LAW VISION

Relieve from ignominy

S M MASUM BILLAH

Bringing the perpetrators to justice

THAT the suspects of war crimes, crimes against humanity, genocide and crimes against international law and peace during the liberation war of Bangladesh in 1971, can not be tried at all was a different stand from the proposition that they can be tried but the accepted norms of procedural fairness must be maintained. The political segments that

were somewhat vocal against any sort of trial of the alleged perpetrators seem to have altered their position as of now and express their eagerness to hold the trial with the precondition of maintaining 'international standards. To me, this transformation is a preliminary victory of the one year old 'International Crimes Tribunal' of Bangladesh constituted under the 1973 Bangladesh Act. Now the challenge for the tribunal vis-à-vis the investigation and prosecution is: To make the trial more credible, internationally acceptable and jurisprudentially sound. The jurisprudential basis of the International Crimes (Tribunal) Act 1973 has also received approbation, with a very lenient reservation, from the international experts, for example until recently by Ian Martin, the ex-secretary general of Amnesty International. The Bangladeshi Tribunal is purely a domestic 'international crimes tribunal' which is carrying historical significance for establishing a growing trend of domestic prosecution of war crimes, crimes against humanity etc.

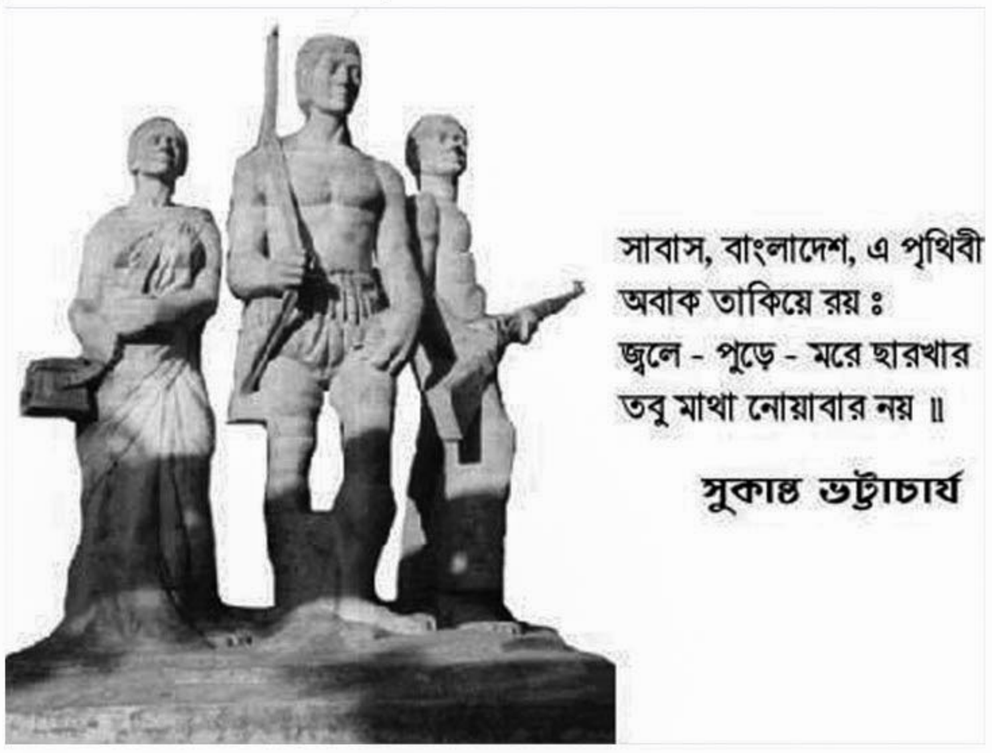
Drawing the curtain of impunity culture

Genocide recurs. Even after the claimed success of Nuremburg Legacy. The 1990s and onwards have witnessed large scale massacre in Bosnia, Sudan, Sierra Leone, Albania, Uganda etc. The 1971 massacre unfortunately had largely remained unaddressed by international legal community. The International criminal law was in a shaping stage. So, the big damage, at least psychological, done to the international community, to my opinion, was started from the impunity of the perpetrators of 1971 genocide launched in the then East Pakistan. Pakistan as a state itself, UN as the representative of international community had failed to bring the perpetrators of heinous crimes of 1971. And Bangladesh with its limitations added with its political commotion and helplessness also failed to ensure trial of the culprits, at least the local aides (members of auxiliary forces or para-militia like razakars, al-badr. al-shams etc).

"How could one hope to restore the rule of law and development of stable, constructive and healthy relations among ethnic groups, within or between independent states if the culprits are allowed to go unpunished?", questions Antonio Cassesse in his report to UN in 1994. How could a woman who had been raped or a civilian whose parents or children had been killed in cold blood quell their desire for vengeance if they knew that the authors of these crimes were left unpunished and allowed to move around freely, possibly in the same town where their appalling actions had been perpetrated? Therefore, Cassesse concludes, the only civilized alternative to this desire for revenge is to render justice. The words of Cassesse find its relevance for Bangladesh case with equal efficacy.

Of 'juddhaporadh' or 'manobotar biruddhe oporadh'

When we talk of the trial of war criminals (in Bangla Juddhaporadh) of 1971 we evidently want to cover far more criminal acts than merely those under 'war crimes' stricto sensu. Crimes perpetrated by the razakars, al-badrs, al-shams etc all very much fall within the notion of crimes against humanity namely, "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds… whether or not in violation of the domestic law of the country where perpetrated." 'War criminals' of 1971 also committed genocide meaning "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: i) Killing members of the group; ii) Causing serious bodily or mental harm to members of the group; iii) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part iv) Imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group." So, 'manobotar biruddhe oporadh' as we understand in bangla is



not as simple as we are used to by newspaper terminology. The English phraseology 'Trial of War Criminals' aptly describes the content but the Bangla word 'juddhoparadh' merely depicts only a small segment of the crimes committed by the perpetrators in 1971 and may be replaced by the word 'juddhokalin aparadh' (crimes during the war) to convey the real intention, scope and purpose of the ongoing trial in Bangladesh.

Superior escaped, why the second line?

An argument sometimes has been advanced and reported that the main responsible persons (Pakistan Army, Pakistan also owes a responsibility to try them under international law) have escaped the trial, so why the next lines (their collaborating hands) would be tried? Unfortunately, such argument is foreign to any canons of criminal jurisprudence. A person is responsible for the acts he himself commits. It is not that the suspects would be tried for the offences of their commanding level officers. However, there is one social advantage of this allegation; this is rather a tacit confession of the second line persons' involvement in the heinous crimes of 1971. In this connection, it would be of significance to see how the tribunal interprets the 'incitement', 'planning' in line with the actual commission of the offence. And how the prosecution establishes the criminality of the offenders? One thing needs to be understood, the role of the local collaborators during Bangladesh war should be treated differently than the role of the collaborators of other instances of the world. The Pakistan army coming from 1200 miles away, could not launch the targeted killings of the intellectuals, the particular religious groups etc. 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 Pakistan Army. 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 of Bangladesh also mentions in Article 47 A.

The Bangladesh statute 1973 has a provision on the responsibility of superiors but not of subordinates (this obstacle is removed after amendment in 2009 casting individual responsibility). Different international tribunals have different provisions dealing with the defense of superior orders. For the Sierra Leone Special Court, a superior order is not a defence to a prosecution but it may be pleaded in mitigation of sentence. There are similar provisions for East Timor, the former Yugoslavia and Rwanda, and Lebanon. The International Criminal Court statute in contrast provides that superior orders may be a defence where three criteria are met: (a) The person was under a legal obligation to obey orders of the Government or the superior in question, (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful. In case of Bangladesh it is too unlikely that the perpetrators would have the benefit of this defense.

Question of Challenges and standards

To my opinion political indifference are the first and formost obstacles to prosecution. Some other identified and presumed challenges of the trial are: i) fear of judges and prosecutors for their personal security ii) difficulties locating and securing the attendance of witnesses and defendants, iii) inadequate structures and procedures iv) processing of war crimes cases v) inadequate witness protection mechanisms vi) inadequate legal resources and poor dissemination of law reports and legal texts and vii) insufficient training on international criminal law. Actually these points are challenges as well as questions of standards. But it is true that the points are much more questions of commitment than law. Procedural fairness, frequently advocated, has no universal shape. Each tribunal becomes unique becuase of the mandate given by law, political and historical context of the tibunal is constituted. On the face of the international concern, media accessibility, it is argued that the Bangladesh tribunal for trying international crimes would apply procedural standards in identical fashion of other accepted tribunals. The procedural fairness should not be considered as rigid bench mark, but a constructive framework upon which the tribunal can deliver the justice.

Impunity of perpetrators of international crimes shakes the confidence of a society and remains as a permanent menace to development of the psychology of a nation. Failure of us 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 international crimes to justice. Let this 26th march rejuvenates our pledge to relieve ourselves from the ignominy of not holding the trial for forty years.

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LAW OPINION

ICTA 1973 and its international standards

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(*…from previous issue*)

PROTECTION of victims and witnesses: Encouraging witnesses to testify in war crimes trials is difficult, as they do not want to risk themselves being endangered. Witnesses at risk may well be the surviving victims of horrendous crimes. They are likely to reveal compelling crime base testimony if they feel valued and secured in the trial process. There must be adequate and readily available protection for witnesses and victims in appropriate cases through camera proceedings, suppressing the identity of a victim or witness to the public, and affording post-testimony sustained security. The Statutes of the ICTY (Art 22), the ICTR (Art 21), and the Agreement on the Cambodian genocide trial (Art 23 expressly oblige the tribunal/court to provide such protection in an inclusive manner. Rules of Procedure and Evidence of ICTY and ICTR have articulated specific protective measures for victims and witnesses (Rules 69 and 75). In Tadic case, the ICTY Trial Chamber II allowed the testimony of three anonymous witnesses, held that "the Prosecution may withhold from the defence and the accused, the names of, and other identifying data concerning witnesses H, K and K", and reasoned that "[a] fair trial means not only fair treatment to the defendant but also to the prosecution and to the witnesses" (Case No. IT-94-1-T of 10 August 1995, paragraphs 39 & 55). The ICTY and ICTR provide for the restitution of property (Rule 105) and compensation to victims (Rule 106). Victims of rape are unlikely to testify in public for fear of social humiliation and stigma haunting them for the rest of their lives. This is why Rules of Procedure and Evidence of both ICTY and ICTR have adopted a special regime for evidence in sexual assault cases, where no corroboration of the victim's testimony is required, consent is no defence, and prior sexual conduct of the victim is no admissible evidence (Rule 96). Their "Victims and Witnesses Unit" set up pursuant to Rule 34 recommends appropriate protective measures and offers counselling and support for victims and witnesses in rape and sexual assault cases. Neither the 1973 Act, nor the Rules provides an adequate protection regime for victims and witnesses, which must be formulated urgently.

Judgment, immunity and indemnity: The judgment of the Tribunal must pronounce the guilt or innocence of the accused with reasons. If convicted, the Tribunal may award death sentence or any other punishment that it thinks just and proper to the gravity of the crimes.

No provision of the Criminal Procedure Code 1898 and the Evidence Act 1872 shall apply in any proceedings under the 1973 Act. The order, judgement, or sentence of the Tribunal cannot be challenged in any manner whatsoever in or before any court or other authority except by the way of appeal embodied in the1973 Act. No legal proceeding, suit, or prosecution can be brought against the government or any person for anything done in good faith under the 1973 Act, which overrides all other laws in force and prevails over the latter in cases of any inconsistency or repugnancy (Act ss20, 23-26).

The procedure for the pronouncement of judgments under the 1973 Act is consistent with that of the Statutes of ICTY (Art 23) and ICTR (Art 22). Rules of Procedure and Evidence of both ICTY and ICTR (part 2, Arts 8-13) deal with the "primacy of the tribunal". Article 30 of the ICTY Statute provides immunities to the tribunal and its judges, prosecutors, and Registrar. Article 19 of the Cambodian Agreement may be cited to the same effect. As such, the immunity and indemnity provisions of the 1973 Act do not appear to be unusual in war crimes trials. The provision for capital punishment in the 1973 Act (s20:2) is not necessarily illegal, though it may entail human right implications and obligations.

Conclusion: The 1973 Act and Rules are not perfect but their alleged inadequacies falling short of international standards are not borne out by this comparison. It reveals that the 1973 Act and Rules are by and large consistent with international practice and as fair and reasonable as one can expect in an international crimes trial. Like all other war crimes trials, the Rules under the 1973 Act (s22) are progressively evolving. The criticisms thus appear to be premature and greatly exaggerated. The potential, if not imaginary, violations of rights of the accused cannot override the right of the victims to justice. The Tribunal must stay in the course of rendering this historic justice. (Ended)

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