

Atrocities against Religious Minorities of Bangladesh: Can we Address it as Genocide?

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The sufferings of religious minorities of Bangladesh through state practice and private measures are not unknown to the international community. In the name of religion, they often become the victim of many discriminations and human rights violations. Can we term these discriminations and human rights violations as 'genocide'? To identify this academic debate, this paper will go through the international legal instruments as well as other municipal legal statutes to see how they have defined genocide. Finally, this paper will try to venture into a definition of genocide to address these discriminations and human rights violations which are being committed against the religious minorities of Bangladesh.

Keywords: genocide, Bangladesh, religious minorities, human rights violation, definition of genocide

1. Background

The religious minorities, e.g., Hindu, Buddhist, Christian, etc. of Bangladesh, had been suffering since 1947 through state practice and private measures.¹ One thing is common – both state and private individuals were creating chaos in the name of religion; to them, it was either to save a religion of the state or the religion of the individual.² For example, the *Enemy Property (Custody and Registration) Order, 1965* allowed the state to confiscate property from individuals it deemed as an enemy of the state. In 1965, Pakistan was in war with India, Pakistan considered Hindus as the enemy of the state and started to confiscate the properties of Hindus. Due to this Order, both the state and individual being inspired by the practice of the state many individuals possessed the properties belonging to religious minorities, even though on many occasions the properties were not abandoned by their original owners. This caused unprecedented forced out-migration of the Hindu Population from the then East Pakistan and the approximate size of the missing Hindu population would be 600 persons each day since 1964.³

Likewise, in 1990, when the *Babri* mosque in India was attacked by the Hindu fanatics, the Muslims here in Dhaka (the capital of Bangladesh) in response to that demolished temples, deities, households, etc.⁴ In 1990, according to a conservative estimate of devastations, nearly 28000 domi-

¹ Bernard-Henri Levy & Les Indes Rouges (Obikoshito Jatiotabad O Ongkure Binoshto Biplober Potobhumite Bangladesh Jokhon Shadhin Hocchilo), trans. S. Bhattacharja, Alliance Francaise de Dhaka, 2014, pp. 13-66.

² Ibid.

³ Abul Barkat, *Deprivation of Hindu Minority in Bangladesh: Living with Vested Property*, Pathak Samabesh Books, Dhaka, 2008, pp. 46.

⁴ O.G. Mansoor, Moslems attack Hindu Temples in Bangladesh with PM-India, BJT (31 October 1990), retrieved from <http://www.apnewsarchive.com/1990/Moslems-Attack-Hindu-Temples-in-Bangladesh-With-PM-India-Bjt/id-13fb->

ciles, 2500 commercial establishments, 3500 temples, and religious establishments were attacked and nearly 2400 women were gang-raped and 700 people succumbed to their injuries.⁵

Even in the present era, in 2004 the then Bangladesh Nationalist Party [BNP] led government added a new *section 78A* in the *Registration Act of 1908* stating in *subsection (b)* that gifts of properties owned by Muslim people will be registered with a fee of 100 Bangladesh Taka and nothing was said about the registration of the gifts made by religious minority people. Therefore, they had to register their gifts as per the price of the land and had to pay a huge amount of registration fee compared to the Muslims.⁶ Later, this discriminatory Act was balanced by inserting another new provision (*bb*) in *section 78A* in 2012 by allowing the same amount of registration fee for the gifts made by religious minorities.⁷

Among thousands of discriminatory events against the religious minorities, mentioned needs to be made of the insertion of ‘*BISMILLAH-AR-RAHMAN-AR-RAHIM*’, altering ‘secularism’ both in the *Preamble* and *Article 8* with ‘*absolute trust and faith in almighty Allah*’ and deleting *Article 12* on ‘*secularism and freedom of religion*’ of the original 1972 [Bangladesh] Constitution through 5th Amendment of the Constitution⁸ were giant steps towards establishing an anti-religious minority state policy. After this 1978 amendment of the Constitution, ‘Islam’ was inserted as the state religion through the 1988s 8th Amendment of the Constitution.⁹

After the above-mentioned trend-setting constitutional amendments, we have experienced what little value the lives and properties of religious minority people have in Bangladesh through the incidents of *Ramu*¹⁰ and the aftermath of the January 2014 National Election.¹¹ Sometimes state remained silent on private interventions even in small incidents. As a result of these state and private practices upon the religious minority people, their number has decreased significantly. According to a recent publication of Bangladesh Hindu Buddhist and Christian Unity Council (hereinafter referred to as BHBCUC), in 1947 there were 29.7% of religious minorities living in the newly established East Pakistan; in 1974, after the struggle of 1971, this percentage dropped to 14.6% and

4612b61af36933facca1c0744af9, accessed on 12.11.2019.

⁵ Primary Report, Human Rights Congress for Bangladesh Minorities, retrieved from <http://www.hrcbm.org/NEW-LOOK/1992.html>, accessed on 12.11.2019.

⁶ Section 78A: (b) registration fee payable for registration of a declaration of *heba* of any immovable property under the Muslim Personal Law (Shariat) shall be one hundred taka irrespective of the value of the property, if such *heba* is made between spouses, parents and children, grandparents and grandchildren, full brothers, full sisters and, full brothers and full sisters; This section was inserted by *section 8* of the *Registration (Amendment) Act, 2004*.

For details see: http://bdlaws.minlaw.gov.bd/sections_detail.php?id=90§ions_id=27913, accessed on 20.11.2019.

⁷ Section 78A: (bb) registration fee payable for registration of a declaration of gift of any immovable property made under the Hindu, Christian and Buddhist Personal Law, if such gift is permitted by their Personal Law, shall be one hundred taka irrespective of the value of the property, provided such gift is made between spouses, parents and children, grandparents and grandchildren, full brothers, full sisters and, full brothers and full sisters ; This section was inserted by *section 3* of the *Registration (Amendment) Act, 2012*.

For details see: http://bdlaws.minlaw.gov.bd/sections_detail.php?id=90§ions_id=27913, accessed on 20.11.2019.

⁸ S. Liton, After 5th Amendment: Constitution Lost Basic Character, The Daily Star, 3 February 2010, retrieved from <http://archive.thedailystar.net/newDesign/news-details.php?nid=124642>, accessed on 20.11.2019.

⁹ K. Debnath, Secular Bangladesh, Partisan to One Religion’, in Bangladesh Hindu Buddhist Christian Unity Council (ed.), *Atrocities on Minorities of Bangladesh*, Roy Prokash, Dhaka, 2014, pp. 182-189.

¹⁰ Bangladesh Hindu Buddhist Christian Unity Council (ed.), *Atrocities on Minorities of Bangladesh*, Roy Prokash, 2014, Dhaka, pp. 41- 43.

¹¹ *Ibid*.

presently, only 9.6% of minorities are staying in Bangladesh.¹²

This trend clearly indicates that a culture of impunity is actually being [in other words, a ‘pre-planned’ undefined crime] happening over the years against the religious minorities of Bangladesh and since it is undefined in any existing Acts, the perpetrators - both state and private individuals, are not getting punished and a culture of impunity has already been established. The trend of this crime is indicating towards the aimed destruction of religious minorities of Bangladesh, similar to that of German policy against the Jews before the Second World War II,¹³ through — a coordinated plan of different actions and at this stage, we can name the crime as ‘genocide’ since there is no other appropriate notion.

Presently, nearly 80 countries, including Bangladesh have inserted genocide as a crime in their Penal Codes pursuant to their binding responsibility as a state party under Article V of the *Convention on the Prevention and Punishment of the Crime of Genocide* (CPPCG) (hereinafter, referred as ‘Genocide Convention’).¹⁴ However, Bangladesh does not define the crime in its Penal Code, rather defines it in a special Act to try and punish the perpetrators of 1971. That’s why the definition of the Genocide of Bangladesh is not effective to address the ‘Genocide’ that is being taking place against the religious minorities of Bangladesh. Therefore, a definition of ‘genocide’ needs to be tailored to address this situation and to end the culture of impunity for committing ‘genocide’ against the religious minorities of Bangladesh.

Therefore, in this paper, the author will try to venture to formulate a definition of genocide to address the atrocities that are being committed against the religious minorities of Bangladesh. While doing so, the author will also discuss how different definitions were tailor-made to address the geopolitical perspectives of those statutes. For that, the author will consider different definitions of genocide provided both in municipal laws and in international statutes and conventions. To note, here the author will not consider the definition against other groups, e.g., political, racial etc.

2. Definition of Genocide: under International Law

The author will start with the definitions that are provided in different international statutes and conventions. While doing so, the author will start with the development of the definition.

Raphael Lemkin, the proponent of the notion of genocide, defined it as: “... *By ‘genocide’ we mean the destruction of an ethnic group... Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be the disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups...*”¹⁵

¹² Ibid, 5-8.

¹³ D. Cesarani, *From Persecution to Genocide*, retrieved from

http://www.bbc.co.uk/history/worldwars/genocide/radicalisation_01.shtml, accessed on 21.11.2019.

¹⁴ Retrieved from <http://preventgenocide.org/law/domestic/>, accessed on 11.11.2019. The state parties are bound under Article V of the Genocide Convention.

¹⁵ R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress*, Washington D.C., *Carnegie Endowment for International Peace*, 1944, Chapter IX, pp. 79, Available from: <http://>

Count 3 of the indictment of the 24 Nazi leaders at the Nuremberg Trials defined genocide as: *“They (the defendants) conducted deliberate and systematic genocide - viz., the extermination of racial and national groups - against the civilian populations of certain occupied territories in order to destroy particular races and classes of people, and national, racial or religious groups, particularly Jews, Poles, Gypsies, and others.”*¹⁶

While considering this definition, it should be highlighted that genocide was not defined in the Constitution of the Military Tribunal¹⁷ (popularly known as — Nuremberg Charter) and in the International Military Tribunal for the Far East Charter¹⁸ (popularly known as — Tokyo Tribunal Charter). During the indictment hearing of the 24 Nazi Leaders, both the British and the French Prosecutors in their closing argument addressed the necessity to include ‘genocide’ both in the Charter and in the indictment and particularly, the French Prosecutor noted that — the crimes committed by the Nazis were so atrocious that a new term ‘genocide’, had to be invented to capture the horror.¹⁹ However, the Judgment did not mention it as ‘genocide’, rather it was referred to as mass murder.²⁰ The Tokyo Tribunal also followed this trend and did not use the term while discussing ‘the rape of Nanking’.²¹

Interestingly, between Nuremberg and Tokyo Trials, the world community did not sit back, rather they defined genocide in *United Nations General Assembly Resolution 96 (I)* [11 December] as: *“Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, ... and is contrary to moral law and the spirit and aims of the United Nations... The General Assembly, therefore, affirms that genocide is a crime under international law... whether the crime is committed on religious, racial, political, or any other grounds...”*²²

It was interesting because, despite it being defined by the UN General Assembly, the Judges of the Tokyo Trials did not consider using the term ‘genocide’. It presumed that the Judges did not want to go beyond the words of the Tokyo Trial Charter and that is why they refrained from using the term even though the UNGA defined the term quite clearly.

Later, the ‘Genocide Convention’ was adopted by the UN General Assembly on 9 December 1948 and came into effect on 12 January 1951 [Resolution 260 (III)], where Article 2 defined genocide as: *“Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: 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*

www.preventgenocide.org/lemkin/AxisRule1944-1.htm, accessed on 10.11.2019.

¹⁶ Retrieved from <http://avalon.law.yale.edu/imt/count3.asp>, accessed on 21.11.2019.

¹⁷ See Article 6, Retrieved from <http://avalon.law.yale.edu/imt/imtconst.asp>, accessed on 10.11.2019.

¹⁸ See Article 5, Retrieved from <http://www.jus.uio.no/english/services/library/treaties/04/4-06/military-tribunal-far-east.xml>, accessed on 10.11.2019.

¹⁹ *United States vs. Hermann Goring, II, Trial of the Major War Criminals before the International Military Tribunal* 30, 45 – 46, 497, 531 (1947) (Indictment), Cited in Matthew Lippman, *The Drafting and Development of the 1948 Convention on Genocide and the Politics of International Law*, in H.G. Van Der Witt, J. Vervliet, G. K. Sluiter and J. Th. M. Houwink ten Cate (eds.), *The Genocide Convention: The Legacy of 60 Years*, Martinus Nijhoff Publishers, Leiden, 2012, pp. 17.

²⁰ *Ibid.*

²¹ *The Tokyo War Crimes Trial* (Nov. 1948) reprinted in *II the Law of War: A Documentary History*, 1029, 1079 (Leon Friedman ed., 1972), Cited in *Ibid.*

²² *United Nations General Assembly Resolution 96 (I): The Crime of Genocide* (<http://documents-ddsny.un.org/doc/RESOLUTION/GEN/NR0/033/47/img/NR003347.pdf?OpenElement>), accessed on: 10.10.2019.

*to prevent births within the group; [and] forcibly transferring children of the group to another group.”*²³

Article 3 of the Convention states that:²⁴ “*The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.*”

This definition, in my view, has given a permanent shape to the definition of genocide, since every other preceding legal instrument, both national and international, have adopted the same elements, with some alterations or additions or deletions, except the Rome Statute of International Criminal Court. For example, paragraph 2 of Article 4 of the *1993 Statute of the International Criminal Tribunal for the Former Yugoslavia* [hereinafter, referred to as ‘the ICTY Statute’] defines it as:²⁵ “*Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.*”

Similarly, being inspired by the Genocide Convention paragraph 3 of Article 4 of the ICTY Statute also extended the horizon of liability for committing genocide by incriminating conspiracy to commit genocide, direct or indirect incitement to commit genocide, attempt to commit genocide, and complicity to commit genocide.²⁶ Paragraph 2 and 3 of Article 2 of *1994 Statute of the International Tribunal for Rwanda* [hereinafter, referred to as ‘the ICTR Statute’] and Article 4 of *2004 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia* for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea [hereinafter, referred to as ‘the ECCC Statute’] adopted same definition and extended liabilities of genocide as specified in the Genocide Convention.²⁷

The last definition of ‘genocide’ is the definition adopted by the *Rome Statute of the International Criminal Court* [hereinafter, referred to as ‘the ICC Statute’]. Article 6 of the ICC Statute defines genocide as: “*For the purpose of this Statute, ‘genocide’ means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.*”

The most significant issue is – the ICC Statute did not adopt the extended liabilities that are defined in other statutes inspired by the Genocide Convention, like – ICTY, ICTR, or ECCC Statutes. The ICC Statute does not prohibit conspiracy, incitement, or complicity to commit genocide without actually being perpetrating it.²⁸ ICC Statute may have weakened the system of preventing the crime

²³ Retrieved from <http://www.hrweb.org/legal/genocide.html>, accessed on 11.11.2019.

²⁴ Ibid.

²⁵ Retrieved from http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf, accessed on 11.11.2019.

²⁶ Ibid.

²⁷ Retrieved from http://www.icls.de/dokumente/ictr_statute.pdf, and http://www.cambodiatribunal.org/wp-content/uploads/2013/08/history_ECCCLaw-Procedure_Law-Establishment-Extraordinary-Chambers.pdf, accessed on 11.10.2019.

²⁸ Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court*, Cambridge Printing House, Cambridge, 2014, pp. 274.

at its early stages, like – when anyone has started to incite to commit genocide.²⁹ However, it should be noticed that the ICC Statute has a general provision incriminating all sorts of attempts to commit any of the offenses defined in the statute and the same provision also provides impunity to those persons who lacked the intention to attempt to commit those crimes.³⁰ Likewise, in *International Crimes (Tribunals) Act 1973* [a Bangladeshi national law dealing with international crimes, hereinafter, referred as ‘ICTA 1973’], there is no provision extending the liability of Genocide through incitement, complicity, conspiracy and attempt, however, blanket provisions under section 3(2)(f)³¹(g)³² and (h)³³ have incriminated incitement, complicity, conspiracy and attempt to commit crimes against humanity, genocide, crimes against peace, war crimes and violation of any humanitarian rules applicable in armed conflicts laid down in *Geneva Conventions of 1949*. Right now, it is an ongoing debate that - whether or not a provision prohibiting attempts is enough to prevent crimes like genocide, which is not an issue to this article.

3. Definition of Genocide: under Municipal Law

As mentioned earlier, nearly 80 countries have defined genocide in their Penal Code. Not all the definitions will be discussed here, but only a few to discuss that they are tailor-made to address the geopolitical situation of their respective countries.

3.1. France

The crime of genocide made its formal entry in French Legislation on 1 March 1994 with entry into force in the New Penal Code, which defines genocide in its Article 211-1, which is: Genocide occurs, wherein the enforcement of a concerted plan aimed at the partial or total destruction of a national, ethnic, racial or religious group, or of a group determined by any other arbitrary criterion, one of the following actions are committed or caused to be committed against members of that group:

Explanation: in light of Article 25, 28 & 30 of the Rome Statute, commission of the crime is must and while committing, these elements (conspiracy, incitement and complicity) of the crime could present as elements of intent, which will lead it to individual criminal liability under the periphery of superior command responsibility.

²⁹ Thomas E. Davies, *How the Rome Statute Weakens the International Prohibition on Incitement to Genocide*, Harvard Human Rights Journal, vol. 22, 2009, p. 245, Available from: <http://harvardhrj.com/>, accessed on 11.11.2019.

³⁰ ICC Statute, Article 25(3)(f) —Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

³¹ (f) any other crimes under international law. In the *Chief Prosecutor vs. Professor Ghulam Azam*, (ICT-BD Case No. 06 of 2011) in Para 135, the Tribunal found: Incitement is not an offence which has been specifically mentioned in section 3(2) of the Act. However, direct and public incitement to commit crime against humanity and genocide is a recognized crime under customary international law and as such the offence of incitement is a crime under international law which is also specified in section 3(2)(f) of the Act. Incitement to commit genocide is an inchoate offence. For Judgment see: <http://ict-bd.org/ict1/ICT1%20Judgment/ICT%20BD%20Case%20NO.%2006%20of%202011%20Delivery%20of%20Judgmentfinal.pdf>.

³² (g) attempt, abetment or conspiracy to commit any such crimes.

³³ (h) complicity in or failure to prevent commission of any such crimes.

- Willful attack on life;
- Serious attack on psychic or physical integrity;
- Subjection to living conditions likely to entail the partial or total destruction of that group;
- Measures aimed at preventing births;
- Enforced child transfers.

This definition, though, inspired by the Genocide Convention, two remarks can be made. First of all, while the conventional definition defines genocide as the intent to destroy a group, the French definition emphasizes the planned and systematic nature of the crime and, to this end, adopts a more objective criterion which is the existence of a concerted plan.³⁴ Secondly, the scope of application of the definition is much enlarged.³⁵ The Genocide Convention only affords protection to ‘national, ethnic, racial and religious’ groups as such, the French definition granting protection to these groups also protects groups defined by any other arbitrary criterion thus making the scope much wider leaving room for a broader interpretation.³⁶ Adopting a more progressive approach than the Genocide Convention, which is often criticized for its narrow scope of granting protection to victims, the French definition is a vivid example of national formulation or extension of scope for application of genocide definition.³⁷

3.2. Iceland

The most contemporaneous Act along with that of *International Crimes (Tribunals) Act, 1973* [hereinafter, referred to as — ICTA 1973] of Bangladesh was the *Genocide Act, 1973 of Iceland*, which was enacted to give effect to the Genocide Convention and to provide for other matters connected therewith.³⁸ Therefore, necessarily this Act adopted the very definition that is provided in the Genocide Convention.³⁹ However, it seems quite paradoxical that it has adopted this definition since it was one of the 29 countries that voted for the inclusion of ‘political group’ as one of the groups in the definition.⁴⁰

3.3. Italy

Italy enacted Law No. 962 of 9 October 1967 to prevent and punish the crime of genocide. The Italian definition is quite identical to that of the Genocide Convention; however, it has attached a detailed sentencing guideline than the French or Iceland’s model.⁴¹ In short, it has attached separate punishment for every genocide act. For example, under Article 1: “*Whoever, in order to destroy*

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Retrieved from <http://www.preventgenocide.org/law/domestic/ireland.htm>, accessed on 22.11.2019.

³⁹ Ibid, section 2(1): A person commits an offence of genocide if he commits any act falling within the definition of “genocide” in Article II of the Genocide Convention.

⁴⁰ D. L. Nersessian, *Genocide and Political Groups*, Oxford University Press, Oxford, 2010, p. 70.

⁴¹ Retrieved from <http://preventgenocide.org/it/legge.htm>, accessed on 22.11.2019.

in whole or in part, a national, ethnical, racial or religious group as such, commits acts intended to cause death or grievous bodily harm to members of the group, and punished with imprisonment from twenty-four to thirty years. The same penalty applies to those who, in the same order, submit it on the group conditions of life calculated to cause the physical destruction in whole or in part of the group."⁴²

Different punishments were awarded in Article 4:

- Acts intended to commit genocide by limiting births.
- Anyone imposes or implements measures to prevent or limit births within a national, ethnic, racial, or religious group, in order to destroy in whole or in part the group itself will punish with imprisonment from twelve to twenty-one years.⁴³

Italy has also added provisions in its Constitution for the extradition of those who are accused of Genocide so that it can try them within its jurisdiction.⁴⁴

3.4. Bangladesh

In Bangladesh, the definition of genocide is provided in section 3(2)(c) of *the International Crimes (Tribunals) Act, 1973* or 'ICTA 1973', which is: "*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 births within the group; Forcibly transferring children of the group to another group.*"

Unlike the other national definitions discussed above, this Act is only applicable to try the genocide that was committed in 1971 by the Pakistan Army and the local auxiliary forces. It is to be noted that legislations of France, Iceland, or Italy did not include 'political group' in their definition.

4. 'As such' vs. 'Such as'

It is to be noted that there is a major difference between the definition of genocide in ICTA 1973 and the definitions provided in most of the national and international statutes, i.e., section 3(2)(c) of ICTA 1973 uses the words — 'such as' instead of the words — 'as such' - that are used in other statutes like ICTY, ICTR, ECCC, ICC including the Geneva Convention. The implication of 'as such' is - these words draw a boundary around the acts committed with intention or commonly known as 'genocidal acts', which are:

- 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

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

destruction in whole or in part;

- Imposing measures intended to prevent births within the group;
- Forcibly transferring children of the group to another group.

However, the words — ‘such as’ of ICT-BD removes such boundary around — the acts committed with intention, rather the above-mentioned five acts stand as examples of such — acts committed with intention. The ICT-BD is at liberty to incorporate more instances of such acts that were committed in 1971 during the war of liberation of Bangladesh with the intention to destroy, in whole or in part, any of the groups mentioned in section 3(2)(c). In reality, the ICT-BD is yet to use this wide-open door allowed to them and in all the judgments, they were rather cautious in considering any explanation that is not widely approved by other international tribunals.⁴⁵

5. Nature of Atrocities Committed against Religious Minorities of Bangladesh: Genocidal or not?

To ascertain whether the atrocities committed against the religious minorities of Bangladesh falls within the definition of genocide or not, it needs to be assessed that whether the elements of genocide, e.g., genocidal group, genocidal intent, genocidal acts, etc., are there or not. For assessing, the author will discuss a few incidents of Bangladesh and will try to identify the elements of genocide, if any, in them.

5.1. The Enemy/Vested Property Act and its Effect

The right to property is a human right⁴⁶ that is recognized by Article 17 of the *Universal Declaration of Human Rights* and Article 42⁴⁷ of the *Constitution of the People’s Republic of Bangladesh*. The Enemy/Vested Property Acts are a group of legislations that denies Bangladeshi Hindus’ right to own and enjoy property.⁴⁸

As mentioned earlier, the *Enemy Property (Custody and Registration) Order II of 1965* was enacted by the Pakistan Government to acquire the properties that were left by the Hindus during the

⁴⁵ For example, in the *Chief Prosecutor vs. Delowar Hossain Sayedee*, ICT-BD Case No. 01 of 2011, Prosecution submitted that the accused — forcefully converted Hindus to Muslims... with an intent to destroy, at paragraph 43, page 27. However, the Tribunal did not hold the accused responsible for genocide for forcibly converting Hindus to Muslims since it was not recognized previously in any other international Tribunals. Prosecution got to place ‘forceful conversion’ as a means to commit genocide due to the presence of the words —such as. For Judgment, see: <http://ict-bd.org/ict1/judgments.php>.

⁴⁶ Right to property is not an absolute human right and it is available subject to certain legal bars, e.g., payment of taxes.

⁴⁷ “42. (1) Subject to any restrictions imposed by law, every citizen shall have the right to acquire, hold, transfer or otherwise dispose of property, and no property shall be compulsorily acquired, nationalized or requisitioned save by authority of law [(2) A law made under clause (1) of this article shall provide for the acquisition, nationalization or requisition with compensation and shall fix the amount of compensation or specify the principles on which, and the manner in which, the compensation is to be assessed and paid ; but no such law shall be called in question in any court on the ground that any provision of the law in respect of such compensation is not adequate.]

⁴⁸ *The European Convention on Human Rights*, in Protocol 1, article 1 acknowledges a right for natural and legal persons to “peaceful enjoyment of his possessions”, subject to the “general interest or to secure the payment of taxes”.

Indo-Pak war in the 1960s.⁴⁹ The Indo-Pak war ended and so ended the regime of Pakistan in 1971, but the law continued to exist.⁵⁰ In this process, the State became the owner of these vested properties and transferred a lot of these lands to private individuals. So far formally 2,01 million-acre lands were labeled as ‘vested property’⁵¹ and informally, the total number is predicted to be 10 million acres⁵². In 2001, the government enacted the *Vested Property Return Act 2001*. However, that was not implemented until recently in 2011 when the government declared to establish two separate legal entities, i.e., Tribunal to return the properties owned by the government and a commission to return the privately owned properties. This has again resulted in complete chaos.⁵³

Now the issue of this paper is not the aftermath of the vested property jurisprudence, but the question - whether this has amounted to genocide or not? The first requirement of the ‘genocidal group’ is satisfied since the victims are Hindus of Bangladesh. The jurisprudence is affecting the group in whole or in part - that is also evident from the statistics that are presented above. Apart from these two issues - the crucial questions are: how to establish ‘genocidal intent’ and ‘genocidal act’?

5.2. Specific Intent to Commit Genocide

Under the regime of International Criminal Law, specific intent can be inferred from various facts, for example:

- Proof of a plan to destroy the group⁵⁴;

⁴⁹ The historic India-Pakistan War continued for 17 days from Sept 6 to Sept 22, 1965 that ended with Tashkent declaration. During the war, Pakistan promulgated *Defense of Pakistan Ordinance* (Ord. no XX111 of 1965) followed by Defense of Pakistan Rules under this ordinance. Under these rules, the government made an executive order on 9 September 1965 named *Enemy Property (Custody and Registration) Order II of 1965* that eventually came to be known as the *Enemy Property Act*. India was declared as enemy country and thus, all interests of enemy, individual properties, firms, companies, lands and buildings should be taken over as enemy property; D. K. Nath, *Vested Property Act and the minorities: ‘tale of woes’*, Retrieved from www.bdnews24.com, 23 August 2013, See more on: <http://opinion.bdnews24.com/2013/08/23/vested-property-act-and-the-minorities-tale-of-woes/#sthash.RSrFlot4.dpuf>, accessed on 22.11.2019.

⁵⁰ The state of emergency was lifted on 16 February 1969, but the government promulgated a new ordinance named *the Enemy Property (Continuance of Emergency Provisions) Ordinance 1969*. This discriminatory law against the minority Hindu community remained in force until independence of Bangladesh. The *Bangladesh Vesting of Property and Assets Order 1972* (Order 29 of 1972) combined the properties left behind by Pakistanis and enemy properties. However, in 1974, the government passed the *Enemy Property (Continuance of Emergency) Provisions (Repeal) Act* (Act XLV of 1974) repealing the Ordinance 1 of 1969. Despite the fact of repealing ordinance 1 of 1969 under the Act of 1974, all enemy properties and firms were vested with the custodian of enemy property under the banner vested property. Thus, the problem continued creating opportunities for land grabbers to adopt foul means in collaboration with corrupt officials like *Tehsildars* of land departments. Thus, the legacy of this black law continued for last 48 years as tale of woes of religious Hindu minorities generating continuous communal hatred and discontent between Hindus and Muslims; *Ibid*.

⁵¹ A. Barkat et. al., *Ibid*, p. 73.

⁵² According to Advocate Subrata Chowdhury, General Secretary, *Arpita Sampatti Ain Protirodh Andolan* (ASAPA) over telephone interview on 01.12.2019.

⁵³ *Ibid*.

⁵⁴ *Prosecutor vs. Dusko Sikirica et al*, Case No. IT-95-8-T, Judgments on Defence Motions to Acquit, 3 September 2001, para 44-46, <http://www.icty.org/x/cases/sikirica/tjug/en/010903r98bis-e.pdf> (accessed on 29.11.2019). The author has also submitted this element as a part of his legal submission in *The Chief Prosecutor vs. Abdul Jabbar Engineer*, ICT-BD-1 Case No. 01 of 2014 on 30.11.2014.

- Accused person's (here it can be a state or an organization) aiding, abetting, and/or complicity to commit genocide⁵⁵;
- Acts committed against the same group by the same perpetrators⁵⁶;
- The scale of atrocities committed⁵⁷;
- The fact of deliberately and systematically targeting victims on account of their membership of a particular group while excluding the members of other groups⁵⁸.

If we look deeply into the situation related to the Vested Property of Bangladesh, then we will see that the plan to destroy the group is evident from the events taking place since 1947. It is evident now that there was an Anti-Hindu state policy in then Pakistan and that is evident through their state strategy and the continuous decrease in the number of the Hindu population of the then East Pakistan, which continued even after the independence of Bangladesh. All the laws, rules, regulations and gazettes that were passed after the killing of Father of the Nation *Bangabandhu Sheikh Mujibur Rahman* established the aiding, abetting and facilitation of the State, for example, *Ershad* (the military dictator and Ex. President of Bangladesh) publicly declared to stop labeling any property as Vested Property during his autocratic regime, however, those remained as a 'mere' declaration and we see during his regime also properties continued to be acquired as Vested Property.⁵⁹ The same statistics also establishes the level of atrocities. Finally, the fact that the Hindus are the only victims of these Act, whereas after independence the Act was kept alive so that the properties of those Bangladeshis who aided and abetted the Pakistani Occupation Army actively and left Bangladesh after independence, can be acquired and controlled under state management; however, none of their properties were acquired under the Vested Property regime. Even it is alleged that the present Vested Property Return Act regime through the latest amendments has transformed the law into an instrument of grabbing the property of the religious minorities.⁶⁰ Therefore, the genocidal intent of the state is established.

The last part is whether illegal land grabbing falls within the frame of 'genocidal acts' or not and 'genocidal acts' most commonly are - 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 births within the group; and forcibly transferring children of the group to another group.

Even though there is an outcry that land grabbing is a part of structural genocide⁶¹, this is a stan-

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ D. K. Nath, *Vested Property Act and the minorities: 'tale of woes'*, Retrieved from www.bdnews24.com, 23 August 2013.

⁶⁰ Per Prof. Abul Barakat, at a roundtable titled — *The Vested Property Repeal (Amendment) Act, 2013* jointly organized by nine rights organizations and citizen groups, i.e., Ain o Salish Kendro, Bangladesh Hindu Buddha Christian Oikya Parishad (BHBCOP), Nijera Kori, Association for Land Reform and Development (ALRD), Arpito Sampatti Ain Protirodh Andolon (ASAPA), Bangladesh Puja Udjapon Parishad, Bangladesh Legal Aid Services Trust (BLAST), Sammilito Samajik Andolon and Human Development Research Centre (HDRC) at CIRDAP Auditorium on 13 June 2014. Vested Property Repeal (Amendment) Act 2013 part of plot, *The Bangladesh Chronicle*, 14 June 2014, <http://www.bangladeshchronicle.net/index.php/2013/06/vested-property-repeal-amendment-act-2013-part-of-plot/>, accessed on 25.11.2019.

⁶¹ Land grabs part of structural genocide - interview with Tamil Nadu journalist Maga Tamizh Prabhakaran, *Tamil Guardian*, 10 February 2014, <http://www.tamilguardian.com/article.asp?articleid=9912>, accessed on 23.11.2019.

dard practice that to be considered as genocide any act should fall within the prescribed ‘genocidal act’. If we apply narrow interpretation, then land grabbing may not fall within the genocidal acts. If we apply wider interpretation and use ‘such as’ just like the definition of Bangladesh in ICT-BD, then definitely this will be considered as a genocidal act. Under the narrow interpretation, we can also put land grabbing into the category of ‘deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part’, since without land it is not possible for a man to live by building a roof over his head, let alone continuing a dignified life. All the basic necessities of life and the right to life itself will not exist if the right to property is denied to human beings.⁶²

5.3 Ramu Incident⁶³

In the heart of the 2012 incident of *Ramu Buddha Mandir Tragedy* was the propaganda through a faked Facebook id and the hate speeches against the Buddhists.⁶⁴ The history of hate speech is quite old in Bangladesh. National, racial, or religious hate speech does not fall within the scheme of freedom of speech⁶⁵ and therefore, it is prohibited under international law, e.g., Articles 19 and 20 of the *International Covenant on Civil and Political Rights* [hereinafter, referred as ICCPR] and Article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination* [hereinafter, referred as CERD], etc.⁶⁶, as well as under national law of Bangladesh, e.g., Article 39 of the *Constitution of Bangladesh*⁶⁷ read with section 153A of the *Bangladesh Penal Code 1860*.⁶⁸

Hate speech in situations, like - Ramu, which worked as incitement to commit any crime, including genocide, is prohibited as per Article 39 of the Bangladesh Constitution. It has been described above that incitement to commit genocide is a crime, both under international law and national law. The present position regarding the elements to prove direct and public incitement to commit genocide against an accused is well settled in the ICTR case of Akayesu, which was further advanced in another ICTR case of Muvunyi.⁶⁹ According to Akayesu, the *actus reus* and *mens rea* for committing direct and public incitement to commit genocide are:⁷⁰

- the act of incitement must be more than a mere vague or indirect suggestion and must specifically provoke another to engage in a criminal act;

⁶² *Franchis Corelli vs. Union Territory of Delhi*, AIR 1981 SC 746 in Tapas Kanti Baul, Jiboner Odhikar ebong Jonosarthe Mamla (Right to Life and Public Interest Litigation) in Ain-O-Salish Kendro (ed.), Jonosarthe Mamla (Public Interest Litigation), 4th edn. Dhaka, Bd Link, 2012, pp. 128-135.

⁶³ Bangladesh Hindu Buddhist Christian Unity Council (ed.), Ibid.

⁶⁴ Ibid,

⁶⁵ V. Muntarhorn, *Study on the Prohibition of Incitement to National, Racial or Religious Hatred: Lessons from the Asia Pacific Region*, Retrieved from http://www.ohchr.org/documents/issues/expression/iccpr/bangkok/studybangkok_en.pdf, accessed on 22.11.2019.

⁶⁶ Ibid.

⁶⁷ Retrieved from http://bdlaws.minlaw.gov.bd/sections_detail.php?id=367§ions_id=24587, accessed on 22.11.2019.

⁶⁸ V. Muntarhorn, Ibid.

⁶⁹ Angelique Leondis & Ying-Lee Lai, *Humanitarian Law Perspectives 2008: Topic 5: The International Criminal Tribunal For Rwanda*, Retrieved from http://www.redcross.org.au/files/2008_ICT_for_Rwanda_Research_Paper.pdf, accessed on 23.11.2019.

⁷⁰ Ibid.

- the “direct” element of incitement needs to be considered in light of its cultural and linguistic context;
- “directness” requires establishing a causal link between the act characterized as incitement and a specific offense;
- there should be a factual inquiry into whether the persons for whom the incitement was intended immediately grasped the implication thereof;
- private incitement to commit genocide does not satisfy the public element of the offense;
- the accused himself must possess the specific intent to commit genocide; and
- the offense is still satisfied even if the actual acts of genocide that the accused incited do not occur.

Now if we analyze the primary stage in the *Ramu* massacre, then it can be identified that most of the above-mentioned elements, especially the *actus reus*, can be established quite easily. However, two questions, i.e., whether this mayhem was spontaneous or pre-planned and whether the alleged accused persons incited with the intention of genocide or not. Regarding nature, Prof. Kaberi Gayen argued that this whole attack was pre-planned since most of the attackers were from outside and they arrived at the scene of occurrence within an hour of hate speeches were preached by the local political leaders (surprisingly, leaders from all political parties participated).⁷¹ Now for incitement to genocide, it does not matter whether the event is spontaneous or pre-planned since the event of genocide does not have to take place to convict a person for inciting to genocide.⁷²

Regarding the intention of ‘the hate speech preacher’, it would be enough to establish whether he had the intention to destroy the group in whole or part. It can be said that considering the scale and gravity of the crime committed in *Ramu*, it would not be hard to infer the perpetrators’ intention. Presently, the reality is - without the presence of the crime in our penal code, the police will never investigate to ascertain whether they had the intention to commit genocide or not; however, the police are still investigating the intention of those people for their crimes under the penal code.

5.4. Rape of Purnima

Purnima, a 12-year-old girl from Bangladesh was gang-raped just because she is Hindu.⁷³ Her parents and sister were bitten mercilessly and then they were locked and later, her father was offered money to withdraw the case and when he did not want to, then they were threatened to leave the country and finding no other alternative, they fled away from the village.⁷⁴ ICTR in Akayeshu has decided for the first time, so far as the last time as well, that rape can be an *actus reus* of genocide if it is committed with an intention to destroy a group in whole or in part.⁷⁵ Unfortunately, there is

⁷¹ Prof. Kaberi Gayen, *A Known Compromise, A Known Darkness: Ramu-nisation of Bangladesh*, Daily Star, Forum, Volume 6, Issue 11, 2012, Retrieved from <http://archive.thedailystar.net/forum/2012/November/known.htm>, accessed on 24.09.2020.

⁷² Angelique Leondis & Ying-Lee Lai, *Ibid.*

⁷³ John Vidal, *Rape and Torture Empties the Village*, The Guardian, 21 July 2003, <http://www.theguardian.com/uk/2003/jul/21/bangladesh>, accessed on 25.11.2019.

⁷⁴ *Ibid.*

⁷⁵ Sherrie L. Russell Brown, *Rape as an Act of Genocide*, 21 Berkeley J. Int’l Law. 350 (2003), Retrieved from <http://scholarship.law.berkeley.edu/bjil/vol21/iss2/5>, accessed on 25.11.2019.

no record in hand to show how many Hindu families fled their native villages or left the country altogether either selling their property cheaply or abandoning their property completely. There is also no record to show that this is a state policy. However, the question can still be raised about the intent of the perpetrators who are responsible. The genocidal intent has to be established using the elements mentioned above. Here, again the absence of the definition of genocide in the penal code is felt.

The alarming issue is - there is ample evidence to show that the police turned a blind eye towards the events where Hindu women and girls are raped by someone who claims to be an activist of the government party.

6. Proposed Definition of Genocide to Address these Atrocities

The case studies discussed above clearly show the urgency to include the crime of genocide in the Bangladesh Penal Code. These are not the only cases against the religious minorities of Bangladesh and there are many more instances of oppression including cultural genocide⁷⁶ through the forced conversion⁷⁷ of religious minorities into Islam and all of these crimes may be defined as genocide if they are committed with genocidal intent. The biggest task for the lawmakers would be to define the *actus reus* of genocide. The definition of genocide for Bangladesh should not be limited to the *actus reus* or genocidal acts mentioned in international instruments, like the *Genocide Convention* or the *ICC Statute*, where ‘as such’ is used. Rather, they should opt for ‘such as’ which is used in the *ICTA 1973* of Bangladesh and that will give them a wider edge in including more genocidal acts. Thus it is suggested that it would be better if the lawmakers survey to identify the common *actus reus* of genocide that are prone and typical to the destruction of religious minorities of Bangladesh in whole or in part.

Bangladesh may not be ready politically to include the ‘political group’ as a genocidal group in that definition. However, the definition should include, along with religious groups, national, racial, and ethnic groups considering the situation of the tribes living in the Hill Tracts of Chittagong and the indigenous people living in the plain lands.

Regarding genocidal intent, the lawmakers can adopt the same standard that is described in the Genocide Convention, which is subsequently being adopted in other international statutes, like - ICC Statute.

⁷⁶ Raphael Lemkin described eight dimensions of genocide - political, social, cultural, economic, biological, physical, religious, and moral - each targeting a different aspect of a group’s existence. Cultural genocide extends beyond attacks upon the physical and/or biological elements of a group and seeks to eliminate its wider institutions. This is done in a variety of ways, and often includes the abolition of a group’s language, restrictions upon its traditional practices and ways, the destruction of religious institutions and objects, the persecution of clergy members, and attacks on academics and intellectuals. Elements of cultural genocide are manifested when artistic, literary, and cultural activities are restricted or outlawed and when national treasures, libraries, archives, museums, artifacts, and art galleries are destroyed or confiscated. For details see; David Nersessian, *Rethinking Cultural Genocide under International Law: Human Rights Dialogue: Cultural Rights*, 22 April 2005, available from Carnegie Council for Ethics in International Affairs, accessed on 26.11.2019.

⁷⁷ The absorption of Armenian women and children into Muslim households was a genocidal act. For details see; Ara Sarafian, *The Absorption of Armenian Women and Children into Muslim Households as a Structural Component of the Armenian Genocide*, in Omer Bartov, Phyllis Mack (eds.), *In God’s Name: Genocide and Religion in the Twentieth Century*, Berghahn Books, New York, 2001, pp. 209-221. Also, Lemkin suggested forced conversion of Americans by Spanish priests amounted to cultural genocide. For details see: A. Dirk Moses, *Empire, Colony, Genocide: Keywords and the Philosophy of History*, in A. Dirk Moses (ed.), *Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History*, Berghahn Books, New York, 2008, pp. 3 - 54.

For defining genocide in the Penal Code of Bangladesh to address the atrocities that are being committed against the religious minorities of Bangladesh, the lawmakers should follow the ‘tailor-made’ method which was undertaken by the lawmakers of both France and Bangladesh (while drafting *ICTA 1973*), rather than adopting a ‘referring’ method, like - Italy (where they just adopted the definition in the Genocide Convention rather than detailing it), or ‘copy-paste’ method of Iceland. Regarding punishment, they can follow the style of the Italian Act referred above and thus designate separate punishment for separate stages of genocide.

Finally, the following draft definition of genocide for the context of Bangladesh is suggested as follows:

Genocide: meaning and including any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, such as:

- Killing members of the group;
- Causing serious bodily, for example, rape, 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, for example: making them landless by grabbing lands or forcible conversion;
- Imposing measures intended to prevent births within the group;
- Forcibly transferring children of the group to another group.

The State may include this in Bangladesh Penal Code or enact a new law altogether to cover possible crimes of genocide.

7. Conclusion

Politically, it will not be easy to draft a definition of genocide and to include it in the Penal Code of Bangladesh or to enact a new law to that effect. Even it may be a far-fetched dream, probably. However, there is no scope to deny that genocide is being committed against the religious minorities of Bangladesh, both state-sponsored and individually and the crime is required to be included in the Penal Code or in a new law to address the atrocities that are being committed against them resulting into their destruction just because they are not Muslims in whole or in part. It is suggested that a tailor-made definition of genocide is made to address the situation of religious minorities of Bangladesh with special emphasis on the ‘typical’ *actus reus* of genocide common in their case.

As the agony of religious minorities in Bangladesh since 1947, the religious harmony among the faiths of Bangladesh is also a matter of common knowledge. Destruction of any of the 23 religious groups will destroy the multi-faith culture of Bangladesh. According to the statistics, a lot of damage has already been done to the number of populations, however, the main damage has been done to the faith people used to have between each other resulting in insecurity among the neighbors. There is a ray of hope since the end of the culture of impunity has started in Bangladesh through the trial of the killers of the *Bangabandhu*, the trial of the killing of the four leaders of our independence, and finally through the establishment and ongoing trial of the International Crimes Tribunals of Bangladesh. If the genocide is inserted in the Bangladesh Penal Code or a new enactment, then a positive step will be taken to mend the ruptured faith among the people of Bangladesh, especial-

ly those who belong to religious minorities and that will fulfill the aspiration of independence of Bangladesh.