

'OPERATION SEARCHLIGHT' in the national self-determination narrative



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LAW OPINION

IN international law, the self-determination narrative of Bangladesh stands as an exception (especially considering this to be the only successful case of secession by force between the WWII and the end of cold war). The praxis of international law of self-determination, as observed by Antonio Cassese, is diverse and full of highly contentious issues. There is in fact a growing consensus among States and jurists, as to the non-applicability of the right to self-determination in contexts beyond colonial domination. The right (which is frequently referred in modern parlance as a doctrine of legitimate independence of a State) therefore, remains with antagonistic ideals and by the same token, is full of uncertainties. This makes it difficult to exactly predict, or, produce an aspired outcome from any particular self-determination narrative (which may range from autonomy to independence). It is noteworthy that the independence of Bangladesh is a glaring exception to these rules, serves as a great hope to the oppressed peoples of different parts of the world. Further, in all plausible senses, Bangladesh (later followed by Bosnia and Herzegovina, East Timor, South Sudan and Kosovo) provided completely separate sets of apologetic bases, for any people to legitimately claim independence, even beyond a colonial setup.

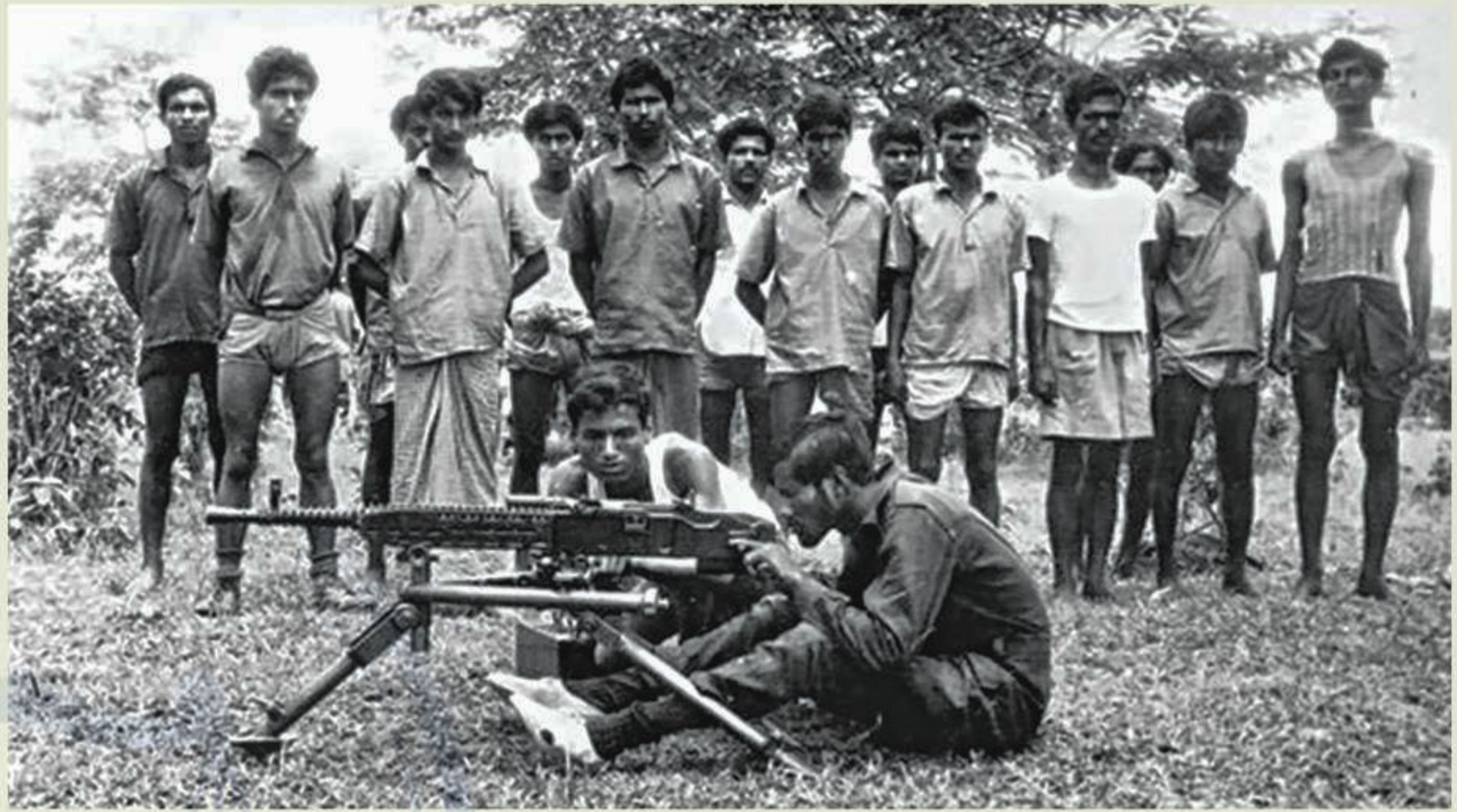
Self-determination being a partly legal and partly political norm, can be maneuvered, influenced or, legitimised (even often predominantly) by political or, factual events. Hence, political legitimacy (which often plays a key role in establishing a claim for an independent State, or, conversely, delegitimising an existing State) is vital substantially (if not exhaustively) for any such narrative. It is submitted that the birth of Bangladesh is marked by a number of political and military events (with logically clear and unambiguous political consequences) that significantly and rapidly adds legitimacy to the claims of Bangalees' to have an independent State. One such event, which is still internationally unrecognised (and academically under-researched), but provides logical and legal premises for our claims to establish a separate State, is the infamous Operation Searchlight.

On 25th March 1971, the Pakistan army launched the operation against the peoples of this land. In Mizanur Rahman Khan's '1971: Secret Documents of USA' the reason behind the attack of 25th March, as identified by CIA, was to destroy Awami League and to bring quick and effective control on the East Bengal. In a confidential telegram of then Consul General Blood to Washington, he wrote: Here in Dacca we are mute and horrified witnesses to a reign of terror by the Pak military. Evidence continue to mount that the military authorities have a list of Awami League supporters whom they are systematically eliminating by seeking them out in their homes and shooting them down. This confidential document of a pro-Pakistan (US) consular mission (in Dhaka) clearly signals the gravity and magnitude of the genocide occurred.

The truth of the statement was endorsed (though in varying degrees) by a number of top ranking army commanders of the then Pakistan army in Bengal. To mention, General Amir Abdullah Khan Niazi, who wrote "The Betrayal of East Pakistan" mentioned in his book that one of the key players of the operation "Major Gen Rao Farman had written in his table diary, 'Green land of East Pakistan will be painted red'. It was painted red by Bengali blood." The evidence and witness narratives regarding the occurrence of a massive genocide in this land on the 25 March 1971 and in the following days, is widely available, highly credible and legally useful.

Convention on the Prevention and Punishment of the Crime of Genocide, 1948 in Article II says: genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group. The military crackdown of 25th March categorically satisfies more than one of the criteria mentioned in the list.

The 25th March genocide despite its (internationally) unrecognised status is a central part of the history of



liberation war of Bangladesh. Understandably, it gave a mammoth impetus in our liberation movement and inspired an armed struggle against the Pakistan army. More importantly, it provided a legal and logical tool for the nation which suffices as a defense of armed resistance. Genocide is often referred as the extreme denial of right to self-determination. Conversely, as a logical parallel, it may be imagined that every genocide adds legitimacy to the claims of right to self-determination. This may be endorsed by the fact that a number of international persons that are arguably more or, less successful in attaining Statehood (beyond colonial domination) defying the principle of *uti possedetis* and territorial integrity, all are allegedly victims of genocide. In simpler terms, there is a growing trend in State practices which is mostly political (and less legal) to consider genocide as a vital fact to add political legitimacy to the pleas of Statehood, as for examples, in cases of Bosnia and Herzegovina, East Timor, South Sudan and also in case of Kosovo. However, this does not mean that genocide

(even if it is proven) alone suffice to establish the legitimacy of an independent State. In practice, the gross human rights violations and mass murders of innocent beings in some cases stand as a convincing apologia in the negotiation tables.

Bangladesh, in 1971 was the victim of recurrent genocides (killing millions of peoples) which were predominantly started following the operation searchlight. However, during the post-independent regimes, a persistent inertia was shown by the State to attain international recognition of these terrible crimes. It is optimistic to see that an effort is being initiated by the spearheads of the State to bring international recognition to the genocides occurred in this land during 1971. It will certainly enrich our glorious narrative of a successful right to self-determination struggle beyond the colonial paradigm.

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BOOK REVIEW

Trials of international crimes in national courts

THE book under review is the first of its kind which objectively "examines the quest of Bangladesh for transition from its violent past to the peaceful future through judicial trials of atrocities committed during its liberation war in 1971". The beauty of this book lies with the fact that it offers sets of critical analyses of Bangladesh's trial process both from legislative and judicial perspectives in order to make the Bangladeshi justice model a contributory one to the progressive development of Asia and international criminal justice jurisprudence. Published in March 2019, the book titled *National Trials of International Crimes in Bangladesh: Transitional Justice as Reflected in Judgments* authored by Professor M Rafiqul Islam from Macquarie University of Australia, is undoubtedly a much needed scholarly contribution in the realm of international criminal law, specially in the context of the long struggle of Bangladesh to ensure justice for the victims of 1971's genocide and atrocity crimes.

This book is well-articulated, sufficiently analysed and eloquently divided into sixteen chapters. In chapter one, the author introduces the readers with the idea of transitional justice as understood in contemporary international law with references to the historic antecedents of international criminal justice mechanism. The ingenuity of this chapter is that the author has contextualised the idea of transitional justice with the background history of Bangladesh's liberation war of 1971.

In chapter two, the legal regime of the trial with a special focus on the International Crimes Tribunals (ICT) Act of 1973 has been described. Particularly, legislative background and salient features of the Act have been explained from a comparative criminal law perspective. In short, the author has tried to see how the 1973 Act has been acting as a conduit for internalising international criminal law in a domestic legal setup.

Chapter three comprehensively disuses the substantive law of the ICT jurisdiction, namely territorial and time-based limitations of the ICT, constitutionally protected and indemnified ICT jurisdiction, retrospective ICT jurisdiction, and nexus between the ICT jurisdiction and

universal jurisdiction.

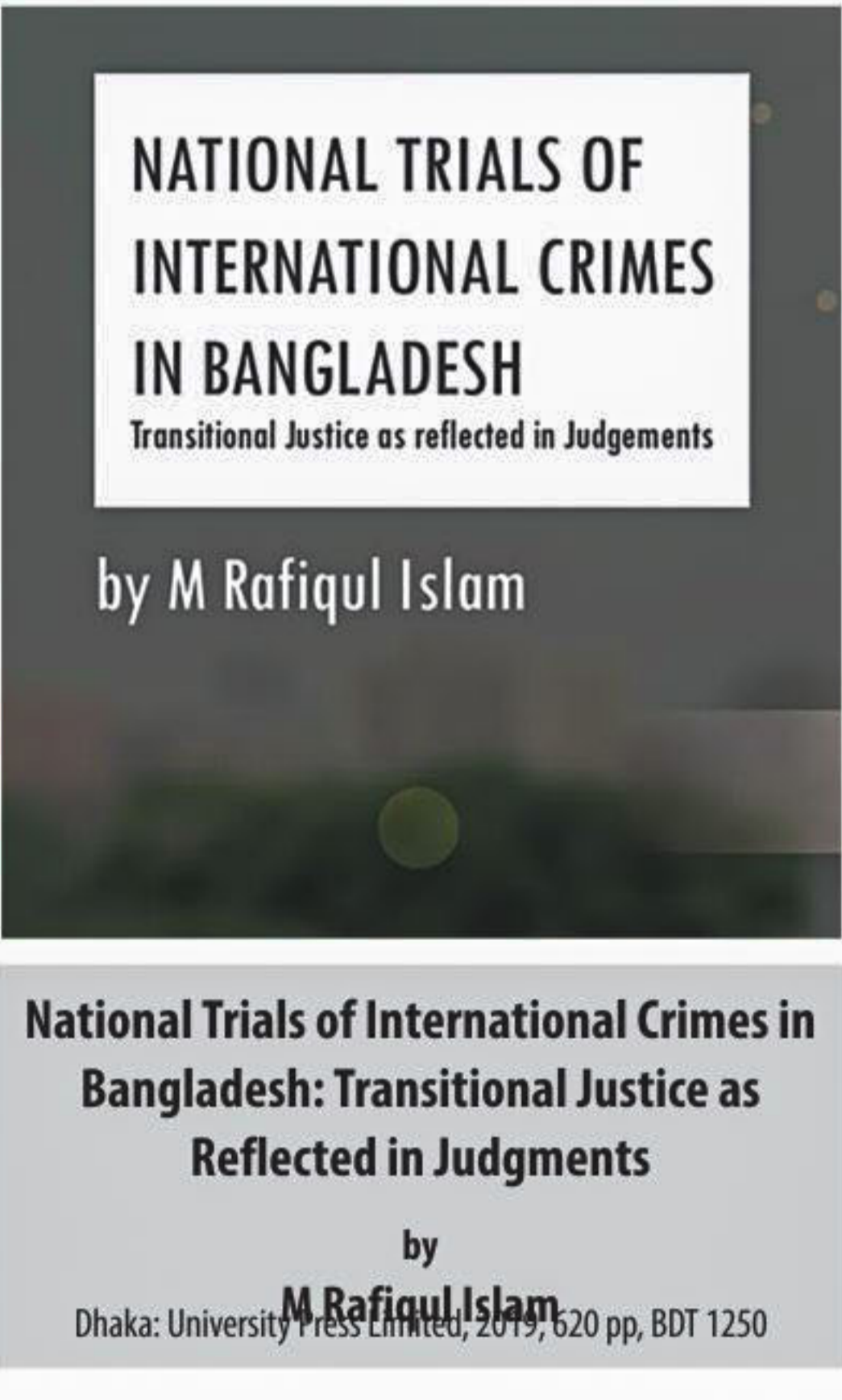
Chapters four, five and six cover discussion on crimes against humanity, genocide and war crimes respectively with reference to judicial decisions held in the ICTs until December 2018. Here, the author has made an excellent attempt of arguing how international criminal law and international humanitarian law are related to each other with the changing nature of conflicts.

Chapter seven has focused on the crimes of rape and sexual violence in armed conflicts. Here, the ideas such as wartime rape and sexual violence have been expounded both from the perspectives of international humanitarian law and international criminal law. Additionally, the position of 1973 Act and relevant ICT judgments on the issue are critically presented.

Chapter eight discusses about accessorial crimes such as complicity, aiding, abetting and incitement and/or instigation, while chapter nine deals with the liability regime (modes of criminal responsibility under the 1973 Act, direct individual criminal responsibility, civilian superior criminal responsibility, and joint criminal enterprise).

Chapter fourteen makes legal responses to the alleged inadequacies of procedures and due process in the ICT trials with reference to international criminal law jurisprudence. Chapter fifteen raises the question of complementarities between international and national criminal justice and contextualises the ICT trial, while chapter sixteen elucidates significance, legacy and contribution of transitional justice in Bangladesh.

This book as a whole, in the language of the author, "presents an account and interpretation of the major legal issues contested by the prosecution and defence before the [ICT] and their judicial exposition reflected in the judgments." The book portrays the significance and legacy of Bangladesh's trial process for other post-conflict countries which have been fighting for long to end the culture of impunity and to ensure justice for the victims of atrocious crimes.



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FROM LAW DESK.



TAPAS KANTI BAUL

YESTERDAY marked the 3rd National Genocide Day of Bangladesh. On 25 March 1971 late night, the Pakistan Occupation Army started Operation Searchlight against the freedom loving innocent Bengalee people and committed Genocide by killing these innocent people due to their Bengalee nationality. Father of the Nation Bangabandhu Sheikh Mujibur Rahman in the early morning of 26 March 1971 declared the independence of Bangladesh just before he was arrested by the Pakistan Occupation Army. Soon thereafter auxiliary forces of Pakistan Occupation Army, e.g., Razakars, Al-Badr, Al-Shams, Al-Mujahed etc. were formed and the members of these auxiliary forces individually and jointly either directly committed or participated in committing widespread and systematic crimes including crimes against humanity, genocide and war crimes in the territory of Bangladesh.

After our victory on 16 December 1971 in the War of Independence, two pieces of legislation were enacted, i.e., Bangladesh Collaborators (Special Tribunals) Order, 1972 and International Crimes (Tribunals) Act, 1973 to try and punish the perpetrators of 1971. The first one was

THE TRIAL OF 1971 GENOCIDE Reflection on ICTBD

from the people of Bangladesh, they decided to establish a tribunal (International Crimes Tribunals, Bangladesh [ICTBD]) under the 1973 Act to try and punish both the Principal and the local perpetrators who committed international crimes, e.g., crimes against humanity, genocide etc. in 1971 during the period of war of independence, i.e., 26 March to 16 December 1971. For almost 39 years neither the principal, i.e., members of Pakistan Occupation Army and Policy makers of Pakistan nor their local perpetrators of the aforesaid auxiliary forces were tried. (*Chief Prosecutor v A. T. M. Azhar*)

Accordingly, nine years back on 25 March 2010, the International Crimes Tribunal No. 1 was established and later in 2012, International Crimes Tribunals No. 2 was established (it is not in operation now). The establishment of this tribunal was itself a success against the culture of impunity that was deep rooted not only in Bangladesh but also in the whole region. No one ever believed these perpetrators could be brought to justice and the victims of 1971 almost believed that they would never have justice for the wrongs committed against them. The commitment of Bangladesh to try the perpetrators of 1971 for committing

noted that till date, 35 judgments have been passed by the tribunals jointly, 23 judgments are pending before the Appellate Division of the Supreme Court of Bangladesh and 6 judgments are executed so far. Now, 37 cases are pending before the Tribunal No. 1 in different stages and nearly 500 cases are under investigation.

Even though the concept of genocide by rape was found in the Akayesu Judgment of ICTR but the first sentence was pronounced in Reazuddin Fakir Judgment of Tribunal No. 1. The testimonies provided by the witnesses, the documents submitted by the Prosecution and the Defence, and the judgments will remain as an important collection of memories of horrific events that took place in 1971. If anyone goes through the pages of these judgments they will learn about the genocide that took place upon the religious minorities of Bangladesh which has reduced the numbers of Hindu populace in Bangladesh. Future generation will find answers on the modus operandi of the perpetrators in exterminating the intellectuals of Bangladesh. The precedents of judgments and orders of different international criminal tribunals and writings of international scholars were

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repealed after the brutal assassination of the Father of the Nation Bangabandhu Sheikh Mujibur Rahman and his family members on 15 August 1975 since the subsequent military backed governments did not want to try the local perpetrators. Rather, the local perpetrators who were leaders and activists of pro-Pakistan political parties were rehabilitated by the subsequent governments till 1990. In the government of 1991 and 2001, Jamat-e-Islami leaders were the part of the government and in 1996, the then government did not have enough mandate to start the trial of the perpetrators of 1971. However, the second legislation, i.e. International Crimes (Tribunals) Act, 1973 survived. In 2009, when the then Awami League government had the absolute mandate

international criminal law shows that it is working towards fulfilling its obligations towards the nation and the international community at large. Bangladesh is respected internationally being one of the few nations for respecting the rights of victims of a conflict to get justice. By trying and punishing powerful pro-Pakistan politicians, like - Salahuddin Quader Chowdhury, Ali Ahsan Muhammad Mujahid, Motiur Rahman Nizami etc. for committing, aiding and abetting, conspiring or compliciting crimes against humanity, genocide etc., Bangladesh has proved that 'you will be tried irrespective of your position and status'. This has definitely increased the faith of people that they will also have justice even if it is late. This is to be

followed and mentioned in the Judgments of the Tribunals and future researchers will be benefited immensely.

In conclusion, the endeavor of the International Crimes Tribunals is a running testament of our glorious past of sacrifice of the innocent victims and valiant freedom fighters. When its journey will end - is a question to be answered by the Executive; however, till today a lot of trials and investigations are pending before it. To become a successful method for transition of this nation from the pains and sufferings of 1971 and to ensure justice for the victims and their families, the Tribunal should continue till the last perpetrator alive.

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