



REVIEWING THE VIEWS

BNP and war crimes trial: A legal deception for political ends



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FOLLOWING the footstep of Jammāt, BNP in a recent statement denounced the ongoing war crimes trials, asked the government to stop it, and urged foreign powers to oppose the trial. Such a blatant disregard for the trials of heinous war crimes perpetrated in 1971 may not be to the wonderment of those who are familiar with the genesis and politics of BNP. However, the statement has legal overtone, which is littered with legal deception engineered to generate public confusion about the trial. It claims the unconstitutionality of the tribunal, which cannot be independent short of US Ambassador Rapp recommendations requiring a definition of crimes against humanity, among others. This note highlights and comments upon this political statement camouflaged in legal make-up.

The Bangladesh Tribunal and its substantive and procedural law do not suffer from any fundamental flaws in constitutional and international law. The designated crimes against humanity under the 1973 Act are recognised crimes at international law long before the enactment of our Constitution. The jurisprudence of these crimes has been developed institutionally since the Nuremberg judgment until recently by various war crimes tribunals and the ICC Statute (Art. 7). The 1973 Act has not for the first time criminalised crimes against humanity, whose legal definition, criminality contents, and culpability elements are well-established in international criminal law. The specified crimes under trial were committed in 1971, predating the Constitution, which has no authority to decriminalise or undermine them. Even if it is conceded for the sake of arguments that the Constitution is relevant to this trial, it is relevant only to the extent of its consistency with international law and obligations. No state can plead the inconsistency of its national law as a defence to exonerate from the definite responsibility to try these crimes, which can come under universal jurisdiction (Pinochet case 1999). This responsibility to try these crimes and punish their perpetrators is a recognised peremptory norm of international law from which

no derogation is permissible. If our Constitution comes into conflict with this fundamental international obligation, international law prevails over the Constitution, which warrants amendments to comply with the international obligation. There is absolutely no international law that renders the Tribunal unlawful. A comparative study of the *modus operandi* of the Bangladesh Tribunal with that of Bosnian and Rwandan tribunals reveals that they are comparable.

Crimes against humanity and their prohibiting international law and judicial precedents existed at the time of the commission of those crimes in 1971 and are enriching continuously. The Tribunal is required merely to interpret and apply these law and precedents in the context of those committed in 1971 to ascertain the responsibility and culpability of their perpetrators. Being human constructs, legal interpretations can vary from trial to trial pursuant to the experience of the judges, ability and constraints of criminal justice system, differing circumstances of the commission of crimes, and complexions of tribunals (international, national, or mixed). This precisely explains why we see varying exposition of the law and judicial precedents pertaining to crimes against humanity in the Bosnian, Rwandan, Sierra Leone, Dili, Kosovo, and Cambodian trials. Presupposing that the Bangladesh Tribunal is incapable of making legally subsumable reasoned interpretation of the law and precedents applicable in the crimes under trial is grossly premature and an over-reaction. Existing resource-rich war crimes trials' interpretations and judgments are set to provide pertinent lessons, understanding, and jurisprudence for the Tribunal to try the alleged perpetrators much along the line of other such tribunals. Moreover, a functional and working definition of crimes against humanity already exists in the 1973 Act (s3), which can be refined and improved further as the Tribunal proceeds. The ICC, commencing its proceedings in 2002 to try crimes against humanity under its Statute Article 7, has only recently expanded Article 7 in its 2010 Kampala Review. Identical examples from various war crimes trials are also available. If the ICC and ad hoc war crimes

tribunals can proceed with a working definition of crimes against humanity, so can the Bangladesh Tribunal.

Which standard of due process is being pleaded in Ambassador Rapp's suggestion and the BNP statement? It cannot be the one that Rapp's government follows in trying Guantanamo detainees. Indeed, there is no common but a minimum international standard to be followed procedurally in procuring and presenting evidence in international crimes trials. Every war crimes trial is unique and different from the next. A procedural standard followed in one may or may not be worthy of adoption in another. Lessons from war crimes trials suggest that procedural aspects are tailored to suit the specific circumstances of a given trial and it is an evolving process. Commencing in 1993-94, the Bosnian and Rwandan tribunals are still developing and improving their trial procedures. So is the situation with the ICC. Nothing prevents the Bangladesh Tribunal from developing its own procedural standard as the need arises in the course of conducting the trials. Minimum procedural standards and due process are important means of ensuring fair trials. But these procedural standards should not be stretched too high to make it undeliverable. The procedural standard, however rigidly and immutably stressed, cannot frustrate the course of justice in ending the impunity of perpetrators. Albeit there will always be room for improvement and this is why the ICC and other war crimes tribunals are constantly changing their procedures simultaneously with trial proceedings. By requiring Bangladesh to achieve the so-called perfection in advance is to set a very high standard that was not expected of the ICC and those 8 war crimes tribunals. Seemingly the requirement is an orchestrated delaying tactic that Jammāt initiated to save its alleged war criminals and now BNP to salvage its political ally and its member in custody.

The claim that 'an individual accused of war crimes should get the same time and support as the accused of other cases get to defend themselves' is untenable in law. War crimes trials and ordinary criminal trials are not the same and as such their accused cannot be treated equally. Crimes against humanity are extraordinary crimes at international law, which are qualitatively different from the legal definition and constituent elements of ordinary crimes, such as murder. International crimes are organised, massive, and their trials involve a myriad of perpetrators including those behind the scenes, spreading over more than one jurisdiction, and raising complex issues of international law. Special tribunals with specific mandates to try war crimes are better suited to render expeditious justice by addressing usual procedural complexities. Ordinary national criminal trials are often circumscribed by technicalities of the applicable law and procedural rules for the admissibility of evi-

dence - the usual causes of delays. The unavailability of typical admissible evidence, such as enough surviving witnesses and physical evidence, warrants the differential treatment of international crimes. The readily available evidence of the commission of war crimes and their perpetrators are usually newspapers reports, special reports, photographs and footages, documentaries, tape recordings, hearsay, and the like, which are not necessarily admissible as a matter of fact in ordinary criminal trials. Special tribunals also apply both national and international law in a mutually supportive way. It is these special factors that necessitate the formation of special tribunals or courts with mandates substantially different from ordinary national criminal trials. Individuals accused of international crimes in Nuremberg, Bosnian, Rwandan, Sierra Leon, East Timor, Kosovo, and Cambodian trials have been treated markedly differently than that one experiences in ordinary national criminal trials.

Nonetheless, the 1973 Act provides certain recognised rights of the accused during and after trial (ss16-17). For examples, the accused has the right (a) to offer any expla-

would be an international relation nightmare for any country that publicly condones these crimes and opposes any trial of their alleged perpetrators merely on rickety technical grounds. Meddling in another country's affairs may not be desirable for many, perhaps save some US officials who still sustain their tradition of treating other sovereignties as less equal than that of theirs. Given the role of paid lobbyists' influence on the US administration, a future Wikileaks revelation explaining the reason for such opposition may well be a possibility. Historically, the Bangladesh liberation war was opposed by the US, among others. Therefore oppositions to this trial are to be expected. It is incumbent upon the government to embark on serious diplomatic negotiations to explain the gravity and intensity of the crimes committed, formidable popular demands for this trial, and positive role the trial would play in bringing post-conflict peace and politico-economic stability in Bangladesh. The liberation war was fought partly to resist any brand of religion that condones and/or perpetrates crimes against humanity. Not to try these crimes for the speculative and illusive individual views



nation pertinent to the charge made against him/her, (b) to conduct his/her own defence or resort to the assistance of counsel, (c) to present evidence in support of his/her defence, and (d) to cross-examine prosecution witnesses (s 17). There is a right to appeal against any conviction, sentence, and acquittal by the Tribunal before the Supreme Court Appellate Division within 60 days (s21 as amended). These rights of the accused are comparable with that of the Bosnian (Art 21), Rwandan (Art 20) and the Cambodian (Art. 13) trials.

Given the current climate of international antipathy towards the perpetrators of crimes against humanity and sympathy for their victims, the BNP's call for foreign interference in the trial is likely to go unheeded. It

would be a contemptuous betrayal of the cherished ideals of the liberation war.

The perpetrators of the 1971 war crimes escaped justice for 40 years to serve sectarian interests and it would be a tragedy for justice if the vested interests of Jammāt and BNP help the alleged perpetrators get off the hook. The war crimes committed in 1971 still stigmatise their victims more than their perpetrators. The reversal of this stigma by mobilising the shame from victims to victimisers has started in this trials. In its desperate bid to frustrate this process, the BNP statement purports to insulate its ulterior political agenda through legal deceptionism and conscience bankruptcy.

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HUMAN RIGHTS WATCH

Border killings mount despite no-shooting decree

THE death toll at the Bangladesh-India border continues to mount three months after the Indian government instructed its border security forces to stop shooting civilians suspected of being undocumented migrants or a threat to national security, say local residents. NGOs have denounced the border killings as extrajudicial. The abuse continues, according to Bangladeshi human rights NGO, Odhikar, which accuses India's border security force (BSF) of circumventing the recent no-shooting decree with beatings, stonings or poisoning. However, the First Secretary of the Indian embassy in Bangladesh's capital, Dhaka, told IRIN that any killings had been linked to border crime.

"The BSF does not attack civilians. This is not happening any more. Only in a few cases, they have acted in self-defence," said Manoj Kumar Mohapatra.

Some 347 Bangladeshis and 164 Indians have been killed by Indian forces since 2006, when the Indian government built the wall, according to BSF.

Mohammad Baten, the latest man allegedly killed by the BSF - the 24th this year - was reportedly beaten to death, according to Bangladesh's border security.

The 4,000km fence has been dubbed the "Great Wall of India" by international media, while locals simply know it as the "wall of death".

India's government built the wall to restrict movement of "illegal immigrants, smugglers and suspected Islamic militants", according to officials quoted in local media.

Farmers corralled by the barbed wire find it increasingly difficult to lead ordinary lives.

"They have surrounded the people of Bangladesh on

three sides with barbed wire," said Adilur Rahman, secretary of Odhikar. "It's like the Berlin Wall. You have brothers, even husbands and wives, separated on both sides."

Distant neighbours

"When they turn [the floodlights] on, the night becomes day here," says nine-year-old Anis Ahmed.

The barbed wire is visible from Ahmed's house at the border near the village of Amgaon in Bangladesh's Dinajpur District. Ahmed and his 11-year-old cousin, Shohir Jamal, work on their family's farm every day.



Their crops grow right up to what is known as the zero point of the border, where Bangladeshi and Indian soil meets.

On this particular day, Ahmed and Jamal walked towards the border while two guards monitored them with binoculars.

"We go up to the fence all the time," they told IRIN.

Wary adults lingered behind, warning them not to go further.

Ahmed and Jamal work on their farm side by side with Indian farmers, who cross the border to work on their land.

"The Indian farmers never speak to us," says Ahmed, "If they do, the BSF yells at them. If we try to talk to them, they don't pay any attention to us. They are worried that the BSF will accuse them of being smugglers, or helping illegal immigrants."

Suspicion

There is mistrust on the Bangladeshi side of the border too. "At night we put our cows inside the house and lock up all the animals," said Jamal. Against the backdrop of border crimes, villagers become suspicious, according to a local primary school teacher, Jalal Ahmed.

"Everyone else thinks we're all smugglers here, so our people have to deal with that prejudice. And there are [actual] criminals here, not just cattle smugglers but a lot of drugs are smuggled here too," he said. "It's very bad for our society, for our children."

Felani Khatun, 15, an undocumented Bangladeshi immigrant in India, was shot while climbing the wall to cross back home on 7 January this year. A photo of her lifeless body hanging from the barbed wire sparked widespread uproar in Bangladeshi media.

Nur Islam, Khatun's father, had successfully climbed over the fence seconds before Felani was shot.

"There was no shout, no warning," he told IRIN. "I don't understand why they didn't shout anything. I saw them. They just got up and shot. And my girl cried out."

Source: IRIN.



Human Rights Day 2011

THIS year thousands of people decided the time had come to claim their rights. They took to the streets and demanded change. Many found their voices using the internet and instant messaging to inform, inspire and mobilize supporters to seek their basic human rights.

Social media helped activists organize peaceful protest movements in cities across the globe in Tunis, in Cairo, in Madrid, in New York, and in cities and towns across the globe at times in the face of violent repression.

It has been a year like no other for human rights. Human rights activism has never been more topical or more vital. And through the transforming power of social media, ordinary people have become human rights activists.

Human rights belong equally to each of us and bind us together as a global community with the same ideals and values. As a global community we all share a day in common: Human Rights Day on 10 December, when we remember the creation 63 years ago of the Universal Declaration of Human Rights.

On Human Rights Day 2011 we pay tribute to all human rights defenders and ask you to get involved in the global human rights movement.

Source: ohchr.org