

## **Prosecuting foreign perpetrators and perpetrators abroad**

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by David Matas

As Bangladesh gears up for prosecution of perpetrators of the 1971 genocide, it has to confront two issues. How can Bangladesh bring to justice perpetrators of the 1971 genocide who have fled Bangladesh and gained a haven abroad? What is to be done with perpetrators of the genocide who are not Bangladesh citizens? These two problems, to an extent overlap, since perpetrators abroad may also be foreign perpetrators.

### **A. Perpetrators abroad**

For perpetrators abroad, there are, in a nutshell, five remedies - extradition, criminal prosecution, civil litigation, revocation of citizenship and deportation. The preferable solution is extradition to Bangladesh for the prosecution in the country. But that solution may well not be available.

#### **1. Extradition**

Canada, for instance, has no extradition treaty with Bangladesh. In principle, Bangladesh could negotiate such a treaty and then invoke it to extradite perpetrators of the 1971 genocide. Extradition treaties operate retrospectively, to crimes committed before the treaties came into force<sup>1</sup>.

The Extradition Act of Canada provides that designated Commonwealth countries are extradition partners<sup>2</sup>. A designated extradition partner has the same legal status as a state with which Canada is party to an extradition agreement. Both Canada and

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<sup>1</sup> Extradition Act section 6

<sup>2</sup> Section 9

Bangladesh are Commonwealth states, but Canada has not designated Bangladesh as an extradition partner.

The Canadian Extradition Act allows further for case specific extradition agreements<sup>3</sup>. That option remains open for Bangladesh but may be laborious.

The Geneva Convention relative to the Protection of Civilian Persons in Time of War requires each party to bring to justice persons to have committed grave breaches of the Convention. The Convention gives states parties the power to hand such persons over for trial to another party concerned, provided the other party has made out a *prima facie* case<sup>4</sup>. Since most states are parties to this Convention, this provision may allow Bangladesh to circumvent the absence of extradition arrangements.

## **2. Prosecution**

If a fugitive can not be extradited, the person should be prosecuted where he or she is found. That sort of prosecution requires the exercise of universal jurisdiction.

The doctrine of universal jurisdiction has spread with the acceptance of the statute of the International Criminal Court. Typically states which ratify the Court treaty enact implementing legislation which adopts universal jurisdiction. Bangladesh can ask states which will not extradite a fugitive to Bangladesh to prosecute the fugitive where the fugitive is found.

To be credible in that request, Bangladesh itself should ratify the statute of the International Criminal Court which it signed long ago, and enact implementing legislation. The current legislation the International Crimes (Tribunals) Act of 1973 does not assert universal jurisdiction. It is limited to acts committed on the territory of

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<sup>3</sup> Section 10

<sup>4</sup> Article 46

Bangladesh<sup>5</sup>.

### **3. Civil litigation**

Civil litigation is an option if neither criminal prosecution nor extradition is possible. Civil litigation requires both the perpetrator and a victim plaintiff to be found in the jurisdiction. In the United States, notably, because of its Aliens Torts Act, an effort to seek civil redress is more likely to bear fruit than a criminal justice effort.

Civil litigation occurs at the initiative of the victim plaintiff. Neither Bangladesh nor the government of the state in which the lawsuit is heard is necessarily involved. Conduct of such litigation may be unduly onerous for an individual victim.

That obstacle can be overcome by the assistance non-governmental organizations willing to help plaintiff victims bring their cases to court. In the United States, there is such an agency - the Center for Justice and Accountability; in Canada there is the Canadian Centre for International Justice; and in the United Kingdom there is Redress.

### **4. Revocation of citizenship**

Revocation of citizenship typically requires proof that the individual acquired citizenship through fraud. In Canada, citizenship is revocable if the person obtained citizenship by false representation or fraud or by knowingly concealing material circumstances<sup>6</sup>. That is the only ground of revocation.

In the case of a Bangladeshi fugitive complicit in the 1971 genocide who has obtained citizenship in Canada, the fugitive must have obtained citizenship by false representation or fraud or by knowingly concealing material circumstances since disclosure of complicity would have prevented the acquisition of citizenship.

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<sup>5</sup> Section 3(1)

<sup>6</sup> Citizenship Act section 10

Bangladesh can trigger a Canadian revocation process by providing to Canadian authorities information about that complicity.

## **5. Deportation**

Something similar can be said for deportation. A Bangladeshi fugitive who has obtained permanent residence abroad is likely removable to Bangladesh for complicity in the 1971 genocide. In principle, obtaining a removal order against a permanent resident should be easier than obtaining revocation of citizenship.

In Canada, though citizenship is revocable only for false representation or fraud or knowingly concealing material circumstances, permanent residence can be lost where it was obtained by reason of misrepresentation even where the misrepresentation was innocent, even where the permanent resident did not know that the misrepresentation was false<sup>7</sup>. As well, the grounds for removing permanent residence are more extensive than the grounds for removing citizenship. A person can lose his or her permanent residence where there are reasonable grounds to believe that the person was complicit in genocide or war crimes or crimes against humanity<sup>8</sup>.

## **B. Foreign offenders**

There are three different locations where the issue of foreign offenders can arise. The foreign offender may be in Bangladesh or in his or her country of nationality or in a third country.

### **1. Foreigners in their own countries**

When we are talking about foreign offenders in the Bangladeshi context, we are, in substance, talking about Pakistanis. Bangladesh does not have an extradition treaty with Pakistan. There is no immediate prospect of such a treaty. The history of the

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<sup>7</sup> Immigration and Refugee Protection Act section 40

<sup>8</sup> Sections 33 and 35.

efforts to bring the perpetrators of the 1971 genocide to justice suggests that Pakistani perpetrators in Pakistan are unlikely to be brought to justice in the near future.

## **2. Foreigners in Bangladesh**

Pakistani perpetrators in Bangladesh can be prosecuted. The Bangladeshi International Crimes (Tribunals) Act of 1973 gives the Tribunals established by the legislation the power to try an accused "irrespective of his nationality"<sup>9</sup>. In principle, a Pakistani perpetrator who shows up in Bangladesh could be tried there.

The question which arises is not so much what can be done as what should be done. Should Pakistani perpetrators who show up in Bangladesh be prosecuted?

In the case of the Special Court for Sierra Leone, crimes committed by foreign peacekeepers fall within the primary jurisdiction of the foreign state<sup>10</sup>. If such a state is unwilling or unable to investigate or prosecute the crime against any suspect, the Special Court may investigate and prosecute the individual provided it has the authority of the Security Council. That authority can be granted on the request of any state including Sierra Leone.

The Rome Statute of the International Criminal Court has a similar principle, the principle of complementarity, which gives primacy for prosecution to the state which has jurisdiction over the crime. The statute provides that a case is inadmissible where the case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute<sup>11</sup>.

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<sup>9</sup> Section 3(1)

<sup>10</sup> Article 1(2)

<sup>11</sup> Article 17

In order to determine unwillingness in a particular case, the Court is directed to consider whether

- a) the proceedings were undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility;
- b) there has been an unjustified delay in the proceedings which is inconsistent with an intent to bring the person concerned to justice;
- c) the proceedings were not conducted independently or impartially, and they were conducted in a manner which is inconsistent with an intent to bring the person concerned to justice.

It seems likely that any effort to determine the willingness of Pakistan to bring to justice an individual perpetrator of the 1971 genocide would lead to a conclusion of unwillingness. Nonetheless, making that determination would be, in my view, a useful exercise. It would affirm the principle in the Bangladeshi context of complementarity. It would assign primary responsibility for prosecuting Pakistani perpetrators where it belongs, to Pakistan. It would show deference to Pakistan as long as Pakistan itself acts in good faith to bring perpetrators to justice. Where there is no such good faith, that lack of good faith would be documented.

### **3. Foreigners in third countries**

Provided there is some sort of extradition arrangement with the state where the foreign accused is found, Bangladesh could extradite the foreign accused to Bangladesh for trial. The fact that the perpetrator is not a national of Bangladesh is not an obstacle to extradition. The obstacles to extradition are no more, but also no less for foreign nationals than for Bangladesh nationals.

There is a difference though for deportation. Deportation of a Bangladeshi abroad would be to Bangladesh. Deportation of a foreign national abroad would be to the state of nationality of the foreigner.

A Bangladeshi abroad complicit in the 1971 genocide deported to Bangladesh could and, once the 1973 law becomes operational, likely would be prosecuted on return. A Pakistani complicit in the 1971 genocide resident in a third country and deported to Pakistan likely would not be prosecuted on return to Pakistan.

Nonetheless, this remedy, deporting a Pakistani complicit in the 1971 genocide to Pakistan, is worth pursuing. Denying international freedom of movement to perpetrators, bottling them up in their home country is at least something. The effort to achieve this remedy makes the point that the genocide happened and complicity has consequences.

### **Conclusion**

As one can see, the answer to neither of the questions initially posed - How can Bangladesh bring to justice perpetrators of the 1971 genocide who have fled Bangladesh and gained a haven abroad? What is to be done with perpetrators of the genocide who are not Bangladesh citizens? - is simple. The efforts to bring either population to justice is unlikely to be comprehensive. Nonetheless, the questions should be addressed. The effort should be made. We deny the international dimension of international crimes if we seek only local justice.

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 .David Matas is an international human rights lawyer based in Winnipeg, Manitoba, Canada.