

# **Incorporating victims' views in reparation cases: a challenge for lawyers.**

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## **1. Analysing the views of a victims' group**

Representing victims of mass crimes is an exiting but difficult job, which has nothing to do with just supporting the prosecution.

Before coming to the issue of reparation, counsel must present, in the language of the ICC Statute, “the views and concerns” of this clients. Analysing the objectives of a victim's group and translating them in a legal action is the first difficulty counsel will meet.

Members of a group of victims don't necessarily have all the same view on their situation. Some of them can even support the defence, as happened in the Belgian trials about the genocide of Tutsi in Rwanda, where some genocide survivors were saved by one of the accused. The fact that victims are organised in a group or structure does not always makes things more easy, as spokesmen of a group can have a political agenda, which is not shared by all members.

When security requirements permits, meeting with the whole group of victims, but also individual contacts, if not with all, at least with some of the members of the group is essential for a counsel to know what the expectations of his clients are, to inform them about the legal possibilities and to share with them the strategic choices to be made.

Discussions on legal strategy can provoke conflicts or split groups, what counsel should avoid when possible, stressing common interest of the group, sometimes de facto becoming conciliator or arbiter.

For my limited experience, the first thing victims of crimes against humanity and war crimes want is generally not compensation, but justice. In their view, compensation should be the result of a process of accountability. Victims know that the outcome of a legal action is uncertain. Thirsty of justice, they accept the risk of a defeat by challenging the persons they consider as responsible for their suffering, hoping the action will at least give publicity to their view, enforce the changes for punishment or accountability, and stress their views on the situation.

Two important traps are to be avoided. The first is to accept cases without legal or factual ground and without any chance of success. Even if the victims insist to do so, it would be rendering them a bad service, and make abuse of the justice system for purely political purposes. The second possible trap is to raise illusions about

compensation. Outreach programs for victims in the framework of the ICC should avoid this too. When the primary motivation of victims becomes financial compensation, a case can also be polluted by false or exaggerated claims.

## **2. Compensation and accountability**

Although for most of the victims, compensation is not the main issue, their participation is often seen as a compensation claim. In the ICC system, applications for participation and for reparation are clearly distinct. This means that a victim can ask for participation, even if he or she doesn't intend to ask for reparation, because of the fact that the accused is indigent, or reparation is made through other channels.

Reparation alone can never be a substitute for accountability. All the families of Belgian peace keepers killed on the first day of the Rwandese genocide received financial compensation from the Belgian state, still it is essential for them to see also those responsible for this killing before a court.

In the Lubanga case, former child soldiers and their families are mainly participating because they want to be recognized as victims, not as perpetrators, because they feel betrayed by those who pretended to be their leaders and representatives.

In some cases even the very qualification of the events can be important for victims (genocide or assassination for example)

Of course, reparation is important too, as a matter of principle, but also because much victims of war crimes and crimes against humanity are living in very difficult conditions . The approach of victims regarding financial compensation depends on the circumstances.

When relatives of Belgians who disappeared or were killed during the Guatemalan dictatorship lodged a complaint on the universal jurisdiction law, the embassy invited them to discuss on a compensation agreement. The immediate reaction was to consider this as an attempt to cover up the case by “buying” the plaintiffs. They wanted to know what happened exactly to their family members and who decided that they had to disappear, find their remains. They wanted prosecution and punishment for the individuals responsible for their sufferings. They wanted justice, not money.

In 2001, two Rwandese nuns were convicted in Belgium for their role in the killing of hundreds of Tutsi who tried to find a safe heaven in the buildings of their convent. For the relatives of these people and the genocide survivors in general, this was an important victory.

As counsel of a group of widows which could assess the responsibility of these nuns for the death of their husband, I discovered that the issue of negotiating compensation with the convent became a political issue

and was seen as an attempt of the nuns to obtain from the victims a positive advice for their anticipated liberation. Within the group of victims, the tension was visible between those looking to the past who wanted justice, and those looking not only for improvement of their present poor condition, but also for a better relationship with their neighbours.

But a victim of torture in Saudi Arabia asked immediately a financial agreement, and lodged only a criminal complaint when his request was rejected by the Saudi government.

When payment of compensation is the result of an acceptance of responsibility or the application of the restitution principle, it will be seen as a valuable act of justice by the victims, certainly when it results from a process of negotiation with their representatives. This was the case when the Belgian state and financial institutions accepted recently a compensation program for goods and assets of holocaust victims.

Financial intervention by international funds is certainly justified when the international community bears a part of responsibility for it's failing to avoid the crimes to be committed. It is more problematic if there is no link between responsibility and reparation. When reparation is a unilateral decision of a national or international

institution, compensation can be seen as just a lucky incident, if not as charity.

For the victims, the origin of compensation is important. The group of Rwandese widows I quoted yet received help from a protestant Ngo to repair their houses. This was welcome, but seen as charity, not as compensation. If the Catholic Church had done the same, it would have been seen as compensation and accountability.

The origin of compensation funds is thus not neutral, and this could become an important aspect of the discussion on the ICC victims' trust fund and other compensation programs. Recuperation of assets of perpetrators is as important as contributions of sponsors.

### **3. Individual and collective reparation**

Collective forms of reparation are often a logical approach to offer redress to traumatised communities. In most occidental legal systems however, reparation is an individual problem, certainly in civil law systems where even the concept of "class action" is unknown. The counsel representing a group of victims will then be forced to translate the demand of a group of clients, even if they are organised, into individual applications for compensation. This translation risks also breaking the solidarity of the group. When convicted have some

assets, only those victims who were represented in court will be able to obtain compensation, the most assertive ones, those with the highest education and sometimes the most wealthy, where others in the same situation will stay without relief.

Discrimination within the group of victims is often inherent in reparation and restitution programs based on individual claims.

Another disadvantage is that no compensation is to be paid to families who were totally exterminated. That's why the Belgian compensation program provides that part of the compensation will be collective, through representatives of the Jewish community legally recognised as such. Unfortunately, no solution could be found for the badly organized Gypsy community.

But also collective reparation represents danger that must be taken into account. In Rwanda, Tutsi survivors of the genocide are sharing their neighbourhood with Hutu families. Compensation for victims can raise jealousy, jeopardize reconciliation between communities, revive the conflict between groups that was at the origin of the crimes committed, and eventually put the beneficiaries at risk. Even the few advantages accorded to families of genocide victims by the Rwandese government, like free school inscription for children, were criticised as forms of ethnical discrimination. So collective reparation also needs explanation and if possible, acceptance of all communities concerned.

#### **4. Avoiding new victimisation**

Victims searching for justice and redress are taking risks. Even when the conflict is officially terminated, the hatred is still there. Victims asking for justice are often seen as enemies searching for revenge.

For victims, the decision to participate in a legal action is not an easy step. It reopens old wounds, entails a new confrontation with a difficult past. Especially for victims of sexual violence, participation in a legal action can provoke a need for psychological help. The counsel must take this into account when questioning his clients and asking them to testify.

Other victims want to speak out and to testify. Challenging and confronting the presumed perpetrators can restore their dignity and self confidence. Unfortunately, it can also put them at risk. In a region in conflict, any contact with a foreigner can create a security risk. It is a duty for lawyers as for investigators to protect the safety of victims and witnesses through a professional approach, sometimes by asking the court to protect their anonymity. One of my clients and genocide survivor was heard as witness in the second Brussels Rwanda trial. Probably because of her cooperation with the Belgian investigators and the publication of her name in the case record, she has been sexually assaulted again, just before the start of the trial. In

the Lubanga case, the Court accepted the anonymity of participating victims, although after the hearing on the confirmation of charges, one of the participating victims was nevertheless discovered and threatened and protections was to be organised.

## **5. Counsel as independent spokesman**

Last but not least, presenting the views and concerns of victims is also encouraging understanding for them. When Palestinian survivors of the Sabra & Shatila massacre used the Belgian law to force an independent investigation, it was a hard challenge for them and for their lawyers to convince the Israeli and even international public opinion that legal action is not revenge, but an alternative for revenge. It was equally difficult to convince the Lebanese and Arab public opinion that an international investigation should entail accountability, not only of Israeli officials, but also of Lebanese individuals, notwithstanding the amnesty law. When radical political groups tried to get control over the action, the legal team was heavily criticized in the Lebanese press for cooperating with Jewish-Israeli lawyers and suspicion was created against the Lebanese member of the team because of his Christian origin.

Crimes against humanity are often committed in a political context. In cases of international crimes, a legal case can become a political or diplomatic struggle, or will at least be influenced by political factors.

Lawyers, who don't necessarily share the political analyses of their clients on the situation in their country, must find a difficult balance between the need for presenting their views and concerns, and the risk of getting involved in an ongoing conflict. Certainly in less developed regions, identification between a lawyer and his clients occurs easily.

Reparation is a form of justice; it must also be seen as justice.

Internal judicial systems, as the ICC, give victims the opportunity to have an influence, not only on reparation issues, but also on issues of jurisdiction, criminal responsibility, and even provisional or conditional liberty of the accused or convicted. Being heard is essential for victims, and should of course also be possible in reparation procedures themselves, to make reparation an issue of justice.