

LAW opinion



Star LAW analysis



Why trials for oppressive dictators pose difficulty?



PHOTO: BBC

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THE trial of former dictator of Yugoslavia, Slobodan Milosevic, at the UN Tribunal at The Hague (Netherlands) has demonstrated that the trial process has bogged down after three years of hearings. Milosevic's frequent illness has also contributed to adjournment of hearings several long periods.

Legal experts do not know how long the trial will continue because the defence case has just begun and Milosevic wants to call 1,000 witnesses, including the British Prime Minister Blair, and the former US President Bill Clinton. The trial may take at least another couple of years before the prosecution is able to sum up the case against Milosevic.

Millions of dollars are being spent for the trial and the countries that have been funding trial-expenses are getting worried that the trial may continue for years together and their budget for the trial expenses will be blown out. Furthermore, there is a fear that Milosevic may be acquitted because of insufficient evidence. If this occurs, it will be a big blow to trial for dictators for horrific crimes committed on the people within its borders and beyond.

Main principles applicable in criminal cases

Two main principles apply in a criminal trial in domestic courts. First, there is a presumption of innocence of the accused person until it is proved beyond reasonable doubt. The prosecution has to prove the charge and the accused person can remain silent during the whole trial, pleading only "not guilty".

Second, sufficient evidence must be established linking directly between the accused person and the crime. If there is no sufficient evidence against the person, the prosecution will

fail because the charge has not been proved against the accused beyond reasonable doubt.

For example, in a trial on a charge for theft, there is likely to be an exhaustive examination of events and circumstances to establish whether the accused person was directly involved in what occurred. The prosecution has to prove by presenting evidence the guilt of the accused beyond reasonable doubt.

Dilemma

If this domestic approach is applied in respect of war crimes, genocide and crimes against humanity that occurred over a period of years in different parts of a country, it is very difficult to pin a dictator down to the crimes.

The same problem caused the UN tribunal in Rwanda to collapse. It was set up by the UN to try the Hutu tribesmen who massacred 800,000 Tutsi tribe people in 1994. Although some cases were heard, most of the accused had to be released from prison waiting for trial and eventually a process of reconciliation was substituted.

The same problem is likely to occur when and if Saddam Hussein is put on trial. It is reported that about 1,000 lawyers including 400 Americans and Europeans are ready to defend him.

Debate among legal experts

There is a debate as to whether domestic criminal procedures should apply to the trial of international crimes. Serious considerations are being thought of as to what kind of procedures should be applied for war crimes, genocide and crimes against humanity.

One group of lawyers says that if domestic procedures of "proving beyond reasonable doubt" in criminal cases is applicable, many dictators who are allegedly responsible for

such heinous crimes would be acquitted. They argue that the presumption of innocence for trial for those in the category of Saddam Hussein and Milosevic is to be abandoned.

The other group believes that presumption of innocence should not be abandoned because trial would degenerate into political revenge.

New suggested procedures for gross international crimes

It is argued that since the dictators held the highest executive office of the land, it has to be presumed that they had the knowledge of the crimes in question as the "buck stops at the executive of the land".

Consequently, the burden of proof will fall on them, not on the prosecutors, to show that they did not know anything about the occurrence of crimes. In that event, prosecution will not need to prove through submission of evidence of knowledge of a dictator through the "chains of command" principle and letters of authority emanating from a dictator.

During the post-Second World War trial in Tokyo in 1945-46 against Japanese military leaders, a legal principle, known as "Yamashita principle" (named after accused General Yamashita) emerged. Under the principle, an accused person could not deny the knowledge of a crime because as commander of military operations, he ought to have known the occurrence of crimes within his watch. His negligence of duty could not be cited as a defence for him.

It may be recalled that there were no instructions in writing from Hitler as to the genocide of Jews in the early 40s under the Nazi regime. If he did not commit suicide, it would have been very difficult to prove conclusively that he was responsible for exterminating millions of Jews in Europe. For trial of such crimes, it is usually impossible to find "the smoking gun", that is, the direct order from a dictator that the killing of civilians be carried out.

Concern for new procedures

If new procedures are in place, many legal experts assert that trial will not be fair. They believe it would be a political revenge, manipulating the legal system, for the victors. Furthermore, the 1948 Universal Declaration of Human Rights, in its Article 11, provides: "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

Consequently, the proposed new procedures will be contrary to the UN Declaration of Human Rights that has become a part of customary international law, according to overwhelming number of legal experts and therefore cannot be violated by member-states of the UN.

Conclusion

It is noted that former Chilean dictator General Augusto Pinochet remains free, although several attempts have been made to put him to trial. There seems to be a big dilemma in pursuing a trial against a dictator.

On the one hand, there is a compelling need to put a dictator on trial for the commission of horrific crimes during their iron-fist rule, on the other hand, the proposed new procedures would suggest not only a complete abandonment of the basic rights of an individual under the Universal Declaration of Human Rights but also a failure of principles of fair and impartial trial.

Given the above dilemma, a new balanced new procedure may be worked out at the session of UN International Law Commission in consultation with The Hague-based International Criminal Court to meet justice with fairness.

The author is former Bangladesh Ambassador to the UN, Geneva

UN Convention against corruption: A gallant move for corruption free world

MD. SAIFUL KARIM

CORRUPTION is a dangerous epidemic that has wide-ranging and horrific adverse effects on societies and states. It undermines democracy, good governance and the rule of law and leads to violations of human rights, hinders the process of sustainable development, erodes the quality of life and allows widespread exploitation and insecurity in the life

may be necessary to define criminal offences to cover a wide range of dimensions of corruption including bribery, the embezzlement of public funds, but also trading in influence and the concealment and "laundering" of the proceeds of corruption.

International co-operation

Chapter IV of the Convention is dedicated for international co-operation. States Parties shall where appropriate and consistent with their domestic legal system, consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption. Parties are bound to render specific forms of mutual legal assistance in gathering and transferring evidence for use in court, to extradite offenders and transfer of sentenced persons. State parties are also required to undertake measures that will support the tracing, freezing, seizure and confiscation of the proceeds of corruption. Article 43 says "In matters of international co-operation, whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties".

Asset recovery

Chapter V of the Convention declares explicitly asset-recovery as "a fundamental principle of the Convention". This is an important issue for many developing countries where high-level corruption has plundered the national wealth, and where resources are badly needed for reconstruction and the development of states. This chapter incorporates provisions for prevention and detection of transfers of illicitly acquired assets, the recovery of property, and the return and disposition of assets. According to Transparency International "The UN Convention also raises hopes that funds transferred abroad by corrupt leaders (most famously, charges have been made against Abacha, Taylor, Mobutu, Fujimori, Bhutto and Suharto) can be brought back to the countries from where they were looted and used for the well-being of the people. The Convention is groundbreaking in including for the first time in an international legal instrument the concept, description and processes for international co-operation in the recovery of such stolen assets. The Convention also establishes the right of people who have suffered damage from corruption to initiate legal proceedings against responsible parties."

Technical assistance and information exchange

Chapter VI of the Convention outlines specific norms for initiation, development or improvement of specific training programmes for the personnel responsible for preventing and combating corruption. As per this chapter States Parties shall take measures conducive to the optimal implementation of this Convention to the extent possible, through international co-operation, taking into account the negative effects of corruption on society in general, in particular on sustainable development. This international co-operation will be ensured through collection, exchange and analysis of information on corruption. Besides this states will be bound to take initiative for implementation of the Convention through economic development and technical assistance.

Concluding remarks

Adoption of new international convention is not and in no way can be a panacea; the main challenge will be the proper implementation of this Convention. At present the most important task for all concerned people of the world, is to urge states to ratify the Convention as soon as possible so that it becomes an active, legally binding instrument.

Corruption, poverty and human rights abuses are indivisibly interlinked with each other. For fuller realisation of economic, social, environmental and political rights, state should be open, accountable and transparent. In this context I may venture to conclude



PHOTO: ADB

of people specially people of the marginalised segment of the society. This evil phenomenon is very much common in all countries developed and least developed, big and small. There was a long standing demand from global community for a balanced and pragmatic international instrument which will introduce a comprehensive set of standards, measures and rules that all countries could apply in order to strengthen their legal and regulatory regimes to fight corruption. For satisfying this long-standing demand of world community, United Nations General Assembly unanimously adopted The United Nations Convention against Corruption on 31 October 2003. It was open to all States for signature from 9 to 11 December 2003 in a high-level political Signing Conference in Merida, Mexico, and thereafter it will remain open for signature at United Nations Headquarters in New York until 9 December 2005. The Convention shall also be open for signature by regional economic integration organisations providing that at least one Member State of such organisation has signed this Convention. The Convention requires ratification by 30 countries for its entry into force. As of January 17, 2005 thirteen states have ratified the Convention. These include: Algeria, Benin, El Salvador, Kenya, Madagascar, Mexico, Namibia, Peru, Romania, Sierra Leone, South Africa, Sri Lanka and Uganda. Unfortunately Bangladesh is yet to sign this Convention.

Purpose of the Convention

According to Article 1 of the Convention the basic purposes of this Convention are:

- = To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;
- = To promote, facilitate and support international co-operation and technical assistance in the prevention of and fight against corruption, including in asset recovery;
- = To promote integrity, accountability and proper management of public affairs and public property.

Salient features of the Convention

The Convention consists of eight chapters and seventy-one articles. It covers topics that include public procurement, bribery, illicit enrichment, embezzlement, misappropriation, money-laundering, protecting reporting persons (including witnesses, experts, victims), freezing of assets and co-operation between States.

Preventive measures

Corruption can be prosecuted after the fact, but first and foremost, it requires prevention. Under Article 5 of the Convention, each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, co-ordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability. Chapter II of the Convention comprehensively deals with the preventive measures of corruption. This chapter includes provisions for preventive anti-corruption policies, practices, and establishment of preventive anti-corruption body or bodies. It also includes provisions for efficiency, transparency, codes of conduct and merit based recruitment of public servant. This chapter also formulates the guidelines for transparency and accountability in matters of public services and public finance. It also elaborates specific requirements for the prevention of corruption, especially critical areas of the public sector, such as the judiciary and public procurement. The Convention calls on countries to promote actively the involvement of non-governmental and community-based organisations, as well as other elements of civil society, and to raise public awareness against corruption. Apart from these this chapter provides specific measures to prevent money laundering.

Criminalisation and law enforcement

Under chapter III of the Convention each State Party is required to adopt such legislative and other measures as

HUMAN RIGHTS monitor



Council of Europe reports on racism

The Council of Europe's expert body on combating racism, the European Commission against Racism and Intolerance (ECRI), released five new reports examining racism, xenophobia, antisemitism and intolerance in Austria, Bosnia and Herzegovina, France, "the Former Yugoslav Republic of Macedonia" and Turkey. ECRI recognises that positive developments have occurred in all five of these Council of Europe member countries. At the same time, however, the reports detail continuing grounds for concern for the Commission:

In Austria, the continuing marked differentiation in law and practice between, on the one hand, Austrian and other EU citizens and, on the other, non-EU citizens, negatively affects the social and political integration of all segments of Austrian society. Racism and racial discrimination still affect the daily lives of members of minority groups, and particularly of black Africans, Muslims and Roma. Manifestations of antisemitism also still represent an issue of concern of ECRI in Austria.

In Bosnia and Herzegovina, severe problems of racism and racial (including ethnic and religious) discrimination persist, often as a result of nationalist policies pursued by ethnically based political parties. Such problems aggravate the situation of certain groups within a society which is globally affected by very difficult post-war socio-economic conditions. Problems of direct and indirect discrimination are pervasive in several areas of life and particularly in education, employment, housing and access to health services.

In France, law enforcement officials and



PHOTO: AFP

members of the judicial service who receive complaints are not always sufficiently alert to the racist aspect of offences, and the victims are not always adequately informed or assisted when dealing with formalities. Muslims are up against an increase in racist acts and statements and access to education

for children of immigrants and Travellers still needs to be improved. Antisemitism has increased alarmingly in France, notably in the school environment.

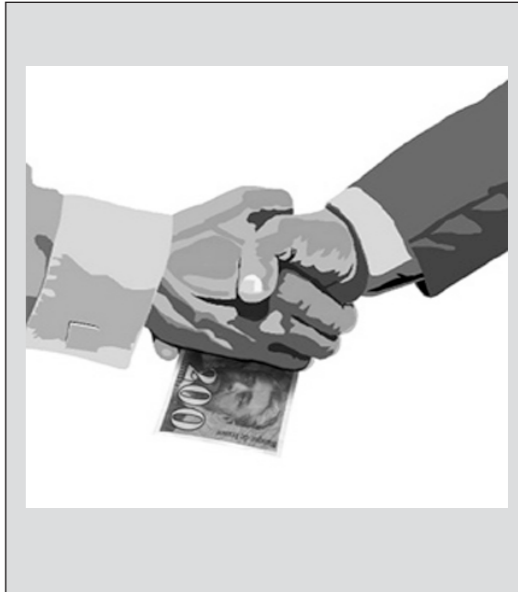
In "the Former Yugoslav Republic of Macedonia", the Roma community continues to experience, on a wide scale, particularly

poor living conditions and to suffer from an accumulation of economic and social disadvantage, aggravated by changing economic conditions, discrimination and insufficient attention from the authorities. ECRI also raises a number of issues relating to the situation of smaller minority groups, as well as of asylum seekers, and continuing problems in the area of citizenship.

In Turkey, despite the reforms, there are still some gaps in the constitution and in criminal, civil and administrative laws as regards action against racism and racial discrimination. There is still room for improvement in the matter of religious freedom, in particular as regards removing the reference to religion on identity cards and abolishing compulsory religious education in schools. No sanctions have been taken against intolerant expressions and acts directed at minority groups by sections of the media and members of the public and there is still no national specialised body to combat racism and intolerance.

These new reports form part of a third monitoring cycle of Council of Europe member states' laws, policies and practices aimed at combating racism. They cover all member states on an equal footing, from the perspective of protecting human rights. They examine whether ECRI's main recommendations from previous reports have been followed and, if so, to what degree of success and effectiveness.

Source: Councils of Europe.



with some words of United Nations Secretary-General, Kofi Annan, "Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid".

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