

Try the War Criminals of 1971

By A H Monjurul Kabir

By terming the unfortunate victims of genocide as martyrs and paying deep tribute to them regularly, we have created an unprecedented heritage of worthless and shocking forgiveness -- a forgiveness which absolved the war criminals of their crimes. We also rehabilitated the collaborators in all spheres of national life in one way or the other!

WHAT could be more appropriate than the following unequivocal statement of justice V R Krishna Iyer, former member of Indian Law Commission and retired judge of the Supreme Court: "The scenes of blood and bestiality ensuing from the military crackdown under General Tikka Khan's deadly direction was such the like of which no eye had seen and no tongue could adequately tell. Bangladesh is fortunately free today but its 'sweetest songs' of freedom are that tell of 'saddest thought' of the millions dead. The appalling human annihilation perpetrated by military personnel of Pakistan and their auxiliary forces in Bangladesh, its dimensions and dastardness prima facie constitutes an international crime." (Law's Trust with the dead in Bangladesh vis-a-vis punishment of Humanists, National Herald, February 4, 1972). And we in last 28 years, did simply nothing to prosecute and punish those criminals for committing genocide, crimes against humanity and war crimes. In fact by terming the unfortunate victims of genocide as martyrs and paying deep tribute to them at a regular fashion, we have created an unprecedented heritage of worthless and shocking forgiveness. A forgiveness which absolved the war criminals of their crimes. We also rehabilitated the collaborators in all spheres of national life with grandeur success!

Of Genocide and War Crimes: An International Perspective

Genocide is a modern word for an old crime. It means the deliberate destruction of national, racial, religious or ethnic groups. Genocide is a word derived from the Latin words *genus*, meaning 'a group', and *caedere*, meaning 'to kill'. History had long been a grim witness to such acts, but the twentieth century saw them carried out on the largest and most inhuman scale known when the Nazi Government of Germany systematically annihilated millions of people because of their religion or ethnic origin. A shocked world then rejected any contention that such crimes were the exclusive concern of the state perpetrating them, and punishment of the guilty became one of the principal war aims of the Allied nations. The charter of the International Military Tribunal at Nuremberg, approved by the Allies in 1945, recognized that war criminals were not only those who had committed crimes against peace and violations of the laws or customs of war, but also those who had carried out crimes against humanity, whether or not such crimes violated the domestic law of the country in which they took place. During its first session in 1946, the United Nations General Assembly approved two resolutions relating to this subject. In the first, the Assembly affirmed the principles of the charter of the Nuremberg Tribunal. In the second -- the basic resolution on genocide -- the Assembly affirmed that

genocide was a crime under international law and that those guilty of it, whoever they were and for whatever reason they committed it, were punishable. It asked for international cooperation in preventing and punishing genocide and it invited member states to enact the necessary national legislation. In a final provision, the Assembly called for studies aimed at creating an international legal instrument to deal with the crime. That was the origin of the Convention on the Prevention and Punishment of the Crime of Genocide unanimously adopted by the Assembly on 9 December 1948.

The term 'convention' in international law means an agreement among sovereign nations. It is a legal compact which pledges every contracting party to accept certain obligations. Genocide, the Convention declares, is the committing of certain acts with intent to destroy -- wholly or in part -- a national, ethnic, racial or religious group as such.

What are the acts? First actual killing. But it is possible to destroy a group of human beings without direct physical extermination. So the Convention includes in the definition of genocide the acts of causing serious bodily or mental harm; deliberate infliction of conditions of life 'calculated to bring about' physical destruction; imposing measures to prevent birth; and, finally, forcibly transferring children of one group to another group. Those acts, the Convention states, constitute 'genocide'. In accordance with the Convention, related acts are also punishable: conspiracy to commit genocide, direct and public incitement to commit genocide, an attempt to commit the crime, and complicity in its commission. The Convention first declares that genocide, 'whether committed in time of peace or in time of war', is a crime under international law which the contracting states 'undertake to prevent and to punish'.

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action under the Charter. If there is a dispute between one country and another on the interpretation, application or fulfillment of the Convention, the dispute must be submitted to the international Court of Justice at the request of any of the parties. Article IV of the Convention declares that those guilty of genocide and the other acts listed shall be punished 'whether they are constitutional responsible rulers, public officials or private individuals'. That clause makes it impossible for a person to plead immunity because he is the head of a State or a public official.

Main principles established by the Convention are:

1) Contracting States are bound to enact the laws needed to give effect to the provisions of the Convention, in particular to provide effective penalties.

2) States undertake to try persons charged with those offences in their competent national courts.

3) Parties to the Convention agree that the acts listed shall not be considered as political crimes. Therefore, they pledge to grant extradition in accordance with their laws and treaties.

All those pledges are for national action. The Convention also envisages trial by an international penal tribunal should one be set up and should the contracting parties accept its jurisdiction. Furthermore, it provides that any of the contracting States may bring a charge of genocide or of any of the related acts, before the competent organs of the United Nations and ask for appropriate

drop the Bangladesh Collaborators (Special tribunals) Order 1972 was enacted by a presidential proclamation. The initial process to try the collaborators was begun. But problem lies with the very Order. The Order is not comprehensive at all and a number of faulty procedures and lacunas were sorted out. According to section 7 of the said Order, a special tribunal shall not take cognizance of any offence punishable under this order except upon a report in writing by an officer in charge of a police station. It means a written instruction of an OC of a police station is a must to proceed with a trial!

No criminal case can be filed in any other court except the tribunal formed under the Bangladesh Collaborators (Special Tribunals) Order 1972 against a person accused of committing crimes mentioned in the schedules of the Order. Section 4 enumerates, 'Notwithstanding anything contained in the code or in any

crimes against humanity or war crimes and other crimes under international law shall be deemed void or unlawful, or ever to have become void or unlawful, on the ground that such law or provision of any such law is inconsistent with or repugnant to any of the provisions of this Constitution.' The expert committee formed by the government drafted a new comprehensive bill for trying war criminals. The then Minister for Law Sree Monoranjon Dhar presented the International Crimes (Tribunals) Bill, 1973 in the Parliament. It was unanimously passed in the Parliament on 20 July 1973.

The International Crime (Tribunals) Act 1973: Salient Features

According to the preamble of the Act (Act No XIX of 1973), it was enacted to provide for the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and crimes under international law and for matters connected therewith. The Act infact was the municipal legislative follow up of the Genocide Convention 1948. It is truly of international character. It also reflects some notions of the Geneva Conventions of 1949. The drafters of the Act were greatly benefited from several reports of international bodies like the International Law Commission.

Section 3 of the Act gives the Jurisdiction and the meaning of the crimes:

(a) Crimes against Humanity, namely, murder, extermination, enslavement, deportation, imprisonment, abduction, confinement, torture, rape or other inhumane acts committed against any civilian population or persecution on political, racial, ethnic or religious grounds, whether or not in violation of the domestic law of the country where perpetrated;

(b) Crimes against Peace, namely, planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(c) Genocide: meaning and including any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic racial religious or political group such as:

(i) killing members of the group;

(ii) causing serious bodily or mental harm to members of the group;

(iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(iv) imposing measures intended to prevent births within the group;

(v) forcibly transferring children of the group to another group;

(d) War Crimes: namely, violation of laws or customs of war which include but are not limited to murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population in the territory of Bangladesh; murder or ill-treatment of prisoners of war or, killing of hostages and detention, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(e) violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949;

(f) any other crimes under international law;

(g) attempt, abetment or conspiracy to commit any such crimes;

(h) complicity in or failure to prevent, commission of any such crimes.

The Act further provides for the constitution of the tribunal, prosecution, investigation, commencement of the proceedings, procedure of trial, rules of evidence and right of appeal. The Appellate Division of the Supreme Court is to hear an appeal, if preferred within sixty days, from the order or conviction and sentence of the Tribunal.

As already mentioned, this Act is really a comprehensive one. Even the trial of Razakars, Al-Badr, Al-Shams is possible under this Act. The Act specifies, 'Auxiliary Forces' which includes forces placed under their control of the Armed Forces for operational, administrative, static and other purposes.

But the then government did nothing to apply this law. In last 26 years (1973-99) no tribunal, has so far been formed by any government under this Act.

The Government of Bangladesh which had ventured to put on trial 195 major Pakistani war criminals later shifted its decision and decided not to proceed with trials as an act of clemency. It also agreed to repatriate the 195 alleged war criminals to Pakistan. As the principal perpetrator of the genocide were repatriated without any punishment, the basis of the accusations against the local collaborators virtually shaken.

On 30 November 1973, under an amnesty order all those held or convicted under the Collaborators (Special Tribunals) Order, except for those charged with murder, rape, arson were released. The general amnesty order was grossly abused by the then party in power. As a consequence, all the collaborators including prominent ones, were set free.

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No successive governments of Bangladesh has taken any step to form any tribunal under the existing International Crime (Tribunals) Act 1973. The Act remains unused. The recent discovery of the mass grave at Muslimbazar again unearthed our utter failure to try the perpetrators of the most heinous crime. Despite all advances in our territory, the twentieth century must unfortunately be considered as one of those most guilty of the crime of genocide. Before stepping in to the next millennium, we must act. Deep in their hearts, millions whose near and dear ones had been victims of the genocide cherish a fervent yearning for justice.

Formation of War Crime Tribunals under our International Crime (Tribunals) Act 1973 and trial of the war criminal can fulfil their yearning for justice. Shouldn't we opt for that?

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law watch



Skulls from beneath demand answer. — Photo: Liberation War Museum

Unearthing of Killing Field in Mirpur

By Akku Chowdhury

ON 27 July 1999 a killing field from the 1971 Genocide committed by the Pakistani Forces was discovered. The Liberation War Museum has taken the initiative for an extensive excavation of the area to find the remains of the victims of the Genocide. So far (upto 16 August) 5 skulls and over 500 small and big bones have been discovered. A team of Doctors under the leadership of Dr. M.A.Hasan has been assigned to make initial identification and do necessary examinations. All scientific and medical facilities will be utilized to find the evidences and clues leading to the identity of individuals and the cause and time of their death. Initial examinations have given us enough evidence to claim they were 'the victims of the 1971 Genocide committed by the Pakistan Forces. We have set up a team of legal experts to proceed to the International Court to take this evidence to prove the Genocide and make those responsible for the crime punished. We have reasons to believe there are quite a few killing fields and spots within a 1000-yard of this location. We are investigating the spots to verify the location and facts. Once we have authentic information we plan to excavate those spots to recover the remains of the Martyrs and other evidences of the Genocide committed by Pakistan Army. We are requesting for international observers to visit this spots to verify for themselves the facts proving the atrocities committed by the Pakistani Forces and their agents in 1971. So far there was a 'Denial of Genocide' by the International Forum drummed up by the Pakistan Government. We appeal to all conscientious people of the World to find the truth and help us to do it. In a response to the Liberation War Museum the Bangladesh Army began assisting with the excavation work from August 12 1999. With their sophisticated instruments and discipline the work is progressing in a systematic way. They have been able to detect and recover a few bullets with marking of Pakistan Ordinance Factory (dated 1964,66 and 67) and other metallic remnants of weapons. The contingent of the Bangladesh Army has been working with great determination and zeal and the Citizens have warmly welcomed their assistance in this worthy cause.

A group of medical Doctors, Radiologists and Forensic experts have done a preliminary examinations of the human remains (skulls, bones, hair, etc.) so far recovered from the Muslim Bazar (Mirpur) excavation site. From the first batch of 216 intact bones and broken pieces they estimate those belong to 7 bodies. They have identified 4 skull (upper portion) four jaws (lower portion). Of these they are yet to recover 3 more skulls. That brings the total number to 7. Their are 21 long bones, of them 6 seem to belong to one person. Since others belong to different persons they couldn't be matched but seems to be of 6 different people. Their is also a strong historical fact that in 1971 this area being in close proximity to the Dhaka Cantonment and with heavy concentration of non Bengalees was used by Pakistan Army to commit such crimes away from any unfriendly witnesses. The Pakistan Army fed the non-Bengalees with such propaganda as the Bengalees being anti Islam and that if Bangladesh became independent they (non-Bengalees, who originally came from India after 1960 and where settled in this area in the suburb of Dhaka) will be rootless. Their are signs of bullet injuries in four skulls, one at the lower part of the spinal cord (sacrum), one hip bone and one in the shoulder blade (scapula). Besides other bones have evidences of injuries. One skull shows signs of a sharp weapon was shoved inside the eye socket. Most of the shoulder blades are broken showing sign of some forced being used. Further sophisticated tests like Carbon testing, DNA Tests, advanced Forensic Test and graphic super imposition to identify the victims and the cause of their death needs to be done. These tests need to be done abroad. We need assistance from humanitarian organization that are equipped to deal-in this matter. Please let the World know and help us find the truth.

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BONES and bullets, skulls and explosives excavated from Muslim Bazar at Mirpur have forced the nation to confront its past once again. The dead has spoken, as loudly as possible, at a time when the nation tried hard to leave the past behind and was occupied in building future.

From beneath the ground, dug by the Pakistani genocidal army and local killers and collaborators, the dead reappeared after about thirty years and asked for their identification, to tell to their loved ones which they could not, as their lives were cut short. They now want to say proper good-bye to their fathers, mothers, brothers, sisters, husbands, wives and friends. They intend to ask questions, why they had to die and what has happened to the killers, whether justice has been done or not.

In a post-genocide society, the question is how to restore social justice and justice. Justice implies trials, accountability for the culpable, and appropriate punishment. Harmony, on the other hand, looks to reconciliation as a means of re-attaining coexistence in a previously polarised society.

Social justice seeks to uphold the principle of the primacy of the law, social harmony, in contrast, aims at more pragmatic goals requiring consensus and compromise, including, if necessary, the non-prosecution of the genocidists. Social justice means looking back into the past to rectify wrongs; social harmony requires looking primarily forward in order to minimise rancorous involvement with what had once transpired, while maximising emphasis on a better future.

According to Professor H.R.Huttenbach of the City University of New York, "By the

end of this century, both formulas will have been applied with some measurable success and failure." In case of Bangladesh, however, neither social justice nor harmony has been achieved.

Justice after Genocide
The discovery, at Mirpur has reinforced the fact of genocide of 1971, when three million souls vanished, by calculated acts, methodically implemented by the Pakistani army and its government and collaborators.

Bringing criminal prosecution is one of the ways whereby post-genocide society can signal to the victims and the survivors that they no longer are hated, as



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the perpetrators did. It also allows relatives and friends of victims to tell their stories, to document the torment and the suffering and to ventilate the feelings and sufferings.

Another important reason for prosecuting those who commit and those who order genocide is that the victims then will see that justice has been done. For victims, seeing their tormentors brought to justice can have a strong therapeutic effect.

Punishing the perpetrators advance the cause of building or restructuring a morally just society. Justice is done to put back in place the moral order that has broken down. Justice is

done as a moral obligation to the victims of genocide.

Post-genocide justice serves to heal the wounds and repair the private and public damage done. If the prosecution issue remains untouched, other forms of social and political disturbances may be triggered. Failure to prosecute may generate populace cynicism and distrust toward the political system.

Forums for Justice

As noted, several international appeals have been made to try the perpetrators of 1971 genocide. Reports suggest, International Court of Justice has



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been approached, but what really is the right and effective forum to settle questions of genocide?

International Court of Justice

The International Court of Justice (ICJ), which sits at The Hague, in Netherlands, is an integral part of United Nations and acts as a World Court. It was set up in 1945 under the Charter of the United Nations. It is the successor of the Permanent Court of International Justice (1922-1946).

ICJ decides cases according to international law, disputes of legal nature, submitted by the States, and in addition, certain international organs and agencies are entitled to call upon it for advisory opinions.

Article 34 (1) of the Statute of the International Court of Justice declares, 'Only States may be parties in cases before the Court'. Article 36 states, 'The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.'

Thus, non-State actors have got no access to International Court of Justice in The Hague. Pakistan filed a complaint to ICJ against India when Pakistani POWs were under Indian protection, which, however, did not proceed further for jurisdiction and procedural reasons.

International Criminal Court
On July 17, 1998, the Statute for the establishment of the In-

ternational Criminal Court (ICC) was adopted by vote of 120 states in favour, 7 states against, and 21 abstentions.

Dubbed as the Rome Statute, as it was adopted in Italian city Rome, the Statute establishes, for the first time in history, a permanent international criminal court with power to try individuals, and not States, for crimes such as genocide, war crimes and crimes against humanity.

The Statute contains many provisions for a Court that is independent and effective. Its Prosecutor has the authority to start investigations without prior approval of States or the United Nations Security Council. Its jurisdiction includes war crimes committed during non-international armed conflict. Crimes of sexual violence such as rape, sexual slavery, gender persecution and forced pregnancy, have explicitly been listed as both war crimes and crimes against humanity.

However, cost of adoption of the Statute had resulted in many unfortunate compromises, and one such compromise would deny Bangladesh genocide of 1971 to be ever raised before ICC. The Court can only prosecute crimes, which happen after the Statute in force. It cannot prosecute past crimes unless they are ongoing.

Moreover, ICC has not come into reality as yet. Sixty States must ratify the Statute before it comes into force and the Court can be established. Over the last one year, only four States have ratified the Statute; these are,

Italy, San Mario, Trinidad and Tobago and Senegal. Senegal was the first State to ratify the ICC Statute. As on 11 August 1999, eighty-four States have signed the Statute. But if ratification is not done faster, at this rate, it will be not before 2014 that ICC would come into existence.

Existing International Criminal Courts

There are two International Criminal Courts that are working now, one in The Hague and other, in Tanzanian city Arusha.

International Criminal Tribunal for the former Yugoslavia (ICTY) was established by Security Council resolution 827 on 25 May 1993. It is mandated to prosecute persons responsible for serious violations of international humanitarian law committed on the territory of the former Yugoslavia since 1991.

The Statute defines the Tribunal's authority to prosecute four clusters of offences: grave breaches of the 1949 Geneva Conventions, violations of laws or customs of war, genocide and crimes against humanity.

Following Rwandan genocide, the United Nations Security Council decided on 8 November 1994 to create an International Criminal Tribunal to 'bring to justice those persons responsible for acts of genocide or other violations of humanitarian law on Rwanda territory, and Rwandan citizens presumed responsible for such acts or violations committed on the territory of neighbouring

States between 1 January and 31 December 1994'. The International Criminal Tribunal for Rwanda (ICTR) has since indicted a number of prominent Rwandans including the Prime Minister.

Thus, the international tribunals that are now functioning cannot exercise jurisdiction over Bangladesh Genocide in 1971.

Genocide Convention

The Convention on the Prevention and Punishment of the Crimes of Genocide, commonly known as Genocide Convention, was adopted by the United Nations General Assembly on 9 December 1948.

The Convention, for the first time, provides a working definition of genocide, and confirms in Article 1 that genocide, whether committed in time of peace or in time of war, is a crime under international law, which the States undertake to prevent and to punish.

However, the Convention did not establish or provide any mechanism to prevent or punish perpetrators genocide. In fact, Article 5 merely states, 'The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide.'

Therefore, it is the responsibility of the national government to implement this convention, set-up appropriate structures and punish perpetrators of genocide.

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In the next episode the writer will analyse the options Bangladesh can explore.