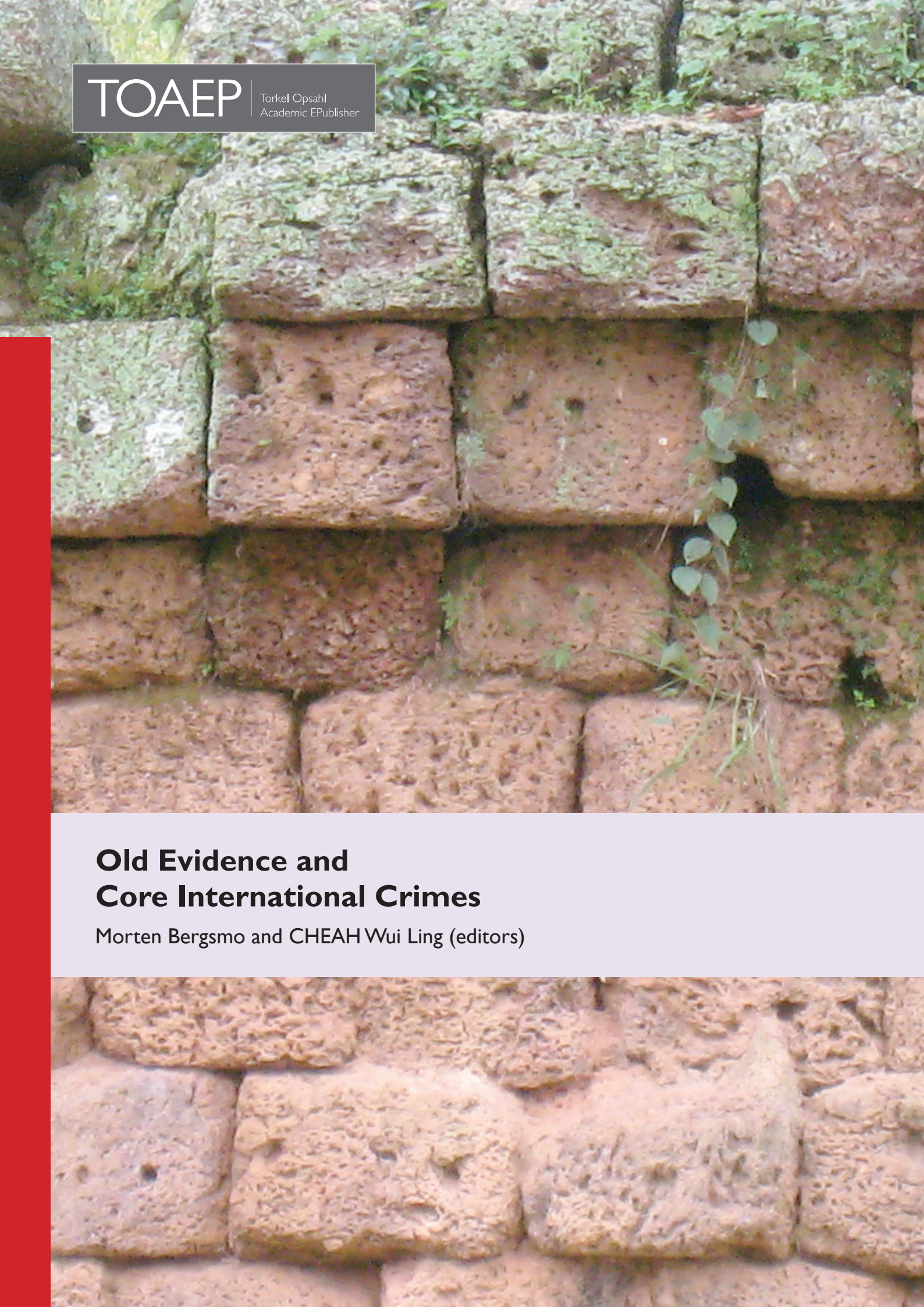


The logo for TOAEP (Torkel Opsahl Academic EPublisher) is located in the top left corner. It consists of the letters 'TOAEP' in a large, white, sans-serif font, followed by a vertical line and the text 'Torkel Opsahl Academic EPublisher' in a smaller, white, sans-serif font.

TOAEP

Torkel Opsahl
Academic EPublisher

The cover image is a photograph of a stone wall made of large, rectangular, reddish-brown stones. The wall is covered in moss and small green plants, particularly along the top and right edges. A small, thin, green vine with heart-shaped leaves is climbing up the wall on the right side. The image is split horizontally, with the top half showing the wall and the bottom half showing a white background with text.

Old Evidence and Core International Crimes

Morten Bergsmo and CHEAH Wui Ling (editors)

E-Offprint:

M. Amir-Ul Islam, “Towards the Prosecution of Core International Crimes before the International Crimes Tribunal”, in Morten Bergsmo and CHEAH Wui Ling (editors), *Old Evidence and Core International Crimes*, Torkel Opsahl Academic EPublisher, Beijing, 2012 (ISBN: 978-82-93081-60-9). This publication was first published on 19 November 2012.

TOAEP publications may be openly accessed and downloaded through the web site <https://www.toaep.org> which uses Persistent URLs (PURLs) for all publications it makes available. These PURLs will not be changed and can thus be cited. Printed copies may be ordered through online distributors.

This e-offprint is also available in the ICC Legal Tools Database under PURL <https://www.legal-tools.org/doc/ajrcio/>.

© Torkel Opsahl Academic EPublisher. All rights are reserved. This e-offprint and publication should not be disseminated without its covers or with additional covers.

Towards the Prosecution of Core International Crimes before the International Crimes Tribunal

M. Amir-Ul Islam*

I deem it a great honour and a privilege to have co-hosted the international expert seminar entitled “Old Evidence and Core International Crimes” organised by the Forum for International Criminal and Humanitarian Law (‘FICHL’) a knowledge-transfer international platform that is extending its support to Bangladesh. Activities such as the seminar and the publication of this anthology assist the prosecutors and investigators engaged in the trials of perpetrators of genocide and crimes against humanity committed in Bangladesh upon innocent men, women and children in 1971, causing death and destruction, rape and rampage, arson and extermination, the killing of three million civilians, and the violation

* **M. Amir-Ul Islam** is Senior Advocate, Bangladesh Supreme Court, and Senior Partner in the leading Bangladesh firm Amir and Amir Law Associates. He was in the Chambers of Mr. John Platts-Mills, Q.C. (1961–1963). He founded, organised and designed the Continuing Legal Education Program (‘CLEP’) for lawyers in 1994. He is Vice Chairman of the Bangladesh Bar Council; Chairman of the Legal Education Committee of LawAsia; Chairman of the Legal Education and Training Institute (‘LETI’), Bangladesh Bar Council; and Honorary Chairman of the Faculty. He is Visiting Member, Faculty of National Law School University of India (1995); Law and Development, Tufts University (1977). He was Special Envoy (1972–1973) and Law Officer (1977–1979), United Nations, New York, UNCITRAL. He was Member of the drafting committee of the Bangladesh Constitution (1972). He served as Minister of Food (1973–1974). He is Founder and Honorary Secretary General of the Bangladesh Institute of Law and International Affairs (‘BILIA’) (1972–); President of the Asia Pacific Organization on Mediation; President of the South Asian Association for Right to Development; Country Chairman of the Union International Des Advocates; President of the SAARCLAW; Vice Chairman of the ILA Bangladesh and the IFA Bangladesh; and Country Correspondent and Contributor for Lloyd’s International Ship Arrest, and Euromoney’s Laws on International Banking and Security.

of 200,000¹ women during an army occupation of nine months (25 March – 16 December 1971).

The support and co-operation of FICHL – and its sister platform, the Case Matrix Network (‘CMN’) – in the field of law and its concern about the trials of core international crimes, such as genocide and crimes against humanity, is based on international and universal commitments as duly resonated in the Preamble of the Rome Statute. One of the objects of the Rome Statute is that perpetrators of core crimes must not go unpunished. It further reiterates that “their effective prosecution must be ensured by taking measures at the national level”.² FICHL and CMN’s co-operation and support thus fits well within the object of the Rome Statute which emphasises measures to be taken at the national level for fair and effective prosecution to be ensured. Bangladesh thus finds a perfect match by developing a collaborative effort and initiative “by enhancing international co-operation” for holding the trial in Bangladesh at the national level, this being an integral part of the universal concept and commitment stated in the Rome Statute, as well as one of the objects of Bangladesh’s International Crimes (Tribunals) Act 1973.³

I, on behalf of my colleagues and friends, with great appreciation and gratitude, would particularly like to acknowledge the most timely initiative taken by FICHL with special tribute to Professor Morten Bergsmo⁴ who, besides being endowed with knowledge and expertise in his field of discipline in international law, is gifted with tremendous capacity, dedication and energy in mobilising experts and resources to ensure support for national initiatives in various countries, like the one extended to Bangladesh. This chapter will particularly focus on the laws applicable to, as well as the background of, genocide and crimes against humanity committed in Bangladesh.

¹ “War’s overlooked victims – Rape is horrifyingly widespread in conflicts all around the world”, *The Economist*, 13 January 2011. This is according to a conservative estimate of the Economist while the unofficial estimate is double the number. See <http://www.economist.com/node/17900482>, last accessed on 3 October 2012.

² Preamble of the Rome Statute of the International Criminal Court, available at <http://www2.ohchr.org/english/law/criminalcourt.htm>, last accessed on 3 October 2012 (‘Rome Statute’).

³ International Crimes (Tribunals) Act 1973, 20 July 1973, amended in 2009, see http://bdlaws.minlaw.gov.bd/pdf_part.php?id=435&vol=17&search=1973, last accessed on 3 October 2012 (‘the Act’).

⁴ For information on Morten Bergsmo, see the note on the first page of Chapter 1.

11.1. Background of the International Crimes (Tribunals) Act of 1973 and Its Content

After the liberation of Bangladesh from Pakistan's occupation army, there rose a human cry for the trial of perpetrators. The father of the nation Bangabandhu Sheikh Mujibur Rahman asked, at the very early stage in 1972 in his speeches, that an international tribunal be sent to Bangladesh to try war criminals. Unfortunately, there was no one able and willing to set up such a tribunal.⁵ Due to a then-existing void in the world of international machinery to prosecute perpetrators of international crimes, Bangladesh, in consultation with international jurists and experts, enacted a special law, namely, the International Crimes (Tribunals) Act 1973 ('the Act').⁶ The International Crimes (Tribunals) Rules of Procedure, 2010 ('ICT Rules of Procedure') was also framed as provided under the Act.⁷ The abovementioned Act was considered by international jurists at that time "as a model of international due process". "It is a carefully prepared document", as commented by the ICJ, which covers:

[...] the legal ramifications of the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and other crimes under International

⁵ Niall MacDermot, Q.C., "Crimes against Humanity in Bangladesh", in *International Lawyer*, 1973, vol. 7, no. 2, pp. 483–484. If there is to be a trial, what kind of court should there be? Sheikh Mujibur Rahman asked this at an early stage in public speeches that an international tribunal should be sent to Bangladesh to try war criminals. Unfortunately, there was no one able and willing to set up such a tribunal. The efforts within the U.N. to promote the establishment of an international criminal court had, for the time being at least, foundered. Even more modest proposals, such as that of the U.N. High Commissioner for Human Rights, so sturdily promoted by Ambassador Rita Hauser, had been blocked. There were, it seems, too many governments with too many skeletons for them to agree to any effective enforcement machinery for human rights. The Commission's purpose in Bangladesh was to try to persuade the government that, if they do hold such a trial, they should themselves constitute an international court for the purpose, much in the way that the victorious allies did at Nuremberg and Tokyo after World War II.

⁶ See *supra* note 2.

⁷ International Crimes (Tribunals) Rules of Procedure 2010, 15 July 2012, amended 28 October 2012 and 28 June 2011.

law, affording appropriate legal protections to those accused of such crimes.⁸

This Act assured that the trial of perpetrators would be conducted in accordance with international legal and human rights standards. Some amendments were also made to the said Act in order to achieve the desired standard, transparency, and due process. An independent Tribunal was set up under this Act to try the perpetrators. At the time of writing, the Tribunal consists of three judges, out of whom two are Judges of the High Court Division of the Supreme Court of Bangladesh and one is a District Judge. An Investigation Agency and a team of prosecutors were appointed in accordance with the provisions of the 1973 Act and the ICT Rules of Procedure, 2010. Furthermore, according to the Act, the accused would be given the full opportunity to defend themselves at trial. Persons convicted of crimes specified under Section 3 of the Act and sentenced by the Tribunal shall have the statutory right to appeal under Section 21 of the Act to the Appellate Division of the Supreme Court of Bangladesh, the highest court of the country.

11.2. Historical Background of Core International Crimes Committed in 1971

The act of genocide was perpetrated in Bangladesh by Pakistan's occupation army with their cohorts, *id est*, the Rajakar, Al Badr, Al Shams, and various local killing squads in 1971. Although the killing of unarmed civilians in early March seemed abrupt and sporadic, it soon became a systematic act of violence with Operation 'Search Light' enforced at midnight, on 25 March 1971, as part of the central planning and conspiracy hatched at Larkana⁹ and reinforced at Rawalpindi by Pa-

⁸ Jordan J. Paust and Albert P. Blaustein, *Human Rights and the Bangladesh Trials: A Legal Memorandum to the People's Republic of Bangladesh*, in Editorial Correspondents Ltd., N.Y., 1973, p. 65.

⁹ S.A. Karim, *Triumph and Tragedy*, The University Press Limited, 2009, pp. 172–176, quoted Mohammed Asghar Khan, *Generals in Politics: Pakistan 1958–1982*, p. 28: "In the middle of 1970, only a few months before the scheduled general election, Bhutto had suggested privately to Yahya that the two of them would make a very good team and could together run the country. Yahya has replied that "this made sense" and asked what he proposed to do about East Pakistan. Bhutto replied: "East Pakistan is no problem. We will have to kill some 20,000 people and all would be well". This story was recounted by Yahya to Air Marshall (Ret'd.) Asghar Khan and it is quite in line with Bhutto's well-known pet theory that the Awami

kistani General Yahya and other generals preparing an operation plan executed in collaboration with their Quislings under the umbrella of a politico-religious military alliance, creating the formation of local militia as an auxiliary force for perpetrating ‘the cleansing process’.

Peter Hazelhurst, writing in *The Times* on 4 June 1971 also indicted Pakistani President Yahya Khan, for having perpetrated a ‘holocaust’ in Bangladesh, and Mr. Z. Bhutto, for their role in the events leading up to the massacre on 25–26 March 1971.¹⁰

11.3. Genocide in Bangladesh and Old Evidence

The object was to eliminate the Awami League and its supporters in former East Pakistan, in order to crush the will of the majority earlier demonstrated in the general election and to turn a majority people of the then East Pakistan (now Bangladesh) into a minority forever by creating terror through indiscriminate killing, rape, arson, and looting, thus forcing ten million people to leave their country, and to seek shelter and succour in the neighbouring states of India. In this mayhem the members of the Hindu community were the major target. Within the first 48 hours, the massacre ravaged Dhaka and all the major towns and cities in Bangladesh. All foreign journalists were expelled by Yahya Khan’s government, leaving only a few who managed to remain in hiding. Simon Dring¹¹, being one of these very few, recounts how within the first 24 hours, the Pakistani army slaughtered approximately 70,000 people in Dhaka alone, along with another 15,000 all over Bangladesh. Let me use here old evidence by referring to Dring’s description of the attack on Dhaka University as follows:

League was a bourgeois party and it had no stomach for a confrontation with the military. What was dismissed by Yahya as a pipe dream a year before was now apparently embraced by him”.

¹⁰ Muhammad Zamir, “Global response to our War of Liberation”, in *The Daily Star*, 16 December 2009, available at <http://www.thedailystar.net/suppliments/2009/december/victorydayspecial/page04.htm>, last accessed on 3 October 2012.

¹¹ Simon Dring is an award-winning foreign correspondent, television presenter and producer, who alerted the whole world about the massacre in Dhaka by the Pakistani Army. He has worked for Reuters, the Daily Telegraph of London, and BBC Television and Radio News and Current Affairs, available at http://en.wikipedia.org/wiki/Simon_Dring, last accessed on 3 October 2012.

Led by American-supplied M-24 World War II tanks, one column of troops sped to Dhaka University shortly after midnight. Troops took over the British Council library and used it as a fire base from which to shell nearby dormitory areas.

Caught completely by surprise, some 200 students were killed in Iqbal Hall, headquarters of the militantly antigovernment students' union, I was told. Two days later, bodies were still smouldering in burnt-out rooms, others were scattered outside, more floated in a nearby lake, an art student lay sprawled across his easel.

Army patrols also razed nearby market area. Two days later, when it was possible to get out and see all this, some of the market's stall-owners were still lying as though asleep, their blankets pulled up over their shoulders.¹²

The military launched its operations on the nights of 25–26 March 1971 with Operation Search Light. Dhaka University was among the targets of this first attack on Bengali nationalism. On 29 April 1971, Ohio Republican Senator William Saxbe placed a letter from a constituent, Dr. Jon E. Rohde, in the Senate record. Dr. Rohde had served in East Bengal for three years as a physician with the United States Agency for Independent Development ('USAID'). His letter contained the following account of what he witnessed before he was evacuated from Dhaka.¹³

¹² See History, *Bangladesh Genocide Archive*, available at http://www.genocidebangladesh.org/?page_id=30, last accessed on 9 October 2012.

¹³ Rohde's letter is reprinted from the Record of the U.S. Senate as "Recent events in East Pakistan" in Sheelendra Kumar Singh *et al.* (eds.), *Bangladesh Documents*, vol. 1, Madras: BNK Press, 1971, 349A/51.

My wife and I watched from our roof the night of March 25 as tanks rolled out of the Cantonment illuminated by the flares and the red glow of the fires as the city was shelled by artillery and mortars were fired into crowded slums and bazaars [...]. On the 29th we stood at the Ramna Kali Bari, an ancient Hindu village of about 250 people in the centre of Dacca Ramna Race Course, and witnessed the stacks of machine gunned burning remains of men, women, and children butchered in the early morning hours of March 29 [...]. At the university area we walked through [...] two of the student dormitories at Dacca University [were] shelled by the army tanks. All inmates were slaughtered [...]. A man who was forced to drag the bodies outside, counted one hundred

Dr. Rohde's assessment of the situation in East Bengal was as follows:

The law of the jungle prevails in East Pakistan where the mass killing of unarmed civilians, the systematic elimination of the intelligentsia, and the annihilation of the Hindu population is in progress.¹⁴

Another American evacuated from Dhaka, Pat Sammel, wrote a letter to the *Denver Post*, which was placed in the House record by Representative Mike McKeivitt of Colorado on 11 May 1971.

Sammel wrote:

We have been witness to what amounts to genocide. The West Pakistani army used tanks, heavy artillery and machine guns on unarmed civilians, killed 1,600 police while sleeping in their barracks [...] demolished the student dormitories at Dacca University, and excavated a mass grave for the thousands of students; they've systematically eliminated the intelligentsia of the country, wiped out entire villages – I could go on and on. It's hard to believe it happened.¹⁵

Further reports of a massacre at Dhaka University can be found among James Michener's interviews in Teheran with Americans who were evacuated from the East Pakistani capital. Several evacuees reported that they had seen Pakistani leaders with specific lists containing the names of Bengali professors who were slated for execution. They also reported seeing mass graves of students who had been killed.¹⁶

three Hindu students buried there [...]. We also saw evidence of a tank attack at Iqbal Hall where bodies were still unburied.

¹⁴ *Ibid.*, p. 351.

¹⁵ Reprinted from the Record of the U.S. House of Representatives in *ibid.*, p. 357.

¹⁶ James A. Michener, "A lament for Pakistan", *New York Times Magazine*, 9 January 1972.

11.4. Murders, Extermination, Widespread and Systematic Attack against the Civilian Population of Bangladesh

The ‘old town’ quarter of Dhaka city was targeted and demolished largely due to the strong Awami League support there, but also because there were many Hindu residents¹⁷ in the area. In Simon Dring’s words,

The lead unit was followed by soldiers carrying cans of gasoline. Those who tried to escape were shot. Those who stayed were burnt alive. About 700 men, women and children died there that day between noon and two pm, I was told.

In the Hindu area of the old town, the soldiers reportedly made the people come out of their houses and shot them in groups. The area, too, was eventually razed.

The troops stayed on in force in the old city until about 11 pm on the night of Friday, March 26, driving around with local Bengali informers. The soldiers would fire a flare and the informer would point out the houses of Awami League supporters. The house would then be destroyed – either with direct fire from tanks or recoilless rifles or with a can of gasoline, witnesses said.¹⁸

After having massacred 15,000 unarmed civilians in a single day, the Pakistani soldiers bragged about their invincibility to Simon Dring:

“These bugger men,” said one Punjabi lieutenant, “could not kill us if they tried.”

“Things are much better now,” said another officer, “Nobody can speak out or come out. If they do we will kill them – they have spoken enough – they are traitors, and we are not. We are fighting in the name of God and a united Pakistan”.¹⁹

Pakistani journalist Anthony Mascarenhas was permitted to tour East Bengal in April 1971. His reports indicate that the government’s policy was to eliminate the Hindus by death or expulsion. The comments made by Pakistani military officials in Bengal are eerily reminiscent of Nazi notions of purification and the weeding out of bad elements

¹⁷ Particularly in the Jagannath Hall, which is a full resident hall exclusively for Hindu and non-Muslim students, teachers and professors of the University of Dhaka.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

from society. According to Mascarenhas, senior government and military officials in East Bengal stated:

[W]e are determined to cleanse East Pakistan once and for all of the threat of secession, even if it means killing off two million people and ruling the province as a colony for 30 years.²⁰

The Pakistani army carried out this ruthless genocide with military precision, employing tanks, artillery, mortars, bazookas, and machine guns against the unarmed civilian population of Dhaka. Although their prime targets were students, local police, intellectuals, political leaders, Awami League supporters, and Hindus, they still killed ordinary citizens indiscriminately.

11.5. Forcible Transfer of Ten Million People and Persecutions

Bangladesh suffered the crimes perpetrated on the entire people. By conservative estimates, three million of the civilian population were killed. Women and children were raped and violated. There was indiscriminate killing of the civilian population, including professors, doctors, engineers, lawyers, teachers, political activists, Awami League leaders and supporters, and members of the religious minority, particularly those of the Hindu community, who were subject to killing, torture, arson, rape and loots. Ten million people²¹ of whom 70 percent were Hindus had to leave the country to seek succour and shelter in the refugee camps of India. Leadership layers in all fields, such as politics, education, business, and professions were the main targets with a view of making the country leaderless in every sector. This was done with a view to destroying this nation, with an intent to make the targeted victims a numerically and electorally a permanent minority without leadership. They would thus be crippled politically and economically, and be easily exploited under Pakistan's military backed autocracy.

²⁰ Mascarenhas, *The Rape of Bangladesh*, Vikas Publications, 1971, p. 117.

²¹ Niall MacDermot, Q.C., p. 479, see *supra* note 4. The result of this systematic repression was a flood of refugees to India on an unprecedented scale. We have no reason to think that the Indian estimate of ten million refugees is exaggerated.

11.6. Independence of Bangladesh and POWs Returned to Pakistan

The scheme of Pakistan's military regime, which denied the right of the majority people, through their elected representatives, to frame the constitution and form a government of their own choice as so expressed through the election of 1970, was to be frustrated by any means. The election was held under the Legal Framework Order ('LFO').²² The resort to crimes of genocide and crimes against humanity, and the holding of another sham election to constitute a so-called parliament consisting of the perpetrators of crimes and their cronies was part of their well-knit agenda. Candidates were handpicked, and having no contestants, the results were published by the military junta to install a rubber stamp parliament.²³ After nine months of resistance against the Pakistani occupation Army, victory was won in December 1971 following an effective resistance and mobilisation by the people of Bangladesh. The occupation army of Pakistan surrendered on 16 December 1971 following a short-lived war declared by Pakistan, while an operation conducted under India-Bangladesh's joint command was formed on 3 December 1971.²⁴ This brought an end to Pakistan's occupation of the country, which emerged as Bangladesh through the blood bath of nine months.

Following the victory, initiatives were taken for the trying of 195 prisoners of war against whom there was specific evidence and proof of core international crimes. Under the pressure of Pakistan's Western allies²⁵ and Islamic states headed by the strong lobby of Saudi Arabia and ultimately on the assurance of Mr. Zulfikar Ali Bhutto, which was given

²² According to LFO, if the constitution could not be framed within 120 days, the Parliament was to be dissolved for the holding of another election, available at <http://www.storyofpakistan.com/articletext.asp?artid=A115>, last accessed on 9 October 2012.

²³ The Parliament was without any rival candidate nor was any poll to be held. See "Reforming Pakistan's Electoral System", in *Asia Report*, March 2011, no. 203–230, available at http://www.crisisgroup.org/~media/Files/asia/south-asia/pakistan/203_Reforming_Pakistan's_Electoral_System.ashx, last accessed on 9 October 2012.

²⁴ "Gen. Tikka Khan, 87; 'Butcher of Bengal' Led Pakistani Army", *The Los Angeles Times*, 30 March 2002, available at <http://articles.latimes.com/2002/mar/30/local/me-passings30.1>, last accessed on 9 October 2012.

²⁵ Niall Macdermot, Q.C., p. 483, see *supra* note 4. In the Western world there seems to be a considerable body of opinion which thinks there ought not to be any trials of those alleged to be responsible.

to both Bangladesh and India that he would ensure the trial of those 195 POWs in Pakistan, they were so returned.

11.7. Old Evidence Revealed Before the Enquiry Commission in Pakistan

The Hamoodur Rahman²⁶ Commission was constituted by the then Pakistani government to obtain credibility in the eyes of the international community and the governments of Bangladesh and India by indicating Mr. Bhutto's willingness to hold the trial before those 195 POWs were returned. He was also to use it as leverage on Pakistan's military junta in order to secure his political power. The commission so constituted inquired into the atrocities committed during the nine months of occupation. The Commission examined nearly 300 witnesses and hundreds of classified army signals between East and West Pakistan.²⁷ General Yahya, General Niyazi, and General Tikka's own admissions, along with those admitted by their cohorts and collaborators, are evident from the available Commission reports and documents. Let us refer to some of this old evidence that is available and that which has been established before the Commission as admitted by those army officers themselves. According to the allegations generally made, the excesses committed by the Pakistani Army and their cohorts, as summarised by the Commission, fall into the following categories:

- a) Excessive use of force and fire power in Dacca during the night of the 25 and 26 March 1971 when the military operation was launched.
- b) Senseless and wanton arson and killings in the countryside during the course of the "sweeping operations" following the military action.
- c) Killing of intellectuals and professionals like doctors, engineers, etc., and burying them in mass graves not only during early phases of the military action but also during the critical days of the war in December 1971.

²⁶ Rahman, (Justice) Hamoodur was the Chief Justice of the Supreme Court of Pakistan and Vice Chancellor of Dhaka University. See http://www.bpedia.org/R_0026.php, last accessed on 9 October 2011.

²⁷ "Hamoodur Rahman Commission Report", available at <http://www.bangla2000.com/bangladesh/Independence-War/Report-Hamoodur-Rahman/default.shtm>, last accessed on 9 October 2012.

- d) Killing of Bengali Officers and men of the units of the East Bengal Regiment, East Pakistan Rifles and the East Pakistan Police Force in the process of disarming them, or on pretence of quelling their rebellion.
- e) Killing of East Pakistani civilian officers, businessmen and industrialists, or their mysterious disappearance from their homes by or at the instance of Army Officers performing Martial Law duties.
- f) Raping of a large number of East Pakistani women by the officers and men of the Pakistan army as a deliberate act of revenge, retaliation and torture.
- g) Deliberate killing of members of the Hindu minority.²⁸

Indefinite identification of responsibility as revealed from the Hamoodur Rahman Report is as follows:

It is, however, clear that the final and overall responsibility must rest on General Yahya Khan, Lt. Gen. Pirazada, Maj Gen. Umar, Lt. Gen. Mitha. It has been brought out in evidence that Maj. Gen. Mitha was particularly active in East Pakistan in the days preceding the military action of the 25th of March 1971, and even the other Generals just mentioned were present in Dacca along with Yahya Khan, and secretly departed there on the evening of that fateful day after fixing the deadline for the military action. Maj. Gen. Mitha is said to have remained behind. There is also evidence that Lt. Gen. Tikka Khan, Major Gen. Farman Ali and Maj. Gen. Khadim Hussain were associated with the planning of the military action [...].

At the same time there is some evidence to suggest that the words and personal actions of Lt. Gen. Niazi were calculated to encourage the killings and rape.²⁹

11.8. An Impunity Culture Begins, Contributing to the Destabilisation of the Constitutional Regime

Mr. Bhutto did not keep his promise and desecrated his international obligation to try these criminals. Following such default, impunity grew in

²⁸ *Ibid.*

²⁹ *Ibid.*

all directions and on all dimensions. In 1977, Mr. Bhutto and his party got the majority's vote and won parliamentary elections held in Pakistan, and the military took over power in a successful *coup d'état* led by General Zia-ul-Haq under code name 'Operation Fair Play'.³⁰

The rest of history that followed are a series of tragedies backed by extra-constitutional regimes and the destabilising of democracy, not only repeating the frustration of the electoral verdict of 1977 in Pakistan, but also leading to the killing of Mr. Bhutto as the elected Prime Minister, who was hung by a court verdict, widely believed to be a judicial killing.³¹ The rule of law and constitutional governance was thus destabilised, and General Muhammad Zia-ul-Haq, who patronised the religious-militant groups as part of his agenda for Pakistan to be eventually transferred into a theological state, was killed in an air crash on 17 August 1988. His military transport aircraft, a C-130, exploded mid-air a few minutes after take-off from Bhawalpur Airport, killing all passengers aboard including the President.³² The power in Rawalpindi rolled from one general to another, except for some interruption by elected governments that were then toppled by the military. Failure to try the perpetrators of core crimes by the Pakistani Army thus caused disaster, followed by a series of killings and frequent constitutional derailment on the one hand, and the rise of core militancy and extremists under the patronage of the military wing on the other. Under the Pakistani military's direct patronisation, Talibans³³ were raised and trained, and used in the Afghan

³⁰ Pakistan's General problem, *Asian Window*, 11 June 2011, available at <http://www.openthemagazine.com/article/international/pakistan-s-general-problem>, last accessed on 9 October 2012.

³¹ See <http://chagataikhan.blogspot.com/2010/02/judicial-murder-of-zulfikar-ali-bhutto.html>, last accessed on 9 October 2012.

³² See <http://storyofpakistan.com/death-of-general-zia-ul-haq/>, last accessed on 9 October 2012.

³³ Pierre Tristam, "History of the Taliban: Who They Are, What They Want", see http://middleeast.about.com/od/afghanistan/ss/me080914a_2.htm, last accessed on 9 October 2012:

They were schooled in Pakistan's *madrassas*, religious schools which, in this case, were encouraged and financed by Pakistani and Saudi authorities to develop militantly inclined Islamists, which raised another military reign, known as Talibans which later transformed into various groups such as al Qaeda, Harkat-ul-Jihad-al-Islami (Huji), etc.

War. There is need therefore for proper and systemic research and analysis by academics and experts, taking Pakistan and Bangladesh as a case study, to identify the relationship between the omission and default in trying the perpetrators of crime, and the destabilisation of the constitution, democracy, and the rule of law as well as the rise of a religio-military oligarchy that has a close relationship with militancy, that is patronised by the military or military-backed regimes, and that has formed under the shelter of political party. The tragedies which followed in the form of coups, counter-coups, killings, and assassinations, the destabilising of the constitutional regime, the subverting of the electoral process, and the rise of extra-constitutional regimes, can be traced back to the failure and omission to hold trials and punish the perpetrators of the original crimes committed in Bangladesh in 1971, giving rise to an impunity culture. This seems to be the core causation between the repetitious derailments of constitutional regimes followed by the rise of terrorism spreading all over the globe. The seed of this lies in the failure to try the perpetrators of core crimes of genocide and crime against humanity in Bangladesh in 1971.

11.9. Tragic Fall Out of the Default

Although Bangladesh's 1973 Act is the first written statute on core international crimes, the trial could not be held due to the hijacking of state power by the killing of the father of the nation, Bangabandhu Sheikh Mujibur Rahman, and his family, which included Begum Mujib and children, including the young child Russel, newly wed Jamal and Kamal, along with their wives, on 15 August 1975. Two other families of close relations to the President, one being a cabinet member, Mr. Serniabad, and his family, met the same fate as his son-in-law, Sheikh Moni, along with Moni's pregnant wife, who was killed around the same time in their respective residences in the city. It was followed by the killing of the four national leaders³⁴ in prison on 3 November 1975 in

³⁴ In the absence of the President Sheikh Mujibur Rahman (in the Pakistan prison), Mr. Syed Nazrul Islam was the Acting President of the government in exile in 1971, Mr. Tajuddin Ahmed was the Prime Minister, Mr. M. Mansur Ali was the Minister of commerce and trade, A.H.M. Kamruzzaman was a cabinet Minister leading the liberation movement as a lawful and constitutional government. See [http:// four-leaders.webs.com/historyofthetime.htm](http://four-leaders.webs.com/historyofthetime.htm), and <http://www.thedailystar.net/newDesign/news-details.php?nid=161098>, last accessed on 3 October 2012.

another orgy operated by the same military group at the Dhaka Central Jail who killed the President on 15 August 1975. This would reveal genocide and crimes against humanity surfacing often thereafter, all part of the same scheme to destabilise Bangladesh by making Bangladesh leaderless, thus subverting and derailing the constitution and democracy so that this nation may not sustain its constitutional values, the values of the war of liberation, and democracy. Thus, in the process, the fruits of freedom are left to the future generation. The killings of 1975 were protected from any trial by an indemnity ordinance decreed by the usurper, after having hijacked the state power. The killers were patronised by the new military-backed regime under which some of the killers were given diplomatic assignments abroad and others were encouraged to form a political party and to become members of the parliament, under the patronage of this regime. The constitution was changed by decree in order to change the secular character of the republic, introducing Islam as the state religion.

During subsequent regimes, cultural workers, artists, public leaders, and judges also became targets of bomb attacks by the religious-militant groups who were allowed to grow and operate under the umbrella of the military-backed regime. This threatened the national peace and stability of the country several times. Systematic terror and violence occurred through the targeting of cinema halls, public meetings, and cultural functions, and the killing of innocent people which created public scares. All court premises in the country, including the Supreme Court, became targets of bomb blasts on 17 August 2005, simultaneously also causing the death of judges in Jhalakathi and some advocates in Gazipur on 14 November 2005.³⁵

Election and post-election violence following the general election in 2001 was another manifestation of such crimes, as reported in various newspapers and documented by a commission of inquiry set up by the government and headed by Judge Shahabuddeen. His report has been submitted before the court and is still waiting to be made public. Based on newspaper reports, during the 87 days of caretaker government in 2001, there were about 2483 incidents of atrocities in which 906 were

³⁵ “2 Britons funded JMB to carry out bomb blasts”, The Daily Star, 9 February 2006, last accessed 4 October 2012. See http://en.wikipedia.org/wiki/Jamaat-ul-Muja_hideen_Bangladesh, last accessed on 9 October 2012.

killed and 15,616 injured. After the assumption of the four-party Alliance³⁶ to power, several hundreds were killed, more than thousand injured, about 41,000 tortured, and several hundred raped as part of the post-electoral violence.³⁷ The figures continued to swell each day as the reports appeared in the dailies. Such violence and atrocities in the form of killings, rape, and looting were committed on Hindu communities and on Awami League leaders and supporters at the grassroots level, repeating the same syndrome perpetrated in 1971 against the party which won the election in 1970 and which led the liberation movement to a victory in December 1971.

³⁶ “A major rightist alliance of B.N.P. along with Jamat-e-Islami and two other parties”, available at http://www.asiapacificms.com/papers/pdf/faultlines_bangladesh.pdf, last accessed on 9 October 2012.

³⁷ Such incidents have been reported in various newspapers such as:

- The Daily Sangbad, 19 September 2001: Father and daughter named Dulal Chandra Das and Akhi Rani Das of a family of Hindu minority were killed by a terrorist group in the village of Haroshshor, Allahabad Union, Debiddar Upazilla of Comilla District.
- The Daily Prothom Alo, 5 October 2001: Terrorist groups attacked in 20 Districts of Bangladesh the supporters of Awami League and the Hindu Minorities. 9 persons were killed and 217 persons were injured in that incident.
- The Daily Star, 11 October 2001: Attacks on Awami League (AL) leaders and workers and the minority community continued in Pabna and Barisal districts.
- The Independent, 17 October 2001: Houses of minority community ransacked in Keshabpur. The members of the minority community of the district left their homes for safer places following terrorism let loose by the armed miscreants.
- The Daily Star, 30 October 2001: Hindus who fled to India tell tales of torture. Hundreds of Bangladeshi Hindu families have fled across the border into India because they say they have been ‘tortured’ since an Islamist-allied government came to power.
- The Daily Star, 11 October 2001: Minorities in 3 Pabna UZs flee houses. Torture and arson alleged. Members of the minority community in some areas of three upazilas in the district are allegedly being subjected to attacks and threats by ‘terrorists’, following the October 1 election. The upazilas are Chatmohor, Sujanagar and Bera.
- The Daily Star, 13 October 2001: Hundreds of minority people flee Agailjhara in Barisal. Hundreds of members of the minority community including local public representatives in the neighbouring Agailjhara upazila of Barisal fled their homes and took shelter in villages in Kotalipara upazila. They left their houses to escape the wrath of hoodlums under the banner of BNP.

On 21 August 2004, there was an attack on the present Prime Minister of Bangladesh Sheikh Hasina while she was leader of the opposition and holding a rally protesting the killing of a senior leader of her party, distinguished statesman, Mr. Shah A.S.M. Kibria, the former Finance Minister of the country who was brutally assassinated in a grenade attack on 27 January 2005 in his constituency at Sylhet.³⁸ The leader of the Awami League, Sheikh Hasina, was protected by a human shield built around her against a repeated grenade attack at the venue of the meeting. Though she miraculously survived with an impairment of hearing and escaped death, her other colleagues, including Begum Ivy Rahman, the wife of the present President of Bangladesh, Mr. Zillur Rahman, along with 21 other active members of the Party, were killed and more than 100 wounded, still carrying the pains and pangs of splinters in their body. Investigations conducted now reveal that this massacre and orgy was planned and conspired under the patronage of the then government in power, now awaiting trial.

It is difficult to fathom the Bangladesh Rifles ('BDR') massacre on 25–26 February 2009. The manner of killing the officers and the wife of the Director General of BDR, and the looting and mutilating of dead bodies, disclose the nature of a crime which cannot be simply dealt with and described under the definition of mutiny or murder alone. It has the symptoms and elements of the core international crime of crimes against humanity. In tracing the above-mentioned mayhem and mass murder, there seems to be a thin veil between the definition of mass murder and crimes against humanity. Hence I crave the indulgence of experts, jurists, and academics, drawing their attention to the continuing repetitions of crime. Specifically, whether this has any connection from the perspective of the science of criminology of core international crimes with the default culture giving rise to impunity, and whether the mass murders as perpetrated on 9/11 in the U.S. or in Bangladesh or Pakistan, which repeatedly recurs in the name of religion or otherwise, should be considered as crimes to be included in the definition of crimes against humanity, those crimes being closely connected and having the characteristics of achieving the same or similar object.

However, there is a thin distinction between mass killing and crimes against humanity. Under the heading "Mass Killing", Blair

³⁸ See <http://www.kibria.org/>, last accessed on 9 October 2012.

wrote, “Looking ahead over the next five years, a number of countries in Africa and Asia are at significant risk for a new outbreak of mass killing”. He defined ‘mass killing’ as:

[...] the deliberate killing of at least 1,000 unarmed civilians of a particular political identity by state or state-sponsored actors in a single event or over sustained period.³⁹

U.S. President Barack Obama and other senior policy makers have communicated that they believe the preventing of mass killing, genocide, and other mass atrocities is important. Upon his acceptance of the Nobel Peace Prize, he stated,

[m]ore and more, we all confront difficult questions about how to prevent the slaughter of civilians by their own government [...] When there is genocide in Darfur, systematic rape in Congo, or repression in Burma-there must be consequence.⁴⁰

What happens if the perpetrators are let go and the impunity culture grows? It will endanger the democratic polity, stability of the country, and its constitutional continuity as it has already happened in Bangladesh more than twice since 1975. The survival of the cultural and civilisational base for democracy and the rule of law would often be undermined by unconstitutional usurpation; consequently society becomes vulnerable to terror and all kinds of violence and militancy.

The present trial taking place before the International Crimes Tribunal at the national level in Bangladesh is being held against the background of what the Bangladeshi people have suffered and were subjected to in 1971. Threats of similar crimes in different forms and shapes seem to still persist as are well-described in various contemporary press reports published and compiled into various documents.

11.10. Lessons from History

I need not elaborate on these trails of tragedy except for the purpose of reminding ourselves of the lessons of history. History teaches us that ac-

³⁹ Lawrence Wocher, “A Smart Use of Intelligence: Preventing Genocide of Mass Killing”, in *Georgetown Journal of International Affairs*, 2010, vol. 11, p. 43.

⁴⁰ Barack Obama, “Remarks by the President at the Acceptance of the Nobel Peace Prize”, The White House, Office of the Press Secretary, 10 December 2009.

tions or omissions to act have definite consequences. The cost of sparing evil has always been very heavy and disastrous. To prevent genocide, the United Nations adopted the Convention on the Prevention and Punishment of the Crime of Genocide in 1948.⁴¹ The Convention deals with issues related to the “crime of crimes”.⁴² The Convention codifies the prohibition against genocide though it has been outlawed for much longer in customary international law and though it has occurred throughout history.⁴³ The definition of genocide is, however, intensely contested terrain.⁴⁴

Despite the adoption of the Convention sixty years ago, many genocides⁴⁵ have occurred in various places⁴⁶ including Burundi, Paraguay, Cambodia,⁴⁷ Iraq, Rwanda,⁴⁸ and it continues to occur today in the

⁴¹ The Genocide Convention had been ratified by 138 states as of 2008. See generally Frank Chalk, “Genocide in the 20th Century: Definitions of Genocide and Their Implications for Predication and Prevention”, in *Holocaust and Genocide Studies*, 1989, vol. 4; Leo Kuper, “The Prevention of Genocide: Cultural and Structural Indicators of Genocidal Threat”, in *Ethnic and Racial Studies*, 1989, vol. 12, p. 157; Ervin Staub, “The Roots of Evil: The Origins of Genocide and Other Group Violence”, in John A. Berry and Carol Pott Berry (eds.), *Genocide in Rwanda: A Collective Memory*, Harvard University Press, 1999.

⁴² This is not a new term, but for a discussion on the term’s use, see Robert D. Sloane, “Sentencing for the ‘Crime of Crimes’: The Evolving ‘Common Law’ of Sentencing of the International Criminal Tribunal for Rwanda”, in *Journal of International Criminal Justice*, 2007, vol. 5, issue 3, pp. 713, 713–734. Genocide was an international crime before Raphael Lemkin designed the word in the early 1940s. See Jeremy Sarkin, “The Historical Origins, Convergence and Interrelationship of International Human Rights Law, International Humanitarian Law, International Criminal Law and International Law: Their Application from at Least the Nineteenth Century”, in *Human Rights and International Legal Discourse*, 2007, pp. 125–172 (hereinafter ‘Historical Origins’).

⁴³ *Ibid.*

⁴⁴ See, e.g., George Chigas, “The Politics of Defining Justice after the Cambodian Genocide”, in *Journal of Genocide Research*, 2000, vol. 2, issue 2, pp. 245–265.

⁴⁵ Barbara Harff, “No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder since 1955”, in *American Political Science Review*, 2003, vol. 97, no. 1, p. 57.

⁴⁶ Benjamin A. Valentino, *Final Solutions: Mass Killing and Genocide in the Twentieth Century*, Cornell University Press, 2004.

⁴⁷ See generally David Cohen, “‘Hybrid’ Justice in East Timor, Sierra Leone, and Cambodia: ‘Lessons Learned’ and Prospects for the Future”, in *Stanford Journal of International Law*, 2007, vol. 43.

Darfur region of Sudan.⁴⁹ In this regard, a major failure of the Convention has been the absence of an institution to oversee the work of preventing genocide from occurring and to intervene where genocide is taking place.⁵⁰

There are certain conditions under which a moral agent may be held morally accountable for his/her actions or omissions. According to the two ‘negative’ Aristotelian principles, an agent should not be ignorant of the facts surrounding his/her actions, and those actions should not show undue force.⁵¹ Equally, the principle of ‘alternate possibilities’ implies that “a person is morally responsible for what he has done only if he could have done otherwise”.⁵²

In addition to crimes of genocide, a sense of moral and ethical duty accompanies the trial of past crimes of genocide, crimes against humanity, and war crimes. These cases encompass a utopian vision of seeking justice through restitution. For example, through his tenacious pursuit of justice, Simon Wiesenthal demanded that the European nations bring Nazi criminals to trial after World War II.⁵³ In a world that would prefer to forget, Wiesenthal hounded both criminals and States to remember and reaffirm the meaning of justice.⁵⁴

⁴⁸ U.N. Economic and Social Council (‘ECOSOC’), Sub-Committee on Prevention of Discrimination and Protection of Minorities, Whitaker Report: Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, U.N. Doc. E/CN.A/Sub.2.11985/6, 2 July 1985 (prepared by Benjamin Whitaker) (hereinafter ‘Whitaker Report’).

⁴⁹ See, The Secretary General, Report of the International Commission of Inquiry on Darfur, delivered to the Security Council, U.N. Doc. S/2205/60, 1 February 2005.

⁵⁰ See Jeremy Sarkin, “The Role of the United Nations, the African Union and Africa’s Sub-Regional Structures in Dealing with Africa’s Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect”, in *Journal of African Law*, 2009, vol. 53, issue 1, p. 1.

⁵¹ M. Fischer and M. Ravizza, *Responsibility and Control: a Theory of Moral Responsibility*, Cambridge University Press, 1998; M. Zimmerman, “Moral Responsibility and Ignorance”, in *Ethics*, 1997, vol. 107, no. 3, p. 411.

⁵² D. Copp, “Defending the Principle of Alternate Possibilities: Blameworthiness and Moral Responsibilities”, in *Nous*, 1997, vol. 31, issue 4, p. 441.

⁵³ Michael Berenbaum, “The Uniqueness and Universality of the Holocaust”, in John K. Roth and Michael Berenbaum (eds.), *Holocaust: Religious and Philosophical Implications*, Paragon House, 1989, pp. 82, 83.

⁵⁴ *Ibid.*

In seeking justice by holding trials, there is the obvious need to deal with old evidence. There is a need to critically evaluate historical records and victim recollections as well as to deal with collective memories. Such an evaluation will avoid inaccurate submissions or oversimplified comparisons. Additionally, it helps contextualise both when the events took place and the span of time that has elapsed since the events occurred. Such litigation aims to present the untold suffering and injustice of “those who have endured and suffered great injustice, [who] often have a powerful sense that what they experienced must not be forgotten, but must be cultivated both as a monument to those who did not survive and as a warning to future generations”,⁵⁵ so that a nation can be free from these crimes and atrocities; however much a government tries to bury these crimes by default, the crimes continue to haunt the nation from the debris of the history in countless ways.

There is no scope to be ambivalent, hesitant, or even half-hearted in one’s resolve to try and punish those perpetrators through proper investigation and by conducting a fair trial. On this issue there is no scope for being in the middle of the road, “ones who are in the middle of the road are in danger of being knocked down”.⁵⁶ Besides its philosophical significance, it is important to remember that the failure to bring criminals to justice has statistically contributed towards generating future crimes, some of which have been mentioned earlier.

One must not forget the past as it has a curious habit of recurrence unless dealt with in an appropriate manner. The German writer Jurgen Fuchs once said, “If you do not solve this problem in a definite way it shall haunt us”.⁵⁷ In Bangladesh, the series of past persecutions is a re-

⁵⁵ See e.g., Michael R. Marrus, *Some Measures of Justice: The Holocaust Restitution Campaign of the 1990s*, University of Wisconsin Press, 2009 (‘Marrus’). Marrus discusses the “wave of Holocaust-era restitution” in the late 1990s.

⁵⁶ It was stated by Margaret Thatcher, “Standing in the middle of the road is very dangerous; you get knocked down by traffic from both sides”, available at http://www.famousquotesandauthors.com/topics/commitment_quotes.html, last accessed on 9 October 2012.

⁵⁷ Dr. Zia Uddin Ahmed, “Justice After Genocide: Ways To Deal With The Past”, News From Bangladesh, 27 October 1997, available at http://www.mukto-mona.com/Articles/Zia_U_Ahmed/justice_after_genocide_092106.htm, last accessed on 3 October 2012. The German writer Jurgen Fuchs once said to Adam Michnik, a leader of the Polish opposition to communist rule about crimes committed

curing nightmare even after its fortieth year of independence, largely because the burden of the past cannot be shaken off.

11.11. Prime Agendas in the Election Manifesto of the Present Ruling Party and Overwhelming Verdict of Victory

The trial of perpetrators of core international crimes under international law was one of the prime agendas incorporated into the election manifesto of the Awami League, the present ruling party in Bangladesh. It was partly a response to the demand of the new generation for such a trial. This demand was re-confirmed by the unanimous resolution of parliament following the overwhelming verdict of victory in the national elections in 2008. It also accorded with the objectives and declaration of Rome Statute:

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.⁵⁸

We, the people of Bangladesh, share the resolve of the Rome Statute by taking measures at the national level, as the present government has undertaken, and “by enhancing international co-operation”, as initiated by FICHL and CMN. It is evident that the people, the government, and the international community, trusting and believing in the rule of law, are:

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.⁵⁹

In concluding, let me say how grateful we are to the eminent jurists of international eminence who have made it convenient to take time

during the communist regime in East Germany that “if we do not solve this problem in a definite way, it will haunt us”.

⁵⁸ Preamble of Rome Statute, *supra* note 2.

⁵⁹ Preamble of the Rome Statute of the International Criminal Court, available at <http://www2.ohchr.org/english/law/criminalcourt.htm>, last accessed on 9 October 2012.

off from their otherwise busy schedules to contribute to the seminar and this anthology, thereby extending their support and solidarity by sharing their knowledge expertise and their exposure to the international trial process related to the prosecution of crimes against humanity and genocide. And in the process of doing so, we exchange and share our common commitment and aspiration to the bringing of an end to impunity so that we may thus prosper in peace, being united by common bonds and determined to contribute to the prevention of such crimes in this country or anywhere else. We gratefully acknowledge your commitment and co-operation towards this common cause.

FICHL Publication Series No. 16 (2012):

Old Evidence and Core International Crimes

Morten Bergsmo and CHEAH Wui Ling (editors)

It is often only years after the commission of core international crimes that prosecutions and investigations take place. This anthology addresses challenges associated with such delayed justice: the location, treatment, and assessment of old evidence. Part I considers the topic from the perspective of different actors involved in the prosecution of core international crimes at the domestic and international levels. Part II comprises chapters focusing on the efforts of the Bangladeshi authorities to investigate and prosecute international crimes perpetrated during the 1971 war.

This book brings together experienced judges, prosecutors, lawyers, scientists, and commentators who have dealt with questions of old evidence in their work. Among the contributors are Shafique Ahmed, Andrew Cayley, David Cohen, Seena Fazel, Siri S. Frigaard, M. Amir-Ul Islam, Md. Shahinur Islam, Agnieszka Klonowiecka-Milart, Alphons M.M. Orie, Stephen J. Rapp, Patrick J. Treanor, Otto Triffterer and Martin Witteveen.

The chapters describe the challenges encountered in practice and suggest concrete solutions that can be tailored to fit the circumstances of the case or country. By providing a comprehensive analysis of the relevant problems in this area and a variety of views, this anthology will serve as an invaluable resource for criminal justice actors and researchers seeking to address questions of old evidence.

ISBN 978-82-93081-60-9

TOAEP

Torkel Opsahl
Academic EPublisher

Torkel Opsahl Academic EPublisher

E-mail: info@fichl.org

URL: www.fichl.org/toaep

CILRAP

Centre for International
Law Research and Policy