RIGHTS *column*

Police brutality

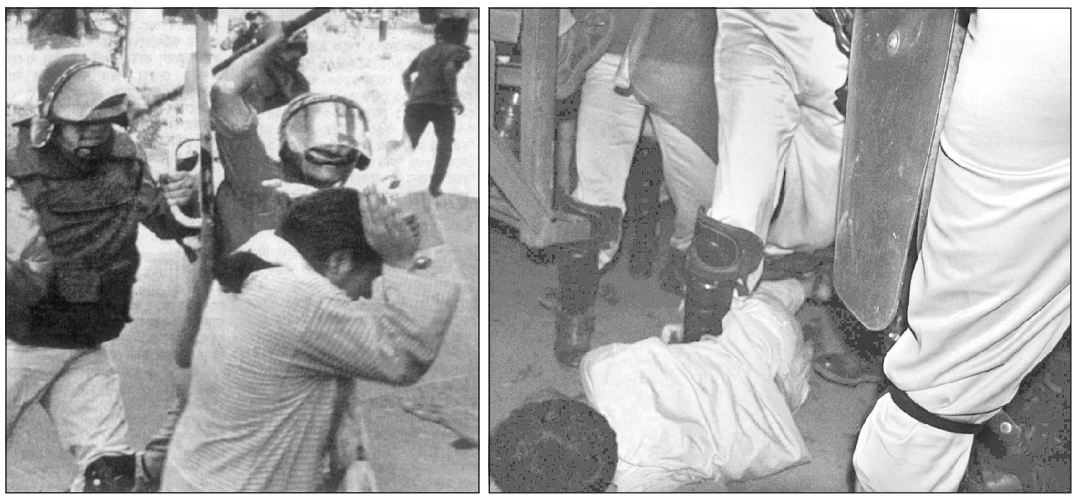
Please, show minimum respect for human rights

ANISUR RAHMAN

IT is very painful to see a police personnel kicking a person as seen in the photo while he is the one who is entrusted to ensure the fundamental human rights for the latter. The conduct of the police is incompatible with human norms, Universal Declaration of Human Rights as well as the fundamental rights guaranteed by our Constitution. Such behaviour by the police denies the very basic rights, i.e. right to be treated according to law, right to dignity and right to get justice. The person being kicked by police might have been an activist of the main opposition, Awami League who, the police complained, threw a bomb that left a police personnel injured. But are they the authority to judge the offence? The duty of the police is to arrest the miscreants and hand them over to the court of law for trial. It is the court only that is entrusted to judge the offence of a person. So this excuse on the part of the police does not substantiate their inhuman act. It is a clear violation of all international human rights documents and the Constitution.

The Constitution of Bangladesh (part 3) guarantees some basic civil and political rights. Among them, the right to protection of law, right to get justice by impartial court or tribunal, right to dignity, right to equality are worth mentioning. The Constitution provides that everyone should be treated in accordance with the law and no action detrimental to the life, liberty, body, reputation or property of any citizen or any resident shall be taken except in accordance with law (Art 31). Now, the question is -- what does 'in accordance with law' mean? In a lay man's view, it means that the matter will be investigated, the person who committed the offence will be arrested and finally produced before the court of law for trial. If anybody threw a bomb to the police, as it's been claimed, they should have investigated the matter and then arrested the person to produce him before the court instead of taking the law into their own hands. Kicking a person or beating a person by police is not consistent with the term "in accordance with law". This Article 31 has much wider consequences than that of "American Due Process". No action inconsistent with this provision can be taken by the law enforcers. Part three of the Constitution, which guarantees the basic rights of the people is the most important part of the Constitution and these rights are judicially enforceable. It is the constitutional duty of every person to abide by the constitutional provision. The police must not be oblivious of the Constitutional provision which begins by saying that 'it is the solemn declaration of the common people'. Any deviation from this part will be termed as violation of the Constitution.

This is not the first time police has acted in such a manner. There have been numerous allegations of maltreatment by police resulting in custodial death. Two persons, one in Chittagong and other in Dhaka died in the police custody only few months ago, though a Supreme Court directive prohibits any interrogation in the police custody except in presence of a relative of the victim. But sadly the direction by the court has hardly been followed. We also frequently say that the conduct by the police is not consistent with the law. But in reality it seems that the police can do whatever they please, showing any respect for the law.



Recent examples of police brutality

Lack of awareness among the police of the basic human rights of the citizens is simply not acceptable. I think police have already realised that in this country no one will be punished even if they commit any offence like beating or kicking an opposition activist. They are also well acquainted with the fact that there is none to question them as to why they kicked a man on the street in lieu of bringing him to book. Actually this is the result of failure of whole law and order system. Using the police force for political gain paves the way for them to abuse their power or exercise their power arbitrarily. Police know that serving the government's interest is more necessary than protecting human rights or human dignity. The Government itself did not seem respectful for the basic human rights of the people when they let the joint forces go unpunished after allegedly killing more than forty lives during operation clean heart.

The violation of human rights by the police has not been a new phenomenon. But today they do not show the minimum respect for human rights. On the other hand we are yet to see the formation of an independent human rights commission to investigate the incidents of violation of human rights. The human rights organisations also restrict their activities in just compiling list of incidents of human rights violation, persons died in the hands of the law enforcing authority every year. Unfortunately there has not been a concerted effort on their part to strongly raise the issue of forming a human rights commission. It is also worth noting that our Constitution does not mention whether violation of constitutional provision is an offence. The court could only ask the government to ensure the fundamental rights of the people in response to writ petition brought by a person. Therefore, it is time to think whether Constitutional amendment is necessary to declare its violation as an offence.

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LAW *views*

Reporting to CRC committee and state of juvenile justice

OLI MD. ABDULLAH CHOWDHURY

As a signatory of UN Convention on the Rights of the Child (UNCRC), the government of Bangladesh obliged to submit a report on the implementation of Child Rights Convention (CRC) every five years. The committee sat for the discussion on the 2nd periodic report of the State Party on September30, 2003. Committee hailed Bangladesh for submitting the report. After discussing with the Bangladeshi government representatives, the report was adopted with some comments and suggestions at 918th meeting of UN on October 3, 2003. Alternative reports prepared by NGOs and UN agencies were also considered by CRC committee before.

Firstly, the report reveals the state of implementing rights of the child in Bangladesh. Condition is not satisfactory in many cases as well. Therefore, committee has suggested Bangladesh to work more sincerely in establishing rights of the child. CRC Committee authenticates their observations by getting from other sources rather than considering only report from the government.

However, some steps taken by the government have also been praised. Adoption of amended National Plan of Action (NPA), National Water and Sanitation Regulation and NPA on Sexual Abuse, Exploitation and Trafficking are the stories of success for the state party of Bangladesh as committee pin down. Committee also applauded induction of some new legislation. The 2000 Suppression of Violence against Women and Children Act, the 2002 Acid Control Act, the 2002 Acid Crimes Prevention Act, the 2002 law safeguarding the speedy progress of trials; and the withdrawal of the 2002 Public Safety Act were hailed by the committee.

Nevertheless juvenile justice system has not been developed properly despite existing laws. Lowest age for criminal responsibility is 7 years which is well below of the mark. There is a provision of life imprisonment from the age of 7 years and execution from the age of 16 years still exists in Bangladesh. In addition to this, separate trial system is to be developed and juvenile court is not established in all the places. Though the Constitution of the People's Republic of Bangladesh has provided a provision for ombudsman (Article77), there is neither any ombudsman nor an independent human rights commission. CRC Committee, however, suggests for ombudsperson as there is a necessity for monitoring juvenile justice mechanism.

It also suggests that arbitrary treatment by police leads street children to prostitution and custody. Corporal punishment, nonetheless, exists. Convicted children do not get proper legal assistance. Not only children are being imprisoned without trial, children themselves don't rely on the justice system. Children are often kept with adults where there are no basic facilities. "Imprisonment should be the last resort, not the first" - as Children Act 1974 suggests though there is always a problem in exercising law and regulations.

In this respect, committee also made some suggestions. Committee suggested that justice for the juvenile must be guaranteed. State party should follow related conventions and protocols relating juvenile justice. The minimum age for criminal responsibility must be increased. Independent, impartial, child-friendly system should be developed where children could express their views freely. Neither capital punishment nor life imprisonment should be applicable for any child before the age of 18. Children must be separated from adults in the custody and condition of custodies should be improved. Police should be trained on juvenile justice in collaboration with UNICEF and UN High Commission for Human Rights.

To recapitulate, all the suggestions and observations were made on the basis of UNCRC, nevertheless Children's Act 1974 has some affinity in many cases. It is a matter of regret that we could neither comply with our own law nor international convention as yet. Unless state part ensure the rule of law, implementation on the rights of the child is really difficult. Report of the concluding observation brings some new tasks for the government. The sooner would be implementation the better would be the condition of the children in Bangladesh.

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LAW *campaign*

Charge against two Guantanamo detainees

A question of international law

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ON February 24, 2004, the United States charged two detainees at Guantanamo Bay, Cuba, with conspiracy "to commit the following offences triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism, said conduct being in the context of and associated with armed conflict. The charges do not allege violation of any specific statutory or treaty provisions. To be within the jurisdiction of the military commission established by the Department of Defense, the alleged acts must be "violations of the laws of war [or] other offences triable by military commission. In the past, military commissions have tried cases involving war crimes, espionage, sabotage and various offences committed by persons in occupied territory against the occupying forces.

The acts charged against one of the detainees, Ibrahim Ahmed Mahmoud al Qosi, include becoming a member of al Qaida, passing information between terrorist cells, serving as an accountant and deputy chief financial officer for al Qaida, assisting in transporting weapons, acting as an armed bodyguard for Usama bin Laden, and assisting bin Laden and other al Qaida members in avoiding capture before, during and after the attacks of September 11, 2001. The acts charged against the other detainee, Ali Hamza Ahmad Sulayman al Bahlul, include participating in al Qaida military training, pledging to protect bin Laden from all harm, creating recruiting video tapes for al Qaida (including one glorifying the October 2000 attack on the USS Cole in Yemen), acting as an armed bodyguard for bin Laden, and assisting him and other al Qaida members in avoiding capture. The United States does not intend to seek the death penalty for either detainee.

This Insight focuses on certain international law issues raised by the charges and by the use of a military commission. It does not address United States constitutional or statutory law issues, nor does it attempt to determine what constitutes a conspiracy under US military law.

As a matter of international law, one might look to the Statute of the International Criminal Court (ICC) for guidance regarding the acts that would amount to participation in a conspiracy. Some provisions of that Statute are controversial, but the provisions relating to conspiracy appear to be generally accepted. In this connection, ICC Statute article 25(3)(d) says that a person commits a crime within the ICC's jurisdiction if he or she "contributes to the commission or attempted commission of [a punishable crime] by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

"(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

"(ii) Be made in the knowledge of the intention of the group to commit the crime...."

A Chamber of the International Criminal Tribunal for Rwanda has dealt with allegations of conspiracy to commit genocide. Genocide is not involved in the Guantanamo cases, but the Rwanda Chamber's approach might nevertheless be relevant as evidence of the meaning of "conspiracy" in international law. The Chamber has said that the offence of conspiracy requires the existence of an agreement, but it need not be formal or express. It could be inferred from concerted action. According to the Chamber, a tacit understanding of the criminal purpose would be sufficient, and the existence of a conspiracy could be based on circumstantial evidence. Moreover, a conspiracy to commit genocide could be comprised of individuals acting in an institutional capacity, even in the absence of personal links with each other.

Some guidance may also be found in the post-World War II Nuremberg prosecutions. Article 6 of the Charter of the Nuremberg Tribunal criminalised conspiracy to commit the offences set out in that article, particularly the planning, preparation, initiation or waging of a war of aggression. Conspiracy was not defined in the Charter. The Tribunal said that "the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and action. The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan. In determining guilt or innocence of individuals, the Tribunal said that actual knowledge of the Nazi aggressive plans was an "all-important question.

In any event, the burden will be on the prosecution to prove the conspiracy.

Transposed to the context of the military commission, the crime resulting from a conspiracy would not necessarily have to be within the jurisdiction of the ICC or of any other international tribunal. Nevertheless, one could look to the ICC Statute, as well as the Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia, to identify the acts normally considered crimes under international law. They include genocide, crimes against humanity, and war crimes.

Neither of the Guantanamo detainees is charged with conspiracy to commit genocide or crimes against humanity. But they are charged with conspiracy to attack civilians and civilian objects in the context of armed conflict. The charges do not identify these attacks as war crimes, perhaps to relieve the commission from having to determine whether the attacks come within the prohibitions of the Geneva Conventions of 1949. It is worth noting, though, that war crimes under the Statutes mentioned above include wilful killing, willfully causing serious injury, and extensive, wanton destruction of property, if the acts are directed against persons or property protected by the Geneva Conventions. Protected persons under Geneva Convention IV (concerning civilians) are those who in the case of a conflict or occupation find themselves in the hands of a party of which they are not nationals. The ICC Statute goes further, reflecting provisions in Protocol I to the Geneva Conventions. In the context of international armed conflict, it criminalises such acts as intentionally directing attacks against civilians and civilian objects, intentionally launching an attack knowing that it will cause incidental and excessive loss of life or injury to civilians or damage to civilian objects, and attacking undefended buildings that are not military objectives. The United States is not a party to the ICC Statute or to Protocol I to the Geneva Conventions, but it is likely that the provisions just mentioned are embodied in existing customary international law.

The military commission may have to decide whether terrorist acts directed against the United States or against US interests were conducted in the context of international armed conflict, and if so, whether the conflict began on September 11, 2001, or perhaps on October 7, 2001 (when the US bombing campaign in Afghanistan began). The conflict has not been a traditional war between sovereign states. Nevertheless, the Counsel to the President of the United States has said that since at least September 11, 2001, the United States has been at war with al Qaida. If the United States is engaged in an international armed conflict as of a given date, it does not necessarily follow that the commission would be precluded from considering earlier conspiratorial acts if they led to the conflict.

The remaining offences charged against the detainees-murder by an unprivileged belligerent, destruction of property by an unprivileged belligerent, and terrorism--do not expressly appear in the Geneva Conventions or in the Statutes mentioned above. Nor does the term "unprivileged belligerent." International law does not criminalise "ordinary" murder or destruction of property, and there is no generally accepted definition of terrorism in international law. Nevertheless, there is a strong multinational consensus that acts such as the bombing of the USS Cole and the attacks of September 11, 2001, amount to terrorism.

The detainees may claim to be prisoners of war and thus entitled to the rights that Geneva Convention III accords to POWs. This is an important issue, primarily because Convention III, article 102 says that a POW can be validly sentenced only by the same courts and by the same procedure as in the case of members of the armed forces of the detaining power and if the provisions of the relevant chapter of the Convention have been observed. (Among those provisions is article 99, which says that no POW may be tried or sentenced for an act that is not forbidden by the law of the detaining power or by international law, in force when the act was committed.) The military commission's rules do not track those of US court-martials. In particular, the rules of admissible evidence do not supply all of the reliability safeguards found in the Uniform Code of Military Justice (UCMJ), and there is no right of appeal to any court. Under the Military Commission Order, the only appeal is to a Review Panel consisting of three military officers, only one of whom must have experience as a judge. Under the UCMJ, the accused has a right of appeal to the Court of Criminal Appeals of the service involved (army, air force, or navy/marines). After that, the US Court of Appeals for the Armed Forces may elect to review the case, and there is even a possibility that the US Supreme Court could review it.

Unless the detainees were acting for the government of Afghanistan (at that time, the Taliban) or of some other country that could be said to be a party to a conflict with the United States, it does not appear that they would be entitled to prisoner-of-war status. Geneva Convention III, article 4(A)(2) gives that status to members of militias and other corps not in the service of a state party to the conflict, only if they are commanded by a person responsible for his subordinates, they have a fixed distinctive sign recognisable at a distance, they carry arms openly, and they conduct their operations in accordance with the laws and customs of war. Al Qaida operatives would not meet those conditions if they acted independently from a government.

Even if the detainees are not entitled to POW status, they are entitled to certain basic human rights under international law. The United States is a party to the International Covenant on Civil and Political Rights (the Covenant), which is a multilateral treaty. Article 14 of the Covenant sets forth certain minimum guarantees designed to ensure that anyone charged with a crime has a fair trial. Article 15 says that no one shall be held guilty of any criminal offence for any act that did not constitute a criminal offence under national or international law at the time it was committed. Article 4 of the Covenant says, "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed," states parties may derogate from certain provisions, including article 14, but only to the extent strictly required by the exigencies of the situation. It does not appear, however, that the United States is relying on article 4. There is no right to derogate from article 15 in any event.

Under article 2(1) of the Covenant, a state party (such as the United States) "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind . . . ." On its face, this appears to apply only to individuals who are within the state party's own territory as well as subject to its jurisdiction. One seasoned observer has concluded, though, that it would be contrary to the purpose of the Covenant if states parties were not held responsible when they take actions on foreign territory that violate the rights of persons subject to their sovereign authority. A federal court in the United States, on the other hand, has interpreted article 2(1) literally.

The Guantanamo detainees are subject to US jurisdiction, but the Guantanamo base is not literally within US territory. It is leased from Cuba. Under the 1903 lease and a 1934 treaty, the United States has "complete jurisdiction and control" over the base for an indefinite duration. No international tribunal has determined whether that is equivalent to saying that the base is part of US territory. There is a split in US federal courts over whether the US jurisdiction and control is equivalent to full US sovereignty over the base. The Ninth Circuit Court of Appeals has held that, for habeas corpus purposes, the United States has both territorial jurisdiction and sovereignty over Guantanamo. The District of Columbia Circuit, however, has held that the Guantanamo base is not within any territory over which the United States is sovereign. This, too, is an issue that the military commission may have to decide, at least if the United States Supreme Court does not decide it first.

Finally, the military commission might take the position that it should not consider any limits on its decision-making powers beyond the President's Military Order of November 13, 2001 (authorising military commissions), Department of Defence Military Commission Order No. 114 and the terms of the charges against the two detainees. Under international law, a nation-state is responsible for any official acts that would violate its obligations, whether or not the acts are done in compliance with domestic executive or military orders.

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Source: American Society for International Law (ASIL).