

Thorsten Bonacker · Christoph Safferling
Editors

Victims of International Crimes: An Interdisciplinary Discourse



Contents

| | |
|--|----|
| 1 Introduction | 1 |
| Thorsten Bonacker and Christoph Safferling | |
| 1.1 Preliminary Remarks | 1 |
| 1.2 Part I: Victims in International Law | 7 |
| 1.3 Part II: Definition of Victims | 8 |
| 1.4 Part III: Victim Protection and Participation in Criminal Trials | 9 |
| 1.5 Part IV: Victims in Transitional Justice Processes | 10 |
| 1.6 Part V: The Role of Civil Society Actors | 12 |
| References | 13 |
| | |
| Part I Victims in International Law | |
| 2 Victim-Oriented Perspectives: Rights and Realities | 17 |
| Theo van Boven | |
| 2.1 Silence and Disregard | 18 |
| 2.2 New Trends | 20 |
| 2.3 Towards an Inclusive Approach to Reparative Justice | 24 |
| 2.4 Concluding Remarks | 26 |
| References | 27 |
| | |
| 3 On Victims and Non-Victims: Observations from Rwanda | 29 |
| Gerd Hankel | |
| 3.1 Introduction | 29 |
| 3.2 Background: The Genocide of 1994 and the Subsequent Wars | 31 |
| 3.3 How the Crimes were Punished | 33 |
| 3.4 What Happened for the Victims | 36 |
| 3.5 What are the Consequences of the One-Sided Victim Perception for Rwandan Society? | 38 |
| 3.6 Concluding Reflections | 40 |
| References | 42 |

Part II Definition of Victims

| | | |
|----------|---|-----|
| 4 | The Status of Victims Under the Rome Statute of the International Criminal Court | 47 |
| | Michael J. Kelly | |
| 4.1 | Introduction | 48 |
| 4.2 | Participation in Court Proceedings | 49 |
| | 4.2.1 Attaining Victim Status | 50 |
| | 4.2.2 Representation of Victims | 52 |
| | 4.2.3 Article 68(3): Victim Participation in Proceedings | 53 |
| 4.3 | Protections | 56 |
| | 4.3.1 Rome Statute Protections: Article 68 | 57 |
| | 4.3.2 Victims and Witnesses Unit | 58 |
| | 4.3.3 The Court's Role in Victim Protection | 58 |
| 4.4 | Reparations | 59 |
| | 4.4.1 Reparations Made Against a Convicted Person | 59 |
| | 4.4.2 The Trust Fund for Victims | 61 |
| 4.5 | Conclusion | 65 |
| | References | 66 |
| 5 | The Individualising and Universalising Discourse of Law: Victims in Truth Commissions and Trials | 67 |
| | Michael Humphrey | |
| 5.1 | Introduction | 67 |
| 5.2 | Rights and Suffering | 70 |
| 5.3 | Truth Commissions | 73 |
| 5.4 | Trials | 79 |
| | 5.4.1 National Trials | 80 |
| | 5.4.2 International Trials | 83 |
| 5.5 | Conclusion | 86 |
| | References | 87 |
| 6 | Redressing Sexual Violence in Transitional Justice and the Labelling of Women as "Victims" | 91 |
| | Susanne Buckley-Zistel | |
| 6.1 | Introduction | 91 |
| 6.2 | Sexual Violence During Violent Conflicts | 92 |
| 6.3 | Masculinities and Violence | 93 |
| 6.4 | Sexual Violence and Transitional Justice | 95 |
| 6.5 | Conclusions | 98 |
| | References | 99 |
| 7 | Everyone Wanted to be Victim: How Victims of Persecution Disappear Within a Victimised Nation | 101 |
| | Brigitte Bailer-Galanda | |
| 7.1 | Political and Social Settings in the First Years of the Second Republic of Austria | 102 |

| | | |
|--|---|------------|
| 7.2 | The Framework for Austria's Dealing with her National Socialist Past | 103 |
| 7.2.1 | The Declaration of Moscow | 103 |
| 7.2.2 | The Externalisation of Responsibility and Guilt | 103 |
| 7.2.3 | The Future State Treaty | 104 |
| 7.3 | The Victims of National Socialist Persecution | 105 |
| 7.3.1 | The Victims Welfare Act and its Selective Definition of Victim | 105 |
| 7.3.2 | Restitution of Lost Property | 107 |
| 7.3.3 | Different Definitions of Victims of National Socialist Persecution | 108 |
| 7.3.4 | A Special Category of Victims | 109 |
| 7.4 | "Aryanisers" as Victims? | 110 |
| 7.5 | Soldiers of the German Army ("Deutsche Wehrmacht") | 111 |
| 7.6 | Mixing of Claims | 113 |
| 7.7 | Former National Socialists: Victims of Denazification? | 114 |
| 7.8 | Immediate Competition Between Former National Socialists and Victims of Persecution | 114 |
| 7.9 | Conclusion: A Nation of Victims | 115 |
| | References | 116 |
| 8 | Transcending Victimhood: Child Soldiers and Restorative Justice | 119 |
| | Mark A. Drumbl | |
| 8.1 | Defining the Terms | 122 |
| 8.2 | Images of Child Soldiers | 125 |
| 8.3 | Social Realities of Child Soldiering: Circumscribed Action | 130 |
| 8.4 | An Emergent Legal Fiction and its Effects | 136 |
| 8.5 | Conclusion | 144 |
| | References | 144 |
| Part III Victim Protection and Participation in Criminal Trials | | |
| 9 | The Protection of Victims in War Crimes Trials | 149 |
| | Daniela Kravetz | |
| 9.1 | Introduction | 150 |
| 9.2 | Protection Framework | 150 |
| 9.2.1 | General Rules Governing Victim Protection | 150 |
| 9.2.2 | Measures of Protection | 154 |
| 9.3 | Challenges in Providing Protecting | 157 |
| 9.3.1 | Due Process Costs of Protective Measures | 157 |
| 9.3.2 | Enforcing Protective Measures | 158 |
| 9.3.3 | Countering Witness Intimidation | 160 |
| 9.4 | Conclusion | 162 |
| | References | 162 |

| | | |
|-----------|---|-----|
| 10 | Victims as Witnesses: Views from the Defence | 165 |
| | Natalie von Wistinghausen | |
| 10.1 | To Start with: Who is a “Victim”? | 167 |
| 10.2 | Is Victim Participation Fully Consistent with the Presumption of Innocence? | 169 |
| 10.3 | Do Victims Have a Right to a Fair Trial? | 171 |
| 10.4 | Witnesses have far more to say than will ever be heard in court. What platform should they be given to tell those parts of their story that do not prejudice the fine focus of the law? | 172 |
| | References | 173 |
| 11 | Participation Rights of Victims as Civil Parties and the Challenges of Their Implementation Before the Extraordinary Chambers in the Courts of Cambodia | 175 |
| | Silke Studzinsky | |
| 11.1 | Introduction | 176 |
| 11.2 | Overview of the Participation Rights and Right to Seek Reparation for Victims as Civil Parties Before the ECCC | 177 |
| 11.2.1 | The Legal Basis | 177 |
| 11.2.2 | Participation Rights | 179 |
| 11.2.3 | Reparation Scheme in Case 002 | 181 |
| 11.2.4 | The Performance of Civil Party Rights in Practice | 183 |
| 11.2.5 | Lessons Learned | 187 |
| 11.3 | Conclusion | 188 |
| | Reference | 188 |
| 12 | The ICC’s Practice on Victim Participation | 189 |
| | Franziska C. Eckelmanns | |
| 12.1 | Institutional Framework | 191 |
| 12.2 | Application Process | 193 |
| 12.3 | Assessment of Victims’ Applications | 197 |
| 12.3.1 | The Applicant’s Identity as a Natural Person | 198 |
| 12.3.2 | An Organisation as an Applicant | 199 |
| 12.3.3 | Harm Suffered | 200 |
| 12.3.4 | Link Between the Harm Suffered and the Crimes | 201 |
| 12.4 | Legal Representation | 202 |
| 12.5 | New Stage of the Proceedings | 204 |
| 12.6 | The Practice of Victim Participation | 206 |
| 12.6.1 | First Category of Victim Participation | 208 |
| 12.6.2 | Second Category of Victim Participation | 210 |
| 12.7 | Victims and Sentencing | 217 |
| 12.8 | Victims Participation Before the Appeals Chamber | 217 |
| 12.9 | Conclusion | 220 |
| | References | 220 |

| | | |
|--|--|-----|
| 13 | Victims' Rights and Peace | 223 |
| | Hans-Peter Kaul | |
| | 13.1 Observations and Impressions Regarding Victims' Issues | 224 |
| | 13.2 Underlying Reasons | 227 |
| | References | 229 |
| | | |
| Part IV Victims in Transitional Justice Processes | | |
| 14 | Victims, Excombatants and the Communities: Irreconcilable Demands or a Dangerous Convergence? | 233 |
| | Chandra Lekha Sriram | |
| | 14.1 Introduction | 233 |
| | 14.2 The Context: Justice Versus Peace | 234 |
| | 14.3 Victim-Centred Justice | 235 |
| | 14.4 Restorative Justice | 238 |
| | 14.5 Excombatants and DDR | 242 |
| | 14.6 Victims and Excombatants in Transition | 243 |
| | 14.6.1 Tensions and Contestations | 243 |
| | 14.6.2 Intentional and Unintentional Linkages | 245 |
| | 14.7 Victims and Excombatants in Recent Transitional Justice Practice | 247 |
| | 14.8 Conclusions | 249 |
| | References | 250 |
| | | |
| 15 | Victims of Genocide and Crimes Against Humanity | 253 |
| | Boris Barth | |
| | 15.1 Definitions | 253 |
| | 15.2 Victim Groups | 258 |
| | 15.3 Conclusion | 260 |
| | References | 262 |
| | | |
| 16 | Victims of Civil War | 263 |
| | Stefanie Bock | |
| | 16.1 Introduction | 263 |
| | 16.2 The Notion of Civil Wars and Their Treatment in International Law | 264 |
| | 16.3 Structural Characteristics of Civil Wars | 265 |
| | 16.3.1 The Outbreak of the Violence: Divide of a Society | 265 |
| | 16.3.2 Asymmetrical Warfare | 267 |
| | 16.4 The Victims of Civil Wars | 269 |
| | 16.4.1 The Fine Line Between Victims and Perpetrators | 269 |
| | 16.4.2 Civilians | 270 |

| | | |
|-----------|--|------------|
| 16.4.3 | Soldiers and Fighters | 272 |
| 16.4.4 | Indirect Victims | 273 |
| 16.5 | Conclusion | 274 |
| | References | 274 |
| 17 | Valorising Victims' Ambivalences in Contemporary Trends in Transitional Justice | 279 |
| | Thorsten Bonacker, Anika Oettler and Christoph Safferling | |
| 17.1 | Introduction | 280 |
| 17.2 | The Enhancement of Victim Participation in Transitional Justice | 280 |
| 17.3 | The Institutionalisation of Human Rights | 282 |
| 17.4 | Social Movements and the Diffusion of Victim Rights | 284 |
| 17.5 | Victim-Centred Transitional Justice: The Example of International Criminal Law | 286 |
| 17.5.1 | The Increased Importance in Structured Criminal Law and International Criminal Law | 286 |
| 17.5.2 | Victim Participation in the International Criminal Court | 287 |
| 17.6 | The Ambivalence of Victim-Centred Transitional Justice | 289 |
| 17.6.1 | Exclusionary Mechanisms in International Criminal Law | 290 |
| 17.6.2 | National and Local Perspectives | 291 |
| 17.7 | Conclusion | 293 |
| | References | 295 |
| 18 | A Reflection on Transitional Justice in Guatemala 15 Years After the Peace Agreements | 297 |
| | Raquel Aldana | |
| 18.1 | Introduction | 298 |
| 18.2 | Preliminary Reflections About Transitional Justice in Guatemala | 300 |
| 18.3 | Lessons from the Victims of the Wartime Trials in Guatemala ... | 304 |
| 18.4 | One Recommendation: Expanding the CICIG to Include the Wartime Trials | 308 |
| 18.5 | Conclusion | 314 |
| | References | 314 |
| 19 | The Role and Mandates of the ICC Trust Fund for Victims | 317 |
| | Katharina Peschke | |
| 19.1 | Short Background | 319 |
| 19.2 | The Two Mandates of the Trust Fund | 319 |
| 19.3 | The Trust Fund as an Agent for Transformation and Empowerment of Victims | 321 |
| 19.4 | The Advantages of the Trust Fund's Dual Mandate | 323 |

19.5 An Outlook to Future Developments: Challenges and Opportunities 325

19.6 Conclusion 327

References 327

Part V The Role of Civil Society Actors

20 From Victimhood to Political Protagonism: Victim Groups and Associations in the Process of Dealing with a Violent Past 331
 Veit Strassner

20.1 Introduction 331

20.2 Victims and Victim Groups: A Typology 333

20.3 Victims Organisations: Crucial Actors in a Difficult Policy 336

20.3.1 Coming to Terms with the Past: A Dangerous Policy 336

20.3.2 The Arrangement of Actors 337

20.3.3 Victims Organisations and Agenda-Setting 338

20.3.4 Victim Groups: Dynamic Actors in a Changing Policy 339

20.3.5 The Victims Organisations as Crucial Actors. 341

20.4 The Existence of Victim Groups: A Necessary But Not Sufficient Condition 341

20.5 The Logic of Political Action. 342

20.6 The Tragic Role of the Victim Groups 343

References 343

21 The Role of Cambodian Civil Society in the Victim Participation Scheme of the Extraordinary Chambers in the Courts of Cambodia 345
 Christoph Sperfeldt

21.1 Introduction 345

21.2 The Roles of Civil Society in the ECCC’s Victim Participation Process 347

21.2.1 The Messengers: Outreach 348

21.2.2 The Middlemen: Intermediary Functions. 350

21.2.3 The Providers: Victim Support Services 352

21.2.4 The Benefactors: Restorative Justice and Collective Reparations. 353

21.2.5 The Watchdogs: Monitoring and Advocacy. 354

21.3 The ECCC, Survivors and Civil Society 355

21.3.1 Case 001: Extensive Support by Cambodian NGOs 356

21.3.2 Case 002: Reaching the Limits 358

21.3.3 Coordination and Collaboration Between the ECCC and Civil Society 361

| | | |
|-----------|--|------------|
| 21.3.4 | The State, Donors, and Civil Society | 363 |
| 21.3.5 | Local Ownership and Sustainability | 365 |
| 21.4 | Conclusion | 367 |
| | References | 369 |
| 22 | Critical Memory Studies and the Politics of Victimhood: Reassessing the Role of Victimhood Nationalism in Northern Ireland and South Africa | 373 |
| | Marcel M. Baumann | |
| 22.1 | Introduction: Who Defines a Victim? | 374 |
| 22.2 | Comparative Victimhood Nationalism, State-Led Amnesia and Civil Society Responses | 377 |
| 22.2.1 | Northern Ireland: Mothers' Tears and the Peace Process Contradiction. | 378 |
| 22.2.2 | South Africa: Amnesty Decisions and the Freedom Park Controversy | 383 |
| 22.3 | Conclusions | 388 |
| | References | 390 |
| | Index | 395 |