

Episode 1 (February 2020)

Legal opportunities and challenges

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

Tine: ‘Welcome to this episode of the Justice Visions podcast. I am Tine Destrooper.’

Brigitte: ‘And I am Brigitte Herremans. Today we are talking to Professor Stephan Parmentier and Doctor Rudina Jasini. Can we say Stephan and Rudina?’

Stephan: ‘Of course.’

Rudina: ‘With pleasure.’

Tine: ‘Stephan you are a professor of criminal law and criminology at the University of Leuven with longstanding expertise in TJ processes as well as in Latin America and in the Balkans and the Great Lakes region. We are really excited to have you here. Rudina, you are an attorney and a researcher at Oxford University, and you wrote your dissertation about victim participation in the Khmer Rouge Tribunal in Cambodia. Great to also have you in the studio.’

Rudina: ‘My pleasure. Thank you Brigitte and Tine.’

Brigitte: Stephan, Ina, thank you for joining us. It’s great to have two experts with us to walk us through the ins and outs of what the legal frameworks are when it comes to victim participation in transitional justice.

Tine: ‘In the pilot episode to this podcast we talked about the questions that are front and centre for the researchers in our team when it comes to victim participation in transitional justice. We also talked about how transitional justice is almost a catch-all term for a very broad range of processes more specifically, the four pillars: truth-seeking, international criminal justice, reparations, guarantees of non-recurrence.’

Brigitte: ‘So we are talking about a vast set of mechanisms in this podcast: tribunals, truth commissions, schemes to restitute land, educational programs, institutional reform, etc.’

Tine: ‘Right, and because there is this broad range of instruments, there is also a broad range of ways in which we can think about the role of victim in them. And that’s what we want to talk about today.’

Brigitte: ‘Briefly, can I ask you before we start, by means of introduction, what drew you to studying victim participation in transitional justice? Where does your research interest in this matter come from? I will start with you, Stephan.’

Stephan: ‘Okay. Thank you very much. I guess that you are starting with me because I’m a bit older and maybe I can have a more historical perspective on this. I want to start with a very personal note. I wrote my first letter on behalf of a victim in a Uruguayan prison when I was 15 years old and that experience, which at the time I had not foreseen, had enormous consequences for me because I started to realize that I was really interested in human rights. It was the first time I started to understand what the concept was, this is in the ‘70s, and many things happened in Latin America, at that time, in Uruguay, Argentine, Chile etc. This was in the time of the dictatorships entering. And I got drawn into this particular mode of thinking, along those lines, and in those days. So I think that was probably my first real recollection of what are human rights and what are victim rights and what that could mean at that time. But then later on, from an academic point of view, I studied law and sociology and I was getting really interested of course in the effects of law in society. In fact I thought that law school was a bit narrow in that sense because it was very normative and it was always talking about what people should do and never asking the question what they actually do and whether law has an impact and in what way it has an impact. And in a way that socio-legal perspective for me has been the academic inspirational source to start thinking about the impact of human rights on everyone concerned, the stakeholders, perpetrators but victims too.’

Brigitte: ‘Thank you. Ina, would you want to elaborate on where your interest comes from?’

Rudina: ‘Thank you Brigitte, like Stephan I would like to start also with a personal note. My research with victims of the Khmer Rouge in Cambodia started in the spring of 2009 when at that time I was pursuing a Master’s degree at the University of Oxford and I received an invitation from one of my colleagues in The Hague with whom I had worked at the International Criminal Tribunal for the Former Yugoslavia (ICTY) who was involved in representing the first group of victims before the Extraordinary Chambers in the Courts of Cambodia. I jumped on this opportunity and I worked with the legal team representing victims for two months in Phnom Penh in Cambodia. What I found at the time and particularly coming from an experience with the legal defence at the ICTY where you felt disconnected from the victims’ stories you saw them always present as witnesses as witnesses in the courtroom. But you were never really close enough to relate or build a rapport and listen to their stories. As part of the work with victims in Cambodia I met with a group of victims, actually the first group meeting was in a pagoda which for most of the victims that had come to represent a meeting point of the survivors and also a place where to honour the memory of those lost. The man sitting in front of me was 15 at the time of the Khmer Rouge and he had lost 35 members of his family. And his

words of pain and sorrow reverberated across that hallowed space of this pagoda and they reverberated across my mind and brought the victims' pain and sorrow ever so close. This was in the way a symbolic moment, it came to represent to me that quite often that justice rendered in the premises of Den Hague or other tribunals had not necessarily been perceived and received as such by victims and victims' communities in post-conflict societies.'

Tine: 'Thank you both so much for sharing that experience and that really touches upon the reason why we invited the two of you today because you have that legal background *and* practice-oriented perspective. What we wanted to do in this episode is precisely, before we dive into the nitty gritty affecting participation on the ground, to really take a step back and consider what the legal framework for victim participation is in these various transitional justice mechanisms.'

Brigitte: 'Yes because of course the role of victims can be as light as consulting them and as far reaching as having victims have the final voice in, for example, determining a reparation scheme.

But what becomes clear immediately is that there are *many* of these instruments and innovations.

In your opinions, what is the most important legal instrument to guarantee victims' rights in the context of transitional justice? And why do you consider it to be so important?'

Rudina: 'I would say that although victim participation at an international level, the international justice level, is perceived as this a new, novel advancement, it is greatly reflected in the parallel advancement at domestic and international level. It was part of a broad movement that saw the marginalisation of victims within the criminal justice system. And I would like to mention two legal instruments that came to be crucial and important upon which various tribunals have built their stature and law as well as their legal framework more specifically on victim participation. The first one is the 1986 [sic], the United Nations' Declaration for Victims of Crime and Abuse of Power which for all practical purposes must consider a focus on domestic crimes. And then in 2006 we had another UN declaration, a very important one, with a focus on victims of international crimes which focused more specifically on the right to remedy as well as the right to reparation this was a momentous development with regard to the victims of both domestic and international crimes. Other than that, what we have seen with regard to the application of victim participation mechanisms in international courts and tribunals, which are hybrid and sui generis, I would argue that victim participation is more an experimental laboratory and not guided by strong and normative legal principles to guide the process of application in practice.'

Brigitte: Okay we will come back to that later. But maybe as this is a key point, you would want to give your take on that, Stephan?'

Stephan: ‘Well, I could not have been said it better than that. Because, yes indeed, these were the two legal instruments I was thinking of myself. First going back to the 19 - I thought it was 1985- the declaration for victims of crime and abuse of power, I have tried to identify four main rights that derive from that declaration. The first is the right to information, the second one is the right to standing in legal procedures, the third is the right to reparation and the fourth one is the right to support. Because of course also during procedures, and pre and after, victims need support often for the kind of the issues they go through, whether it is traumatisation that happened before or even during procedures. And I think that these are really the milestones in a certain way at the domestic level, as Ina was saying. But I would like to suggest that what we always go back to that initial declaration, and at the same time and also because it is 1985, it may sound very strange because the Universal Declaration goes back to 1948. What happened in those 40 years with victims? In fact they were nowhere. Human rights have often been considered as the rights of the suspects, of the accused. If you look at victims, strangely enough, they are a recently invented category, or a recently discovered category. And that in itself is very worthwhile to consider. Because of course it is not without mobilisation of many victim groups around the world that this declaration has taken root. And then of course a number of other legal instruments, some binding ones in the Council of Europe and in the EU have seen the light of day.’

Tine: ‘I find it very interesting what you say about how for 40 years almost there was this gap, this non-attention, and then you are also referring to the mobilisation of victims groups themselves in facilitating that this was all of a sudden on the agenda. How do you understand that sudden attention, why were they all of a sudden successful these victim organisations in putting it on the agenda and getting these instruments, these declarations adopted at the international level?’

Stephan: ‘There could be a number of issues, or a number of arguments there, a number of factors that have played a role. I can see at least two. One is exactly what happened in Latin America in the 1970s. Think of Argentina, think of Chile in 1975, 1976 sorry, and 1973 respectively when the juntas took root. And then of course victims started to organise themselves immediately, basically immediately. It was not easy of course as they were in the midst of a very authoritarian regime, with strong state power. But many of them either stayed in the country or were banned and exiled and then started to form groups in Europe, in other countries in Latin America, sometimes in the United States. Then on the other hand I see the development of international scientific organisations and if I’m not mistaken in the early 80s, or even a little bit before that, there is the establishment of the World Society of Victimology. Now the name itself is telling, because it’s about the victim rights and needs and the interest for victims. It was really like a joint-venture I would say between victim groups, at the grass roots level, very vocal and educated and well professionalized, and then the academics who were interested in providing more input and more visibility for the victims, and then you see these drafts

going back and forth about the importance of coming to a declaration, of course it is a non-binding instrument in those days, but still it sets the scene because it the starting point for a stronger and longer development, also in regional systems in Europe and other parts of the world.'

Brigitte: 'Stephan, the principles that you have just mentioned have celebrated their 15th birthday this year. A lot has changed since they were adopted. Are there also elements in the guidelines that we should be sceptical of, or places where they are too limited in scope. Based on what we know today, is there room for improvement, Ina?'

Rudina: 'Definitely, I think that the empirical work and the application in practice have given us enough understanding of how to further the process and shape of victim participation. This needs to be reflected in the legal instruments and you have to start with the main legal foundations. That would be my main reflection. I would say that although we are still in this experimental stage as we have seen with the ICC, the ECCC, the Special Tribunal for Lebanon and also the new Kosovo specialist Chambers which have given the most general definition of victim participation we have come to see thus far. Therefore, I think we need to reflect and enshrine these new ideas and principles in the legal instruments.'

Tine: 'I want to pause for a moment on this notion of definitions you are touching upon, because we are talking about all these various legal instruments. I am curious to hear your thoughts about differences in interpretation of who is considered a victim and also what is considered meaningful legal participation. I'm looking at you Stephan, as you also worked on these instruments, do you see any conflicting notions there?'

Stephan: 'First of all I see lots of congruency, similarity between on the one hand victims of crime, of ordinary crimes at the domestic level that is 1985 and then 2005-2006, victims of international crimes, in fact they are called victims of serious violations of human rights and humanitarian law. So the notion of international crime hardly figures in the basic principles. Despite these very fundamentally different focuses: domestic, ordinary crime, international crime, mostly let's say international at the supranational level, I see a lot of congruences. It is basically about victimhood, victimisation, the rights of victim, and a little bit about the needs. I would say probably that the needs of victims are a bit snowed under in these legal instruments. And this is probably because of that, because they are legal instruments and it is much more difficult to legalise a need than it is to legalise a right. The other part is that I see both instruments finding the way in binding documents because in fact both of them are non-binding, they are declarations, which seems to suggest they are very soft, you could go in different directions interpreting them. And this goes to what Ina said that the interpretation becomes very important and who deals with them, who gives substance to them and the substance is given by various bodies, including non-legal bodies such as the General Assembly and what have

you, Parliaments and institutions like those but also like Courts. In fact what you see is that there is a slow legalisation of these non-binding instruments into case law of specific courts, the two strongest courts at the regional level are the European Court on the one hand and Inter-American Court on the other hand.'

Brigitte: 'Rudina, I would like you to tell us a bit more about the provisions for victim participation in the specific case of Khmer Rouge tribunal and how it compares to other TJ instruments.'

Rudina: 'In fact the participation of victims of the Khmer Rouge at the extraordinary chambers in the courts of Cambodia built on this strong definition of victim participation that came with the ICC which was a very strong base. Although this is a different tribunal which operates within a very specific context but the ICC or the Rome treaty laid the way for this development which is what we have seen as a trend now in international criminal justice. In the case of Cambodia I would like to mention first and foremost that victim participation was an afterthought. It was not a forethought that was carefully analysed and thought from the very beginning. The frameworks of the institution had realised quite late in the process: here we have this new mechanism that was mentioned in the agreement and the statute and therefore now we need to give some scope. In the first case which was the case against Duch, the famous director of the S-21 prison in Phnom Penh you had 96 victims initially who were recognised and granted the statue of civil parties. They were represented by four legal teams that were all pro bono. You did not have a harmonious approach of victim legal representation.'

Tine: 'Actually, we talked earlier this month to Sangeetha Yogendran who is a former practitioner at the victim support section of the court. Let's listen to what she had to say about this point.'

Sangeetha: 'The tribunal started its victim participation scheme with high aspirations and I think that a lot of the victims who signed up also came into the process with equally high aspirations. Unfortunately the reality on the ground was that due to the high numbers signing up to be civil parties and the need for some level of efficiency before the tribunal itself, what you see is that perhaps participation became a bit more 'tokenistic' unfortunately. You see a situation where a lot of victims were signing up to participate as individuals but due to the high number numbers, - I think in case two we are talking about more than 4000 civil parties signing up, - you saw them ending up being grouped in quite large groups of victims who were then represented by their own civil party lawyers, and all those civil party lawyers were represented by a national or international co-lead lawyer. What you see perhaps is that you have lost some of the substance in that participation because now victims were represented by the lawyers on the one level and then again removed by another level by the co-lead lawyers.'

Rudina: ‘This comes to a very important principle: the idea of victim participation is to allow the victims to have a different forum than that of a witness, to allow them to tell their story, which in the context of a criminal trial is always very confined. It is also important to remember that the testimony of a civil party does not necessarily carry the same weight as the testimony of a witness. All in all, can we allow 4000 victims to have a say in a courtroom? Not really. Whoever is chosen to tell a story should not be seen as a representation of all the victims who were recognised or granted the rights as civil parties. If I could add one thing, as part of the empirical research in Cambodia where I interviewed 52 victims who had participated as civil parties in the first case and the second case, the primary purpose of the interviews is to understand what are the motivations that lie behind victims’ participation. One element I think is that much of the victims’ understanding is shaped by the information by human rights organisations in Cambodia that had prepared the terrain. And secondly, to understand what victims want. And there are different opinions. In my research I identified six primary motivations: truth, seeking truth was the paramount of all of them; facing the accused; seeking justice, our understanding of justice. And here we have to take into consideration the socio-cultural and religious nuances, it was not necessarily linked to pursuing a verdict of the accused it was much broader the idea of justices which links also with the idea of reconciliation. And reparation was perhaps the most critical, disappointing aspect of victim participation which is a characteristic of not only Cambodia but of most victims who have participated or are continuing to participate at the ICC or other courts.’

Tine: ‘But then, if I understand you correctly in the first part of what you just said, you also seem to be implying an a priori incompatibility between victim participation and the forum of a criminal justice process. Stephan, is that also something that you see, that tension there?’

Stephan: ‘Oh yes, absolutely the tension is always there. In fact you also see it at the domestic level where victims think that they can seek, and express more, and gain more from processes whether it is really serious crime processes or ordinary crime cases. But at the international level it is even more prominent I think because you have many more victims and of course the capacity of many of those systems is very limited. And they are often depending on external funding, provisional funding. Very few organisations have a permit mandate and they if they have a that kind of mandate, they are very much constrained in terms of financial resources. So the tension I think is always there and I very much agree which Ina it has to do a lot with the expectations. And everyone involved, every stakeholder involved, in my view should really look more carefully into the preparations of all of these mechanisms or let’s say of the role of victims in all of these mechanisms. It is [Pablo de Greiff](#), our well-known colleague at New York University and former special rapporteur on transitional justice who has been insisting every time again on the necessity of managing victim expectations. And I think it becomes even more important as new truth commissions are being set up, and new tribunals like the Kosovo one or more

recently, like the Lebanon one which has not produced any single person to come forward let's say, or to be brought to court. But it is very important to tell victims what they can expect in these specific forums. The lack of preparation, and the lack of clarity in relation to those forums generates I think a lot of frustration and a lot of disappointment and at the end of certain international or even national prosecutions, because there are of course also national prosecutions in the field of crimes, leaves victims sometimes with empty hands and with a double victimisation, with a re-victimisation because not only have they been victimized materially or physically before, or psychologically often of course, but in their hopes to receive redress or reparation in a tangible or non-tangible way, are also quashed and that is even more problematic because they lose the faith in the systems and in the institutions. And that may have a tremendous impact on the role of victims in society later on, whether if they are able and willing to be part of to society, how they can function, how they can be citizens again and how they can participate in political institutions or in social life and economic activities. I mean, if you have been traumatised and re-traumatized so many times then it becomes increasingly difficult to assume a proper role as an ordinary let's say common and proper citizen. And I think that the ramifications of this victim gap let's say, some call it even a deficiency, the tensions, but that is actually too soft of a word in this case, the consequences of all of this, are yet to be seen. So I am a bit concerned that also victim organisations or human rights organisations or lawyers, or whomever, even the courts themselves, or governments, are putting too much emphasis on the possibilities for victims to be actively involved while in reality they are not for whatever reasons, for constraints, institutional, financial. But also because the sheer numbers of course are extremely difficult to manage.'

Tine: 'Do you see any best practices when it actually comes to victim participation, specifically in criminal justice? Because we are now talking about criminal justice of course, but there is a victim participation also in truth commissions and in other forums, in memorialization, but when it comes specifically to criminal justice do we see any examples where things have worked in a way?'

Rudina: 'It is a hard one and I would say that some of us started the work and research in this field with the enthusiasm believing that there can be a different approach to international criminal justice where victims are made to feel that they are stakeholders in the process. But when you look close to the way that is applied to understand that maybe we need to reconsider what are the best possible ways for victims to feel involved in a transitional justice mechanism. And I make this a little bit broader because another aspect that is not very much discussed is that in addition to victims that have been granted status as civil parties, let's take the context of Cambodia where we have 1,7 to 2 million people. We have to think of victims who have not been granted status and we have to look at the bigger picture. That is: are we trying to accommodate the interests of victims as a whole or are we are here to adjust the expectations of a group of people even though 4000 it is a big number, it is a huge group. On

several layers, I see it much more as multilayered challenges to victim participation. To say that there are any best practices it is hard to say. I would say that we are still in that experimental stage and we have to see, we don't even know yet and there needs to be some status to measure what has been the impact.'

Brigitte: 'We want to ask you last question that we are asking all of our interviewees. What are the most pressing questions and where do we need to start looking for answers?'

Stephan: 'That is an easy question, a multimillion dollar question I would say. Actually, I know an interesting project with ERC funding at the University of Ghent that could provide some of those answers. But maybe in a couple of years from now. Well there are a couple of things that I would like to suggest that we need to look in more carefully. One is, as Ina was suggesting already, victims are very different in terms of their needs. The rights may be similar but the specific needs that they have can be very different. Moreover, I think we need to look more into the depths of victims' needs. To talk about rights is a legal language but to talk about needs is a social language. And I we have not even covered the surface of how these two fit together, the rights discourse and the needs discourse. And as long as that is not done, it is going to be extremely difficult to even make progress in terms of accommodating institutions to the needs of victims. And I would say that probably the best way to deal with victims' needs and rights, is to prevent the violations to happen altogether. That of course is seemingly not so easy but it is actually in the victims' participation guidelines because it is that famous fifth category which nobody has a really good idea about, the guarantees of non-recurrence. If you look at it in more details, it is actually changing the world. Literally it is changing society in all different kinds of ways. But is something which cannot be done in legal always only. I mean, law has a function, law has a mandate. But as Pablo de Greiff in one of his reports was arguing, it also needs institutional input, it needs social input, economic, political. So this is really broadening up a new arena. And a focus on prevention in the long arena seems to be more promising than always running behind institutions which are dealing to a certain extent with the past but will never be able to satisfy victims' needs, and even have a hard time satisfying victims' rights.'

Brigitte: 'Ina, what are the most pressing issues for you?'

Ina: 'I echo entirely the thoughts of Stephan here. This is a major area to discuss, it is multidimensional, multilayered. I have come to an understanding based on my, I would say limited, research on victim participation, and I am still working on it, that we need a concerted effort when it comes to victims' involvement in a post-conflict society. Courts are fraught with limitations, legal and procedural. We expect too much from international criminal tribunals. Sometimes we have this broad and overriding objective such as truth, accountability, reconciliation, reparation, all in all too much for a court with a primary focus of establishing

criminal responsibility, that is the reason why the courts have been established for. Then we have this other important element that is the victim participation. But from the context of a more narrow understanding, if we have a victim participation, then we have to have first a clear definition who the victim is. Secondly, very clear legal procedural foundations: statute, law, rules of procedures and evidence. And third, what does victim participation look like in trial. And fourth, importantly what does it live up to. And it should start first and foremost, I'm coming back to what Stephan said: needs. If we have a good understanding of the needs, maybe we will tailor and shape up a system that will allow to accommodate victims' needs and that is paramount.'

Tine: 'There is a lot of inspiration there and inspiration for a new, and needed I think, research agenda and also in a very concrete sense I feel that there is a lot of stuff to talk about in our next episodes of the podcast. So I would like to thank you very much for beautifully laying the groundwork for all these topics that we will still talk about it in the next episodes. Next time we will talk to Laurel Fletcher of Berkeley's Human Rights Centre, precisely about that evolution of transitional justice as both as a legal discipline and field of practice. So thank you so much for setting the scene for that.'

Stephan and Rudina: 'With pleasure.'