

War Criminals: Trial

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On 29th January 2009, Bangladesh Parliament adopted a resolution to try war criminals. On 25th March, the government decided to try war criminals under the 1973 International Crimes (Tribunals) Act and the investigation as claimed by the Law Minister had already begun.

Bangladesh's case and the law:

.On 3rd December, 1973, a resolution of the General Assembly (resolution number 3074) was adopted underscoring the obligations of member-States of the UN in the detention, arrest, extradition and punishment of war crimes and crimes against humanity. Bangladesh is a member of the UN and it is a duty of Bangladesh to hold trials for such international crimes.

On October 31, 2007 the Sector Commanders of the Liberation War reportedly said that the war criminals committed crimes of 53 varieties in the country in 1971. About 5,000 killing fields are in place in the country.

These crimes fall under genocide, crimes against humanity and serious breaches of the 1949 Geneva Conventions on armed conflict. Those who attempted, instigated, conspired to commit such crimes and connived in not preventing such crimes are also liable for trial in Bangladesh.

Bangladesh government announced first amnesty on 16th May 1973 under the 1972 Collaborators (Special Tribunals) Order for persons convicted or charged with offences under this law. A second amnesty was announced under the same law on November 30, 1973 for those who were convicted or accused of serious crimes.

The amnesty announced does not cover those who had specific charges of collaboration and according to a statement of the then leader of opposition Sheikh Hasina (now Prime Minister) in the parliament on 16th April, 1992 : “ Around 37,000 anti-liberation personnel were captured after the war among the 26,000 were freed after the general clemency was declared. Even then 11,000 war criminals were held captive and were being tried”.

With the change of regime in 1975, the Collaborators (Special Tribunals) Order of 1972 was repealed on 31 December, 1975. Under the law, all proceedings in any tribunal, magistrate, or court and all investigations or other proceedings before any police officer or other authority “shall abate and shall not be proceeded with”. Accordingly 11,000 held for trial were set free.

However the other law, the International Crimes (Tribunals) Act 1973 has not been repealed and it a law of the land.

International Crimes (Tribunals) Act 1973:

This Act was enacted on 20th July 1973. This law has been protected by an amendment of the Constitution of Bangladesh (Article 47.3) so that the Supreme Court could not term the Act unconstitutional for being counter to any of the fundamental rights enshrined in the Constitution.

Section 3 of the Act has defined the crimes against humanity, anti-peace crimes, genocide, war crimes, breaches of rules of the Geneva Conventions of 1949 during armed conflicts, any crime under international law. It also embraces crimes such as murder, torture, ousting any civilian from Bangladesh territory, considering him a slave or with any other objective, looting personal or public property and damage to towns and villages in the absence of military necessity.

Furthermore an attempt to commit, instigate, and conspire to commit such crimes and conniving in not preventing such crimes.

The law contains provisions of constituting tribunals, (each tribunal consisting of a chairperson and not less two and not more than four) appointment of chief prosecutor and prosecutors, establishment of an Agency for the purpose of investigation into such crimes, punishment and giving legal aid to accused. The law also recognises the right of the accused to appeal against the verdict of the Tribunal to the Appellate Division of the Supreme Court .

The law makes it clear that the proceedings of the Tribunal trial shall be in public (Section 10 of the Act) . This is for the sake of transparency, fairness and justice. Justice must not only be done but seen to be done.

Does the 1973 Act need review?

The Act was enacted in 1973. Meanwhile Bangladesh has become party to many international human rights conventions/treaties. Some legal experts argue that taking into account of the provisions of the 1966 International Covenant on Civil and Political Rights, in particular Articles 9 (arrest and speedy trial), and Articles 14 and 15 (the right of the accused), Sections 11 (power of the Tribunal), Section 17 (right of the accused) and Section 21 (right of appeal) may be revisited so as to ensure that they conform with provisions of international human rights conventions/treaties.

The Act scraps the provisions of the Criminal Procedure Code of 1898 and the Evidence Act 1872 in any proceedings under the Act (Section 23).

The Act lays down the rules of evidence for the Tribunal which are much more relaxed and not bound by technical rules of evidence than those in the Evidence Act of 1872 (Section 19). This is perhaps because of the fact that occurrences of commission of war crimes take place during armed conflict or in an abnormal situation where evidentiary materials are found to be thin.

That is why the Act allows the Tribunal may admit “any evidence including reports and photographs published in newspapers, periodicals, and magazines, films and tape-recordings and

other materials as may be tendered before it, which it deems have probative value". Section 22 states that the Tribunal may regulate its own procedure.

The UN legal experts may assist Bangladesh as to whether the aforesaid provisions of the Act need to be reviewed in the light of the provisions of the UN human rights conventions/treaties to which Bangladesh is a party.

Two courses of action are possible under the 1973 law:

The first one is to set up a tribunal, appointment of prosecutors and setting up of investigation agency. This is the easiest part to do by the government. The law provides to file a complaint to the investigation agency and unless the investigation agency is set up, no one lodge a complaint under this law.

However relatives can file a FIR for a murder case against individuals under the country's Penal Code and in fact it was reported on December 15 1993, a murder case lodged against some people known as war criminals in a magistrates' court. The result of the case is not known or reported.

The reality is that the tribunal cannot work until prosecutors submit the charges to the Tribunal but the prosecutors can only submit a formal charge until the Investigation officers complete their investigation and a prima facie case has been made against a person.

The second option is prior to setting up the tribunals, a fact-finding committee is set up whose task will be gather all materials, documents in support of the evidence to be submitted to the Tribunal. The materials may be collected from within the country or abroad. In this connection, the UN can assist the fact-finding committee on what kind of evidentiary materials are required for the trial.

In overseas during the Liberation War, international community was involved in monitoring the situation and there are many materials abroad such as possessing materials of evidentiary values resting in broadcast in radios, human rights organisations, university centres of human rights and individuals.

In the case of Cambodian war crime trial now going on in that country, some crucial evidentiary documents that once thought missing were reportedly discovered by the Yale University Genocide Research Centre. Bangladesh must explore such possibilities to gather and collate materials for prosecution from abroad.

Another idea has been argued is that when the tribunal is set up, a pre-trial chamber (a mechanism used by ICC) may be established consisting of some members of Tribunal to examine the prima facie evidence with a view to finding whether there is a case to answer for the accused.

International community and the proposed trial:

War crime trial has international dimension. It has been a sensitive issue for many authoritarian developing countries because some of their heads of State or governments adopt systematic and widespread state-sponsored oppressive and repressive measures against civilian population and political opponents and therefore they think they could be indicted by the Hague-based UN International Criminal Court.

It is obvious that there are strong reservations of many countries for holding trials for such crimes.. For example, about 30 countries that abstained from voting in the UN General Assembly when the Cambodian trial was put to vote. All African and Arab countries object to the issue of warrant of arrest on 4th March to the Sudanese President by the International Criminal Court on charges of crimes against humanity in Darfur region of Sudan

President Bashir is suspected of being criminally responsible, as an indirect co-perpetrator, for intentionally directing attacks against an important part of the civilian population of Darfur, murdering, exterminating, raping, torturing and forcibly transferring large numbers of civilians, and pillaging their property,” according to a press release issued by the International Criminal Court.

Preparation of White Paper:

Against the background, the government may seriously consider in preparing a White Paper on the reasons for holding trials for such horrible and senseless crimes committed during the Liberation War of 1971.

A copy of the White Paper may be distributed to all foreign resident diplomatic missions in Dhaka. Furthermore, the government may embark on diplomatic efforts through our missions overseas to explain the need and the popular demand for this trial to cross section of public including civil society and media abroad, eliminating the perception that the trial is a policy of revenge and retaliation

The Trial must be held with all procedural adequate safeguards for the accused. International community that will monitor the process of trial must be satisfied with fair and impartial process of trial. International observers may be allowed to monitor the trial as Bangladesh has nothing to hide.

To sum up:

The government has decided that the trial of war crimes will be held under the 1973 International Crimes (Tribunals) Act. But it is desirable that the Act needs to be reviewed in the light of Bangladesh’s obligations to comply with international human rights treaties. The UN can assist Bangladesh not only in collecting relevant evidentiary material from abroad but also advise on the review of the Act.

Furthermore, to demonstrate the commitment to trial of war crimes, it is appropriate Bangladesh may now ratify the Statute of International Criminal Court of 1998 and the ratification will show to the international community Bangladesh's firm resolve that war crimes must not and cannot escape punishment through a due process of a trial.

Crimes against humanity, war crimes and genocide are the gravest crimes in international law and the effective punishment is an important element in the prevention of such crimes, protection of human rights and the promotion of international peace and security.