LAW opinion

International laws and trials in Bangladesh

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CRIME, although committed against a person, is an offence against a State and that is why state prosecutors (public prosecutors) pursue a criminal case. A person who allegedly commits a crime can always be charged until he/she is alive. Unlike civil litigation or disputes, length of time does not affect crime. In other words, it does not have statutory limitation and does not lapse.

War crimes, genocide and crimes against humanity are categorized as international crimes. These crimes have their universal application because of their brutality and systematic attack against civilian population.

Any individual suspected to have committed such crimes can be tried by states at any time that are parties to the 1948 Genocide Convention and the 1998 Rome Statute of International Criminal Court.

Definitions of international crimes

War crimes: any crime that is contrary to the 1949 Geneva Convention of Armed Conflicts. This includes disproportionate use of power and action against civilians.

Crimes against Humanity: This includes murder, extermination, torture, rape and persecution or other inhuman acts as part of a widespread or systematic attack or with knowledge of attack, directed against any civilian population and knowledge of attack.

Genocide: Genocide includes any act of killing with intent to destroy in whole or in part, a national, ethnical, racial or religious group.

Difference between genocide and crimes against humanity

If the definition of genocide under the 1948 Genocide Convention is examined, it is argued that the definition of genocide requires the "intent to destroy in whole or in part" of which intent can be difficult to prove in the court of law and especially those acts stemming from conflict situations.

While the crimes against humanity under the 1998 Rome Statute, do not arguably require an "intent to destroy a group in whole or in part" by the perpetrators, but instead require that such atrocities detailed in the definition such as murder, extermination and so on, are committed as part of a "widespread or systematic attack directed against any civilian population, and "knowledge of the attack" refers to the knowledge of the perpetrators or supporters of the attack, or of those in power situations who have acquiesced to the attack, upon any civilian population.

Past Instances

The responsibility first lies on the state where crimes had occurred. If the domestic system falters or fails in this respect, international mechanism may come into play. In that sense, international mechanisms operate to provide redress where the domestic system fails or is found wanting.

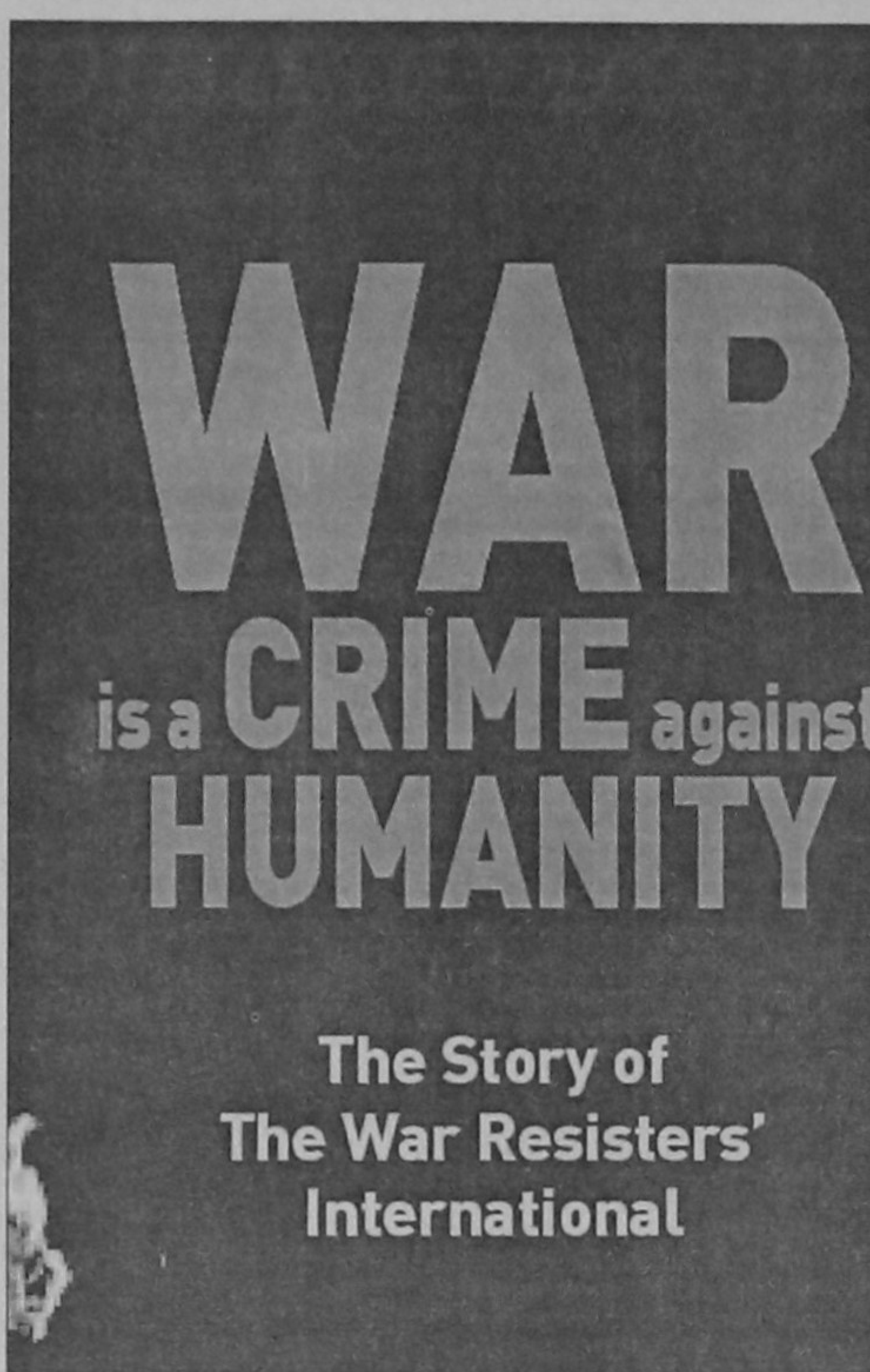
For example, on a request from Spain, Chilean late President Augusto Pinochet was arrested in London in 1998 for crimes against humanity and only on medical grounds, he was released. Yugoslavia's late dictator Slobodan Milosevic was surrendered by the Serbian government and was put on trial at the Ad-hoc International Criminal Court in 2002 on charges of genocide, war crimes and crimes against humanity in Bosnian conflict until he died in custody.

In recent times, more than 28 years after the killing stopped, Khemer Rouge Communist leaders are being tried before a tribunal in Cambodia with the assistance and advice of the UN.

From 1975 to 1979, the Khemer Rouge leaders embarked on a preplanned economic and social experiment and during the experiment, about 1.7 million died from brutal treatment, starvation and disease, especially those who lived in urban areas. The extermination has been known as the "Killing Fields" in international community.

The hearing on last 20th November came one day after the arrest of the last of the five alleged criminals being pursued by public prosecutors, the former Khemer Rouge President, Khieu Samphan, 76. Taken by the police from a hospital where he was recovering from an apparent stroke, he was charged with war crimes, and crimes against humanity.

The above instances demonstrate that no one, even a head of state, is immune from criminal trial against war crimes, genocide and crimes against humanity.



Bangladesh Case

One may argue that there were many reasons inside and outside the country that could be attributed for not commencing trial for the last 36 years. Some argue that elected governments neglected this matter, reasons only known to them..

It is noted that the amnesty granted by Bangabandhu Sheikh Mujibur Rahman on December 16, 1973, the second anniversary of Independence, did not apply for those who had specific charges of collaboration with the Pakistani armed forces who committed international crimes against unarmed civilian people in Bangladesh.

Against the background, it has been strongly argued by various organizations that alleged perpetrators could easily be tried for crimes against humanity for their commission of such crimes against civilian population under the existing International Crimes (Tribunals) Act 1973.

The International Crimes Act 1973 provides the government with power to try the suspected war criminals of 1971 by setting up tribunals.

The Act which was promulgated under the blanket immunity for the government provided by the first amendment to the Constitution in 1973 for trying war criminals, also scraps the usual protections ensured for the accused in the Criminal Procedure Code 1898 and in Evidence Act 1872, (the law makes newspaper reports and photographs of war crimes admissible in court) in an effort to ensure meting out of punishments to war criminals.

Furthermore, ordinarily a crime has to be proven 'beyond a reasonable doubt' in criminal laws, but this high standard does not pertain to trials under the 1973 International Crimes Act, making it much easier to prove international crimes.

The Act also limited the scope of appeal against the verdicts of the war crimes tribunals as it provides a convicted person may appeal only to the Appellate Division of the Supreme Court against a judgment.

However the success of the prosecution case at the court of law under the current legal system in the country depends largely on three factors (a) identification of suspected criminals, (b) collection of evidence including documentary and circumstantial and (c) proof of connection, direct or indirect, between the crimes and the alleged perpetrators.

The alleged perpetrators will have the right to be represented by their defence lawyers.

Among others, defence lawyers may argue, that while Pakistani alleged criminals totaling 195 who were directly or indirectly involved during the butchery of Bangladeshis in 1971 were allowed to go free under "an act of clemency" by the then government in 1974 in terms of the Bangladesh-India-Pakistan Agreement of April, 9, 1974, the case against the alleged perpetrators in Bangladesh who had a supportive role, may be set aside.

The text of the 1974 Agreement is a public document and paragraphs 14 & 15 of the Agreement are relevant in this context.

It is therefore imperative preparation of the case by the prosecutors needs to be thorough, based on documents including newspapers of 1971 and statements of witnesses, with a view to rebutting the arguments of defence lawyers.

Process of trial by Care Taker or Elected Government

One fundamental question has been raised is whether this caretaker government or elected government will take action in establishing tribunals for trial. There appear to be two sides of the arguments.

One side argues that the caretaker government may start the process and should not wait for the elected government to do so.

Their line of argument runs that this caretaker government is no ordinary caretaker government because of its long tenure (not three months like the past caretaker governments) and it has already engaged itself with some reforming tasks that are not routine functions but related to policy that will have long-term consequences for the country. Therefore they argue that the caretaker government may establish tribunals for the trial under the existing law of the land.

The other side advances the argument that the sole purpose of the caretaker government is to create a suitable and congenial environment for the Election Commission to hold free, fair and credible election (Article 58D of the Constitution). It is noted that past elections were reportedly held under the shadow of money power, muscle influence, and bogus voters, among others.

They argue that the caretaker government is therefore empowered to discharge responsibilities in relating to actions that are connected for fair elections, besides maintaining law and order as well as performing necessary functions to govern the country.

Accordingly they argue that whatever steps or actions this caretaker government has adopted are related to creating a congenial environment for impartial, free and fair elections. Therefore they advance the argument that it is not the responsibility for the caretaker government to proceed with the process of the trial.

Conclusion

Despite the argument for and against the Caretaker government in establishing tribunals for the trial, one fact is clear that the trial in Cambodia with the assistance of the UN shows that time and inaction in the past does not matter.

The proposed trial in Bangladesh will be seen to be consistent with the spirit and aims of the UN and action against inhuman and senseless crimes that are condemned by the civilized world. The effective punishment is an important element in the prevention of such crimes, protection of human rights and the promotion of international peace and security.

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HUMAN RIGHTS analysis

2007: Occupational accidents in Bangladesh

FROM January to December 2007, a total of 3,550 workers of which 2,512 (70.76%) were male and 262 (7.38%) were female in different workplaces (formal and informal) including transport sector were victimized due to various accidents and violation around the country. Noteably, the number of death of workers was 1,768 and while the injury figure was 1,782. While death due to accidents was 41 percent and the violation was 19 percent. Similarly, injury due to accident was 20 percent and injury due to violation was 20 percent.

Considering overall accidents and violations, it was observed that the rate of occupational accident and violation was comparatively high in the garments sector among all other different factories or sectors. It is hereby also mentionable that the rate of road accident as well as the victimization rate among the transport workers was very alarming.

Workplace Incidents: Among 3,550 victimised workers, a total of 983 workers were victimised mainly for the workplace incidents. And while 376 workers were killed and 607 workers were seriously injured.

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Sector / Industry	Workplace Incidents		Road Accident		Worker's Right Violation		Other Incidents		Total
	Death	Injury	Death	Injury	Death	Injury	Death	Injury	
Garments	80	236	51	88	50	368	13	4	890
Road Transport	2	3	451	121	49	35	9	2	672
Building Construction	77	92	16	10	10	3	19	11	238
Day Labour	24	2	73	65	18	1	56	55	294
Rice Mill	14	15	4	0	4	0	0	3	40
Domestic Worker	7	1	2	2	40	34	14	0	100
Shops Worker	9	4	22	1	22	10	3	1	72
Farmer	43	16	19	5	37	63	57	7	247
Other	120	238	220	57	107	216	26	13	997
Total	376	607	858	349	337	730	197	96	3350

Noteably, among different workplaces, 80 workers were killed and 236 workers were injured in garments sector, 77 workers killed and 92 workers were injured in construction sector, 43 killed and 16 workers were injured in agriculture sector (farmer), 24 day-labourer were killed and 2 were injured, 14 were killed and 15 workers were seriously injured in rice mill factories. Moreover, 120 workers were killed and 238 workers were injured in other different industries or sectors around the country during the previous year.

Road Accident: Road accident was the common panic for the workers in the last year. A total of 1207 workers (858 killed and 349 injured) workers of different sectors were the worst sufferer of the rampant road accident wholeover the previous year. It was very alarming that 572 transport workers were victimised due road accident and while, 451 killed and 121 were injured. Meanwhile, the death and injury figure due to road accident among the day-labourer were 73 and 65 respectively.

Worker's right violation: Again considering the violation figure, the garments sector was in the highest peak. Due to violation including both physical and sexual torture by employer, suicide of the worker because of rape, torture by the law enforecement agent, killing of workers because of previous enmity etc 50 workers were killed and 368 workers were injured in the garments sector during the previous year. While for the domestic workers the figures were respectively 40 and 34. In more detail, 337 workers were killed and 730 workers were injured in different sectors mainly for the worker's right violation.

Other incidents: Moreover, 293 (197 killed and 96 injured) workers of different sectors were victimised of other incidents including malicious firing, attack by wild animal, thunderstorm, cyclone, gas cylinder combustion, sinking into water etc.

Source: Bangladesh Occuptional Safety Health and Environment Foundation (OSHE).

Star LAW book review

International human rights law for domestic courts

DR. ABDULLAH AL FARUQUE

M. Shah Alam, Enforcement of International Human Rights Law by Domestic Courts, New Warsi Book Corporation, Dhaka, 2007, pp. xxiv+2003

Implementation of international law, especially international human rights law, in the domestic jurisdiction remains one of the most delicate and complicated problems of international law. Such implementation is not merely theoretical abstraction, but intensely practical issue. The book under review is an excellent exposition of this delicate issue and explores the potentials of the domestic courts of different jurisdictions to apply international human rights law in the state territories. The author of the book- Professor M. Shah Alam, is one of the most distinguished scholars in Bangladesh on international law. According to the author, domestic courts have remained largely unused for implementing norms of international human rights law within domestic jurisdiction. The author has made special attempt to examine how the problem of domestic implementation of international norms is addressed in Bangladesh. The author has drawn the conclusion that all the organs of the state i.e., judiciary, executive and legislature, have parts to play to facilitate and promote better implementation of international human rights law in Bangladesh. The book is divided into five chapters.

The first chapter of the book deals with theoretical problems of implementation of international law, specially human rights law, in the domestic level. However, it is appropriately contended by the author that rigid adherence to theoretical approaches is rather oversimplification of the state practices on the enforcement of international law. Individual state practices are more complex and vary widely to situate the issue in rigid compartmentalization. It has been observed that one of the reasons for weaker regime of implementation is soft law character of international law. Soft law character of international law also leads to divergence of state practice and perception on relationship between international law and municipal law. Such a diverse practice can also be largely attributed to the judicial tradition, education, training and motivation of judges that profoundly influence their attitude and approach towards domestic implementation of international human rights law. The traditional notion of state sovereignty remains of the major impediments of enforcement of international human rights norms in domestic level. While critically examining state sovereignty vis-a-vis direct application of international law in state territories, the author emphasises that state sovereignty in the age of globalisation should not be understood in absolute terms to obstruct direct application of international law.

Given the uniqueness of the US practice on the issue, the chapter two of the book is devoted to the analysis of invoking international human rights

Enforcement of International Human Rights Law by Domestic Courts

M. Shah Alam

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law in the US courts. It has been argued that the US practice on the issue is a bundle of contradictions, which comprehensively reflects the peculiarities of the problems associated with domestic implementation of the norms of international law. One the one hand, the relevant provisions of the U.S. Constitution and judicial decisions provide the most ideal situation of domestic enforcement of international human rights law in the U.S.A. On the other, government policies in the USA is manifestly conservative towards implementation of international human rights instruments.

Having examined the peculiarities of the US practice, chapter three explores the practices of the selected countries such as the UK, India, continental Europe and Japan to represent different trends on the issue of domestic implementation of international human rights norms. While the UK follows dualist model, the British courts now consider unincorporated treaty to generate judicially enforceable 'legitimate expectation' of claimants. Similarly, India, being follower of dualistic model, its judiciary by virtue of judicial activism have progressively applied international human rights norms and standards in the absence of enabling acts of the parliament.

Chapter four highlights Bangladesh position in relation to domestic application of international law, which is characterised by paucity of case laws, ambiguity of constitutional and statutory provisions, and reluctance of the judges as well as lawyers to refer to international instruments. The author has drawn the attention of the legal community as well as the policy makers to the fact that Bangladesh needs to clearly define, work out and follow a framework of norms, standards and policies for fulfilling its obligations under international law specially human rights norms. Considering the fact that art. 25 of the constitution of Bangladesh incorporates many fundamental principles of international law, judiciary has immense opportunity to read these international standards, principles and norms into constitutional and statutory provisions which are justiciable. According to the author, an enlightened and activist judiciary can always resort to international norms to illuminate our domestic laws o provide remedies to victims of violation of human rights.

The book also contains a bibliography and annexes, which is very useful source materials on the topic.

Despite the growing interest and importance of the subject matter of the book, there is dearth of scholarship on this issue in Bangladesh. Therefore, the book is long over-due and expected to fill the gap. The book is readable, well researched and well-structured. The language of the book is lucid and arguments have been presented in a convincing and persuasive style. No doubt, it will be of great interest to the students of international law, academics and human rights experts and will attract wider readership.

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