LAW OPINION

Of 'Crimes against Humanity'

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There is no need to separately prove that the 'Crimes against Humanity' was committed during 1971 as part of a widespread and systematic attack as it is required under some of the international statutes.

Section 3(2)(a), International Crimes (Tribunals) Act, 1973 (as amended in 2009) [henceforth, 1973 Act] defines the 'Crimes against Humanity' in the following manner:

'Crimes against Humanity: namely, murder, extermination, enslavement, deportation, imprisonment, abduction, confinement, torture, rape or other inhumane acts committed against any civilian population or persecutions on political, racial, ethnic or religious grounds, whether or not in violation of the domestic law of the country where perpetrated;'

Many have expressed their concern by the degree to which the above definition of 'Crimes against Humanity' under the 1973 Act differs from international standards. It may be stated that 'international standard' itself is a fluid concept, it changes with time and requirement through a mechanism of progressive development of law. Therefore, one can look at the concept of 'standard' from entirely a technical perspective; whereas, others can see it as a matter of inherent spirit.

Looking at the contemporary standards of definition of 'Crimes against Humanity' in various statutes on international crimes, the first observation can be made is that there is no 'consistency' among definitions. The Statute of the International Criminal Tribunal for the Former Yugoslavia, 1993 (ICTY Statute), the Statute of the International Tribunal for Rwanda, 1994 (ICTR Statute), the Rome Statute of the International Criminal Court, 1998 (Rome Statute) or the Statute of the Special Court for Sierra Leone, 2002 (Sierra Leon Statute) although share common spirit, do differ in legal technical nitty-gritty.

Article 5 of the ICTY Statute 1993 defines the 'Crimes against Humanity'. The said definition neither requires the presence of 'Widespread and Systematic Attack' nor the presence of 'knowledge' thereto as conditions for establishing the liability for 'Crimes against Humanity'.

Similarly, Article 3 of the ICTR Statute defines the 'Crimes against Humanity'. According to the said definition there is no need to prove the existence of 'knowledge' regarding the attack to establish the liability for 'Crimes against Humanity'.

Further, the definition of 'Crimes against Humanity' under the Rome Statute differs from both ICTY and ICTR Statutes. Article 7 of the Rome Statute defines the 'Crimes against Humanity'. According to the Rome Statute definition, there are specific needs: (a) the relevant crimes must have been committed as part of a 'widespread or systematic' attack; and (b) the relevant crimes were committed with knowledge of such attack.

Recently, Article 2 of the Sierra Leone Statute has defined the 'Crimes against Humanity'. It is to be noted that the Sierra Leone Statute was adopted after the Rome Statute. Nevertheless, the Sierra Leon Court did not adopt the definition of the 'Crimes against Humanity' of the Rome Statute. In establishing the 'Crimes against Humanity' in the Sierra Leon Court, there is no need to prove that the relevant crimes were committed with the knowledge of attack.

From the above discussion it is very clear that there is no actual consistency in the definition of 'Crimes against Humanity' as per the ICTY Statute, the ICTR Statute, the Rome Statute and the Sierra Leone Statute. Therefore, the claim as to the existence of a consistent international standard for the definition of 'Crimes against Humanity' is baseless.

It is nevertheless conceded that the abovementioned definitions of 'Crimes against Humanity' under various international documents do contain a common spirit. Though they differ in legal technical nitty-gritty, it cannot be said that any of these statutes has not met the international standards in defining the 'Crimes against Humanity'.

As far as the 1973 Act is concerned, the following observations can be made:

1.The definition of 'Crimes against Humanity' under the 1973 Act is almost similar to the definition under the ICTY Statute. In both these definitions there is no need to prove that the relevant crimes were committed as part of a 'widespread or systematic attack'. Further in both cases, there is no need to establish that the accused had any kind of knowledge, whether actual or constructive, regarding the crimes committed.

2.The definition of 'Crimes against Humanity' under the 1973 Act differs from the ICTR Statute and the Sierra Leon Statute to the extent that in Rwandan Tribunal or Sierra Leon Court there is a need to prove that the 'Crimes against Humanity' have been committed as part of a 'widespread or systemic attack'; whereas under the definition of 1973 Act there is no such need. However, in all these three forums, there is no need to prove the existence of knowledge regarding the said attack to establish the liability for 'Crimes against Humanity'.

3.The definition of 'Crimes against Humanity' under the 1973 Act differs from the Rome Statute in two accounts: (a) According to the Rome Statute the relevant crimes must be committed as part of a 'widespread or systematic attack', whereas, there is no such requirement under the 1973 Act; (b) According to the Rome Statute the element of the 'Crimes against Humanity' requires the proof of existence of knowledge regarding commission of the relevant crimes, whereas, there is no such requirement under the 1973 Act.

It is now necessary to define the terms: 'attack', 'widespread attack' and 'systematic attack'. It is necessary because the 'Crimes against Humanity' must be committed as a part of the attack or had occurred as a consequence of the attack. This principle was appreciated and applied in the case of *The Prosecutor* v. *Fatmir Limaj* et al., ICTY (Trial Chamber), November 30, 2005. At paragraph 189 of the judgment of the said case, the Tribunal ruled: 'It must be established that the acts of the accused are not isolated, but rather, by their nature and consequence, are objectively part of the attack.'

The term 'attack' is defined in the case of *The Prosecutor* v. *Blagojevic and Jokic*, ICTY (Trial Chamber), January 17, 2005. At paragraph 543 of the judgment of the said case, it was stated that, "'Attack" in the context of a crime against humanity can be defined as a course of conduct involving the commission of acts of violence.'

Further, in the case of *The Prosecutor* v. *Miroslav Deronjic*, ICTY (Appeals Chamber), July 20, 2005, it was stated that, 'In order to constitute a crime against humanity, the acts of an accused must be part of a widespread or systematic attack directed against any civilian population …' (paragraph 109).

The terms 'widespread' and 'systematic' were defined in the case of *The Prosecutor* v. *Dario Kordic, Mario Cerkez*, ICTY (Appeals Chamber), December 17, 2004 as: '… the phrase "widespread" refers to the "large-scale nature of the attack and the number of targeted persons" and the phrase "systematic" refers to the organized nature of the acts of violence and the improbability of their random occurrence.'(paragraph 94)

The case of *The Prosecutor* v. *Goran Jelisic*, ICTY (Trial Chamber), December 14, 1999 shows that in order to prove that the attack was widespread or systematic, the court must consider various factors, including, the existence of an acknowledged policy targeting a particular community, the establishment of parallel institution meant to implement this policy, the involvement of high-level political or military authorities, resources military or other, the scale or the repeated, unchanging and continuous nature of the violence committed against a particular civilian population, etc. (paragraph 53)

It may be mentioned that the purpose of evaluating the 'Crimes against Humanity' as part of a widespread and systematic attack is to eliminate the possibility of the same being committed as an isolated or sporadic event. If the specific offences of 'Crimes against Humanity' which were committed during 1971 are tried under 1973 Act, it is obvious that they were committed in the context of the 1971 war. This context is itself sufficient to prove the existence of a 'widespread and systematic attack' on Bangladeshi self-determined population in 1971. The Tribunal, as per section 1993) of the 1973 Act, shall not require proof of facts of common knowledge; it shall take judicial notice of such fact. This is more so for the reasons that during 1971 war there was evidence to the effect that:

(a)there was existence of an acknowledged policy targeting a particular community (i.e. self-determined Bangladeshi civilian community);

(b)there was establishment of parallel institution meant to implement this policy;

(c)the involvement of high-level political or military authorities, resources military or other; and

(d) the scale or the repeated, unchanging and continuous nature of the violence committed against a particular civilian population.

Therefore, the specific offences committed as 'Crimes against Humanity' during 1971 war, were very much a part of a widespread and systematic attack of the ongoing war. Therefore, under section 19(1) of the 1973 Act, the Tribunal can take judicial notice of the same and as such, there is no need to prove the relevant crimes to have been committed as part of a 'widespread or systematic attack'.

In conclusion, it is stated that there is no need to separately prove that the 'Crimes against Humanity' was committed during 1971 as part of a 'widespread and systematic attack' as it is required under some of the international statutes. Moreover, it has already been mentioned above that there are a number of international documents where 'Crimes against Humanity' does not need the proof of widespread and systematic attack. As far as the issue of proving the existence of Knowledge regarding commission of the 'Crimes against Humanity' is concerned, it is argued that like the 1973 Act of Bangladesh, there is no need to prove such element to establish the 'Crimes against Humanity' under the ICTY, ICTR, Rome or Sierra Leon Statutes.

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HUMAN RIGHTS WATCH

Do good fences make good neighbours?

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DO good fences make good neighbours? Not along the India-Bangladesh border. Here, India has almost finished building a 2,000km fence. Where once people on both sides were part of a greater Bengal, now India has put up a "keep out" sign to stop illegal immigration, smuggling and infiltration by anti-government militants.

This might seem unexceptional in a world increasingly hostile to migration. But to police the border, India's Border Security Force (BSF), has carried out a shoot-to-kill policy even on unarmed local villagers. The toll has been huge. Over the past 10 years Indian security forces have killed almost 1,000 people, mostly Bangladeshis, turning the border area into south Asian killing fields. No one has been prosecuted for any of these killings, in spite of evidence in many cases that makes it clear the killings were in cold blood against unarmed and defenceless local residents.

Shockingly, some Indian officials endorse shooting people who attempt to cross the border illegally, even if they are unarmed. Almost as shocking is the lack of interest in these killings by foreign governments who claim to be concerned with human rights. A single killing by US law enforcement along the Mexican border makes headlines. The killing of large numbers of villagers by Indian forces has been almost entirely ignored.

The violence is routine and arbitrary. Alauddin Biswas described to Human Rights Watch the killing of his 24-year-old nephew, who was suspected of cattle rustling, by Indian border guards in March 2010. "The BSF had shot him while he was lying on his back. They shot him in the forehead. If he was running away, he would have been shot in the back. They just killed him." The BSF claimed self-defence, but no weapons were recovered.

Some of the victims have been children. One father recounted how his sons were beaten by BSF officers. "The BSF personnel surrounded the boys and without giving any reason started beating them with rifle butts, kicking and slapping them. There were nine soldiers, and they beat my sons mercilessly. Even as the boys fell down, the BSF men continued to kick them ruthlessly on their chest and other sensitive organs."

The border has long been crossed routinely by local people for trade and commerce. It is also crossed by relatives and friends separated by a line arbitrarily drawn by the British during partition in 1947. As with the Mexican border in the United States, the border has become an emotive issue in Indian politics, as millions of Bangladeshis now live in India illegally. Many are exploited as cheap labour.

India has the right to impose border controls. But India does not have the right to use lethal force except where strictly necessary to protect life. Yet some Indian officials openly admit that unarmed civilians are being killed. The head of the BSF, Raman Srivastava, says that people should not feel sorry for the victims, claiming that since these individuals were illegally entering Indian Territory, often at night, they were "not innocent" and therefore were a legitimate target.

Though India is a state with functional courts, he apparently believes the BSF can act as judge, jury and executioner. This approach also ignores the many victims, such as a 13-year-old named Abdur Rakib, who broke no law and was killed simply because he was near the fence. Sadly, Bangladeshi border officials have also suggested that such killings are acceptable if the victim was engaged in smuggling.

As the recent WikiLeaks report about endemic torture in Kashmir underscores, Indian soldiers and police routinely commit human rights violations without any consequences. Permission has to be granted by a senior Indian official for the police to even begin an investigation into a crime committed by a member of the security forces, such as the BSF. This rarely happens.

The response of various government officials to allegations of a shoot-to-kill policy has been confusing: we do shoot illegal border crossers since they are lawbreakers; we don't shoot border crossers; we only shoot in self-defence; we never shoot to kill.

But there is some reason for hope. Under pressure, senior Indian officials have expressed revulsion at the behaviour of the BSF and have promised to send new orders to end the shoot-to-kill policy.

As India's economy has grown and foreign investors have flocked in, its human rights record has largely flown under the radar in recent years. But India is a growing world power with increasing influence. It should understand that its behaviour will come under increasing scrutiny. Routinely shooting poor, unarmed villagers is not how the world's largest democracy should behave.

Brad Adams, Asia Director of Human Rights Watch. Extracted from guardian.co.uk