War crimes tribunal

SYED ZAKIR HOSSAIN

FROM PAGE 42

The proposed war crimes trial in Bangladesh has an international dimension. Aside from its alleged local perpetrators, Pakistani troops and generals of the eastern command in 1971 responsible for the designated crimes are likely to be implicated. Many have died but some are still alive. They deserve to be brought to justice. This exercise would involve extradition arrangements. Some perpetrators of Bangladeshi origin are now living abroad. Some are naturalised citizens in foreign countries (see the list of nationally and internationally rehabilitated war criminals published by Bangladesh Centre for Genocide Studies, Brussels, and BBC Channel 4 documentary "War Crimes File"). Some of those implicated may even manage to leave Bangladesh to flee justice. Bringing them home to face trial would also require extradition arrangements, which would not necessarily be easy for Bangladesh. Bangladesh requires international cooperation in executing any arrest warrants issued by the proposed tribunal. Therefore, some form of international involvement in the trial process is likely to facilitate the execution of any international arrest warrants on, and extradition of, indicted criminals from abroad. UN involvement may be considered to facilitate these acts.

The tiers of the proposed tribunal are crucial. Section 6 of the 1973 Act deals with various aspects of the tribunal's chairperson, its seat, and qualifications of its judges. But it is silent on the issue of its hierarchical chambers. It is almost common practice now that such a tribunal should have three chambers, namely pre-trial chamber, trial chamber, and appeal chamber. A pre-trial chamber is necessary because the prosecution of the designated crimes may involve political consideration in the form of revenge or reprisal, which is prohibited in law. The prosecutor's office may initiate a prosecution with political motivation. In order to avoid such a possibility, the pre-trial chamber composed of judge/s of the tribunal examines the prima facie evidence to determine whether there is a legal case to answer. If there is, only then the pre-trial chamber issues an arrest warrant and the case proceeds to the trial chamber. Whilst the prosecutor is still competent to initiate a case, its decision is not final or decisive. There is a judicial determination at the pre-trial chamber of the prima facie legal merit of the case. Once this legal admissibility test is discharged, the case is conclusively decided by the trial chamber, against which an appeal lies with the appeal chamber. This is clearly a pragmatic check and balance approach. The International Criminal Court (ICC) follows this approach and so does the Extraordinary Chamber of Cambodian Court. The possibility of extra-legal consideration in the prosecution of war crimes in Bangladesh may not be gainsaid in some cases. In a bid to avoid this potential problem and any conflict of interests, a three-chamber tribunal appears to be intuitively appealing for Bangladesh.

United Nations involvement may also be sought in the appointment of judges, and investigating judges, and prosecutors. International participation and cooperation at all levels of the trial have been ensured through the inclusion of some foreign judges, co-investigating judges, and co-prosecutor nominated by the UN Secretary-General in both Sierra Leone and Cambodian trials of war crimes. Mixed international and national judges and prosecutors were also appointed in East Timor and Kosovo courts to try war atrocities. The end in view is to ensure the trial process and its decisions are impartial and acceptable internationally. Bangladesh may consider this mixed approach of judges and prosecutors for obvious benefits. It may opt for the chair of the tribunal and the majority judges from Bangladesh and the minority from among foreign nationals through the UN. In this way, the functioning of the tribunal can have national control with international exposure. Purely nationalistic option is fraught with the potential risk of sending an undesirable signal to the rest of the world, which may tarnish the impartial image and credibility of the tribunal. The capacity and willingness to hold fair trials of particularly internationally designated crimes by national tribunals/courts is increasingly being scrutinised by international observers for signs of corruption, lack of due process, and political influence. The fundamental principle that centers round every criminal trial, be it national or international, is that justice is not only to be done but also manifestly seen to be done. The proposed war crimes trial in Bangladesh is no exception. It must be a fair and credible trial.

In formulating the applicable substantive law and procedural rules of the tribunal, Bangladesh must be careful about certain basic principles of international law and its own constitutional law. An instance is Article 9 concerning arrest and speedy trial and the right of the accused enshrined in Articles 14 and 15 of the International Covenant on Civil and Political Rights 1966 of which Bangladesh is a party and its own constitutional guarantees embodied in chapter 3 of its Constitution. Being a party to the Vienna Convention on the Law of Treaty 1969, Bangladesh must affirm that it would not invoke or apply any national law to escape international treaty obligations. The Simla Pact 1973 is especially relevant to this point. A case has to be made for arguing that the Simla Pact is void in international law for its inconsistency, if not repugnancy to, the peremptory norm of international law (see my article in The Daily Star of 29 January 2009).

There must also be an adequate and readily available appeal remedy and provisions for the protection of victims and witnesses in appropriate cases through the conduct of proceedings in camera and suppressing the identity of a victim or witness. These matters, among others, must be taken into account in formulating substantive law and procedural rules pursuant to s10 (procedure of trial), s11 (powers of the tribunal), s17 (right of the accused person during trial), and s21 (right of appeal) of the 1973 Act. Viewing sentences from human rights perspective, the maximum penalty may not exceed life imprisonment, which may require a reappraisal of the capital punishment provided in s 20(2) of the 1973 Act. This is likely to be a contentious issue if the UN involvement is sought and negotiated. Many local perpetrators are allegedly responsible for undue enrichment in 1971. Provisions for reparations in appropriate cases through the judicial process may go a long way in rewarding many surviving victims and/or their relatives in ameliorating their grievances of past injustices.

In most, if not all, instances of the formation of special war crimes tribunals or courts, UN involvement was felt necessary and negotiated by the state concerned. The end result has been a negotiated agreement or memorandum of understanding (MOU) between the UN and the state concerned. Except the Bosnian and Rwandan tribunals, all other, notably Sierra Leone and Cambodia, special courts/tribunals have been nationally controlled. These agreements/MOUs spell out terms and conditions for minimum UN and maximum national involvement. Cambodia successfully negotiated that the tribunal be majority Cambodian, albeit under certain conditions. The then co-Prime Ministers of Cambodia sent a letter on 21 June 1997 to the UN Secretary-General requesting the assistance of the UN and the international community in "bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979". This letter backed by intense diplomatic maneuvering triggered formal negotiations that resulted in the UN getting involved. The Cambodian agreement with the UN was not easy to come by. Working out a similar outcome may not be easy either for Bangladesh. One may argue that such a diplomatic move will receive a frosty reception in some countries. Some may also surmise that the major powers like the US and China, which opposed the Bangladesh liberation war, may even oppose any 1971 war crimes trial.

There are potential obstacles to be overcome through diplomatic negotiations. Thirty states abstained from voting on the resolution approving the Cambodian genocide trial in the UN General Assembly. Due to its past legacy of military bombardment on Cambodia during the Vietnam war and political support for the Khmer Rouge after they were ousted in 1979, the US maintained a low profile in the negotiations but worked hard behind the scenes to strike a deal between the UN and Cambodia. Similarly China was the biggest supporter of the Khmer Rouge and its steadily increasing political and economic presence in Cambodia caused many to fear that the plan for genocide trial would be sacrificed in the interest of political and economic stability. This fear was unfounded because the trial of Khmer Rouge leaders was thought to be much more than a foreign policy issue for the majority states, which seized this opportunity to address past injustices and end the culture of impunity.

Bangladesh may pursue the Cambodian route and tailor it to suit its conditions for a Bangladesh-run tribunal. It must formally seek assistance from the UN and the Prime Minister's request for the UN help in holding the trial presented to the UNDP Representative and UN Coordinator in Bangladesh on 3 February 2009 is the first step. This request needs to be followed up with the UN Secretary-General for embarking on excruciatingly difficult diplomatic negotiations with the UN and its members. Instead of emphasising too much unfounded fears and potential hurdles, Bangladesh must deeply concentrate on diplomatic means to overcome them. It must take the advantage of the current climate of growing international antipathy towards the perpetrators of heinous crimes and sympathy for their victims. Should Bangladesh succeed, the UN is set to appeal, as it did in the case of Cambodia, to the international community to provide assistance including financial and personnel support to the proposed tribunal.

In this intensely interdependent world, the proposed trial of the war criminals of 1971 must meet the minimum threshold requirements of national and international criminal justice systems. It must be guarded against being portrayed by the global information super-highway as a politically expedient trial carried out by a kangaroo tribunal. Should this ever eventuate, it would reinforce the status quo of an evasion of justice for crimes that shock the conscience of humankind and keeping the surviving victims and their relatives under a cloud of gross injustice. An outward-looking tribunal is preferred over an inward-looking tribunal. International safeguards will help ensure credible justice in the eyes of the international community. This does not compromise the sovereignty of Bangladesh. The sovereignty of Bangladesh should not be seen as a tool for isolation and insulation from the international scrutiny of the formation and operation of the tribunal. Rather, it must be used as a tool for international participation and collaboration in ensuring distributive justice to all stakeholders -- both the victims/relatives and their perpetrators alike.

Rafiqul Islam is Professor of Law, Macquarie University, Sydney, Australia.