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WAR CRIMES AND GENOCIDE 1971: BRINGING THE PERPETRATORS TO JUSTICE

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> Nations are essential elements of the world community. The world represents only so much culture and intellectual vigor as are created by its component national groups. Essentially the idea of a nation signifies constructive cooperation and original contributions, based upon genuine traditions, genuine culture, and a well-developed national psychology. The destruction of a nation, therefore, results in the loss of its future contributions to the world.
>
> Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie 1944) at 91

> The danger of genocide lies in its promise to create a world without enemies. Think of genocide as a crime in service of a utopia, a world without discord, enmity, suspicion, free of the enemy without or the enemy within. Once we understand that this utopia is the core of the genocidal intention, we have to realize that this utopia menaces us forever.
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> Michael Ignatieff, *Lemkin's Word*, New Republic (Feb 26, 2001) at 25

INTRODUCTION

Although prosecution and punishment of international crimes like war crimes and genocide at the international level has attracted considerable attention on the part of scholars, prosecution and punishment of extraordinary international criminals at the national level has attracted much less.[1] There has been little concentration on how domestic courts or tribunals punish international crimes when they exercise national, territorial, or universal jurisdiction. This is a notable concern, insofar as national and local criminal justice institutions play a key role in sanctioning extraordinary international criminals. These institutions carry the bulk of the prosecutorial weight. Assuredly, they remain deeply influenced by substantive elements and procedural aspects of international institutions. It is amidst this opportunity the trial of the perpetrators of international crimes during the Bangladesh Liberation War of 1971 is committed to be held by Bangladesh Tribunals under a law namely International Crimes Tribunal Act, 1973 (as amended in 2009). In this paper we have argued that the genociders of 1971 can be brought to justice unquestionably under this 1973 law ensuring the standards propounded by recent trends of international criminal law. The paper makes an effort to discard the concerns surrounding this much awaited and desired trial from a blend of national and international law perspective. It suggests some avenues to make the trial more effective, transparent and acceptable. The paper while recognizing the magnitude and extent of the respective crimes, have viewed the words war

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crimes, crimes against humanity, genocide and crimes against international law and peace in indivisible manner. As a thematic need for International Genocide Conference (Dhaka: 2009) the paper would lay emphasis on genocidal aspect of the proposed trial.

TRIAL OF INTERNATIONAL CRIMES

Certain crimes because of their very nature, gravity, magnitude and horrendousness are today defined as 'crimes under international law' or simply 'international crimes'. Consequences of these crimes transcend national boundaries and on account of their atrocious nature adversely affect international peace and security i.e. violate international public order. According to contemporary international law, international crimes fall under universal jurisdiction of states implying that any state at any point of time is deemed to have jurisdiction to try these crimes. Principles of International Law[2] have regarded the following crimes as crimes under international law: a) Crimes against peace b) War crimes and c) Crimes against humanity.

Principle VII of the Nuremburg Charter declares that complicity in commission of the foregoing crimes is also a crime under international law. However, prior to the Nuremberg Charter on December 11, 1946 the United Nations General Assembly declared that “genocide, whether committed in time of peace or in time of war, is a crime under international law and therefore, punishable under international law.”[3] Act of genocide is contrary to the spirit and aims of the United Nations and condemned by the civilized world. They are condemned universally. So, universal jurisdiction is applicable to the crime of genocide and as such any and every state has jurisdiction to try this offence. As a leitmotif, international crimes may be tried in either of the two available forums: in a municipal court/tribunal, or in an international court/tribunal. Whereas the domestic court may apply either international law or domestic penal provisions, the international court/tribunal has the option of resorting to international law. In our case it is argued that the domestic tribunal set up under International Crimes (Tribunal) Act, 1973 would have to apply established principles of international law and International Criminal Law with a blend of national law.

QUESTION OF STATE JURISDICTION

States enjoy criminal jurisdiction in conjunction with other types of jurisdiction like civil, administrative, judicial etc. Jurisdiction of a state may also be categorized as jurisdiction to prescribe; jurisdiction to adjudicate and jurisdiction to enforce.[4] States exercise their jurisdiction either on the basis of nationality principle (a state is the supreme authority in relation to its nationals) or on the basis of territorial principle (a state is the supreme authority in relation to all actions and omissions, events etc. taking place within the boundaries of the state). Domestic jurisdiction of the state is one of the manifestations of state sovereignty also and hardly raises any concern from other states or bodies. When a state exercises its civil jurisdiction in relation to even foreign nationals no other state, not even the state of nationality of the aliens seem to bother at all. However, when a state exercises criminal jurisdiction in relation to aliens it may face questions on the part of the state of nationality of the aliens. In this situation, the doubts of the state of nationality may be eroded by ensuring 'due process of law'. The objections of states of nationality concern not so much the exercise of criminal jurisdiction by the 'host state' as much as apprehension regarding respecting cardinal principles of justice administration like 'rule of law', 'due process of law', etc. If these concerns are well addressed there remains no valid ground for objecting to exercise of criminal jurisdiction by a state. As argued in the latter parts of this paper that the 1973 war crimes law of Bangladesh has the merit and mechanism of ensuring the standard of these safeguards. So, the jurisdictional manifestations of Bangladesh to try the 1971 war criminals and genociders fit with the provisions of international law.

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WAR CRIMES AND GENOCIDE

In this background we need to think about prosecuting the 'war crimes' and ‘genocide’ committed during Bangladesh liberation war in 1971. War crimes have a strict legal definition and signify “violations of the laws and customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.”[5] When we talk of the trial of war criminals of 1971 we evidently want to cover far more criminal acts than merely those under 'war crimes' *stricto sensu*. Crimes perpetrated by the *razakars, al-badrs, al-shams, jamaat*,[6] and other anti-liberation elements fall very much within the notion of crimes against humanity namely, “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds… whether or not in violation of the domestic law of the country where perpetrated.”[7] War criminals of 1971 also committed genocide meaning “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.”[8]

The English phraseology 'Trial of War Criminals' aptly describes the content but the Bangla word *Juddhoparadh* merely depicts only a small segment of the crimes committed by the perpetrators in 1971 and may be replaced by the word *Juddhokalin aparadh* to convey the real intention, scope and purpose of the intended trial.

WAR CRIMES AND GENOCIDE AS *JUS COGENS* OF INTERNATIONAL LAW

Why genocide is a recurring phenomenon in the post-UDHR international relations? Is it the consequence of attitudinal shift from the Genocide Convention (with emphasis on duties of the states’ to prevent and punish the crime of genocide) to the UDHR (with emphasis on the rights of the individuals vis-à-vis their states)? Preponderance of a rights-oriented culture left the sphere of states obligations vis-à-vis collective rights seriously ignored.[9] Victims of genocide were and continue to be the casualties at the tall order. Even prevention and punishment of the crime of genocide began to be treated as a domestic matter. The observation of the International Court of Justice is a serious response to such contention:

> [A]s to the territorial problems linked to the application of the Convention, the Court would point out that the only provision relevant to this, Article VI, merely provides for persons accused of one of the acts prohibited by the Convention to ‘be tried by a competent tribunal of the state in the territory of which the act was committed.[10]

So, states can not be oblivious of this type of obligation to try the crimes of genocide. This obligation clearly falls within the sphere of ‘*erga omnes*’-from where no derogation is acceptable. The object and purpose of the Genocide Convention was illustrated by the world Court in the following manner:

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The origin of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of the mankind and results in great losses to humanity and which is contrary to moral law and to the spirit and aims of the United Nations ….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.[11]

The *erga omnes* and *jus cogens* concepts are often presented as two sides of the same coin. The term *erga omnes* means "flowing to all," and so obligations deriving from *jus cogens* are presumably *erga omnes*. Indeed, legal logic supports the proposition that what is "compelling law" must necessarily engender an obligation "flowing to all". It is difficult to distinguish between constituents of "general principle" creating an obligation so self-evident as to be "compelling" and so "compelling" as to be "flowing to all," that is, binding on all states.[12] The obligation of states for *jus cogens* crimes was narrated in the *Barcelona Traction* case, the International Court of Justice as,

[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[13]

Thus, the first criterion of an obligation rising to the level of *erga omnes* is, in the words of the ICJ in the above mentioned case, "the obligations of a state towards the international Community as a whole." The ICJ gave examples, at the same place, of such crimes as,

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.[14]

With the establishment of a permanent International Criminal Court having inherent jurisdiction over these crimes demonstrates a convincing argument for the proposition that crimes such as genocide, crimes against humanity, and war crimes are part of *jus cogens* and that obligations *erga omnes* to prosecute or extradite flow from them. Bangladesh could hardly denunciate itself from such obligation to try the war crimes and genocides in 1971.

GENOCIDE IN 1971 AND PARA-MILITIA FORCES OF EAST-PAKISTAN

In 1971, the world witnessed acts of genocide committed by the Pakistani military and their allies against the *Banglees* in general and *Hindu Banglees* 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. M K Nawaz rightly pointed out that, "The Bangalee people have a language and culture different from the people of West Pakistan can accordingly be considered as ethical group within the meaning of Article II of the Genocide Convention".[15] Anthony Mascarenhas wrote:

The Nazi style programs were intended, in the context of the ambitions of the West Pakistan regime, as military answer to what was essentially a political problem of its own making …..the obliteration of Bengali language and culture is the continuing purpose of the regime.[16]

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.'[17] On March 25 the genocide was launched. The university in Dhaka was attacked and students exterminated in their hundreds.

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Death squads roamed the streets of Dhaka, killing some 7,000 people in a single night. It was only the beginning. Within a week, half the population of Dhaka had fled, and at least 30,000 people had been killed. Chittagong, too, had lost half its population.

All over East Pakistan people were taking flight, and it was estimated that in April some 30 million people were wandering helplessly across East Pakistan to escape the grasp of the military.[18] Ten million refugees fled to India, overwhelming that country's resources and spurring the eventual Indian military intervention. The population of Bangladesh/East Pakistan at the outbreak of the genocide was about 75 million.

When the burden of the killing became too much for the army, the Pakistanis enlisted and trained paramilitary units made up of non-Bengali Muslims and Bengali collaborators from right-wing religious parties. These paramilitary units, the *al-Badr, rajakar* and *al-Shams*, worked as informers and assassins to augment the military's gruesome task of killing Bengalis.[19] In June 1971 it was reported in international media that reported on the formation of these units:

> 'Throughout East Pakistan the Army is training new paramilitary home guards or simply arming "loyal" civilians, some of whom are formed into peace committees. Besides Biharis and other non-Bengali, Urdu-speaking Moslems, the recruits include the small minority of Bengali Moslems who have long supported the army -- adherents of the right-wing religious parties such as the Moslem League and *Jamaat-e-Islami.*
>
> '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.'[20]

The involvement of the *razakars, al-badrs* and *al-shams* in the atrocities are depicted and documented by many works in Bangladesh. Detail treatment of those narratives is out of the ambit of this paper.[21] So there is no reason why the genociders should escape justice.
There are overwhelmingly strong evidences that the above crimes were committed by Pakistani regular and auxiliary forces during the Bangladesh War of Liberation in 1971 (anti-liberation forces call it civil war which, however, in no way diminishes the criminal liability of the perpetrators). In terms of number of people killed (about three million), women raped (two hundred thousand) and persons forced to flee their homes to turn refugees (ten million took shelter in India), the above crimes undoubtedly rank first after Nazi holocaust during the Second World War, followed by genocide committed by Khemr Rouge regime of Pol Pot in mid-seventies in Cambodia, brutal elimination of about one million Hutus by the Tutsis in Rwanda in the late eighties and the ethnic cleansing of the Muslims by the Serbs in Bosnia in the early nineties of the last century. While these latter crimes have been prosecuted, or are being prosecuted, it is preposterous that the crimes committed in Bangladesh during 1971 have remained to date with impunity.[22]

WHY THE TRIAL MUST TAKE PLACE?

The rationality of holding the trial can be explained from several perspectives: [23]

1. These crimes are so heinous in nature that it shocks the conscience of the human kind. It shakes the foundation of human civilization itself. The perpetrators are regarded as the *hostis humani generis* i. e. enemy of the human kind under international law. That is why such crimes should not go unpunished.
2. Peaceful co-existence is not possible between the violators and the victims. From the viewpoints of restorative justice even after so many years such trial should be held.
3. Holding of such trial also deserves significance for the sake of revival of the spirit of liberation war and the ideals for which the people fought in 1971. To get relief of ignominy we have for not able to punish the committers such trial is necessary.

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4. From a sense of deterrence that is to create an example for the future violators holding of trials of the suspected criminals should be brought to justice.
5. In order to show respects to the departed souls of 1971, the trial should take place.

HOW THE TRIAL CAN BE HELD?

What are the options available to Bangladesh to try the war criminals of 1971? Can the criminals be tried in an international tribunal under international law? Unfortunately, criminals of 1971 cannot be tried in the International Criminal Court, the only permanent court having international criminal jurisdiction. The ICC established under the Rome Statute in 1998 lacks jurisdiction to try offences and crimes committed prior to its establishment. Bangladesh, therefore may take resort to any one of the following possibilities:

a) Establish an International Tribunal to try these crimes
b) Establish an UN sponsored National Tribunal for the trial
c) Establish a Special tribunal under the domestic law to try the war criminals of 1971.

In our opinion, the first two options may appear to be far-reaching for Bangladesh. Formation of any International War Crimes Tribunal, whether with or without UN cooperation, may not be that easy because of international politics. We should never lose sight of the fact that even 'enemies have friends'. The only remaining option, therefore, is to try the perpetrators in a Special Tribunal established under 1973 international crimes law as prevailing in Bangladesh solely for this purpose. Under which law these crimes should be tried? Here again, Bangladesh has two options: first, try the war criminals in the national court applying universal jurisdiction, and second, try them in the national court/tribunal under national/municipal law.

With respect to the first option, Israel's prosecution of Nazi official Adolf Eichmann in 1961 provided a convincing example. The court in that trial observed:

> The abhorrent crimes … are not crimes under Israel (read Bangladesh) law alone. These crimes, which struck at the whole mankind and shocked the conscience of nations, are grave offences against the law of nations itself… Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an International Court, 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*.[24]

Now, with regard to the second option, we may consider ourselves to be extremely lucky in the sense that we already have a statute which was enacted by the Bangabandhu government in 1973. The title of the statute is self-explanatory: The International Crimes Tribunal Act, 1973. The law is updated with modern trends of war crimes law and genocide dimensions in July 2009 by Bangladesh Jatiyo Shangshad-the parliament,

The war crimes designated in section 3(2) of the 1973 Act fall squarely within the purview of the extraordinary crimes at international criminal law. Bangladesh is better off by establishing a special tribunal to try these crimes through the application of a hybrid system of law composed of its own criminal law and international criminal law.[25]

Section 6 of the 1973 Act deals with various aspects of the tribunal’s chairperson, its seat, and qualifications of its judges. Some scholars had suggested that a pre-trial chamber could have checked politically motivated investigation.[26] 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 functioning of the tribunal should have national control with international exposure. Purely nationalistic option is fraught

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with the potential risk of sending an undesirable signal to the rest of the world, which may tarnish the impartial image and credibility of the tribunal. The capacity and willingness to hold fair trials of particularly internationally designated crimes by national tribunals/courts is increasingly being scrutinized by international observers for signs of corruption, lack of due process, and political influence. The fundamental principle centers round every criminal trial, be it national or international, is that justice is not only to be done but also manifestly seen to be done. The proposed war crimes trial in Bangladesh is no exception. It must be a fair and credible trial.

In formulating the applicable substantive law and procedural rules of the tribunal, Bangladesh must be careful about certain basic principles of international law and its own constitutional law. For example Article 9 concerning arrest and speedy trial and the right of the accused enshrined in Articles 14 and 15 of the International Covenant on Civil and Political Rights 1966 of which Bangladesh is a party and its own constitutional guarantees embodied in chapter 3 of its Constitution. Being a party to the Vienna Convention on the Law of Treaty 1969, Bangladesh must affirm that it would not invoke or apply any national law to escape international treaty obligations. The Shimla Pact 1973 is especially relevant to this point. A case has to be made for arguing that the Shimla Pact is void in international law for its inconsistency, if not repugnancy to, the peremptory norm of international law.[27]

Should Bangladesh succeed in ensuring fairness and transparency in conducting the trial, the UN is set to appeal, as it did in the case Cambodia, to the international community to provide assistance including financial and personnel support to the proposed tribunal.

INTERNATIONAL CRIMES TRIBUNAL ACT 1973

The 1973 Act is self contained having both substantive and procedural provisions. Under this Act jurisdiction of the Tribunal includes *inter alia*, crimes against humanity, crimes against peace, genocide, war crimes, violation of international humanitarian law and any other crimes under international law.
The Act reproduces the definitions of the different crimes from existing international law and goes further to include 'any other crimes under international law' in the jurisdiction of the Tribunal. By the latest amendment in June 2009 the legislature of Bangladesh has updated the International Crimes Tribunal Act 1973. As it stands now, any individual or group of individuals besides members of the armed forces, defence forces or any auxiliary force, which had committed genocide and crime against humanity and peace, would come under the purview of the law. The crimes mentioned in the law are: murder, extermination, enslavement, deportation, imprisonment, abduction, confinement, torture, rape or other inhuman acts committed against any civilian population or persecution on political, racial, ethnic or religious grounds.

The law defines crime against peace as planning, preparation, initiation, or waging of a war of aggression, or war in violation of the international treaty, agreements or assurances. It mentioned that genocide meaning and including any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group such as killing members of the group; causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent birth within the group; forcibly transferring children of the group to another group.

The law defines war crimes as mainly violation of the laws or customs of war which includes, but not limited, to murder, ill treatment, or deportation to slave labour; murder or ill treatment of prisoners of war or persons on the seas, killing of hostages and detainees, plunder of public or

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private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessities.

The crimes also include violation of any humanitarian rules applicable in arms conflicts laid down in the Geneva Convention of 1949; any other crimes under international law; attempting, abetting, or conspiring to commit any such crimes; complicity in or failure to prevent any such crimes. The law has provisions for appointing the chairman of the tribunal from among the judges of the Supreme Court or a person qualified to be a judge of the Supreme Court or anyone who served as the judge of the tribunal. The law also has a provision for ensuring independence of the tribunal.

A common critique made to the address of war crimes tribunals relates to concerns about "Fair trial". 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.[28]

As to definition of genocide it can be said that though new dimensions of genocide like genocidal rape, forced pregnancy etc are not specifically mentioned as constituent elements of genocide, the using of the words 'other crimes under international law' and 'not limited to' would not debar a competent and prudent tribunal to accommodate those dimensions under this law. So, at any parlance the 1973 law (as amended in 2009) conforms to the international jurisprudential standards of criminal law.

MYTHS SURROUNDING THE TRIAL AND THE REALITY

37 years of lapse in failure to hold trial has given rise to many confusion and misconceptions. The new state of Bangladesh took legislative, judicial and administrative steps to hold trial of the committers of heinous crime. But successive pro-Pakistani martial law regime in conjunction with the evil forces had perpetuated the power in Bangladesh. The result is that they have escaped the justice and created an array of confusion against any sort of trial. Following excuses are often used as ploy against holding trial of the offences in 1971. It has been argued that all these contentions are misleading and untenable in the eye of law.

1. There was no war other than a civil strife in 1971 in Pakistan, so any allegation of war crimes is baseless.

This contention is a clear negation of the history of the birth of Bangladesh itself. People holding such opinion lives in a fool's paradise. On 25th March 1971, large scale massacre was perpetrated by the Pakistani forces in the name of 'Operation Search Light'. An unjust war was levied upon the unarmed people of Bangladesh. Bangladesh declared independence as a response to that.

The Proclamation of Bangladesh independence has clearly stated why the people as a last resort declared the war against Pakistani authoritarian regime. Once a territory is declared to be independent complying with all the established norms of international law and practices, any presence of outside forces is taken to be a threat to the sanctity of territorial integrity of that newly born country. So the battle fought clearly comes within the definition of war as enshrined by international law.[29]

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A civil war is usually fought to usurp the state power between two or more rival groups of a country. The sole purpose of civil strife is to overthrow a regime from the power and to assume it by the rival opponents. Then what happened between Bangladesh (East-Pakistan) and West-Pakistan during the 24 years life span of Pakistan? It was nothing other than to establish the right to self-determination[30] of the *Bangalee* population against an external force. It was fought not to alter the internal sovereignty but to alter the external sovereignty –to struggle for emancipation from the clutches of exploitation, oppression and suppression of west-Pakistani authoritarian regime for the purpose of a *just* government.

2. Genocide did not occur as there was no large scale mass killing in the then east Pakistan. The prevailing conviction that 30 lakh (3 million) people were killed is a misnomer. So, the extent of mass killing so as to render it as 'genocide' is not fulfilled.

Indiscriminate massacre on the ground of religion, race, caste etc with the sole intention to destroy a particular group either whole or in part does fall within the definition of genocide. In order to determine a particular crime as genocide the test is the intention of the perpetrators not the number of people massacred. This is particularly evident from the definitional scope of genocide under the Genocide Convention, 1948. With the intent to destroy an ethnic, national or religious groups etc either wholly or in part comes within the purview of genocide.

3. A considerable period of 37 years after the 'incident' has elapsed. So it is not viable to go for a trial.

Law of limitation is totally foreign to known canons of criminal jurisprudence. International criminal law particularly emphasizes on this aspect that crimes like war crimes, genocide, crimes against humanity, crimes against international law and peace are so gravious in nature that their application, extent and consequences can not be confined within a time framework. The trend of the development of international law for last four decade is that in such cases states should have universal jurisdiction to try the offenders. Apart from some processual and convenience adversary there is no strong objection against the jurisprudential basis of universal jurisdiction. If used competently and following the due process of law any tribunal can exercise universal jurisdiction to try the war crimes.[31]

4. Evidence is essential in order to prove the commission of an offence. It is impossible to produce testimony of crimes occurred in 1971; hence the question for a trial is not reasonable.

After the Second World War the perpetrators of war crimes and genocide were brought to the altar of justice. In the recent past, trial of international crimes committed in Rwanda, Bosnia-Herzegovina, Cambodia has been held in Tribunals. The laws followed in those trials had a simplified way of proof. Bangladesh has also enacted International Crimes Tribunal Act 1973 in line with that standard. In this law it is provided that even the news report, papers, letters other convincing documents can be taken into account as a proof of involvement in the international crimes during 1971 war. Besides these, many victims of war, their successors, sufferers are still alive to narrate the incidents and people involved with the genocides and war crimes are within the reach of any incarceration and investigation. So, it is erroneous to say that identification of the culprits and production of proof would be impossible.

5. The then government of Bangabandhu declared amnesty to the criminals, hence holding trial again would be violative of rule of law on the one hand and ignominious for Bangabandhu himself on the other. By the Shimla Pact among India, Bangladesh and Pakistan the war prisoners and main culprits were condoned. So, trial of the criminals can not be held.

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Amnesty shown by the then government was not applicable for every offence committed. [32]Persons charged with murder, rape, looting, arson etc were not condoned. There are strong evidences against suspected people for such involvement. A jurisprudential aspect of international law is that amnesties shown committers to genocide, war crimes and other international crimes are opposed to peremptory norms of international law. Any amnesty, arrangement and treaty amongst states in derogation of such principles stand void as per the provisions of international treaty law convention.[33]

The essence of Shimla Pact was that Pakistan would try the genociders and war criminals. But Pakistan did not keep their promise which was a negation of Pakistan's state responsibility under international law. Pakistan's failure can no not be an excuse from exoneration of Bangladesh's responsibility to try the allies of the Pakistani Forces.

6. If a citizen of a country thinks that he is aggrieved of certain matters, he can proceed to the court. As no citizen has over the years has filed such cases, why at present such trials of the war criminals should take place?

Such suggestions seem to emanate from erroneous concept. An individual can file a case when it is committed against that particular person. Crimes during 1971 war were perpetrated against the newly born state itself. So the state itself should be ready to bring charge. Majority of the persons subjected to victimization is not alive or if alive, not easily traceable—this type of proposition can only come from a sense of complacency. This is an excuse which resembles or fortifies the excuse of the alleged perpetrators of not holding a trial. The victims still alive are shaken, psychic-burnt, dreadfully teared on the one hand, the violators are complacent surrounded by falsity of justification can on the other, can only be hold to be contrary to restorative justice.

8. The demand for trial of war criminals and perpetrators of genocide is rather deigned to divide the nation into two segments. So to avoid clash and chaos trial of war crimes and genocide should not take place at all.

The demand for a trial has the vestige of dividing the nation—an assumption. Does any law acts on assumption? Matter is that the nation was divided into two segments-one is pro-liberation another is anti-liberation. The anti-liberation forces along with the Pakistani Military forces levied an unjust and treacherous war to banglaee people. After the liberation, the defeated forces with a pause, again revived with the religious fanaticism and has taken revenge in this way or that. The latest in the series is the denial of any liberation war in 1971 and hence the denial of the existence or birth of Bangladesh itself. The two streams were and still continue. Non-divisibility may be an element of state formation but that is not necessarily an inevitable constituent to retain the nationalism. Why Bangladesh state was formed, what should be its purposes and fundamentals are sacredly embodied in the Proclamation of Independence and the original constitution.[34] Whatever repugnant to the accomplishment of those goals is liable to be condemned. This is a question of sustenance as a nation as well.

9. The officers of Pakistani forces liable for genocide and war crimes somewhat escaped the trial. So, without prosecuting the commanding level officers how the persons in 2nd line can be tried? Even if they are prosecuted, can they be prosecuted for genocide?

This is a question which entails higher jurisprudential value and deserves a bit detail treatment. Firstly, one thing should be made clear, that the command responsibility does not stand in the eye of international war crimes and genocide law. However, it can be a mitigating factor in awarding punishment.

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The definition and extent of genocide under Genocide Convention is important. One thing to be reminded that the proposed trial would charge the suspects with war crimes, genocide, crimes against humanity etc. Mere allegation of genocide may not be the preferred option. Even then, any charge of genocide against the *razakars* etc would have to be proved in the test of conspiracy to genocide, planning for genocide and incitement to genocide. Article III of the Genocide Convention lists five punishable acts, including genocide itself, and "[d]irect and public incitement to commit genocide." The other three acts are conspiracy to commit genocide, attempt to commit genocide, and complicity in genocide. The convention defines genocide as any of a series of acts, including killing and causing serious bodily or mental harm, that are committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such. However, incitement to genocide is not defined any further by the Genocide Convention or any other treaty. So the treaty law instructs only that to commit incitement to genocide: 1. one must have specific intent to cause genocide, and 2. the incitement must be direct and public. From the evidences found against the members auxiliary forces like the *razakars* and *al-badrs* it would not be difficult to bring their activities within the ambit of these acts which are not less grievous than the genocide itself.

In *Prosecutor* v. *Nahimana*, [Case No. ICTR 99, 2003] while discussing a broadcast of Dec. 12, 1993 for example, the Tribunal conflated "the promotion of ethnic hatred" with incitement to genocide. Although the Genocide Convention does not explicitly require specific intent for "punishable acts" other than genocide, including incitement, the ICTR interpreted the Convention that way: "the person who is inciting to commit genocide must have himself the specific intent to commit genocide." Arguably, however, the inciter need not have specific intent to commit genocide himself, only to cause genocide by inspiring an audience to commit it is sufficient.

Courts have repeatedly affirmed that there is no causation requirement for incitement to genocide. For example, in *Nahimana* (2007) it was observed that "[D]irect and public incitement to genocide is…punishable even if no act of genocide resulted from it. This is confirmed by the *travaux preparatoires* of the Genocide Convention, from which we can conclude that its drafters wished to punish direct and public incitement to genocide even if no genocide is committed, in order to prevent its occurrence."[35] Because of its inchoate nature, incitement is punishable by virtue of the criminal act alone irrespective of the result.

Akayeshu case[36] decided by International Criminal Tribunal for Rwanda is a good illustration on the point. Jean-Paul Akayesu, mayor of the Rwandan township of Taba, was the first person prosecuted by the ICTR for incitement to genocide, and for genocide itself. Early in the morning on April 19, 1994, Akayesu had come upon a crowd of more than 100 people standing near the corpse of a young Hutu militiaman. Akayesu gave a speech, exhorting the crowd to unite against the "sole enemy" which he described as the accomplices of the Inkotanyi, or Tutsi rebels who had been fighting to overthrow the Hutu-led government of Rwanda. A three-judge ICTR panel found that Akayesu's audience had understood his speech as a call to exterminate the Tutsi people. The judges were also convinced that Akayesu knew his speech would be understood that way, since genocide had already begun elsewhere in Rwanda, and since genocidal militias had already formed in Taba. Hundreds of Tutsi were in fact killed in Taba in the days after Akayesu's speech. In September 1998 the Tribunal convicted Akayesu not only of genocide (making his case the first such conviction ever) but also of "direct and public incitement to commit genocide." Although Akayesu made his speech in person, the trial chamber made a point of interpreting "direct and public" to include many forms of communication, including broadcast:

> Direct and public incitement must be defined for the purposes of interpreting Article 2(3)(c), as directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or

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> threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.[37]

In line with this it can be said that the statements by the members of the *razakar, al-shams* and *al-badr* forces published in papers, letters and other communications with the Pakistani forces do fall within the incitement to genocide.

Another point comes for consideration here. Whether there is option to treat crime against humanity as a part of genocidal activities. Is there any division line then between crimes against humanity and genocide? Recently there is a tendency amongst jurists to shift from crimes against humanity to genocide. From a group-pluralist point of view, the concept of crimes against humanity fails precisely because it ignores the specific character of the target groups, and the specific intention to diminish humanity by annihilating the group as such. To be sure, the crimes against humanity include a crime called--extermination. But the legal definition, though it requires extermination committed in a planned, systematic attack, does not require a specific intent to exterminate, nor does it require the targeting of a racial, ethnic, religious, or national group as such.

Discarding this contention, David Luban argues that the legal category of extermination tends to treated in the same core meaning as of genocide, and it deserves equal claim to the designation as the --crime of crimes. Genocide by destroying part of a group continues to be a mass hate crime, and as such it still contains the distinctive evil of all hate-crimes--a murderously anti-pluralist motivation on the part of the perpetrator.[38] Hence the distinction between crimes against humanity and genocide has become thin under modern international criminal law. There is option, then to bring the charge of genocide against the native groups indulged into extermination of humankind during war 1971 in Bangladesh.

CONCLUSION

Genocide 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. Post- 2nd World War Development of international law in general and international criminal law in particular has made laudable scope for prosecuting and punishing the culprits of war crimes, genocide, crimes against humanity and crime against peace and international law. Domestic jurisdiction of states in this respect has been widened by the recognition of 'universal jurisdiction' whereas international criminal law has been placed on a solid footing by a clear definition of 'crimes under international law'. The 1973 Act of Bangladesh makes a unique blending of these two aspects and is, therefore, believed to be an ideal piece of legislation to try the committers of heinous crime of 1971 without invoking any legitimate dissent from any quarter in the international community. An outward-looking tribunal is preferred over an inward-looking tribunal. International safeguards will help ensure credible justice in the eyes of the international community. This does not compromise the sovereignty of Bangladesh. The sovereignty of Bangladesh should not be seen as a tool for isolation and insulation from the international scrutiny of the formation and operation of the tribunal. Rather, it must be used as a tool for international participation and collaboration in ensuring distributive justice to all stakeholders – both the victims/relatives and their perpetrators alike. Justice dissipates the call for revenge, because when the Court/Tribunal metes out to the perpetrator his just deserts, then victim's calls

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for retribution are met; by dint of dispensation of justice, victims are prepared to be reconciled with the erstwhile tormentors, because they know that the latter have now paid for their crimes. A fully reliable record is established of atrocities so that future generations can remember and be made cognizant of what happened.

NOTES AND REFERENCES:

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[1] *Punishing Genocide in Rwanda*, Mark A Drumbl, Working Paper, Washington & Lee University School of Law, 2006 at p. 1

[2] Principle 6 of the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal adopted by the United Nations International Law Commission on August 2, 1950 .

[3] General Assembly Resolution No 96 (1) of 11 December 1946. See also, Raphael Lemkin, *Genocide as a Crime under International Law*, 41 American Journal of International Law, 1947.

[4] On the question of states' jurisdiction please see, J. G. Starke, *Introduction to International Law*, (Aditya Books: New Delhi, 1994) at p. 201-241.

[5] Principle VI, Principles of International Law Recognized in the Charter of the Nuremburg Tribunal and in the Judgment of the Tribunal, 1950 and also Section 3(2) (d) of the International Crimes (Tribunal) Act, 1973 (Act No XIX of 1973).

[6] These were *para-militia* forces formed by Pakistani Government predominantly composed of local allies of the then East-Pakistan belonging to rightist block. It is convincingly established, documented and evidenced that the members of these forces were engaged in committing the war crimes and other heinous crimes like genocide, extermination of humankind and rape. Still large numbers of suspects are alive residing home and abroad justifying their atrocities during 1971 liberation war of Bangladesh.

[7] This is the explanation of crimes against humanity as enshrined in the International Crimes Tribunal Act, 1973 in line with the definition given in the Nuremburg Charter.

[8] Article II of the Genocide Convention, 1948 and Section 3(2) (c) of the International Crimes Tribunal Act, 1973 (Act XIX of 1973).

[9] Dr. Mizanur Rahman, *Mapping Genocide: Considerations on Universal Declaration of Human Rights*, Stamford Journal of International Law, Vol. 1 No. 1, July-December, 2008, at p. 208.

[10] *Genocide Case, Bosnia and Herzegovina* v. *Yugoslavia* (ICJ, 1996:615-16).

[11] ICJ Reports, 1951 (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion).

[12] Professor M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes, Duke Journal of Comparative and International Law*, *59* Law & Contemp. Probs. (Autumn 1996) at p. 63.

[13] Barcelona Traction, Light and Power Company Ltd. (*Belgium* v. *Spain*), 1970 ICJ 32.

[14] Barcelona Traction, Light and Power Company Ltd. (*Belgium* v. *Spain*), 1970 ICJ 32.

[15] M. K. Nawaz, *Bangladesh and International Law*, 11 Indian Journal of International Law, 1971 at p. 251.

[16] Anthony Mascarenhas, *The Rape of Bangladesh* (Delhi: Vikash Publications, 1971) at p. 120.

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

[18] Ibid. at p. 48.

[19] Mashuqur Rahman, *The Demons of 1971*, www.rediff.com/news/2007/jan/04spec.htm.

[20] Sydney Schanberg, June 1971.

[21] For having a detailed account of genocide and extermination done by the *razakars, al-shams* and *al-badrs* please see, Report on the Findings of the Peoples Inquiry Commission on the activities of the War Criminals and the Collaborators, 26th March 1994 and 26th March 1995. See also, Dr. M A Hasan, *Juddhaporadh, Gonohotta O Bicharer Onneshon*, War Crimes Fact Finding Committee & Human Studies Center, Dhaka, 2001 and Documents on the Crime Against Humanity Committed by Pakistani Army and Their Agents in Bangladesh, 1971, a Bangladesh Liberation War Museum e-book. See also, *War Crimes*, Ain O salish Kendra, Dhaka, 2008

[22] Dr. Shah Alam, *Prosecuting The 1971 Perpetrators Of Genocide, Crimes Against Humanity And War Crimes* , The Daily Star, 5 January 2009. Available at: http://www.thedailystar.net/law/2008/01/01/index.htm.

[23] *Jukti Torke Juddhaporadhider Bichar*, Key note paper presented by Dr. Mizanur Rahman in the Freedom Fighters' Mass Assemblage in Dhaka, 15 March 2008.

[24] *Adlof Eichman* v. *Attorney General of the Government of Israel*, Supreme Court of Israel, ILR 36 (1962) at p. 277.

[25] Dr. Mizanur Rahman, *War Crimes Trial: National and International Legal Aspect*, The Daily Star, 26th March, 2009.

[26] Professor Rafiqul Islam, *Trial of War Criminals: Some Issues*, The Daily Star, 2 February 2009 available at: http://www.thedailystar.net/law/2009/02/02/interview.htm, last visited on 26 July 2009.

[27] Professor Rafiqul Islam, *Trials of war criminals under International Humanitarian Law in Bangladesh*, The Daily Star, 29 Januray 2009, available at: www.thedailystar.net/law/2009.

[28] Dr. Mizanur Rahman, *War Crimes Trial: National and International Legal Aspect*, The Daily Star, 26th March, 2009.

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[29] For an elaborate discussion on this point see, S. M. Masum Billah and Khaleda Parven, *Proclamation of Independence: the Unsung Document on the Way of Constitutionalism in Bangladesh*, in Jaglul Ahmed Choudhury Edited, Bangladesh Journal of National and Foreign Affairs, Vol- 5, No-3, May-June 2005, at p. 70.

[30] After the recognition of right to self-determination internationally through the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966 it is the proclamation of independence of bangladesh which has categorically assert this right to uphold the human dignity of *Bangalee* people. See, S. M. Masum Billah and Khaleda Parven, *Proclamation of Independence: the Unsung Document on the Way of Constitutionalism in Bangladesh*, in Jaglul Ahmed Choudhury Edited, Bangladesh Journal of National and Foreign Affairs, Vol- 5, No-3, May-June 2005, at p. 74.

[31] In the *Pinochet Case (1998)*, the House of Lords have recognized firmly the rationality of universal jurisdiction.

[32] See for details, *Juddhaporadhider Bichar:Ekti Aaini Onushondhan*, in Dr. Mizanur Rahman (ed), POLOL & ELCOP, 2006.

[33] Article 53 of the Vienna Convention on the Law of the Treaties, 1969.

[34] In *Anwar Hossain Chowdhury* v. *Bangladesh* (1989) BLD (AD) spl 1, it has been established that Proclamation of Bangladesh is the genesis of Bangladesh Constitution.

[35] SUSAN BENESCH, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, Virginia Journal of International Law, Vol. 48:3, 2007.

[36] *Prosecutor* v. *Akayesu*, Case No. ICTR Judgment, (Sept. 2, 1998)

[37] Ibid. Cited by David Luban, *Calling Genocide by Its Rightful Name: Lemkin.s Word, Darfur, and the UN Report,* Chicago Journal of International Law, Vol.7, No. 1

[38] David Luban, *Calling Genocide by Its Rightful Name: Lemkin.s Word, Darfur, and the UN Report,* Chicago Journal of International Law, Vol.7, No. 1

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