

LAW ANALYSIS

Trial of international crimes: Strategic change is due

TAPOS KUMAR DAS
 THE International Crimes (Tribunals) Act, 1973 was enacted to provide for the detention, prosecution and punishment of persons responsible for committing genocide, crimes against humanity, war crimes and other crimes recognised under international law. After a long hibernation of successive governments, in pursuance of this Act, two Tribunals were established: Tribunal-1, on 25 March 2010 and Tribunal-2, on 22 March 2012. The Tribunals so constituted tried and convicted few perpetrators who committed atrocities in Bangladesh in

await disposal in Tribunal-1 and 675 cases are pending for investigation in Prosecution. If things remain in this pace, with present strength, arithmetically, Tribunal-1 and Prosecution may require more than 200 years in disposing all issues in hand. After 46 years of the atrocities, there are few accused alive to be prosecuted. The accused so charged and tried already were so aged that four of them died during trial. In reality, if the present trial process is not excelled in manifold, it is assumed that the age-old accused persons might remain unprosecuted. In course of time, memories are fading, witnesses are dying or becoming uninterested for

hand, the Tribunal so appointed and resources so allocated for the Prosecution are disproportionate to address the bulk of offences. On the contrary, atrocities of 1971 are so outrageous that no other response can ever be adequate. In this standing, we can neither forgive nor prosecute such atrocities. Professor Frank Haldemann considers that, 'crime is not only an offense against some abstract notion of the State, or against some impersonal set of rules, it is the wrongful violation of a person by another person'. So, he proposes that primary concern should not be making the offenders suffer, but to restoring human relations and victims' interest.

understanding, it is time to look for an alternative justice which is less vindictive and state-centered and is more compassionate and responsive to victim's suffering. In this connection, Professor Frank Haldemann campaigns for the concept of justice as 'recognition' - a form of justice which is involved in giving due 'recognition' to the sufferings endured by victims. Recognition focuses on individual or collective victims. Unlike restorative justice, which emphasises on the restoration of broken societal relations, recognition focuses primarily on the victim's sense of injustice and diminished self-respect. This different kind of justice, distinct from retribution requires a determination to compensate the victims' loss justly. So, for the Prosecution and Tribunal, there are two strategic challenges: firstly, timely justice with limited resources; secondly, justice from the perspective of the victims' needs. To expedite the trial process 'admission of guilt' coupled with 'apologies' could be encouraged by offering 'minimal conviction' to offenders. Sociologist Nicholas Tavuchis observes that a proper and successful 'apology' for wrongdoing requires 'acknowledgement' and 'full acceptance of responsibility' by the wrongdoer. On recognition of responsibilities, the offender must be required to adequately compensate the victims or their successors to restore the original condition prior to the wrongdoing, as if no loss had ever occurred. Even though non-pecuniary losses like human life, physical integrity, dignity or community cannot be restored, recompense might work as 'positive make up' for such losses. Law says, 'where there is a right there is a remedy'. In the face of infringement of rights, if the remedy offers nothing compensatory to the victims, what is the good of having such right? It is not only unjust to deprive people of their right to effective remedy, but it is also unjust to prolong their lives in agony of being victimised.



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1971. Since 15 September 2015 only Tribunal-1 has been functioning and on the contrary, Tribunal-2 remains non-functioning. During 42 months operation time, Tribunal-2 had decided 11 cases. And till 5 December 2016, in 69 months, Tribunal-1 had decided 16 cases. So, in 111 (69+42) months operation time, two Tribunals altogether decided 27 cases (16+11). On an average, per case disposal time is around 4.11 months. Presently, 22 cases

many compelling reasons. Records and documents which could have been used as corroborative evidence are being destroyed systematically. Any further delay shall effectively frustrate the trial process only. Seemingly, with the conviction of leading perpetrators, trial of international crimes has lost its momentum. More shockingly, closing of Tribunal-2 manifestly demonstrates withdrawal of political commitment in this cause. In one

Justice administered by the Tribunals is retributive in nature. Justice is done in the name of abstract notion of 'humanity' but not necessarily for 'human victims'. After half a decade of commencement, time has come to revisit 'who' actually has gained - 'what' - from the trial of the international crimes. No doubt, the State succeeded in ending the sense of impunity, but for the victims and their family, there is little achievement other than the mental contentment. On this

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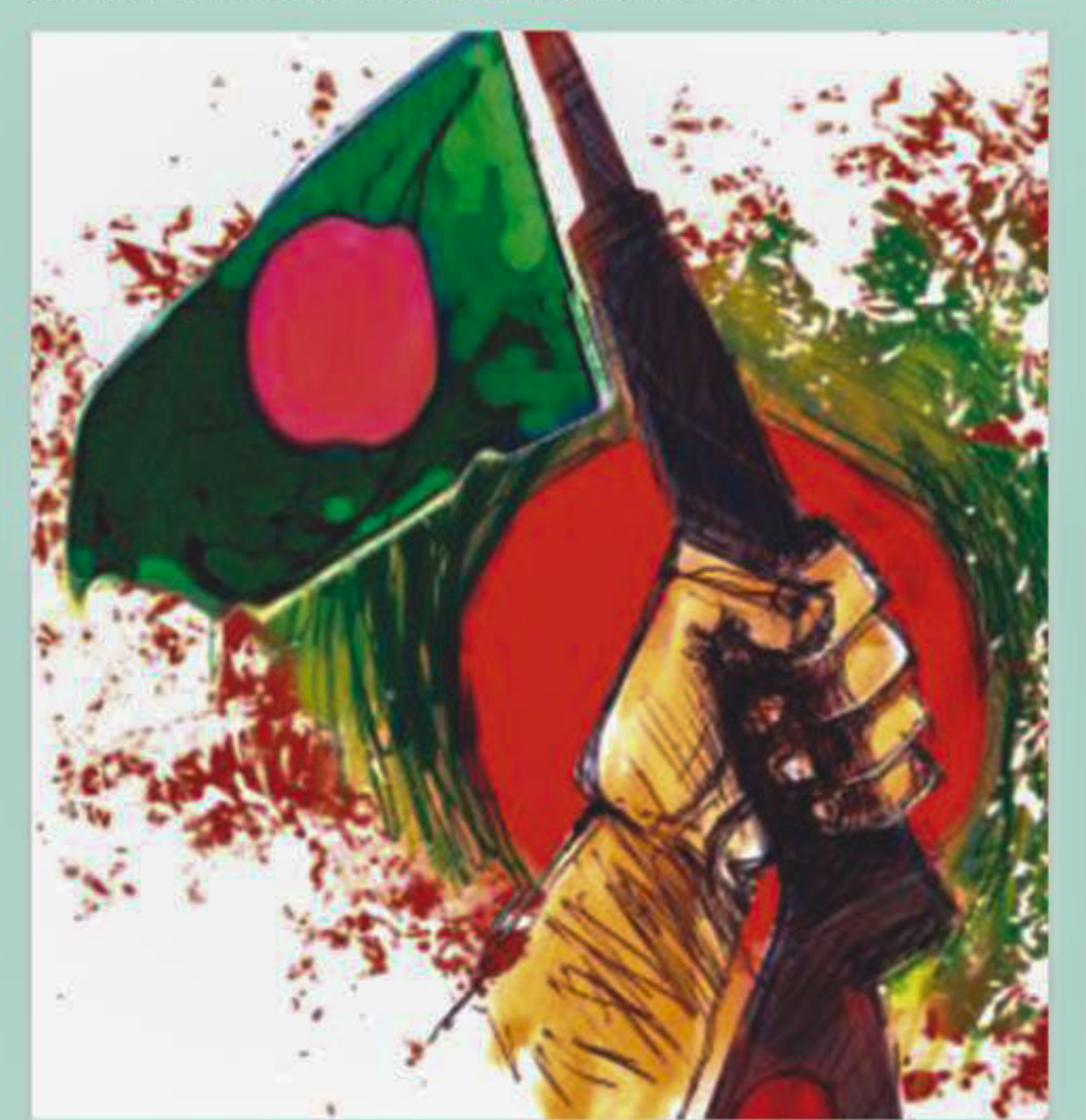
FOR YOUR INFORMATION
The 26th of March
The emergence of Bangladesh

RAIHAN RAHMAN RAFID
 FROM a legal point of view, the Independence Day of Bangladesh has a connection with the Proclamation of Independence of 1971 which is considered to be one of the bases of our national liberation and present legal system. Bangladesh, as a State became independent on the 26th of March as it had started to possess all the elements of Statehood from this very day.

In political science, (a) population, (b) territory, (c) government, and (d) sovereignty are widely accepted and generally known as the elements of a State. According to the Montevideo Convention of 1933, a State also needs to have capacity to enter into relations with other States.

Bangladesh, the then East Pakistan, in 1971, had her own population of 75 million having allegiance to the leader Bangabandhu Sheikh Mujibur Rahman and a land area of 147,610 km (56,993 sq mi). This area of land was vested on the eastern provisional-State for independent administration after the 1947 partition between India and Pakistan.

In exercise of its right to self-determination, the first (provisional) government of Bangladesh was formed by the elected representatives of Bangladesh on the 10th April 1971, and the formal swearing was held on the 17th April 1971, at Mujibnagar. Thus, a de facto government turned into a de jure one with the force of the Proclamation of Independence which served as an interim constitution for the country. Till the Constitution was formally drafted and adopted, this government administered



the country having functional executive and legislative wings both during and after liberation war. The Proclamation of Independence was given retrospective effect from the 26th of March, 1971.

The Declaration of Independence was given by the father of the nation at the early hours of the 26th March, 1971 saying, "...from this day Bangladesh is independent". Even on 7th of March, he urged the Bengali population to prepare for liberation war. This however did not establish the sovereignty of Bangladesh at that moment. Bangladesh was declared sovereign by the Proclamation of Independence itself. The declaration of independence by Bangabandhu was instrumental to the resistance and in the formation of a provisional government as it served as a direction at a crucial moment for the nation. To simply understand, sovereignty (of a polity, i.e. political unit) is, among others, the state of making laws and controlling resources without the coercion of any other country. As Bangladesh had been a sovereign nation then, it exercised its legislative authority by issuing the Laws Continuance and Enforcement Order which provided that "all laws which were in force on the 25th day of March, 1971, in the territories now comprised in the People's Republic of Bangladesh shall continue to be in force in Bangladesh". Therefore, it is considered for Bangladesh to have had attained sovereignty on the 26th March.

Despite the provisional government was formed on 10th April, its effectiveness was from the 26th March in which day the four elements of State came into existence. This is how it became the Independence Day of Bangladesh and still reminds us about the emergence of a new State.

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LAW LETTER

Freedom of expression in social media

We often articulate that technology has made the world smaller, but the social media has made the globe even smaller. These days we mostly use the platform of social media to express our thoughts. It has become a podium for performing citizen journalism. In democratic structure, social media is regarded as a tool for encouraging 'social participatory governance'. Social media user is challenging administrative norms and structure dictating public sector declaration around the world: from government to government and government to public. As a democratic country, the right to freedom of speech and expression is recognised in Article 39 and 43 of the Bangladesh Constitution. Despite the constitutional protection, Sections 57, 54, 61 and 76 of the ICT Act, 2006 and Amendment of 2013 thereof have given huge discretionary power to the police, abuse of which is one of the major concerns in present day scenario of Bangladesh even if these very provisions go against the international standards. While there is no straight reference of social media in the international instruments nevertheless the following terms of the international and regional



conventions has given strong indication of right to freedom of speech and expression 'through any other media of his choice' in Article 19 of UDHR, 'regardless of frontiers' in Article 19 (2) of ICCPR, 'without interference by public authority and regardless of frontiers' in Article 10 of ECHR, 'either orally, in writing, in print, in the form of art, or through any other medium of one's choice' in Article 13 of ACHR, establishes freedom of speech and expression through social media. Therefore the provisions under the Constitution of Bangladesh, ICT Act and other relevant laws are not synchronised enough to control the Social media in relation to the right to freedom of speech and expression. Furthermore, the crimes mentioned in the ICT Act of Bangladesh are unclear and inconsistent. The said offences are also inconsistent when we balance them with crimes under the Penal Code. Thus, there is a requirement for diverse and balanced regulatory mechanism taking the present situation and global human rights instrument as well as the present features of social media. **Mazharul Islam** PhD Research Scholar in Law, South Asian University, India

RIGHTS WATCH

Redress against domestic violence

ANAM HOSSAIN
 FEW days ago, I came across this video in Facebook where a middle-aged man hits his wife repeatedly on a train. It was, arguably, in India. Though the voice was inaudible, it was apparent that the woman got beaten because of disobeying her husband's order. From the swollen eyes of that woman, you do not have to be Sherlock Holmes to figure out that this was not the first time she had been hit. Although the incident took place in India, it is undeniable that the same does not happen in most households of Bangladesh. Despite rampant campaigns, articles written, books published, movies made and what not, the problem persists. Women face all kinds of violence ranging from dowry killings, marital rape, sexual harassment, acid attacks, trafficking etc. Quite shockingly, these are often committed by their husband, brother, in-laws or other close relatives. This is why the bruises hurt more, more than if the perpetrator was a stranger. According to Ain O Shalish Kendro, in 2016 alone, 191 women have been murdered by their husbands. If we remember Rumana Manzur, who was a teacher of Dhaka University became blind after her husband, Syeed Hasan, allegedly gouged her eyes out with his fingers and chewed part of her nose off in front of their young daughter, as young as five years old, during a bitter argument over

her education in 2011. Girls who witness violence against their mothers either end up being psychologically distorted or accept violence as a natural consequence of marriage. The fact that domestic violence is illegal is known to more people today than it was even a few years ago. Even then the women are scared to lodge complaints. Some even defend their husbands and consider the matter as 'private'. Women who seek legal redress either end up reaching a family negotiation or get frustrated by the legal intricacies. Bangladesh enacted the Domestic Violence (Prevention and Protection) Act in 2010 to address this issue. The Act has defined 'domestic violence' as 'physical abuse, sexual abuse or economic abuse against a woman or a child of a family by any other person of that family with whom the victim is, or has been, in a family relationship'. It does not only contain physical and sexual sufferings but it goes on to include economic and psychological sufferings too. This means depriving the victim of any economic or financial property/resources (e.g. dowry, alimony, movable or immovable assets) to which the victim is entitled by virtue of any law, custom, family relationship etc shall constitute domestic violence. On the other hand, verbal abuse, harassment and even controlling behavior such as putting restrictions on

movement, communication or self-expression also do amount to violence of domestic nature. As soon as the police receive a complaint of domestic violence, it is under a statutory duty to inform the victim of her rights and ensure her safe custody. The victim may file a complaint straightaway, obtain medical services, free legal support as well as have access to a shelter home. The 2010 Act empowers the Courts to issue a wide variety of orders including an interim protection order, protection order, residence order, compensation order and custody order. Upon filing an application with the Court, the Court may issue an interim protection order along with a show-cause notice against the culprit. The interim order can be obtained even in the absence of the suspect or the alleged criminal. Interim protection order is a temporary order valid for a limited period of time, usually, till the hearing of the case. Once the Court has determined that domestic violence has indeed taken place, it can issue a protection order which restrains the defendant/attacker from committing any further act of domestic violence, from entering the victim's place of work/business, from making any kind of contact with the victim etc. Breach of protection order can lead to imprisonment extending up to six months or fine up to Taka 10,000 or both and repetition is punishable



with imprisonment up to two years or fine up to Taka 100,000 or both. The Court can even issue a residence order in favor of the victim

in which case the defendant will be restrained from staying in the same place where the victim resides, or direct the respondent to arrange alternative

accommodation for the victim. Further, if there is any personal injury or financial loss or trauma or psychological damage or damage to movable or immovable property belonging to the victim or in which she is entitled to, the Court can pass a compensation order against the defendant. The Court may, as well, pass an order against the defendant for the maintenance of the victim and her children (if any). With regards to custody orders, the Court may grant a temporary custody of any child or children of the victim to the victim. However, it is particularly important to note that any false complainant is liable to be punished under the same law. Women need to be aware of their rights protected by the law. Many might blame the legal system, but it is mostly our attitude that requires change. Next time you face or come across anyone who has faced or is facing domestic violence, dial 10921. It is a 24/7 helpline for Violence Against Women and Children in Bangladesh. Various legal and other rehabilitation services are provided by the helpline, including rescuing victims in case of emergency through law enforcement agencies. Law can only provide assistance when sought. If you regard the problem to be 'private', you will regret when it continues in 'public'. **THE WRITER IS A PRACTISING BARRISTER**