

At long last, let justice be served



MUHAMMAD HABIBUR RAHMAN

FOR a long time, war had been a way for conflict resolution in society. Many rules have been formulated in support of war for the protection of states and their interests whenever the issue of sovereignty has come up. Since ancient times, discussions have abounded regarding theories for and against war and just wars; on questions of differences between military and civilian targets; on a difference of situations between the warring and non-warring.

Once, it was considered improper to start a war without making any announcement, and

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superior officials. Not even a head of state is able to claim any special right regarding immunity. Any court in any country of the world now has the jurisdiction to take into cognisance any crime against humanity. It is a major duty of every country to hold trials for such crimes. It is also a duty of a country to return an accused of such crimes to other countries, and to assist in collecting evidence. A resolution to this effect (Resolution No. 3074) was adopted by the General Assembly of the United Nations in 1973.

There is no such word as "juddhaporadh" (war crime) in Bengali. The term "war crime" was first used in English in 1906. The use of the term "war crime" increased after World War II. While

Pakistan.

A country just liberated was, then, badly suffering from internal conflicts. People were struggling to cope with the abnormal rise in prices of essentials. It became a very difficult task to coordinate the budget to meet the demand for petroleum products. During that crisis, Bangladesh thought it would not be wise to neglect the opinion of other countries, and tried to develop normal relations with Pakistan.

Several lakh Bangladeshis became stranded in Pakistan during the war. The then Pakistan government kept several thousand Bengalee employees in confinement. Lobbying for bringing back these stranded and confined Bangladeshis put strong pressure on the government.

On December 22, 1971, top members of the Mujibnagar cabinet returned to Dhaka. Prof Anisuzzaman, writing about the event, noted: "Two days before that, I had a talk with Prime Minister Tajuddin Ahmad about two issues. One was punishment of the collaborators of the Pakistani army for the killing of the intellectuals. He said there would not be any lack of effort, but it would not be an easy task. I asked him why. He said he didn't think that it would be possible to try any of the Pakistani prisoners of war. I again asked for the reason. He said, 'There is pressure from the Americans. They are putting pressure on the Pakistanis to release Bangabandhu and putting pressure on India to release the prisoners of war and normalise the situation in the subcontinent.' He also said the Soviet Union did not have the will for the trial of the POWs, and even India was not interested about it."

He said: "In these circumstances, where would you get the strength to try them? And if you fail to try the main perpetrators, the process of trial of their collaborators is bound to be weak."

In his book, *Uttal Toronger Dingulite*, Fakhruddin Ahmad writes about this: "That was just a statement." He says: "I haven't found any policy in the Mujibnagar government's documents about the issue of the trial of war criminals. There might have been an understanding regarding this with the Indian government before the Pakistani army's surrender on December 16, 1971."

The Indian prime minister assured Bangladesh's prime minister that the Indian government would extend full assistance in bringing to trial all persons responsible for the most heinous genocide in recent history. From among the 93,000 Pakistani POWs, the Bangladesh government reduced the number of those accused of war crimes to 195 by July 1972.

The Bangladesh government was not active enough in collecting evidence or preparing documents for the cases, even for this few number of war criminals," J.N. Dixit writes in his book, *Liberation and Beyond*.

He also notes: "Mujibur Rahman told Haksar [special envoy of the Indian prime minister] that he did not want to waste energy and time on the trial of the war criminals due to the difficulty in collecting evidence. This attitude of Mujibur Rahman was appropriate for the greater sake of ensuring peace and stability in the subcontinent. And that helped in organising the Bhutto-India meeting in Simla in July 1972."

Bangladesh passed the International Crimes (Tribunal) Act (law No. 19 of 1973) to arrest,

hand over to criminal court, and punish members of any armed or defence or auxiliary forces or POWs for genocide, crimes against humanity or war crimes, and any other crimes under international laws. Officials took help from reports of different international organisations, especially the International Law Commission, at the time. A law was passed for the first amendment to Bangladesh's constitution (law No. 15 of 1973) so that the Supreme Court could not term the International Crimes (Tribunal) Act unconstitutional for being counter to any of the fundamental rights. Section 3 of the International Crimes (Tribunal) Act has given detailed explanation about the crimes against humanity, anti-peace crimes, genocide, war crimes, violation of rules for human welfare as in the Geneva Convention during 1949 armed conflict, any crime under international laws, and attempt to commit, instigate and conspire to hold such crimes, and conniving in not preventing such crimes. There was no provision in that law of filing any complaint. However, investigations could be initiated if anyone lodged any complaint before an investigation agency constituted by the government. At present, there is no government agency for this. If needed, that law can be amended.

The 1973 law contains provisions for constituting tribunals, arresting the accused, handing them over to criminal courts, punishing and giving legal aid to the accused. The law also recognises the right of the accused to appeal against the verdict with the Appellate Division of the Supreme Court 60 days into deliverance of the judgement. The Bangladesh International Crimes (Tribunal) Act 1973 does not limit the definition of war crimes to the violation of rules and regulations of war. It has incorporated murder, torture, ousting any civilian from Bangladesh territory, considering him a slave, or with any other objective, murder and torture of any POW, murder of any hostage or captured person, looting of personal or public property, and damage to and destruction of towns and villages in the absence of any military need.

There was a lack of prosecutors with minimum skill and dedication needed for holding trials for war crimes. I felt that the trial for war crimes was not possible when one of the top state counsel appointed for the war crimes trial told me: "I'll have to save my..." Later I told Aminul Haq, who later became attorney general: "You will not be able to hold trial for the war crimes."

No tribunal could be finally formed due to lack of experience and experienced lawyers, uncertainty about the trial of war criminals, and, above all, the political compulsion of the sub-continent. The war criminals could not be brought to trial.

It was not impossible to hold trials of some accused under the country's existing Penal Code and Code of Criminal Procedure. I have learnt from newspaper reports that a murder case was filed against some people known as war criminals in a magistrate's court in Jessore on December 15, 1993. The result of that case is not known to me.

Nor is it that trials cannot be held in a quick manner. The trial of East Pakistani governor Dr. Malek began on November 13, 1972. He was awarded life imprisonment when the trial ended on November 19. However, all of Dr. Malek's ministers were not

brought to trial. Though the nationality of some was cancelled, some got it back later. The government took a decision about it of its own will. The number of cases went up due to indiscriminate complaints under the powers of Collaborators (Special Tribunal) Order (PO No. 8 of 1972) and irregular handover to the criminal courts.

On May 16, 1973, some people convicted and accused under the Collaborators Act were pardoned. The government did not pursue the cases filed on charges of murder or similar heinous crimes. The passage of the law was blocked as about 34,600 people were accused under it. The government, as a result, was forced to pardon generously. And this was done at a time when the anti-government and anti-Liberation War activities were advancing towards a suicidal stage.

On April 9, 1974, a treaty was signed by Bangladesh, India and Pakistan. A joint statement said: "Bangladesh's foreign minister said the excesses and crimes done by these POWs amount to war crimes, crimes against humanity and genocide according to the decisions in the UN General Assembly and international laws. And there is unanimous agreement in opinion that the trial of those, about 195 POWs in number, facing allegations of crime, should be held for the sake of normal process of trial. The minister of state for defence and foreign affairs of Pakistan stated that his government expressed its regret and condemned any such crime if it had taken place." The last sentence was merely a statement, vague, unmoving and devoid of compassion.

Talking of the cruelty and destruction of 1971, Bangladesh's prime minister asked people to start everything anew by forgetting the past. He also said the people of Bangladesh knew how to forgive.

On December 15, 1973, the prime minister of Bangladesh

December 29, 1991, heated discussions were there in and outside Parliament about his citizenship. Several organisations became active about the trial of war criminals. From a sense of commitment to the principles of the Liberation War, love of country and resentment at the government's failure to try the war criminals, a national coordination committee was formed on February 11, 1992 at the call of Jahanara Imam.

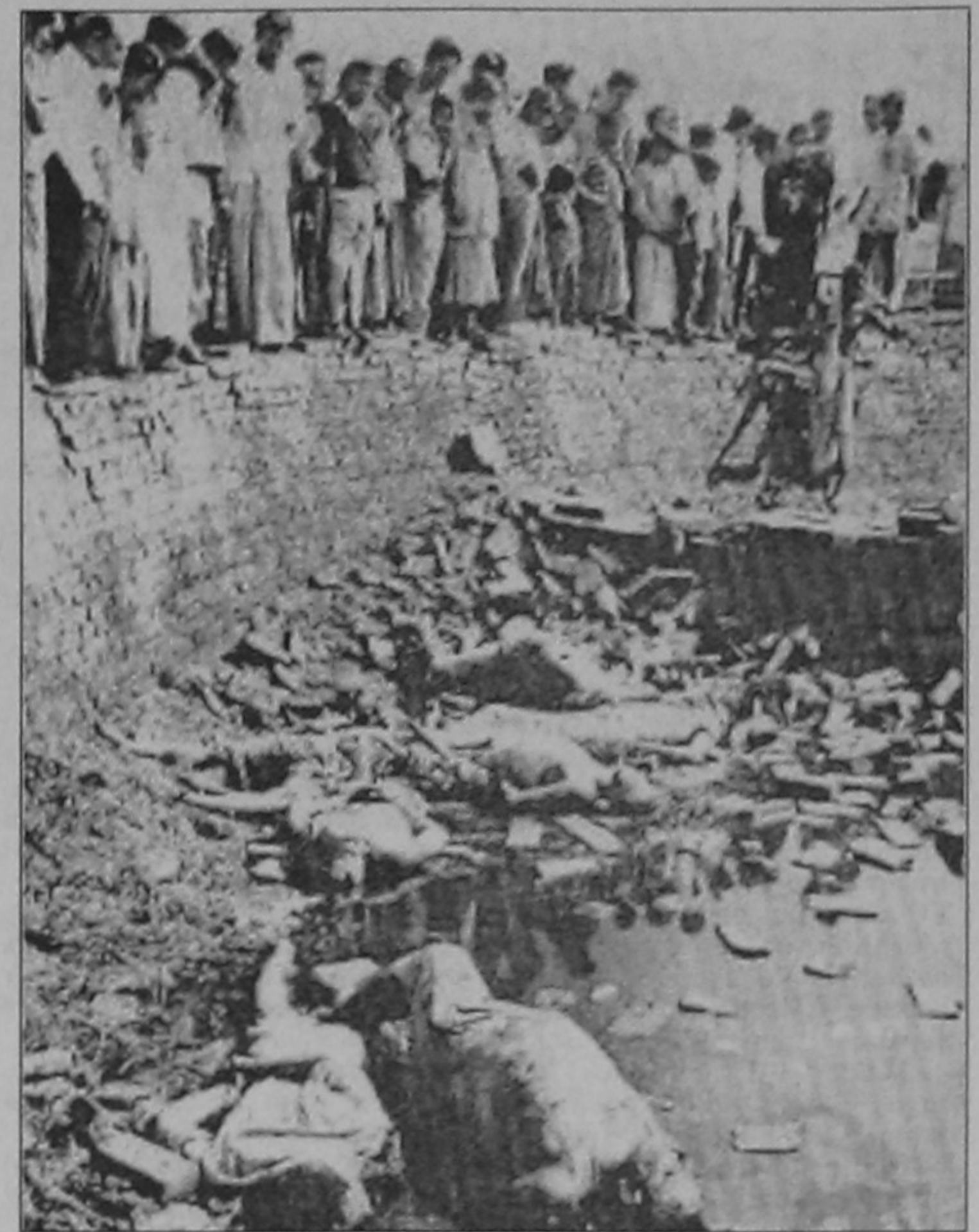
During an interview with journalists from Bengali newspapers in London on March 22, 1992, Prime Minister Khaleda Zia said: "Golam Azam is not above the law, but there is no logic in a trial at the *gono adalat*."

While reading out a verdict from the *ejlash* podium set up near the March 7 memorial at Suhrawardy Udyan on March 26, 1992, Jahanara Imam, as chairman of Bangladesh *gono adalat*-1, said: "Golam Azam should face proper trial for crimes that warrant the death penalty."

The leader of the opposition in Parliament, Sheikh Hasina, told the House on April 14, 1992: "If the question is raised in this parliament as to whether the *gono adalat* is legal or illegal, (existence of) people is denied... This court has delivered its verdict, but not taken the law in its own hand... Honourable Speaker, we think the existing law (International Crimes Act 1973) is enough to implement the judgement of this court. Despite that, if you think there is any deficiency in this act, the parliament can definitely address that."

Below is the proposal she made:

"For implementation of the people's opinion as reflected in the judgement of the *gono adalat* on March 26, 1992 against Pakistani citizen Golam Azam's opposition to the Liberation War of 1971, war crimes, genocide and crimes against humanity, opposition to Bangladesh in the name of salvaging Pakistan even after Bangladesh's birth, and involve-



At this time, there is a need to bring about structural and qualitative changes in the existing traditional courts for holding trial properly without delay under the common laws. We need to take preparation for complex trials of tricky offences like war crimes after creating an atmosphere of justice. The accused may make confession about totally different issues; evidence of war crimes may emerge without expectation. In a changed situation, the international opinion and situation may become favourable for holding trials for war crimes.

On October 31, 2007, the sector commanders of the Liberation War said during a discussion meeting that the war criminals committed crimes of 53 varieties in this land in 1971. About 5,000 killing fields were in place. During a meeting with newspaper editors, 'Chief Adviser' Dr. Fakhruddin Ahmed said he believed the participation of war criminals in national elections was undesirable. But there is help in the law. For any aggrieved person wanting to take help from the law the door of law was open, he said.

Ordinary citizens of Bangladesh believe, and neutral international analysts opine, that members of the Pakistani army and their collaborators committed war crimes in Bangladesh. While enacting the law in 1973 to try these war criminals, the then law minister Manoranjan Dhar said: "They are not enemies of Bangladesh but also of enemies of humanity." We have failed to try these enemies of humanity. We have said with firm belief: "Their trial is a must in this land." But it did not happen. We have said again: "People of Bengal know how to pardon." The pride associated with pardon does not become those who failed to try these criminals. We know it. Trials cannot be held in adverse situations. It is possible sometimes when the situation is in favour.

We remained silent about the trial of war criminals when elected governments were in power. Can it not be thought to be well-considered that we are becoming vocal about different issues, including the trial of war criminals, during the rule of an unelected government? However, there is a "but" here. A small-scale political coup took place on January 11, 2007. People found hope in the statements of the government in the subsequent few weeks. The government itself has said it is trying to do what did not happen in the last 36 years. It spontaneously raised the issue of a trial of the war criminals.

The sector commanders of the Liberation War are now demanding:

Forming a probe commission in line with Section 3 of Article 47 of the Constitution to ensure trial of those involved in war crimes, crimes against humanity, and genocide during 1971, and announcing terms of reference according to the International Crimes Act to put the activities of the commission above controversy; placing the government demand before the UN General Assembly and engaging some international jurists with the works of the commission to speed up and make the task easier.

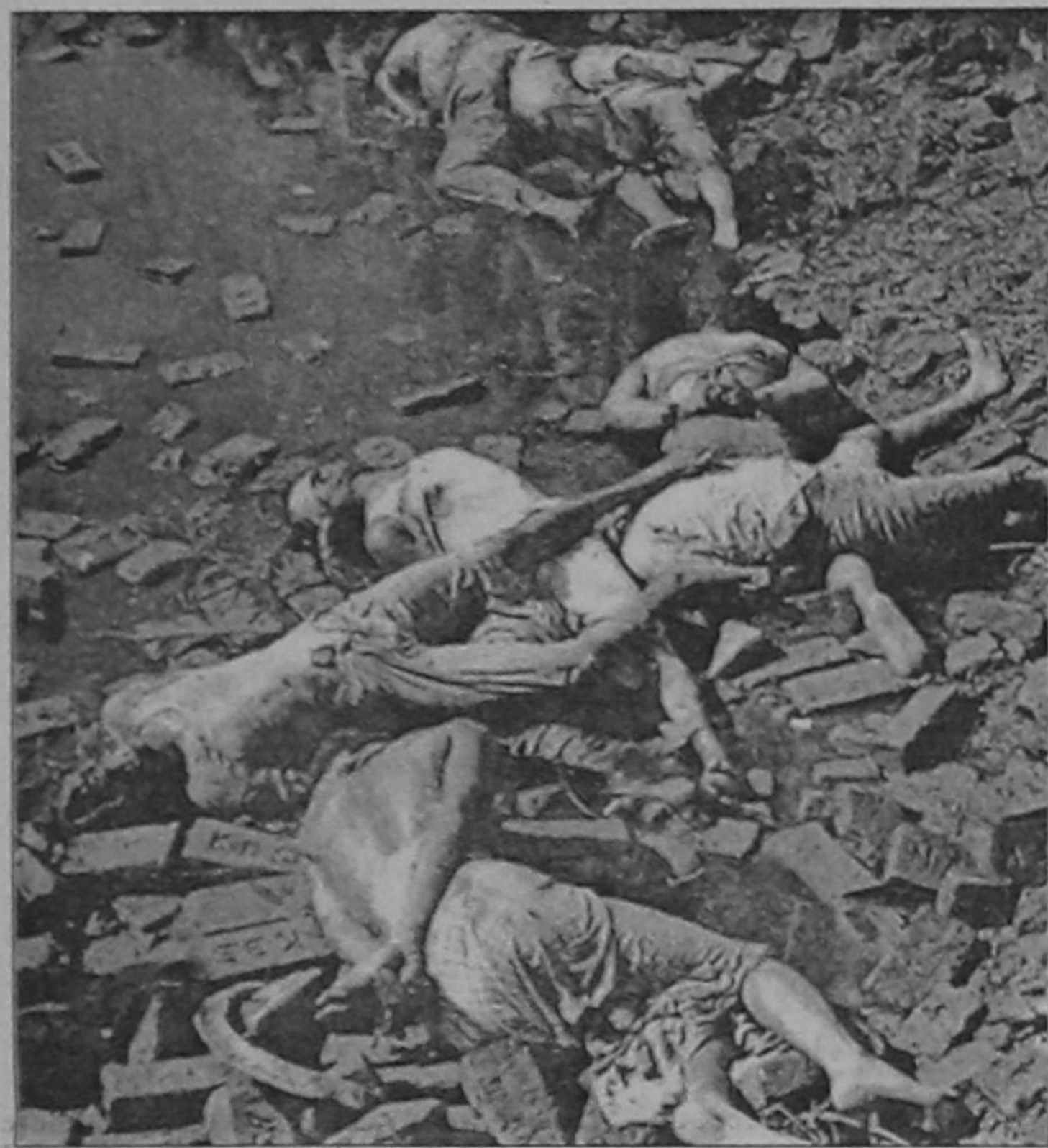
Taking the initiative for trial of the war criminals by constituting tribunals as per the International Crimes (Tribunal) Act XIX/73 and, after linking the commission's work with the tribunal, promulgating ordinance for holding trial of crimes that took place during the Liberation War (murder, rape, torture, looting, arson and planned genocide).

We will have to decide whether we would seek trial for any one or more than one crime mentioned in law No. 19 of 1973. To prove the allegation beyond doubt, the allegation must be made clear, and necessary documentation must be completed. We will not resort to what is untrue. Emotion has not helped us, and will not do so in the future. The law does not go by its own motion. There will be no lack of clever people to block its path or change its direction if we cannot steer it properly.

Without blaming anyone, we will have to know clearly why we failed to hold trials for genocide and what obstacles are ahead. Legal ambiguities need to be removed. We will not introduce any law like those of the Tudor era according to our own convenience. We will not establish any kangaroo court. We will take care that the accused get justice. We will collect evidence, considering their excuses and explanations, and face them. If we fail to do so, we will declare them as innocent.

Anarchy will be caused in the country if we punish the accused without any reason. We will have to take a decision about this through trial. We will not infringe or take away the rights of any citizen. The issue of trial, if prolonged for an indefinite period, will not bring any good to the country. We will hold such a proper trial that we can follow as a precedent in the future. It will be a process that even foreigners can emulate. Those who seek justice want justice for crimes committed. Let the trial of crimes against humanity be hastened.

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without exhausting peaceful attempts to solve international disputes. The question of justice and religion was also involved in the use of arms. Pope Innocent III wanted to ban the use of cross-bows on the ground that it was not necessary and that it caused too much suffering.

Some unwritten codes of conduct for the opponents were fixed during armed conflicts in ancient times. There was a time when no definition of war crimes existed, and it was, thus, difficult to arrive at its proper meaning. Nevertheless, it was taken for granted by all that violating the rules of war constituted war crimes, and that any civilian may also be guilty of such crimes.

Under the Hague conventions of 1899 and 1907, breach of some war rules was identified as a crime. After World War II, three kinds of war crimes were committed in breach of the law. Any war and preparation for war, or a war violating international conventions or treaties, and conspiracy for such a war is war directed against peace.

Among the conventional war crimes are killing in violation of war rules, torture, forcible removal or shifting of civilians from occupied land, killing or torturing of prisoners of war (POWs), killing of hostages, looting of public and private properties, and destruction of towns and villages without military need.

War crimes become crimes against humanity when civilians are killed or ethnically cleansed before or during the war, turned into slaves, subjected to torture on political, racial or religious pretexts, and fall prey to inhumane activities. A common symptom of war crimes is a sudden increase in the number of refugees from the affected area. About 10,000,000 people from Bangladesh took shelter in India during the Liberation War.

There is a relationship between crimes against humanity, genocide, and war crimes. Genocide has a target of destroying, completely or partly, a group of people. In the commission of crimes, a certain group of people comes under massive oppression. Crimes against humanity are more pervasive than war crimes. These can take place both during wartime and when there is no war.

During trials of crimes against humanity and war crimes, no individual can claim that he committed such acts on orders from



trying to arrive at a definition of war crimes in relation to the trial of war criminals of the Axis powers after World War II, the allied forces included attacking warfare, brutal torture on civilians, and attempts to eliminate a certain group or nation.

In August 1945, the United States, Great Britain, and Russia introduced a law for trial for war crimes. The Allies promulgated Control Council Law No. 10 on December 20, 1945, specifically mentioning where the German war criminals committed war crimes. The trials of the Nazi war criminals were held in Nuremberg in 1945, and were completed in a very short time. An 11-nation tribunal tried 22 Japanese war criminals in Tokyo during 1946-48.

As hard it is for poor people to get justice, it is equally hard to try members of the armies of powerful countries. The Nuremberg and Tokyo trials were held, but no proper trial was conducted for war crimes committed in Vietnam. At the initiative of Jean Paul Sartre and Bertrand Russell, the International War Crimes Tribunals in Sweden and Denmark passed verdicts through a symbolic trial.

Though the *gono adalat* (people's court) is a very effective medium for expressing public protest, its verdict cannot be implemented until the executive branch of the government accepts it as its own. Generally, there is no possibility of getting any result from this kind of alternative informal tribunal, working in parallel as it does to the courts.

Countries which had gone through minimum insurgency opposed the creation of Bangladesh. Saudi Arabia and its allies did not express sympathy for Bangladesh as the new country adopted secularism as a state policy. Could there be any difference if the Bengali translation of secularism happened to be non-communalism? China extended its support to its ally Pakistan since the Soviet Union supported Bangladesh. Most of countries that entertained different opinions about the Soviet Union and other socialist countries supported Pakistan. Though Bangladesh was the second largest populous Muslim country, its status in the Muslim world was unenviable. The Bangladesh government of the time was very anxious about its recognition by the Muslim world and the country which it had separated from,



said: "We don't believe in the policy of revenge and retaliation. So, those who have been accused and convicted under the Collaborators' Act have been pardoned under a general amnesty, and given the opportunity of normal life as citizens of the country again. I believe those who made mistakes and resorted to malice at others' instigation, will be allowed to take part in building the country if they repent for their acts."

In his speech at the UN General Assembly on September 25, 1974, Prime Minister Sheikh Mujibur Rahman said: "We left no stone unturned to normalise our relations with Pakistan and made final contribution by pardoning 195 prisoners of wars at last... While doing this, we did not impose any precondition or engaged ourselves in any kind of bargaining. We were only influenced by the thought of the future of our people."

On March 26, 1975, the president said at a meeting organised on the occasion of Independence Day: "My brothers and sisters, we have tried but failed to fulfil a pledge. I have fulfilled my promises with my life. We thought the Pakistanis would definitely be sorry and return our assets. I had promised to hold their trial. I have breached this promise; I did not hold their trial. I released them because I wanted to establish friendship in Asia, in the world."

The sympathy in the international arena for the trial of war crimes that took place in Bangladesh totally waned after the tripartite 1974 treaty. Though there was occasional lamentation about the failure to hold trials for war crimes, there was hardly any debate about it before 1992.

After Golam Azam emerged as the amir of the Jamaat-e-Islami on

ment in illegal activities to capture state power despite being a Pakistani citizen, Bangladesh Jatiya Sangsad is asking the government to take legal steps to hold trial for the allegations against Golam Azam after constituting a tribunal in line with the International Crimes (Tribunal) Act 1973.

That motion was not passed in parliament. On April 19, 1992, the ruling party proposal: "Golam Azam's trial will be held under the existing law of the land," was passed in the absence of all the opposition parties.

On June 22, 1994, the Appellate Division of the Supreme Court gave judgement in support of Golam Azam's citizenship of Bangladesh by birth. Two days later, Golam Azam expressed his apology for any mistake he had committed in the past. Jahanara Imam died on June 26. Later, the political front became busy with the outlines of a caretaker government.

By this time, the National Public Inquiry Commission formed by the National Coordination Committee had published two reports against 16 war criminals and Razakars. However, reports against seven more could not materialise.

Maybe more than one issue of past war crimes will remain unsettled. To remove all obstructions to hold trial in future, we can amend the International Crimes (Tribunal) Act or introduce a new law after consulting international jurists.

To hold trial under the existing laws of the land, there should not be any provision of death penalty for war crimes. The countries which have repealed the provision of death penalty may refuse to return a war criminal if he takes shelter in any of those countries.

