

The victims of terrorist acts before the courts

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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

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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...

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

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- 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.

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 Belgium².
- 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.

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.

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www.eureste.org**

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

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:

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- 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

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www.eureste.org**

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

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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...).