

The Bangladesh War Crimes Trials - Strengthening Normative Structure

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Abstract

Post-Nuremberg there has been an interesting variety of criminal justice mechanisms to ensure avoidance of impunity for war crimes. Apart from the ICTY, ICTR mechanisms and the ICC, States have also exercised sovereign territorial right to try war crimes. State interests and international concern aiming at ensuring avoidance of impunity can be effectively blended in the institution and applicable law too, like was done in Kosovo, Timor and Cambodia. Handled by international community it could restore the credibility of the State's intention to try war crimes. Bangladesh's law on punishing war crimes during the liberation war has come in for much criticism for its features that are against the fundamental due process norms that apply across the diversity of justice mechanisms. This research paper looks at the recent judgment of the ICT in Bangladesh from the perspective of the due process concerns and presents the hybrid tribunals as an alternative methodology for criminalizing war crimes in Bangladesh legislation.

Key words: international humanitarian law, war crimes, Bangladesh, ICTA, 1973, hybrid tribunals

1. Introduction

International criminal law has chartered its journey through a variety of forums growing in content and meaning of the proscribed criminal behavior and violations as well as in the methodology of penalizing such violations. A pertinent factor that remains is ensuring the local ownership of these trials by the affected population, especially in the context of the increased and diverse mechanisms that are now available for fighting impunity at international level. Local ownership of trials can be largely addressed through domestic prosecution of the violations, but questions arise as to the strength of the legal systems to do so, especially if they are fledgling States or are facing issues of political instability. Also to be noted is the fact that post-Nuremberg, the substantive law on the violations under international law has gained much volume, there has been an increased and extended articulation of the violations that could be subjected to prosecution by ICC and other mechanisms of international cooperation.

1.1 Features of Transitional Justice

The transitional justice during the post-Nuremberg period has developed the discussion on accountability around four major issues of the accountability process during this period.¹ Firstly, while the gains of the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are an important chapter in the history of International criminal law, their possibilities and the pitfalls cannot be ignored. The fact that criminal impunity is unacceptable is well established now with many states participating in the establishing of the international forum for the trial of war crimes in Yugoslavia and Rwanda. ICTY and ICTR are significant examples in international community's commitment to cooperate in punishing impunity.²

The second feature of this discussion on accountability is the growing incidence of truth commissions, an effort at the reconciliation process. This mechanism had its origins in Latin America, and presented itself as a possible example for most conflict zones through its famous example in South Africa.

Another feature of this discussion on transitional justice is the invocation of universal jurisdiction law – Belgium used this method and Spain used this example for pleading extradition of Augusto Pinochet of Chile – for human rights abuses and torture, though it is a subject of much debate.

The fourth feature of the transitional justice is the issue of accountability mechanisms through State legislations, especially for allowing civil tort claims by the victims of human rights abuses – the Alien Tort Claims Act in the United States, a mechanism that has been received with much skepticism and subjected to much debate.³

2. Hybrid Tribunals

A possible fifth, and an innovative, feature of this transitional justice that is now emerging after proving itself of being a significant contribution to the international criminal law – an ad hoc mechanism called the Hybrid Courts. A mechanism that was much welcomed by the international community, these hybrid courts are characterized by a mix of national and international components and is thus said to “hold a good deal of promise and actually offer an approach that may address some of the concerns about purely international justice, and purely local justice on the other.”⁴ A feature of this model is the combination of the knowledge and strengths of the ad hoc mechanisms with the benefits that are exclusive to the local prosecutions. It was tested in a post-conflict scenario with no scope for an international tribunal as in East Timor and Sierra Leone or there is an international tribunal but is incapable of addressing the sheer volume of cases reported on the human rights violations during the conflict and post-conflict period, as in Kosovo, and was found to meet the needs of the situation.

The benefits that arise from these institutions are significant – they are blend of the international and municipal law in the institutional apparatus as well as the applicable law. For example foreign judges work along with domestic judicial officials on trials of cases prosecuted and defended by local lawyers with assistance from their counterparts in other countries. The applicable law is a domestic law that has been layered and tempered with internationally acceptable standards of justice.

2.1 Why Hybrid tribunals

One of the most significant gains from the experience of the ad hoc/hybrid tribunals’ model has been effective in the areas of legitimacy, capacity and norm penetration. A purely international forum would also lack legitimacy as the victims of crimes at the trial, lack ownership of these trials. Being far removed from the scene of the crime, the key actors in the tribunal may be unfamiliar with the conflict and culture in which the crimes have been committed. Thus much of the benefit that results from the trial may not have actually reached the victim population. One of the foremost issues with regard to the prosecution forums in the domestic scenario is that since they are post-conflict structures they are not above questions of impartiality and independence.

On the second issue of capacity, most post-conflict societies are taking fledgling steps at reconstruction of ravaged administrative structures including the legal structures.⁵ They are as such not sufficiently capable of handling issues of international crimes and international law. On the other hand, the international courts have also been subjected to criticism that they have built extensive international case-law but not much information that is vital to domestic capacity to handle international crimes.

On the issue of penetration of norms, while the international courts have developed, elucidated and enforced fundamental norms significant to criminalization of certain conduct as international crimes, they have faced the difficult of not being customized for the domestic circumstances. (Dickinson, 2003) The domestic tribunals apart from lacking expertise to try international crimes also face difficulties in addressing international human rights standards of fair trial, as was clearly demonstrated in the case of Bangladesh, which will be discussed in the pages to follow.

Hybrid courts, being a mix of both the legal systems, offer a blend of legitimacy by providing ownership without affecting independence and impartiality; they help prosecute more perpetrators in a less time, as compared to the costs of an international tribunal; to conduct a domestic trial that ensures compliance with international fair trial norms.

Increasingly this mechanism is being used to address arguments raised on the complementarity questions that come up when States try to ensure domestic criminalization of offences in conflict zones. The Preamble of the Rome statute⁶ says that the ICC shall be complementary to national criminal jurisdictions.⁷ While the Rome statute did not use the word complementarity, the crux of its intention can be derived in the word admissibility in Art.17. In short form, Article 17 states that the Court may treat a matter before it as inadmissible in the following situations - (a) a State is already investigating or prosecuting, (b) the State has already investigated and decided not to prosecute, (c) the accused has already been tried or (d) the case is not of sufficient gravity. A case is admissible, however, if the Prosecutor can prove that any of the preceding scenarios resulted from the State’s “unwillingness” or “inability” to “genuinely” prosecute.⁸ The unwillingness factor is evaluated on the basis of whether the national proceedings were designed to shield the accused or constituted an unjustified delay inconsistent with bringing the accused to justice. Inability, meanwhile, is determined on the basis of whether “due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its

proceedings.”⁹ This research paper presents the hybrid tribunals as an effective alternative for the Bangladesh effort at war crimes prosecution, especially as it allows for traversing beyond the discussion on the issues of admissibility and complementarity that are a part of the discourse in international criminal law.¹⁰

3.0 Bangladesh War Crimes Trials – Introduction

An independence gained after nine months of the war now termed as liberation, a war that saw dissections on religious lines and resulted in atrocities and crimes that language fails to describe – Bangladesh began its journey as a nation on the eastern side of India after separating from its parent State Pakistan in the year 1971. The birth pangs continued to haunt the country while it did precious little in the last three decades to overcome the horrors of the conflict zone in the months of liberation war. A legislation was enacted in the year 1973 to assuage the feelings of the victims of horror that affect almost three million people in death, and three times that number had fled the country into neighbouring India to escape persecution from the Pakistan Army and the auxiliary forces that supported it and the private armies that are a common feature in South Asia, but it remained frozen in the gazette, as Bangladesh continued its journey towards stability, as peace and democracy became interregnum features between two military coups.

In the year 2010 interest in the war crimes accountability was revived with the Government extracting and ever-greening the legislation for its curative value. But it is this updation of the legislation that came in for much international scrutiny and criticism.¹¹ Bangladesh’s legitimate claims at prosecuting rights violations during and immediately after its war for liberation has gained much international support, especially because of the astounding volume of horrors that were visited upon the population of the former East Pakistan during the nine months of the liberation struggle. A published report claimed the figures reflecting human rights violations as on the day of independence of Bangladesh (16/12/1971) stood at an estimated 30 million dead, with a staggering 200,000 incidents of reported sexual violence by the Pakistan Army and their local Bengali supporters. There were also instances of violence unleashed on religious lines.

Attempts to bring in accountability of the offenders for human rights violations were largely unsuccessful as the legislative intent for such attempt was absent, so is the executive will to prosecute for such violations. A 100,000 people (members of the Pakistan Army) were arrested and investigated for the war crimes, resulting in conviction of only 752¹². The convicted were later released and allowed to leave the country as a result of a tri-partite agreement between Pakistan and Bangladesh and India. Post-independence, Bangladesh moved intermittently between military regimes and fledgling efforts at democracy, thus leaving any thoughts about war crimes accountability to a forgotten chapter in the history of the country. Attempts for truth and reconciliation were also not pursued neither were the role of the local participants in the violation ever discussed. This allowed the local participants against the liberation war and their acts of violations remain beyond any level of accountability, thus leaving distaste and a sense of frustration and revenge in the large masses of the country’s population, an anger that was reflected in the recent unrest witnessed in the capital, Dhaka, after the judgments were pronounced by the ICT (International Crimes Tribunals) Tribunals. Impunity from the accountability process also allowed the local participants in the human rights violations of 1971 to group into political formations and attempt to gain public acceptance despite their role in the history of the nation. Also of mention here is the tri-partite treaty (India being the third party) that Bangladesh signed with Pakistan, allowing immunity from trial and accountability to the members of the Pakistan Army for the horrific events of the 1971 war. The spill-over effect felt from this treaty was that there was not much inclination to punish the local participants in the war time atrocities when the main perpetrators of those activities gained immunity.

3.1 The International Crimes Tribunal Act, 1973

The Awami League (a political party in Bangladesh, that was formed by the participants in the liberation struggle of 197, awami means of the people, in Urdu) government in the year 2010 revived the war crimes prosecution process, by amending the International War Crimes Tribunal Act of 1973. Renaming it as the International Crimes Tribunal Act, the law is now directed at ensuring no impunity to perpetrators of the human rights violations during the armed conflict of 1971. Significantly enough, the word “war” has been dropped from the title keeping in mind the changing paradigm of armed conflicts in the post 1971 period. Not much of the history of drafting this legislation as well as the nature of the amendment process of 2010 is known, except that the intent was to ensure that every kind of a human rights violation is to be addressed. It is another fact that the provisions of the legislation itself do not match the legislative intent, either in its original version or in its amended version. The reason why the legislation has come into the centre stage of the discussion in international criminal law and international humanitarian law is because of the question whether crimes of

human rights violations in a conflict zone can ever be addressed by a domestic tribunal, keeping in mind the national mood in that conflict zone and the structural incapacities of the legal system in that country.

3.2 The Judgment of the International Crimes Tribunal

Interest on the Bangladesh war crimes prosecutions has been demonstrated in public spaces for long and some commentators were of the opinion that the tribunal could be an important international precedent, but they expressed doubts about the legislative intent as reflected through its provisions.¹³ The immediate reason for the international debate has been the judgment handed out by the tribunals established in Bangladesh by the government for the trial of international crimes.¹⁴ An appraisal of the case of Bangladesh has to begin with a brief narrative on the in absentia trial and judgment in the case of Abul Kalam Azad handed out by the International Crimes Tribunal -2, with the purpose of putting the legislation and the provisions of it in the perspective of this discussion – whether an ad hoc hybrid tribunal could be a better mechanism in ensuring accountability for human rights violations in conflict scenario.

The judgment in its introductory words has stated that the legislation International Crimes (Tribunal) Act, 1973, hereinafter referred to as the Act, is an ex post facto domestic legislation enacted in 1973 and that the second Tribunal itself that handed out the judgment was constituted in 2012 after the law has been subjected to updation via amendments in 2009. Also of significant mention in the judgment is the averment of the tribunal to the issues of fairness in the Act and Rules of Procedure formulated by the tribunals.¹⁵ The stated intent of the tribunals in fashioning their rules of procedure is the national needs, such as, the long denial of justice to the victims of the atrocities committed during the liberation war and the nation as a whole.¹⁶ It is of another matter that the presence of the feature and the level with regard to disclosure of such rules of procedure are a subject of debate in domestic and international legal forums.

The judgment handed out a sentence of conviction on Abul Kalam Azad for the offences of abduction, confinement and tortus as crimes against humanity as specified in Section 3(2)(a) of Act and on the offence of murder as crimes against humanity and for the offence of rape and for the offence of genocide for the killing of members of the Hindu community, genocide being specified as a crimes against humanity under Section 3(2)(c) of the Act. The sentence of death was handed out to the accused under Section 20(2) of the Act. Also of importance here is the statement of the tribunal with regard to the action proposed under this judgment as the accused is absconding and the trial was in absentia. The tribunal said that the sentence of death awarded shall be executed after causing the arrest of the accused or his surrender before the Tribunal, whichever is earlier. To be understood as an import of this statement is that if the accused is arrested before he surrendered there would be an execution of his sentence without his appearance before the judicial body.

3.3 Normative concerns in the ICT Act,1973

This research paper examines some of the fundamental questions of normative interest regarding the trial and the response of the tribunal to those questions within this judgment. The paper also attempts to critique the legislation to put forward an idea that having recourse to the hybrid tribunal mechanism would have been a better choice to address the concerns raised, internationally and in the domestic political space, on the accountability for the war crimes of 1971 liberation war.

Some of the fundamental questions and normative concerns raised and addressed by the tribunal are the following:

1. The affect of delay in prosecuting human rights crimes on the evidence in the case and the functioning of the tribunal. The tribunal quoted Art.1 of the Geneva Convention¹⁷ on the non-applicability of statutory limitations to war crimes and crimes against humanity¹⁸, as providing protection against even any statutory limitation in prosecuting crimes against humanity, genocide etc. Bangladesh is a signatory to this convention. Thus the tribunal justified prosecution as always open and not barred by time limitation.
2. The second concern was the validity of in absentia trial. The judgment handed out by ICT-2 pointed out that the Act of 1973 allowed such trials. Recourse was made to the example of the debate on in absentia trials that arose at the International Military tribunal at Nuremberg. Art.12 of the Charter of the International Military Tribunal allowed for such trials whenever the tribunal found it necessary in the interests of justice. Also to be noted here is that United Nations reversed its policy against trials in absentia with the Special Tribunal for Lebanon in 2006 by allowing the trials to commence without an accused ever showing up before the court, after being given sufficient notice and opportunity to do so.

3. On the question of retrospective application of a few provisions of the Act as incorporated through amendment, the tribunal was of the opinion that such amendment only reiterated its jurisdiction for ensuring avoidance of impunity for international crimes and as such cannot be seen as having retrospectively created new offences or classes of offenders.
4. On the question of immunity from prosecution granted in the tri-partite agreement that Bangladesh was a party to, the tribunal was of the opinion that keeping in mind the settled principle of *jus cogens* as referring to peremptory principles or norms from which no derogation is permitted. The offences mentioned in Section 3 of the Act were seen as breaches of customary international law and no treaty or executive act can create any clog to prosecute members of auxiliary forces or individuals or groups of individuals based upon an executive immunity which was part of the agreement. The support for this argument also came from the obligation imposed on the State by the UDHR.
5. On the issue whether the accused could be prosecuted under the Collaborators Order 1972 and hence if the present prosecution could be barred by the doctrine of Double Jeopardy, the tribunal opined that there was no evidence of such attempt being made. The tribunal also opined that the offences under the Collaborators Order 1972 were not the same as envisaged under the 1973 Act, and hence expressed disinclination to invoke the principle of Double Jeopardy.
6. Next concern was about the possibility of prosecution of the accused without addressing the need to prosecute his accomplices. Recalling the import of Section 4(1) of the Act¹⁹ the tribunal was of the opinion that if the accused was found guilty and criminally liable beyond reasonable doubt for his culpable acts, inaction in prosecuting his accomplices cannot be the reason for holding the former innocent or relieved from liability.
7. A much larger issue of the definitive aspect of the crimes submitted for prosecution under the Act of 1973 was also addressed by the tribunal. On a plea by the defence that Section 3(2) of the ICTA 1973 does not explicitly contain the 'systematic' element for constituting the crimes against humanity, the tribunal disagreed with the plea by having recourse to the elements and definition of crimes as contained in the Rome Statute. This argument of the tribunal is susceptible to controversy and academic debate, as such a reading would further the *ex post facto* element in the law. Further it is submitted that such reading of the developments in the law later to the date of the legislation in question should be through legislative action and not through the interpretation of a tribunal in any one given situation. On the question raised about the definition of the crimes against humanity as contained in Section 3(2) the tribunal utilized the later developments in the international criminal law on the necessity of an armed conflict of international nature, and also the definition of the crimes against humanity as adopted in the ICTY and ICTR²⁰. It is another matter that the tribunal has stated elsewhere in the judgment that it is not obliged to read the provisions contained in the Rome Statute for the purposes of this definition, as it is a domestic tribunal constituted under the domestic statute and not under the Rome Statute. Such selective reading of international criminal law institutional mechanisms has only reiterated the confusion and controversy around the work of the tribunal and the legislation itself.

At this stage, it is also necessary to address the normative concerns that lie within the legislation, specifically with regard to the 1973 Act's differences and inconsistencies with international law. These inconsistencies are grouped under three heads – a) with regard to the pre-trial process, b) the interval between the investigation and the trial, and c) the issues of concern with regard to the trial process.

3.3.1 The Pre-trial process:

Some of the fundamental rights of the accused that have been for long a part of the international jurisprudence of rights and have since then become rules of customary international law are conspicuously absent in this legislation. While Bangladesh is a signatory to the International Covenant on Civil and Political Rights and the jurisprudence of rights that was built into the Covenant, the rights of the accused under this legislation are very limited, with some of the basic rights not finding place.

1. The investigation process itself leaves much to be answered, with the government appointed investigating officers having the right to detain and question any person without notice. The law does not talk of any form of prior disclosure to the suspect, that he is being suspected of any violation under this law.
2. Of more surprise is the role of investigating officer/prosecutor. A person appointed as prosecutor is also competent to act as an investigating officer.²¹ It is not a mere speculation to say that the level of

investigation is always layered on the need of evidence for the prosecution to establish the guilt of the accused, and not an investigation into the happening of a human rights violation.

3. The most right of an accused, recognized in all legal systems of civilized nations, is the right against self-incrimination. The Act of 1973 has given a go to this important right, by stating that any person may at any time be called for investigation and questioning by the investigation officer and such person shall be bound to answer all questions put to him by an Investigation Officer and shall not be excused from answering any question on the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such person.²²
4. The investigation process itself leaves further questions about the methodology, as much of what happens is known to the world only through a press briefing, if information is available with the officer which according to him is sufficient for prosecution, the officer can even make a statement that there was a confession from the suspect.
5. The Act does not make a provision for a lawyer to be present during the investigation process and also does not have any provision allowing the suspect to confer with his defence counsel. Thus the role of the legal support is completely eliminated during the pre-trial process.
6. Despite there being a special tribunal under this legislation, cognizance can be taken by any magistrate for an offence of not responding to the summons for the investigation process, or not answering the questions put to him.²³ This only reaffirms the fact that the suspect does not have a right to remain silent and also that his silence or not answering a question makes it a punishable offence.
7. The lack of recourse to legal help extends to the formal charge process; the suspect/accused is not allowed to confer with their legal help.

3.3.2 Post-investigation pre-trial process

Only three weeks of time is given to the accused to prepare his defence following the arraignment of charges. A further aberration from the settled principles of international law is that the accused is prevented from conferring with his lawyers even when the charges lack any specificity on time, location and details of the alleged victims of violation. It is not gainsaid when it is stated that three weeks is insufficient to address allegations of this nature, especially of events that have happened more than four decades earlier. At the ICC and the ICTY and ICTR, such time to respond could extend up to six months. While the plea of local jurisdiction being a help in reducing unexplained delays, it is also a valid point that no defence could be arranged in three weeks of time.

3.3.3 Trial process – some important lacunae in the legislation

1. The legislation is conspicuously absent on issues of independence and impartiality of the judicial process – a fundamental norm of any judicial institution. Like the investigators, all the judges of the tribunal are government appointees.²⁴ There is no provision in the legislation that reiterates that they shall act free of any influence.
2. Another feature that gains prominence because of its absence is the challenge to such appointments. The legislation specifically bars any challenge to such appointment or constitution of the tribunal.²⁵
3. Judges have an unfettered right to question the witnesses, with no right to re-examination available to the defence.²⁶
4. Adding further to the woes of the accused under this legislation, is the provision with regard to the rules of evidence. It is a matter of further worry that the Evidence Act, 1872 and the Criminal Procedure Code, 1898 that are a part of the criminal law of Bangladesh are not applicable to trials under this Act.²⁷ The Act allows media archives also as having probative value, and it is matter of prudence and judgment to opine on the value of media statements with regard to establishing the guilt of any person.
5. Another major inconsistency with international law is the provision in the Constitution, via the amendment process, of a specific measure preventing any form of an interlocutory appeal from the tribunal to a separate or a higher court.²⁸
6. The appeal against conviction can be made only to the Bangladesh Supreme Court; there is a provision to make recourse to the tribunal to ask it to review its judgment – a futile effort especially because it is difficult to expect it to overrule its judgment. An example of this is the review petition before the

tribunal seeking clarification on the definition of crimes against humanity. This review petition was rejected by the tribunal.

7. At the normative level are questions on the definitional aspect of this legislation. The Act is silent on the definition of individual offences that qualify as crimes against humanity. Neither did it explain as to the method of classifying a crime as a crime against humanity. Adopting the Nuremberg definition would presuppose the existence of an armed conflict, a scenario that cannot be explained with reference to Bangladesh, as there are doubts whether it would qualify as an international conflict. Notwithstanding the fact that international criminal law has moved away from the necessity of international armed conflict and in the ICTY, it dropped the international armed conflict clause, there is no indication from the ICT Act, 1973 about any normative reasons for adopting the definitions in the Geneva Convention. Nor does the legislation in its preamble and scope, give any guidance with regard to the identification of offences as crimes against humanity, leaving much for interpretation of the tribunal based largely upon the Geneva Convention. Much development in the transitional justice post-Geneva convention thus does not find any reflection with regard to the definitional aspects of the ICT Act, 1973. This is in contrast to the other mechanisms of transitional justice like the ones in East Timor and Sierra Leone which had a clear definition of the violations characterized as crimes against humanity. The interesting part about these definitions was that they were largely reflecting the kind of crimes that are found in the development of law post-Geneva convention.²⁹ Similar was the case of Cambodia at the Extraordinary Chambers of the Court of Cambodia.³⁰ The definition adopted in those mechanisms was as follows: ‘a systematic or widespread attack directed against a civilian population on national, political, ethical, racial or religious grounds.’³¹ The Bangladesh legislation seems to have moved away from the fundamental aspect of law-making ensuring normative strength, as is seen in the definition of the crimes against humanity in ICTA. Another more significant weakness in the legislation is that it did not gain from the immense knowledge capacity that was built into the concept post the Geneva Convention. Thus it can be said that ICTA fails to answer the internationally followed normative structure on two grounds – a) define individual offences that qualify as crimes against humanity, and b) in contrast to ICC and other tribunals, it does not have clarity on the definition of crimes against humanity. More importantly, as compared to the ICTY and ICTR which attempted to give a plausible definition for rape and sexual offences.
8. The International Crimes Tribunal Rules of Procedure 2010, Rule 50 provides for the burden of proof to be on the Prosecution. However, this is not the case in all aspects of the trial. Rule 51(1)³² requires the defence to prove alibi, if it is relied upon, and any particular fact or information which is in its possession or knowledge. This is in conflict with the presumption of innocence and the burden of proof being upon the prosecution as set out clearly in ICCPR at Article 14.2 as a universally recognized principle of law.³³

4.0 The road ahead for the Bangladesh War Crimes Prosecution

The international community stands by Bangladesh’s right to prosecute offenders of war crimes. Bangladesh should first address the concerns regarding the normative weaknesses in the ICT Act, 1973. Some of the issues that require immediate address are the definition of crimes, evidentiary rules, investigation process, ensuring rights of the accused, and the issue of death penalty and they be revised on lines of other international criminal law mechanisms.

4.1 Structured Definitions

ICT Act, 1973 must be suitably changed to ensure that its definitions meet the needs of the kind of crimes that have been alleged to have been committed at that time. Of special need is the requirement of adding the offence of rape and sexual offences in the list of crimes that can be prosecuted.

4.2 Improved Investigation Process

The investigation process needs a special address especially because of the delay in initializing the prosecution process. It is a reality that the prosecution needs to place immense reliance on the expert testimony, especially because there has been a long time between the commission of offences and the judicial efforts, leading to pertinent gaps in the evidence that may be available. The investigation process shall ensure that there is compliance with international standards, inputs from the examples of tribunals in East Timor and Cambodia can be utilized for this purpose.

4.3 Truth and Reconciliation process

An effort of the Truth and Reconciliation process should be explored. Truth commissions are official, non-judicial bodies of a limited duration established to determine the facts, causes, and consequences of past human rights violations.³⁴ Truth commissions are often put in place with other defining expectations, such as providing an official platform where victims can commence healing through acknowledgement of their suffering.³⁵

As stated by the International Center for Transitional Justice, the objectives of a truth commission should focus upon the establishment and explanation of facts, protection, recognition and restoration of the rights of the victims, and ensuring positive social and political change. This mandate is performed through a structured functional methodology – preparing a report that establishes an accurate and impartial historical record of human rights violations; the investigation process should protect the integrity and well-being of the victims; offering policy proposals that aim at ensuring prevention of repetition; supporting the work of the justice system; and promoting communal or national reconciliation. An important feature of the truth commission is that its proceedings are open, unless the interests of justice require otherwise. While courts of law usually focus on the facts of an individual case, which are proven by exacting standards of evidence, truth commissions complement that approach by establishing the social and historical context of violations and large-scale patterns behind massive numbers of cases. Their analysis can help to uncover the logic and strategy behind abuses, helping to establish moral or political responsibility.³⁶

Often truth commissions have an ingrained mandate towards achieving reconciliation in the society. A picture-book example of the reconciliation methodology is the rainbow state of South African Truth and Reconciliation Commission, which allowed victims to participate in amnesty proceedings where perpetrators confessed their crimes. Another example is the East Timorese Commission on Reception Truth and Reconciliation, which organized “community reconciliation proceedings” in cooperation with traditional authorities in indigenous communities. Bangladesh could attempt at a reconciliation process with a neutral agency monitoring the process.

4.4 Trial Monitoring

Another innovative feature in the diverse mechanisms of the international criminal law has been the aspect of trial monitoring. At a very preliminary level, trial monitoring addresses two important issues of the justice administration – it ensures trained participation of the local interest in the war crimes prosecution, thus restoring the local ownership especially of the local population towards the trials; it also brings the international community much closer to the trial process, thus addressing their concerns in fighting impunity. A significant advantage that trial monitoring brings along is the aspect of institution monitoring, because essentially it is monitoring the performance of an institution conducting the trial. Observing trial participants can help to pinpoint problems in the criminal justice system and identify entry points for reform advocacy.³⁷ The most important theoretical contribution of trial monitoring is ensuring the primacy of rule of law, a normative construct finding practical value. Most commonly, trial monitoring helps to ensure that the rights of the defendant to a fair trial are upheld.³⁸ For example, trial monitors can gauge whether the judge is not influenced by outside actors to favour the prosecution lawyers over the defence representatives. This is especially important when charges are of a political nature, which is often the case in trials brought against human rights defenders and journalists.

Another purpose of trial monitoring is to ensure that justice is appropriately carried out with regard to human rights violations. In this case, the observers aim to investigate the extent to which those responsible for human rights violations are brought to justice and punished in accordance with international law. For example, monitors may discover through the process of trial monitoring that the prosecution is failing to disclose evidence so as to not to implicate other political officials not involved in a trial. Thirdly, trial monitoring projects may be taken on for the purposes of identifying patterns across a large number of trials whereby human rights are violated. A systemic monitoring project, for example, may send observers to monitor every libel trial in a country over a period of several years in order to recommend changes in how the justice system approaches libel cases.

4.6 Civil Society Engagement

Civil Society engagement is necessary to ensure sustained and structured local interest and ownership in fighting impunity. It can further the cause of fostering public ownership of the trial process in international crimes. Methodology for engaging with civil society in court monitoring could be structured around identifying the advocacy interests of the civil society, identifying the knowledge capacity lacunae and creating awareness about

the monitoring process. NGOs have created a similar monitoring programme in Sierra Leone. The International Center for Transitional Justice has established an independent local monitoring programme comprising lawyers and civil society members in Sierra Leone.³⁹ This programme monitors proceedings in the Special Court of Sierra Leone and reports on the substantive and procedure work of the court for the local and the international community. It also works towards increasing capacity for monitoring efforts.

Following the success of the methodology at Sierra Leone, the International Criminal Court Registry decided to establish a monitoring mechanism, it extended the mechanism at the ICTY to the ICC.

5.0 Hybrid tribunals – a possible way for Bangladesh to fight impunity?

To better address the right of Bangladesh to prosecute offenders of crimes, choice of hybrid tribunals can be a plausible one. Hybrid tribunals are a better way of addressing questions of legitimacy that have plagued the government's intention to institute tribunals and prosecute the offenders after forty years of their alleged commission. The choice of either the domestic tribunal or an international tribunal misses one important dimension of international criminality. "If the goal of international trials were simply to prosecute individuals successfully then that would not particularly be a problem. But I have tried to argue that the real goal of international criminal justice, apart from sending people to jail, is to make a more symbolic case about the nature and existence of society that gave rise to the norms."⁴⁰

If correctly implemented, mixed panels can indeed contain a promise in the areas of legitimacy, capacity and norm penetration. Hybrid courts have been presented as combining the best and avoiding the worst of international and domestic justice, particularly as regards legitimacy, capacity and norm penetration.⁴¹ They are more likely to be perceived as legitimate by local and international population. Secondly, they play a significant role in capacity building within the domestic judicial institutions and systems. Of more importance here the role that they play in the local community, along with the necessary interaction-both formal and informal-among local and international legal actors may contribute to the broader dissemination (and adaptation) of the norms and processes of international human rights law.

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¹⁴ The Chief Prosecutor V. Abul Kalam Azad ICT-BD Case No.05 of 2012.

¹⁵ Section 22 of the ICT Act, 1973 confers powers on the Tribunals to develop their Rules of Procedure,
ensuring larger compliance with the intent of the Act.

¹⁶ Paragraph 13 of the judgment.

¹⁷ Geneva Convention(1948) and the conventions of 1949 on humanitarian law comprising four treaties and
three additional protocols

¹⁸ It was opened for signature and ratification and accession by General Assembly resolution 2391 of November,
1968.

¹⁹ Section 4. (1) When any crime as specified in section 3 is committed by several persons, each of such person
is liable for that crime in the same manner as if it were done by him alone.

²⁰ The definition of 'Crimes against humanity' as contemplated in Article 5 of the ICTY Statute 1993 neither
requires the presence of 'Widespread and Systematic Attack' nor the presence of 'knowledge' thereto as
conditions for establishing the liability for 'Crimes against Humanity'.

²¹ S.8(2) of the ICT Act, 1973 as amended in 2009. http://bdlaws.minlaw.gov.bd/pdf/435____.pdf

²² Section 8(5) of the ICT Act, 1973

²³ Section 8(7) and (8) ICT Act, 1973.

²⁴ Section 6(2) of the ICT Act, 1973.

²⁵ Section 6(8)

²⁶ Section 10(1)(h) of the ICT Act, 1973.

²⁷ Section 19. (1) A Tribunal shall not be bound by technical rules of evidence; and it shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and may admit any evidence, including reports and photographs published in newspapers, periodicals and magazines, films and tape-recordings and other materials as may be tendered before it, which it deems to have probative value.

²⁸ Art.47(3) Notwithstanding anything contained in this Constitution, no law nor any provision thereof providing for detention, prosecution or punishment of any person, who is a member of any armed or defence or auxiliary forces or who is a prisoner of war, for genocide, crimes against humanity or war crimes and other crimes under international law shall be deemed void or unlawful, or ever to have become void or unlawful, on the ground that such law or provision of any such law is inconsistent with, or repugnant to any of the provisions of this Constitution.

²⁹ Sierra Leone's statute in Art.2 explains the content of the violations amounting to crimes against humanity. Article 2 Crimes against humanity

The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:

- a. Murder;
- b. Extermination;
- c. Enslavement;
- d. Deportation;
- e. Imprisonment;
- f. Torture;
- g. Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;
- h. Persecution on political, racial, ethnic or religious grounds;
- i. Other inhumane acts - <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnD1MJeEw%3d&tabid=176>

³⁰ http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf

³¹ Art.5 of the law on the establishment of extraordinary chambers in the courts of Cambodia for the prosecution of crimes committed during the period of democratic Kampuchea.

³² 51. (1) The onus of proof as to the plea of 'alibi' or to any particular fact or information which is in the possession or knowledge of the defence shall be upon the defence.

³³ 14.2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
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Author's note - Some of the points of this paper were part of a conference presentation International conference on Norms : from Theory to Practice at Cluj Napoca, Romania in April, 2013. However, this research paper has been written as a complete revision of content and methodology.

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