judicial and executive function, spread all over Europe and gradually influenced the structure of the emerging national States.

Noteworthy is the example of England, where the new concept of State brought about a shift in the prosecution system. The State took on the prerogatives of the victims, such as initiating and conducting a criminal action, as it considered the protection of the society more important than the safeguard of the rights of the individual victim¹⁶⁴. This process started during the 1700's, when the King lost power, as the parliamentary sovereignty became established. Laws were passed by the parliament and, thus, crimes were not a violation of King's peace any longer, but were considered as a threat to civil society and social interests¹⁶⁵. Despite this shift in the perception of crime as a conduct, which affected the public interest first, victims still had the right to initiate the prosecution. In fact, even if the role of the State as a protector of the society was in rapidly increasing, England kept the system of private prosecution for victims. The power of the State was to adjudicate and punish the perpetrators¹⁶⁶. The private prosecution was seen as a guarantee for the citizens, with could have been threatened by a boundless and absolute power of the State¹⁶⁷. But, it should be admitted that starting a prosecution was extremely expensive and in most of the cases the victim could not afford such a long and complicated proceeding. For this reason the State, took actions to encourage the victims to start an action against the offender. The victim could gain a reward, which could be either the recovering of the costs or part of the fine, for reporting the crime and the offender, triggering the prosecution as informer¹⁶⁸. In spite of this system of rewards for victims, the State had prosecutorial powers in case of political or particularly serious crimes. However it did

¹⁶² J. Doak, *Victims' Rights, Human Rights and Criminal Justice. Reconceiving the Role of the Third Parties*, Oxford and Portland: Hart Publishing (2008), p. 5.

¹⁶³ W. F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: the Return of the Victim*, 'The American Criminal Law Review' 13 (1975-1976), p. 656.

¹⁶⁴ J. Doak, *Victims' Rights, Human Rights and Criminal Justice. Reconceiving the Role of the Third Parties*, Oxford and Portland: Hart Publishing (2008), p. 4.

¹⁶⁵ J. A. Wemmers, *Where Do They Belong? Giving Victims a Place in the Criminal Justice Process*, 'Criminal Law Forum' 20 (2009), p. 397.

¹⁶⁶ E. Yoroshefsky, *Balancing Victims' Rights and Vigorous Advocacy for the Defendant*, 'Annual Survey of American Law' (1989), 140.

¹⁶⁷ J. Cardenas, *The Crime Victim in the Prosecutorial Process*, 'Harvard Journal of Law and Public Policy' (1986), p. 361.

¹⁶⁸ J. Doak, *Victims' Rights, Human Rights and Criminal Justice. Reconceiving the Role of the Third Parties*, Oxford and Portland: Hart Publishing (2008), pp. 4-5.

not mean that in England, during the 1700's, existed an official body of public prosecutors. The parties were private citizens, who prosecuted in the name of the Crowd¹⁶⁹.

The decisive reforms of the administration of justice, which further marginalised victims' rights to redress, took place in the 1800's¹⁷⁰. The Metropolitan Police Act of 1829 set a police force with the specific responsibility to safeguard the public order. Very soon this institution replaced the victim's role in overseeing the prosecution. The police received the reports from the victims and investigated the case. If there were relevant evidence to build the case, the police officer initiated the criminal proceeding before a court of justice. At trial stage the police officers acted as an attorney: he stated the case, presented evidence and examined witnesses. If the case was particularly complicated the police officers could hire a solicitor as a legal consultant¹⁷¹. Regardless the absence of an official system of public prosecution, magistrates or solicitors, who received the evidence gathered in the investigation stage by the police, initiated and conducted criminal proceedings. Moreover in the majority of the cases solicitors received public funding¹⁷². In this way the traditional role of the victim as private prosecution turned into that of an informer or a witness¹⁷³.

The Prosecution of Offence Act of 1879, setting the office of the Director of the Public Prosecution, introduced in England the figure of the public prosecutor, who had the duty

Under the superintendence of the Attorney General, to institute, undertake, or carry on such criminal proceedings (...), and to give such advice and assistance to chief officers of police, clerks to justices, and other persons, whether officers or not, concerned in any criminal proceeding respecting the conduct of that proceeding, as may be for the time prescribed by regulations under this Act, or may be directed in a special case by the Attorney General.¹⁷⁴

The Metropolitan Police Act and the Prosecution Of Offence Act could be seen as the implementation of the reforms advocated by the Enlightenment thinkers. The monopoly of the justice criminal system by the State usurped the right of the victims to private prosecution and to redress the offence by the criminal process. The interests of the victim had been eliminated, since the purpose of the criminal justice system became redress of the offender's debt to society¹⁷⁵.

¹⁶⁹ J. Cardenas, *The Crime Victim in the Prosecutorial Process*, "Harvard Journal of Law and Public Policy" (1986), p. 361.

¹⁷⁰ M. Cherif Bassiouni, *International Recognition of Victims' Rights*, "Human Rights Law Review" 6 (2006), p. 208.

¹⁷¹ J. Cardenas, *The Crime Victim in the Prosecutorial Process*, "Harvard Journal of Law and Public Policy" (1986), p. 363.

¹⁷² D. Bentley, *English Criminal Justice in the Nineteenth Century*, Bloomsbury Publishing (1998), p. 7.

¹⁷³ J. Doak, *Victims' Rights, Human Rights and Criminal Justice. Reconceiving the Role of the Third Parties*, Oxford and Portland: Hart Publishing (2008), p. 5.

¹⁷⁴ The Prosecution Of Offence Act of 1879, 42 & 43 Vict., chapter 2.

¹⁷⁵ J. Cardenas, *The Crime Victim in the Prosecutorial Process*, "Harvard Journal of Law and Public Policy" (1986), p. 389.

5. Victims, Crimes and Punishment in Islam

To understand the Islamic criminal law system (after 622 A.D.) is fundamental to start from the concept of unity or *Tawhid*. According to this, the individual is closely connected to the community through a relationship of mutual support, as well as he/she has the direct obligation to serve God. The individual is an integral part of the society and when s/he commits a crime, s/he betrays his responsibility toward God and his commitments of solidarity to the society. The idea of *Tawhid* conveyed by the Qur'an implies that the preservation of God's creation is the main obligation of each individual¹⁷⁶.

In the Islamic criminal justice system there are three categories of crimes and punishment: *Hudud*, *Qisas* and *Ta'zir*. Every category indicates a different basis of rights breach, namely God's right or individual's right. Secondly, they differ on the standard of fact-finding; the degree of the discretion conferred on the judge, when it comes to implementing the punishment and the harshness of the punishment itself¹⁷⁷.

The most serious crimes are the *Hudud* ones. This category of crimes includes: theft, adultery, slander, drinking alcohol, highway robbery, rebellion and apostasy. They refer to the violation of God's creation and right by breaking the harmony of the society. Consequently, the gravity of the *Hudud* crimes implies that their punishments are the harshest and there is no room for judicial discretion, because the penalty is already prescribed in the Qur'an. However, the harshness of the punishment is counterweighted by very strict evidentiary standards, as the guilt has to be proven beyond any reasonable doubt¹⁷⁸. Besides that, there are other specific conditions to be fulfilled in order to assess the guilt of the accused: he/she must be an adult in possession of his/her mental faculties and the criminal act has been carried out under no coercion. The law prescribes to the judge to follow a specific and strict procedure before convicting the offender and for this reason it can be difficult to prove the charges. In these cases, the general trend is to drop out the *Hudud* charges and reclassify them to the lower category of *Qisas* and *Ta'zir*. In trials for *Hudud* crimes the victim has no procedural rights. Only certain schools of jurisprudence allow the victim to take part in the process as a witness. The Hanafi'i and the Maliki'i schools allow the victim to face the offender, but according to Maliki'i interpretation of the law it can happen only when the trial deals with highway robbery *Hudud* crimes. On the contrary, the Shafi'i and Hanbali schools do not allow the victim to testify at all, because, due to his/her involvement, the testimony is considered unreliable¹⁷⁹.

Ta'zir crimes, which mean chastisement for bad behaviour, are the mildest category of crime in Islamic system. Within this class of crimes can be included all the crimes for which the Qur'an do not prescribe any punishment; instead, it is left to the discretion of the judge the implementation of a penalty. *Ta'zir* crimes are not a divine revelation and the punishment for these crimes can be changed and adapted according to the contextual setting of the society and the status and personality of the offender.

¹⁷⁶ N. H. Ammar, *Restorative Justice in Islam: Theory and Practice*, in *Victims and Victimization A Reader*, Open University Press (2009), p. 138.

¹⁷⁷ Ibidem, p. 139.

¹⁷⁸ Ibidem, p. 140.

¹⁷⁹ Ibidem, p. 141.

The main aim of *Ta'zir* crimes is the rehabilitation of the offender¹⁸⁰. The principal features of the punishment are forgiveness and minimum punitive measures. The offender can avoid penal sanctions if the victim and then the judge grant the grace to him/her; if the victim has forgiven the offender before the beginning of the trial and if the offender has repented¹⁸¹.

Contrary to the other two, in *Qisas* crimes, which delineated specific categories of crimes involving violation of the rights of individual, namely all types of murder, voluntary or involuntary, assault, battery, mayhem and other bodily harm that results in injury or death, the victim has an effective role in the legal prosecution and in the determination of the punishment¹⁸². A victim of *Qisas* crimes, is not only the moving party with respect to the prosecution, but has the rights to present evidence, interrogate witnesses, and also bring the criminal action to an end accepting compensation¹⁸³. The role of the victim is instrumental in transforming the punishment from retributive to restorative. The sanction for *Qisas* crimes was the *talion* (retaliation), which means the equivalent infliction of physical or bodily harm against the perpetrator. However, the law provides alternative punishments: a *Diyya*, which is a compensation to be paid to the victim or to his family and reconciliation. It is wrong to compare the *Diyya* to the compensation for civil damages as conceived in Western criminal law systems, since it presents a punitive element¹⁸⁴.

Before the judge issues a verdict, he has to ask to the victim or his family to choose between *talion* or the *Diyya* and his decision is influenced by the choice made. If the offender does not accept the *Diyya*, the retaliation applies, but on the other hand, if the offender successfully satisfies the victim, the retaliation is abolished¹⁸⁵.

An additional step to compensation is *Sulh* or reconciliation, which can only take place with the agreement of the victim and requires a negotiation in the presence of an appointed judge or guardian (*wali amr*). The judge's task is to inform the victim of the possibility to forgive the offender. The judge sets the reparation and tries to reconcile the parties, but eventually it is the victim or his family that decides what kind and how the punishment has to be exercised¹⁸⁶. The victim can exercise this prerogative until the last possible moment, even after the verdict is issued. The Islamic criminal law system shows several elements of restorative justice in *Qisas* crimes: the victim has an active role, since he starts the case, faces the offender and has plenty of opportunity for rehabilitation, restoration, satisfaction and reconciliation¹⁸⁷.

¹⁸⁰ Ibidem, p. 145.

¹⁸¹ N. H. Ammar, *Restorative Justice in Islam: Theory and Practice*, in *Victims and Victimization A Reader*, Open University Press (2009), p. 145.

¹⁸² M. Rahami, *Islamic Restorative Tradition and Their Reflections in the Post-Revolutionary Criminal Justice System of Iran*, "European Journal of Crime, Criminal Law and Criminal Justice" (2007), p. 233.

¹⁸³ M. Cherif Bassiouni, *Qesas Crimes, The Islamic Criminal Justice*, New York: Oceana Publication (1982), p. 203.

¹⁸⁴ N. H. Ammar, *Restorative Justice in Islam: Theory and Practice*, in *Victims and Victimization A Reader*, Open University Press (2009), p. 143.

¹⁸⁵ Ibidem, p. 143.

¹⁸⁶ M. Rahami, *Islamic Restorative Tradition and Their Reflections in the Post-Revolutionary Criminal Justice System of Iran*, "European Journal of Crime, Criminal Law and Criminal Justice" (2007), p. 247.

¹⁸⁷ N. H. Ammar, *Restorative Justice in Islam: Theory and Practice*, in *Victims and Victimization A Reader*, Open University Press (2009), p. 146.

6. Victimisation after II World War

Most nations were shocked by the reports providing evidence of the atrocities committed by Germans prior to the outbreak and during the II World War. However, nothing was done to deter Germany in its actions, which were to include mass murder of Jews and other races, deportation of civilian population to slave labour, ill treatment of prisoners of war and wanton destruction of cities and extermination of the inhabitants¹⁸⁸. After the defeat of Germany, the intention of the four victorious countries (United States, United Kingdom, Soviet Union and France) was to set up a tribunal for establishing war guilt, punishing the brutality of the Nazi regime and eventually to address public opinion.

However, victims did not become the object of criminological research domestically and internationally until the period following the end of II World War. For considering the evolution of victim's position in international criminal law we must consider the international legal contest of the post II War World. At this time the concept of victim was pretty much unknown. The general position under international law was that where individual suffers harm in consequence of a violation of rules of international law, the injuries resulting are not that of the harmed person, but that of the State. The development of the idea that an individual could acquire a legal status under international law grew slowly¹⁸⁹. In fact, Nuremberg International Military Tribunal confirms that little attention has been provided to the role and rights of the victims of international crimes in the formation of accountability mechanisms dealing with perpetrators. It did not address the protection and rights of the victims¹⁹⁰. This tribunal was based mainly on the idea that international criminal proceedings should be focused upon the punishment of individual perpetrators¹⁹¹.

The Nuremberg International Military Tribunal, which was to try Nazi statesmen, military leaders, administrators, bankers, industrialists, propagandist and educators, is the result of a path began after the outbreak of the hostilities of the II World War. On the 8th of August 1945, the leaders of the four Allied (United States, United Kingdom, Soviet Union and France) signed the London Agreement, which established an *ad hoc* International Military Tribunal to try the leaders of the European Axis and their principal agents¹⁹². Specifically the London Agreement was made up by two short documents: the first one is the Agreement, which expressed the principle that the international military tribunal was established to hear the cases of the major war criminals whose offences "have no particular geographic location"¹⁹³. The second

¹⁸⁸ J. A. Appleman, *Military Tribunals and the International Crimes*, Westport Connecticut: Greenwood Press Publishers (1954), p. VII.

¹⁸⁹ C. McCarthy, *Victim Redress and International Criminal Justice. Competing Paradigms, or Compatible for of Justice?*, "Journal of International Criminal Justice"10 (2012), p. 354.

¹⁹⁰ M. Bachrach, *The Protection and Rights of Victims under International Criminal Law*, "The International Lawyer" 34 (2000), p. 12.

¹⁹¹ C. McCarthy, *Victim Redress and International Criminal Justice. Competing Paradigms, or Compatible for of Justice?*, "Journal of International Criminal Justice"10 (2012), p. 352.

¹⁹² B. F. Smith, *Reaching Judgment at Nuremberg*, London: Andre Deutsch (1977), p. 58.

¹⁹³ Article 1 of the Agreement for the Prosecution and Punishment of the Major War Criminals of the

document of London's Executive Agreement concluded by Allied was the Charter of the International Military Tribunal, which dealt with constitution, jurisdiction, functions and procedural rules of the Tribunal¹⁹⁴.

The second subsection of the Charter entitled "Jurisdiction and General Principles" was the most meaningful by far. It included Article 6, which listed the three groups of crimes coming in the jurisdiction of the Tribunal: crimes against peace, war crimes and crimes against humanity. The conception of crimes against humanity¹⁹⁵ was an innovative offense to the language of international law¹⁹⁶. Crimes against humanity represented the first attempt to realize a system of transnational justice, which can potentially address the needs of communities who experienced the tragic events of the II War World. The aspiration was to build a more comprehensive concept of transnational justice and with the wording of the provision of crimes against humanity they meant to create a connection between the claims of justice for the mass atrocities committed during the war and the experience of the victims and their impact on the society¹⁹⁷. This new concept of justice, which went beyond the accountability and punishment of perpetrators, was meant to give room to the experiences of sufferings of the victims, as a legacy to the society. The victims' voice became an instrument to reconstruct a record of the history and ponder about the material and psychological consequences of the war's violence. Even if the emotions of the victims could seem not fit within the juridical and political context of the Nuremberg trials, they are part of the events the Tribunal was in charge to try. The psychological experiences of war victims were needed to have a comprehensive understanding of the impact of war on politic and society. Including the voice to victims represented a way to cope with ethical and political concerns and to reflect about the values and practices that were necessary to rebuild society after II War World¹⁹⁸.

However, on one hand, if the Charter of the tribunal, by including crimes against humanity within the jurisdiction of the IMT, set the promises for the involvement of victims, on the other hand, the complete absence of the word "victim" in the Statute, meant that the drafters did not foreshadow the possibility for victims to testify, neither provide them with any procedural rights, nor protection nor support during the trial¹⁹⁹. In the same way, the practice of the prosecution underestimated the value of

European Axis, London 8th of August 1945.

¹⁹⁴ B. F. Smith, *Reaching Judgment at Nuremberg*, London: Andre Deutsch (1977), p. 58.

¹⁹⁵ Article 6 (c) of the Charter of the International Military Tribunal, London 8th of August 1945, "namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

¹⁹⁶ F. Biddle, *The Nuremberg Trial*, "Proceedings of the American Philosophical Society" 9 (1947), p. 301.

¹⁹⁷ S. Chakravarti, *More than "Cheap Sentimentally": Victim Testimony at Nuremberg, the Eichmann Trail, and Truth Commissions*, "Constellations" 15 (2008), pp. 223-224.

¹⁹⁸ S. Chakravarti, *More than "Cheap Sentimentally": Victim Testimony at Nuremberg, the Eichmann Trail, and Truth Commissions*, "Constellations" 15 (2008), p. 233.

¹⁹⁹ S. Garkawe, *The Role of Victims at the Nuremberg International Military Tribunal*, in H. R. Reginbogin, C.

victims' testimonies as an instrument to replace victims in society and to educate the international community on war atrocities. In fact, for the prosecution, which was focused on providing an impartial method of judgment, the major crimes of the defendants were waging of, and conspiring to, wage aggressive war and built its case on them. The peripheral role played by victims represented a lost occasion for the IMT to provide a sense of justice and vindication for the millions of victims of the Nazi. There were several reasons why victims should have been given a greater role in proceedings. Firstly, hearing the victims' narratives would have led the Tribunal to deal more amply with the crimes against Jews, Gypsies, Slavs, homosexuals, disabled persons, religious minority and people of colour, which represented a fundamental aspect of the II World War²⁰⁰. Victims' involvement would have counterweighted the focus of the prosecution for waging of, and conspiring to, wage aggressive war²⁰¹. Secondly, evidence from victims would have personalized the crimes committed by Nazi and given a more dramatic dimension to the trial, enhancing, thus, the legitimacy of the IMT in front of the worldwide community. But, since the Nazi crimes were presented through a long list of bureaucratic documents and statistics, the main issues discussed during the hearings, which dealt mostly with the admission and relevance of the evidence, brought about a general disinterest towards the trial in the press and public opinion. Despite the promises, the Nuremberg trial rather than being perceived as memorable, was quite flat most of the time²⁰². Thirdly, the prosecution underestimated the beneficial effects for the victims being able to tell their story before a court in a public process. Psychological studies showed that for survivors of traumatic events testifying in a public forum could be a therapeutic and cathartic experience²⁰³.

The American Chief Prosecutor Justice Jackson played the most prominent role during the preparations of trial and during the trial itself. He expressed a new impartial approach to international justice. It is undeniable that the Nuremberg trial represented an instance of "victor's justice", but in Jackson's vision the trial was not a facade to impose a punishment. Jackson's main concern was not to breach the juridical principle that there cannot be punishment without the criminal conduct of the defendants being proven. In order to provide an impartial method for international justice, the strategy was to focus on the individual responsibility of the 24 defendants and to provide incontrovertible evidence, upon which the judges could base their decision. Given this style of prosecution, it is not a matter of surprise that, Jackson's first approach was to anchor the cases to the voluminous and detailed material evidence, like documents, communications and photographs culled from the Nazi, instead of using victims and

J. M. Safferling, *The Nuremberg Trials: International Criminal Law Since 1945: 60th Anniversary International Conference = Die Nürnberger Prozesse: Völkerstrafrecht Seit 1945: Internationale Konferenz Zum 60. Jahrestag / on behalf of Touro College Jacob D. Fuchsberg Law Center*, München: K.G. Saur (2006), p. 86.

²⁰⁰ S. Garkawe, *The Role of Victims at the Nuremberg International Military Tribunal*, in H. R. Reginbogin, C. J. M. Safferling, *The Nuremberg Trials: International Criminal Law Since 1945: 60th Anniversary International Conference = Die Nürnberger Prozesse: Völkerstrafrecht Seit 1945: Internationale Konferenz Zum 60. Jahrestag / on behalf of Touro College Jacob D. Fuchsberg Law Center*, München: K.G. Saur (2006), p. 86.

²⁰¹ *Ibidem*, p. 88.

²⁰² *Ibidem*, pp. 88-89.

²⁰³ *Ibidem*, p. 89.

survivors' testimonies, despite their potential substantial public impact. He argued that documents provided a sounder foundation to the case. On the contrary Jackson thought that witnesses under the pressure to perform before a court in a public hearing could retract their confessions²⁰⁴. He was influenced by the assumption, largely widespread in the immediate aftermath of the II War World, that victims, because of the horrible events they experienced, were psychological unable to testify²⁰⁵. Victims were considered counterproductive for the case of the prosecution because they were perceived to be too emotional and, thus, not able to provide objective evidence²⁰⁶. Moreover, the prosecution feared that victims' credibility could have been subject of criticism and the witnesses could even be charged of perjury, because there was a general disbelief of the whole range of the atrocities committed by Nazi, such as, for instance, the Holocaust²⁰⁷. Presenting the case through the Nazi's materials reinforced the idea that the trial was based on objective and impartial evidence of the specific crimes of Nazi officials²⁰⁸. Definitely, the main goal of the Tribunal was not to offer a model of reconciliation, neither social transformation nor educating the public about Nazi crimes. Education would have been a consequence of the disclosure of the evidence against the Nazi defendant, but it was not a concern²⁰⁹. The trial aimed not only to punish the surviving leader of the Third Reich, but also trace a record of the massive atrocities committed during the war and during the previous twelve year of Nazi regime²¹⁰. Jackson in his Final Report to the President Concerning the Nuremberg War Crimes Trial illustrated the achievements of the trial, which clearly expressed the attempt of providing a rationalistic and objective justice, where there is no room for arbitrary victors' justice, or emotions of the victims, or the legacy of suffering that affected societies after war²¹¹. Justice Jackson stated that the London Agreement

for the first time made explicit and unambiguous what was theretofore, as the Tribunal has declared, implicit in International Law, namely, that to prepare, incite, or wage a war of aggression, or to conspire with others to do so, is a crime against international society, and that to persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds in connection with such a war, or to exterminate, enslave, or deport civilian populations, is an international crime, and that for the commission of such crimes

²⁰⁴ D. Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory*, Oxford: Oxford University Press (2001), p. 61.

²⁰⁵ S. Garkawe, *The Role of Victims at the Nuremberg International Military Tribunal*, in H. R. Reginbogin, C. J. M. Safferling, *The Nuremberg Trials: International Criminal Law Since 1945: 60th Anniversary International Conference = Die Nürnberger Prozesse: Völkerstrafrecht Seit 1945: Internationale Konferenz Zum 60. Jahrestag / on behalf of Touro College Jacob D. Fuchsberg Law Center*, München: K.G. Saur (2006), p. 90.

²⁰⁶ Ibidem, p. 90.

²⁰⁷ Ibidem, p. 90.

²⁰⁸ S. Chakravarti, *More than "Cheap Sentimentally": Victim Testimony at Nuremberg, the Eichmann Trail, and Truth Commissions*, "Constellations" 15 (2008), p. 225.

²⁰⁹ Ibidem, p. 225.

²¹⁰ S. Landsman, *The Eichman Case and the Invention of the Witness-Driven Atrocity Trial*, "Columbia Journal of Transnational Law" 69 (2012-2013), p. 73.

²¹¹ S. Chakravarti, *More than "Cheap Sentimentally": Victim Testimony at Nuremberg, the Eichmann Trail, and Truth Commissions*, "Constellations" 15 (2008), p. 233.

individuals are responsible²¹².

Moreover, he added:

We have documented from German sources the Nazi aggressions, persecutions, and atrocities with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people²¹³.

And he concluded his report affirming,

this trial is the world's first post mortem examination of a totalitarian regime. In this trial, the Nazis themselves with Machiavellian shamelessness exposed their methods of subverting people's liberties and establishing their dictatorships²¹⁴.

However, just before the first hearing of the trial, Jackson decided to present few witnesses to "try out the defense" and to "introduce a little drama into the case"²¹⁵. There were a total of 33 witnesses for the Prosecution, plus several thousand documents introduced against the individual defendants. For the defendants 61 witnesses and 19 defendants appeared before the court, in addition to 143 witnesses by way of written interrogatories, together with voluminous documents²¹⁶. The witnesses were military or political leaders of the Nazi regime. Among the 94 witnesses that spoke before the Court about the crimes against Jews, only 3 were actually Jews, who survived the war²¹⁷. The role of prosecution's witnesses was that of corroborating evidence of the documentation on criminal plans of the German leaders²¹⁸. Among the few testimonies, the most significant were those of Otto Ohlendorf, Rudolf Franz Ferdinand Hoess, General Erwin Lahousen, Walter Schellenberg and Dieter Wisliceny. The SS-Gruppenführer Otto Ohlendorf and Rudolf Franz Ferdinand Hoess, which both testified as witnesses of the prosecution against Ernst Kaltenbrunner, the Chief of the Reich Security Main Office. Otto Ohlendorf was the commander of Einsatzgruppe D, which operated in South Ukraine²¹⁹. On the 3rd January 1946, he testified as witness of the prosecution against Ernst Kaltenbrunner, who was the Chief of the Reich Security Main Office. Ohlendorf stated that Himmler gave him the instruction that Einsatzgruppe D had to

²¹² R. H. Jackson, *Final Report to the President Concerning the Nuremberg War Crimes Trial*, "Temple Law Quarterly" (1946-1947), p. 142.

²¹³ R. H. Jackson, *Final Report to the President Concerning the Nuremberg War Crimes Trial*, "Temple Law Quarterly" (1946-1947), p. 142.

²¹⁴ *Ibidem*, pp. 142-143.

²¹⁵ B. F. Smith, *Reaching Judgment at Nuremberg*, London: Andre Deutsch (1977), p. 87.

²¹⁶ J. A. Appleman, *Military Tribunals and the International Crimes*, Westport Connecticut: Greenwood Press Publishers (1954), p. VIII.

²¹⁷ L. Jockusch, *Justice at Nuremberg? Jewish Responses to Nazi War-Crime Trials in Allied-Occupied Germany*, "Jewish Social Studies" 19, (2012), p. 108.

²¹⁸ A. Tusa and J. Tusa, *The Nuremberg Trial*, London: Macmillan International Criminal Law (1983), p. 171.

²¹⁹ Otto Ohlendorf testimony, 3 January 1946, in *The Trial of the Major War Criminals Before the International Military Tribunal: Proceedings Volumes*, Vol. 4, p. 315.

follow during its mission in Russian territory. These “instructions were that in the Russian operational areas of the Einsatzgruppen the Jews, as well as the Soviet political commissars, were to be liquidated”²²⁰. He affirmed that under his command “in the years between June 1941 and June 1942 the Einsatzkommandos reported 90,000 people liquidated”²²¹.

Undoubtedly Rudolf Franz Ferdinand Hoess’s testimony was the most accurate and effective, since he was the Commander of the camp at Auschwitz from May 1940 until December 1943²²². He was forbidden to write note regarding the number of victims, but he affirmed that Eichmann, who had the task of organizing and assembling these people, was the only one who had notes and according to him in Auschwitz a total sum of more than 2 million Jews were killed²²³. Hoess proved to be particularly well informed on everything occurring in concentration camps regarding the treatment and the methods applied to the internees. He showed to be aware even of the medical experiments that were carried out in several camps.

General Erwin Lahousen, as assistant of the head of the military intelligence attended many meeting between his superior and military chiefs and ministers. He was an important witness because he saw who of the members of the cabinet took the decisions and how; he knew the hierarchy of the command and to what level the orders were sent. With his testimony Lahousen brought evidence against several officers, like Ribbentrop²²⁴. Dieter Wisliceny was a colleague of Eichmann and his testimony was particularly relevant because of his deep knowledge of the policy on the Jewish Question and the Final Solution. In particular he was present when Eichmann received from Hitler the order to undertake the final solution²²⁵.

According to Jackson, the main issue of the trial was to prove that Germans were planning aggressive war and, for reaching this goal, the prosecution used only the kind of witnesses that could provide evidence of any war crimes that implied conspiracy and planning a war²²⁶. The ideal witness for the prosecution was an insider, a person who had a political or military role, who knew the hierarchical structure of the Nazi regime and the decision-making procedure and eye-witnessed the summit between political and military leaders, where the main decision regarding planning an aggressive war were taken. It was unlikely for the victims to have copies of the documentation, which provide specific information about the orders the defendants gave. The horrors that survivors endured were mostly linked to perpetrators who were so much lower in the chain of the Nazi hierarchy, that they were not even indicted before the tribunal²²⁷. Given that, in Jackson’s view there was no room for any victims’ role.

²²⁰ Otto Ohlendorf testimony, 3 January 1946, in *The Trial of the Major War Criminals Before the International Military Tribunal: Proceedings Volumes*, Vol. 4, p. 315.

²²¹ Ibidem, p. 318.

²²² Rudolf Franz Ferdinand Hoess testimony, 15 April 1946, in *The Trial of the Major War Criminals Before the International Military Tribunal: Proceedings Volumes*, Vol. 11, p. 397.

²²³ Ibidem, p. 396.

²²⁴ A. Tusa and J. Tusa, *The Nuremberg Trial*, London: Macmillan International Criminal Law (1983), p. 163.

²²⁵ Ibidem, p. 171.

²²⁶ B. F. Smith, *Reaching Judgment at Nuremberg*, London: Andre Deutsch (1977), p. 88.

²²⁷ S. Garkawe, *The Role of Victims at the Nuremberg International Military Tribunal*, in H. R. Reginbogin, C.

Victims were virtually absent at the Nuremberg trial.

The case of the Jews who survived the Holocaust is an emblematic example of this policy. Jackson stated in his opening speech of the trial that “of the 9,600,000 who lived in Nazi dominated Europe, 60% are authoritatively estimated to have perished. 5,700,000 Jews are missing from their countries in which they formerly lived, and over 4,500,000 cannot be accounted for by the normal death rate nor by immigration; nor are they included among displaced persons”²²⁸. Nevertheless, as stated above, only 3 Jews, who survived the Holocaust, testified before the tribunal. This does not imply that the representation by the Tribunal of the Nazi genocide of European Jews was not accurate. In fact, the Prosecution provided documentary and graphic evidence of the Jewish mass extermination and, secondly, crimes against Jews fell under the four indictments of crimes against peace, war crimes, crimes against humanity and conspiracy to wage aggressive war. But, on the other hand, it is undeniable that the trial focused on the murdered victims, than on the Holocaust survivors²²⁹.

The representative of Jewish organization, such as for example the World Jewish Congress, requested to the prosecution for participation of victims of the Holocaust, but the American chief prosecutor Jackson partially reject this proposal, arguing that “it is intended to have one military trial embracing the hole conspiracy of the Nazis against the world, in which the Jewish could should have its place”²³⁰. There were specific political reasons behind the choice of the prosecution to put at the centre the Nazi criminal and their documents and relegate the victims to the margins of the trial. Firstly, the prosecution did not have the intention to turn the Nuremberg trial into a Holocaust trial. To minimize the issues of Jewish associations, which claimed for a more active participation of the victims, the prosecution opposed that the Jews’ mass extermination would have been treated in the trial through the new crime category of crimes against humanity²³¹. Jackson feared the risk that, allowing the Jewish victims to present their case before the tribunal, the trial could turn into a vengeance trial and provoke racial tensions²³². Moreover, according to Jackson, the possibility that other groups of victims, following the Jews precedent, should have asked for more representation in the trial, would have complicated to focus on the responsibilities of

J. M. Safferling, *The Nuremberg Trials: International Criminal Law Since 1945: 60th Anniversary International Conference = Die Nürnberger Prozesse: Völkerstrafrecht Seit 1945: Internationale Konferenz Zum 60. Jahrestag / on behalf of Touro College Jacob D. Fuchsberg Law Center*, München: K.G. Saur (2006), p. 90.

²²⁸ Jackson’s opening speech of the Trial, second day, Wednesday 21 November 1945, para. 118. Available at <http://avalon.law.yale.edu/imt/11-21-45.asp>.

²²⁹ L. Jockusch, *Justice at Nuremberg? Jewish Responses to Nazi War-Crime Trials in Allied-Occupied Germany*, “Jewish Social Studies” 19 (2012), pp. 109-110.

²³⁰ Minutes of a meeting with Justice Robert H. Jackson, held at the Federal Court House, N.Y.C., Tuesday June 12 from 10 to 11:30 A.M., Truman Library website, available at http://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/index.php?action=doc, pp. 5-6.

²³¹ L. Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust*, New Haven and London: Yale University Press (2001), p. 6.

²³² D. Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory*, Oxford: Oxford University Press (2001), p. 67.

the Nazi leaders.²³³ The prosecution recognized that the exposition of the Nazi policy against the Jews was a relevant evidence to prove the conspiracy to wage aggressive war, but, on the other hand, the Holocaust was seen as one of the numerous evidence of Germans' criminal plans²³⁴. Secondly, since the prosecution represented the Allied countries, which fought Germany during the II World War, the main concern was to build a case on the war crime of launching and waging an aggressive war. Thirdly, considering that the whole Nazi regime was under accusation during the Nuremberg trial, the main focus was for the evidence, either oral or written, provided by elite leaders of the government, the party, police and military apparatus, rather than relying on the sufferance inflicted to the victims²³⁵.

Following these principles, it is easy to understand that the few victims admitted as witnesses, because of their position could provide a detailed and objective evidence on the heinous practices of Nazis in carrying out the Final Solution. The first witness was Abram Gerzevitch Suzkever a Jewish writer who joined the United Partisan Organization and fought under the Soviet command in Vilna. His poetry on the Nazi violence committed in the ghetto of Vilna, represented not only the testimony of the Jewish suffering, but also an impetus of the antifascist resistance. He was called by soviet Prosecutor Smirnov to testify before the Court on the 27th of February 1946, in other to prove the charge of crimes against humanity committed in Vilna in the Lithuanian Soviet Republic. Suzkever described the massive pogroms that started in July 1941 and ended with the liberation from Germans in July 1944. He clearly stated that the aim of German occupation was, as Germans declared, "that they were exterminating the Jewish race as though legally"²³⁶. His testimony was very detailed, since he provided names of the perpetrators. According to his testimony "the mass extermination of the Jewish people in Vilna began at the moment when District Commissar Hans Fincks arrived"²³⁷ In the end of his testimony Suzkever affirmed that at the beginning of the German occupation 80,000 Jews lived in Vilna and after the occupation about 600 Jews remained in Vilna²³⁸.

In the afternoon session of the 27th of February 1946 the Soviet prosecutor Smirnov proceeded with the interrogation of the second witness Samuel Rajzman, a Polish accountant in an export firm, who was deported from the Warsaw ghetto to Treblinka extermination camp²³⁹. He lived in Treblinka camp for one year, since August 1942 to august 1943 and during this period his work was to load the clothes of the murdered persons on the trains²⁴⁰. Because of his position, Rajzman was well

²³³ L. Jockusch, *Justice at Nuremberg? Jewish Responses to Nazi War-Crime Trials in Allied-Occupied Germany*, "Jewish Social Studies" 19 (2012), p. 115.

²³⁴ L. Jockusch, *Justice at Nuremberg? Jewish Responses to Nazi War-Crime Trials in Allied-Occupied Germany*, "Jewish Social Studies" 19 (2012), p. 133.

²³⁵ *Ibidem*, p. 135.

²³⁶ Abram Gerzevitch Suzkever testimony, 27 February 1946, in *The Trial of the Major War Criminals Before the International Military Tribunal: Proceedings Volumes*, Vol. 8, p. 302.

²³⁷ *Ibidem*, p. 303.

²³⁸ *Ibidem*, p. 306.

²³⁹ L. Jockusch, *Justice at Nuremberg? Jewish Responses to Nazi War-Crime Trials in Allied-Occupied Germany*, "Jewish Social Studies" 19 (2012), p. 120.

²⁴⁰ Samuel Rajzman testimony, 27 February 1946, in *The Trial of the Major War Criminals Before the*

acquainted with the rules regulating the treatment of the people in this camp and he was able to provide a detailed description of the behaviour of Nazis towards the Jewish prisoners. According to Rajzman's account "every day (...) three, four, or five trains filled exclusively with Jews, from Czechoslovakia, Germany, Greece, and Poland. Immediately after their arrival, the people had to leave the trains and line up on the platform. All were obliged to walk through the street to the gas chambers"²⁴¹. He confirmed that under the control of the camp commander Kurt Franz, "between July and December 1942 an average of 3 transports of 60 cars each arrived every day. On an average, I believe they killed in Treblinka from ten to twelve thousand persons daily"²⁴².

On the 7th of August 1946, Izrael Eizenberg the third and last Jewish witness testified before the court, questioned by Major Elwyn Jones the junior counsel for the United Kingdom. Major Jones asked his witness about a huge mass execution that took place in the end of October 1942 at Maidanek Camp. SS men killed groups composed of about 1,000 people²⁴³. He was cross-examined by Herr Pelckmann the SS counsel. He asked the witness to rank the SS officials cited in his affidavit and to identify them from some pictures. The aim of this cross-examination was to convince the court that Eizenberg lied, but he successfully answered Pelckmann's questions²⁴⁴.

Several others Jews submitted affidavits to the prosecution, but they did not testify personally before the court. One of the most relevant affidavits was from Rudolph Kasztner, who "as one of the leaders of the Hungarian Zionist organization I not only witnessed closely the Jewish persecution, dealt with officials of the Hungarian puppet government and the Gestapo but also gained insight into the operation of the Gestapo, their organization and witnessed the various phases of Jewish persecution"²⁴⁵. His affidavit was read in court on the 13th of December 1945 by the American executive Trial Counsel Thomas J. Dodd for the presentation of the case of concentration camp. Kasztner provided a detailed chronological account of the major phases of the persecution of the Hungarian Jews²⁴⁶. His position of leader of the Hungarian Zionist organization gave him access to demographic data regarding the number of Jews killed during the German occupation. According to his calculation in 1940-1941 a census showed that there were 762,000 Jews in the Hungarian territory, but in August 1945 there were only 240,000 Jews still alive²⁴⁷. The end of his affidavit is very useful to achieve the goal of the Tribunal of prosecuting the Nazi officials, because Kasztner listed the names of Germans perpetrators and members of

International Military Tribunal: Proceedings Volumes, Vol. 8, p. 327.

²⁴¹ Samuel Rajzman testimony, 27 February 1946, in *The Trial of the Major War Criminals Before the International Military Tribunal: Proceedings Volumes*, Vol. 8, p. 324.

²⁴² *Ibidem*, p. 327.

²⁴³ Izrael Eizenberg testimony, 7 August 1946, in *The Trial of the Major War Criminals Before the International Military Tribunal: Proceedings Volumes*, Vol. 20, p. 484.

²⁴⁴ *Ibidem*, Vol. 20, p. 485.

²⁴⁵ Rudolph Kasztner's affidavit, document 2605-PS, in *Nazi Conspiracy and Aggression*, Vol. 5, p. 313.

²⁴⁶ *Ibidem*, p. 316.

²⁴⁷ *Ibidem*, p. 321.

Hungarian government, who collaborated with the Nazi²⁴⁸.

The second one is the affidavit by the Polish Jew Mojzesz Goldberg. His report is particularly effective because he worked from June 1942 to July 1944 for the Waffen SS in Radom and he was able to provide personal details of all the SS officials who took a direct part to the mass murders. He affirms that Dr Held and Hauptsturm, Obersturmfuehrer Grabauand Oberscharfuehrer Seiler, together with their companies carried out the expulsions in Radom on the 5, 16 and 17 August 1942, during which some thousands of people were shot on the spot²⁴⁹.

The small number of Jewish witnesses who spoke before the court illustrated that the main purpose of the trial was to cast a light on the responsibility of the key figures of the Nazi regime, instead of providing the representation of vexations, suffering and the genocide of Jews in Europe. The prosecution dreaded that the tales of the dramatic fate and human tragedies could bring more harm than benefits, because they could represent a distraction²⁵⁰.

For this reason, the prosecution decided to rely on Nazi documents and on the testimonies of Nazi officials to prove the crimes of the Final Solution. The Prosecution approach showed that it established an explicit hierarchy of the forms of evidence. Prosecutors completely relied on the indisputable evidence of the crimes provided by the documents collected from the Nazis and lauded their “indisputable character”²⁵¹. Conversely, they objected that victims could have seen events from different observation points, since they had different personal relations to different people. But the main reason for not setting up the case on witnesses was that they lacked of objectivity given that they had a strong bias against the Hitler regime”²⁵². This vision mirrored the main aim of the Tribunal, which to prove that behind the crimes against humanity, war crimes and crimes against peace, there was a conspiracy or common plan to aggression. The determination of this link became the more relevant than delineating the myriad of crimes²⁵³. During his opening statement Justice Jackson affirmed explicitly that he meant to

deal with the Common Plan or Conspiracy to achieve ends possible only by resort to Crimes against Peace, War Crimes, and Crimes against Humanity. My emphasis will not be on individual barbarities and perversions, which may have occurred independently of any central plan. One of the dangers ever present is that this Trial may be protracted by details of particular wrongs and that we will become lost in a wilderness of single instances²⁵⁴.

²⁴⁸ Rudolph Kasztner's affidavit, document 2605-PS, in *Nazi Conspiracy and Aggression*, Vol. 5, p. 325.

²⁴⁹ Mojzesz Goldberg's affidavit, document D-955, *Nazi Conspiracy and Aggression: Supplement A*, p. 1155.

²⁵⁰ L. Jockusch, *Justice at Nuremberg? Jewish Responses to Nazi War-Crime Trials in Allied-Occupied Germany*, “Jewish Social Studies” 19 (2012), p. 122.

²⁵¹ D. Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory*, Oxford: Oxford University Press (2001), p. 61.

²⁵² *Ibidem*, p. 61.

²⁵³ *Ibidem*, p. 62.

²⁵⁴ Robert H. Jackson United States Chief Prosecutor, Opening speech at the Nuremberg Trail, 21 November 1945, in *The Trial of the Major War Criminals before the International Military Tribunal: Proceedings Volumes*, Vol. 1, p. 103.

More generally, the tribunal itself established to deliver retributive justice through the punishment of the major war criminal of the Axis. Victims were only a marginal concern²⁵⁵.

In 1948, two years after that the trials of the Nuremberg International Military Tribunal have affirmed the principle of individual criminal responsibility under international law, the United Nations General Assembly adopted the Universal Declaration of Human Rights, which provided a declaration of the rights of the individual under international law, but it did not confer any particular status to those who were harmed by any violation of rights declared therein²⁵⁶.

In the 1960's the victim's rights movement rose with the goal of enhancing the role and rights of crime victims in criminal proceedings²⁵⁷. These movements criticized the marginal role of victims in criminal proceedings, in particular the fact that victims did not have the right to consult the Prosecutor, did not have any claim in plea bargains and were subject to harsh cross-examination when called to testify²⁵⁸. This last feature of the criminal justice systems causes the victims what is described by the United Nations as "secondary victimization"; that is the "harm that may be caused to a victim by the investigation and prosecution of the case or by details of the case being publicized to the media"²⁵⁹.

Although, the 1950's saw the birth of victimology, a new discipline which deals with the study of victim's physical and psychological reaction to the trauma suffered and victim's experience of the criminal justice system and society in general, it was only in the 1970's that victimology started to realize its potential nationally and internationally²⁶⁰.

The First International Symposium on Victimology was held in 1972 and it focused principally on victim's compensation. It provided that States should have protected victims against the harmful consequences of criminal trial. The Second International Symposium on Victimology, held in 1976, focused on the issue of whether crime victims should play an active role in criminal process. Participants stressed that the position of victims is stronger in continental European countries, where victims can participate as "partie civile" and weaker in common law countries, where the victim is called only as a witness²⁶¹.

The turning point in obtaining recognition on victims by the international community was the 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. This treaty provides victims with a system of

²⁵⁵ S. Garkawe, *Victims and the International Criminal Court: Three Major Issues*, "International Criminal Law Review" 3 (2003), p. 345.

²⁵⁶ C. McCarthy, *Victim Redress and International Criminal Justice. Competing Paradigms, or Compatible for of Justice?*, "Journal of International Criminal Justice" 10 (2012), p. 355.

²⁵⁷ S. Garkawe, *Victims and the International Criminal Court: Three Major Issues*, "International Criminal Law Review" 3 (2003), p. 347.

²⁵⁸ C. P. Trumbull IV, *The Victims of Victim Participation in International Criminal Proceedings*, "Michigan Journal of International Law" 29 (2007-2008), p. 781.

²⁵⁹ U. N. Office for Drugs Control and Crime Prevention, *Handbook on Justice for Victims* (1999), p. 34.

²⁶⁰ R. Aldana-Pindell, *An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes*, "Human Rights Quarterly" 26 (2004), p. 615.

²⁶¹ Ibidem, p. 616-617.

compensation and restitution from the offender and the State and develops standards of victims' access to justice and fair treatment by the police, prosecutors and courts. Part A of the Victims' Declaration recommends states to adopt measures that will improve victims' access to justice and fair treatment, restitution from the offender, compensation from the state, and assistance toward recovery. More specifically, the recommendations on victims' access and fairness recommend that states treat victims with compassion and dignity, guarantee them access to the mechanisms of justice, establish or strengthen judicial and administrative mechanisms to allow victims to secure redress through procedures that are fair, inexpensive, accessible, and inform victims of their rights to seek redress²⁶².

7. Victims' role before ICTY and ICTR

Following Article 22, Rule 34 of the Rules of Procedure and Evidence of the ICTY²⁶³ provides for the establishment of the Victims and Witnesses Unit to assist and support victims. It includes administrative, financial and practical arrangements to bring a witness before the court, and to provide to them information about the Tribunal and trial procedures. The Victims and Witnesses Unit provides also medical and psychological care where needed.

The ICTR's Statute reproduces the same provisions of articles 20 and 22 of ICTY's Statute and of Rule 34. Furthermore, the role of the Victims and Witnesses Unit before the ICTR has been expanded because of the gravity of the crimes committed. The Unit has to "develop short term and long term plans for the protection of witnesses who have testified before the Tribunal and who fear a threat to their life, property or family"²⁶⁴.

Bearing in mind that some steps forward have been done, however the path to a full and complete recognition of the victims' rights at trials was still long. In the normative framework of the *ad hoc* tribunals, victims' participation at trials is not foreseen, as they are merely an instrument in the hands of both Prosecutor and Defence²⁶⁵. The ICTY and ICTR Statutes did not give any procedural rights to the victims. The victim did not have any independent standing or any right to intervene during the trial. The actual possibility for the victim to be able to tell her/his story at trial-stage relied on either one of the parties summoning her/him and the chamber

²⁶² Principle 19 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, A/RES/40/34, 29 November 1985, "States should consider incorporating into the national law norms proscribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support."

²⁶³ Rule 34 (A) of the Rules of Procedure and evidence: "There shall be set up under the authority of the Registrar a Victims and Witnesses Section consisting of qualified staff to:

(i) recommend protective measures for victims and witnesses in accordance with Article 22 of the Statute; and

(ii) provide counselling and support for them, in particular in cases of rape and sexual assault."

²⁶⁴ Rule 34 (A) (iii) of Rules of Procedure and Evidence of ICTR.

²⁶⁵ See article 85 (A) ICTY and ICTR RPE.

approving the summoning or the chamber itself summoning her/him²⁶⁶. One of the reasons behind this choice was the idea that it was a specific task of the Prosecutor to represent the interest of the victims in every stage of the proceeding. The victim was considered only as a witness and, such as, s/he was solely allowed to testify as a witness of the Prosecutor or the defence, could not refuse to give evidence, had to take the oath, could speak only during the examination and cross-examination conducted by the parties. Further, the witness could not be present in the court while other witnesses are testifying and could not have access to the evidence produced by the Prosecutor and the defence, could not be assisted by a lawyer while s/he is testifying²⁶⁷. In practice, victim's participation was ruled by the norms governing witness's testimony²⁶⁸. The story telling of the victims was constrained because it was given in the form of legal evidence and, thus, it had to fulfil procedural requirements. The testimony of the victim had to illustrate the events providing a "legally authoritative account"²⁶⁹. In the experience of the *ad hoc* tribunals it happened often that the need of victims of telling their stories and healing their suffering clashed with the goal of achieving justice. This conflict was usually solved at disadvantage to the victim²⁷⁰. The victim could only tell a partial version of his/her story, as the testimony was shaped according to the evidentiary needs of the prosecution and the defence²⁷¹. The case of General Radislav Krstić showed that victims as witnesses were objectified by the tribunal for the ends to establish the responsibility of the defendant and to trace an historical record of the events²⁷².

The case *Prosecutor v. Krstić*²⁷³ tried the events well known as the 'fall of Srebrenica'. In this Bosnian town, the Bosnian Serb Army carried out the worst massacre in Europe after the II War World. Between the 14th and the 15th of July 1995 the Bosnian Serb Army, headed by General Radislav Krstić, attacked the town and executed more the 7000 civilians. The Krstić's trial started on 13th of March 2000 and on the 2th of August 2001 he was convicted for genocide, crimes against humanity and violations of the laws and customs of war and sentenced to 46 years imprisonment²⁷⁴. Since the beginning of the Trial Chamber stated that there was not enough time to give to victims the possibility to share the sufferance they experienced because:

²⁶⁶ M. Heikkilä, *International Criminal Tribunals and Victims of Crime: A Study of the Status of Victims Before International Criminal Tribunals and of Factors Affecting This Status*, Åbo Akademi (2004), pp. 74-75.

²⁶⁷ E. Haslam, *Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?*, in *The Permanent International Criminal Court. Legal and Policy Issues*, Hart Publishing (2004), p. 320.

²⁶⁸ M. Heikkilä, *International Criminal Tribunals and Victims of Crime: A Study of the Status of Victims Before International Criminal Tribunals and of Factors Affecting This Status*, Åbo Akademi (2004), p. 74.

²⁶⁹ M. Dembour and E. Haslam, *Silencing Hearings? Victim-Witnesses at War Crimes Trials*, "European Journal of International Law" 15 (1) (2004), p. 154.

²⁷⁰ E. Haslam, *Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?*, in *The Permanent International Criminal Court: Legal and Policy Issues*, by D. McGoldrick, P. J. Rowe and E. Donnelly, Hart Publishing (2004), p. 318.

²⁷¹ *Ibidem*, p. 318.

²⁷² M. Dembour and E. Haslam, *Silencing Hearings? Victim-Witnesses at War Crimes Trials*, "European Journal of International Law" 15 (1) (2004), p. 154.

²⁷³ *Prosecutor v. Radislav Krstić Case No. IT-98-33-T*, 2 August 2001.

²⁷⁴ M. Dembour and E. Haslam, *Silencing Hearings? Victim-Witnesses at War Crimes Trials*, "European Journal of International Law" 15 (1) (2004), pp. 156-157.

the task at hand is a more modest one: to find, from the evidence presented during the trial, what happened during that period of about nine days and, ultimately, whether the defendant in this case, General Krstić, was criminally responsible, under the tenets of international law, for his participation in them²⁷⁵.

In *Prosecutor v. Krstić* 18 victims testified. Through the analysis of the transcripts of the victims' testimonies, it could be observed that 'objectification'²⁷⁶ of victims. The prosecutor during the examination of the victims-witnesses showed to be more interested in an expeditious trial, than in giving victims the opportunity to tell their story. In fact in several occasions the prosecutor interrupted the victim testimony when his/her account became to be not relevant to assess the responsibility of the defendant²⁷⁷. The testimony of witness J, was an example of the frustration and impatience of both the prosecutor and the victim-witness,

Q. Witness, I realise that the trip that you made to Zepa was very difficult and very frightening, but I would just like you to simply confirm a number of points to the Judges by simply answering yes or no. Otherwise, I think we're going to be here a very long time, and I know you want to go home to Bosnia tomorrow. So simply answer yes or no. Do you understand?

A. Why should I say yes or no to your questions?

Q. Did you arrive in Zepa on the 26th of July?

A. On the 26th of July, I arrived in Zepa, about 3.00 in the afternoon.

Q. And then I think, on the 29th of July, Zepa fell, you --

A. On the 29th, Zepa fell.

Q. You left Zepa and you spent a long time -- Witness, listen to my question and simply answer yes or no to the question. I think you left Zepa on the 29th of July and you spent over 40 days wandering in Bosnian Serb territory, and then you eventually made your way to the free territory on the 17th of September of 1995. Is that right? Just yes or no.

A. Yes. Yes. Yes.

Q. Thank you, Witness.

Mr. Cayley: Mr. President, I have no further questions for the witness²⁷⁸.

Victims-witnesses continuously referred to members of family, friends and neighbours they lost because of the massacre, but the Chamber and the prosecutor were not interested in details about the lives of the murdered victims. In her testimony of witness DD, tried to her child, but the prosecutor considered this part of the testimony redundant²⁷⁹,

²⁷⁵ Prosecutor v. Radislav Krstić Case No. IT-98-33-T, 2 August 200, para. 2.

²⁷⁶ E. Haslam, *Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?*, in *The Permanent International Criminal Court. Legal and Policy Issues*, Hart Publishing (2004), p. 319.

²⁷⁷ M. Dembour and E. Haslam, *Silencing Hearings? Victim-Witnesses at War Crimes Trials*, "European Journal of International Law" 15 (1) (2004), p. 158.

²⁷⁸ Prosecutor v. Radislav Krstić Case No. IT-98-33-T, hearing of the 10 of April 2000. The transcript of the witness J testimony can be found at <http://www.icty.org/x/cases/krstic/trans/en/000410ed.htm>, paras. 2474-2475.

²⁷⁹ M. Dembour and E. Haslam, *Silencing Hearings? Victim-Witnesses at War Crimes Trials*, "European Journal of International Law" 15 (1) (2004), p. 159.

A. I was going to tell you the whole story from Tuesday to Thursday. Can I do it?

Q. Witness, the Judges have already heard quite a lot of evidence in this case about the events in Pocari, so for the purposes of my examination, I'm not going to ask you questions about those days²⁸⁰.

It is noteworthy than in the case *Prosecutor v. Krstić*, the Chamber allowed the victims-witnesses, when the examination was concluded, to speak freely to the court. Most of the victims express how was difficult to keep on living a normal life, others communicated their desperation and hopelessness. Even in this occasion, the victims' regime under the Statute of the ICTY showed its limits. In fact the ICTY can provide for restitution of victims-witnesses properties, but the chamber was not entitled to offer compensation for the harm suffered²⁸¹. The case *Prosecutor v. Krstić* showed to what extent the procedure of fact finding limited the victims' role in the proceeding and constrained the manner they conveyed their tragic experience. Being used by the prosecutor, the defence and the Chamber as a mean to prove the guilt of the offender and to establish a record of the fact, they had a little control over their narrative²⁸².

The drafters of the ICTY and ICTR underestimated victims' legitimate interests in the pursuit of justice. They assumed that the Prosecutor's interest coincides in its entirety with that of the victims. It would be too simplistic denying that the interest of the victims cannot diverge from the Prosecutor's concerns, but, on the other hand, the principle of discretionary prosecution has to be maintained for upholding the basic principles of public order and legal certainty. Giving to victims the right to submit applications in order to challenge the exercise of the Prosecutor's discretionary power would represent a supplementary guarantee of fairness and legal certainty. The prosecutor would be obliged to respond to victims' applications and, whether he fails to justify his refusal to start a case on them, his decision can be declared void. In this way the reasons for not undertaking a case on persons who suffered a violation of their fundamental human rights, would be based on the interest of the international community, including victims, rather than on a political ground²⁸³.

These tribunals failed to take into consideration victims' interests, but the international community learned from this lesson and argued for a new approach while drafters had to set out the provisions of the International Criminal Court²⁸⁴. The Preamble to the Rome Statute of the International Criminal Court provides a great reminder of this issue and affirms that "during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity"²⁸⁵. With this emphasis on human suffering, the Rome Statute makes the interest of victims a priority²⁸⁶. It tries to increase their procedural rights,

²⁸⁰ Prosecutor v. Radislav Krstić Case No. IT-98-33-T, hearing of the 10 of April 2000. para. 5752.

²⁸¹ M. Dembour and E. Haslam, *Silencing Hearings? Victim-Witnesses at War Crimes Trials*, "European Journal of International Law" 15 (1) (2004), pp. 171-172.

²⁸² Ibidem, p. 164.

²⁸³ C. Jorda and J. de Hemptinne, *The Status and the Role of the Victims*, in *The Rome Statute of the International Criminal Court: A Commentary*, Antonio Cassese Ed. (2004), pp. 1394-1395.

²⁸⁴ E. Haslam, *Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?*, in *The Permanent International Criminal Court. Legal and Policy Issues*, Hart Publishing (2004), p. 320.

²⁸⁵ Preamble of the Rome Statute, U. N. Doc. A/CONF.183/9 of 17 July 1998.

but this attempt has been more symbolic than concrete, since victims are given “those rights that allow for the possibility of some form of participation”²⁸⁷.

The ICC has to face an extraordinary challenge. There is still the risk of objectification of the victim, but for the first time the ICC has the instruments to cope with the conflict between the need to give heed to the suffering of the victims and the need to establish the judicial facts.

8. Conclusion

The overall investigation of the historical evolution of victims’ participation in criminal proceedings outlines to what extent the path of victims has been an issue subjected to what can be described like a “yo-yo effect”. In fact, the present article explored eras, where victims, with their extensive rights to initiate and conduct the criminal proceeding, were the leading actors and periods where victims were deprived of any standing at trial stage, since their personal interests in criminal prosecution were taken over by the State. This analysis, first, aimed to provide an ample historical precedent, which clearly showed that once victims had a primary role in the criminal proceeding, because the goal of criminal justice system was to redress the wrong they suffered. And secondly to prove that the cyclical marginalization of victim’s status in the system of criminal justice, which occurred over the centuries, was mainly led by political and economic justifications.

In the Republican period Roman system of criminal justice showed to what extent victim occupied a key position in criminal trials, having an active participatory role in the criminal justice process²⁸⁸. Criminal justice system provided for victims to seek individualized justice against a particular offender in all cases, except those affecting the *Pax Deorum*²⁸⁹. The shift from the Republic to the Empire, headed by the Emperor, led to the centralization of the State powers in the hand of one single authority and to the State monopoly of the criminal prosecution. The crimes started to be perceived as a violation of the peace of the Emperor. As criminal proceeding became a dispute between the State, represented by a public prosecutor, and the offender, the victim was denied his/her active role during the investigation and the trial stage²⁹⁰. Victims’ participation undertook a similar path in the criminal justice systems of the English Kingdom. Until the 14th century both the criminal procedural instruments of appeal of felony and writ of trespass gave to victims the right to initiate a criminal prosecution and to participate actively at trial stage. But as the monarchy gradually gained more power, the King increased the State structures and began a process of centralisation of justice. Once again, alike the Roman experience, as

²⁸⁶ C. P. Trumbull IV, *The Victims of Victim Participation in International Criminal Proceedings*, “Michigan Journal of International Law” 29 (2007-2008), p. 777.

²⁸⁷ R. Henham, *Some Reflection on the Role of Victims in the International Criminal Trial Process*, “International Review of Victimology” 11 (2004), p. 204.

²⁸⁸ J. A. Wemmers, *Where Do They Belong? Giving Victims a Place in the Criminal Justice Process*, “Criminal Law Forum” 20 (2009), p. 395.

²⁸⁹ B. Santalucia, *Pena Criminale*, in *XXXII Enciclopedia del Diritto* (1982), pp. 736-737.

²⁹⁰ J. Doak, *Victims’ Rights, Human Rights and Criminal Justice. Reconceiving the Role of the Third Parties*, Oxford and Portland: Hart Publishing (2008), p. 7.

consequence of the centralization of State powers, the victim, who was the main beneficiary and the leading actor of the criminal justice system, saw removed his/her legitimate interest to a fully participation to the prosecution and punishment of the offender. In the 1700's, the Enlightenment thinkers contributed to set up a philosophical dimension, which provided a solid ground to the political theories on the origin of a centralized State entity. The only way for the individuals to safeguard their well-being was to set up a social contract, through which they gave up some rights to a central authority. So the State came to govern the legislative, executive judiciary functions to the purpose of guarantee the individual's interests. Specifically, Beccaria believed that the judicial function was a mean to protect the interest of the entire community, turning the criminal justice system into a dispute between the State and the defendant, who, because of his/her misconduct, had to pay a debt to society. The State took on the prerogatives of the victims, such as initiating and conducting a criminal action, as it considered the protection of the society more important than the safeguard of the rights of the individual victim. The historical pattern explored in this article so far, demonstrates that the change of perspective in the view of the purpose of criminal prosecution and in the nature of crime was led by a rationale, which had a political and economic nature, rather than a legal one. In fact, while the aim of the criminal justice system in its early stage was to compensate the victim for the damage suffered, when State structure became more complex, the restitution paid to the victim was substituted for a punishment, which often included a fine to be paid by the offender to the State²⁹¹.

This focus of the criminal justice system on the prosecution and punishment of the offenders deeply influenced the establishment of international criminal tribunals of the post II World War era. Even if the international criminal tribunals differed from national criminal courts they tended to be punishment centred and to marginalize the role of the victim²⁹². The main concern of the Nuremberg trial was to prove the responsibility in planning, launching and waging an aggressive war of the elite leaders of the Nazi regime. Thus the prosecution decided to base its case on the evidence, either oral or written, provided by the members of the government, the party, police and military apparatus, rather than relying on the narratives of sufferance of the war victims²⁹³. After almost fifty years, the ICTY and ICTR recognized that the cooperation of the victims is pivotal for the success to the prosecution of the offenders, but the victim was still given the role of a witness, without any procedural standing. The practice of the *ad hoc* tribunals showed the victims were a tool in the hands of the prosecution and the defence. The storytelling of the victims was led and constrained by the prosecutor, who appeared more interested in achieving the conviction of the defendants, than giving room to the victims' narratives of the atrocities they have been subjected to. It is interesting to notice that the prosecutors of both the Nuremberg and the *ad hoc* tribunals gave a marginal role to the victims, as

²⁹¹ J. Cardenas, *The Crime Victim in the Prosecutorial Process*, "Harvard Journal of Law and Public Policy" (1986), p. 390.

²⁹² M. Heikkilä, *International Criminal Tribunals and Victims of Crime: A Study of the Status of Victims Before International Criminal Tribunals and of Factors Affecting This Status*, Åbo Akademi (2004), p. 69.

²⁹³ L. Jockusch, *Justice at Nuremberg? Jewish Responses to Nazi War-Crime Trials in Allied-Occupied Germany*, "Jewish Social Studies" 19, (2012), p. 135.

they feared victims' narrative could have been a distraction from the main end, as to say ends to establish the responsibility of the defendant and to trace an historical record of the events.

The Rome Statue of the International Criminal Court²⁹⁴ represents a step forward regarding the treatment of victims during every stage of the trial, since the investigations until the proper trial stage. The extension of victims' role in proceedings flows from the increasing awareness that judgments and prosecutions alone are not enough to redress victims' suffering²⁹⁵. The cornerstone of the change of perspective is the assumption that victims have a personal interest in the criminal prosecution and that they have the right to represent it before the court at trial²⁹⁶.

²⁹⁴ The Rome Statue of the International Criminal Court, U. N. Doc. A/CONF.183/9 of 17 July 1998.

²⁹⁵ M. Pena and G. Carayon, *Is the ICC Making the Most of Victims Participation?*, "The International Journal of Transitional Justice" 7 (2013), p. 522.

²⁹⁶ E. Haslam, *Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?*, in *The Permanent International Criminal Court: Legal and Policy Issues*, by D. McGoldrick, P. J. Rowe and E. Donnelly, Hart Publishing (2004), p. 320.