

Prosecuting 'War Crimes' in Domestic Level: The Case of Bangladesh

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1. Introduction

Theodore Meron, the former Judge of the International Criminal Tribunal for the former Yugoslavia (ICTY) in an Article has posed a pearl question: *Why do atrocities like massacres recur irrespective of claimed success of prosecuting the perpetrators at Nuremburg and the like?* To quote Meron:

From the brutal regime of Pol Pot to Saddam Hussein's extermination of ethnic Kurds; from the genocide in Rwanda to the massacres in Darfur; from the "ethnic cleansing" in Bosnia and the Srebrenia enclave to the attacks on Kosovo Albanians; and from Sierra Leone to Uganda; the world has continued to witness malevolent deeds that surpass understanding. These atrocities recur, not only in spite of the Nuremberg proceedings and their legacy, but also in spite of the increasing interest in international and mixed criminal tribunals, and an unprecedented interest in international humanitarian and criminal law. Thus, one may reasonably ask: since such atrocities still occur, what is the legacy of the Nuremberg Tribunals and their latter-day heirs? Why can we still call them a success? Or can we?¹

Meron has started from Polpot, not from Niazi, the perpetrator of most heinous calculated massacre of the last century during Bangladesh Liberation War 1971. The reluctance of the international community in bringing the perpetrators of 1971 genocide in Bangladesh was the starting point of the failure to preventing further genocidal atrocities. To this, the later international tribunal's fashionable jurisprudence in prosecuting atrocities has increased the possibility to try the criminals at the national level being empowered and co-operated by international community. So ultimately, as Meron admitted, a multifaceted approach that marshals legal judgments by national courts-which bear the primary responsibility along with other tools - such as asset confiscations, travel restrictions, and political stigmatization - should have a meaningful impact on deterring future crimes. If the risk of being caught in the net of criminal tribunals grows, so will the prospects for

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¹ Theodor Meron, Reflections on the Prosecution of War crimes by International Tribunals, *The American Journal of International Law*, Vol. 100, No. 3 Jul., 2006, at 577.

deterrence. Given the limited number of international criminal tribunals and their scarce resources, war crimes prosecution by national courts seems to assume ever more importance. Bangladesh, the pioneer in formulating first national war crimes law in the history of the world back in 1973, spirit of which was later inculcated the ICC statute, can become an example of effective national prosecution of war crimes with a blend of national and international criminal jurisprudence. The Sierra Leone, Dili, Cambodia, and Lebanon experiences with suitable compatibility may be the torch bearer for Bangladesh.

2. Prosecuting 'War Crimes'

Certain crimes because of their very nature, gravity, magnitude and horrendousness are today defined as 'crimes under international law' or simply 'international crimes'. The war crimes, genocide, crimes against humanity, crimes against peace and international law do fall within this category. The consequences of these types of crimes are devastating in nature. The ICJ in its *Advisory Opinion on Genocide, 1951* said:

The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding upon states, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such odious scourge.'²

Bangladesh can not go with the stigma of that scourge, so should have the case with Pakistan. Pakistan failed to prosecute the blue-printers of the international crimes irrespective of giving promise to do so. Bangladesh can not and should not fail the rest notable perpetrators at least (who belonged to auxiliary forces like *razakars*, *al-badrs* and *al-shams*). Throughout this paper, we have loosely used the term war crimes and it denotes not only the violations of the laws and customs of war, but also "crimes against the peace, crimes against humanity, and genocide" as those concepts have been defined since the end of the Second World War.

3. Does Bangladesh have Jurisdiction?

Jurisdiction is the critical legal issue underpinning the prosecution of war criminals in a state's courts. A state must establish proper jurisdiction to assert judicial and penal authority over such offenders, especially if they are not

² ICJ Report, *Advisory Opinion*, 1951 (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide)

citizens of that state and the crimes they committed were not committed in that state or against citizens of that state. Legally defined, jurisdiction is "the authority of states to prescribe their law, to subject persons and things to adjudication in their courts and other tribunals, and to enforce their law, both judicially and non-judicially."³ Jurisdiction involves a state's legitimate assertion of authority to affect its legal interests, and applies to law-making activities, judicial processes, or enforcement means.

Domestic jurisdiction of the state is one of the manifestations of state sovereignty and hardly raises any concern from other states or bodies. Jurisdictional manifestations of Bangladesh to try the 1971 war criminals and perpetrators of genocide fit with the provisions of international law. Article 3 of the International Crimes Tribunal Act 1973, accommodates the blend of national, territorial and universal manifestations of jurisdictions. Every state may create its own laws for defining and punishing war crimes, but the definitions of war crimes usually overlap with the definition of war crimes established under international law. Thus, any state may exercise universal jurisdiction under international law to punish persons who commit acts falling within international law's definition of war crimes.

The universal jurisdiction has been the key consideration in prosecuting the war criminals which is established over certain crimes (such as piracy, war crimes and genocide) without reference to the place of perpetration, the nationality of the suspect or the victim or any other recognized linking point between the crime and the prosecuting State. The international crimes are so inherently odious that it must be treated differently from ordinary *delicts*. It is against the universal interest, offends universal conceptions of public policy and must be universally condemned. The perpetrators are viewed as *hostis humani generis*, enemies of humankind, and any state which obtains custody over them has a legitimate ground to prosecute in the interest of all states, even if the state itself has no direct connection with the actual crime. In *Eichmann case*, the Jerusalem District Court upheld Israel's jurisdiction to try Eichmann and observed:

³ Deena R. Hurwitz, *Universal Jurisdiction and the Dilemmas of International Criminal Justice: The Sabra and Shatila Case in Belgium*, Available at: <http://ssrn.com/abstract=1314940>, Last Accessed on 10 January 2010.

The abhorrent crimes defined in this Law are not crimes under Israeli (read Bangladesh here) law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itselfTherefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is . . .in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is *universal*.⁴

To date, one can say that universal jurisdiction is not a formula for gaining jurisdiction, but one for placing the national legal order at the service of the international community. Bangladesh can legitimately manifest this service.

4. The Non-Derogable Obligation

An argument, often forwarded, is that the Simla Pact 1974 between India, Pakistan and Bangladesh did close the chapter of any trial of the war criminals and amnesty shown by *Bangabandhu*, the Founder Father of Bangladesh, to the native collaborators also barred any trial of this sort. But the immunity, as Professor Rafiqul Islam has argued, provided in the Simla Pact exonerating the perpetrators of the said crimes contradicts the international obligations of the Pact-states.⁵ The prohibition of genocide, crimes against humanity, and war crimes is a *jus cogens* principle (peremptory or fundamental norm) of international law. According to the International Court of Justice, a *jus cogens* principle gives rise to *erga omnes* - an obligation “towards the international community as a whole”.⁶ The state parties of the Pact are obliged to perform this obligation by prosecuting the perpetrators of these crimes. This norm and obligation are highest in international law, which permits no derogation from them. This hierarchical status of their prohibition is based not only on customary international law but also reinforced through codification in Articles 53, 64, and 71 of the 1969 Vienna Convention of Law of Treaty. Article 53 prescribes international treaties conflicting with an existing *jus cogens* norm “is void”. Article 64 says that if a new *jus cogens* norm emerges, “any existing treaty which is in conflict with that norm becomes void and terminated”. Article 71 releases the parties to a treaty void under Articles 53

⁴ *Adlof Eichman v. Attorney General of the Government of Israel*, Supreme Court of Israel ILR 36 (1962) 277

⁵ Professor M Rafiqul Islam, *The Pursuit of Post-Conflict Justice through War Crimes Trials in Bangladesh: Challenges and Options* in Dr. Mizanur Rahman (ed), *Post-conflict Justice, Peace and Human Rights*, ELCOP, Dhaka, 2009 p. 18

⁶ *Barcelona Traction Light and Power Company Ltd (Belgium v. Spain)* 1970 ICJ 32

and 64 from any obligation to perform the treaty. The Simla Pact itself is void to the extent of its inconsistency with, or repugnancy to, a body of existing *jus cogens* principles of international law. Its parties are totally released from performing the Pact obligations concerning the prohibition of war crimes trials. Hence, there appears to be no insurmountable legal obstacles to prosecute Pakistani and Bangladeshi nationals for their alleged commission of genocide, crimes against humanity, and war crimes by constituting independent and impartial special tribunal.⁷ Amnesties shown to the perpetrators of war crimes do not gain validity being opposed to universal principles of war crimes law.

5. War Crimes Law and Constitutionality Question

Constitutionality of the International Crimes (Tribunal) Act 1973 is also a concern for many quarters. It needs to be noted that the International Crimes Tribunal Act, 1973 Act is a constitutionally protected legislation (Article 47A of Bangladesh Constitution). The Constitution derives its validity from the people itself. Bangladesh has secured independence through a liberation war (the war was unjustly imposed) and proclamation of Bangladesh Independence forms the genesis of Bangladesh Constitution (B. H. Chowdhury J. in 8th *Amendment Case*, 1989). The safeguard against *post-facto* legislation is not applicable for law which is designed to prosecute and punish the international crimes. An analogy may be drawn from Australian jurisdiction. The Australian High Court upheld the retrospectivity of a national war crimes law in *Polyukhovich case* and said:

The retrospective operation of the Australian War Crimes Act was authorized by the constitution since that operation was a matter incidental to the execution of a power vested by the constitution in the parliament.⁸

In that case, Ivan Polyukovich was charged with war crimes in respect of acts allegedly committed by him during World War II. He initiated a challenge to the constitutional validity of the Australian *War Crimes Act*, on the basis that the Act: 1. Purported to operate retrospectively; and 2. Granted jurisdiction over individuals for alleged crimes which had no connection with Australia. The Court held that the Act is not retrospective in operation because it only criminalizes acts which were war crimes under international law as well as “ordinary” crimes under Australian law at the time they were committed. While there is no obligation at customary international law to prosecute war

⁷ Islam, *Op. cit.* at 18

⁸ *Polyukhovich v. Commonwealth, High Court of Australia*, (14 August 1991)

criminals, there is a right to exercise universal jurisdiction. The *War Crimes Act* facilitates the exercise of this right. Mr. Justice Dawson in the judgment observed:

[T]he *ex post facto* creation of war crimes may be seen as justifiable in a way that is not possible with other *ex post facto* criminal laws[T]his justification for a different approach with respect to war crimes is reflected in [Article 15(1)] the International Covenant on Civil and Political Rights to which Australia became signatory on 18 December.⁹

Bangladesh is also a party to the ICCPR. So, there is hardly any reason why Bangladesh case should be a different one.

6. Due Process of Law

Section 6 of the 1973 Act deals with various aspects of the tribunal's chairperson, its seat and qualifications of its judges, etc. Some scholars had suggested that a pre-trial chamber could have checked politically motivated investigation. But it seems that the recent amendment to the 1973 war crimes law has ensured the independent investigation by the agencies. Hence, international standard of the prosecution is not compromised by the law. The 1973 Act not only envisages right of appeal of a person convicted by the tribunal to the Appellate Division of the Supreme Court but also incorporates rights of the accused during trial. The accused may give explanation relevant to the charge, can conduct his own defence or have assistance of counsel, shall have the right to present evidence in support of his defence and to cross-examine any prosecution witness. These are the manifestations of the 'due process of law' and 'fair trial' and make the 1973 Act more humane, jurisprudentially sound and legally valid and therefore, an improvement over the Nuremberg Charter- the founding stone of modern international criminal justice administration.

Procedural fairness is a much talked concern in international crimes trials. Dr. Abdullah Al Faruque argues:

There is no theory of procedural fairness that is universal in its application. Because of the mandate and political and historical context of each tribunal is unique, there is no pretense that the proposed tribunal for war crimes in Bangladesh will apply procedural standards in identical fashion of other tribunals. The procedural fairness should not be considered as rigid bench

⁹ *Ibid* at 643

mark, but a constructive framework upon which the tribunal can deliver the justice.¹⁰

What is expected is that the proposed tribunal in Bangladesh should conform to international minimum standards of procedural fairness to gain its credibility.

7. Trying the 2nd Line Perpetrators

The commanding level soldiers have escaped justice so the lower level perpetrators should also escape - is a kind of argument untenable in law. Without allies how can a massacre happen? Legal definition suggests that the planners and participators are liable to the same extent. International criminal law has discarded the command responsibility. Though superior's order can be argued as a mitigating factor in some cases. In 1971, the world witnessed acts of genocide committed by the Pakistani military and their allies against the *Bangalees* in general and *Hindu Bangalees* in particular in Bangladesh. The military regime of Pakistan being aided and instigated by their native allies (*razakar, al-badr, al-shams* etc) committed incalculable and unprecedented genocide in Bangladesh. On February 22, 1971 the generals in West Pakistan took a decision to crush the Awami League and its supporters. It was recognized from the first that a campaign of genocide would be necessary to eradicate the threat: 'Kill three million of them,' said President Yahya Khan at the February conference, 'and the rest will eat out of our hands'. On March 25 the genocide was launched.¹¹

Collectively known as the *Razakars*, the paramilitary units spread terror throughout the Bengali population. 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. The proposed trial should prefer first the commanding level leaders of *razakars, al-shams, etc.* 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 also mentions in Article 47A.

¹⁰ Dr. Abdullah Al Faruque, *International Crimes Tribunal in Bangladesh: Evolving Standard of Procedural Fairness* in Dr. Mizanur Rahman (Ed), *Post-conflict Justice, Peace and Human Rights*, ELCOP, Dhaka, 2009

¹¹ Robert Payne, *Massacre* (New York: Macmillan, 1972), at p. 50

There are two principal points of charging the auxiliary forces members, one for actual commission and another for planning, abetting and conspiracy to genocide and war crimes. Actual commission, planning, incitement to genocidal offences are treated in the same line. Rwanda's *Akaeshu Case*¹² has established that incitement to genocide is equally indictable like the actual commission of genocide itself. Incitement has been a precursor to, and a catalyst for, modern genocides. It may even be a *sine qua non*, according to witnesses and the abundant historical and sociological literature on the topic. It seems that without incitement, genocides like the Holocaust and especially the Rwandan one might not have happened.

The evidence is strongest with respect to Bangladesh genocide where religious feelings were used to execute massacres. These are also the cases on which there is the greatest scholarly consensus that they were in fact genocides. Incitement seems to play a critical role when intended victims live among the majority group, so that mass killings cannot take place without the participation or at least the tacit acceptance of many members of the majority group. In Nazi Germany and in Rwanda there were well-documented incitement campaigns. In Turkey, there were plans to “excite Moslem opinion by suitable and special means” before the Armenian genocide. By contrast, in Darfur, ethnic cleansing and killings have been carried out by paramilitaries (*Janjawiid*) mainly in villages inhabited solely by their victims. There is huge documented evidence of *razakars*, *al-shams*, *al-badr* etc (which we prefer to call auxiliary forces) members urging people to ‘maintain the unity of Pakistan and the sanctity of Islam’ and to ‘exterminate the enemies.’¹³

The Bangladesh statute 1973 has a provision on the responsibility of superiors but not of subordinates (this is removed after amendment 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

¹² *Prosecutor v. Akaeshu Case* No ICTR Judgment (Sept 2, 1998).

¹³ This type of phrases used by auxiliary forces’ members which subsumes the germ of genocide and war crimes can be traced from the narratives of news papers, reports of national and international spokesmen, in 1971.

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.

8. Obstacles to Prosecution

What are some possible obstacles and challenges before the prosecution of war crimes in Bangladesh? Perhaps Bosnia and Herzegovinian experience can be an example. The problems faced by the Bosnian domestic courts in prosecuting the war crimes were manifold.¹⁴ Some may perceivably be identical with the Bangladesh situation: a. political indifference of biased or uncommitted authorities b. fear of judges and prosecutors for their personal security c. difficulties locating and securing the attendance of witnesses and defendants, d. inadequate commitments, structures and procedures e. processing of war crimes cases, *i.e.* problems caused by reluctant, fearful or forgetful witnesses, f. inadequate witness protection mechanisms, g. large case loads h. inadequate legal resources and poor dissemination of law reports and legal texts and i. insufficient training on humanitarian law and on necessary skills, such as cross-examination, indictment drafting and witness selection. These are questions of standards as well. How can we tackle all these foreseeable problems? One simple way of avoiding large scale case loads is to choose the cases and charges strategically. The other points are much more a question of commitment than law. Failure of the authorities 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 war crimes to justice.

9. Reflecting Thoughts

The war criminals sicken the conscience of civilized society. Bangladesh has waited far too long to bring the perpetrators of the 1971 crimes to justice. But one advantage of that wait is that many other international tribunals have sprung up in the meantime and gone about their work. They have accumulated experience from which Bangladesh can learn. Their experience will make the work of the International Crimes Tribunals of Bangladesh easier. The international criminal law enshrines that effective prosecution must be

¹⁴ *War Crimes Trials before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles*, Human Rights Department, March 2005.

ensured by taking measures at the national level and by enhancing international cooperation. The ICC Statute to which Bangladesh is a signatory, in its preamble has laid down that there should be an end to impunity for the perpetrators of the heinous crimes and states that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. International crimes is an act of total and most crude form of denial of the basic right to life of individual and so repugnant to human dignity. Preservation of human dignity in all situations is a non-derogable obligation of the states in the human rights regime created by the international community. It is not only for the rule of law, not only for the sake of justice but even more for the sake of humanity that the perpetrators of genocide in 1971 be brought to justice and duly punished through a trial conducted in accordance with due process of law.