

War crimes trial: National and international legal aspects

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THAT 'No crime should go unpunished' has been a cardinal principle of administration of criminal justice ever since the emergence of justice administration. What constitutes a 'crime' is defined by provisions of law in force at a particular point of time. An act or omission treated as a crime in one legal system may not have same nomenclature in another system. However, over centuries of societal development certain acts and omissions have come to be generally recognized as 'offences' and 'crimes' almost universally. Moreover, any act of criminal nature is deemed to be ultimately directed against the peace and security of the society, either on a national level or on an international plane. Thus, crimes may be differentiated as crimes under the domestic/municipal law (threatening internal peace and security) and crimes under international law (threatening international peace and security). These are dealt with by municipal criminal law or international criminal law respectively.

States enjoy criminal jurisdiction in conjunction with other types of jurisdiction like civil, administrative, judicial etc. Jurisdiction of a state may also be categorized as jurisdiction to prescribe, jurisdiction to adjudicate and jurisdiction to enforce. States exercise their jurisdiction either on the basis of nationality principle (a state is the supreme authority in relation to its nationals) or on the basis of territorial principle (a state is the supreme authority in relation to all actions and omissions, events etc. taking place within the boundaries of the state). Domestic jurisdiction of the state is one of the manifestations of state sovereignty also and hardly raises any concern from other states or bodies. When a state exercises its civil jurisdiction in relation to even foreign nationals no other state, not even the state of nationality of the aliens seem to bother at all. However, when a state exercises criminal jurisdiction in relation to aliens it may face questions on the part of the state of nationality of the aliens. In this situation, the doubts of the state of nationality may be eroded by ensuring 'due process of law'. The objections of states of nationality concern not so much the exercise of criminal jurisdiction by the 'host state' as much as apprehension regarding respecting cardinal principles of justice administration like 'rule of law', 'due process of law', etc. If these concerns are well addressed there remains no valid ground for objecting to exercise of criminal jurisdiction by a state.

Certain crimes because of their very nature, gravity, magnitude and horrendousness are today defined as 'crimes under international law' or simply 'international crimes'. Consequences of these crimes transcend national bound-

aries and on account of their atrocious nature adversely affect international peace and security i.e. violate international public order. According to contemporary international law, international crimes fall under universal jurisdiction of states implying that any state at any point of time is deemed to have jurisdiction to try these crimes. Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal adopted by the United Nations International Law Commission on August 2, 1950 in Principle VI defined the following crimes as crimes under international law:

- a) Crimes against peace
- b) War crimes
- c) Crimes against humanity

Principle VII declared that complicity in commission of the foregoing crimes is also a crime under international law.

However, prior to the Nuremberg Charter on December 11, 1946 the United Nations General Assembly declared that 'genocide, whether committed in time of peace or in time of war, is a crime under international law...' and therefore, punishable under international law. In other words, universal jurisdiction is applicable to the crime of genocide and as such any and every state has jurisdiction to try this offence.

Thus, international crimes may be tried in either of the two available forums: in a municipal court/tribunal, or in an international court/tribunal. Whereas the domestic court may apply either international law or domestic penal provisions, the international court/tribunal has the option of resorting to international law.

In this background we need to think about prosecuting the 'war crimes' committed during our liberation war in 1971. It needs to be mentioned that we are using the words 'war crimes' very loosely. War crimes have a strict legal definition and signify 'violations of the laws and customs of war'. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.' When we talk of the trial of war criminals of 1971 we evidently want to cover far more criminal acts than merely those under 'war crimes' stricto sensu. Crimes perpetrated by the razakars, al-badrs, al-shams, jamaat, and other anti-liberation elements fall very much within the notion of crimes against humanity.

With respect to the first option, Israel's prosecution of Nazi official Adolf Eichmann in 1961 provided a convincing example. The court in that trial observed: 'The abhorrent crimes ... are not crimes under Israel (read Bangladesh) law alone.'

grounds... whether or not in violation of the domestic law of the country where perpetrated.' War criminals of 1971 also committed genocide meaning 'any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.'

The English phraseology 'Trial of War Criminals' aptly describes the content but the Bangla word 'Juddhoparadh' merely depicts only a small segment of the crimes committed by the perpetrators in 1971 and may be replaced by the word 'Juddhokalin aparadh' to convey the real intention, scope and purpose of the intended trial.

What are the options available to Bangladesh to try the war criminals of 1971? Can the criminals be tried in an international tribunal under international law? Unfortunately, criminals of 1971 cannot be tried in the International Criminal Court, the only permanent court having international criminal jurisdiction. The ICC established under the Rome Statute in 1998 lacks jurisdiction to try offences and crimes committed prior to its establishment. Bangladesh, therefore may take resort to any one of the following possibilities:

- a) Establish an International Tribunal to try these crimes
- b) Establish an UN sponsored National Tribunal for the trial
- c) Establish a Special tribunal under the domestic law to try the war criminals of 1971.

In my opinion, the first two options may appear to be far-reaching for Bangladesh. Formation of any international war crimes tribunal whether with or without UN association may not be that easy owing to international politics. We should never lose sight of the fact that even 'enemies have friends'. The only remaining option, therefore, is to try the perpetrators in a Special Tribunal established solely for this purpose. Under which law can these crimes be tried? Here again, Bangladesh has two options: first, try the war criminals in the national court applying universal jurisdiction, and second, try them in the national court/tribunal under national/municipal law.

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These crimes, which struck at the whole mankind and shocked the conscience of nations, are grave offences against the law of nations itself... Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is universal.

Now, with regard to the second option, we may consider ourselves to be extremely lucky in the sense that we already have a statute which was enacted by the Bangabandhu government in 1973. The title of the statute is self-explanatory: The International Crimes Tribunal Act, 1973. Quite interestingly, though after the brutal assassination of the Father of the nation many amendments were made to the Constitution, war criminals who were in detention or undergoing punishment were freed, all collaborators not falling within the scope of the General Clemency were released, anti-liberation elements were rehabilitated and not seldom rewarded, this Act somehow escaped the wrath of those in power and even today continues to be an integral part of the body-legislation of the country. Hence, there is no necessity in having a fresh legislation to try the war criminals of 1971. The 1973 Act is self-contained having both substantive and procedural provisions. Under this Act jurisdiction of the Tribunal includes inter alia, crimes against humanity, crimes against peace, genocide, war crimes, violation of international humanitarian law and any other crimes under international law.

The Act reproduces the definitions of the different crimes from existing international law and goes further to include 'any other crimes under international law' in the jurisdiction of the Tribunal. It is now for the government to establish 'one or more tribunals'. The Act provides for an 'Investigation Agency' for the purpose of investigation into the alleged commission of crimes. In order to cast away any doubt as regards ensuring 'due process of law' and in order to pre-empt subsequent allegations that the tribunal is 'Victor's tribunal' and the trial is 'Victors' justice', it may be wise to involve the UN or other international experts in the work of the Agency. It will also add an international flavor to the otherwise national tribunal. We have nothing to hide from the international community. On the contrary, we should make available to the whole world all the evidence relating to the atrocities committed by the war criminals in 1971 and this will ultimately enhance the international acceptability of the trial.

A common critique made to the address of war crimes tribunals relates to concerns about 'Fair trial'. The 1973 Act not only envisages right of appeal of a person convicted by the tribunal to the

Appellate Division of the Supreme Court but also incorporates rights of the accused during trial. The accused may give explanation relevant to the charge, can conduct his own defence or have assistance of counsel, shall have the right to present evidence in support of his defence and to cross-examine any prosecution witness. These are the manifestations of the 'due process of law' and 'fair trial' and make the 1973 Act more humane, jurisprudentially sound and legally valid and therefore, an improvement over the Nuremberg Charter- the founding stone of modern international criminal justice administration.

Bringing culprits to justice has some notable merits:

Trials establish individual responsibility over collective assignation of guilt, i.e., they establish that not all Pakistanis, not all collaborators and not all Jamatis were responsible for the crimes committed in 1971 and not all of them but individual perpetrators had committed such crimes- although, of course, there may be a great number of perpetrators;

Justice dissipates the call for revenge, because when the Court/Tribunal metes out to the perpetrator his just deserts, then victim's calls for retribution are met;

By dint of dispensation of justice, victims are prepared to be reconciled with the erstwhile tormentors, because they know that the latter have now paid for their crimes;

A fully reliable record is established of atrocities so that future generations can remember and be made cognizant of what happened.

Therefore, the crimes committed by the war criminals in 1971 cannot be simply forgotten. It is not only for the rule of law, not only for the sake of justice but even more for the sake of humanity that they be brought to justice and duly punished through a trial conducted in accordance with due process of law. Post-2nd World War Development of international law in general and international criminal law in particular has made laudable scope for prosecuting and punishing the war criminals. Domestic jurisdiction of states in this respect has been widened by the recognition of 'universal jurisdiction' whereas international criminal law has been placed on a solid footing by a clear definition of 'crimes under international law'. The 1973 Act of Bangladesh makes a unique blending of these two aspects and is, therefore, believed to be an ideal piece of legislation to try the war criminals of 1971 without invoking any legitimate dissent from any quarter in the international community.

The stage is perfectly set. The prosecutors are prepared. Alas, the perpetrators are still at large! It's time that they were forced to appear before the Tribunal. The sooner the better!

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