



Pakistani war criminals should not go unpunished

SM MASUM BILLAH

"Repatriation did not end such responsibility, it merely transferred primary prosecutorial responsibility to Pakistan where it remains today." --- [Jordan P Paust and Albert P Blaustein (1978)]

DHAKA'S response to Islamabad's recent statements on Bangladesh's war trial process was a reminder of Pakistan's responsibility to bring the perpetrators of the war crimes and crimes against humanity of 1971 to book. The Dhaka-Islamabad relationship took a new turn after Pakistan denied any kind of involvement in the 1971 Bangladesh genocide. The denial gave rise to criticism and mass protest in Bangladesh and elsewhere around the globe. Many quarters have even gone to the extent of urging the government to cut off diplomatic ties with Pakistan. This is where Dhaka needs to act sensibly. The government, however, did not buy the idea, while it remained respectful to the people's feelings. Perhaps, it wants to champion its celebrated principle of foreign policy: 'friendship to all, enmity to none' coined by none other than Bangabandhu, the father of the nation.

Bangladesh has more to do after Pakistan's reaction to its war trial process. Pakistan's anguish regarding the death sentences handed down by the Dhaka based war crimes tribunal seems merely cosmetic, for, the country also fully practices death penalty in its justice system. Pakistan's claim of immunity of the masterminds of 1971 genocide through the 1974 Delhi Agreement also calls for a fresh reading of history and international law. Sadly, the claim of clemency and denial of complicity stand opposite to each other.

Pakistan's reaction, in a curious way, reveals the trial's necessity. Since 2010, Bangladesh has been prosecuting its own citizens against whom credible evidence of crimes committed during the 1971 war has been found. Pakistan should cooperate with this justice process, not oppose it. Pakistan also owes responsibility, not to Bangladesh, but to humankind and universal conscience, to prosecute its own citizens who were the masterminds of the 1971 atrocities that included genocide and rape. Notably, refusal by states to cooperate prosecution of persons guilty of war crimes is contrary to the principles and purposes of the UN Charter and the generally recognised principles of international law.

The law is clear. No statute of limitation can compromise the measure of justice. The crimes of genocide, rape



When, if ever, will Pakistan acknowledge its war crimes?

and torture are unforgivable. No governmental action or treaty can grant pardon to them. The obligation is peremptory in nature from which no derogation is permissible.

It is true that the tripartite Delhi Agreement of 1974 that Pakistan has referred to in its statement, expressly mentions 'clemency' and 'reconciliation' -- two startling terms used despite Bangladesh's commitment to prosecute the leading 195 accused. The wordings were the result of a stiff political negotiation between India and Pakistan with Bangladesh's acquiescence.

Bangladesh consented 'not to proceed with the trials' in response to Pakistan's oral appeal of 'forgive and forget'. Unfortunately, emphasis is supplied often merely on the phrase 'as an act of clemency' used in one of the clauses of the agreement. But if one looks at Bangladesh's 1972-1974 attempts to prosecute the suspects, one fairly assumes that the words 'as an act of clemency' simply do not fit into the context. Let me offer two examples.

Firstly, Bangladesh made a constitutional change to hold the trial effectively. Secondly, Bangladesh enacted the first ever international crimes law at the national level in 1973. The 1973 Act, notes JP Paust and AP Blaustein in their 1974 in-depth commentary on war crimes due process in Bangladesh, is a rich source of analysis of international law text. These two legislative steps were too precious to be compromised and not to be acted upon. Even we may recall that Pakistan noted its concern mentioning these two moves of Bangladesh to hold the 195 masterminds accountable in its aborted 1973 ICJ reference. It is upto

Pakistan now to explain on what grounds it had convinced India and Bangladesh to hand over the suspects to it. Geoffrey Robertson QC (2014) sees no law permitting such immunity to the suspects. Rather, there was pressure from Pakistan's then allies, the United States and China, which withheld recognition of Bangladesh until it dropped its plan to put the main Pakistani perpetrators on trial. This stand of the great powers and the UN, observes Robertson, was a 'betrayal of their promise of Nuremburg that never again should genocide go unpunished'. Bangladesh's participation in the agreement, as such, should be understood in light of concern for the 4 lakh Bangalees stranded in Pakistan during the 1971 Liberation War, repatriation of the Biharis stranded in Dhaka and more importantly, obtaining the recognition of Pakistan to foster the attainment of membership of international community including the UN.

JP Paust and AP Blaustein (1978) viewed the 1974 agreement as 'politics'. The issues of international crime and criminal jurisdiction, they argued, became intermeshed with post-war regional disputes and global politics. The international community should take note of this context that prevailed at the time of conclusion of the agreement.

In 2009, Bangladesh took a legal interest, in the form of prosecuting at least the local collaborators, when it decided to end the culture of impunity. Meanwhile, the international community had overlooked the performance of Pakistan's similar obligation. The ICT Bangladesh, in its national capacity and expertise, has been adding a fresh wave

to international criminal law. In a way, the trial is a tribute of Bangladesh to the conscience of modern civilisation. Criticisms are obvious and which trial did not embrace that? Is it not equally obvious their importance to the study of international crimes? Who can say that these trials will not offer a valuable context of explanation to the unimpressive record of the International Criminal Court? Yet, Bangladesh should learn to improve and welcome the criticisms that sufficiently appreciate its context such as the one that Geoffrey Robertson recently made.

One notes that the 1974 agreement omitted to oblige Pakistan to prosecute the suspects. As mentioned earlier, there was no necessity of that. The omission and Bangladesh's stand of 'not to proceed with the trials' do not relieve Pakistan of its duties it had already owed under the 1949 Geneva Convention and 1948 Genocide Convention to which it was a party. In fact, Bangladesh had reason to believe so, for, Pakistan admitted its obligation in its 1973 ICJ reference when it had asserted its 'exclusive jurisdiction' over the 195 suspects and denied Bangladesh's jurisdiction to prosecute them.

We would have been in a better position had there been a full hearing of the 1973 ICJ reference. However, let us draw an analogy from one of the ICJ's later rulings under an identical situation. The ICJ, in the *Bosnian Genocide Case* (1996) found Serbia (identical to Pakistan's role in 1971) responsible of breaching the 1948 Genocide Convention by failing to prevent genocide and cooperate with the International Criminal Tribunal for the former Yugoslavia (ICTY) in punishing the perpetrators. The dissenting opinion of the world court even noted Serbia's active complicity in the Bosnian genocide. It seems that Pakistan enjoyed the benefit of a time when international criminal law was still at a nascent stage. The 1970s was an era of international impunity where genocides of autocrat rulers were ignored. Many, however, were taken to the dock later on. From this angle, Pakistan should feel thankful that Bangladesh did not raise before the ICJ till today Pakistan's complicity to genocide, even in light of recent developments of international law and politics. There is a growing opinion that Pakistan's fresh denial of complicity to Bangladesh genocide demands a fresh scrutiny and referral of the issue to an international justice forum.

The writer studies PhD in Law at Victoria University of Wellington, New Zealand. Email: billah002@gmail.com