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TERRORISM, THE LAW AND VICTIM'S RIGHTS

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Introduction

By
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Ladies and Gentlemen,

In October 2005, the Belgian Red Cross's Emergency Psychosocial Intervention Service organised study days on the promotion of resources for the victims of terrorist acts and their families. European theoreticians and practitioners in the field of victimology came together to think about the questions brought about by terrorism today.

This event was part of the pilot project launched by the European Commission in 2004 that aims to devise a common European response in order to offer the victims of terrorism and their families psychosocial support, the means to fight against terror and easier access to justice.

Following up this same project, the Belgian Red Cross's international humanitarian law department is organising in turn this evening a conference-debate on the issue of "Terrorism, the law and victims' rights".

Since the Belgian Red Cross's mandate includes the diffusion and implementation of International Humanitarian Law (IHL), our organisation has a strong interest in the existing legal framework which governs terrorist acts.

To recall, International Humanitarian Law is a set of rules that aim to limit the negative effects of armed conflicts on humanitarian grounds. It protects the people who are not or who are no longer involved in combat and restricts the means and methods of war.

Since terrorist acts take place not only in times of peace but also during armed conflicts and since they affect civilians, the Belgian Red Cross, with its mandate of protecting victims, has the duty to regularly recall the rules of IHL applicable to such acts. The principles that stem from these rules can be summarised as follows:

- First of all, a terrorist act is a war crime since it generally indiscriminately targets civilians in order to wreak terror among them, which is expressly forbidden by the 1949 Geneva Conventions' First (Art. 51) and Second (Art. 13) Additional Protocols, both introduced in 1977.
- Also, people suspected of having committed such war crimes much be searched for, prosecuted and tried before national courts (Art. 49/50/129/146 of the Geneva Conventions).
- Finally, the accused must be tried before an impartial court and in accordance with the rights of the defence. They must, moreover, be protected against any attack affecting their dignity and their physical integrity in accordance with the Fourth Geneva Convention, which expressly prohibits "all

measures of intimidation or of terrorism" against detained persons (Fourth Geneva Convention, Art. 33). A fact sheet produced by the Belgian Red Cross outlines the legislation. Several copies are at your disposal.

Protection against terrorist acts as provided for by IHL in cases of armed conflict and by the conventions on human rights in times of peace cannot stop there. It must also be carried out in the more specific framework of national and international legal proceedings, particularly in view of the fact that, since 2001, the legal arsenal in terms of the fight against terrorism has been reinforced at international level (for instance within the EU, with its Framework-Decision of 13th June 2002 on the fight against terrorism) and at national level (as in Belgium with the Law of 27th December 2005 on the improvement of the modes of investigation in the fight against terrorism and serious and organised crime).

The study days of October 2005 briefly touched upon the geopolitical context of terrorist acts and the place of the victim in court proceedings. Several lessons were drawn from this experience, and two of them in particular can be useful guidelines for this evening's reflections:

First of all, combating terrorism requires above all an understanding of this act and therefore a definition for it and the identification of its origins.
While terrorism can be characterized a priori by several criteria (the use or threat of violence, an attack against civilians, the aim of destabilising state institutions and spreading terror), it is however difficult to determine this phenomenon's boundaries. No international convention has to date a universal definition of terrorism as such because of disagreements, i.a. at political level, between states, in spite of the UN Secretary-General's appeal in 2005.
Secondly, victims need their experience to be recognised, they need better support with regard to justice and to have what they want to say listened to by legal professionals (the investigating judge, for instance).

- At international level, conventions generally provide for a right to reparation and the right to an effective remedy for the victims of grave violations of human rights, in which terrorist acts are included.
- However, few international instruments seem to provide for measures regarding the status of the victim in terms of protection and follow-up, particularly in the context of a trial in an international criminal court, with the exception of the International Criminal Court as we shall soon see.
- Yet this observation should not amplify the phenomenon of "victimisation": the victims of terrorist acts should not take precedence over others. Furthermore, it is also vital that the rights of the victim should be balanced with the rights of the accused, who must also be treated properly during their detention.

Today, it is to you law practitioners, members of academia, representatives of the Federal Police and of the public authorities that we are turning in the hope that you will share with us your thoughts and experiences to analyse in greater detail the many practical questions aroused by terrorism at the judicial level.

Two issues will be discussed :

- The legal context of the fight against terrorism in Belgium and at international level:
  - Which rules govern terrorism ?
  - What are the problems generated by their implementation?
  - Is cooperation between courts and between police forces efficient?
- The place of the victims' of terrorist acts in the context of Belgian, European and internatinal criminal procedures
  - What does justice have to offer for the victims of terrorist acts?
  - What place does justice give them at the moment?

This conference is only the beginning of a European-wide reflection process on the role of the judicial system in the face of terrorist acts and, in more general terms, of the most serious crimes. While the judicial system is not supposed to solve the victims' problems, it is however above all a setting in which the victims move and act to make their voices heard. To this end, the institutional framework must enable the victims to find their bearings and have confidence in the system.

This evening's conference will be chaired by Mister Christian De Valkeneer, Procureur du Roi (Public Prosecutor) in Charleroi and Professor of Law at the Université catholique de Louvain.

I would like to thank him and the speakers for their presence and their precious contributions to this event in spite of their very busy schedules.

I shall now give the floor to Mr. De Valkeneer, who will make a presentation on the conference's first issue and introduce the speakers.

I thank you for your attention and hope the discussion will be fruitful.

The European Union and the fight against terrorism

By
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Introduction – The fight against terrorism at the level of the European Union

Combating terrorism is one of the European Union's priorities.

It did not start focussing on this issue after the terrorist attacks in Madrid or in London, or even in the aftermath of September 11, 2001. In fact, its interest in terrorism goes back to the 1970s', since the first efforts that were made by the European Community's Member States, as they were known at the time, to develop cooperation in policing and criminal matters to fight against what was then called "euroterrorism", i.e. the terrorism of the time that targeted Western interests from Middle-Eastern groups or from left-wing or right-wing extremists. But naturally, the dimension of the attacks of September 11, Madrid and London reinforced the European Union's attention on this issue.

In the aftermath of the terrorist attacks of 11th September 2001, an action plan was adopted by the European Council. This action plan was revised later, following the attacks on 11th March 2004 in Madrid. This plan demonstrates the EU's ambitions in this field and how high they are.
When you take a look at this action plan, you can see the cross-cutting, "transpillar" character of the fight against terrorism in the EU: the three pillars of the Treaty on the European Union serve as a framework for initiatives in the fight against terrorism.

These three pillars of the Treaty are :

- Community law (the Treaty on the European Community),
- Common foreign and security policy,
- Police cooperation and judicial cooperation in criminal matters.

In a way, each of these three pillars has been put to the service of the fight against terrorism.

Concerning the first pillar, instruments have been adopted regarding asylum, immigration and controls at external borders. A whole series of initiatives have been taken to reinforce the fight against counterfeit passports and false travelling documents.
Many measures in the framework of this pillar have also been introduced to increase security in ports, transportation, airports etc, as well as a series of initiatives seeking to reinforce the fight against the financing of terrorism.
There is, for instance, the Directive adopted in October 2005 that aims at the same time to fight against money laundering and against the financing of terrorism.

There are also, but these straddle the first and the second pillar, regulations and common positions that endeavour to implement United Nations legislation, Security Council resolutions for instance. The United Nations have adopted several instruments targeting terrorism, including for example the Security Council's resolutions requiring that the property and financial assets of people involved in terrorist acts should be frozen. At European Union level, several texts seek to implement these SC resolutions. These texts have led to many criticisms concerning the protection of fundamental rights.

The European Community's Court of First Instance made several rulings quite recently on the legality of these texts which, in a way, validates them. These decisions by the Court of First Instance were in turn subject to very critical comments.

In the first pillar, there is also a Directive on reparation for the victims of crime. This Directive does not only concern the victims of terrorism but the victims of crime in general, which means it is crosscutting. This Directive is not very ambitious. It attempts, among other things, to bring closer together, to approximate the Member States' legislations on victim compensation, but most of them are not formulated in a binding mode.

In this presentation, I particularly want to focus on the initiatives taken in the context of the third pillar of the Treaty on the European Union, i.e. in the area of police cooperation and judicial cooperation in criminal matters. This work was started in the 1970s', but for many years, it was at a standstill and only really gained momentum after the Treaty of Amsterdam came into force.

The work on police cooperation and judicial cooperation in criminal matters can be analysed following four different aspects:

- First of all, the efforts made to approximate the Member States' penal legislations
- Then, the work aimed at developing cooperation mechanisms at police level, on the one hand, and at judicial level in criminal matters, on the other.
- Work on trying to set up European actors in the field of police and judicial cooperation in criminal matters. I'm thinking more particularly here about Europol, which is the European Police Office, and about EUROJUST, which is a European office for judges. These two actors both operate in The Hague and are up and running on a daily basis.
- The fourth aspect concerns the EU's external judicial work on criminal matters. Indeed, the EU has external contacts with organisations such as the United Nations, but also with Interpol, the Council of Europe and the Financial Action Task Force on Money Laundering concerning money laundering and the fight against the financing of terrorism. The EU also has many contacts on this issue with third countries like the United States.

I shall try to underline, for each of these four aspects, the initiatives that seem to me to be most symptomatic of what the Union is doing in terms of combating terrorism.

1. The approximation of legislations on crime

Aims : A Framework Decision was adopted on 13th June 2002 seeking to approximate the legislations of the EU's Member States in terrorist matters. It attempts to approximate the definition of terrorist incriminations, give common definitions of terrorist offences and also seeks to bring closer the levels of penalties for punishing these terrorist offences.

A small measure appears in this instrument on the rights of the victims. However, this stipulation is not very binding since it simply provides, among other things, that "each Member State shall, if necessary, take all measures possible to ensure appropriate assistance for victims' families".

Impact : As far as the impact of this Framework Decision is concerned, as I mentioned earlier, this Decision was adopted in the context of the third pillar of the Treaty on European Union. But the third pillar of the Treaty is intergovernmental by nature… and one of the consequences of this intergovernmentality is that the decisions made do not have direct effects. For the Framework Decision to be implemented, i.e. for it to be applied in practice, each Member State has to adopt the necessary measures to incorporate it into their legislation. This is true for all texts. Most of the time, the Member States dig their heels in when it come to taking the necessary integration steps. This can be explained by the fact that we are in the criminal domain and therefore at the heart of the Member States' national sovereignty. This Framework Decision had to be implemented by 31st December 2002 at the latest. Most Member States have taken steps at the present time to incorporate the text but some have still not done so, and among the States who have taken steps, some integrations are pretty "unfaithful".

Belgium brought its legislation in line with this Framework Decision but did so after the deadline with the Law of December 2003. This Framework Decision has been widely criticised, as have been the integration laws regarding the protection of fundamental rights. Among the main bones of contention were the definitions of terrorist offences laid down in the Framework Decision. They are very vague and not clear. These texts are criticized for endangering the infamous principle of the "legality of offences", a principle according to which definitions much be sufficiently detailed. There was in fact an appeal to the Belgian Arbitral Court seeking to annul the approximation law of the Framework Decision in question. However, the Arbitral Court's ruling of 13th July 2005 rejected this appeal for an annulation and "validated" the approximation law in question.

Concerning yet again the approximation of legislations in criminal matters, a Framework Decision was adopted in 2001 seeking to effect a "rapprochement" between the legislations of the Member States in the area of victims' rights in criminal procedures. Once again, this Framework Decision is crosscutting, not unlike the Directive on reparation for victims in the first pillar. As a result, it does not only concern the victims of terrorism but also the victims of crime in general and, as in the case of the Directive adopted in the first pillar, several stipulations of this Decision leave the Member States with plenty of room to manoeuvre.

2. Simplifying the mechanisms of cooperation concerning the police and criminal judicial proceedings

a. Judicial cooperation at criminal level

Aims : The work carried out since the 1970s' has attempted to reduce sluggishness, speed up and loosen up the organisations for juridical cooperation in criminal matters. Since the extraordinary Tampere European Council in 1999, work has taken on the form of the well-known process of mutual recognition of judicial decisions. The idea is mutual trust within the European Union in spite of the remaining divergences between our criminal law systems, to recognise the judicial decisions of each Member State and to implement them because we are all part of the same space.

The first concrete outcome of this process is the Framework Decision of 13th June 2002 on the European arrest warrant and surrender procedures. This Framework-Decision is crosscutting inasmuch as it seeks to simplify present-day extradition procedures and replace them with a simple surrender procedure for almost all types of crime.

These measures do not only target terrorism but target terrorism among others. Adopting such a Framework Decision was strongly affected by the context of the fight against terrorism in that it was negotiated upon and adopted very quickly in the aftermath of the attacks of September 11, 2001. Everyone agrees that if it had not been for the post-September 11 context, this Framework Decision would certainly not have been adopted as "quickly" or as "easily" as it was. In the third pillar, all of the texts were adopted unanimously by the Member States, and the adoption of a text concerning criminal judicial matters is, I repeat, at the heart of national sovereignty for the Member States and thus very difficult to adopt unanimously.

Impact : As far as the European arrest warrant is concerned, all of the EU's Member States have incorporated it at the present time but many are showing delays in this respect regarding the deadlines that they were supposed to follow. Furthermore, again, many incorporations are not faithful to the Framework Decision.
In this case, Belgium is a "good pupil" in that it has not only respected the deadlines (it implemented the European arrest warrant via the Law of 19th December 2003) but also because its incorporation was pretty faithful to the Framework Decision.

This European arrest warrant, as well as the process of mutual recognition as a whole, have suffered many criticisms based yet again on the protection of fundamental rights.
For instance, the principle that is precisely the foundation of mutual recognition was criticised, i.e. mutual trust. The possibility of attaining mutual trust was doubted. When the Framework Decision was adopted, distrust was generally the rule between the judicial authorities. The legitimacy of this mutual trust was also criticised because it is all very well to say that "we shall trust each other in spite of our disagreements" but these divergences exist not only from the point of view of material law (i.e. the definition of offences, the level of the sentences) but also at the level of the criminal procedure. Certain constitutional jurisdictions, notably the Polish, German and Cypriot Constitutional Courts, attacked the internal incorporation laws concerning the European arrest warrant.

A claim was also made before the Arbitral Court against the Belgian incorporation law concerning the European arrest warrant. The Court has not yet really ruled on the issue. It has asked the European Community's Court of Justice preliminary questions. These preliminary questions are really very important because they concern the legality of the Framework Decision of the European Union itself. Among the questions posed, there are questions about the judicial instrument, i.e. the Framework Decision (Is this type of instrument really appropriate to implement a European arrest warrant?). One question also concerns compliance with the principle of legality in criminal law terms.

These questions are very important for the future of the European arrest warrant. That said, it does not seem to me that there is much suspense in the matter since the Court of Justice, in several recent rulings, has shown itself to be extremely in favour of deepening and developing the European criminal law space. I may be wrong but I do not see it bringing into question the legality of such a Framework Decision, which is extremely important for the development of this space.

Before I say a few words on police cooperation, I would just like to stress that the process of mutual recognition is not, of course, limited to the European arrest warrant. There are many other texts that aim to make the process come to life and that have an interest in combating terrorism, for instance a Framework Decision on implementing decisions to freeze assets and evidence, a Framework Decision on the mutual recognition of confiscation decisions and, finally, a Framework Decision on the European evidence warrant which aims to develop judicial cooperation concerning pieces of evidence, but this latter document is still being negotiated, and the negotiations are particularly heated.

b. Police cooperation

Crosscutting texts have been adopted which aim to combat terrorism and seek to develop the exchange of information on the subject between not only national authorities but also between national authorities on the one hand, and EUROJUST and EUROPOL on the other.
Then, there are far more cross-sectoral texts that aim to develop police cooperation in general and, among other things, to develop the exchange of information. In this respect, I should like to mention the principle known as the principle of availability laid down in the Hague Programme which implies that the information held by the police services of one Member State is to be made available to their counterparts in other Member States. A proposal has been tabled and is at the negotiation stage. This principle is to police cooperation what mutual recognition is to judicial cooperation in criminal matters. But while mutual recognition aims to guarantee the free circulation of judicial decisions, the principle of availability aim to ensure the free circulation of information.

3. The development of European actors in the policing and judicial sectors

I have told you about Europol and EUROJUST, who both have competencies in combating terrorism. I am thinking for instance about EUROPOL, in which an "Antiterrorist Taskforce" was created.

There are also common investigation teams that are set up and that enable several magistrates or several police officers from different Member States to work together and to carry out investigation on another States' territory. The priority field of action of these investigation teams is precisely the fight against terrorism. The basic idea is to exploit to the full these European actors and the means they have at their disposal to reinforce the fight against terrorism.
Obviously, this is much easier said than done… and generally speaking, the European actors in this field suffer from mistrust on the part of their national authorities, on the police side and on the judicial side.

4. The EU's external relations in the judicial sector concerning criminal matters

I shall simply say that, following the attacks of September 11, 2001, the EU's relationships with third countries such as the United States but also Russia, Morocco etc… have considerably developed, notably in the area of combating terrorism. The same applies to the Union's contacts with other organisations.

Conclusion

To conclude, I would like to stress the two-pronged effect of combating terrorism on the European judicial space in criminal matters.

First of all, I think there is a positive effect to fighting terrorist within this space because it is the fight against terrorism which made the development of the European penal space possible in the 1970s' and its extension in depth following the terrorist attacks of September 11.

But I also think that a negative effect is working on the European judicial space in criminal matters and more precisely on what might be referred to as the European judicial penal space's "shield pole".

Criminal law has a complex relationship with the protection of fundamental rights. In this respect, criminal law has two functions. First of all, it works as a "sword" which aims to combat crime and therefore to protect individuals and crime and secondly, as a "shield" which aims to avoid excesses on the part of the repressive authorities and to, in a way, provide guidance for the use by the public authorities of legitimate violence.

Since the launch of European criminal law in the 1970s', its priority has very clearly been the "sword" pole and therefore the fight against crime. Very few measures have been taken in the "shield" area, and this is all the more obvious when we look at victims' rights. As you will have certainly noticed, I have said almost nothing about victims' rights for the simple reason that, at the moment, the European Union is not developing many initiatives in this area. A few crosscutting texts have been adopted. I told you about the Directive on reparation for the victims of crime. I also talked about the Framework Decision on the status of victims in criminal trials.

As far as the victims of terrorism in particular are concerned, I told you about very timid measures that appear in the Framework Decision of January 2002 on combating terrorism. There is also the decision to declare the 11th March as the European day for the commemoration of the victims of terrorism. And, following the Madrid attacks of 11th March 2004, a new budget line was inserted into the Community budget to help the victims of terrorism, a budget line that, incidentally, feeds this pilot project.

For the rest, the European Union's antiterrorist action plan says almost nothing about victims' rights, which is of course a problem since the Amsterdam Treaty mandated the European Union to set up a European space of freedom, security and justice.
Thank you.

Analysis of the first court ruling made on the basis of the Belgian Law of 27th December 2005 on the modes of investigation in the fight against terrorism and serious and organised crime

By

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Introduction

Mister Chairman, Ladies and Gentlemen, the first idea that sprang to my mind when I was contacted by the organisers of this conference was that I would examine the issues adjacent to the fight against terrorism i.e. "parallel" legislation if I may use such an expression, which aims to implement the methods of repression not specifically targeting terrorism. (I am talking here among others about the European arrest warrant and the law on particular methods of investigation.)

And then, two weeks ago, Brussels' Criminal Court 54a made a ruling (that was several hundred pages long) applying for the first time the law on terrorist crimes.

After a quick read of the ruling, which is obviously not final and which, according to the information I have received, is already being appealed against by some of the accused parties, I can already say that this ruling is bound to go down in the legal history of our country and will be a key decision as it contains several considerations on criminal law and criminal procedure about which one cannot remain indifferent.

As an introduction, and this will also be my conclusion, I remain firmly convinced of the fact that a democracy which is attacked by the violence of terrorism will only respond effectively to this violence if, basically, it sticks to the rules it is facing. And I will not hide the fact that neither the news nor the way it seems the court has responded to certain considerations argued by the defence seem to be in line with what I would like to see developing. Let me explain.

I am extremely surprised by the more and more obvious revelation that certain states systematically practice torture in what is visibly an institutionalised manner, torture which is naturally kept hidden, and in some cases, torture which is tolerated by certain states but is kept half-hidden, so to speak, when we hear about 'planes landing on our territory, apparently with the authorisation of the authorities of our country. This type of practice worries me, and you will see that the 54th courtroom's ruling alludes among other things to the problems mentioned by the defence, which were at the same time suspicions and evidence that torture is being practiced in Moroccan prisons, among them a ruling that appears in the case file of the Court of Casablanca, which reproves such practices. You will see what the Brussels criminal court has to say about this.

Three points will be looked into regarding the decision by Brussels' criminal court: the court's competence, the taking of evidence and the liability of the prejudice

1. The competence of the court

An exception was underlined by the defence of certain accused persons which considered that the terrorist infringements stipulated in Article 137 of the Penal Code were in fact political misdeeds. The court's response was extremely clear with regard to judicial precedents and to the doctrine that is applied today.
Allow me to read to you now some excerpts that are, unfortunately, somewhat fastidious but which, to me, make it possible to have a clearer idea of the way issues were handled. After having rejected with extreme firmness the argument according to which a number of the accused considered that the acts they had committed were political acts and therefore came under the jurisdiction of the Court of Assize, the Court could not help going beyond this simple rejection of the argumentation and wrote this: "*Whereas the development of international law also imposes very abundantly but also in a particularly enlightening manner that the political character of the offence should not be recognised for the offences provided for in the Law of 19th December 2003. Whereas present-day terrorism reveals on the contrary blind crime characterised among other things by the deliberate will to harm a very large number of victims, whether the latter are involved or not in the conflict that generated the terrorist act and by the wish to bring about a state of terror propitious for upsetting the balance of power, and whereas even if they stem from political mobiles and whatever the political form of the nation that is fought against, such actions may not benefit from a different treatment than violations of common law" (our translation).*

My feeling on reading these few considerations which are all in all strictly legal considerations is that, in a way, it is a trend at the moment to simply not apply the law with extreme strictness but to add to it considerations that are maybe more of a moral or political nature. If one follows this hypothesis through, then one pulls out of the judicial debate a bit too quickly.

2. Problems concerning the taking of evidence

In this court case (in which I took no part, otherwise I would not have taken the liberty of speaking here today about this case), the defence brought to the fore a number of problems of criminal procedure that concern i.a. the admissibility of the legal proceedings.
It has to be known that the case brought before the court started out on elements from i.a. the observations and electronic eavesdropping carried out by the "Sûreté de l'Etat" (State security service). And, most strangely, the Court mentions that in the present case, two reports were submitted that had been written by the "Sûreté de l'Etat", dated 25th November and 24th December 2002.

Besides these grievances regarding means of proof being obtained irregularly in Belgium according to internal law and to directly applicable supranational legislation, the defence of certain accused persons maintains that "*at the very least, the taking of evidence by the judiciary of means of proof required by the "Sûreté de l'Etat" would contravene the right to a fair trial in view of the fact that the "Sûreté de l'Etat" has not revealed the sources of the information it has provided, making it therefore impossible to verify their regularity upstream. That it is by taking this fact into consideration that the legislator recently introduced rules concerning the systematic observations carried out by a police body in the framework of the Law of 6th*

January 2003 on particular investigation techniques which inserted an Article 47 in the Criminal Investigation Code". And the Court said that "*It is therefore clear in the legislator's mind, the legislator who adopted the organic law on the information services, that the Sûreté de l'Etat was competent to carry out observations based on Article 13 of the aforementioned law. That the Court must produce an equal text in the way the legislator intended".* The Court concluded in the following curious way: "*That it is therefore rightfully that the defence of the accused X argues that the systematic observations that the Sûreté de l'Etat is said to have carried out in this case are irregular in view of the requirements of Article 8 §2 of the Convention safeguarding human rights and fundamental freedoms, and that the "comité R" rightfully conveyed to the legislator numerous warnings in this respect, which, however, remained unanswered".*(our translations)

If we were to stop here, what would be the conclusion to these sharp considerations? Simply that the elements collected by the Sûreté de l'Etat and added to the file and that are at the origin of the prosecutions should, in a way, discredit them. And the Court responds like this: "*That even though many pieces of information communicated by the Sûreté de l'Etat cannot be used as proof as such, it remains pertinent to apply in their respect the principles that must govern the taking of evidence in court"* and to return to the ruling made by the Court of Cassation on 16th November 2004 which makes it possible in pretty much any situation to accept upstream of the prosecution irregularities in the taking of evidence. It will of course be interesting to see what will be the position of the European Court of Human Rights regarding this type of consideration but it is not completely over yet.

The Court says: "*That by analogy, all of the principles that have just been recalled, all of the information provided by the Sûreté de l'Etat does not therefore have the vocation of being used as proof but constitutes simple pieces of information which, even if they may justify a future investigation that might confirm them, may not in themselves and in a determining way found the judge's conviction. That this restriction is a procedural guarantee that counterbalances the prejudice, for legitimate motives, to the integrally adversarial character of a criminal trial".* But we are overjoyed with this consideration, aren't we? But the following is upsetting: "*That to conclude, nothing justifies doing away with the information provided by the Sûreté de l'Etat, which could not in any way prejudice the investigation that followed."* (our translation)

A series of considerations concerning irregular evidence with respect to foreign law need to be expressed here. One should know that in this case – as you will have all guessed, this is the GICM case – some information comes from Morocco, from France and also Italy.

These pieces of information are of various types: telephone tapping, observations, documents, hearings from Moroccan prisons in particularly obscure conditions…

A certain number of problems were posed, and the court responds systematically by stating that it is necessary, whenever a problem is mentioned regarding the regularity of proof obtained abroad, to determine, in the context of Article 6 of the European Convention of Human Rights, whether this Article is observed or not, and therefore to ask whether the trial is a fair trial or not in the sense of this Convention.

Then, important problems were analysed: the duration of custody, the timeframes for detention and judgment in Morocco, the suspicion of generalised torture in Morocco… When I say suspicion of generalised torture, this was not only a suspicion. There were objective pieces of evidence in the case file that made it reasonable to believe that in Moroccan prisons, statements had purely and simply been obtained under torture.

I hope you will allow me to read what the Court had to say in this respect: "*That, however, the Court is neither equipped, nor competent, nor habilitated to give out good and bad marks to a State in the matter. Its approach can therefore only be a general one but must remain focussed on the facts of the case since the court is only referred to for one case in particular. That the mandated court must be particularly attentive when it comes to examining the required proof in a country that does not offer the same standards of protection in terms of human rights as those that are in force in Belgium. That however, in this case, there is no concrete element of a nature to lead one to believe that the accused X, Y and Z were tortured, in particular the complaint expressed by the accused X at the hearing whereby he is said to have been heard under constraint and pressuring. Also, the fact that he retracted from the hearing, which is in itself extremely usual, is not an indication of torture, the Belgian jurisdictions being confronted daily with the attitude of accused people revising their statements."* Finally, "*the declaration of the Moroccan prisoner's spokesperson produced by the accused Y's defence is not by nature convincing. Whereas in view of the preceding elements, there is no reason to consider that the litigious hearings conducted in Morocco are contrary to the principle of international and supranational law directly applicable in our national judicial system. There is therefore no reason to remove them from the debate for this motive."* (our translations)
This means, therefore, that if in doubt, one keeps the evidence that has been collected.

Other problems arose: the absence of confrontation, the elements of proof collected in France, the oath, the contradiction with internal law, the problems regarding custody in France…
The Court did not take them into consideration: it ignored the non-application of certain principles: the absence of notification of the right to silence, the duration of the custody, the brutality, the lack of sleep… These rules, which apply in France, seem to us to be absolutely essential and are printed in all manuals on criminal procedure. Whatever the case, using this type of method must never be accepted.

3. <u>The legal conditions of imputability of the different accusations</u>

I shall now deal with more specific problems of criminal law, judicial security and the definition of participation as stipulated in Article 66 of our Penal Code (the participation of several people in the same crime or offence).
The Court declares: "*For the accusation of belonging to a group to be declared to be established, it is necessary to demonstrate the intention of adhering to and effectively collaborating in a group, and it must have been demonstrated elsewhere that this group has the vocation of perpetrating terrorist acts. In such a hypothesis, the violation of Articles 139* [definition of a terrorist group] *and 140* [participation in an activity of a terrorist group] *will remain established even if the vocation of the group has not yet been turned into action by the slightest preparatory act in view of a terrorist attack",* so in a way, we are now leaving the notion of

attempt… "*or, if the participant ignores everything about the terrorist acts in question that might be carried out abroad by other members of the group, as long as he has adhered and contributed to this group, and knowing that in doing so he will contribute towards creating if only on a very small scale or very indirectly conditions enabling the group as a whole to become operational."* (our translations)
This is what is known, in my book, as borrowed crime. For me, there is here a problem of judicial insecurity.

In view of what precedes in the judgment, the Court concludes with a moral consideration: "*The use of force by individuals to materialise their opposition, even it is their political opposition to the regime of the sovereign State recognized as such by the international community embodied by the United Nations Organisation, must be considered, as long as it meets the specifications of the Belgian Penal Code's Article 137, to be a terrorist act unless it is a fight for self-determination against a colonising State or if it is a fight aimed at preserving or re-establishing democratic values. However, the last two reflections must be subject to exception when the means employed, such as the deliberate murder of unarmed civilians, are odious to such an extent that they are reproved by morality at any time and in all nations".*

I do not know what the Court of Appeal will do with this judgment, nor what the Court of Cassation will say about a certain number of considerations regarding the procedure and criminal law, nor what the European Court of Human Rights will have to say about all this.

Conclusion

My initial feelings on this issue, that I mentioned to you earlier on, while they are slightly excessive, certainly did not cool down on reading this ruling. (I read it quickly as this decision is very lengthy and extremely tedious.) But I do not have the feeling that to mix morals with justice is a productive confusion. Furthermore, neither do I have the impression that to broaden to such an extent the receivability of several methods which are by definition and by their very nature inadmissible, in the name of the fight against terrorism, serves justice in its fight against this terrorism.
That is what I wanted to tell you this evening. Thank you for your attention.

The psychosocial impact of legal proceedings on the victims

By
Thibaut Lorent

Psychologist
Belgian Red Cross

Introduction

Before getting to the heart of the subject, I would like to say that I am standing in for Nathalie Toledo, an excellent colleague of mine who is an "Assistante de Justice" (Justice Assistant) for Namur's "Parquet" (Public Prosecutor's Office). I am sorry that she is not here tonight, which does not mean to say that I am not very pleased and honoured to stand in for her today, but as I had the opportunity to hear her talk on this subject during the Study Days in October, I am sure you would have been touched, as we all were back then, by her testimony and by the wealth of her experience.

I would like to thank her because I shall base my reflection on her speech several times. By the way, the text of her speech is available in the proceedings of the study days that Delphine Pennewaert and Frédéric Casier told you about earlier on. Finally, I would also like to thank them for having invited me to take part in this conference-debate.

My presentation will be divided into two parts. The first is a vital preliminary. I shall try to briefly explain what victims experience before the question of the legal procedure arises. The second part will deal specifically with the issue of concern to us today: the psychosocial impact of judicial proceedings on the victims.

Part 1 : Preamble

This introduction will be based on two fundamental points which I hope will raise many people's awareness of the psychosocial consequences of the judicial procedure. The first point will deal with the way the victims experience this procedure, and the second will go into their needs!

Indeed, the victims who turn up in court have experienced a nasty impact on their lives: the traumatic event itself. And what an impact! The bomb, the explosion, the towers collapsing, the underground train derailing, the bitter smell of smoke and blood, the screams, the silence and the tearing apart.

To talk about the psychological and social impact of the judicial procedure without mentioning the effects of what brings the victims to becomes subjects in this same procedure would be meaningless.

Talking about meaning, I am not using the term "impact" by chance as it has meaning for our discussion. When we consult the dictionary, we see that "impact" is a ballistics term! It comes from the Latin "impactus",

meaning "to hit". The term is used when two or more objects collide. The point of impact is also the point where the trajectory of a projectile hits the target.
Does this mean that the victim "collides" with the judicial procedure? We shall talk about this later on.

But let us go back to the consequences of the initial impact :

The first, most obvious, consequences are the physical wounds, when the victim's flesh has been damaged. As for the after-effects of terrorists attacks, they are numerous: multiple physical traumas, burns, damaged hearing following the blast of an explosion, etc.

The second type of consequence is less obvious and concerns the psychological and social wounds. They are less obvious because the victim cannot wear a sling or use a prosthesis or crutches, which are there for anyone to see… These wounds are invisible and yet these are gaping wounds! The victims carry them inside them, in their hearts and in their bodies, and the symptoms, as Dr. Barois, a professor specialised in psychotraumatology puts it, "are only makeshift bandages".

A. The victims' experience

Let us go further and look into the way the victims experience the event and its aftermath.
Don't worry: I won't talk about symptoms or syndromes…
In short, and bearing in mind that each individual experiences the disaster in a unique way, one element is always present… something essential since it is fundamentally human: the victim always experiences the event as a tearing apart!

In one brief moment, the terrorist attack excludes the person from the world of the living… There is a break in continuity, in the physical and psychological survival systems, his/her beliefs in a fair and safe world, in the ability of the State to protect us…

We could also say a break with everything that protected the victims, from their skin to their house or the means of transport in which they felt safe… There is also a break in the structural envelope made up by the organisations and the institutions whose mission it is to protect them and which have failed… And even, above all, the envelopes of these illusions that protect us all, that keep us sane and give meaning to our lives, are torn apart. In short, the victims' contacts with the world are shattered…

This break means meeting death! While feeling the fear of being abandoned and dereliction. The first emotions to be experienced are fear, horror, anxiety… Then come anger, sadness and despair in the face of the many losses and the griefs!
This is, perhaps too synthetically, what the victim experiences.

B. The victims' needs

Very quickly, when victims are confronted with all of these things, they start asking very simple questions: Who? Why? How? Because they need to bring some meaning to what is happening to them, they need to control, if only in their minds, the upheaval they are going through! To find a way to beat the powerlessness they are going through.
Who? Why? How?
These very questions are the same questions posed by society and by the judicial system that represents society! We shall see that the victims' expectations and the function of the judicial institution are not necessarily one and the same.

The needs of the victims are many, and they change over time and differ from person to person!
I am not going to go now through an exhaustive list of them but there are also invariants in this case.

The first need of the victim, since s/he has been brutally excluded from the community of humans, is to be reintegrated into it! Since these links with the world (in the sense of the victim's internal and external world: the others, his/her membership groups etc.) have been brutally severed, these same links need to be re-established, need to be sutured as one would sew up a physical wound to ensure good scarring.

The specific needs linked to this "meta-need" are numerous, and all books on victimology or psychotraumatology talk about them is some way. Here are a few: welcoming, listening, recognizing, information, truth, understanding, and of course, justice!
But these words (and some of them are missing) are trees that hide forests that are sometimes very deep… What does welcoming mean, how should one listen to a person and recognise what s/he says etc…? It is not so easy!

Let's talk about the need for justice.
This need is particularly important for all victims of intentional acts of violence, in particular for the victims of terrorist acts. Indeed, the individual is not the target of the terrorist but his/her community or society as a whole. A society that reveals itself to be fallible and which, therefore, owes the victim all the more.

So the victim turns to the State and its institutions for his/her rights to be re-established, i.e. the rights of all human beings.
The victim invoke the law. Since laws have been violated, they should be restored in full in terms of prosecution and sanction.

Yet, as we saw earlier on, the steps taken by the individual victim and the function of the judicial system do not necessarily match. Yet the law, and criminal law in particular, have a function of social regulation. But this function is submitted to rules that protect the accused and guarantee a fair trial…

A nice quote by J.M Domenech illustrates this in a slightly ironic way: "*To be a victim is to see barbarity break into one's existence and at the same time to be forced to adhere to civilised responses."*

And we all know from the presentations of the previous speakers that these responses, as civilised as they may be, can be implacably complex and cruelly slow…

This concludes my preamble, which simply aimed to give you an idea of the state of the victim who is about to become an actor in his/her judicial destiny by going to court seeking justice and compensation.

Part 2 : The psychosocial impact of the judicial procedure

This is now doubt when the impact of the judicial procedure can hit the victims, who are fragile to some extent. The many needs of the victims and, as a consequence, the many expectations they have, collide with a system that more often than not they did not know until then… This is what Nathalie Toledo underlined in her presentation:

« The first thing that springs to mind: I do not know of a single victim for whom the legal proceedings were not a source of violence."

And true enough, the road the victim is about to go down often looks like the road to hell!
From the police's questions to the endless waiting until the trial, the victim will be faced with two things.

First of all, the victim will be confronted with what s/he would prefer to forget and wish s/he had never gone through.
This means reliving the event during the legal proceedings. Then, there is the reality of the judicial system, which is not what the victim thought justice was like, it is nothing like s/he had imagined, not even vaguely, such as a cardinal virtue or a slightly fascinating and scary noble institution, but rather an organisation which, like any other, is ruled by laws, codes and procedures.

« [The victim may] realize that one's word and suffering will not be enough for Justice to be done […and] that if the facts are only too real for the victim, they might never become a judicial reality […]" (N. Toledo).

The victim will become aware of the fact that justice takes time and has the duty to be fair. That if s/he has rights, so does the accused. Finally, that in spite of the clear progress achieved in terms of the rights of the victims, s/he is not at the heart of the judicial procedure, unlike the accused, for whom this procedure was originally created.

Here again, the victim experiences violence, a feeling of helplessness and of dependence on others. More grieving processes to go through!

After the period of rupture comes the time for conflict and the feelings that go with it: anger and discouragement!
Indeed, the procedure means going down a fixed track, "There's no end to it!". The victim is put on the track but the locomotive is in trouble…

There is therefore a real risk for incomprehension to set in with a feeling of frustration which sometimes leads victims to enter into an endless spiral of claims. Also, the victims sometimes behave strangely… Their suffering and anger are uncomfortable to face and difficult to deal with!
How many times have we seen protesting victims disgusted by justice… And they tell us that "it is like banging your head against a wall…"! Impact, and new psychosocial upheavals that wear you out…

But at the end of this dark tunnel, what they expect is recognition or at least partial recognition!

Which is no doubt very important for the victims of terrorist acts since the supporting structure has been hit, i.e. society and all of its sections as a whole, i.e. this supporting structure that must sew wounds up and repair!
This is why there is much talk about secondary victimisation and the need to prevent it.

And it is precisely because it is very difficult for the victim to move within this structure and to face the system that several reforms have been introduced (following among others an unprecedented event in Belgium) that make the system more welcoming today!
The procedure has given back to the victim a more acceptable place. S/he is again in a position to act, which is all to the good. But behind the texts that organise the procedure, there are men and women. The police officer who takes the statement, the investigating judge, the trial judge, the court officials…

These people embody the supporting structure and the links we were talking about earlier. They are the surgeons who suture, each at their own level, the victims' wounds… The main part of the treatment (again in the words of C. Barois) is basically psychosocial treatment!
This means that aiding victims is team work and does not only involve mental health professionals.
The medical-administrative, social and legal statuses of the victims will be considered by health workers to be part of the victim's psychosocial support!
But meeting the various actors at these different levels, even more than the question of the statuses, will have very strong psychological effects on the victims in terms of trust, recognition and the feeling of being recognised as a person and not as a case.
As I was saying at the beginning of the conference, this is not about giving more rights but practising law differently, practising it better.

To conclude, it is important for me to say that many victims benefit from the good work of justice and of its procedures which participates in reducing their suffering and their trauma by reintroducing society's participation as represented by the actors of the legal system.
The victims of terrorism, more than other victims as we have seen, call upon the community. It is up to the community and therefore up to each and everyone of us to welcome them with warmth and understanding. This is how the links with society, which have been severed, can be symbolically repaired so that the impact is not longer the collision between two objects but the meeting of two subjects!

The victims of terrorist acts before the courts

By

Luc Walleyn

Lawyer

I. Introduction

Contrary to what one might think, the legal position of the victims of terrorist acts and their right to go to court are not straightforward either in Belgian courts or before international jurisdictions.

Over these last few years, extraordinary efforts have to made to fight against terrorism, be it at the national, international or European levels. However, victim support and compensation for the harm they have suffered are not top priorities for those who are involved in combating terrorism.

1. Terrorism as an international crime

The perpetrators of terrorist crimes often consider that the whole world is their field of action, and people fall victim to these actions not only in their own country but also abroad. However, the main reason why terrorism is considered to be an international crime is because it targets the States' vital interests. A set of international instruments covers this type of crime which, like war crimes, often leads to universal competency. Terrorism is fought against in the framework of international judicial and police cooperation.

2. Principles and guidelines concerning the rights of the victims

This "international terrorism law" does not give much space to the victims of terrorist acts. Until recently, this was also the case for international humanitarian law. Concerning IHL, the rights of the victims developed on the basis of international instruments guaranteeing human rights, which focused on protecting the rights of individuals. Indeed, in non-international armed conflicts, humanitarian law often applies in parallel with rules on human rights. Over the last few years, legal actions on the part of the victims of international crimes have developed quite spectacularly, unlike actions from the victims of terrorist acts. Yet terrorist acts also affect fundamental human rights: the right to life, the right to freedom, the right to physical integrity and to human dignity. These rights are even far more essential than the right to the freedom of expression, for instance, even if in the case of terrorism, the States do not violate them but private groups. This does not mean that the States do not have the obligation to prevent such violations and guarantee reparation where necessary.

At international level, the idea is developing whereby repressing international crimes does not only concern the States, the international community and the perpetrators but also the victims, and their rights are more readily taken into consideration as can be seen in the Rome Statute of the International Criminal Court. On 16th December 2005, the United Nations General Assembly, after years of preparation and discussions on projects in the ECOSOC framework, adopted a fundamental text titled "*Basic Principles and Guidelines on*

the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law"[1].

Among the principles laid down in the document, the first is precisely the right to an effective legal remedy for the victims of these violation.
The text then goes on to confirm the right of the victims to reparation which includes not only the payment of compensation but also: including restitution, compensation and rehabilitation, satisfaction and guarantees of non-repetition. In practice, all of these rights are difficult to achieve from one or several of the terrorists who have been sentenced, but the States might also have a role to play. Thirdly, the victims have a right to information. This right is mostly exercised with regard to the States and the international community. What happened exactly? Who is responsible for the crime? Where is the body of the family member who has been killed? How are the negotiations to have the hostage freed proceeding? For the families of the victims, these are vital questions.

II. The victims before the Belgian jurisdictions

1. The victims and their rights

In Belgian law, any natural or legal person who has suffered harm in relation to the crime is considered to be a victim. This is a very broad definition.

The rights of the victims in our national law are also very wide-ranging in comparison with other legal systems such as Anglo-Saxon law:

- the victim may associate in a court action with the public prosecutor, can participate in the debates, have the witnesses questioned, appeal…
- s/he may take legal action by associating in a court action with the public prosecutor
- the victim has several rights during the investigation (information, requests for investigations…), which were recently extended with the Franchimont reform of the "Code d'instruction criminelle" (Criminal investigation code).

However, the rights of the victims of crimes committed abroad, as is often the case for Belgian victims of terrorist act, were recently limited by the Law of 5th August 2003 on serious violations of international humanitarian law. This law not only limited the scope of application of universal competency for grave violations of humanitarian law but also dealt with a series of other cases concerning extraterritorial competencies.

[1] G.A. Res. 60/147, U.N. Doc. A/RES/60/147

In fact, the position of victims of crimes committed abroad – such as the attacks in Madrid – is extremely complicated. Their possibilities of accessing justice vary widely depending on whether the perpetrator is on Belgian soil or abroad.

2. The rights of a victim when the perpetrator of the crime is in Belgian territory

- Of course, the possibilities of action for the victim are countless when the crime has been committed either in Belgium or on a Belgian ship or in a diplomatic post, these places being assimilated to Belgian territory.
- If a crime committed against a Belgian citizen in a foreign country is punishable in this particular country with a sentence of over five years' imprisonment, the victim may associate in a court action with the public prosecutor against an offender as soon as this offender is on Belgian soil.
- Any victim of a crime as defined by the Strasbourg Convention of 27th January against terrorism may associate in a court action with the public prosecutor against a perpetrator whose extradition is refused by Belgium[2].
- The victims of a terrorist crime as defined by the Penal Code (Articles 147 and following) which has been committed abroad against a Belgian citizen or against a Belgian or European institution may associate in a court action with the public prosecutor if the perpetrator is in Belgian territory.

3. Action against a perpetrator who is outside Belgian territory

Things become more complicated if the perpetrator is abroad. In the hypothesis that a person is the victim of a crime committed abroad by a foreigner, proceedings *in absentia* are generally impossible unless the crime falls within the jurisdiction of international humanitarian law, i.e. a war crime, a crime against humanity or a crime of genocide. Certain terrorist acts may also constitute such crimes. But even if the Belgian jurisdictions are competent, the victims rarely have the right to engage in proceedings.

- If the crime has been committed by a Belgian or by a person who habitually resides in Belgium, there is a possibility to associate in a court action with the public prosecution, even if the perpetrator is abroad.
- This is also the case of a perpetrator, even if s/he is foreign, who is attached to a unit of the Belgian army abroad or authorised to be part of the troops.
- The victim of a war crime committed *in wartime* against a Belgian, a foreigner residing in Belgium or from an allied country may also associate in court proceedings with the public prosecutor.

4. The Federal Prosecutor's monopoly brought into question

[2] This Convention is also the only convention to have been incorporated as such in our criminal procedure, but the definition of a terrorist crime in the Strasbourg Convention is not identical to the definition that appears in the Belgian Penal Code.

In other cases, the Law of 5th August 2003 gave the Federal Prosecutor alone the right to prosecute a crime which falls under the competency of Belgian jurisdictions but which has been committed abroad by a foreigner who is outside the territory. Following the ruling of the Arbitral Court of 23rd May 2005 which annulled this measure, it is again possible to associate with the public prosecutor before the investigating judge since 1st April of this year. However, a Bill was recently tabled in the Chamber of Representatives with a view to reintroducing the Prosecutor's monopoly in these situations. This Bill takes into consideration the criticisms expressed by the Arbitral Court (the decision to not proceed with a claim would be made by the "Chambres des mises en accusation" (Court's indictment division) and no longer by the Prosecutor alone).

Under the regime annulled by the Arbitral Court, the prosecution of terrorist acts committed abroad by foreigners was possible but of the sole competency of the Federal Prosecutor in the following cases:

1) Crimes characteristic of war crimes or of crimes against humanity committed against a Belgian or against a person who is a legal resident of Belgium.
2) Crimes for which Belgian courts are competent in view of an international obligation to prosecute.

A series of international conventions on terrorism bring about this obligation to prosecute:

- The Hague Convention of 16th September 1970, for the suppression of unlawful seizure of aircraft ;
- The Montreal Convention of 23rd September 1971, which concerns the suppression of unlawful acts against the safety of civil aviation, i.e. aerial hijacking and other actions against civil aviation;
- The New York Convention of 14th December 1973 on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including diplomatic agents;
- the European Convention on the Suppression of Terrorism, signed in Strasbourg on 27th January 1977 (which is incorporated in our penal procedure);
- The New York Convention of 10th December 1984 Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This Convention may of course apply for instance if persons kidnapped by terrorists are victims of torture or degrading treatment;
- The New York Convention of 12th January 1998 for the Suppression of Terrorist Bombings.

In all of these cases, Belgium is under the obligation to prosecute, for instance if extradition is refused or if the perpetrator, found on the territory, is handed over (the *aut dedere aut judicare* principle), but the victim had to (and will no doubt still have to) wait for the Federal Prosecutor to refer the case to an investigating judge before s/he can associate in a court action with the public prosecutor.

The victims may also take civil action. In rare cases, this can make sense. Sometimes, terrorist groups are not only linked to States but also to private persons who own property in Belgium or elsewhere. If measures in terms of frozen property do not aim to bring the victims compensation, the victims might however be able to get hold of some of these resources. They may also take action against persons, companies or organisations suspected of aiding and abetting terrorism.

Abroad, in American courts for instance, a series of rulings have been made in terms of complicity with terrorism based on the "*Alien Torts Claim Act*". It is possible, by implementing these decisions, to seize property in Belgium, which naturally brings about the problem of immunity that often arises with foreign States.

Action in a civil court can *inter alia* offer an opportunity if the Prosecution remains inactive. Conflicts of interest between the Prosecution and the victims or simply different views on the policy of prosecution are indeed possible. The Prosecution may choose to not prosecute an accomplice but focus on the main perpetrator, for example. In cases of war crimes, situations occur where the authorities prefer to not prosecute in order to not affect a peace process. Some of you might remember the case of the Franco-Belgian family on a cruise which was kidnapped off the Libyan coast by the Abou Nidal Palestinian group. These people were held captive for several years and were finally released after a ransom was paid to their kidnappers, with economic and diplomatic compensation for Libya's intervention. Belgium was shocked by the fact that the main suspect in this case was arrested one day in Brussels in possession of a visa delivered by the Ministry for Foreign Affairs of the time, and had probably come to pick up the ransom.
Another example is the Lockerbie case. The victims' case was dismissed by the French Court of Cassation, and they were not allowed to take part in the Dutch trial where some of the perpetrators were finally sentenced. Although Libya did finally pay the victims high compensation, this was only the indirect result of the legal proceedings, following negotiations, and diplomatic and economic pressures.

In short, the victims are often quite powerless, lacking information and means.

III The victims before international jurisdictions

Certain international crimes fall within the competence of international jurisdictions, but no international jurisdiction is explicitly competent to rule on terrorist crimes. If this is sometimes the case, it is because certain terrorist crimes are also war crimes or even crimes against humanity. Very serious terrorist acts such as September 11 in the United States or the attacks in Madrid on 11th March 2004 can be considered as large-scale attacks against a population of civilians, which is in line with the definition of crimes against humanity.

- Several international courts are competent to rule on war crimes and crimes against humanity. However, no intervention is possible before the courts created by the United Nations in the cases of Former Yugoslavia and Rwanda for the victims of these crimes except as witnesses for the Prosecutor.
- Before mixed courts such as the Special Tribunal for Sierra Leone, some courts in Bosnia and in Kosovo, the victims do not, as a rule, intervene either.
- There is however, and this is quite revolutionary, a possibility for victims to intervene before the International Criminal Court. The Statute and the Rules of Procedure and Evidence of the Court are joining the trend that is becoming standard procedure when it comes to victims' access to justice.

1. The victims before the International Criminal Court

One cannot say at this level that victims can associate with the public prosecutor in the classic Roman-Germanic sense but they may be heard by the Court that has to judge the perpetrator, express their views and preoccupations, that might in some cases be different from those of the Prosecutor or of the claiming party, and obtain reparation.

Before the International Criminal Court, the status of the victims is fairly hybrid but recent developments, as well as recent jurisprudence, are clearly giving them more and more rights. In the Court's Statute, the rights of the victims were only at the embryonic stage. They are already far more developed in the Court's Rules of Procedure and Evidence. Just a few weeks ago, the Court's Pre-Trial Chamber announced a very important decision regarding the possibilities of victims to intervene during the procedure. This decision goes a long way and was made at the victims' request via the International Federation of Human Rights.

In general terms, the possibilities for action can be summarised as follows:

- The victims may take part in the preliminary hearings on the competency of the Court, on the admissibility and, following this recent decision of the Pre-Trial Chamber, on all questions concerning the investigation concerning them.
- They can also participate in the procedure on the substance of the case, but they have less rights in this respect than the defence.
- The victims may have a legal representative, but the Court may impose a common Counsel.
- There is, finally, the reparation phase. The victims may obtain compensation and other forms of reparation not only from the accused but possibly also from the Trust Fund that was set up in the framework of the Rome Statute.

This Trust Fund, which does not, unfortunately, have many funds to hand out to the too numerous victims of crimes against humanity, might serve as a model for the creation of a compensation fund for the victims of terrorist acts.

2. The rights of the witnesses

To conclude, I would like to stress that the victims, whether before internal or international jurisdictions, may also have their own interests as witnesses. It might be in the Accusation's interest for the witness to speak, while it might be in the witness's interest to remain silent if s/he risks retaliation. S/he may also wish to protect his/her honour or intimacy, in the case of sexual crimes, for instance. The victims must also be able to ensure their rights are respected after the trial, by requesting for example protection measures, anonymity or measures concerning the hearing (from a distance, by video link etc…).

General Conclusions

By

Christian de Valkeneer

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After such rich presentations, it is of course very difficult to conclude since we dealt with international cooperation and the way Europe is trying to deal with the issue of terrorism, with the way victims could receive reparation and might finally be taken into consideration in a "terrorist trial", not to mention the issue of applying Belgian antiterrorist legislation and how to deal with the victim at his/her personal level.

Personally, I was most affected by some points that Mister Lorent made in his presentation, for example. I think that an important idea underlined by Mister Lorent is that, all in all, what is vital for the victim if the way the victim will be dealt with by all of the actors of the judicial system. I really think this is essential. I think that, as a magistrate, it is as fundamental as realising that, beyond the efficiency of prosecutions, and even beyond repression and getting a ruling in a court for a prosecutor or for a judge to pronounce a technically and legally excellent ruling, there is also the fact of taking into consideration this victim and what s/he is trying to say.

I chaired for a year Brussels' accelerated justice chamber, where we dealt with "small cases", i.e. cases where the debates did not last very long. It took twenty or thirty minutes, and the facts were not extremely serious. I always wondered how important it was for victims to come and explain what had happened to them. In fact, even if their testimony did not contribute anything that constituted criminal evidence, it was important to allow them to speak and to finally be able to express something to the judicial system, to also be able to tell the perpetrator what they had been through, what they felt about the fact that they had been a victim. I think that this opportunity to speak is very important and that, indeed, we shall never repeat often enough to future lawyers or indeed to legal professionals how important it is to allow not only the victims but also all the other parties in a criminal trial, including the perpetrator of the crime, to speak. Room must be made for them to express themselves.

Now I would like to finish with a two-toned conclusion, i.e. with a pessimist note and a optimistic one.

On the pessimistic front, I tend to think that over the next few years we are going to live through a series of terrorist attacks against which our system is relatively powerless. And, as we said earlier, I believe that the greatest danger, or the greatest mistake we could make would be to want to respond to violence with another form of violence, with legal violence, where we would end up legalising, in a way, torture and all sorts of actions that are completely in contradiction with the essence and the very foundations of our societies. So, I think that democracies are relatively inefficiently armed against the type of terrorism we have experienced over these last years. We should not kid ourselves. We will certainly arrest some more people. But regarding suicide attacks, I think we are inadequately armed since we have relatively few elements of prevention in this respect.

Now I have a more optimistic thought: behind the people who commit these acts, there are men and women. I have approached quite a few who were accused or charged for terrorism one way or another. What has always amazed me, all in all, is how human these people are. I think that, in future, it would be in our interest to think about the mechanisms that can bring some people to act out, or at any rate the conditions that bring about these actions. Criminology work is really needed here on why people act out and how mechanisms set in in people who will engage themselves in a certain type of combat that might go as far as a suicide attack, i.e. their death. For instance, in the London attacks of July 2005, it appeared that we were dealing with people who were either perfectly or very well or relatively well integrated. At any rate, these people were not complete outcasts. At some stage, they got involved in a process that led them to carry out a suicide attack. In this respect, I think work really needs to be done to try and understand what goes on in people's minds instead of counting on a purely repressive system that risks, in my opinion, to lead to excesses and, finally, to become a kind of breeding ground for other types of terrorism and other candidates for terrorism. It is necessary to think about the mechanisms that lead to these acting outs because I think that some avenues might be worth exploring which would make it possible to introduce certain preventive measures which, to my mind, are probably more fruitful than repression, even if repression is useful from time to time.

This repression must, on the one hand, remain within the legal framework or at any rate respect fundamental rights. This repression must be limited to people who can be labelled at a point in time as real terrorists, i.e. who might resort to blind violence or contribute to the use of blind violence at some point in time. The aim is also to not cause confusion by considering for instance that such and such a person is a terrorist or is a member of a terrorist group because of something s/he might have said, which might supposedly justify repressing them. This would indirectly feed terrorism, which is naturally the absolutely perverse effect that repression can have.