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EPILOGUE

Justice after decades in Bangladesh: national trials for international crimes

The 2008 parliamentary elections in Bangladesh revitalized the country's dormant war crimes process. After almost forty years, the new government decided to prosecute local collaborators who sided with the Pakistani armed forces and allegedly perpetrated war crimes, crimes against humanity, and genocide during the 1971 war. The war crimes process is based on a 1973 law, the International Crimes (Tribunals) Act. The title illustrates the complex environment in which the new International Crimes Tribunal, established in 2009, is required to operate: notwithstanding that the 1973 Act is national legislation, its subject-matter jurisdiction finds its origin in international law. The article addresses select legal challenges that the Tribunal will face in a context of disputed history, in particular regarding the alleged crime of genocide. The article concludes that in the era of institutionalized complementarity, such a national attempt to investigate and prosecute war crimes should be welcomed by the international community. Yet, in the context of limited resources and a polarized political environment, effectively achieving reconciliation and deterrence will depend above all on professionalism and fairness.

Introduction

In 2008, the main focus of analysis of the 1971 war and related atrocities unexpectedly shifted from a merely historical—and historiographical—perspective, to a legal one. Opportunity then arose for the rhetoric of justice to become a concrete institutional feature of the Bangladeshi society. The promise that the '[t]rial of war criminals [would] be arranged'[1] was part of Ms Sheikh Hasina's election manifesto. Once appointed prime minister, this provision was almost immediately implemented with the announcement in 2009 of the creation of the International Crimes Tribunal (ITC), effectively established in March 2010. Such an initiative, by a person who is both the leader of the Awami League—a political party that was one of the main targets of the Pakistani repression in 1971—and the daughter of Mr Sheikh Mujibur Rahman, the 'Father of the Bangladeshi Nation', undoubtedly carries a strong emotional and political charge. For the purposes of this contribution, however, we will focus our attention on some legal implications of this process—that is, the prosecution before a domestic tribunal of alleged war criminals forty years after the events—both from a national and an international perspective.

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Revitalizing a dormant process

Previous attempts to bring war criminals to justice were made immediately following the end of the 1971 war and the start of Bangladesh's existence as a state. The first effort concerned the fate of West Pakistani prisoners of war held by India and Pakistan. This project was definitively abandoned as part of the outcome of negotiations with Pakistan in 1974.[2] All prisoners of war were finally allowed to return to Pakistan. Later attempts focused on the so-called 'collaborators'.[3] Legislation adopted in 1973 continues to constitute the legal framework for the prosecution of those responsible for crimes committed during the 1971 war: the International Crimes (Tribunals) Act (ICT Act).[4] It is original in its endorsement of international criminal law principles in national law, to be implemented by a domestic special jurisdiction. According to Article 3 of the Act, the Tribunal was granted jurisdiction over any member of the armed forces, notwithstanding nationality, for the perpetration of crimes against humanity, crimes against peace, genocide, violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949, and any other crimes under international law.

The killing of Mr Sheikh Mujibur Rahman on 15 August 1975 and the ensuing era of political instability put an end to this process. Similarly, no further action was taken in relation to the fact-finding already completed, such as the 1972 Report of the International Commission of Jurists on *The events in East Pakistan, 1971* (hereafter, 1972 ICJ report).[5]

When political conditions finally allowed for the effective revival of the process, it became clear that, 38 years on, the 1973 legislation had somehow lost part of its *avant-gardisme*. Adaptations to international standards—that had evolved in the interim—were therefore considered necessary. In 2009, the parliament of Bangladesh reviewed several aspects of the 1973 Act. It extended the jurisdiction of the Tribunal to civilians and groups of persons;[6] the requirement for a military judge to sit on the Tribunal was removed;[7];the independence of the Tribunal was affirmed;[8] and Bengali was inserted as a procedural language, alongside English.[9] On the basis of domestic legal procedures, any further issue arising in relation to the Act is to be addressed by the judges through the rules of procedure that they are entitled to draft and modify[10] within the limits of the ICT Act, which is itself protected by the Constitution of Bangladesh.[11]

By the end of October 2011, seven cases had been opened, concerning five high-ranking officials of the Jamaat-e-Islami party and two others from the Bangladesh Nationalist Party. They are alleged to have sided with and assisted the Pakistani armed forces in 1971 through the formation of killing squads such as Razakar and Al Badr.[12] The seven suspects were arrested during 2010. One was released on bail for health reasons.

The first indictment was enacted against Mr Delawar Hossain Sayedee on 3 October 2011 with an expected trial date of late October 2011. It encompasses twenty counts, including charges of genocide and crimes against humanity, for which the death penalty can be imposed.

Criminal justice and disputed history

Reviewing crimes that occurred forty years ago confers an historical dimension to the trials, with the underlying idea that justice should be done and the truth be known. The process is extensively reported in Bangladeshi media and has also attained the attention of international media and non-governmental organizations. There seems to be strong popular support for the trials in Bangladesh, as expressed on the occasion of the 2008 general elections. This positive view does not, however, reflect a consensus within Bangladesh, where many members of the opposition have attacked the Tribunal. The Jamaat-e-Islami party has hired foreign lawyers. Concerns voiced by professional international actors about the regulatory framework of the trials have also been echoed at the national level.

Applying domestic law in an international context

The name of the Tribunal reflects in itself an aspiration: 'It is not only for the rule of law, not only for the sake of justice, but for the sake of humanity that the perpetrators of genocide in 1971 be brought to justice and duly punished through a trial conducted in accordance with due process of law'.[13] The Tribunal's judges will have to find an appropriate way to deal with tensions between international and national dimensions of the process.

The first challenge concerns the international context of the crimes which, when they occurred, was also domestic, namely a war of secession for independence. The main perpetrators still alive are foreign citizens—they are Pakistani—in relation to Bangladeshi criminal jurisdiction. Although it is unlikely that any of them will be tried by the Tribunal, it will have to find a way to articulate the collaborators' alleged responsibility within the overall context of the use of force by Pakistani armed forces in Bangladesh. It might conclude that some crimes were committed exclusively by 'collaborators', perhaps in relation to the murder of intellectuals in the very last days of the 1971 war.[14] However, many crimes probably occurred as the result of some kind of combination, either as concerted actions involving both paramilitaries and Pakistani armed forces, or as Pakistani orders implemented by paramilitaries or 'collaborators' in Bangladesh. The modes of liability involved differ, as do the means of proof for the legal requirements of the forms of participation.[15]

Secondly, although the 1973 Act is national law, its subject-matter jurisdiction finds its origin in international law. This dimension is reflected in the name of the Act and the Tribunal, and it may have internationalized the perception of the Bangladeshi process among some foreign actors who have called, *inter alia*, for the Act to be amended to fully accord with the definition of core international crimes in the Statute of the International Criminal Court adopted as late as 1998. It is unclear how this external expectation is to be squared with the concern shared by all involved that crimes be applied as they were defined in 1971.

Thirdly, there has been much discussion of fair proceedings before the Tribunal, emphasizing the rights of suspects and accused, in a socio-political context

that is deeply focused on the interest of victims in knowing the truth. For the Tribunal, there is and cannot be a competition between the rights of the defence and the right to truth. They are two wings of one bird. One will fail without the other. In our view, the deterrent and reconciliatory functions of war crimes prosecutions depend on both. The main focus of criminal justice for core international crimes is the alleged conduct of the suspect. Victims address this conduct. Facts are sought from many sources to help shed light on what transpired. This fact-finding must be vigorous, the factual analysis uncompromising, and the factual conclusions and propositions sound. That is why criminal justice enjoys compulsive powers of search and seizure. Criminal justice is invasive as a surgical knife to ensure that incriminating charges as well as convictions and sentences are based on the strongest possible facts. Tainting factual propositions and conclusions by compromising procedural fairness is like conducting surgery with a dirty knife. This challenge is well known to war crimes lawyers around the world, also the professionals involved in Bangladesh.

Genocide and past war traumas

Even if the Tribunal has not yet reached conclusions on the attacks that occurred during the 1971 war, there seems to be a widespread public perception in Bangladesh that what transpired during these nine months amounts to 'genocide' against the people of Bangladesh. Such interest in using the genocide label is common in countries or groups affected by severe crimes. This accusation raises questions in this as in other situations.

First, the obligation to punish under the 1948 Genocide Convention concerns individual acts of genocide more so than a general socio-political state or condition of 'genocide'. The facts linked to the legal classification of individual conduct can only be established through criminal trials. They have not yet taken place. To speculate in general terms whether specific individuals are guilty of the crime of genocide absent a tested evidentiary record makes limited sense for lawyers.

Secondly, to the extent that the Genocide Convention does refer to genocide as a socio-political state or phenomenon separate from individual acts of genocide, it does not define how many victims must be affected by this general 'genocide'. The 'genocide' qualification of the overall process cannot be taken for granted from an international law perspective. This fact is often complicated by the lack of reliable statistics on the number of persons killed in what is considered a 'genocide'.[16] Despite the contested toll, it is obvious that massive killings took place during the 1971 War. According to the 1972 ICJ report, '[w]hen the Pakistan forces realized that the initial crack-down had failed to subdue the Bengali population and that resistance was continuing, they concentrated their attention upon three groups, Awami Leaguers, intellectuals and students, and the Hindus'.[17] Members of other political movements such as the socialists and the communists were also targeted, as well as independence fighters in general.[18]

The 1972 ICJ report concluded that 'a strong prima facie case that the crime of genocide was committed against the group comprising the Hindu population of

East Bengal' could be established. Concerning the potential perpetration of genocide against the other groups, it considered 'that there may be difficulties in establishing the proposition in a court of law'.[19] The difficulty lies in the fact that the Awami Leaguers, intellectuals and students were *a priori* targeted for political reasons, as a political group.[20]

The ICT-BD Act has tried to tackle the issue by modifying the wording of the commonly accepted definition of genocide. Its Article 3(1)(c) defines genocide as '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…'. Unlike Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 'political group' is included in the list of potentially targeted groups. Instead of having the group targeted 'as such', the order of the words have been reversed to apply to the following list of five acts, identical to that mentioned in the Genocide Convention but not exhaustive.

The crime of genocide was already criminalized in 1971, notably through the 1948 Genocide Convention. Pakistan was very active in the negotiation and drafting of the Convention and acceded to it on 12 October 1957.[21] Moreover, the International Court of Justice asserted the customary nature of the prohibition of genocide as early as 1951.[22] There does not seem to be any doubt that the 1948 Genocide Convention and its definition of the crime apply to the 1971 conflict in Bangladesh.

There is indeed room for national adaptations of the definition. The legality of such modifications is a matter for national courts to determine. The insertion of 'political group' raises questions that the ICT-BD judges will have to address. We note that there was no ambiguity with regard to the rejection of 'political group' from the list of potential victim groups during the negotiations of the Genocide Convention; that was the result of a lengthy and vivid debate.[23]

It might be possible to assess the alleged crimes committed against the two abovementioned groups as committed against a 'national group,' with particular focus on a few segments of its population like the Awami Leaguers, intellectuals, and students. It might be useful to consider what other tribunals have experienced in similar cases. The International Tribunal for Former Yugoslavia recognized that the destruction of 'part' of the group could be interpreted in qualitative terms: genocide 'may also consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such'.[24]

Another possibility would be to adopt an approach along the same line as that taken by the Extraordinary Chambers in the Courts of Cambodia, which is addressing the crimes committed against the Khmer people, that is, the majority group in Cambodia, under the criminal category of persecution, a sub-category of the crimes against humanity.[25] The group is normally targeted as such, as for genocide, but the intent is not necessarily to destroy it, rather to harm it.[26]

Impunity and reconciliation

The International Criminal Court is established on the basis of a principle of complementarity. It can only act when there is a lack of will or ability to genuinely

investigate and prosecute in national jurisdictions. Strengthening the ability of national criminal justice is therefore a hallmark of the age of complementarity.

Against this background, the international community should applaud the will and efforts of Bangladesh to investigate, prosecute, and adjudicate allegations of core international crimes in the 1971 war. Bangladesh is proceeding on the basis of its only legislation dating back to 1973, through its own specialized national jurisdiction, drawing on national judges, prosecutors, and investigators, with minimal assistance from the outside world. It sets an example for other countries that are materially speaking less resourced, and it challenges those international criminal jurisdictions that enjoy resources not seen at the national level.

For all that, the war crimes process in Bangladesh faces many challenges. The first among them is the limited resources that are available to the Tribunal. This problem should be addressed. Appropriate international assistance may be useful.

Secondly, the political environment around the Tribunal is polarized, with strong expectations of justice on the one hand, and a rejection of the war crimes process on the other. Professionalism and fairness should be key elements of the response by the Tribunal. Only then will its judgements have a deterrent effect and victims benefit from a judicial narrative that unites. Only then can the Tribunal reduce impunity in a manner that reconciles more than it divides.

Notes and references

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2 Suzannah Linton, 'Completing the circle: accountability for the crimes of the 1971 Bangladesh War of Liberation', *Criminal Law Forum*, Vol. 21, No. 2, 2010, p. 203.
3 In 1972, the Bangladesh Collaborators (Special Tribunals) Order was adopted but its effects soon mitigated by the adoption of an amnesty law for the least serious crimes. See Linton, 'Completing the circle', pp. 204–205.
4 The International Crimes (Tribunals) Act, Act No. XIX of 1973, 20 July 1973, modified by The International Crimes (Tribunals) (Amendment) Act, 2009 (Act No. LV of 2009), available at: http://www.legal-tools.org/en/go-to-database/record//ltdetails/178287/.178991c1252e4ce89ddaa66c8bad92199c0a68b43bdafb9b9ffc9c965bd65585/.
5 International Commission of Jurists, 'The events in Pakistan: a legal study by the Secretariat of the International Commission of Jurists', 1972, available at: http://www.globalwebpost.com/genocide1971/docs/jurists/1_preface.htm.
6 The International Crimes (Tribunal) Act, Article 3(1).
7 The International Crimes (Tribunal) Act, Article 6(2).
8 The International Crimes (Tribunal) Act, Article 6(2A).
9 The International Crimes (Tribunal) Act, Article 10(2).
10 The International Crimes (Tribunal) Act, Article 22. The International Crimes (Tribunals) Rules of Procedure were adopted on 15 July 2010 and later amended on 28 October 2010 and 28 June 2011.
11 Article 47(3) of the constitution of Bangladesh, introduced by The Constitution (First Amendment) Act 1973, on 15 July 1973: '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.'
12 Shariar Kabir, 'Bangladesh Holocaust of '71', *Forum*, Vol. 4, No. 12, December 2010, available at: http://www.thedailystar.net/forum/2010/December/bangladesh.htm.
13 Mizanur Rahman, 'An end to impunity', *Forum*, Vol. 4, No. 12, December 2010, available at: http://www.thedailystar.net/forum/2010/December/impunity.htm.

14 International Commission of Jurists, 'Part II: outline of events in East Pakistan', *The events in East Pakistan, 1971* (Geneva: ICJ, 1972). See also Kabir, 'Bangladesh Holocaust of '71'.
15 Linton, 'Completing the circle', pp. 273–279.
16 In this case, Bangladesh claims that three million persons were killed. Pakistan on the other hand, claims that 26,000 West-Pakistanis were killed. This figure was endorsed by a commission formed by the Pakistani government to investigate the crimes committed during the 1971 war. See Hamood Ur Rehman Commission Report, July 1972, para. 33, available at: http://www.pppusa.org/Acrobat/Hamoodur%20Rahman%20Commission%20Report.pdf.
17 International Commission of Jurists, 'Part II: outline of events in East Pakistan', *The events in Pakistan*, 1–25 March, 1971.
18 Kabir, 'Bangladesh Holocaust of '71'.
19 International Commission of Jurists, 'Part IV: legal position under international penal law', *The events in East Pakistan, 1971* (Geneva: ICJ, 1972).
20 These issues are discussed by Sarmila Bose in her article, 'The question of genocide and the quest for justice in the 1971 war', Journal of Genocide Research, Vol. 13, No. 4, 2011 in this volume.
21 Convention on the Prevention and Punishment of the Crime of Genocide, New York, 9 December 1948, Status of ratification, available at: http://preventgenocide.org/law/convention/UNTreatyCollection-GenocideConventionStatusReport.htm.
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23 See the discussion in William A. Schabas, *Genocide in international law: the crime of crimes*, 2nd ed. (Cambridge: Cambridge University Press, 2009), pp. 61, 71, 74, 82.
24 International Criminal Tribunal for Former Yugoslavia, *Jelisić* (IT-95-10) *'Brčko'*, Trial Judgement, 14 December 1999, para. 82.
25 Extraordinary Chambers in the Courts of Cambodia, Case No. 2, (002/19-09-2007-ECCC-OCIJ), Office of the Co-Investigating Judges, Closing order, 15 September 2010.
26 See for instance the definitions of 'persecution' in: *Statute of the International Tribunal for the Former Yugoslavia*, adopted 25 May 1993 by UN Security Council resolution 827, Article 5 h); *Statute of the International Criminal Tribunal for Rwanda*, adopted 8 November 1994 by UN Security Council on Resolution 955 (1994), Article 3 h); *Rome Statute of the International Criminal Court*, adopted on 17 July 1998 entered into force on 1 July 2002, Article 7 paragraph 1 f).

Notes on contributors

Morten Bergsmo is visiting professor, Georgetown University (2010–); senior researcher, University of Oslo; visiting fellow, Stanford University; and ICC consultant and co-ordinator of the ICC Legal Tools Project. He will be visiting professor of law at Peking University Law School (2012 and 2013). He was formerly visiting ccholar, UC Berkeley (2010 Spring); senior researcher, PRIO (2006–09); special adviser to the Office of the Director of Public Prosecution of Norway (2007–08); senior legal adviser and chief of the Legal Advisory Section, ICC Office of the Prosecutor (2002–05); co-ordinator of the establishment of the ICC Office of the Prosecutor (2002–03); legal adviser, ICTY (1994–2002); and legal adviser, UN Commission of Experts for the Former Yugoslavia established pursuant to Security Council resolution 780 (1992) (1993–94). He represented the ICTY to the UN negotiation process to establish the ICC (1996–2002). Since 2005, he has worked extensively with national capacity building, knowledge-transfer, and legal empowerment in the area of core international crimes in more than 25 countries. He founded and directs the capacity building platform Case Matrix Network (www.casematrixnetwork.org) and the Forum for International Criminal and Humanitarian Law (www.fichl.org).

Elisa Novic is a PhD candidate at the Law Department of the European University Institute, where she works on the concept of cultural genocide, considering in particular the intentional destruction of groups' culture in international law. She is also an adviser for the Case Matrix Network in which she has been involved with the International Crimes Tribunal of Bangladesh.