REVIEWING *the views*

WAR CRIMES TRIAL

Shimla Pact not a legal barrier

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PAKISTANI troops and their local para-military forces committed heinous war crimes during the Bangladesh liberation war in 1971. In response to popular demands and its election pledge, the incumbent government has taken steps to try these war crimes. This war crimes trial represents the quest of humankind to combat and prosecute certain designated crimes, namely genocide, crimes against humanity, and war crimes, as a collective bid to ensure dignified human coexistence. Prosecution, conviction, and punishment of their perpetrators are on the increase both internationally and nationally. The international community and the UN have been in favour of ending the impunity and immunity of perpetrators by bringing them to justice. The current move by Bangladesh in holding such trials is, though belated, in order and indeed imperative. This trial entails many aspects. This brief legal note deals only with one aspect, namely the effect of the Shimla Pact on this trial. It shows that the Shimla Pact is no barrier to such a trial as recently remarked by the High Commissioner of Pakistan.

Both Bangladeshi and Pakistani nationals are likely to be implicated in the proposed trial. The trial of Bangladeshi nationals accused of committing these crimes are comparatively less complex and difficult than those of the Pakistani nationality. Section 3 of the International War Crimes Tribunal Act 1973 provides that any tribunal established under this Act shall have the power to try and punish any person accused of war crimes committed in the territory of Bangladesh regardless of their nationality. Theoretically, this provision mandates to try members of the Pakistani army who committed, and the generals who ordered and presided over the commission of, these crimes. Indeed, Bangladesh prepared a list of 195 Pakistani army personnel accused of war crimes and decided to prosecute them. Following the fall of East Pakistan on 16 December 1971, more than 93,000 surrendered Pakistani troops were taken as prisoners of war (POWs) in safe custody of the Indian army. The listed 195 alleged war criminals were among those POWs in Indian custody. Those listed war criminals were sent to Pakistan under the Shimla Pact, negotiated between India and Pakistan, presumably acquiesced by Bangladesh, in 1972. The parties agreed not to try them on a pledge that Pakistan would prosecute them on the basis of the recommendations of its own Judicial Commission, which had already been set up in December 1971 to investigate and report on the 1971 East Pakistan crisis. The Commission was launched by the then President Zulfikar Ali Bhutto and headed by the then Chief Justice of Pakistan, Justice Hamdoor-ur-Rahman. The Commission's report, which was initially suppressed but subsequently declassified, confirmed and condemned the Pakistan army's senseless and wanton destructions, killings, tortures, and rapes as a deliberate act of revenge and recommended public trials to punish those responsible for the commission of these excesses, crimes, and atrocities in East Pakistan. Successive Pakistani governments ignored this report and never held any such trial to punish their alleged perpetrators.

The immunity provided in the Shimla Pact contradicts the international legal obligations of the Pact-states. The prohibition of genocide, crimes against humanity, and war crimes is a *jus cogens* principle (peremptory or fundamental norm) of international law. According to the International Court of Justice (ICJ) in a number of cases (*Bacelona Traction 1970*, *Namibia Opinion 1971*, and *Nicaragua 1986*) held that a *jus cogens* principle gives rise to *erga omnes* - an obligation "towards the international community as a whole" (ICJ Report 1970 at 32). The state parties of the Pact are obliged to perform this obligation by prosecuting the perpetrators of these crimes. This norm and obligation are highest in international law, which permits no derogation from them. This hierarchical status of their prohibition is deeply rooted in customary international law and codified treaty law. Articles 53, 64, and 71 of the 1969 Vienna Convention of Law of Treaty reinforce this prohibition. Article 53 prescribes international treaties conflicting with an existing jus cogens norm "is void". Article 64 says that if a new jus cogens norm emerges, "any existing treaty

which is in conflict with that norm becomes void and terminates". Article 71 releases the parties to a treaty void under Articles 53 and 64 from any obligation to perform the treaty. All parties to the Shimla Pact are parties to the Vienna Convention obliging them not to make ant treaty that is inconsistent with, or repugnant to, any *jus cogens* principle.

Genocide, crimes against humanity and war crimes are well defined and punishable in customary international law, the Hague Convention 1907, the Nuremburg Judgment 1945, the Genocide Convention 1948, the Geneva Conventions 1949 and their Additional Protocols 1977. The culpability of these crimes and criminal responsibility of individual perpetrator are duly recognised in the mandates (as well as in judgments) of the Yugoslav War Crimes Tribunal 1993 in Article 7(1 and 3), the Rwandan War Crime Tribunal 1994 in Articles 6(1 and 3), the Statute of the International Criminal Court 1998 (Articles 6-8), the mandate of the Special Court of Sierra Leon 2002, and the mandate of the Cambodian genocide tribunal 2007 to prosecute Khmer Rouge leaders for committing genocide. The legal scope of rape inclusively include all kinds of sexual violence, including forced pregnancy constituting genocide as it involves the unlawful confinement of women/girls forcibly made pregnant with the intent of affecting the ethnic composition of a population (Article 7 of ICC Statute). The inseparable nexus between systematic rape and genocide is judicially endorsed. The ICJ in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia-Herzegovina* v *Yugo, Serbia and Montenegro*) in 1993 recognised this linkage in issuing a provisional ruling on Serbian acts against Bosnia. The Rwandan War Crimes Tribunal explicitly articulated this nexus in Akayesu case in 1998. So did the Yugoslav War Crimes Tribunal in a number of cases. The culpability and criminal responsibility of individuals for rape is internationally recognised.

Criminal trials are always open and not barred by time limitation. This explains why the Nazi war criminals of the Second World War are still being prosecuted. Trials of genocides committed during the 1973 Chilean revolution and the Pol Pot regime of Cambodia in the1970s are now ongoing. The sovereign immunity of Slobodan Milosevic of Serbia, Charles Taylor of Liberia, and Augusta Pinochet of Chile (with the Chilean Senate's life-long immunity) as the head of state could not protect them from being detained and prosecuted for committing genocides, crimes against humanity, and war crimes. The ICC has charged and issued warrant against the sitting President of Sudan for committing genocide in Darfur. These examples dispel their aura of invincibility and set a precedent that heads of states are not immune from committing crimes in international law and jurisdiction of courts/tribunals.The trial of a Congolese militia commander, Lubanga, for committing war crimes has started at the ICC since 26 January 2009. The perpetrators of these crimes are *hostis humanis generis* (enemy of humankind) and jurisdiction over them is universal, authorising any national or international court or tribunal to try them even in the absence of any linkage with the nationality of their perpetrators and/or the place of the commission of these crimes. The House of Lords reiterated and reinforced the exercise of universal jurisdiction over these crimes in *ex Parte Pinochet No. 3* in 1999. Lord Millet in this case observed: "every State has jurisdiction under international customary law to exercise extra-territorial jurisdiction in respect of international crimes which satisfy the relevant criteria" (All English Law Reports, vol 2 (1999), at p. 177).

Indiscriminate killings of innocent and unarmed civilians committed by Pakistani occupation troops and their local associates with the deliberately pursued intention of exterminating the Bengalees can come well within the purview of genocide. Widespread atrocities, tortures, inhuman, humiliating, degrading, and cruel treatment, disappearances, and systematic rape in 1971 clearly constitute crimes against humanity. Pakistani troops and its local allies throughout the liberation war caused massive destruction of houses, villages, towns, and public utilities as reprisals and collective punishment; and executions without trials, torturing sick and wounded, and taking hostages. These are the notable war crimes listed in the common Article 3 of the Geneva Conventions as well as their Additional Protocols.

International instruments and judicial precedents referred to establish it beyond doubt that grave breaches of international humanitarian law occurred during the Bangladesh liberation war in 1971 through the commission of genocide, crimes against humanity, and war crimes by Pakistani occupation troops and their local associates. The prohibition of these crimes is recognised as a jus cogens norm of international law, which cannot be set aside by the Shimla Pact or the acquiescence of its parties. The listed war criminals were in the custody of India, which pardoned and returned them to Pakistan pursuant to the Shimla Pact's POWs repatriation arrangement. Bangladesh had no control over their return to Pakistan. Even if it is conceded that Bangladesh had acquiesced with the arrangement, the act suffers from legitimacy crisis. The Shimla Pact itself is void to the extent of its inconsistency with, or repugnancy to, a body of existing *jus cogens* principles of international law. The immunity given to the perpetrators in the Pact was invalid in international law. No legal obligation can be derived from any treaty or its provisions which are invalid. The parties of the Shimla Pact are totally released from performing the Pact obligations concerning the prohibition of war crimes trials. Hence, the Shimla Pact constitutes no legal barrier to the war crimes trial in Bangladesh. Immunities from trials on the basis of this invalid Pact appear to be a sinister move to evade justice for crimes that shock the conscience of humankind, keep the surviving victims and their relatives under a cloud of gross injustice, and undermine the international community's commitment to render global justice for heinous crimes at international law.

International humanitarian law has become a defining norm of the international order to combat some designated crimes in international law. These heinous crimes, though prohibited in all forms and manifestations, still stigmatise their victims more than their perpetrators. The Bangladeshi victims of these crimes and their relatives are no exception. The reversal of the stigma and mobilising the shame associated with these crimes from victims to victimisers is long overdue in Bangladesh.

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LAW *vision*

Of 'struggle' and 'war'

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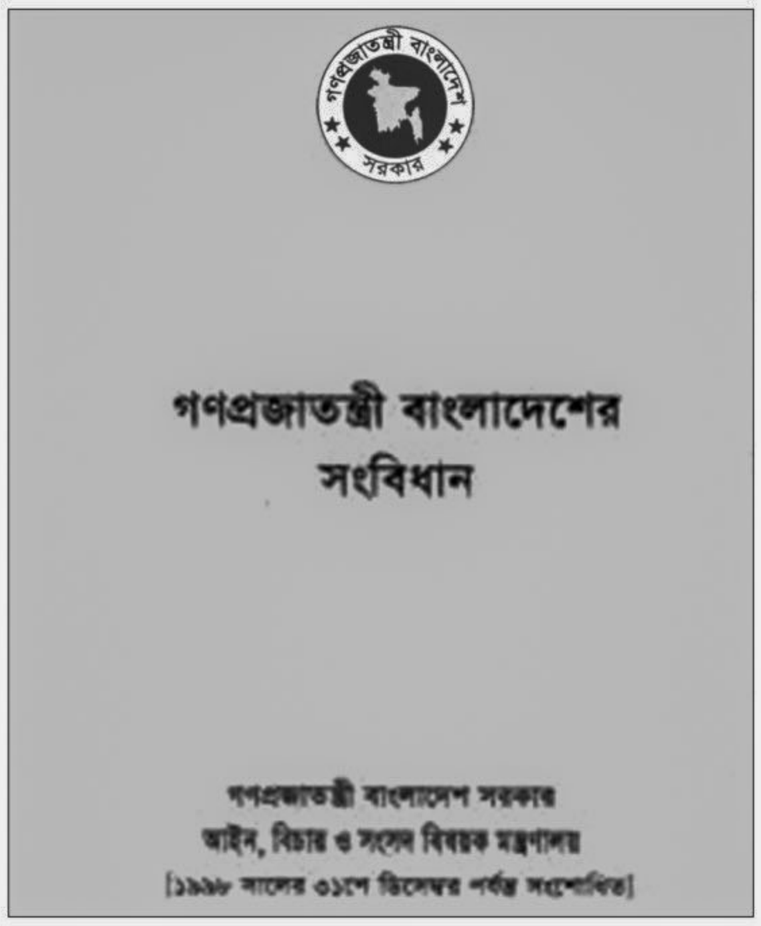

'CONSTITUTION' is defined by many thinkers in their own majestic ways. Out of those definitions, I am fond of referring to Aristotle, who defined it as"the way of life the state has chosen for itself". How can state choose its way of life being an abstract entity and having no brain of its own to think with? Can it make an informed and decisive choice for itself? Actually, 'state' means, *inter alia*, its people and the choice is, in fact, done by the people.

The question is, when and how did the part of the globe now known as Bangladesh make its plan of life it is following now? Was it the case that people of Bangladesh suddenly started to think of a constitution after that black night of 25th March 1971 when West Pakistanis imposed a treacherous war upon the armless civilians of Bangladesh? No. It was not the case historically.

Think of history. It is of essence, particularly when history of a constitution is intertwined with the tragic birth of a historically oppressed nation. I said to my students that history of our constitution is, in fact, history of 'struggle' for a just constitution that our people were engaged in from 1947 to 1971. That it was the failure of or, rather appropriate to say, unwillingness of Pakistani rulers to frame a constitution guaranteeing the just and equitable rights of our people (of the then East Bengal, later on East Pakistan and now Bangladesh) that compelled them to engage in a 'historic struggle for national liberation'. Deliberate political, economic, and other infrastructural and attitudinal disparities maintained by West Pakistani rulers, and absence of constitutional safeguards at the hands of our people as against those odds, plus failure to win an equilibrium in different aspects of life through repeated constitutional attempts at different stages of development of the historic struggle led to the extreme stage of war. 'War' was an important part of that struggle, of course the most obvious part of it; but war alone cannot explain the raison d'être and basis of our constitution in modern times. It was not an isolated phenomenon; War of 1971 was an epilogue of a sad drama, the last link of a long-drawn chain of oppression. Nor was it the sole story behind our constitution; we have more glorious history of struggle, which, if focused in its true and the then prevailing unavoidable context, would justify both the war itself and the incumbent constitution.

Whereas we know that one of the purposes of the preamble of a constitution is to indicate the source of its validity, unfortunately preamble of our constitution failed to underscore the history of our struggle from 1947 to 1971 as the source of validity of our constitution. As a justification of framing our constitution, the first paragraph of the preamble traced the history as back as the proclamation of independence on 26th March, 1971 and then recorded the ensuing liberation war. My hypothesis is that it is not enough.

Some people would argue that in the original preamble, the struggle was focused by using the phrase "a historic struggle for national liberation"-- the same being later on replaced by the phrase "a historic war for national independence" by the Proclamations (Amendment) Order, 1977. But a careful reading of the original first paragraph would reveal that the use of the word 'struggle' was inappropriate, because what happened after proclamation of independence (having proclaimed our independence) was, though struggle in general, war in particular. So if grammatical construction of the original first paragraph is adopted, which records only that part of the struggle that occurred 'having proclaimed the independence', it makes sense that the change of 1977 was correct in so far as it termed that part of the struggle as 'war'. But if the spirit of using the word 'struggle' is taken into account, which seems to be deliberate, we would say that the framers of original constitution used a right word in a wrong place.

In my view, If the history of 'struggle' could be recorded in the first paragraph as an antecedent to, and the *raison d'être* for, the proclamation of independence, and then if the matter of war could be presented as the *post hoc*, it would more coherently serve the purpose of both the history and the law (Preamble).

This is what, I would say, framers of the Proclamation of Independence, 1971 could ably accomplish in drafting the preamble to the first ever constitution of Bangladesh. I mean, the proclamation graphically described the rationale of the birth of a new country and legitimacy of framing its constitution. Whereas preamble of the Proclamation traced the history back to the election of 1970 as an immediate justification, a well-thought-out constitution in the independent Bangladesh could record in its preamble the gist of what unease, inequality, disparity, injustices, oppression and so on we were put through, resulting in the later development of political crises further leading to an unequal war. That could be a true appraisal of the validity of its constitution to the scores of upcoming generation. This would also protect us from distortion of our true historyglorious, tortuous and pathetic past.

Bangladesh Constitution is the epitome of a constitution emerging from a true revolution. Its constitutional history is akin to that of the USA and the USSR. Preamble to such a constitution cannot but record the history of revolution in it. Whereas the true spirit of our preamble cannot be changed after the 8th Amendment Case, wording of the preamble can be changed in a way that would more appropriately present the true history and represent the true spirit. True spirit of our constitution is the spirit that ran through the minds and souls of our people from 1947 to 1971 in quest for a just constitution.

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GOOD NEWS

Chile passes landmark domestic legislation on refugees

CHILE'S Senate has adopted a refugee law that will enhance South America's growing reputation as a safe haven for people forced to flee their home countries because of violence or persecution.

The Law for the Protection of Refugees, passed on March 9, 2010 by the upper house of Congress, establishes a legal framework for the protection of refugees in Chile and incorporates this country's obligations under the 1951 Refugee Convention and its 1967 Protocol. The Chamber of Deputies approved the law earlier.

Among other things, the legislation includes universal and regional definitions of refugees; sets out guarantees and obligations for refugees; and regularizes procedures and guidelines for determining refugee status. It must now be signed by the president before entering into force.

"This shows that refugee issues are of interest to all political sectors," said Fabio Varoli, UNHCR's liaison officer in Chile. "We appreciate that the debate and approval was so fast."

The refugee bill was presented in April 2009 by Chilean President Michelle Bachelet, who noted that democratic governments in her country had provided protection to thousands of refugees, while adding that "when the rule of law was ignored, several thousand Chileans received protection [overseas]." Chile hosts almost 2,000 refugees and asylum-seekers from more than 30 countries.

Passage of the law comes as the popular Bachelet leaves office to be replaced by Sebastian Pinera and at a time when the nation's attention remains focused on the response to a massive earthquake on February 27 that left several hundred people dead.

Passage of a refugee law in Chile adds to South America's renewed reputation as a haven for people forced to flee their homelands. Although Colombia continues to face problems of internal displacement, many countries are welcoming refugees from around the world.

In 1999, Chile became the first South American country to launch a resettlement programme in cooperation with UNHCR. Brazil, Argentina and Uruguay have since initiated similar programmes and Paraguay will soon follow suit.

This spirit of concern for the forcibly displaced is enshrined in the Mexico Plan of Action, which was adopted by 20 countries in 2004 to safeguard refugees in Latin America and to find durable solutions for them. The plan called among other things for the strengthening of legislative protection for refugees.

Source: UNHCR News Story.