REJOINDER

War Crimes Act does not need reform

MOHAMMAD GHOLAM RABBANI *and* WALI-UR RAHMAN

(The following rejoinder was received by us some days ago. We publish it with our reponse given below).

CHRISTINE BALDERAS

WITH both anger and amusement we read together a news report, published in the first page of the Daily Star of Dhaka, dated January 26 titled "War crimes Act needs reform" which is, as reported, the opinion of the International Bar Association and to say specifically that of its war crimes committee.

The entire opinion was not reported. We tried in vain to get whole of it and so our reply will be incomplete. At the outset it is necessary to state that the International Bar Association, obviously formed by the professional lawyers, cannot claim and we are sure will not claim to be an humane organisation, but its members are engaged in legal profession on payment of fees to defend the persons accused in criminal offences knowingly or without caring to know whether their clients are guilty or not guilty.

We guess some of the members of this Association may be engaged to defend the accused before the War Crimes Tribunal at Dhaka and we further guess some of them may have already been engaged in anticipation of the trial.

There is "significant omission" as stated in that report with regard to protecting the rights of the accused is erroneous vis-à-vis section 17 of the International Crimes (Tribunals) Act, 1973 (hereinafter called as the said Act) which reads: "17. Right of accused person during trial-(1) During trial of an accused person he shall have the right to give any explanation relevant to the charge made against him. (2) An accused person shall have the right to conduct his own defence before the tribunal or to have the assistance of counsel. (3) An accused person shall have the right to present evidence at the trial in support of his defence, and to cross-examine any witness called by the prosecution."

Further, if convicted, he shall have the right of appeal to the Appellate Division of the Supreme Court of Bangladesh (read section 21 of the said Act). This provision of right of appeal is a unique guarantee to get the fullest justice and this provision was hitherto unknown to the international laws relating to trial of war criminals. Right to appeal does not exist in the ICC statute, nor in the ongoing trials in Cambodia or Tanzania.

Another opinion that "crime against peace should be deleted as it contains outdated statutory language" is also erroneous. They obviously had not in their mind that the Tribunal at Dhaka shall have to try the crimes committed during the war of liberation in Bangladesh. Pakistan authorities declared an unjust treacherous war and its army from the midnight of 26 March 1971 started killing unarmed innocent civilians which was preplanned crime against peace Section 2(b) of the said Act reads: "Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances."

This is the copy in toto of crimes against peace as defined in principle vi (i) of the charter of Nuremberg Tribunal.

Another opinion is that there is no mention of an essential element of a criminal offence, namely, mens rea or the guilty mind in the "crimes against humanity." This is the common law that a criminal offence consists of two elements - mental and physical. But this common law is applicable to ordinary offences under the penal code, but not to the extraordinary offences committed during the war. Principle 1 of the charter of Nuremberg Tribunal reads: "Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment," that is, only the physical element is necessary and not the mental element to constitute a war crime.

It is absurd to keep a provision giving the right to the accused to challenge the constitution of the tribunal or the appointment of its members as suggested. This provision is not even in the Rome Statute of the International Criminal Court, but its article 41(2) only gives a futile right: "Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision." However, there will be always the inherent right to a judge to feel himself embarrassed and he may feel so, if and when necessary.

Another objection is with regard to the provisions of investigation, in particular rules relating to self-incrimination and the suggestions is article 14 of the International Covenant on political rights as well as certain section of the Rome Statute should be included relating thereto. Prosecution is solely concerned with the investigation and the charge would fail if there is no proper investigation.

We have read together several times article 14 of the International covenant on civil and political rights. For lack of space we are unable to quote that article, but we swear that none of the provisions contained in the said Act of 1973 offences any of provisions contained in that article 14. There is a proviso to article 8(5) of the said Act of 1973 which was not noticed that self-incrimination shall not subject the maker to any arrest or prosecution or be proved against him in any criminal proceeding.

The suggestion that certain sections of the Rome Statute of the International Criminal Court dealing with rights of suspects during investigations should be included in the Act of 1973 would, we are afraid, further delay the trial. If we compare the preamble of our Act of 1973 with that of the Rome Statute of 2002 we will at once realise that there is not an iota of similarity as to the background against which the Act of 1973 or Rome Statute of 2002 was enacted. Act of 1973 was reviewed and fine-tuned by two of the finest international criminal lawyers, Professor Jeseheck and Prof. Otto Von Trifterer who assisted Justice Jackson, the chief prosecutor at the Nuremberg Trial. The two Professors were drawn from the Maxplank Institute of International Criminal Law, Freibourg, Germany.

Later on in December 26-29, 1974, the Third International Criminal Law Conference at Dhaka, endorsed the 1973 Act: some of the jurists were A.N.F. Ballester, Director of Foundation for the Establishment of an International Criminal Court, Igor Blishchenko, Professor of International Law Institute, Moscow. Subrata Roy Chowdhury of High Court, Kolkata, B. De Schutter, Director, Center for International Criminal Law, Brussels, Justice Krishna Ayer of Indian Supreme Court, Professor Hans Leu of University of Caraces, Professor Shigeru Oda, of Tohoko University of Japan, Professor Robert K. Woetzel, of International Law, Boston College, USA and President of Foundation for the establishment of an International Criminal Court. It may be mentioned that this conference first mooted the idea of ICC.

We are aggrieved by the report in question. For the persons who have prepared the report in question, we quote from the speech of D.N Pritt of UK made before the international conference on prosecution of nazi criminals held on March 25-28, 1969 at Moscow.

"Moreover, these international crimes are not analogous to crimes committed by individuals against the laws and interests of their own states; they are mass crimes organised and planned by the state and not against it, as part of the policy directed to the destruction of the lives of innumerable civilians including children and women indeed of humanity as a whole, and the individuals taking part in the commission of these crimes are in general acting as the servants and not the antagonists of the state and its government. It follows that those crimes, by their very nature and origin, are not such as can be forgiven by the state or expiated by the passage of time, so as to exonerate these individual perpetrators, but are crimes for which neither the state itself nor the individuals can ever be forgiven."

We would, therefore, request our concerned friends in refraining from making such remarks without fully understanding the history, milieu and background of the history of the war of liberation fought by the Bengalees with the help of the allied forces in winning freedom for establishing a democratic, non-communal, secular and equitable society. The trial thus is a necessity and not a luxury to consolidate the democratic aspirations of the Bengalees, a dream of the Father of the nation.

Justice Mohammad Gholam Rabbani is a former judge of the Appellate Division of the Supreme Court of Bangladesh. Wali-ur Rahman is a former ambassador.

Our response

THE Daily Star would like to make a number of points about the article by Mohammad Gholam Rabbani and Wali-ur Rahman, which was written in response to our news report of January 26 and titled "War crimes act needs reform."

The original January news item reported on legal advice prepared by the International Bar Association's War Crimes Committee for the UK's All Party Parliamentary Human Rights Committee. The news report did not set out *The Daily Star's* view on Bangladesh's war crimes legislation but the opinion of this committee as reflected in its legal advice*.

The Daily Star considered it appropriate to report the findings of this committee, since it comprises a renowned group of international criminal lawyers with particular expertise in war crimes law. There are few other similarly expert committees.

Rabbani and Rahman suggest that this committee comprises defence lawyers -- biased toward the interests of those accused of war crimes. But that is not the case.

In fact, the committee's 20-member advisory board includes only two lawyers who have acted in the defence of alleged war criminals. The rest of the committee comprises four senior war crime prosecutors -- including Justice Richard Goldstone who was a former chief prosecutor for the International Criminal Tribunal for former Yugoslavia and the International Criminal Court. It also includes two judges, Judge Raid Juhi, David Hunt, QC, and Judge Patricia Wald, who sat on the Iraqi, Sierra Leone, and Yugoslavia tribunals, respectively. The committee also includes a whole host of people with a particular commitment to holding war crimes trials -- including David Scheffer, former US ambassador-at-large for war crimes issues, and Larry Johnson, former UN assistant-secretary-general for legal affairs**.

Rabbani and Rahman also suggest that some of these committee members will be -- or indeed may already be -- engaged by those accused of war crimes relating to the 1971 Liberation War. The imputation here seems to be that this legal opinion was written with a view to assisting the interests of those who will be charged in Bangladesh in the future.

Such a statement is for the IBA to respond to -- but it seems a rather extraordinary allegation that such a committee could ever allow itself to be biased in this manner. Moreover, it is more likely that if any of these committee members were to be involved in any war crimes tribunal in Bangladesh, they would be assisting the Bangladesh government in the prosecution rather than helping the accused.

The Daily Star would also like to point out some important inaccuracies in Rabbani and Rahman's arguments.

- They say that, unlike the 1973 Bangladesh law, the "Right to appeal does not exist in the ICC (International Criminal Court) statute, nor in the ongoing trials in Cambodia or Tanzania." This is not correct. All three of the relevant statutes have complex appeal provisions.
- Article 81 to 85 of the ICC statute deals with rights of appeal -- which are not only allowed following a conviction but during the trial itself, in relation to certain specified issues. Article 24 of the statute that set up the trials in Tanzania following the Rwandan genocide, and Articles 17 and 32 of the statute that sets up the trials relating to Cambodia, also deal with the establishment of an appellate court.
- They say that whilst ordinary criminal law consists of both a mental and a physical element -- that it not the case with "extraordinary offences committed during the law."
- This is inaccurate. One only has to look at Article 13 of the ICC statute which specifically states that: "Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge." Similar provisions exist in other modern war crimes statutes.
- They also say that "it is absurd to keep a provision giving the right to the accused to challenge the constitution of the tribunal or the appointment of its members" and that such a provision "is not even in the Rome Statute." This again is not correct -- Articles 17 and 19 of the Rome Statute, when read together, provides these rights to the accused.

A key point made by Rabbani and Wali-ur Rahman at various points in the article is that the International Crimes (Tribunals) Act, 1973 is adequate when judged both by the standards of the 1948 Nuremberg Statute and by jurists in 1974. On this point, the authors are absolutely right. They then, however, go on to argue that the law is therefore adequate. Such a position ignores the fact that the world of international law has developed considerably in the nearly 40 years since the 1973 Act was enacted, and the standards of 1948 or 1973 are simply not considered satisfactory now. This is the point of the IBA's committee's legal advice -- to assess the 1973 Act against current international due process requirements.

The Daily Star is as eager as the authors of the rejoinder in its support for war crimes trials relating to the 1971 war. However, where we seem to differ is that The Daily Star is concerned that consideration is given to ensuring that the trials meet certain minimum international standards. It is for this reason that the paper considered it important to report on what expert independent organisations, like the IBA, have to say about the 1973 Act.

* The legal opinion is available on The Daily Star's website.
** The full list of the committee can be found here: http://www.ibanet.org/PPID/Constituent/War_Crimes_Committee/Officers.aspx

Greece's deficit-driven debacle

Greece's share of the European Union's gross domestic product is a mere 2.6 percent. However, its fiscal deficit, which now threatens the viability of the euro, is evidence that a currency union comprising sovereign member states with separate fiscal policies is conflicting and unsustainable.

ABDULLAH A. DEWAN

YEARS of profligate living by deficit spending has pushed Greece towards default, threatening a cascade of financial crises in other EU problem economies such as Spain, Portugal, Italy, and Ireland.

The Economist, citing research, recently noted: "It has spent half of the last two centuries in default." With its solemn belief in a united Europe and the reciprocity of Europe's commitment to Greece -- the country embraced the euro nine years ago -- it surrendered its sovereignty in monetary policy to the European Central Bank (ECB). When it adopted the euro, its public debt was in excess of 100 percent of its GDP. With discretionary fiscal expenditure uncompromised Greece kept borrowing, and its spending grew at an average of 4 percent a year until 2008.

In 2009, budget deficits jumped to 12.7 percent of GDP. In January, interest rate on 10 year Greek bonds hit 7.1 percent compared to 3 percent on comparable German bonds. Greek bonds were degraded to BBB+ from A rating. A sovereign default is brewing, a crisis for the euro is looming -- forcing EU leaders to pledge "determined and coordinated action" to defend the euro if necessary.

Suspecting that Athens may have engaged in accounting tricks to cover up its growing deficit, the European Commission has instituted an investigation. Discovery of any such malpractice will put Greece's bailout process in jeopardy. In fact, a recent poll revealed that 70 percent of Germans are averse to financial support for Greece.

Officially, the EU treaty has a "no bailout" clause pledged by all member states. But can the EU afford a default by Greece? That may induce contagion effects -- threaten the viability of the euro, damage the prospects of the entire European project, and cause defaults elsewhere outside the euro zone -- raising the spectre of a second global financial crisis.

While the EU bosses debate the moral implications of a bailout, a falling euro is already providing some relief. The moral hazard is that other problem economies could unleash their deficit spending habit, believing that the rest of the euro zone would ultimately come to their rescue anyway.

So far, the euro has depreciated nearly 15 percent against the dollar and continues to slide -- albeit slowly. The falling euro boosts Greece's exports and provides the desired means to increase tax revenues, restoring some order in fiscal operations and the much needed fiscal consolidation. Until the crisis emerged, the euro was believed to be overvalued and the correction came as a blessing, as if to rescue Greece, and was welcome in all the euro zone capitals.

Professor Melvyn Krauss (New York University) in his February 12 NYT piece wrote: "So long as inflationary expectations in the euro zone remain subdued, a 'bailout by the euro' will not pit European against European. But what the falling euro does do is pit Europeans against Americans."

It is anticipated that the euro may keep falling as fiscal consolidation continues in EU countries and the dollar will continue gaining strength against the euro. Fiscal consolidation is an unpopular measure that holds back public programs and brings hardships to many stakeholders. However, if the euro keeps falling, that hardship will be less severe.

Some observers blame Greece's crisis partly on the unsustainable appreciation of the euro, brought about by the US policy makers' deliberate move of letting the dollar fall in order to boost US export sector jobs. If the US unemployment continues at its current rate of around 10 percent, the policy makers will surely move to put the dollar in reverse gear, eliminating EU zones gains in export advantage by the falling euro.

Although there is no provision for bailout of members of the euro zone, letting Greece default may have dire consequences for others. Athens owes its neighbours billions. According to estimates from the Bank of International Settlements, Greece owes foreign financial institutions a total of $303 billion -- $75.5 billion to French banks, $64 billion to Swiss banks, $43.2 billion to German banks.

Among the possible measures being discussed are direct EU aid, a European bond issue, bilateral loans, help from the IMF, as a way to help the highly indebted country get back on its feet. There is speculation that even expulsion from the euro zone was also raised.

As a prudent step though, the Greek government is required to make significant spending cuts -- a deficit reduction of 8.7 percent of GDP this year. Higher fuel taxes and a freeze on salaries paid to some civil servants are already being enforced. The European Commission and the ECB are set to monitor the implementations of these measures.

Greece's share of the European Union's gross domestic product is a mere 2.6 percent. However, its fiscal deficit, which now threatens the viability of the euro, is evidence that a currency union comprising sovereign member states with separate fiscal policies is conflicting and unsustainable.

Economist Nouriel Roubini, one of the foremost predictors of the 2008 global financial crisis, observed: "No currency union has survived without a fiscal and political union." An economic government or a political union is unlikely at this stage. However, some form of fiscal discipline is being contemplated by the leaders of the stronger EU economies.

AFP

Caught in the Drachma dilemma?

Since its inception, EU has always been aspiring to become a superpower to counterbalance the US. With the present crisis on the table that goal has been pushed back. As Greece's crisis is affecting the weaker economies, each country is poised for inward looking management while the block as a whole has become somewhat weakened. Saving Greece from bankruptcy and keeping the euro and the monetary union afloat have become the immediate exigencies of the EU leaders.

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