LAW *campaign*

Belgian law to punish grave breaches of Int. Humanitarian Law

A contested law with uncontested objectives

STEFAAN SMIS *and* **KIM VAN DER BORGHT**

IN 1993, Belgium enacted a law that placed it in the lead of a development in international and national law that was reinvigorated following the horrendous crimes committed during the Nazi regime. Following the Second World War, the main perpetrators were brought to trial before the ad hoc military tribunals of Nuremberg and Tokyo. To ensure that the remaining perpetrators would not remain unpunished, the then newly established State of Israel adopted implementing legislation to accept claims brought to its courts for genocide, war crimes and crimes against humanity. The Belgian law represented a further step in that direction.

The Belgian law of 1993, as amended in 1999, allowed Belgian courts to prosecute persons for genocide, war crimes and crimes against humanity on the basis of universal jurisdiction in absentia. This meant that Belgian courts had jurisdiction to prosecute such crimes regardless of the place of commission of the crime, the presence of the perpetrator on Belgian territory, the nationality of the perpetrator or the victim or the time the crime was committed. To bring a claim a person need not have to be a Belgian national or reside in Belgium. The law moreover recognised no immunities on the basis of the official position of the person.

Functional immunities

The law was not uncontested. It was praised by human rights organisations, but doubts were raised about its legality in international law. By rejecting all immunities, it led to tension with well-established rules of diplomatic law that accord functional immunity to Heads of State, Heads of Government and Ministers of Foreign Affairs while they are in office, to allow them to perform their function unhindered. In this context, Judge Oda wrote that Belgium might well have been at the forefront of a trend, but the International Court of Justice decided that Belgium had outrun international legal developments. The Court judged that the immunity of incumbent Heads of State, Heads of Government and of Ministers of Foreign Affairs is complete. The Court emphasised that this immunity does not mean impunity in respect of all crimes that may have been committed while in office. These high offices accord complete immunity from prosecution by a foreign jurisdiction, but only for as long as these offices are held. Even when in office, a Head of State, Head of Government or a Minister of Foreign Affairs can be tried by his or her national courts or by an international criminal court if such a court has jurisdiction.

An amendment in 2003 brought the Belgian law in line with this judgement of the International Court of Justice by setting aside immunities only as far as international law permits. This formulation allows the Belgian law to develop in line with international law rather than ahead of it.

Filtering genuine claims from abuses of legal process

During extensive discussions in the Justice Commission of the Belgian Chamber of Representatives, it was recognised that the law could be abused by bringing unsubstantiated and politically motivated claims to Belgian courts. Given the publicity such claims would receive, it was probable that some individuals or groups would use this to voice their political opinions. The Belgian legislature wanted to ensure that such claims could be dismissed at the earliest opportunity or transferred to a more appropriate jurisdiction where the claim could be better assessed.

In the law, a distinction was made between claims brought on the basis of universal jurisdiction in absentia and claims that have a link with Belgium. In claims brought by Belgian nationals or persons in Belgium, the default rules of Belgian law apply that prohibit abuses of the court system. If no direct link exists with Belgium, only the Federal Prosecutor can initiate a criminal investigation. The Federal Prosecutor will initiate such an investigation unless one of the four exceptions listed in Article 7(1) apply: if the claim is clearly without merit; if the facts described in the claim cannot be interpreted as constituting a crime as defined in the law; if the claim cannot give rise to an admissible criminal investigation; or where the needs of justice or the international obligations of Belgium require that the claim should be brought before an international court or tribunal, before the national courts of the place of commission of the suspected crimes, the national courts of the state from which the suspect is a national or where the suspect can be found. Under the latter circumstances, the Federal Prosecutor will not initiate criminal investigations if he judges that such courts or tribunals have jurisdiction and are independent, impartial and equitable. If the decision of the Federal Prosecutor is taken on the basis of the fourth exception, the Minister of Justice is obliged to inform the relevant authorities of this decision and of the facts of the case. Against the decision of the Federal Prosecutor not to initiate criminal proceedings, an appeal is possible in the Court of Appeal.

Contributing to a comprehensive international system

The 2003 amendments to the law make the prosecution for genocide, war crimes and crimes against humanity part of a comprehensive international system that was completed by the establishment of the International Criminal Court. Notwithstanding the general principle maintained in the law that accords universal jurisdiction to Belgian courts even if the suspected perpetrator is not found in Belgium, it is the intention of the Belgian legislature to avoid using such universal jurisdiction in absentia if more appropriate mechanisms are available to obtain justice for the victims. Claims can be transferred to the International Criminal Court. The procedure prescribes that the Minister of Justice in consultation with the Council of Ministers issues an executive order informing the International Criminal Court of its intention. This is not possible for a claim that refers to a crime committed on Belgian territory or that is committed by or against a Belgian national, unless this crime is identical with or connected to a crime for which the International Criminal Court has accepted a claim as admissible. The Belgian courts can regain jurisdiction over the claim if the International Criminal Court does not initiate an investigation or declares the claim inadmissible or outside its jurisdiction.

Transferring a claim to another state is subject to the prevailing jurisdiction of the International Criminal Court, and can be done via two distinct procedures. The first procedure allows the transfer of a claim to a court or tribunal of the state where the crime was committed. Unless the crime was committed in Belgium, the claim can also be transferred to a court or tribunal of the state of which the suspected perpetrator is a national or where the suspected perpetrator can be found. Such a transfer is conditional upon such a court or tribunal respecting basic principles of equity. The second procedure is the transfer to the state of which the suspected perpetrator is a national on the condition that that state criminalises grave breaches of humanitarian law and guarantees the right to an equitable trial. Such a transfer is not possible if the victim is a Belgian national or if the crime was committed in Belgium. Under the second procedure, there is no guarantee that the claim will ever be presented to a court in the transferee state. The decision-making procedure in Belgium for such transfers to a state or to the court or tribunals of a state involves the intervention of the Minister of Justice in consultation with the Council of Ministers.

A national law in line with definitions of international crimes

Taking into account the rapid entry into force of the Statute of the International Criminal Court and the definitions of crimes used in this instrument, it became necessary to amend the law and adapt its definitions to the new international instruments. The entry into force of the Rome Statute required cooperation between Belgium, the International Criminal Court and other countries that might exercise jurisdiction. The descriptions of the crimes in the 2003 amendments (Article 1) are parallel with those in the Rome Statute. Even though the Rome Statute was the main source of inspiration for the amendments, certain other international instruments were also taken into account such as the second protocol of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

Concluding remarks

The 2003 amendments of the Belgian law limited the scope of the law by incorporating the judgement of the International Court of Justice and by basing its definitions on international instruments. Nevertheless, the amended law has led to diplomatic tension between Belgium and some of the countries with which it maintains good relations. Specifically, strong pressures from Israel and the United States have led to a decision of the incumbent Belgian Government to introduce a new series of amendments that require a clear link with Belgium before a Belgian court can accept jurisdiction. The future law will be based on the nationality principle, allowing Belgian courts to accept cases where the perpetrator is a Belgian national or normally resides in Belgium. A claim can be also be accepted on the passive personality principle allowing Belgian courts to accept cases where the victim is a Belgian national or has resided in Belgium for at least three years. Moreover, a claim will only be accepted if the suspected perpetrator is a national of a country that does not criminalise genocide, war crimes and crimes against humanity or that cannot guarantee a fair trial.

To ensure that no uncertainty exists about the immunities of government officials visiting Belgium to attend meetings of international organisations or about the immunities of officials of international organisations based in Belgium, the future law will contain explicit provisions detailing these immunities as they exist both in international customary law and in the treaties to which Belgium is a party.

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LAW *advocacy*

AI open letter to the Prime Minister

Dear Prime Minister,

Amnesty International is concerned about reports that the Government of Bangladesh is considering signing a bilateral agreement with the United States of America (USA) providing impunity to any USA nationals within its territory if a warrant of arrest or surrender has been issued against them by the International Criminal Court (ICC) on grounds of genocide, crimes against humanity and war crimes committed anywhere including crime committed on the territory of your state.

Amnesty International is writing to urge you to refuse to sign this agreement, as it would violate Bangladesh's obligations under international law, including the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948 (Genocide Convention) which was ratified by Bangladesh on 5 October 1998.

Signing the above mentioned agreement with the USA will violate Bangladesh's obligation under Article 4 of the Genocide Convention.In addition, Bangladesh would be in breach of Article 6 of that convention.

Amnesty International has been working towards the establishment of the ICC for nearly 10 years, believing that it is an essential mechanism to end impunity for the worst crimes known to humanity. No one should have impunity for these crimes.

Amnesty International is confident that the ICC, with 18 of the highest qualified and respected judges in the international community and a highly qualified and experienced Prosecutor will allay the US government's concerns and that the US government will in due course change its position.

Amnesty International hopes that you will consider the following legal arguments against impunity agreements which are set out in detail in International Criminal Court: US efforts to obtain impunity for genocide, crimes against humanity and war crimes.

Impunity agreements are unlawful because they commit states to violate their legal obligations under international law, including the Rome Statute, to bring those responsible for genocide, crimes against humanity and war crimes to justice.

Impunity agreements are not permitted by the Rome Statute. US assertions that the agreements are provided for in Article 98 of the Statute are incorrect, as numerous legal analyses, including by Amnesty International, conclude.

Impunity agreements contain no assurance that if US nationals are not surrendered to the ICC they will be brought to justice in the USA or anywhere else. In fact, in some cases the US judicial system would not be able to do so as US criminal law does not include many of the crimes under international law included in the Rome Statute.

The European Union's legal experts have also analysed the agreement and have reached the same conclusion: "entering into US agreements - as presently drafted - would be inconsistent with ICC States Parties' obligations with regard to the ICC Statute and may be inconsistent with other international agreements to which ICC States Parties are Parties."

A state ratifying such an impunity agreement would also give up its sovereign right to decide which court - whether one of its own courts, the courts of another state seeking extradition or the ICC - would exercise jurisdiction over persons found in its territory accused of crimes, including crimes in its own territory.

If the USA decided not to investigate or prosecute the accused, the state that surrendered the person would have no way to compel the accused to return for investigation and prosecution in its courts, or the courts of another state, or to ensure the surrender of the accused to the ICC.

AI would also like to point out that so far, to the best of our knowledge, the USA has not taken retaliatory measures against any state that has refused to sign such agreements. The American Service members' Protection Act, which authorises withdrawal of military assistance also, provides that the President may waive it at any time for reasons of 'national interest'. There is therefore no obligation on the US Administration to cease military aid if an impunity agreement is not signed.

We hope that you will refuse to enter into this agreement or any agreement that seeks to provide impunity to anyone accused of genocide, crimes against humanity and war crimes. We also hope that you will take steps to promote Bangladesh's ratification of the Rome Statute of the International Criminal Court as soon as possible.

LAW *reform*

Justice delivery system

Internal component for delay should be eliminated

MD. NUR ISLAM

THE justice delivery system in our country is time consuming and unaffordable to the poor people to some extent. The existing regime of civil suits in Bangladesh is governed by the Code of Civil Procedure enacted in 1908. Since then little change has taken place. The legal system may very well be described as admirable but at the same time slow and costly and entails an immense sacrifice of time, money and talent. The causes of backlog and delay of disposal of cases are systematic and profound. The legal system's failure to impose the necessary discipline at different stages of trial of cases allows dilatory practice to protect the case life. A case usually takes about ten to twenty years to disposed of. It is learnt that nearly one million cases are now pending in different courts of the country. The break-up of this backlog is: 4,946 cases in the Appellate Division of the supreme court; 1,27,244 cases in the High court Division, 3,44,518 civil cases and 95,689 criminal case in the judges court and 2,96,862 cases with Magistrate courts and 99,004 cases with Metropolitan Magistrate courts. After years of controversy and frustration of the problem of administration of justice system, a new device needs to be chalked out.

Components of delay in civil cases

A great deal of delay occurs in summon service, processes filed by the parties are not promptly sent to the nazir for service; unduly long adjournments are frequently granted as a matter of course for filing deficit court fees on plaints, process-fees, cost, commissions etc. Tardy practices are made in filing written statement; amendment of pleading even at belated stage; substitution of parties also causes delay of disposal of suits. Want of skilled lawyer and indifferent court is also a contributing device for causing delay of disposal of suits.

Components of delay in criminal cases

Absence of witnesses in the criminal cases even after repeated issuance of summons and warrants; driving out of the witnesses of the criminal case by the defence side in a collusive venture and connivance; absence of prosecutor and defiance lawyer; non-production of accused persons by the jail authority are the key component hindering speedy disposal of cases. Failure of producing the accused persons by the jail authority outside the districts on grounds of their involvement and being wanted in other criminals of the said districts for shortage of police escorts; abscondence of the accused persons and their voluntary surrender before the court in the middle of trial seeking for recalling of the witnesses already examined which cause the delay. Splitting up of the criminal records for simultaneous trial of the adult as well as juvenile offenders at two separate court; frequent hearing to the bail matters for the same accused persons; non-appearance of the magistrate recording the confessional statements of the accused persons even after repeated issuance of summons and processes; non-arrival of the Investigation officer even after exhaustion of all the process; non-compliance of warrants by the police personnel; non-appearance of the expert witnesses for proof of the expert reports and dilatory tactics of the defence lawyer etc are the usual components of delay in the disposal of criminal cases. These are the common causes of delay, which are generally faced by the Sessions, Special and Tribunal Judges during the trial of criminal cases.

Some recommendations to avoid delay

Court supervision and monitoring

A consensus has emerged that a docket can be current only when a judge supervises the scheduling and progress of all steps of the case with systematic case management. Once a litigant invokes the jurisdiction of the court, the court has the responsibility of pressing the lawyers and litigants to prepare the case for adjudication without delay. The court's loss of control over the litigation invariably leads to procedural inactivity.

In reality, each case is to be supervised throughout its life with no unreasonable interruption in its procedural development. Monitoring can play the pivotal role for improved court administration and case management. In terms of monitoring, the District & Sessions Judges may hold the key position in the lower judiciary and as such their responsibility to enhance improved court management is a must. In this sphere, the following strategies can be recommended:

- Quarterly sitting arrangement;
- Interaction with Bar in respect of related matters;
- Co-ordination with the Judges of Subordinate court;

Monitoring in terms of providing logistic support. Here logistic support includes skilled staff, necessary Stenographer/Typist, accommodation of office and residence and transport facility of the judges.

Time saving device

By applying the time saving devices we can save more time. As it is seen in the different stages of the suits/cases there are some time killing matters. Those stages can be avoided or minimised by the presiding Judges by applying the appropriate means.

Introduction of informal justice system

Alternative dispute resolution system can be strongly recommended to overcome those set backs and delays beside the formal justice system in order to eliminate the endless sufferings of the poor litigants. This new device can be developed by practising dispensation of justice in traditional methods like mediation, conciliation and arbitration. For the first time in our legal system the provisions with regard to ADR has been introduced by amending the code of civil procedure. In chapter V of Artha Rin Adalat Ain, the provisions of ADR have also been incorporated. Certainly, this concept is denovo in our Civil Justice Delivery System.

Tired and frustrated litigant !

Case categorisation system

For the purpose of filing and record, cases will be classified according to subject matter/type and possibly also value and age. This could help with the consolidation of similar types of cases for hearing and disposal by the judge at the same time and assist the case tracking and case flow management finally resulting in expeditious disposal of suits and cases.

Effective legal aid system

The main objective of legal aid system is to promote access to justice and ensure justice for all without any discrimination. By providing legal aid system a good number suits and cases can be disposed of at it's earliest. A large section of justice seeking people is being hindered to proceed with their cases for financial constraints. In this circumstance, the effective legal aid system can play a vital role to minimising the number of suits/cases pending before the court of law.

Comprehensive legal reforms

The government has already introduced Alternative Dispute Resolution (ADR) in judicial system by amending the civil procedure code. ADR introduced earlier in family courts of 15 district, as pilot project has been proved successful. Another reform as to formation of monitoring cell to discuss and highly sensational cases for quick disposal has also proved effective. The government is the major litigant in this country, either as plaintiff or dependent. Under PO No. 142 of 1972, the government is a necessary party in all title suits for specific performance of contract and so on. In many cases the government does not make any appearance. The government is thus responsible in many cases to prolong the litigation. To shorten the case life and to stop hesitation on the part of government PO 142 of 1972 should be amended. Major reforms in our legal system are necessary for ensuring speedy justice.

Concluding remarks

The fundamental aim or motto of the judiciary is to ensure justice within shortest possible time. Judiciary plays a co-ordination role between other two organs of the state. It's role is not limited therefore merely in settling disputes within the four walls of the court room in between two disputants. The judiciary cannot be oblivious of the social consequence that may follow from what it decides and how it decides.

Finally, it may be pointed out that no solution of the problems will ever be effective unless and until the parties including their advocates and also the judges come forward with all sincerity to end litigation in due time. Only then the maxim of equity which goes to say that justice should not only be done but must be shown to have been done will come into reality.

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