

Chapter 13

Victims' Rights and Peace

Hans-Peter Kaul

Abstract The contribution provides an overview of the ICC victims' participation and reparations system. It analyses the origins of the system—the French system of victims' participation in criminal proceedings—and examines its potential to alleviate and to acknowledge the sufferings of the victims but also the many challenges or even risks for errors it presents. The article refers in particular to the problem of establishing standards of evidence sufficient to ascertain that a person has suffered harm as a result of the commission of a crime under the jurisdiction of the Court and the related issue of establishing a person's identity. It also refers to the Court's obligation to guarantee the victims a genuine and authentic participation in the proceedings through a legal representative. The article highlights the significant contribution to promote reconciliation and peace in regions affected by mass crimes the ICC system of victims' participation and reparations can make. In the second part of this article, the author turns the attention to several key questions concerning the relationship between victims' rights and peace: what are the factors and risks leading time and again to mass victimisation of human beings? Is it not a fundamental and urgent necessity for all concerned to exhaust all ways and means to prevent developments that lead to mass victimisation? Given this question, the author finds that the most serious dangers and grave risks to make thousands of men, women and children victims of international crimes are brought about by war-making, illegal or questionable uses of armed force or outright crimes against peace as defined in the Nuremberg principles. The conclusion is that the best chance to prevent mass victimisation is determination and resolve in the prevention of questionable uses of

The author is a judge at the International Criminal Court. From 1996 to 2003, he has been the head of the German delegation for the negotiations for the ICC, before being elected in February 2003 as the first German judge to the ICC for a period of three years. He was re-elected in 2006 for another period of nine years. From March 2009 to March 2012, Judge Kaul has served for three years as the Second Vice-President of the ICC. He is assigned to the Pre-Trial Division. The form of an oral presentation as actually delivered has been largely maintained also for reasons of authenticity.

H.-P. Kaul (✉)
Pre-Trial Division of the International Criminal Court, The Hague, The Netherlands
e-mail: Hans-Peter.Kaul@icc-cpi.int

armed force, including possible future crimes against peace, crimes of aggression as defined in Articles 8 *bis* and 15 *bis* and 15 *ter* of the Rome Statute, as, according to experience, they inevitably lead to widespread human suffering and victims.

Keywords Victim participation • Standards of evidence • Proof of identity • Legal representative • Domestic legal community • Nuremberg principles • Kampala • Rome Statute

It is very much appreciated that the International Research and Documentation Center for War Crimes Trials, in cooperation with the Center for Conflict Studies of Marburg University has taken the initiative to organise this important international conference on “Victims of International Crimes”. It is a pleasure and an honour to be given the opportunity to submit and to share with you, as a Judge of the International Criminal Court (ICC), some experiences and general thoughts on the rights of victims and peace.

In this contribution, I will deal with two sets of issues:

- (1) What are some observations and impressions of an ICC Judge with regard to victims’ issues? What are some more general aspects of the system of victims’ participation as practiced at our Court?
- (2) What are some of the underlying reasons that so many—women, children and men—time and again, become victims of international crimes in so many parts of the world? How important is the existence of peace for victims’ rights?

To a certain extent, this approach and structure of my contribution builds on the pertinent and comprehensive presentation of the system of victims’ participation and reparations under the Rome Statute¹ of the ICC which was made yesterday² by Franziska Eckelmans from the Appeals Division of the ICC.

13.1 Observations and Impressions Regarding Victims’ Issues

It is well-known and widely acknowledged that the system of victims’ participation at the International Criminal Court and the possibility for victims to receive, under certain conditions, reparations for the harm suffered, is one of the many positive and quite significant innovations introduced by the Rome Statute.³ In the following, let me at first share, from the perspective of a Pre-Trial Judge, some personal

¹ For a comprehensive monography on the rights of victims before the International Criminal Court see Bock 2010.

² See Eckelmans, Chap. 12 in this volume, pp. 189–222.

³ Stahn et al. 2006, p. 220.

observations made during the work of Pre-Trial Chamber II of the ICC with regard to victims issues.

Already in the first cases in which victims’ applications had to be examined, a number of challenging legal and practical issues became apparent. We had to determine standards of evidence sufficient to establish that a person has suffered harm as a result of the commission of a crime under the jurisdiction of the Court. As our situations concern developing African countries, at times still affected by conflict, a number of difficulties arose with regard to the question of establishing a person’s identity. In the absence of a proper identity card, which document may be considered to be sufficient? It would take me too long to recall all the solutions which were found by the Judges to solve this problem. But it is fair to say that meanwhile there is a consolidated practice and jurisprudence of Chambers with regard to the question of proof of identity.⁴

The particularities of international criminal law present an important challenge to victims’ participation in the ICC proceedings. The innovative system of victims’ participation and reparations as set out in the Rome Statute was largely inspired by the French system of victims’ participation in criminal proceedings. Cases under French criminal law regularly involve one perpetrator and a limited number of victims. Thus, a criminal judge or a criminal chamber in France will generally not be confronted with important difficulties in the admission of victims. It is obvious that the situation before the ICC is entirely different: its cases concern mass crimes committed in countries at a great distance from The Hague with usually hundreds or thousands of victims.⁵

The unavoidable consequence is that victims regularly cannot be present at the hearings. They must be represented by an intermediary, namely a legal representative. This is a serious handicap which reduces the positive effects of victims’ participation at the ICC. Thus, the only instances of genuine victims’ participation are the cases in which they appear as direct witnesses before the Court. In times of modern technology, these negative effects can be mitigated. We have, for example, heard that some victims in the Kenya situation are able to follow the proceedings of our Chamber on video screens which may even be available in public spaces or in supermarkets.

Many Chambers were faced with the further problem that various victims participating in the proceedings had given mandates to different legal representatives who all

⁴ See for example ICC *Prosecutor v Bemba*, PTC, ICC-01/05-01/08-320, 12 December 2008, Fourth Decision on Victims’ Participation; ICC *Prosecutor v Bemba*, TC, ICC-01/05-01/08-1862, 25 October 2011, Decision on 270 applications by victims to participate in the proceedings; ICC *Situation in Darfur*, PTC, ICC-02/05-110, 3 December 2007, Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor; ICC *Situation in Uganda*, PTC, ICC-02/04-191, 9 March 2012, Decision on Victim’s Participation in Proceedings Related to the Situation in Uganda. For an overview see Chung 2008, pp. 459–545.

⁵ With a critical remark: Van den Wyngaert 2012.

wished to appear in Court. In an important decision taken in December 2008, I ruled as a Single Judge in the *Bemba* case that 54 victims admitted by the Chamber to participate should be represented jointly by a common legal representative.⁶ It should be noted that also other Chambers, including Trial Chamber II and Trial Chamber III, have subsequently followed this decision.⁷ In the Kenya cases,⁸ of which my Chamber was seised, the 327 admitted victims in Case 1 and the 233 admitted victims in Case 2, were represented in each case by one common legal representative.

Another critical aspect related to the legal representation of victims is the issue of communication. Counsel should be in close contact with the victims in order to genuinely represent their views and concerns. Further, it is the legal representatives' task to inform the victims regularly on the proceedings. However, we have had problematic cases in which the communication between the victims and their representative was not realised satisfactorily. After receiving the mandate to appear before the ICC, some lawyers did not find it necessary to maintain contact with the victims and to seek their views; they seemed to be primarily interested in representing their own interests. This is, in my view, an untenable situation as we must guarantee the victims a genuine and authentic participation. One possible option could be to ensure a meaningful participation through the appearance of Elders or self-chosen representatives of African villages affected by the crimes in question.

My experience in the two Kenya cases was that the common legal representatives of victims managed to convey to the Chamber and to the public the concerns and sufferings of the victims convincingly. However, I felt that the legal representatives of victims at times acted in the courtroom like a second prosecutor, which is not their legitimate role.⁹

Another major issue of victims' participation is the question of reparations. The conclusion of the *Lubanga* trial¹⁰ and the subsequent conclusion of the *Katanga and Ngudjolo* trial will provide an understanding of the reparation scheme at the ICC.

⁶ ICC *Prosecutor v Bemba*, PTC, ICC-01/05-01/08-322, 16 December 2008, Fifth Decision on Victims' Issues Concerning Common Legal Representation of Victims.

⁷ ICC *Prosecutor v Katanga and Chui*, TC, ICC-01/04-01/07-1328, 22 July 2009, Order on the organisation of common legal representation of victims; ICC *Prosecutor v Bemba*, TC, ICC-01/05-01/08-1005, 20 November 2010, Decision on common legal representation of victims for the purpose of trial.

⁸ ICC *Prosecutor v Ruto and Sang*, ICC-01/09-01/11; ICC *Prosecutor v Muthaura and Kenyatta*, ICC-01/09-02/11.

⁹ ICC *Situation in the Democratic Republic of the Congo*, PTC, ICC-01/04-101-ENG, 17 January 2006, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, para 51; ICC *Prosecutor v Katanga and Chui*, PTC, ICC-01/04-01/07-474, 13 May 2008, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, para 155; ICC *Prosecutor v Bemba*, PTC, ICC-01/05-01/08-320, 12 December 2008, Fourth Decision on Victims' Participation, para 90. On the role of the legal representatives see also for example McGonigle Leyh 2011, p. 505 et subs.

¹⁰ ICC *Prosecutor v Lubanga*, TC, ICC-01/04-01/06-2842, 14 March 2012, Judgment pursuant to Article 74 of the Statute.

Article 75 of the Statute reads that the Court shall establish general principles relating to reparations. As no principles have been established so far, this question is left to the Trial Chambers. The two Trial Chambers dealing with the abovementioned cases will be challenged with the important task of establishing principles for reparations and rendering the first decisions on victims' reparations.¹¹

All in all, it is my view that the ICC system of victims' participation and reparations can make a significant contribution to promote reconciliation and peace in regions affected by mass crimes. Victims who feel part of the judicial process may accept more easily the outcome of ICC judgments. They can also provide the Judges with useful information for their decisions which otherwise may not be available to them. Furthermore, there is a possibility to strengthen the domestic legal community by involving local lawyers in the common legal representation of victims.¹² Taken together, these effects may facilitate reconciliation and peace.

The ICC system of victims' participation and reparations is an entirely new, unique, complex and holistic system. On the one side, it represents progress and an inherent potential to alleviate and to acknowledge the sufferings of the victims. On the other side, it cannot be overlooked that the system and its implementation present many challenges or even risks for errors. Thus the Judges of the International Criminal Court and all parties concerned continue to be faced with the task to make the best out of this far-reaching concept.

13.2 Underlying Reasons

In the second part of this contribution, I turn to some questions which in my view have not yet been discussed at this conference. There are several questions which we also should consider:

What are the factors, what are the risks that according to our experience lead time and again to the depressing phenomenon that large numbers of innocent human beings become victims of international crimes? As we are considering the topic of victims' rights and peace, it is my suggestion that States, the international community, continue to be faced with a rather obvious necessity. All ways and means must be exhausted to prevent and to stop possible developments which may lead to mass victimisation. In this respect I would like to emphasise a principle, which might seem almost obvious or even commonplace—which it is not.

It is necessary to recall and to be fully aware that the best protection of human rights is the absence of violence, armed conflict and war-making. The conclusion out of this simple truth is obvious. There is an urgent necessity—and it is probably the best approach to victims' issues—to avoid and to prevent mass victimisation through violence, armed conflict and war-making.

¹¹ Van den Wyngaert 2012; McKay 2008, p. 4.

¹² Boyle 2006, p. 307.

This is a reality and experience which must be seen quite clearly: the greatest risks of mass victimisation, the greatest risks to make thousands of men, women and children victims of international crimes stem from war-making, illegal or questionable uses of armed force or outright crimes against peace as defined in the Nuremberg principles.¹³ As I have stated already many times, we should bear in mind a cruel reality. Experience shows that war, the injustice of war in itself begets massive war crimes and crimes against humanity, thus leading time and again to human suffering and victims. There is no armed conflict without murder, killing of innocent civilians and children. There is no war without rapes and other sex crimes. We have seen this in World War II, in Vietnam, in the former Yugoslavia, in Iraq and also in practically all African situations and cases with which the ICC is currently seised. As in the past century, a terrible law seems to hold true: war, the ruthless readiness to use military force, to use military power for political interests regularly leads to wide-spread victimisation, to massive and grievous crimes of all kinds.

People around the world, men and women in every country, share a desire not to become victims of brutal force and violence. They share a desire for justice and peace. People around the world agree that the highest value and best protection for human dignity and human rights is the absence of armed force.

Thus, when we discuss the issue of victims of international crimes the conclusion seems obvious: All ways and means must be exhausted to contain, to avert the risk of future war-making. All must be done to reduce and to eliminate, if possible, the risks emanating from future illegal or questionable uses of armed force, including possible future crimes against peace, crimes of aggression as defined in Articles 8(bis) and 15(bis) and 15(ter) of the Rome Statute.

Since Nuremberg, to wage war without recourse to self-defence pursuant to Article 51 of the UN Charter is no longer a national right but an international crime. The Kampala break-through of 11 June 2010 on the crime of aggression offers also a chance to avoid future mass victimisation through illegal uses of armed force. Once again, determination and resolve in the prevention of the use of armed force offers in my view the best chances to prevent *ab initio* mass victimisation.

It is time for a new impetus to promote a culture of peace and non-use of force in international relations. As Benjamin Ferencz, the last surviving Nuremberg Prosecutor has often told us, “you have to begin very early to educate young minds that war is not glorious. War is an abominable crime, no matter what the cause”. Consequently, one way of preventing future mass victimisation is to incorporate the reasons and necessity of the common task to discredit or even outlaw, in the curricula of schools, universities and all kinds of educational organisations, the use of aggressive or questionable armed force.

¹³ Doc. A/CN.4/SER.A/1950/Add.1 (1950). United Nations International Law Commission: Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal, 5 June–29 July 1950.

This is my conviction. As a Judge of the International Criminal Court, I felt it important to underline this point for the record of this important conference.

References

- Bock S (2010) *Das Opfer vor dem Internationalen Strafgerichtshof*. Duncker & Humblot, Berlin
- Boyle D (2006) The rights of victims. JICJ 4:307–313
- Chung CH (2008) Victims' participation at the International Criminal Court: are concessions of the court clouding the promise? NJIHR 6:459–545
- McGonigle Leyh B (2011) Victim participation and the ICC. In: Letschert R, Haveman R, de Brouwer A, Pemberton A (eds) *Victimological approaches to international crimes: Africa*. Intersentia, Antwerp, pp. 493–524
- McKay F (2008) Victim participation in proceedings before the International Criminal Court. Hum Rights Brief 15(3):2–5
- Stahn C, Olásolo H, Gibson K (2006) Participation of victims in pre-trial proceedings of the ICC. JICJ 4:219–238
- Van den Wyngaert C (2012) Victims before International Criminal Courts: Some views and concerns of an ICC trial judge. Case West Reserv Univ J Int Law 44:475–496