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INTERNATIONAL JUSTICE DAY

Bangladesh should ratify ICC statute

DR. AHMED ZIAUDDIN

ON this day ten years back on 17 July 1998, the world descended in Italian capital Rome and signed overwhelmingly an international treaty establishing the first permanent judicial institution with global jurisdiction, the International Criminal Court (ICC). The document was voted in by 120 states only 7 opposing, created a new international legal regime, an investigation, and prosecution and trial mechanism never seen before.

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The ICC, as an independent and truly international court, was assigned to deal with very serious crimes of international concerns, namely, the crime of Genocide, crimes against humanity, war crimes and the crime of aggression.

What was remarkable about this treaty, also known as the Rome Statute, city where it was adopted, was how quickly states from all parts of the world joined this treaty and in less than four years, the statute came into force on 1 July 2002 when over 60 countries ratified the instrument. A new court was born on that day. Since then, 17 July has been marked as the International Justice Day to mark adoption of the Rome Statute.

The establishment of the ICC signaled the end of impunity for those who committed international crimes, persons like Yahiya Khan, Pol Pot, Pinochet, Hitler etc. Many of these people went to grave without facing justice for their crimes. In case of Yahiya Khan, for example, who was responsible for killings of three millions and hundreds and thousands of rapes, and victimizing millions of others, died without facing his victims and paying for his crimes. If an international institution like today's ICC was around in 1971, Yahiya and his gangs certainly would have to stand before the court and the world to account for his crimes.

The ICC is only a complimentary court. It is intended to supplement national courts, which are primarily responsible to try war crimes, crimes against humanity and acts of Genocide. The ICC exercises its jurisdiction in exceptional circumstances only when states are "unwilling" or genuinely "unable" to try these at national level. This is precisely what has happened when governments of Democratic Republic of Congo, Uganda, and the Central African Republic have all approached the ICC asking assistance with prosecution of international crimes perpetrated in their own countries.

The Court have since investigated situations in these countries, accused individuals with highest criminal responsibilities, issued warrants of arrests and at least four such accused are in court's custody now in The Hague in Holland, former Congolese Vice President and rebel leader Jean-Pierre Bemba, Thomas Lubanga Dyilo, the first arrestee from DRC and other two war lords Germain Katanga and Mathieu Ngudjolo Chui. The Prosecutor is also investigating situations in Afghanistan and Colombia.

Meanwhile, the UN Security Council asked the Prosecutor of the ICC to investigate situation in Sudan in 2005. This was significant endorsement of effectiveness, legitimacy and credibility of a new court within three years of its establishment. The Security Council, responsible for maintaining international peace and security, realized importance of independent investigation and impartial prosecution and trial for providing security and securing peace. The Court has since issued international arrests warrants against Ahmad Mohammad Harun, a militia leader and Ali Muhammad Al Abd-al-Rahman, a sitting minister of Sudanese government. Last week, the ICC Prosecutor asked the Pre-Trial Chamber III of the ICC to issue warrant of arrests against President of Sudan Omar Hassan Ahmad Al Bashir.

The Court will take time and consider evidences presented by the Prosecutor and sufficient grounds exist, the Judges would then issue international arrests warrant against the Sudanese President on 10 different counts of acts of Genocide, crimes against humanity and war crimes. This then would be a groundbreaking development in that that would be the first ever arrest warrants issued by an international court against a sitting President of a country. In Article 27(1), the Rome Statute has done away with immunity attached to official capacity. It states, "This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or Parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in or of itself, constitute a ground for reduction of sentence."

There are some who argue that justice process could impede peace initiatives following conflicts but in reality, peace and justice are not incompatible and in fact, there cannot be any peace without justice.

Although the Court has no retrospective jurisdiction, it can only try crimes perpetrated after coming into force of the Statute in 1 July 2002, the Government of Bangladesh actively participated in its negotiations in Rome and was one of the first in this part of the world to sign the statute. It was quite logical for Bangladesh to support development of an international justice mechanism to deal with Genocide and other international crimes, which its people were all victims of.

However, a long time has passed since Bangladesh signed the Statute in 1999 but ratification process has not yet been completed and as such, Bangladesh has not formally joined this international justice process. In Bangladesh, ratification of an international treaty is a simple process, exactly the same followed during signing of any instrument- a Cabinet decision. One can always argue necessity of a second Cabinet decision to ratify since; the second such decision cannot impart higher authority than the first one that decided to sign. But, nonetheless, this still remains undone.

Bangladesh has no reason not to ratify the Rome Statute as the people of Bangladesh have collectively fought against Genocide, crimes against humanity and war crimes and have liberated the country. People of Bangladesh would never allow commissioning of such crimes in Bangladesh nor would they participate in such acts. So, ratification is more making position of Bangladesh clear and to contribute to international justice as a part of our Constitutional commitment to international peace.

The key objective is to ensure that those in the world responsible for atrocities should not only be tried but Bangladesh would be an active participant in this justice process. More significantly, once ratified, implementing legislations would take existing legal provisions to international standards; international crimes not defined in Bangladesh laws would be incorporated enabling courts of Bangladesh to enforce international criminal law. That is the only way to address too may international crimes seen around.

The Caretaker Government has already acceded to number of international Conventions such as the United Nations Convention against Corruption, Convention on the Rights of Persons with Disabilities, Optional Protocol to the Convention on the Rights of Persons with Disabilities, International Convention for the Suppression of Acts of Nuclear Terrorism and Convention on the Protection and Promotion of Diversity of Cultural Expressions, all done in 2007. As such, there are no legal or constitutional limitations for the current government to ratify the Rome Statute that Bangladesh is already in half way as a signatory.

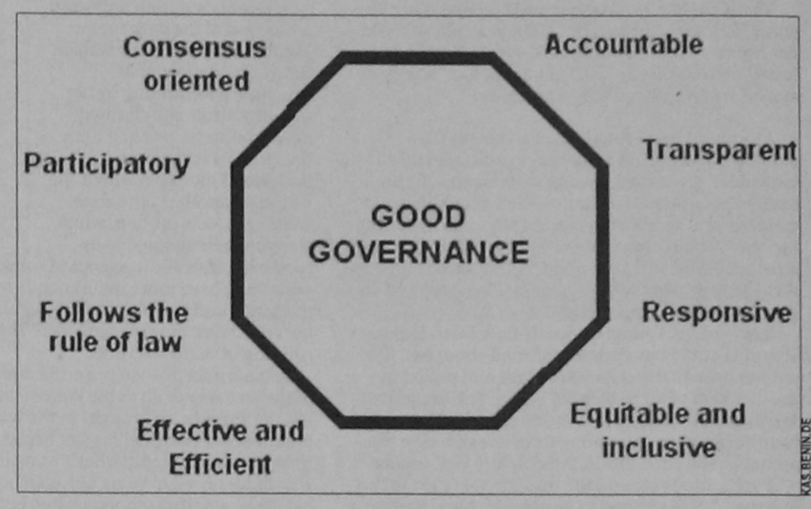
On this International Justice Day, we urge the Caretaker Government to ratify Rome Statute of the International Criminal Court as a mark of our collective respect to those who lost their lives and honors. We owe this to those whose bloods and sacrifices created Bangladesh so that we can emphatically say no to Genocide, crimes against humanity, war crimes and other international crimes. Ratification of the Rome Statute could also be this Government's lasting contribution to justice and of it legacy.

The write is Convener, Asian Network for the International Criminal Court (ANICC).

LAW *opinion*

A tale of governance

OLI MD. ABDULLAH CHOWDHURY



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QUALITY of governance has not improved much though non-partisan caretaker government initiated anti-corruption and targeted institutional reforms designed to ensure that the next elections will be free and fair. Human rights organisations have expressed their concerns, as there is a sharp increase in rights violation during the time of emergency. Not only there are reported incidents of torture and violations of jail code, children and women from marginalised community are often becoming victim of abuse and maltreatment. Corruption continues to spread although an anti-corruption drive began to bring members of political, business and public administration elites to accountability for their corrupt practices.

Bangladesh nearly reached to a state of pandemonium when confrontations intensified in October 2006 during the transition of power from the incumbent government to a non-party caretaker government (CTG). Development partners of Bangladesh have monitored the situation intensively and Swiss Development Corporation (SDC) in the country assistance paper reflected on the situation. Cooperation Strategy Bangladesh 2008-2012 delineates the situation "The sitting President assumed the duty of Chief Advisor of the CTG under controversial circumstances. Street agitations intensified with the AL-coalition announcing boycott of the elections. Ultimately, the armed forces intervened; resulting in the President's appointing a new Chief Advisor and Council of Advisors and postponing elections. Under a state of emergency, the new CTG assumed power in January 2007. Since then, it has been pushing for reforms in public institutions, in the judiciary, and in the election process to improve governance". A massive crackdown on corruption although went on, targeting allegedly corrupt politicians, officials and businessmen; there is hardly any significant improvement in the state of overall governance.

Again, UK is one of the four biggest donors along with World Bank, Asian Development Bank and Japan. Department For International Development (DFID), UK in the white paper "Working Governance work for the Poor" identifies good governance requires three things:

- State Capability
- Responsiveness
- Accountability

Good governance is not only about government, it is also about political parties, parliament, the judiciary, the media and civil society. Elections and democracy though are an important part of the equation, but equally important is the way government goes about the business of governing. However, Accountability is at the heart of how change happens. Where accountability is good, audit institutions and parliamentary committees scrutinise the way government bodies spend their money and what they achieve. Courts help prevent abuse of office. And beyond the formal structures of the state, civil society organisations give citizens power, help poor people get their voices heard, and demand more from politicians and government. Ironically, the process of strengthening the executive branch of the government at the expense of the legislature and the judiciary occurred incrementally throughout the history of Bangladesh.

Moreover, Perception-based governance indicators prepared by staff at the World Bank Institute, which aggregate data from a number of survey-based indexes, revealed low ratings for Bangladesh on six key indicators, with particularly poor ratings on control of corruption, regulatory quality, and rule of law. As revealed in Bangladesh Country Assistance Strategy 2006-2009 by World Bank, Bangladesh scored poorly on all six indicators for 2004. Let alone other indicators, control of corruption is still a far cry. Though interim government imposed a state of emergency and attempted to take actions against corruption, TIB has reported rise in corruption in the year 2007.

Furthermore, it has been reported in The Daily Star (June 19, 2008) referring to TIB that Bribery claimed 3.84 percent of per capita income of the country during the period. Corruption in education, health, land administration, local government and in different utility services sectors increased in the first half of 2007 despite the caretaker government's anti-corruption effort during state of emergency. In terms of magnitude, law enforcing agencies including the joint forces, police and Rapid Action Battalion (RAB) were found to be the most corrupt while land administration was found the most corrupt in terms of the amount of bribe that went into any sector, according to the National Household Survey on Corruption 2007.

If we look at other reports on the state of governance in Bangladesh, there are similar findings as well. Institute of Governance Studies, BRAC University publishes report on the state of governance in Bangladesh annually. The findings of 2007 point to a set of paradoxes for governance: in the interim, governance suffered a setback as the political, albeit non-partisan, power was further concentrated by the executive and the accountability mechanisms further weakened. Moreover, parts of the business sector that operated under the assumption of bad governance and through pervasive corruption, are suffering from instability and uncertainty-adding pressure to the declining state of economy in Bangladesh.

However, there are rays of hope also. Researchers from Institute of Development Studies (IDS) at the University of Sussex have found strong linkage between tax and governance and the National Board of Revenue (NBR) has recorded a 193 percent rise in income tax collection totalling Tk 739.11 crore in the tax year 2007-08 from Tk 252.11 a year ago, reported in The Daily Star on December 4, 2007. Their research suggests that states relying on revenue from natural resource exports or aid have little need to negotiate with, or to be accountable to citizens, or to build capacity to raise and administer tax.

On the other hand, states that rely on broad taxation have much greater incentives to practice better governance. Historical experience, contemporary evidence and case studies comparing experiences between countries also support the linkage. States having substantial track record of good governance rely principally for revenue on broad taxation of citizens and enterprises and the number of income tax payers has increased by 20 percent as 6,45,617 individuals submitted income tax returns in the 2007-08 tax year compared to 5,35,994 tax payers a year ago. Highest tax was collected in Sylhet where submission of tax returns saw a 49 percent rise with 1,403 percent growth in collection of income tax, according to NBR. With the rising number of tax payers, citizens of the country are anticipating quality improvement in governance.

As reflected in the white paper, "Making Governance Work for the Poor", governance is influenced by what happens in the region, by international organisations and standards, and by the views of other countries and international partners. This is about politics and politics determines how resources are used and policies are made. In short, good governance is about good politics.

To recapitulate, "The State of Governance in Bangladesh 2007", published by Institute of Government Studies, BRAC University has commented also that without any political will to change by the ruling party or a demand for reforms by the opposition and with the booming economy in the background, the prospect for a shift in the paradigm of governance remained grim. The hope for improved governance, therefore, lies with the elected government and the opposition for the people of Bangladesh in 2009.

The writer is working for FIVDB.

LAW *campaign*

PIL the name of people's power

NAJMUL HASAN

WHAT is the nature of the constitutional mandate that enables Public Interest Litigation (PIL) to be recognised and accepted in Bangladesh? A uniqueness of the Bangladesh constitution is its autochthonous nature, which in consequence highlights the people's power concept. Accordingly since this autochthonous constitution reflects the power of the people a PIL approach so mandated.

Development of a guiding principle for PIL is the 8th Amendment 69 case of 1989 where it was declared that parliament couldn't alter the basic structure of the constitution and decentralise the supreme court. This was not a case on social justice but related to the power relations debate it came as an inspiration to the judges and lawyers favouring activism and a greater role for the judiciary. The judges declared the need for progressive and dynamic interpretation of the constitution. They reaffirmed and re-establish the principle that while interpreting the constitution, the intention of its makers and its spirit must be taken into consideration and an Article should not be looked into in isolation.

Accordingly, an interpretation requires consideration of the so-called unique features of the constitution of Bangladesh one of which is its autochthonous nature. BH Chowdhury, CJ said, "Our Constitution has preceded form the people and it is not rhetorical flourish. Our Constitution is not the result of the process of the Indian Independence Act 1947 though we have taken inspiration from the wisdom of the past. Ours is an autochthonous Constitution." The first hint of an emerging unique Bangladesh argument in favour of PIL came in the same year form Ishtiaq Ahmed, a leading constitutional lawyer. He argued that a Constitution always carries the spirit of the age and the Constitution of Bangladesh reflects the historical realities of the time of its creation and contain a vision and dream of the unfolding future. Framers utilised the wisdom of the two decades long experience gained by the Indian and Pakistani Constitutions and enacted a Constitution which is distinctively our own. Then he said, "The emphasis is relevant and important because it is a cardinal principle of interpretation of constitution that in interpreting a word or a provision in the constitution that constitution must be read as a whole, every part of it throwing light on the other, every word used deriving its meaning and colour from the total context of the constitution. The preamble and part which follows the preamble, particularly Article 7, Fundamental Principle of state Policy, the Fundamental Rights, the scheme of limited government all these exist not in isolation but as parts of one whole document."

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In December 1994, Quazi Shafiuddin J in the Parliament boycott case resorted to one of the distinctive features of the Constitution, its autochthonous nature. He observed that Article 7 declares that all powers in the Republic belong to the people must be exercised on their behalf under the authority of the Constitution which is, as the solemn expression of the will of the people, the supreme law of the Republic. Therefore, a citizen and voter is a member of the whole people of Bangladesh and is a owner of power along with other citizens of the country. Since this power is to be exercised under or by the authority of the Constitution, each and every citizen of Bangladesh shall call any violation by anybody in question. He added a discussion of the preamble in favour of his argument and pointed out that under the preamble the people are to safeguard, protect and defend the Constitution. The Parliament boycott case attempted to provide an indigenous theoretical framework without resorting to Indian or Pakistani constitutional arguments. This was instrumental in strengthening the apprehension that attempts to follow other jurisdictions without appreciating the local situation are preventing the success of PIL.

PIL has recently been included in the topical talking judicial agenda (if not propaganda), perhaps, following or being enlightened by the trends in other legal systems and least, quite regrettable, as a principle origination from the aspirations of the land. As a result, some attempts have been made in Bangladesh, often in misplaced and misconceived manners in the name of PIL.

Dr. Mohiuddin Farooque advocated autochthony constitutional litigation' (ACL) and argued that to build a credible national jurisprudence the functional constructional should be autochthonic. By 1996, there appeared to be a consensus among activists, leading constitutional experts, lawyers and judges as to the uniqueness of the constitutional scheme, necessity of inclusive interpretation and autochthonic nature inspiring public interest matters. All that was needed was a pronouncement by the apex Court, the Appellate Division, in order to remove the reservations of conservative judges and lawyers.

The leading judgment was delivered by Justice Mustafa Kamal. Earlier in 1991, he refused standing in the *Sangbadpatra case* as not being a PIL and in the same case declared that the Indian Constitutional position is different and can't be blindly applied to Bangladesh. He further examined this theme in 1994 and was waiting to see "how the Supreme Court of Bangladesh finds its own answer to this issue". In a 1995 lecture, he took pride in the autochthonic nature of the Constitution. In that case, Mustafa Kamal J. begins with the argument of inclusive interpretation. He states:

"Article 102 of our Constitution is not an isolated island standing above or beyond the sea level of the other previsions of the constitution. It is a part of the over-all scheme, objectives and purposes of the constitution. And its interpretations is inextricably linked with the

(i) emergence of Bangladesh and framing of its constitution,
(ii) the Preamble and Article 7
(iii) Fundamental Principles of State Policy,
(iv) Fundamental Rights and
(v) the other provisions of the constitution."

He then proceeds to discuss each of the five categories separately. Discussing the first point, he denies that the Bangladesh Constitution is just a replica with local adaptations of a Constitution of the Westminster model among the commonwealth countries of Anglo-Saxon legal tradition. It is not the result of a negotiated settlement with a colonial Power or consent or a foreign sovereign. Although it has been amended 13 times, it is not the last of an oft-replaced and oft-substituted constitution. This constitution is the fruit of a historic war of independence achieved with the lives and sacrifice of a telling number of people for a common cause, making it a class part from other Constitutions of comparable description. It is a Constitution in which the people feature as the dominant actor.

It was the people of Bangladesh who in exercise of their own self-proclaimed native power made a clean break for the past unshackling the bondage of a past statehood and adopted a Constitution of its own choosing. The Constitution, historically and in real terms, is a manifestation of what is called "the People's Power". The people of Bangladesh, therefore, are central as opposed to ornamental, to the framing of the constitution.

The writer is Advocate of the Supreme Court, Ex-Secretary General Bangladesh, Ain-Jibi Federation.