BELGIUM[1]

Contents

Cases — Fight against Revisionism

☛ *Ayachi and Gendron* (Unreported, Brussels Court of Appeal, 27 January 2009)

A Court of First Instance found two managers of a website guilty of denial of genocide based on the facts that on their website they had disseminated a video, 'Nazism and Zionism are but one', which also equated an Israeli minister to Hitler. The condemnation was based on a 1995 Act which criminalises the approval or gross denial of the Nazi genocide during the Second World War. The managers had also been condemned for inciting hatred and racial discrimination which is criminalised under a 1981 Act because they broadcast extracts of the Koran on their website which incited hatred and racial discrimination against Jewish citizens.

Concerning the facts assimilated to an approval or a gross denial of the genocide committed by the Nazi, the Brussels Court of Appeal reversed the Court of First Instance ruling and decided that the video in question could be regarded as an offensive or excessive caricature of the Israeli policy, namely during the 1982 Lebanon war, but not as an approval or a gross denial of the genocide committed by the Nazis. According to the Court, the freedom of speech did not exclude caricature, pamphlet or exaggerated comparison. For this count, the accused have been found not guilty.

On the other hand, quotes of the Koran which incited hatred and violence against the Jews reproduced outside their literary and historical context remained an offence under the 1981 Act and the condemnation of the accused was confirmed.

The case had been brought before justice by the public prosecutor, by a public law association (the Centre for Equality of Opportunities and Fight against Racism) and by complaints from civil parties. In relation to the complaint from civil parties, the Court of Appeals held that their complaint was admissible only if they could prove that they suffered a personal, direct and moral or material damage. One of the civil parties was the chair of a *de facto* association ('Dialogue and Sharing') which tried to bring Jewish and Muslim Belgian communities closer. Because of her action, the Court considered that she suffered sufficient damage and that her complaint was admissible. By contrast, the Court of Appeals struck out the complaints lodged by the other members of the same association because their mere membership did not suffice to prove the existence of a personal damage.

Cases — Crimes against Humanity

☛ Brussels Chambre des mises en accusation, 9 April 2010 (unpublished)

An Iranian political refugee lodged a complaint in Belgium against various Iranian authorities alleging they were criminally responsible for the forced disappearance of his sister who had been arrested in 1982 and had disappeared in 1988. The complainant had been a political refugee since 1982 and obtained Belgian nationality in 1987. According to the *Code of Criminal Proceedings*, a complaint for a crime of international humanitarian law committed

[1] Information and commentaries by Eric David, Emeritus Professor, Free University of Brussels. This report covers activities which took place in 2010 and 2011.

outside Belgium is admissible if the crime has been committed against a Belgian citizen or against a political refugee residing in Belgium at the time of the crime (Preliminary Title of the *Code of Criminal Proceedings*, Art. 10, 1°*bis*). The complaint raised the question whether the brother of the direct victim of the crime could himself be regarded as a victim of the crime.

The Chamber answered negatively and affirmed that the preparatory work of the 2003 Act relating to international humanitarian law crimes restricted the scope of the Act to crimes committed against the victim not against the complainant.

However, there are good reasons to dispute this conclusion. During the preparatory work, only one parliamentarian interpreted the act in such a limitative way. Furthermore, the Minister of Justice, who drafted the Act, did not confirm this interpretation. However, the Court of Cassation, quoted by the Chamber, had said in the past that the residence condition had to be fulfilled by the victim not by the complainant.[2] Again, this interpretation can be drawn neither from the text of the Act nor from the preparatory work.

Cases — War Crimes

☛ *ETO* (Unreported, Brussels Tribunal of First Instance, 8 December 2010)[3]

Between 7 and 11 April 1994, the Belgian military contingent of the UNAMIR was assigned to protect the *ETO (Ecole technique officielle*) in Kigali where 143 foreigners had taken refuge at the beginning of the Tutsi genocide in Rwanda. Very quickly, 2000 Tutsi had joined them. *Interahamwe* militias stayed outside the *ETO* patiently waiting for the departure of the Belgian soldiers. When the 143 foreigners were safely driven to Kigali airport on 11 April, the Belgian soldiers left the *ETO* and the 2000 Tutsi despite their pleas to remain under protection. As soon as the Belgian troops left the *ETO*, the *Interhahamwe* massacred nearly all of the 2000 Tutsi who had been left without security.

Ten years later, on 7 April 2004, surviving members filed a suit against Belgium and against the Belgian officers who were on duty at the time of the massacre in order to obtain compensation for the damage they suffered because of the departure of the Belgian military from the *ETO*. The suit was founded in Belgian tort law (*Civil Code*, Art. 1382), not in criminal law.

Belgium relied on various defences including that the claim was barred by a statute of limitations; that the facts in questions were not attributable to Belgium; and that the responsibility for failure to prevent IHL crimes did not apply in this case.

Concerning the application of the statute of limitations to facts from 10 years ago, the Tribunal rejected the argument since the massacre was an IHL crime which escaped any statute of limitations (Preliminary Title of the *Code of Criminal Proceedings*, Art. 21). However, the Tribunal limited the scope of the rule excluding the statute of limitations to the Belgian officers and did not extend it to the Belgian State since the rule only applied to crimes committed by individuals or private legal entities. As the State cannot incur criminal responsibility (*Criminal Code*, Art. 5), the rule excluding the application of a statute of limitations to IHL crimes could not concern the State. Nevertheless, the Tribunal recalled that State responsibility was not totally excluded because the State had to answer for the acts of its militaries as State organs.

Concerning the attribution of the abandonment of the *ETO* to Belgium, Belgium pleaded that the abandonment was attributable to the UN, not to Belgium because the Belgian

[2] See 6 *YIHL* (2003) pp. 469–470..

[3] See <www.justice-en-ligne.be/spip.php?rubrique107>

contingent was a part of the UNAMIR and therefore, only the UN was accountable for the failure of the Belgian military. The Tribunal rejected the plea because the facts clearly showed that the Belgian contingent acted under the Belgian authority, not under the UN authority.

Concerning the responsibility for failure to prevent IHL crimes, Belgium argued that this rule as provided for in Art. 136*septies* of the *Criminal Code* only applied between a superior and his subordinates, not between militaries and foreign troops like the *Interahamwe* militias. The Tribunal rejected the plea since this restriction did not appear in Art. 136*septies*. The letter of the provision allowed its application to the facts in question. Even if the respondents obeyed superior orders, this did not exclude their criminal responsibility since these orders triggered war crimes.

The ruling of the Tribunal was not final as its effect is only to reopen debates to establish the responsibility of the respondents. Meanwhile, on 7 February 2011, Belgium and the Belgian officers appealed against this decision. According to the lawyers, of the parties, the hearings will not take place before 2014.

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