



REVIEWING the views

Some concerns of war crimes trial and response

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37 years of lapse in failure to hold trial of international crimes has given rise to many confusions and misconceptions. The new state of Bangladesh took legislative, judicial and administrative steps to hold trial of the perpetrators of heinous crime. But successive regimes in conjunction with the anti-liberation forces had perpetuated the power in Bangladesh. The result is that they have escaped the justice and created an array of confusion against any sort of trial. Following excuses are often used as ploy against holding trial of the offences in 1971. It is argued here that all these contentions are misleading and untenable in the eye of law.

There was no war other than a civil strife in 1971 in Pakistan, so any allegation of war crimes is baseless.

This contention is a clear negation of the history of the birth of Bangladesh itself. People holding such opinion lives in a fool's paradise. On 25th March 1971, large-scale massacre was perpetrated by the Pakistani forces in the name of 'Operation Search Light'. An unjust war was levied upon the unarmed people of Bangladesh. Bangladesh declared independence as a response to that.

The Proclamation of Bangladesh independence has clearly stated why the people as a last resort declared the war against Pakistani authoritarian regime. Once a territory is declared to be independent complying with all the established norms of international law and practices, any presence of outside forces is taken to be a threat to the sanctity of territorial integrity of that newly born country. So the battle fought clearly comes within the definition of war as enshrined by international law.

A civil war is usually fought to usurp the state power between two or more rival groups of a country. The sole purpose of civil strife is to overthrow a regime from the power and to assume it by the rival opponents. Then what happened between Bangladesh (East-Pakistan) and West-



Pakistan during the 24 years life span of Pakistan? It was nothing other than to establish the right to self-determination of the Bangalee population against an external force. It was fought not to alter the internal sovereignty but to alter the external sovereignty to struggle for emancipation from the clutches of exploitation, oppression and suppression of west-Pakistani authoritarian regime for the purpose of a just government.

Genocide did not occur as there was no large-scale mass killing in the then east Pakistan. The prevailing conviction that 30 lakh (3 million) people were killed is a misnomer. So, the extent of mass killing so as to render it as 'genocide' is not fulfilled.

Indiscriminate massacre on the ground of religion, race, caste etc with the sole intention to destroy a particular group either whole or in part does fall within the definition of genocide. In order to determine a particular crime as genocide the test is the intention of the perpetrators not the number of people massacred. This is particularly evident from the definitional scope of genocide under the Genocide Convention, 1948. With the intent to

destroy an ethnic, national or religious groups etc either wholly or in part comes within the purview of genocide.

A considerable period of 37 years after the 'incident' has elapsed. So it is not viable to go for a trial.

Law of limitation is totally foreign to known canons of criminal jurisprudence. International criminal law particularly emphasises on this aspect that crimes like war crimes, genocide, crimes against humanity, crimes against international law and peace are so grave in nature that their application, extent and consequences cannot be confined within a time framework. The trend of the development of international law for last four decade is that in such cases states should have universal jurisdiction to try the offenders. Apart from some processual and convenience adversary there is no strong objection against the jurisprudential basis of universal jurisdiction. If used competently and following the due process of law any tribunal can exercise universal jurisdiction to try the war crimes.

Evidence is essential in order to prove the commission of an offence. It is impos-

sible to produce testimony of crimes occurred in 1971; hence the question for a trial is not reasonable.

After the Second World War the perpetrators of war crimes and genocide were brought to the altar of justice. In the recent past, trial of international crimes committed in Rwanda, Bosnia-Herzegovina, Cambodia has been held in Tribunals. The laws followed in those trials had a simplified way of proof. Bangladesh has also enacted International Crimes Tribunal Act 1973 in line with that standard. In this law it is provided that even the news report, papers, letters or other convincing documents can be taken into account as a proof of involvement in the international crimes during 1971 war. Besides these, many victims of war, their successors, sufferers are still alive to narrate the incidents and people involved with the genocides and war crimes are within the reach of any incarceration and investigation. So, it is erroneous to say that identification of the culprits and production of proof would be impossible.

The then government of Bangabandhu declared amnesty to the criminals, hence holding trial again would be violative of rule of law on the one hand and ignominious for Bangabandhu himself on the other. By the Shimla Pact among India, Bangladesh and Pakistan the war prisoners and main culprits were condoned. So, trial of the criminals cannot be held.

Amnesty shown by the then government was not applicable for every offence committed. Persons charged with murder, rape, looting, arson etc were not condoned. There are strong evidences against suspected people for such involvement. A jurisprudential aspect of international law is that amnesties shown to perpetrators of genocide, war crimes and other international crimes are opposed to peremptory norms of international law. Any amnesty, arrangement and treaty amongst states in derogation of such principles stand void as per the provisions of international treaty law convention.

The essence of Shimla Pact was that Pakistan would try the perpetrators of genocide and war criminals. But Pakistan did not keep their promise, which was a negation of Pakistan's state responsibility under international law. Pakistan's failure can no not be an excuse from exoneration of Bangladesh's responsibility to try the allies of the Pakistani Forces.

If a citizen of a country thinks that he is aggrieved of certain matters, he can proceed to the court. As no citizen has over the years has filed such cases, why at present such trials of the war criminals should take place?

Such suggestions seem to emanate from erroneous concept. An individual can file a case when it is committed against that particular person. Crimes during 1971 war were perpetrated against the newly born state itself. So the state itself should be ready to bring charge. Majority of the persons subjected to victimization is not alive or if alive, not easily traceable -- this type of proposition can only come from a sense of complacency. This is an excuse, which resembles or fortifies the excuse of the alleged perpetrators of not holding a trial. The victims still alive are shaken, psychically, dreadfully teared on the one hand, the violators are complacent surrounded by falsity of justification on the other, can only behold to be contrary to restorative justice.

The demand for trial of war criminals and perpetrators of genocide is rather designed to divide the nation into two segments. So to avoid clash and chaos trial of war crimes and genocide should not take place at all.

The demand for a trial has the vestige of dividing the nation -- an assumption. Does any law acts on assumption? Matter is that the nation was divided into two segments -- one is pro-liberation another is anti-liberation. The anti-liberation forces along with the Pakistani Military forces levied an unjust and treacherous war to Bangalee people. After the liberation, the defeated forces with a pause, again revived with the religious fanaticism and has taken revenge in this way or that. The latest in the series is

the denial of any liberation war in 1971 and hence the denial of the existence or birth of Bangladesh itself. Non-divisibility may be an element of state formation but that is not necessarily an inevitable constituent to retain the nationalism. Why Bangladesh state was formed, what should be its purposes and fundamentals are sacredly embodied in the Proclamation of Independence and the original constitution. Whatever repugnant to the accomplishment of those goals is liable to be condemned. This is a question of sustenance as a nation as well.

The officers of Pakistani forces liable for genocide and war crimes somewhat escaped the trial. So, without prosecuting the commanding level officers how the persons in 2nd line can be tried? Even if they are prosecuted, can they be prosecuted for genocide?

This is a question that entails higher jurisprudential value. It is to be noted that command responsibility does not stand in the eye of international war crimes law. However, it can be pleaded as a mitigating factor in awarding punishment.

The definition and extent of genocide under Genocide Convention is important. One thing to be reminded that the proposed trial would charge the suspects with war crimes, genocide, crimes against humanity etc. Mere allegation of genocide may not be the preferred option. Even then, any charge of genocide against the collaborators etc would have to be proved in the test of conspiracy to genocide, planning for genocide and incitement to genocide. Article III of the Genocide Convention lists five punishable acts, including genocide itself, and (d) direct and public incitement to commit genocide.

This is an abridged version of a paper presented at the Second International Conference on Genocide, Truth and Justice organised by Liberation War Museum at Dhaka.

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FOR YOUR information

What is Slavery?

"No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms" Universal Declaration of Human Rights, Article 4

To be a slave is to be controlled by another person or persons so that your will does not determine your life's course, and rewards for your work and sacrifices are not yours to claim. According to Kevin Bales, one of the world's leading experts on contemporary slavery, "people are enslaved by violence and held against their wills for purposes of exploitation." While people today most likely believe that slavery is a thing of the past, the practice is still thriving wherever poverty, social conditions, and gullability can be exploited. Bales estimates that there are 27 million slaves in the world today. (Kevin Bales, Disposable People: New Slavery in the Global Economy, University of California Press, 1999)

The Slavery Convention (article 1.1)

in 1926 defined slavery as

"...the status or condition of a person over whom all or all of the powers attaching to the right of ownership are exercised...."

The convention defined slave trades as

"...all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves by whatever means of conveyance." (article 1.2)

The 1926 Convention's definition of slavery was broadened to include forced or compulsory labour in 1930 in the International Labour Organisation Convention (No. 29) concerning Forced or Compulsory Labour (article 2.1):

"...all work or service which is exacted from any person under the menace of any penalty and for which

The International Labour Organization (ILO) says there are eight main forms of forced labour in the world today. ILO's definitions and the countries it cites as examples of where the practices exist:

Type	Definition	Countries
Slavery	A "physical abduction" followed by forced labour.	Congo, Liberia, Mauritania, Sierra Leone and Sudan
Farm and rural debt bondage	Workers see all their wages go to paying for transportation, food and shelter because they've been "locked into debt" by unscrupulous job recruiters and landowners - and they can't leave because of force, threats or the remote location of the	Benin, Bolivia, Brazil, Cote d'Ivoire, Dominican Republic, Guatemala, Haiti, Mexico, Paraguay, Peru, Togo
Bonded labour	Another form of debt bondage, it often starts with the worker agreeing to provide labour in exchange for a loan, but quickly develops into bondage as the employer adds more and more "debt" to the bargain.	Bangladesh, India, Nepal, Pakistan, Sri Lanka
People trafficking	Individuals are forced or tricked into going somewhere by someone who will profit from selling them or forcing them to work against their will, most often in sexual trades. Many countries are both "origins" and "destinations" for victims.	Albania, Belarus, Bosnia and Herzegovina, Brazil, China, Colombia, Cote d'Ivoire, Czech Republic, Dominican Republic, Ecuador, France, Ghana, Haiti, Honduras, Hungary, Israel, Italy, Republic of Korea, Laos, Latvia, Malaysia, Moldova, Myanmar, the Netherlands, Nepal, Nigeria, Philippines, Poland, Romania, Russia, Thailand, Ukraine, United Kingdom, USA, Vietnam, Yugoslavia
Abuse of domestic workers	Maids and other domestic servants are sold to their employers or bonded to them by debts.	Benin, Cote d'Ivoire, France, Haiti, the Middle East
Prison labour	The contracting out of prison labour or forcing of prisoners to work for profit-making enterprises.	Australia, Austria, China, Cote d'Ivoire, France, Germany, New Zealand, Madagascar, Malaysia, USA
Compulsory work	People are required by law to work on public construction projects such as roads and bridges.	Cambodia, the Central African Republic, Kenya, Burma (also known as Myanmar), Sierra Leone, Swaziland, Tanzania, Vietnam
Military labour	Civilians are forced to do work for government authorities or the military.	Burma (also known as Myanmar)

the said person has not offered himself voluntarily."

According to the United Nations, 4 million people a year are traded against their will to work in a form of servitude. The majority of them come from Southeast Asia, Eastern Europe and Latin America.

Slavery includes

1) The practices and institutions of debt bondage: the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

2) The practices and institutions of serfdom: the condition or status of a

tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

3) Servile forms of marriage: a woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or the husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or a woman on the death of her husband is liable to be inherited by another person.

4) The exploitation of children and adolescents: any institution or practice whereby a child or young person

under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

To determine exactly which practices constitute slavery it is necessary to consider the circumstances of the enslavement:

the degree of restriction of the individual's inherent right to freedom of movement;

the degree of control of the individual's personal belongings;

the existence of informed consent and a full understanding of the nature of the relationship between the parties.

Compiled from: Human Rights Education Associates.

LAW news

Global coalition calls on Bangladesh to join ICC

THE Coalition for the International Criminal Court (CICC) a global network of more than 2,500 civil society organizations this week called on the People's Republic of Bangladesh to accede to the Rome Statute, the founding treaty of the International Criminal Court, without further delay. Bangladesh is the August 2009 target for the Coalition's Universal Ratification Campaign (URC), which each month calls upon a different country to join the Court.

In a letter dated 13 August 2009 to Bangladeshi President Mr. Md. Zillur Rahman the CICC urged Bangladesh to prioritise its accession to the Rome Statute. The government of Mr. Rahman signed the Rome Statute on 16 September 1999 and his accession to power in December 2008 signifies an end to Bangladesh's two year state of emergency.

"Now is the time for Bangladesh to move beyond the inertia and confusion of the past years and take a leadership role in South Asia by joining the International Criminal Court," says Ahmed Ziauddin, coordinator of the Asian Network for the ICC and Advisor of Dhaka-based Odhikar, a member of the CICC.

"As Bangladesh works to address impunity for past crimes and reestablish the rule of law, joining the ICC will help ensure that grave crimes are not committed in the future," he said.

The ratification process in Bangladesh requires approval only by the Cabinet, not the parliament. National coalition members maintain that the Rahman government's recent commitment to bring the law governing the trial of war criminals up to international standards is a good sign of the government's commitment to fighting impunity at home and abroad.

"Bangladesh can become the first country in South Asia to join the ICC, paving the way for an end to impunity in a region vastly under-represented at the Court," said Brigitte Suhr, director of regional programs for the Coalition. "There are currently 110 ICC states parties. The movement to put an end to the commission of grave crimes keeps growing. Bangladesh can make history by putting its region on the map of countries committed to justice."

Once Bangladesh joins the Court, the under-represented Asia/Pacific region will have a stronger voice at the ICC and can participate in a more meaningful manner. Currently, seven Asian states Afghanistan, Cambodia, Japan, Republic of Korea, Mongolia, Tajikistan and Timor-Leste are member states of the Court. Bangladesh's accession is sure to spur other states in the region to join the growing global movement for accountability for the most serious crimes.

There are currently four active investigations before the Court: Uganda; the Democratic Republic of Congo; Darfur, Sudan; and the Central African Republic. The Court also has several situations under analysis, including in Colombia, Afghanistan, Georgia, Kenya and Cote d'Ivoire. It has issued arrest warrants in each of the four situations under investigation.

Source: Coalition for the International Criminal Court.

