

HUMAN RIGHTS *advocacy*

Prosecuting 'International Crimes' at domestic level

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GIVEN the limited number of international criminal tribunals and their scarce resources, war crimes prosecution by national courts seems to assume ever more importance. Bangladesh was the pioneer in formulating first national war crimes law in the history of the world back in 1973, spirit of which was later inculcated in the ICC statute, can again become an example of effective national prosecution of war crimes with a blend of national and international criminal jurisdiction. The case of Sierra Leone, Dili, Cambodia, and Lebanon experiences with suitable compatibility may be the torch bearer for Bangladesh.

Certain crimes because of their very nature, gravity, magnitude and horrendousness are today defined as 'international crimes'. The war crimes, genocide, crimes against humanity, crimes against peace and international law do fall within this category. The consequences of these types of crimes are devastating in nature. The ICJ in its Advisory Opinion on Genocide Convention 1951 said that states have a duty to ensure the 'condemnation of genocide' and to co-operate international community 'in order to liberate mankind from such odious scourge.'

Bangladesh cannot go with the stigma of that scourge, so should have the case with Pakistan. Pakistan failed to prosecute the blue-printers of the international crimes irrespective of giving promise to do so. Bangladesh cannot and should not fail to prosecute the rest notable perpetrators at least (who belonged to auxiliary forces like *razakars, al-badr and al-shams*).

Does Bangladesh have jurisdiction?

Jurisdiction is the critical legal issue underpinning the prosecution of war criminals in a state's courts. A state must establish proper jurisdiction to assert judicial and penal authority over such offenders. Legally defined, jurisdiction is 'the authority of states to prescribe their law, to subject persons and things to adjudication in their courts and other tribunals, and to enforce their law, both judicially and non-judicially.' Jurisdiction involves a state's legitimate assertion of authority to affect its legal

interests, and applies to law-making activities, judicial processes, or enforcement means.

Domestic jurisdiction of the state is one of the manifestations of state sovereignty and hardly raises any concern from other states or bodies. Jurisdictional manifestations of Bangladesh to try the 1971 war criminals and perpetrators of genocide fit with the provisions of international law. Article 3 of the International Crimes (Tribunal) Act 1973, accommodates the blend of national, territorial and universal manifestations of jurisdictions. Every state may create its own laws for defining and punishing war crimes, but the definitions of war crimes usually overlap with the definition of war crimes established under international law. Thus, any state may exercise universal jurisdiction under international law to punish persons who commit acts falling within international law's definition of war crimes.

The universal jurisdiction has been the key consideration in prosecuting the war criminals which is established over certain crimes (such as piracy, war crimes and genocide) without reference to the place of perpetration, the nationality of the suspect or the victim or any other recognized linking point between the crime and the prosecuting State. The international crimes are so inherently odious that it must be treated differently from ordinary *delicts*. It is against the universal interest, offends universal conceptions of public policy and must be universally condemned. The perpetrators are viewed as *hostis humani generis*, enemies of humankind, and any state which obtains custody over them has a legitimate ground to prosecute in the interest of all states, even if the state itself has no direct connection with the actual crime. In Eichmann case, the Jerusalem District Court upheld Israel's jurisdiction to try Eichmann and observed, "the jurisdiction to try crimes under international law is universal." To date, one can say that universal jurisdiction is not a formula for gaining jurisdiction, but one for placing the national legal order at the service of the international community.

Bangladesh can legitimately manifest this service.

War crimes law and constitutionality question

International Crimes (Tribunal) Act, 1973 Act is a constitutionally protected legisla-

tion (Article 47A of Bangladesh Constitution). The constitution derives its validity from the people itself. Bangladesh has secured independence through a liberation war (the war was unjustly imposed) and proclamation of Bangladesh Independence forms the genesis of Bangladesh constitution (B. H. Chowdhury J. in *8th Amendment Case*, 1989). The safeguard against *post-facto* legislation is not applicable for law passed which is designed to prosecute and punish the international crimes. An analogy may be drawn from Australian jurisdiction. The Australian High Court upheld the retrospectivity of a national war crimes law in *Polyukovich case* (1998) and said, "The retrospective operation of the Australian War Crimes Act was authorized by the constitution since that operation was a matter incidental to the execution of a power vested by the constitution in the parliament." In that case, Ivan Polyukovich was charged with war crimes in respect of acts allegedly committed by him during World War II. He initiated a challenge to the constitutional validity of the Australian War Crimes Act, on the basis, *inter alia*, that the Act purported to operate retrospectively. The Court held that the Act is not retrospective in operation because it only criminalizes acts which were war crimes under international law as well as "ordinary" crimes under Australian law at the time they were committed.

Trying the '2nd line' perpetrators

The commanding level soldiers have escaped justice so the lower level perpetrators should also escape - is a kind of argument manifestly unjust and untenable in law. Without allies how can a massacre happen? More so, the charges against the perpetrators, be he an army officer, be he a member of a group or even an individual, likely to be charged not merely for 'war crimes' or 'massacre' but also for 'crimes against humanity' which is a more matured expression of international criminal law. Legal definition suggests that the planners and participants are liable to the same extent. International criminal law has discarded the command responsibility. Though superior's order can be argued as a mitigating factor in some cases. In 1971, the world witnessed acts of genocide committed by the Pakistani military and their allies against the Bangalees in general and



An end to impunity

Hindu Bangalees in particular in Bangladesh. The military regime of Pakistan being aided and instigated by their native allies (*razakar, al-badr, al-shams* etc) committed incalculable and unprecedented genocide in Bangladesh.

Collectively known as the *Razakars*, the paramilitary units spread terror throughout the Bengali population. With their local knowledge, the *Razakars* were an invaluable tool in the Pakistani Army's arsenal of genocide. By an Ordinance (East Pakistan *Razakar* Ordinance, 6th June 1971) the *razkar, al-badr, al-shams* were declared to be the auxiliary forces of the Pakistani Army. The proposed trial should prefer first the commanding level leaders of *razakars, al-shams*, etc. From Pakistan Government's Ordinance and surrender document of 16th December 1971, they appear to come within the definition of 'auxiliary forces' - a term which the constitution also mentions in Article 47A.

There are two principal points of charging the auxiliary forces members, one for actual commission and another for planning, abetting and conspiracy to genocide, war crimes and crimes against humanity. Actual commission, planning, incitement to genocidal offences are treated in the same line. Rwanda's *Akashu Case* (1998) has established that incitement to genocide is equally indictable like the actual commission of geno-

cide itself. Incitement has been a precursor to, and a catalyst for, modern genocides. It may even be a *sine qua non*, according to witnesses and the abundant historical and sociological literature on the topic. It seems that without incitement, genocides like the Holocaust and especially the Rwandan one might not have happened.

The evidence is strongest with respect to Bangladesh genocide where religious feelings were used to execute massacres. These are also the cases on which there is the greatest scholarly consensus that they were in fact genocides. Incitement seems to play a critical role when intended victims live among the majority group, so that mass killings cannot take place without the participation or at least the tacit acceptance of many members of the majority group. In Nazi Germany and in Rwanda there were well-documented incitement campaigns. In Turkey, there were plans to "excite Moslem opinion by suitable and special means" before the Armenian genocide. By contrast, in Darfur, ethnic cleansing and killings have been carried out by paramilitaries (Janjawid) mainly in villages inhabited solely by their victims. There is huge documented evidence of *razakars, al-shams, al-badr* etc (which we prefer to call 'auxiliary forces') members for urging people to 'maintain the unity of Pakistan and the

sanctity of Islam' and to 'exterminate the enemies'.

Obstacles to prosecution

What are some possible obstacles and challenges before the prosecution of war crimes in Bangladesh? Perhaps Bosnia and Herzegovinian experience can be an example. The problems faced by the Bosnian domestic courts in prosecuting the war crimes were manifold. Some may perceivably be identical with the Bangladesh situation like security question of the judges and prosecutors, difficulties locating and securing the attendance of witnesses and defendants, inadequate witness protection mechanisms and large case loads etc. How can we tackle all these foreseeabilities? One simple way of avoiding large-scale case loads is to choose the cases and charges strategically. The other points are much more a question of commitment than law. Failure of the authorities to address impunity would seriously undermine the rule of law and negatively impact public confidence in the legal system. Conscientious efforts are to be made to face these challenges and bring those responsible for war crimes to justice.

Reflecting thoughts

The war criminals sicken the conscience of civilised society. Experience of 'international crimes' is a saga to a nation's psychology. The ICC Statute to which Bangladesh is a party as of now, in its preamble has laid down that there should be an end to impunity for the perpetrators of the heinous crimes and states that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. International crimes is an act of total and most crude form of denial of the basic right to life of individual and so repugnant to human dignity. Preservation of human dignity in all situations is a non-derogable obligation of the states in the human rights regime created by the international community. 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 the perpetrators of 'international crimes' in 1971 be brought to justice.

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REVIEWING *the views*

Of 'struggle' and 'war': A humble dissent

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MOHAMMAD Moin Uddin, an Assistant Professor of Law from Premier University Chittagong has come out with something new in our Preamble talk. The gist of his write-up in the last issue of *Law and Our Rights*, as it appeared to me, is that the substitution of 'war' in place of 'struggle' in the Preamble was right as per the 'grammatical construction' of the relevant phrase. To the author it was the correction of the mistake of 'inappropriate' use of a 'right word in a wrong place'. Bless my soul!

While impliedly supporting the anti-liberation aggression on the constitutional philosophy, he even mildly rebuked the framers of the 'well-thought-out constitution' for their poor drafting skill. The 'hypothesis' of Mr. Moin is that by using 'having proclaimed our Independence on the 26th day of March, 1971' before 'through a historic struggle for national liberation' the framers of constitution delimited the boundary of our liberation history within 9 months of 1971. This being so 'it makes sense that the change of 1977 was correct' because 'what happened after the proclamation of independence was though struggle in general, war in particular.' I'm simply thundered by such a silly outlook towards such a glorious revolution.

Is it only a 24 years' history?

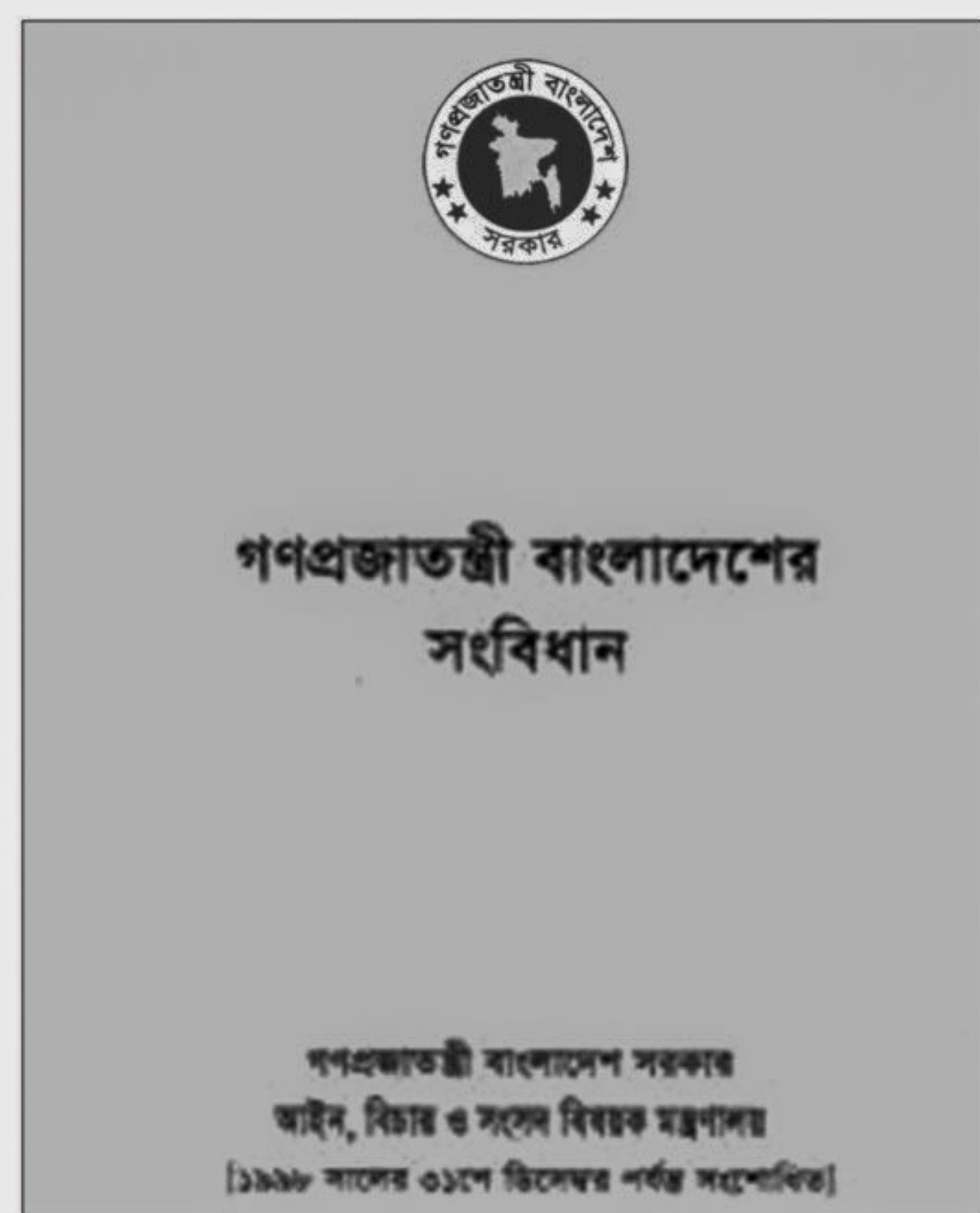
To the author, 'The true spirit of our constitution is the spirit that ran through the minds and souls of our people from 1947 to 1971 in quest for a just constitution.' This, to me, is a poorly conceived idea ignoring the thousands years' search of the *Banglaees* for a nation state. It was the *Baro Bhuiyans of Sonargaon* who bought freedom from the Mughals for blood. It was the

Bangalees who staged the first revolution against the British in 1760 soon after 1757 Plassey tragedy. Those under-armed but desperately courageous revolutions reached their culmination in 1971. Saying that the 1971 'war' was a result of mere political, economic and constitutional failure Pakistani rulers is a clear negation of the 'struggle' for Secularism, Socialism and *Bangalee* Nationalism which were not matters of some 24 years. The 1977 amendment for which the author stands did exactly this thing. It, while accepting a 'war' with Pakistani forces, completely changed those guiding principles of the 'struggle' into communalism and so called *Bangladeshi* nationalism, a complete reversal of the truth.

Did the framers 'inappropriately' use 'struggle'?

If the English text of the Preamble is considered, the 'grammatical construction' proposed by the writer holds no ground at all. In the English version the clause is 'having proclaimed our Independence on the 26th day of March, 1971 and through a historic struggle for national liberation.' Here the presence of 'and' between the proclamation of independence and struggle for national liberation makes it clear that these two parts are separated by the disjunctive conjunction. These being separate, the first part must not affect or qualify the second one. Formal declaration of independence has been mentioned first to refer the 'immediate' justification while the prolonged 'historic struggle for national liberation' has been mentioned as the guiding philosophy behind the whole process.

The Bangla text of the Preamble, however, may provide some literal and *prima facie* foothold to the author's view. Here the conjunction 'and' is totally missing. So it



may readily be claimed that by using 'historic struggle for national liberation' just after 'having proclaimed our independence', the framers of the constitution intended to refer 9 months of 1971. The point becomes stronger on the ground that in case of conflict between Bangla and English text the former shall prevail. Yet I request the writer to wait a bit more.

Intention is not to be deduced readily from a 'grammatical construction'. Doing so will be to forget that 'it is a constitution we are expounding'. Interpretation of constitutional principles is a mat-

ter of reasoned application of rational precepts to conditions of time and place', to borrow words from Dean Roscoe Pound. Constitution is to be interpreted on the basis of its overall spirit and scheme without caging the interpretation within the confines of the written words taken in isolation (*Mahudul Islam, Constitutional Law of Bangladesh*, p 29-30). Now leaving aside the English text, even the Bangla text of the Preamble looked upon as a whole will negate the writer's view.

If taken grammatically, the first paragraph of the Preamble would mean that we established the

Independent Sovereign People's Republic of Bangladesh by proclaiming our independence and then by waging a nine-month 'war' for national liberation. But would it not strike at the very root of the Proclamation of Independence? Constitutionally speaking, for the establishment of the Independent Sovereign People's Republic of Bangladesh we did not wait for the 'war' to be concluded on December 16, 1971. It was established on the 26 March 1971 immediately upon the declaration of independence which was confirmed retrospectively on April 17, 1971 through a formal proclamation of independence. So it becomes logical that 'historic struggle for national liberation' was used in the first paragraph not merely to refer 9 months' physical war rather to denote the politico-philosophic foundation which supplied validity to the proclamation of independence itself.

Again, to arrive at his 'hypothesis' the writer totally overlooked the second paragraph of the Preamble in the original constitution. Here the framers mentioned the principles of socialism, secularism and nationalism which 'inspired our heroic people to dedicate themselves to... the struggle for national liberation'. And here you shall not see the qualifying clause 'having proclaimed our independence'. Hence this 'struggle for national liberation' can never be construed to refer only 9 months of 1971. So should we say that the Preamble speaks of two different struggles (one limited and another wider) for national liberation? Only a shallow 'grammatical construction' can afford this.

The 1971 episode of the history: 'War' or 'Struggle'?

Even if for the sake of argument we accept that the struggle mentioned in the first paragraph of the

Preamble is a limited one, it does not warrant terming the use of 'struggle' 'inappropriate'. Nor it is correct to claim that the 1971 episode of history 'though struggle in general, was war in particular'. Rather the opposite is pertinent. Though *prima facie* a war, it was a 'struggle' in reality. The 1971 was not a mere armed rebellion against any ruler. It was not a fight fought between two rival armies. It was a mass upsurge for the fulfillment of a thousands years' cherished dream a free homeland for Bangalees. It was not a 'war' for mere independence. It was a 'struggle' for a total emancipation of the people (liberation) from oppression. That is why the undisputed leader of 75 million people declares, "This time the 'struggle' is for liberation, this time the 'struggle' is for freedom." That is why we adorn and distribute the credit of 1971 among each and every individual - who fought the 'war' in the field, who starved to feed the freedom fighters with the sole piece of bread available at home, who fled the neighborhood in fear of persecution, who sang in the refugee camps or in the streets of New York, who lobbied in the international plane or even who prayed to the Almighty for the freedom.

Here the writer completely ignored the terms 'liberation' and 'independence'. A struggle for 'liberation' has been changed into a war for 'independence'. What does 'independence' mean? It is the sovereignty meaning freedom from external interference. Liberation is not a mere freedom from foreign dominance; it means freedom from exploitation, poverty and hunger. So doesn't it explain that the term 'struggle' was appropriately used to give a wider dimension to the 1971 efforts for national 'liberation' while 'war' for national inde-

pendence' was used to restrict it from every possible dimensions? Then why does the author consider 'war' to be a right term and hence support such a warrior's approach to 1971? On which side his allegiance lies?

Is the source of validity missing?

The writer professed a sort of arbitration as well. If that is to be complied with, we shall consume the 'war' in its present place and relocate the 'struggle' from its 'wrong place' to a right one by recording it in the first paragraph as 'an antecedent to and *raison d'être* for, having proclaimed our independence'. It shall contain twenty four years' 'struggle' to indicate the source of validity of the constitution which the framers of the constitution 'failed to underscore'. Is Montesquieu looking at the foggy England from his sunny vineyard in Paris? As shown above the 'historic struggle for national liberation' mentioned in the original constitution covered the history of thousands years not of mere twenty four Pakistani years alone. Of course, the historic 'war for national independence' as it stands now unforgivably omits it. And if any one is to blame for this, it is the person causing the pro-Pakistani amendment, not the framers of the constitution.

Consuming the 'war' for national independence and inserting one or two sentences before that to accommodate the 'struggle' for national liberation would be a stance of neutrality over which even a Chief Adviser to the Non Party Caretaker Government would think thrice. If any amendment is needed, that is the revival of the original constitution *in toto* nothing else.

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