

Nicolas Ligneul

*Assistant Professor at the Faculty of Law of Paris-Est-Créteil,
Lawyer at the Paris Court of Appeal, Admitted to plead at the
International Criminal Court*

WAR CRIMES IN UKRAINE: THE VICTIMS' PERSPECTIVE

*«I want to go on living after I die»*¹. With this sentence from her diary, the famous Anne Franck summed up in a few words the issue of the status of victims.

The United Nations has defined victims as *«persons who, individually or collectively, have suffered harm, including physical or mental harm, mental suffering, material loss, or serious violation of their human rights, as a result of acts or omissions that contravene the criminal laws in force in a State»*².

Victims must be treated with compassion and respect. They must be able to be compensated through legal recourse so that they can be restored with dignity.

However, in the context of the Russian invasion of Ukraine, war crimes are systematic. The facts are horrific. Assassinations, looting, rape, bombing of civilians, summary executions of prisoners, torture,... are the daily life of Ukraine.

The crimes are atrocious. The damage suffered is colossal and the victims of war crimes are very numerous.

The issue of the status of victims can be summed up by the situation of the nine-year-old Ukrainian girl who saw her mother die in front of her eyes after she had been raped a very large number of times. Of course, the perpetrators must be arrested and prosecuted. They must pay for their crimes.

But what will become of this little girl? What is its future? In our modern societies, it is not possible to abandon the victim. To become a victim is to die, at least a little. The status of the victim is the means of keeping him alive after death. By recognising her right to see the perpetrators prosecuted and convicted, and by recognising her right to be declared a victim and to be compensated.

Faced with the need for recognition of the status of victims, modern international law establishes the principle of recognition of the status of victims. In the context of the war in Ukraine, the recognition of this principle is real (I), but the effective implementation of this principle deserves to be improved (II)

1 After being hidden in an apartment in Amsterdam because she was Jewish, Anne Franck was deported by the Nazis and died in the Bergen Belsen camp at the age of 16. After World War II, his father found his diary and published it.

2 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, United Nations General Assembly, resolution 40/34 of 29 November 1985.

I – The principle of recognition of Ukrainian victims of war crimes committed in Ukraine by the Russian military

The recognition of the principle of compensation for victims of war crimes is a pious wish accepted by all. This recognition of victims' rights leads to rights that can be implemented on the basis of domestic law (A) or international law (B).

A - Recognition of victims' rights by domestic law

The status of victims of war crimes is provided for in the 3rd and 4th Geneva Conventions of 12 August 1949.

The Third Geneva Convention deals with the status of prisoners of war and the Fourth Geneva Convention deals with the status of civilians in time of war. These conventions stipulate that the signatory states of these conventions must implement them on their territory.

They do not provide for any specific mechanism of international law for the implementation of these war crimes and therefore refer to the domestic law of the contracting parties to the conventions for their practical implementation.

In our context, therefore, it is necessary to refer to Ukrainian or Russian domestic law to determine which law should be applicable to victims of war crimes.

Ukrainian or Russian law can prohibit war crimes. Under the Third and Fourth Geneva Conventions, it is even an obligation.

However, in the context of the Russian invasion of Ukraine, the use of Ukrainian or Russian law does not allow for the recognition of the status of war crimes victims

There are two explanations for this.

On the one hand, it is very difficult to implement the Third and Fourth Geneva Conventions in practice. The jurisdiction of the Russian judge is illusory. Who can believe that a Russian judge will prosecute Russian perpetrators of war crimes in Ukraine? As for the jurisdiction of the Ukrainian judge, it has little significance. The war criminals are Russian. They are difficult to arrest and try in territory occupied by a foreign power.

On the other hand, the Geneva Conventions provide for an obligation to prohibit war crimes, but they do not provide for an obligation to compensate victims.

It therefore seems that the implementation of victims' rights before the Russian or Ukrainian courts is theoretically possible but without practical significance.

The other possible way to implement the punishment of war crimes committed against Ukrainian victims is to have recourse to the jurisdiction of the domestic courts of other states.

The application of criminal law in the area has traditionally recognized the principle of the territoriality of criminal law. Consequently, when an offence is committed, the criminal law of a State may apply if one of the constituent elements of the offence is committed in its territory. For example, the French Penal Code retains the jurisdiction of French law for the commission of an offence on French territory or if the perpetrator or, in some cases, the victim, has French nationality.

In the case of the Ukrainian conflict, the nationality of the perpetrator, but also and sometimes of the victim, can lead to the retention of the jurisdiction of a Western State (France, Switzerland, Belgium,...). For example, when the Russians intentionally bombed a French NGO recently, the matter was referred to the Paris prosecutor's office.

Even if this is not a textbook hypothesis, in practice, this national competence is very limited. There are few French people in the ranks of the Russian army and Ukrainian victims do not often have French nationality.

Some modern systems recognize the universal jurisdiction of their judges. This is, for example, provided for in Article 689-2 of the French Code of Criminal Procedure. Doctrine has defined universal jurisdiction as «the ability of a judge to deal with an offence regardless of the place where it was committed and regardless of the nationality of the perpetrator and the victim»¹. It is an exception to the application of criminal law in space.

Strictly understood, universal jurisdiction theoretically recognizes a place for victims. However, even in systems that give it a large place, for example, in French law, it is limited. For example, French law recognizes the universal jurisdiction of the French judge to hear war crimes, crimes against humanity and crimes of genocide, but on condition that one of the perpetrators or accomplices of the acts is present on French territory. Universal jurisdiction is therefore limited.

Moreover, the question of the situation of victims is not specifically addressed by universal jurisdiction. They are therefore in the same situation as victims of common law offences in the Western world. Even if the French judge has jurisdiction, it is difficult to imagine that a victim of war crimes in Ukraine would obtain compensation for the harm suffered in France. This may happen at the margins, but it is not satisfactory from a global point of view.

Universal jurisdiction therefore makes it possible to prosecute the perpetrators of war crimes. However, its scope for compensating victims is very limited.

B - Technical solutions based on international law

The International Criminal Court (ICC) recognizes a place for victims in the court's jurisdiction. This includes the possibility for victims to intervene in the proceedings, to be heard, to be recognised as a victim and, where appropriate, to be compensated.

Similarly, the creation of a possible Special Tribunal for Ukraine (TPSU) would lead to the recognition of probably limited jurisdiction over war crimes. The TPSU would have to deal primarily with the crime of aggression. The recognition of the status of victims is not the same. It is the Ukrainian state as a whole that has been the

1 Damien Vandermeersch «Universal Competence» in Cassese, Antonio, and Mireille Delmas-Marty. National Jurisdictions and International Crimes. Presses Universitaires de France, 2002, pages 589 et seq.

victim of the crime of aggression, within the meaning of international law. The status of the victim is therefore obviously not the same.

In the event that the TPSU were given jurisdiction over war crimes and crimes against humanity, the foreseeable place of victims is comparable to that recognized on the occasion of the Special Tribunal for Lebanon or the ICC.

There would then be a recognition in principle of the status of victims, but the scope of this status seems limited.

II – Modalities for the implementation of the status of victims of war crimes

The implementation of the status of victims leads to the recognition of a limited role for them (A) but which can be improved (B)

A – The limited implementation of the status of victim of war crimes

The victim has a limited role in the proceedings and limited rights to obtain compensation.

The victim's role in the proceedings is limited.

Prior to the confirmation of charges hearing, victims are virtually ignored by international criminal law.

The place given to victims is particularly erased. Under international criminal law, they can file a complaint and, when the ICC Prosecutor General so decides, be heard. For example, they do not have a lawyer, even though they need one.

After the confirmation of charges hearing, the role of victims is a very limited one in the proceedings. The ICC's practice is often very hostile to victims by recognizing their right to be heard or to ask questions of witnesses or defendants that is very limited in practice.

In essence, the place of the victims is erased, because they have only a limited right to reparation.

Victims can only claim compensation or reparations.

In itself, this is obviously particularly frustrating.

In addition, victims are not entitled to full compensation.

There is no application of the principle of reparation in integrum in international law. The reparation granted to victims is necessarily limited

This can be explained by the Treaty of Versailles syndrome, i.e. by the idea that the settlement of an armed conflict should not be excessive in order to prevent the humiliation of the vanquished from leading to further conflicts.

In the context of war crimes after the creation of the ICC, this idea no longer seems to me to be justifiable. War crimes and crimes against humanity are not crimes like any other. Those who are victims are not victims like any other. It therefore seems to me that reparation for the victims of these crimes, which are distinct from simple war damages, cannot be limited.

B – How can we give a more significant place to the victims of war crimes?

Several measures appear to be necessary to improve the status of victims of war crimes.

For example, the assistance of victims' lawyers from the time the war crimes are committed to the execution of the judgment of the International Criminal Court is obviously necessary.

Prior to the proceedings, victim assistance requires the involvement of NGOs and lawyers as soon as the war crime is committed. This makes it possible to avoid contamination of the proceedings, to provide legal support to victims of war crimes by ensuring their safety, their psychological and material care and the preservation of evidence.

International criminal law does not provide for the involvement of lawyers at this stage on the side of victims.

However, with the support of NGOs, a legal task force has been set up in Ukraine to assist victims and allow them to benefit from the assistance of a lawyer from the moment of the complaint and throughout the duration of the procedure. This legal task force, which was developed by my law firm with the NGO FUVI, has made it possible to recruit and train volunteers to become victims' representatives and, in conjunction with many Ukrainian NGOs, to allow victims to file complaints and benefit from the advice of lawyers from the beginning of the procedure until the decision to be made.

During the proceedings, assistance to victims presupposes the presence at their side of lawyers who are familiar with the proceedings before international courts and NGOs involved with victims on a long-term basis.

Preparing for proceedings before international courts requires teamwork. The recognition of the status of victims leads to the appointment of counsel to victims and to the provision of a collective victim counselling team.

In international criminal law, the defence has the right to prepare, the Prosecutor General has the right to prepare, but the victims have lawyers appointed at the last moment, who do not know them, are often very far from the conflict and assume a function that is not noble.

This state of the law cannot be maintained. International criminal law must allow victims to be assisted from the time of the commission of a war crime by lawyers who are aware of the nobility of their intervention and who have sufficient technical, human and financial resources to assist them.

It is also, of course, necessary to put in place compensation for victims worthy of the name. There is no justification for not providing full compensation for the victims' damages.

The International Criminal Court has set up a fund to compensate victims.

Convictions of perpetrators to compensate victims are often very low.

For example, compensation may consist of the payment of a sum of a few hundred dollars or the obligation to build a school.

For victims of war crimes, these reparations are not insufficient, they are undignified. They are unworthy of what has been suffered by victims of war crimes.

They are unworthy of what recognition of victim status should be, and they are unworthy of what international criminal justice should be.

This is due to the fact that prosecuting authorities are not interested in the victims, but rather in the perpetrators of war crimes. The guarantee fund, for its part, does not have a budget that allows it to pay substantial sums to victims.

Yet not all perpetrators of war crimes and their accomplices are poor.

Our task force therefore intends to bring together many victims of war crimes and assist them before the International Criminal Court. With a significant number of victims, our task force will prosecute those who profit from war crimes, seize assets in the courts of the states in whose territories they are located. It will then propose to the Victims' Compensation Fund of the International Criminal Court that these assets be paid to the Compensation Fund on the condition that these sums are used to compensate Ukrainian victims.

As others did before me at the end of the Second World War, the Legal Task Force that I lead will stand up to war criminals and seek them out in order to seize their assets and bring them before international criminal courts.

Don't think that we won't have the means or that we will give up.

We will not forget the words of Anne Franck: «The most important thing to keep in mind is that you should never wait a minute to change the world».

Justice is on the march, Russian war criminals will pay!

N.Ligneul. War Crimes in Ukraine: The Victims' Perspective

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