THE SEARCH FOR JUSTICE IN BANGLADESH

An Assessment of the Legality and Legitimacy of the International Crimes Tribunals of Bangladesh through the prism of the principle of complementarity

by

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Contents

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Preface

In the autumn of 2011 after completing my graduate studies in the UK I returned to Bangladesh to join the International Crimes Tribunal (ICT) as Researcher to the Chief Prosecutor. The renaissance styled architecture of the Old High Court building where the ICT was based added a sense grandeur to the proceedings. As I ploughed through the fifteen hour work days, the formal appointment as 'Researcher' I had been originally promised by the Bangladesh Government's Ministry of Law Justice and Parliamentary Affairs never came. Thanks to the unqualified support of my parents, I ended up working for about a year without a shred of regret. Although I worked without pay, I knew there were countless others who would gladly volunteer to take the position that had been offered to me. I may have played the smallest of roles in the collective effort of delivering justice to the victims of the war of 1971, but the time I spent at the ICT will remain as the most challenging and rewarding experience of my life.

Justice systems, whether they be national or international, are always subject to scrutiny and criticisms. Such criticisms are appreciated given that they are generally expressed for the purposes of improving an ongoing judicial process. I was conscious of many criticisms of the ICTs from before. However it was during my time as Researcher that I was fully exposed to the onslaught of criticisms directed at their standards of justice. In the past I had worked with Human Rights Watch (HRW) on multiple occasions on issues which were integrally related to fighting impunity in Bangladesh. This made reading HRW's critical statements on the ICTs an uncomfortable and at times painful experience. It was this discomfort, among other

reasons, that inspired me to start exploring these criticisms. I was determined to get to the bottom of it. As I dug deeper, several questions slowly began to take shape in my mind. I asked myself: what was the historical context behind Bangladesh's struggle against impunity? In the 'complementary' system of justice created by the Rome Statute of the International Criminal Court (ICC), where did the Bangladeshi ICTs fit in? Critics assessed the quality of the ICTs trials against international standards of justice. Was this right? If the objective of the principle of 'complementarity' is to end impunity, how does the International Criminal Court balance this objective with the fair trial rights of individuals being tried at the domestic level? Of course, there were many criticisms, but what were the main ones that could not be ignored? Are the genuine weaknesses of the ICTs capable of delegitimising the whole justice process? Are the ICTs a site for show trials? These questions form the outer boundaries of this thesis.

Declaration

I hereby declare that this thesis is my original work. I confirm that information derived from other sources have been indicated, and no part of the thesis has been submitted for any other Degree or Diploma to the University of Warwick or any other university.

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Abstract

Bangladesh's place on the globe as a sovereign nation-state came at the expense of millions of victims who perished during the war of 1971. For the greater part of four decades an endemic culture of impunity deprived the surviving victims of justice. As the crimes of 1971 remained beyond the *ratione temporis* of the ICC, the Bangladesh Government established the first International Crimes Tribunal in 2010 under the International Crimes (Tribunals) Act 1973 for the purposes of detaining, prosecuting and punishing "persons responsible for committing genocide, crimes against humanity, war crimes and other crimes under international law" in 1971. According to critics, the ICTs are a case of "complementarity gone bad" because they have failed to uphold international standards of justice. This thesis determines the legality and the legitimacy of the ICTs of Bangladesh. It does so by analysing the major criticisms directed towards the statutory provisions of the ICTA and the trial process of the ICTs through the prism of the principle of complementarity with particular reference to the "principles of due process recognized by international law".

Introduction

Overview of the thesis

In December 2008, the *Mohajote* (Grand Alliance) led by Bangladesh Awami League (AL) secured a 75% majority in the 9th National Parliamentary Elections of Bangladesh. The voters rejected the Bangladesh Nationalist Party (BNP) and Jamaat-e-Islami (JI), a right-wing coalition that had been in power from 2001 to 2006.[1] This 'fall from grace' occurred for several reasons. But one reason that featured prominently was the popular support towards the electoral pledge made in the manifestos of the parties belonging to the Grand Alliance, that if elected to power, the trials of those who allegedly commited international crimes during Bangladesh's "historic struggle for national liberation" would be arranged.[2] Nearly four decades

[1] See, Bangladesh Election Commission *Statistical Report 8th Jatiya Shangshad Election October 1, 2001* (Election Commission Secretariat, 2002) 6 < http://www.ec.org.bd/MenuExternalFilesEng/124.pdf > accessed 1 March 2017; 'Monitoring Report of the 9th Parliamentary Election 2008 in Bangladesh' (Democracy Watch, February 2009) 24-25 < http://www.dwatch-bd.org/National%20Election%20Final%20Report-2008.pdf > accessed 1 March 2017.

[2] The Constitution of the People's Republic of Bangladesh, Preamble < http://bdlaws.minlaw.gov.bd/pdf_part.php?id=367 > accessed 1 February 2017; Julfikar Ali Manik, 'The Trial we are Still Waiting for' (2009) 3(12) Forum < http://archive.thedailystar.net/forum/2009/december/trial.htm > accessed 20 September 2017; Bangladesh Awami League, 'Election Manifesto of Bangladesh Awami League, 9th Parliamentary Election, 2008' < https://www.albd.org/~parbonc/index.php/en/resources/articles/4070-election-manifesto-of-bangladesh-awami-league,-9th-parliamentary-election,-2008 > accessed 1 February 2017; Jatiyo Shomajtantrik Dol, 'Jatiyo Shomajtantrik Dol-Jashod er Nirbachoni Ishtehar – Poribortoner Procheshta Effort for Change' < http://www.jasod.org.bd/index.php?option=com_content&view=article&id=9&Itemid=26&lang= > accessed 1 February 2017; Nizam Ahmed, 'Critical elections and democratic consolidation: the 2008 parliamentary elections in Bangladesh' (2011) 19 (2) Contemporary South Asia 137, 147, 150; Haroon Habib, 'Landslide win' (2009) 26 (2) *Frontline* < http://www.frontline.in/static/html/fl2602/stories/20090130260205700.htm > accessed 1 February 2017; Rounaq Jahan, 'Political Parties in Bangladesh' (2014) CPD-CMI Working Paper Series 8, 10 < https://www.cmi.no/publications/file/5229-political-parties-in-bangladesh.pdf > accessed 25 February 2017; Henrik Alffram, Ignoring Executions and Torture Impunity for Bangladesh's Security Forces (Human Rights Watch, 2009) < https://www.hrw.org/report/2009/05/18/ignoring-executions-and-torture/impunity-bangladeshs-security-forces > accessed 3 March 2017; Sabir Mustafa, 'Ghulam Azam: War crimes trial that exposed Bangladesh scars' *BBC News* (17 July 2013) < http://www.bbc.co.uk/news/world-asia-23314457 > accessed 5 March 2019.

earlier in 1971, East Pakistan had seceded from West Pakistan and through one of the bloodiest conflicts of the 20th century Bangladesh had cemented its place on the global map as a sovereign nation-state.

The judicial initiatives pursued immediately after the war in the early 1970s ended in failure and for the greater part of the next four decades Bangladesh was engulfed by a culture of impunity that left the victims of the most egregious crimes deprived of any form of acknowledgment or apology, let alone 'justice'. This is why in the elections of December 2008 the 'Grand Alliance' swept into parliament by a landslide, while the Jamaat-e-Islami a political party that had believed and fought for a unified Pakistan and had assisted the Pakistan Army in the commission of atrocities in 1971, managed to secure only two out of the nationwide three hundred seats.[3] Unaddressed for nearly four decades, the scars and wounds of war had not healed and the voters had expressed their decisive and unequivocal support to the pledge of delivering justice through 'war crimes trials'.[4]

On 23 March 2010, Bangladesh ratified the Rome Statute.[5] The crimes of 1971, however, remained beyond the *ratione temporis* of the ICC because of its prospective

[3] 'Bangladesh Jatiya Sangsad (Parliament) Elections in 2008' (*Inter-Parliamentary Union*, 27 February 2017) < http://www.ipu.org/parline-e/reports/arc/2023_08.htm > accessed 27 February 2017; Bangladesh Nirbachon Commission, *Porishongkhan Protibedon, Nobom Jatiyo Songshod Nirbachon* (Nirbachon Commission Shochibaloy 2012) < http://www.ecs.gov.bd/MenuExternalFilesEng/304.pdf > accessed 1 March 2017.

[4] Morten Bergsmo and Elisa Novic, 'Justice after decades in Bangladesh: national trials for international crimes' (2011) 13 Journal of Genocide Research 503; Philip Hensher, 'The war Bangladesh can never forget' *Independent* (19 February 2013) < http://www.independent.co.uk/news/world/asia/the-war-bangladesh-can-never-forget-8501636.html > accessed 26 February 2017; M Rafiqul Islam, 'Trials for international crimes in Bangladesh – Prosecutorial strategies, defence arguments and judgments' in Kirsten Sellars (ed), *Trials for International Crimes in Asia* (Cambridge University Press 2016) 303; 'Bangladeshi tribunal upholds death sentence for 1971 crimes, journalist David Bergman brings more' < https://www.youtube.com/watch?v=bRHWanU2bu4 > accessed 26 February 2017.

[5] 'Bangladesh Ratifies ICC Rome Statute' (*The Hague Justice Portal,* 24 March 2010) < http://www.haguejusticeportal.net/index.php?id=11564 > accessed 26 February 2017.

mandate. Two days later, following through on its electoral promise, the newly formed Bangladesh Government led by Prime Minister Sheikh Hasina announced the constitution of the first International Crimes Tribunal (ICT-1) under the International Crimes (Tribunals) Act, 1973 (ICTA) for the purposes of the "detention, prosecution and punishment of persons responsible for committing genocide, crimes against humanity, war crimes and other crimes under international law" in 1971.[6] Within the next few months the Tribunal framed its Rules of Procedure, which was published via an official Bangladesh Gazette notification on 15 July, 2010. The second International Crimes Tribunal (ICT-2) was established on 22 March, 2012 and after three and half years of operation was deactivated on 15 September, 2015.[7] The proceedings of ICT-1 continued until 13 July 2017 when its Chairman Justice Anwarul Haque succumbed to cancer.[8] Although trial proceedings at ICT-1 are currently at a standstill, the Bangladesh Government has declared that the Tribunal is in the process of being reconstituted and will resume hearing cases soon.[9]

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[6] 'War crimes panel announced' *bdnews24* (Dhaka, 25 March 2010) < http://bdnews24.com/bangladesh/2010/03/25/war-crimes-trial-panel-announced > accessed 6 May 2014; The International Crimes (Tribunals) Act 1973 [ACT NO. XIX OF 1973] < http://bdlaws.minlaw.gov.bd/pdf_part.php?id=435 > accessed 6 May 2014.

[7] 'International Crimes Tribunals Merged to One' *The Daily Ittefaq* (Dhaka, 15 September 2015) < http://www.clickittefaq.com/international-crimes-tribunals-merged-to-one/ > accessed 6 May 2017; 'Bangladesh Keeps One 1971 War Crimes Tribunal in Operation' *Bdnews24* (Dhaka, 15 September 2015) < http://bdnews24.com/bangladesh/2015/09/15/bangladesh-keeps-one-1971-war-crimes-tribunal-in-operation > accessed 6 May 2017.

[8] Tuhin Shubhra Adhikary, 'War Crimes Trial Stalled' *Bdnews24* (Dhaka, 1 September 2017) < http://www.thedailystar.net/backpage/war-crimes-trial-stalled-1457080 > accessed 15 September 2017.

[9] 'Reform in International Crimes Tribunal Soon' *Dhaka Tribune* (Dhaka, 19 September 2017) < http://www.banglatribune.com/others/news/244015/%E0%A6%86%E0%A6%A8%E0%A7%8D%E0%A6%A4%E0%A6%B0%E0%A7%8D%E0%A6%9C%E0%A6%BE%E0%A6%A4%E0%A6%BF%E0%A6%95-%E0%A6%85%E0%A6%AA%E0%A6%B0%E0%A6%BE%E0%A6%A7-%E0%A6%9F%E0%A7%8D%E0%A6%B0%E0%A6%BE%E0%A6%87%E0%A6%AC%E0%A7%8D%E0%A6%AF%E0%A7%81%E0%A6%A8%E0%A6%BE%E0%A6%B2-%E0%A6%AA%E0%A7%81%E0%A6%A8%E0%A6%B0%E0%A7%8D%E0%A6%97%E0%A6%A0%E0%A6%A8-%E0%A6%B6%E0%A6%BF%E0%A6%97%E0%A6%97%E0%A6%BF%E0%A6%B0%E0%A6%87 > accessed 20 September 2017.

To date, the ICTs have delivered twenty-seven judgments through which a total of fifty-one accused have been tried and sentenced.[10] The first ever judgment passed *in absentia* against Abul Kalam Azad was described by one commentator as a "watershed moment" in Bangladesh's "tortuous" history.[11] At the moment, nine cases are currently at the trial stage and twenty-two cases are at the pre-trial stage.[12] The death penalty has been passed against thirty-one of the accused. The Appellate Division of Bangladesh's Supreme Court has so far heard the appeals filed by seven of the accused and has passed the death sentence against six of them.[13] On appeal, the Supreme Court commuted the sentence passed against one accused from the death penalty to life imprisonment.[14] The appeals filed by eighteen convicts are currently pending.[15] For the purposes of this thesis, the ICT-1 and ICT-2 shall be collectively referred to as the ICTs.

The opinions of stakeholders regarding the overall fairness of the trial process at the ICTs are highly polarized. The Bangladesh Government claims that the trials are at par with "international standards" and the ICTA adheres "to most of the rights of the

[10] The judgments of the International Crimes Tribunals No. 1 and 2 can be downloaded from < http://www.ict-bd.org/ict1/judgments.php > and < http://www.ict-bd.org/ict2/judgments.php > accessed 6 May 2014.
[11] Sabir Mustafa, 'Bangladesh's watershed war crimes moment' *BBC News* (21 January 2013) < http://www.bbc.co.uk/news/world-asia-21133320 > accessed 6 May 2014.
[12] Tuhin Shubhra Adhikary, 'War Crimes Trial Stalled' *Bdnews24* (Dhaka, 1 September 2017) < http://www.thedailystar.net/backpage/war-crimes-trial-stalled-1457080 > accessed 15 September 2017.
[13] 'Bangladesh Hangs Islamist Mir Quasem Ali for 1971 War Crimes' *BBC News* (4 September 2016) < http://www.bbc.co.uk/news/world-asia-37268320 > accessed 15 September 2017.
[14] 'Bangladesh Islamist Delwar Sayeedi Death Sentence Commuted' *BBC News* (17 September 2014) < http://www.bbc.co.uk/news/world-asia-29233639 > accessed 15 September 2017.
[15] '7 Years of War Crimes Trial' *The Daily Star* (Dhaka, 25 March 2017) < http://www.thedailystar.net/supplements/7-years-war-crimes-trial-1381120 > accessed 15 September 2017.

accused enshrined under Article 14 of the ICCPR".[16] According to several academics and justice forums, the governing statute and the rules of procedure of the ICTs uphold the "core tenets of the right to fair trial".[17] On the other hand, critics comprising of counsel defending the accused, academics, international lawyers, human rights and non-governmental organizations as well as foreign State agencies claim that the trials before the ICTs are "replete with violations of the right to a fair trial"[18] and the justice standards adopted in them do not "comply with the norms and standards of international law".[19] The ICTs have been described as a case of "complementarity gone bad".[20] Calls have been issued to establish an "internationally supervised mechanism" by the United Nations that implements "recognised due process rights" and adopts "fair trial protections" guaranteed by the Constitution of Bangladesh and those international instruments to which Bangladesh

[16] Ministry of Foreign Affairs, 'A Position Paper on ICT-BD Trials and Execution of Verdict against Mr. Abdul Quader Molla on 12 December 2013' (The Government of the people's Republic of Bangladesh, 2013) 2, 8 < http://www.mofa.gov.bd/media/position-paper-ict-bd-trials-and-execution-verdict-against-mr-abdul-quader-molla > accessed 8 August 2017.

[17] Ridwanul Hoque, 'War Crimes Trial in Bangladesh: A Legal Analysis of Fair Trial Debates' (2016) 17 (1) Australian Journal of Asian Law 1, 16; See also, Islam (n 4) 306, 317; International Crimes Strategy Forum, 'Stephen Rapp: Of misconceptions, unrealistic expectations and double standards' *bdnews24* (Dhaka, 22 May 2011) < http://opinion.bdnews24.com/2011/05/22/stephen-rapp-of-misconceptions-unrealistic-expectations-and-double-standards/ > accessed 21 May 2017; International Crimes Strategy Forum, 'Legal framework of ICT and fair trial attributes' *bdnews24* (Dhaka, 28 March 2013) < http://opinion.bdnews24.com/2013/03/28/legal-framework-of-ict-and-fair-trial-attributes/ > accessed 21 May 2017; Tureen Afroz (ed) *Genocide, War Crimes & Crimes Against Humanity in Bangladesh: Trial under International Crimes (Tribunals) Act, 1973* (Forum for Secular Bangladesh and Trial of War Criminals of 1971 2010).

[18] 'Bangladesh: Halt Imminent War Crimes Executions Impose Immediate Moratorium on the Death Penalty' (*Human Rights Watch*, 1 September 2016) < https://www.hrw.org/news/2016/09/01/bangladesh-halt-imminent-war-crimes-executions > accessed 8 March 2017.

[19] Suzannah Linton, 'Completing the Circle: Accountability for the Crimes of the 1971 Bangladesh War of Liberation' (2010) 21 (2) Criminal Law Forum 191; Abdus Samad, 'The International Crimes Tribunal in Bangladesh and International Law' (2016) 27 (3) Criminal Law Forum 257, 290; See also, Abdur Razzaq, 'The tribunals in Bangladesh: Falling short of international standards' in Kirsten Sellars (ed) *Trials for International Crimes in Asia* (Cambridge University Press 2016) 341-359.

[20] Beth Van Schaack, 'The Bangladesh International Crimes Tribunal (BICT): Complementarity Gone Bad' (*IntLawGrrls*, 8 October 2014) < https://ilg2.org/2014/10/08/the-bangladesh-international-crimes-tribunal-bict-complementarity-gone-bad/ > accessed 6 August 2017.

is "obliged to observe" as a State Party.[21] These criticisms have undermined the legality and legitimacy of the ICTs in the global arena.[22]

The aim of this thesis is to determine the legality and the legitimacy of the ICTs of Bangladesh through the prism of the principle of complementarity with particular reference to the "principles of due process recognized by international law".[23] Assessing the legality of judicial proceedings does not always have to necessarily be a painstaking exercise if performed through the formulas dictated by legal positivism.[24] The most fundamental preconditions necessary to ensure the legality of any judicial process is to see whether the process is founded on a set of legal rules, whether those rules were framed by an entity having the authority to do so, and if those rules conform to relevant legal texts such as Constitutions, Charters etc. On the

[21] 'International Legal Experts Express Concern Over the Lack of an Appropriate Accountability Mechanism in Bangladesh and Calls on the United Nations to Support an Internationally Supervised Mechanism' (*Toby Cadman*, 31 May 2016) < http://tobycadman.com/international-legal-experts-express-concern-over-the-lack-of-an-appropriate-accountability-mechanism-in-bangladesh-and-calls-on-the-united-nations-to-support-an-internationally-supervised-mechanism/ > accessed 6 August 2017; Desmond de Silva, 'The Bangladesh War Crimes Tribunal should be internationalised - for the sake of the nation's future' (*No Peace Without Justice*) < http://www.npwj.org/ICC/Bangladesh-War-Crimes-Tribunal-should-be-internationalised-sake-nation%E2%80%99s-future.html > accessed 6 August 2017.

[22] Mathias Holvoet and Paul de Hert, 'International Criminal Law as Global Law: An Assessment of the Hybrid Tribunals' in Shavana Musa and Eefje de Volder (eds), *Reflections on Global Law* (BRILL 2013) 96, 107; Mary Kozlovski, 'Bangladesh's way: Dhaka's controversial International Crimes Tribunal' (*International Bar Association,* 4 July 2013) < https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=AA9E9993-62BA-4E44-A177-DF51CA884C19 > accessed 6 August 2017; Beth Van Schaack, 'Precipitating Politics Around The Revival of Prosecutions in Bangladesh' (*Intlawgrrls*, 10 October 2014) < https://ilg2.org/tag/bangladesh/ > accessed 6 August 2017; Geoffrey Robertson, *Report on the International Crimes Tribunal of Bangladesh* (International Forum for Democracy and Human Rights 2015) 124; Samad (n 19) 262; Zakia Afrin, 'The International War Crimes (Tribunal) Act, 1973 of Bangladesh' [2009] Indian Yearbook of International Law and Policy 341, 346 < http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1184&context=pubs > accessed 6 August 2017; 'International Legal Experts Express Concern Over the Lack of an Appropriate Accountability Mechanism in Bangladesh and Calls on the United Nations to Support an Internationally Supervised Mechanism' (n 21).

[23] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, article 17(2).

[24] Vesselin Popovski, 'Legality and Legitimacy of International Criminal Tribunals' in Richard Falk, Mark Juergensmeyer and Vesselin Popovski (eds), *Legality and Legitimacy in Global Affairs* (Oxford University Press 2012) 388.

other hand, assessing the legitimacy of a judicial proceeding is not so easy. While the search for legitimacy is a largely theoretical and academic exercise, the search itself is not an exact science. Legitimacy belongs to a higher order of intellectual appreciation originating from the school of natural law which merges law with ethics.[25] This is why not all legal things are by default legitimate. In order for the 'legal' to be 'legitimate' it must satisfy the ideas of what is understood as moral and fair. Quintessential examples include laws that allowed and perpetuated slavery or the per se 'legal' but 'illegitimate' laws passed against the Jews by the Nationalist Socialist Party in Germany after 1933.

Even more interestingly, not all illegal acts are always interpreted as illegitimate. This is reflected in the broad interpretation of the NATO bombings of the Federal Republic of Yugoslavia in 1999. While most observers agree that the targets of the bombings were legitimate, lingering questions remained as to whether NATO had fulfilled all the laws of war or had operated within the boundaries of the United Nations Charter.[26] Therefore, in order for a judicial process to be perceived as legal and legitimate, that process must not just be founded on laws or rules that are properly framed, those laws or rules must also be ethical and rational.[27]

Legitimacy was perhaps best explained by Lon Fuller in 1958 when he wrote: " when men are compelled to explain and justify their decisions, the effect will generally be to pull those decisions toward goodness, by whatever standards of ultimate goodness

[25] Popovski (n 24).
[26] Adam Roberts, 'NATO's 'Humanitarian War' over Kosovo' (1999) 41 (3) Survival 102, 114; Martti Koskenniemi, ''The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law' (2002) 65 (2) The Modern Law Review 159.
[27] Popovski (n 24) 389.

there are."[28] This pull towards 'goodness' is what necessitates the need to hold not just 'legal', but 'fair' trials. On this note, the legitimacy of a domestic trial process functioning within the 'complementary' system of justice is determined by assessing its judicial standards. This requires testing the extent to which the justice standards of that domestic process deviate from the "principles of due process recognized by international law" and determining whether that deviation can be accommodated within the need to respect "diversity of legal systems, traditions and cultures" or not be accommodated because the "violations of the rights" of the accused which came about through those deviations were of the "egregious" kind.[29]

With this in mind, this thesis carries out an assessment of the legality and legitimacy of the ICTs of Bangladesh during the period of 2010 to 2017. To this end, it conducts a detailed exploration of the historical context behind the ICTs and a comprehensive unpicking of the major areas of contention surrounding Bangladesh's struggle against impunity. Due to constraints of space, it has been possible to only assess the major criticisms of the ICTA and the ICTs. What does and does not qualify as a major criticism was a decision taken on the basis of emphasis and importance given to them by critics, the availability and accessibility to necessary facts and documents, and finally whether a criticism had the potential to overthrow the principle of complementarity and delegitimise the whole justice process.

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[28] Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71(4) Harvard Law Review 630, 636.

[29] Office of the Prosecutor, 'Paper on some policy issues before the Office of the Prosecutor' (International Criminal Court, September 2003) 5 < https://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf > accessed 24 September 2017; *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi") ICC-O1/11-01/11OA6 (24 July 2014) [3] < https://www.icc-cpi.int/CourtRecords/CR2014_06755.PDF > accessed 24 September 2017.

The importance of the assessment this thesis aims to carry out is twofold. Firstly, unearthing those criticisms which are wanting in merit lend support to a key argument of this thesis that, while the ICC assesses domestic proceedings in terms of the "principles of due process recognized by international law", the Office of the Prosecutor (OTP) should be receptive towards the "diversity of legal systems, traditions and cultures", unless of course the deviation from the "principles of due process […]" results in "egregious" violations of the rights of the accused rendering a trial incapable of offering "any genuine form of justice" and "inconsistent with an intent to bring the person to justice".

Secondly, placing a microscope over the 'complementary' system of justice within which Bangladesh's struggle against impunity operates, reveals the genuine weaknesses which national criminal jurisdictions like the ICTs wrestle with when prosecuting international crimes. This in turn helps to identify some of the tension points of the principle of complementarity. The thesis, therefore, goes beyond testing whether the ICTs are compliant with a set of human rights. Rather, it unpicks a justice system in the context of complementarity, the aim of which is to end impunity.

The Chapter Outline

The thesis is arranged over seven chapters. Chapters I and II discuss the historical context of the ICTs. Chapter I examines the period between 1947 and 1971, outlining the circumstances leading up to Bangladesh's struggle for national liberation and the international crimes committed during that time. It considers the events which led to the secession of East Pakistan from West Pakistan resulting in the emergence of

Bangladesh. It gives an account of the nature and scale of crimes committed by the Pakistan Army and its auxiliary forces against the Bengalis during the war of 1971. Finally, it sheds light on the criminal nature of the roles played by three auxiliaries, namely the Razakars, Al Badr and Al Shams, many of whose members came from a political party known as Jamaat-e-Islami.

Chapter II traces the post-independence years from 1972 to 2010 and examines two justice initiatives that were set in motion after the surrender of the Pakistan Army and its auxiliary forces. It explains why those initiatives failed and identifies the causes of a deeply rooted culture of impunity in Bangladesh, a culture which was challenged when the first ICT was established in 2010 after a campaign spanning nearly four decades.

Chapter III then focuses on the principle of complementarity. It explores the *travaux préparatoires* and statutory provisions of the Rome Statute, policy papers published by the ICC's Office of the Prosecutor (OTP) and relevant decisions handed down by the ICC for the purposes of identifying the 'benchmark' in terms of which the legality and legitimacy of judicial proceedings before a national criminal jurisdiction, such as the ICTs, ought to be assessed.

In this context, Chapters IV, V, VI and VII proceed to analyse at length the most contentious criticisms of the statutory provisions of the ICTA and trial process of the ICTs that have managed to capture the narrative defining and undermining Bangladesh's fight against impunity before the international community. On the basis of the 'benchmark' identified in Chapter III, this analysis is performed in terms

of the principle of complementarity and the "principles of due process recognized by international law".

Chapter IV critiques three specific provisions of the ICTA that critics allege are incompatible with the principle of legality, otherwise known as the principle of *nullum crimen sine lege*. Because of the number of issues analysed, this Chapter (IV) is considerably longer than others. Firstly, it asks whether if Section 3(1) ICTA which empowers the ICTs to prosecute "any individual or group of individuals, […] whether before or after the commencement of this Act" violates Article 35(1) Constitution of the People's Republic of Bangladesh which protects persons from facing retroactive prosecution of crimes by prohibiting *ex post facto* laws. Secondly, it probes whether the definition of 'crimes against humanity' and the inclusion of 'political group' as a protected group in the definition of 'genocide' reflected the state of customary international law in 1971 and if the variations in these definitions provided for in the ICTA fell within the boundaries of reasonable discretion exercised by a national legal system. Thirdly, it analyses whether the retroactive amendment of Section 21 ICTA allowing the Prosecution to appeal against the life sentence passed on Abdul Quader Molla (Molla) violated the principle of legality and if the Supreme Court of Bangladesh relied on established judicial principles and precedents while justifying the enhancement of Molla's punishment on appeal from life imprisonment to the death penalty.

Chapter V analyses whether the passing of the death penalty by the ICTs and the Supreme Court of Bangladesh violates the principle of complementarity. It briefly traces the global movement for abolition of the death penalty and identifies the

categories of crimes against which the passing of the death penalty is still permissible under contemporary standards of international law. It then asks if the 'complementary' system of justice created by the Rome Statute of the International Criminal Court (Rome Statute) permits domestic courts of State Parties to apply the death penalty as punishment for international crimes.

Chapters VI explores two key objections relating to the trial process of the ICT's. Firstly, it asks whether Articles 47(3) and 47A of Bangladesh's Constitution deprive those charged with international crimes of their fair trial rights and alter the 'basic structure' of the Constitution. Secondly, it examines the ICTs practice of limiting the number of defence witnesses and assesses the extent to which this practice has affected the rights of the accused.

The analysis moves on to Chapter VII which asks whether the 'complementary' system of justice prohibits national criminal jurisdictions from trying alleged perpetrators of international crimes in their absence, provided that *trials in absentia* were used for objectively acceptable reasons. It goes on to analyse whether *trials in absentia* under the ICTs ensure the minimum safeguards, which are, notifying an accused of impending proceedings, ensuring that the State appoints and pays for legal counsel, and providing an absconding accused the right of appeal.

Throughout the detailed examination in Chapters IV-VII, the recurring question remains to what extent any variation in application of fair trial standards (or breach thereof) renders a national process invalid from the perspective of the principle of complementarity.

Finally the Conclusion to the thesis restates the key propositions concerning the legality and legitimacy of the International Crimes Tribunals of Bangladesh. It also considers how the future scholarship of the principle of complementarity might develop in light of the thesis findings and by identifying some of the points of tension which were revealed while writing this thesis.

Chapter I

The Bengalis struggle from autonomy to independence and the international crimes of 1971

Introduction

The aim of this thesis is to determine the legality and the legitimacy of the International Crimes Tribunals (ICTs) of Bangladesh through the prism of the principle of complementarity with particular reference to the "principles of due process recognized by international law".[1] In order to do so, some appreciation of the historical context of these initiatives is first required. This chapter examines the period between 1947 and 1971, outlining the circumstances leading up to Bangladesh's struggle for national liberation and the international crimes committed during the war of 1971. Part I considers the events which led to the secession of East Pakistan from West Pakistan resulting in the emergence of Bangladesh as a sovereign nation State. Part II gives an account of the nature and scale of crimes committed by the Pakistan Army and its auxiliary forces against the Bengalis during the war of 1971. It also sheds light on the criminal nature of the roles played by local auxiliaries, namely the Razakars, Al Badr and Al Shams, many of whose members came from a political party known as Jamaat-e-Islami.

1. The State of Pakistan (1947 – 1971)

[1] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, article 17(2).

Going into the details of the partition of United India is not required for the purposes of this chapter because its focus is on the war of 1971 and the atrocities which were committed during that war. However, the results of partition do indicate a deeper significance that ultimately led to the catastrophic consequences of 1971. This part explains that the Islamic Republic of Pakistan was an unnatural State from a geographical point of view from the very beginning. It then identifies the cultural and economic fault lines which caused resentment amongst the Bengalis of East Pakistan towards West Pakistan. Finally, it traces how the demands for autonomy transformed to a demand for all-out independence after the Pakistani military refused to transfer political power to the elected representatives of the Awami League which won a majority of seats in Pakistan's first ever general elections in December 1970 and in an unprovoked attack applied an excessive use of force on the Bengalis on 25 March 1971.

1.1 *Pakistan – East and West separated by a thousand miles*

Academics have described the Islamic Republic of Pakistan as a "geographical anomaly", a "double country" and an "anachronism" for its unusual makeup.[2] Although the partition of United India in 1947 resulted in the birth of Pakistan which was a union of the Muslim majority areas of the Indian subcontinent, its two wings, namely West Pakistan and East Pakistan were separated by a thousand miles of Indian territory.[3] The idea of a separate homeland for the Muslims of India was envisioned

[2] Imran Ali, 'The Punjab and the Retardation of Nationalism' in D A Low (ed), *Political Inheritance of Pakistan* (Palgrave Macmillam 1991) 49; Richard V Weekes, *Pakistan: Birth and Growth of a Muslim Nation* (D Van Nostrand Company 1964) 3; A F Salahuddin Ahmed, 'Foreword' in Ziaur Rahman (ed), *Speeches of Sheikh Mujib in Pakistan Parliament (1955-56)* (Vol-1, Hakkani Publishers 1990) iii.
[3] James A Michener, 'A Lament For Pakistan' *The New York Times* (9 January 1972); Salahuddin Ahmed, *Bangladesh: Past and Present* (APH Publishing 2004) 306; Aparna Pande, Shefali Dhar and

as early as the 1930s, however on both occasions when the idea was floated, the 'homeland' comprised of the Muslim majority provinces in the north-western regions of India.[4] The demand for a separate territorial identity for the Muslims of the eastern region of India took shape from the Lahore Resolution of 1940, a political statement adopted by the All-India Muslim League.[5] The All-India Muslim League, also known as the Muslim League was a political party that campaigned for the establishment of Pakistan, which would be a Muslim-majority nation-state. The Resolution read: "[…] the areas in which the Muslims are numerically in a majority as in the North-Western and Eastern zones of India should be grouped to constitute Independent States in which the constituent units shall be autonomous and sovereign."[6] Although the Indian Congress strongly opposed the possibility of a divided India at the time, the Lahore Resolution nevertheless added momentum to the movement for Pakistan.

In 1946 provincial elections were held throughout United India for the purposes of electing members of the legislative councils. In the provinces where Muslims were a majority, the Muslim League secured 439 out of the 494 seats.[7] The elected legislators of the Muslim League met at a Convention following this overwhelming victory and amended the Lahore Resolution by replacing the word 'states' to 'state'.[8] Therefore, a year prior to the birth of the Islamic Republic of Pakistan, it was envisioned as a 'state' with a federal structure comprising of two autonomous wings equal to each other. As the months passed and it became evident that power could not be transferred without

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Sidhanta Mehra, 'Introduction' in Aparna Pande (ed), *Routledge Handbook of Contemporary Pakistan* (Taylor and Francis 2017) 2.
[4] L F R Williams, *The State of Pakistan* (Faber and Faber 1962) 23.
[5] M Rafiqul Islam, *Bangladesh Liberation Movement: International Legal Implications* (The University Press Limited 1987) 8.
[6] Cyril Henry Philips, *The Evolution of India and Pakistan 1858 to 1947: Select Documents* (Oxford University Press 1962) 354-355.
[7] Islam (n 5) 9.
[8] ibid.

partition, the Muslims of the eastern zone opted to join Pakistan.[9] Although this decision was not backed by a referendum, the politicians representing the Bengali-Muslim community that formed the majority of the eastern zone believed that the decision to merge with Pakistan would protect them from Indian Hindu domination.[10] The promises of political empowerment and fiscal autonomy in the Lahore Resolution were other important reasons that shaped this assessment. On 11 August, 1947 Quaid-i-Azam Mohammad Ali Jinnah shared his vision of a modern and secular Pakistan before the Constituent Assembly of Pakistan:

> You are free, you are free to go to your temples, you are free to go your mosques or to any other places of worship in this State of Pakistan. You may belong to any religion or caste or creed – that has nothing to do with the business of the State. […] We are starting with the fundamental principle that we are all citizens and equal citizens of one State. […] Now, I think that we should keep that in front of us as our ideal and you will find that in course of time Hindus would cease to be Hindus and Muslims would cease to be Muslims, not in the religious sense, because that is the personal faith of each individual, but in the political sense as citizens of the State.[11]

Four days later on 14 August, 1947 the Islamic Republic of Pakistan comprising of "two racially, culturally and linguistically diverse wings" was born."[12]

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[9] ibid.
[10] ibid.
[11] *Quaid-I-Azam Mahomed Ali Jinnah: Speeches as Governor-General of Pakistan 1947-1948* (Pakistan Publications 1963) 8-9; Ahmed, 'Foreword' (n 2) i-ii.
[12] Islam (n 5) 10.

1.2 *The breakup of Pakistan: identifying the fault lines*

While it is true it was the physical distance that had caused the existence of historical and cultural differences between the people of these two regions,[13] the veteran Indian journalist Kalyan K. Chaudhuri argues that what initially held the two regions together as the Islamic Republic of Pakistan was the "spiritual and political exhilaration of a new [Islamic] nationalism".[14] However, as the months of togetherness turned into years the Bengalis of East Pakistan began to realize that the helms of power had merely shifted hands from the British to the Punjabis of West Pakistan.[15]

Democratic institutions, processes and the parliamentary system of governance were compromised in the first decade of Pakistan. It was also during this time that Muhammad Ali Jinnah and his protégé Liquate Ali Khan created an all-powerful bureaucracy.[16] The nature of power exercised reached such an extent that bureaucrats of the central secretariat, most of who came from West Pakistan, superseded the ministers of their department and reported directly to Jinnah.[17] In fact, because there was not a single representative from the Bengalis of East Pakistan amongst the senior bureaucrats, important decisions relating to politics, defence, economy and diplomacy were taken by the "ruling elite composed of West Pakistani civil and military officers."[18] Even when it came to addressing issues at the provincial level, all key

[13] Rounaq Jahan, *Pakistan: Failure in National Integration* (Columbia University Press 1972) 10-23.
[14] Kalyan Chaudhuri, *Genocide in Bangladesh* (Orient Longman 1972) 2.
[15] Weekes (n 2) 9-11.
[16] Islam (n 5) 12.
[17] ibid 12-13.
[18] G W Choudhury, *The Last Days of United Pakistan* (C Hurst & Co Publishers Ltd 1974) 6; Philip Oldenburg, 'The Breakup of Pakistan' in Lloyd Rudolph and Susanne Rudolph (eds), *The Regional Imperative: The Administration of U.S. Foreign Policy Towards South Asian States Under Presidents Johnson and Nixon* (Concept Publishing 1980) 143.

positions in the administration were occupied by West Pakistanis.[19] Due to such significant underrepresentation of the Bengalis of the Eastern wing in the bureaucracy, they were by default unable to be a part of the executive power structure at the central and provincial level.[20] The rise of the bureaucracy also meant compromising with democracy. This paved way for the Pakistan Army to intervene and assume the role of the "guardians of national interests and unity"[21] during the second decade, which in effect facilitated the beginning of the end of united Pakistan. This was coupled with the perpetual attempt of the Punjabis of the West to culturally dominate and economically exploit the Bengalis of the East.[22] The unifying strength of the Islamic nationalism was gradually eroding away and it was becoming incapable of preserving the union of two distant lands and cultures it had once brought together.

A key indicator of this domination was the focus that was placed on which language would be the state language of Pakistan. It took eight years for 'Bengali' to be adopted as one of Pakistan's state languages. On 25 February, 1948 Dhirendranath Datta, serving at the time as a member of the Constituent Assembly of newly independent Pakistan, moved an amendment with regard to the rules of procedure of the Assembly that if passed would allow for Bengali to be adopted as one of the official languages along with Urdu and English.[23] The proposed amendment was rejected due to staunch opposition offered by Prime Minister Liaquat Ali Khan and others. From the Punjabi

[19] Choudhury (n 18) 6.
[20] Jahan (n 13) 96-100.
[21] Islam (n 5) 7.
[22] Weekes (n 2) 9; Jahan (n 13); Richard Nations, 'The Economic Structure of Pakistan: Class and Colony' (1971) I (68) New Left Review 3; Mussarat Jabeen, Amir Ali Chandio and Zarina Qasim, 'Language Controversy: Impacts on National Politics and Secession of East Pakistan' (2010) 25 A Research Journal of South Asian Studies 99.
[23] M Waheeduzzaman Manik 'Dhirendranath Datta: Glimpses of a Life' *The Daily Star* (Dhaka, 21 February 2007) < http://archive.thedailystar.net/suppliments/2007/21stfeb/dhirendranath.htm > accessed 22 January 2014.

point of view, this was unsurprising. They believed that the glue that held together the unity of West and East Pakistan was the "Muslim" and "Pakistani" identity of the citizens of Pakistan, not their ethnic roots.[24] The imposing of Urdu was perceived as the all-important tool to "Islamise" the people of East Pakistan who were in need of "purification" from Hindu influences.[25] As a result, showing complete disregard to the reality that the majority of the people of Pakistan spoke Bengali and did not understand Urdu, Liaquat Ali Khan said: "Pakistan has been created on the demands of a hundred million Muslims in the sub-continent and the language of a hundred million Muslims is Urdu. […] Pakistan is a Muslim state and it must have for its lingua franca, the language of the Muslim nation."[26]

Jinnah's speeches also reveal that he was moving away from his earlier vision of Pakistan where "Hindus would cease to be Hindus and Muslims would cease to be Muslims".[27] On 19 March, 1948 at the Race Course Ground of Dhaka the capital city of East Pakistan, Jinnah declared: "The State language of Pakistan is going to be Urdu and no other language."[28] Jinnah's words were met with immediate protest from several hundred students present at the gathering.[29] In another speech made a few days later, he argued that in order for a nation to "remain tied up solidly together and

[24] 'Pakistan: Jinnah's Fading Dream' *Time* (15 March 1971) 97 (11) <http://content.time.com/time/magazine/article/0,9171,904838,00.html> accessed 15 July 2015.
[25] William van Schendel, 'The Pakistan Experiment and the Language Issue' in Meghna Guhathakurta and William van Schendel (eds), *The Bangladesh Reader: History, Culture, Politics* (Duke University Press 2013) 180-181.
[26] Salil Tripathi, *The Colonel Who Would Not Repent: The Bangladesh War and Its Unquiet Legacy* (Yale University Press 2016) 36; See also, *Bangladesh: The Unfinished Revolution* (1st edn, Zed Press 1979) 75-96.
[27] 'On his Election as the First President of the Constituent Assembly of Pakistan' in *Quaid-I-Azam Mahomed Ali Jinnah: Speeches as Governor-General of Pakistan 1947-1948* (n 11) 8-9.
[28] Sheikh Mujibur Rahman, *The Unfinished Memoirs* (The University Press Limited 2012) 104.
[29] Mafizullah Kabir, *Experiences of an Exile at Home: Life in Occupied Bangladesh* (Asiatic Press 1972) 3.

function" it needed "one State Language".[30] During his farewell message on his departure from East Pakistan on 28 March, Jinnah stood by his previous position to not grant anything beyond provincial status to the Bengali language and offered a few words of advice to the people of the province:

> What should be the official language of this province is for your representatives to decide. But this language controversy is really only one aspect of a bigger problem – that of provincialism. […] Pakistan is the embodiment of the unity of the Muslim nation and so it must remain. That unity we, as true Muslims, must jealously guard and preserve. If we begin to think of ourselves as Bengalis, Punjabis, Sindhis etc. first and Muslims and Pakistanis only incidentally, then Pakistan is bound to disintegrate.[31]

At the beginning of 1952 the Prime Minister of Pakistan Khwaja Nazimuddin reiterated that Urdu alone would be the state language of Pakistan, a position which the Bengali student community again rejected for being unfair.[32] A ban was imposed on holding processions and on 21 February of that year thousands of students organized a protest rally in defiance of the order. The police opened fire. At least four students lost their lives. Salam, Barqat, Rafique and Jabbar, the names of the students who were killed roused nationalistic passions throughout East Pakistan. William van Schendel notes that the movement of 1952 represented a psychological break for many

[30] 'National Consolidation' in *Quaid-I-Azam Mahomed Ali Jinnah: Speeches as Governor-General of Pakistan 1947-1948* (n 11) 86.
[31] 'Farewell Message to East Pakistan' in *Quaid-I-Azam Mahomed Ali Jinnah: Speeches as Governor-General of Pakistan 1947-1948* (n 11) 103-104.
[32] Talukder Maniruzzaman, *Radical Politics and the Emergence of Bangladesh* (Bangladesh Books International Ltd 1975) 33.

Bengalis because it ruptured the dream of a Pakistan based on communal ties and sowed the seeds for the search of a secular alternative.[33]

Only in the Constitution of Pakistan of 1956, was Bengali finally acknowledged alongside Urdu as one the two State languages of Pakistan.[34] However, the "constitutional guarantee"[35] granted to the Bengali language was again thrown into uncertainty after the military coup of 1958 through which General Ayub Khan emerged as dictator. This time, the Ayub government proposed to replace the Bengali script with the Roman script.[36] In 1967, President Ayub Khan in his autobiography 'Friends Not Masters' described the Bengalis of East Pakistan as an ethnic group that possessed the "inhibitions of down-trodden races".[37] Commenting that they had not psychologically adjusted to the "requirements of the new-born freedom", Ayub Khan went on to say that the Bengalis also suffered from "popular complexes, exclusiveness, suspicion and sort of defensive aggressiveness".[38] He felt all these Bengali traits originated from "considerable Hindu cultural and linguistic influence" and the fact that Bengalis had always been ruled "either by the caste Hindus, Moghuls, Pathans, or the British".[39]

On the economic front there was a sharp disparity in wages and living conditions between the two parts of the country. Although the labour and resources of East Pakistan were employed for the benefit of Pakistan, the profits were not shared

[33] Schendel (n 25) 183.
[34] The Constitution of the Islamic Republic of Pakistan 1956, article 214(1).
[35] Dennis Kurzon, 'Romanisation of Bengali and Other Indian Scripts' (2010) 20 Journal of the Royal Asiatic Society 61, 71-72.
[36] Maniruzzaman (n 32) 71-72.
[37] Mohammad Ayub Khan, *Friends Not Masters, A Political Autobiography* (1st edn, Oxford University Press 1967) 187.
[38] ibid.
[39] ibid.

equitably between the regions.[40] In 1972, Kabir Uddin Ahmad, an economist trained at the London School of Economics shared his observations on the economically exploitative policies and actions of West Pakistan towards East Pakistan:

> […] through various economic policies – the exchange rate, allocation of foreign exchanges, commercial and industrial import licences and the regional distribution of Central Government expenditures, the Government of Pakistan has not only given undue benefits to West Pakistan, but also has drained away real resources from East Bengal. […] these policies have done enormous damage to the economic future of East Bengal by keeping export process abnormally high in the outside world. The policy of tariff protection and the development of industries in the west wing has turned the eastern wing to its protected market.[41]

In the same year Azizur Rahman Khan, another economist reached similar conclusions.[42] These views drew support from the works produced from the late 1950s throughout the 1960s by Cambridge, Harvard and MIT trained economists of the likes of Rehman Sobhan, Nurul Islam, Md Anisur Rahman, M Akhlaqur Rahman and others.[43] Ridiculed in the early 1960s by the Deputy Chairman of Pakistan's Planning

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[40] Maniruzzaman (n 32) 71-72.
[41] Kabir Uddin Ahmed, *Breakup of Pakistan: Background and Prospects of Bangladesh* (1st edn, London Social Science Publishers 1972) 50.
[42] Azizur Rahman Khan, *The Economy of Bangladesh* (St Martin's Press 1972) 23.
[43] Rehman Sobhan, 'The Problem of Regional Imbalance in the Economic Development of Pakistan' (1962) 2 (5) Asian Survey 31; Nurul Islam, 'Some Aspects of Interwing Trade and Terms of Trade in Pakistan' (1963) 3 (1) The Pakistan Development Review 1; Rehman Sobhan, *Basic Democracies Works Programme and Rural Development in East Pakistan* (Oxford University Press 1968); M Anisur Rahman, 'Disparity Ascendant' *Forum* (Dhaka, 1969) 7; Rehman Sobhan, 'Pakistan's Political Crisis' (1969) 25 The World Today 203; Mazharul Haq, Nurul Islam, Rehman Sobhan, M Akhlaqur Rehman, AKM Ghulam Rabbani and Anisur Rahman, 'Growth and Causes of Regional Disparity in Pakistan' (1976) 14 (1-4) Pakistan Economic and Social Review 265; Rehman Sobhan, 'Who Pays for Development?' (1971) 1 (4) Pakistan Forum 6; Nurul Islam, 'Foreign Assistance and Economic

Commission as the "mediocre minions of foreign power"[44] the core argument advocated by these economists was that the economic disparity between West Pakistan and East Pakistan was "perpetuated"[45] by the first, second and third Five Year Plans which had given preferential treatment to West Pakistan by allocating "disproportionately higher levels of development and non-development expenditure in the public sector of West Pakistan".[46] Economists from West Pakistan, however, attributed the 'disparity' to East Pakistan's low level of economic development in 1947 and also to the existence of a greater demand for the allocation of resources from West Pakistan which stemmed from the presence of the "bulk of migrant entrepreneurs" and the fact that Karachi was set up as the country's capital.[47] Rounaq Jahan has pointed out that the economic disparity, irrespective of its rationale, was "open for all to see".[48] On a similar note, Arthur K Blood concluded that "East Pakistan's economic interests have been subordinated to those of the West" giving the East Pakistanis legitimate cause to "resent" that reality.[49]

1.3 *East Pakistan's transformation into Bangladesh – from autonomy to independence*

Development: The Case of Pakistan' (1972) 82 The Economic Journal (Special Issue: In Honour of E.A.G. Robinson) 502; Nurul Islam, *Making of a Nation – An Economists Tale* (The University Press Limited 2003) 61-82.

[44] Rehman Sobhan, 'Disparity: A Dead Horse or a Live Problem?' in Rehman Sobhan (ed), *From Two Economies to Two Nations: My Journey to Bangladesh* (Daily Star Books 2015) 20.

[45] Rehman Sobhan, 'East and West Pakistan: Economic Divergence' in Meghna Guhathakurta and William van Schendel (eds), *The Bangladesh Reader: History Culture and Politics* (Duke University Press 2013) 189.

[46] Mazharul Haq, Nurul Islam, Rehman Sobhan, M Akhlaqur Rehman, AKM Ghulam Rabbani and Anisur Rahman (n 43) 275; Jahan (n 13) 34.

[47] Jahan (n 13) 30-35.

[48] ibid 35.

[49] Arthur K Blood, 'US Government Top Secret Report: Conflict in East Pakistan: Background and Prospects' in Fazlul Quader Quaderi (ed), *Bangladesh Genocide and World Press* (Fazlul Quader Quaderi 1972) 29.

In the summer of 1949 a political party named the Awami Muslim League came into existence in East Pakistan. With Maulana Bhashani as President and the young Sheikh Mujibur Rahman as the Organizing Secretary of its youth wing, the Awami Muslim League resurrected the original idea of 'states' under the Lahore Resolution of 1940. In the 42-point party manifesto issued by the Awami League, demands for regional autonomy for East Pakistan in the context of the Lahore Resolution and the recognition of Bengali as one of the state languages of Pakistan stood out.[50]

As the years passed, Sheikh Mujibur Rahman graduated up the ranks and was elected the President of the Awami League in 1963. Unlike his political predecessors who came from aristocratic backgrounds, Mujib came from humble beginnings which played an important role in helping him to maintain "closer links with the people" and possess "a better understanding of their feelings and aspirations."[51] In 1966, Mujib who had by then emerged as the undisputed leader of East Pakistan launched a mass movement founded on what he called the Six Points Programme. Zeroing in on attaining "full autonomy", the programme was presented before the people as a "charter of survival".[52] The demands included, the reintroduction of a parliamentary form of government and universal adult franchise; establishing a federal form of government with only two departments – defence and foreign affairs – to be lodged with the central government and all residual powers to reside in the two states; creating separate currencies and state banks for the two states; reforming the taxation system so that all heads of taxation were under the states, with the central government dependent on a fixed levy from the states; ensuring the independence of the two states

[50] Maniruzzaman (n 32) 32.
[51] Ahmed (n 2) iv.
[52] Ahmad (n 41) 35.

in international trade; and the development of a militia or paramilitary force in East Pakistan.[53]

As the movement took shape, representatives of the leading student organizations of East Pakistan, namely the Chhatro League and Chhatro Union, formed a Students' Action Committee in 1969. The committee endorsed the Six Point Programme of Sheikh Mujib and produced a detailed Eleven Points Charter of demands.[54] Kamal Hossain the first Law Minister and Chairman of the Constitution Drafting Committee of Bangladesh wrote: "Such a comprehensive charter of demands was significant on more counts than one. The inclusion of the substance of the Six Points Programme meant that not only were these demands made by one political party, but that having enlisted support from all the major student groups – who had divergent political affiliations – it had evolved into a national charter of political demands for East Bengal."[55]

The first general elections in the history of Pakistan were held on 07 December, 1970. This had been the result of mass movements and campaigning by the pro-democracy camp in Pakistan that demanded the initiation of the transfer of power from the military to the elected representatives of the people.[56] In his memoirs published in December 1972, Mafizullah Kabir, Professor and Chair of the Department of History of Dhaka University recalled that "it was an irony of fate that before the general

[53] This is a summarized version of the Six Points Programme by Talukdar Maniruzzaman. The full text of the programme authored by Sheikh Mujibur Rahman and published in 1966 was titled 'Six-Point Formula: Our Right to Live' can be read here: < http://en.banglapedia.org/index.php?title=Six-point_Programme > accessed 6 March 2017.
[54] Kamal Hossain, *Bangladesh Quest for Freedom and Justice* (Oxford University Press 2013) 32.
[55] ibid 35.
[56] Christophe Jaffrelot, 'Nation-building and Nationalism: South Asia, 1947-90' in John Breuilly (ed), *The Oxford Handbook of the History of Nationalism* (Oxford University Press 2013) 506.

elections of 1970 […] elections were held only once in East Pakistan in 1954 and never in West Pakistan" and that on both occasions "the popularly elected representatives were not allowed to function."[57]

The results of the elections came as a shock to the military establishment.[58] With a nationwide voter turnout of 63.1%, Sheikh Mujibur Rahman's Awami League won 167 out of 169 seats in East Pakistan in a house of 313. Winning 83 seats out of 131 seats allocated to West Pakistan, Zulfiqar Ali Bhutto's Pakistan People's Party (PPP) came in second.[59] The driving force behind Sheikh Mujibur Rahman's election campaign had been the Six Points Programme and the Eleven Points Programme launched by the students which if implemented would have ensured a fairer and equitable system of governance between the two wings of Pakistan. And, as the newly elected leader of the majority party in the general elections, Sheikh Mujib was set to assume the Prime Ministership of Pakistan. On the other hand, Zulfiqar Ali Bhutto's campaign included pledges of a strong central government, a powerful army and a "thousand year war with India".[60] Bhutto declared that Sindh and Punjab were the "bastions of power" and that a "majority alone does not count in national politics".[61] Henry Kissinger in 'The White House Years' writes: "He [Yahya] expected a multiplicity of parties to emerge in both East and West Pakistan which would continually fight with each other in each wing of the country; the President would therefore remain the arbiter of Pakistan politics.[62]

[57] Kabir (n 29) 9.
[58] Shyamali Ghosh, *The Awami League 1949-1971* (Academic Publishers 1990) 201.
[59] ibid.
[60] Ahmad (n 41) 42.
[61] Hossain (n 54) 65.
[62] Hengry Kissinger, *The White House Years* (Weidenfeld & Nicolson and Michael Joseph 1979) 850.

Unprepared to concede General Yahya Khan who had replaced General Ayub Khan as Pakistan's military strongman in 1969 ignored Mujib's proposals for an early convening of the National Assembly. Yahya set 3 March, 1971 as the date for convening of the Assembly. With a very 'real' possibility of Sheikh Mujibur Rahman becoming the future Prime Minister of Pakistan and seeing through his political mandate, Bhutto responded to the situation by saying that his party would not attend the session of the National Assembly in the absence of an understanding for "compromise or adjustment" on the Six Points.[63] In an abrupt move on 1 March, 1971, Yahya Khan indefinitely postponed the session of the National Assembly. The reasoning behind the declaration was that the political leaders of Pakistan were yet to reach a consensus on the main provisions of the future Constitution of Pakistan. It became clear to the Bengalis that the ruling minority in West Pakistan was not prepared to accede to the aspirations of the Bengali majority.[64] Many took to the streets. The curfew imposed by the military authorities was rejected and the army fired upon unarmed civilians. Sheikh Mujib announced a programme of strikes and non-cooperation throughout the country.[65] Curfews continued to be imposed and they were continually disobeyed. Firing upon the civilian population by the military continued. On 2 March, a statement by Mujib read: "It is the sacred duty of each and every Bengali in every walk of life including government officials, not to cooperate with anti-people forces and indeed to do everything in their power to foil the conspiracy against Bangladesh. […] representatives … elected by the people are the only legitimate source of authority. All authorities are expected to take note of this fact."[66]

[63] Ahmad (n 41) 73.
[64] ibid 80.
[65] ibid 35.
[66] ibid 82.

On the same day the Chhatra League organized a mass rally, which was also attended by Mujib. In his presence, the Bengali students hoisted the flag of Bangladesh.[67] Commenting on the nature of the non-cooperation movement, Maniruzzaman observed: "In an impressive display of unity, all of the employees in the government offices, including the judges of the High Court, absented themselves from their offices, and promised to continue to do so for as long as Mujib demanded. But General Yahya Khan showed an utter lack of empathy with the feelings aroused among the Bengalis, and ultimately he reacted in a desperate manner."[68]

On 7 March, 1971 Sheikh Mujib stood before "an incredible mass of humanity"[69] and issued a call to the people of East Pakistan. He declared that it would not be possible for him and his party to attend any future session of the National Assembly without the withdrawing of Martial Law, returning of all military personnel to the barracks, conducting inquiries into the killings of unarmed civilians and most importantly, the transfer of power to the elected representatives of the people. Sheikh Mujib finished his speech by demanding independence. He said: "Our struggle now is for freedom, our struggle is now for independence."[70] Mujib's call fell short of being a formal declaration. It was intentionally kept that way because the Pakistan Army had been mobilized to take up positions in multiple vantage points across Dhaka city.[71] Closing all doors for political negotiation and issuing a unilateral declaration of independence

[67] Md Anisur Rahman, *Through Moments in History: Memoirs of Two Decades of Intellectual and Social Life (1970-1990)* (Pathak Shamabesh 2007) 37.
[68] Maniruzzaman (n 32) 43.
[69] Viggo Olsen and Jeanette Lockerbie, *Daktar: Diplomat in Bangladesh* (Moody Press 1975) 329.
[70] Sheikh Mujibur Rahman, '7th March, 1971 Speech of Bangabandhu Sheikh Mujibur Rahman' (2 March 2013) < https://www.youtube.com/watch?v=J9vUulq4tZI > accessed 22 January 2014.
[71] Maniruzzaman (n 32) 90.

could invite a repressive and militant response from the army. It would also give Yahya Khan the opportunity to showcase Mujib as rash and secessionist.

From 16 March, 1971 a series of meetings were held between Sheikh Mujib and Yahya Khan in Dhaka to reach a political settlement. As the meetings progressed it is now known that Yahya Khan directed his Generals to prepare the blueprint for a military crackdown to be effective all over East Pakistan on 25 March.[72] Yahya brought in reinforcements of about 50,000 soldiers along with Army tanks, weapons and bombers.[73] Air Marshall Noor Khan the former Commander-in-Chief of the Pakistan Air Force who was at the time staying at Dhaka's Hotel Intercontinental informed Md Anisur Rahman and Rehman Sobhan that the Generals of West Pakistan were planning a "military crackdown" and that the negotiations were a "ploy to buy time for troops to move to East Pakistan."[74] Although this message was passed on to Sheikh Mujib, extensive talks were held over the next eight days and the Bengalis were given the impression by their counterparts from the West that an agreement on the basis of their demands could be met. That 'agreement' remained unrealized and on the night of 25 March, 1971, the Pakistan Army with a view to crush any political aspirations of the Bengalis of East Pakistan initiated 'Operation Searchlight'.[75]

[72] Siddiq Salik, *Witness to Surrender* (The University Press Limited 1997) Appendix III.
[73] Ahmad (n 41) 92.
[74] Md Anisur Rahman, *Through Moments in History: Memoirs of Two Decades of Intellectual and Social Life (1970-1990)* (Pathak Shamabesh 2007) 39.
[75] Abu Md Delwar Hossain, 'Operation Searchlight' (*Banglapedia*) < http://en.banglapedia.org/index.php?title=Operation_Searchlight > accessed 22 January 2014; 'Genocide' (*Bangladesh Genocide Archive*) < http://www.genocidebangladesh.org > accessed 22 January 2014; 'Simon Dring Recounts "Operation Searchlight"' *The Daily Star* (Dhaka, 25 March 2013) < http://archive.thedailystar.net/beta2/news/simon-dring-recounts-operation-searchlight/ > accessed 22 January 2013.

The Pakistan Army in an attempt to coerce the Bengalis to subjugation applied an excessive use force on the 'dark night'[76] of 25 March.[77] As the Pakistani troops ravaged Bengal, Yahya Khan flew back to Karachi. Appearing before the press, he condemned Sheikh Mujib as a 'traitor', banned the Awami League and claimed to 'have saved the unity of Pakistan'.[78] Mujib was arrested soon after, but before his capture he issued a formal Declaration of Independence, which read:

> This may be my last message, from today Bangladesh is independent. I call upon the people of Bangladesh wherever you might be and with whatever you have, to resist the army of occupation to the last. Your fight must go on until the last soldier of the Pakistan occupation army is expelled from the soil of Bangladesh and final victory is achieved.[79]

Members of the Awami League who had been elected to the National Assembly and the Provincial Assembly managed to escape and assemble in Calcutta, India. On 10 April, 1971 the Members of the National and Provincial Assemblies formed themselves into a Constituent Assembly in exile and drafted the Proclamation of Independence.[80] The Proclamation was read out on 17 April during a formal ceremony at Baidyanathtala of Meherpur, a district neighbouring India.[81] The declaration gave recognition to the Declaration of Independence given by Sheikh Mujibur Rahman on

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[76] 'dark night' is the phrase used to remember the military crackdown on 25 March, 1971.
[77] Ved P. Nanda, 'Self-Determination in International Law: The Tragic Tale of Two Cities--Islamabad (West Pakistan) and Dacca (East Pakistan)' (1972) 66(2) The American Journal of International Law 331-333.
[78] Ahmad (n 41) 92.
[79] Sajahan Miah, 'Proclamation of Independence' (*Banglapedia*) <http://en.banglapedia.org/index.php?title=Proclamation_of_Independence> accessed 22 January 2016; David Loshak, *Pakistan Crisis* (Heinmann 1971) 89.
[80] 'Bangladesh Emerges from India-Pakistan Conflict' (1972) 11 International Legal Materials 119.
[81] Miah (n 79)

26 March, 1971 and proclaimed the Constituent Assembly as the supreme and sovereign authority of Bangladesh.[82] The Assembly appointed Sheikh Mujibur Rahman as the President of Bangladesh, and Tajuddin Ahmad, the General Secretary of the Awami League as the Prime Minister.[83] In Mujib's absence, Syed Nazrul Islam, a senior leader of the Awami League served as Acting President. The rationale supporting the Proclamation was that following the free elections held in Pakistan for the purposes of framing a Constitution the Assembly summoned was arbitrarily and illegally postponed for an indefinite period by Yahya Khan and instead of fulfilling the promises made, the Pakistan authorities imposed an unjust and treacherous war, leaving no choice for the representatives of Bangladesh to constitute themselves into a Constituent Assembly and declare independence.[84] The fact that the elected representatives of East Pakistan had won an overwhelming landslide victory substantiated the claim that they represented the entire people of the region.[85] The Proclamation of Independence was applied retroactively from 26 March, 1971 and played a pivotal role in establishing a chain of command that would lead the ensuing conflict. War had been thrust upon the Bengalis and in the following nine months they waged a war of liberation war against the Pakistan army. It was their success in this war that cemented the existence of Bangladesh as a nation-state.[86]

2. The nature and scale of crimes committed against the Bengalis by the Pakistan Army and its auxiliary forces in 1971

[82] ibid.
[83] ibid.
[84] Moudud Ahmed, *Bangladesh: Era of Sheikh Mujibur Rahman* (The University Press Limited 1983) 5.
[85] ibid.
[86] Rounaq Jahan, 'Genocide in Bangladesh' in Samuel Totten and William S. Parsons (eds), *Centuries of Genocide Essays and Eyewitness Accounts* (Routledge 2013) 249.

From the very beginning of the war there were serious concerns that crimes were being committed by the Pakistan Army and its local auxiliaries. This part substantiates that crimes at the scale of international crimes were committed against the Bengalis during the war of 1971, confirming a genuine cause for seeking justice in Bangladesh. Groups that were particularly targeted included supporters of the Awami League, Bengali academics and Hindus. The sources supporting these claims in the first instance include eye-witness testimonies, newspaper reports authored by foreign correspondents who covered the war, reports of proceedings of legislative and judicial bodies of foreign States and reports published by international organisations. It notes that although the extent of crimes has been disputed in some quarters, this is not something that is seriously denied in academia. This part also identifies the Razakars, Al Badr and Al Shams, many of whose members came from the political party known as Jamaat-e-Islami, as the auxiliaries of the Pakistan Army.

2.1 *A reign of terror against the Bengalis*

Major Abu Taher, a Bengali officer and commando of the elite Special Services Group (SSG) of the Pakistan Army, who eventually escaped to command the largest sector of the Bangladesh forces during the war, was stranded in West Pakistan on the night of 25 March. He recalled: "The barbaric purpose of the Military Junta was not unknown to us who were in West Pakistan, when from General Headquarters of the Pakistan Army the message went out: 'Burn everything, kill everyone in sight."[87] The first set of documents that recorded the atrocities of the Pakistan Army were a set of

[87] Lifschultz (n 26) 77.

"dissenting cables" wired by Archer Blood, the then United States Consul General based in Dhaka, to the American government.[88] The cable sent out on 28 March 1971 the subject of which was "selective genocide" concisely described the nature of the atrocities. It read:

> Here in Dacca we are mute and horrified witnesses to a reign of terror by the Pak military. Evidence constitutes to mount that the MLA authorities have a list of Awami League supporters whom they are systematically eliminating by seeking them out in their homes and shooting them down. […] Among those marked for extinction in addition to A.L. hierarchy, are student leaders and university faculty. […] Moreover, with support of Pak military, non-Bengali Muslims are systematically attacking poor people's quarters and murdering Bengalis and Hindus. Streets of Dacca are aflood with Hindus and others seeking to get out of Dacca. […] Full horror of Pak military atrocities will come to light sooner or later.[89]

In an attempt to prevent the news of atrocities from being communicated to the rest of the world, Pakistani military authorities rounded up all foreign journalists present at the time and confined them inside Dhaka's Hotel Intercontinental before having them expelled from the country altogether on 27 March, 1971. Simon Dring, a reporter working with the Daily Telegraph had to hide in the lobby, kitchen and rooftop of the

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[88] Sajit Gandhi (ed), 'The Tilt: The U.S. and the South Asian Crisis of 1971' (*The National Security Archive*, 16 December 2012) < http://nsarchive2.gwu.edu/NSAEBB/NSAEBB79/ > accessed 23 September 2017.

[89] 'Selective Genocide' (Department of State of the United States of America, March 1971) < http://nsarchive2.gwu.edu/NSAEBB/NSAEBB79/BEBB1.pdf > accessed 23 September 2017; See also, John Salzberg, 'UN Prevention of Human Rights Violations: The Bangladesh Case' (1973) 27(1) International Organization 115, 116.

Intercontinental for 32 hours to evade the roundup and expulsion.[90] Accompanied by Michel Laurent a French war photographer working for the Associated Press, Dring roamed the streets of Dhaka and beyond and witnessed firsthand the brutalities that were taking place accounts of which were published by the Daily Telegraph on 30 March, 1971.[91] Another report published on the same day read:

> Caught completely by surprise, some 200 students were killed in Iqbal Hall, headquarters of the militantly anti-government student's union, I was told. Two days later, bodies were still smoldering in burnt-out rooms, others were scattered outside, more floated in a nearby lake, and an art student lay sprawled across his easel. The military removed many of the bodies, but the 30 bodies still there could never have accounted for all the blood in the corridors of Iqbal Hall. At another hall, reportedly, soldiers buried the dead in a hastily dug mass grave which was then bulldozed over by tanks.[92]

Within the larger narrative of a ruthless military campaign, the Pakistan Army as depicted by Archer Blood systematically targeted Bengali students and academics, "candidates and all levels of leadership"[93] of the banned Awami League and the Hindu religious minority. One of the first targets of the Pakistan army was Dhaka University - the intellectual hub of the region, which had been the haven of multiple student led movements against the oppressive policies and actions of the government in West

[90] 'Simon Dring Recounts "Operation Searchlight"' (n 75).
[91] Simon Dring, 'How Dacca Paid for a United Pakistan' *The Daily Telegraph* (London, 30 March 1971); Jahan, 'Genocide in Bangladesh' (n 86) 249.
[92] Simon Dring, 'Dacca Eyewitness: Bloodbath, Inferno' *The Washington Post* (30 March 1971).
[93] 'Carnage in Dacca – An American's Account from V. M. Nair' *The Statesman* (21 July 1971).

Pakistan.[94] An American citizen, who for the purposes of keeping open the chance of being able to return to Bangladesh and wished to remain unnamed, was evacuated to Karachi on 4 April, 1971. Interviewed by journalist V.M. Nair, the American informed that he was carrying a 24-paged account of the massacre that was going on in Bangladesh.[95] Residing in East Pakistan throughout the entire period of March 1971 he confirmed the killings of at least thirty-two Professors and Heads of Department.[96] Some of them had been picked up from their homes and shot afterwards.[97] Reuters correspondent Howard Whitten reported that members of Sheikh Mujib's Awami League were shot like dogs.[98] With regard to the targeting of Awami Leaguers a European based in Chittagong, the port city of Bangladesh said, "You merely had to point someone as a suspect for him to be finished off and many old scores are repaid."[99]

Odhir Chandra Dey, a Hindu boy was seven years old on the night of 25 March, 1971. His whole family was murdered in cold-blood by the Pakistan Army because his Father, Modhushudon Dey owned a restaurant inside the Dhaka University campus where students gathered for "political discussions".[100] Scarred for life, Dey recalled:

> Six to seven soldiers had gotten into our house and they started destroying all our belongings. […] Ranjit-da rushed to the spot and said, "Rina! Rina!

[94] 'Killings at University' (Department of State of the United States of America, March 1971) < http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB79/BEBB4.pdf > accessed 22 January 2014; 'Selective Genocide' (n 89).
[95] 'Carnage in Dacca – An American's Account from V. M. Nair' (n 93)
[96] ibid.
[97] ibid.
[98] 'Members of Awami League Shot Like Dogs in Chittagong' *The Statesman* (29 June 1971).
[99] ibid.
[100] Odhir Chandra Dey, 'I was Just a Kid Then' in Meghna Guhathakurta and William van Schendel (eds), *Bangladesh Reader: History, Culture, Politics* (Duke University Press 2013) 237.

> Hold up your hands!" […] As soon as he said it, the soldiers turned back and shot him. […] The bullet pierced my brother's chest and came out through his neck, and then hit the cheek of Ranu-didi. […] After that, the military shot my boudi. She was pregnant then. […] Then they snatched the earrings of my boudi from her ears. […] When the military aimed their gun to shoot my father, my mother ran to him and stood in front of him spreading her hands. She begged the military, "You have ruined me! You killed my son, my daughter-in-law. Don't kill him, I beg for his life!" They did not pay heed to her appeal, and instead ordered to go away. They tried to drag her forcibly but failed. Lastly, out of rage, they cut both of her hands with a bayonet. Her hands got totally dispersed and were hanging just on the skin. Even after she died, they shot her body several times in front of my father. Father also got shot. Both bodies were wet with blood.[101]

It was evident that the Pakistani military authorities were applying brute force to suppress the Bengali population into subjugation. The accounts of Henrik Van der Heijden an economist of the Pakistan Division of the IBRD were published in 'A Thousand My Lais – World Bank Study on Bangladesh'. Heijden had toured Bangladesh in June 1971. Heijden described Khulna, a district located in the southwest region of Bangladesh felt like a town from the Second World War that had undergone strategic bomb attacks.[102] Their ultimate goal, however, remained undisclosed until the publication of a four-paged articled titled 'Genocide' in The Sunday Times on July

[101] ibid 238-239.
[102] Henrik Van der Heijden, *A Thousand My Lais – World Bank Study on Bangla Desh* (Society for Human Rights 1971).

13, 1971.[103] Anthony Mascarenhas, a Pakistani journalist who was treated as a guest by the army and with their assistance had toured East Pakistan to gather a picture of the ongoing military campaign, penned the report. 'Genocide' has been praised in the BBC as "one of the most influential pieces of South Asian journalism of the past half century".[104] In it, Mascarenhas succinctly summarized the policy that defined Yahya Khan's strategy:

> The Pakistan Government's policy for East Bengal was spelled out to me in the Eastern Command Headquarters at Dacca. It has 3 elements:
>
> *(i)* the Bengalis had proved themselves 'unreliable' and must be ruled by West Pakistanis;
>
> *(ii)* the Bengalis will have to be re-educated along proper Islamic lines. The 'Islamisation of the masses' – this is official jargon – is intended to eliminate secessionist tendencies and provide a strong religious bond with West Pakistan;
>
> (iii) when the Hindus have been eliminated by death and flight their property will be utilized as a golden carrot to win over the base for erecting administrative and political structures in the future.[105]

The superpowers of the world stood divided on the question of liberation of the Bengalis and the existence of an independent Bangladesh. While India and the Soviet

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[103] Anthony Mascarenhas, 'Genocide' *The Sunday Times* (London, 13 June 1971) < http://tarekfatah.com/genocide-the-june-1971-article-about-pakistans-mass-murders-in-east-pakistan-by-tony-mascarenhas-in-londons-sunday-times-that-woke-up-the-world/ > accessed 22 January 2014.
[104] Mark Dummett, 'Bangladesh War: The Article that Changed History' *BBC News* (London, 16 December 2011) < http://www.bbc.co.uk/news/world-asia-16207201 > accessed 22 January 2014.
[105] Mascarenhas (n 103).

Union recognised the political aspirations of the Bengalis, the United States came to the aid of Pakistan.[106] Kalyan K. Chaudhuri has argued that although victory of the Bengalis was inevitable, had it not been for the direct military support of the Indian Government and the diplomatic support of the Soviet Union at the UN Security Council, the Bengalis struggle for liberation would have turned into a "long-drawn armed struggle".[107] In early December 1971, the Indian Army directly intervened in support of the Bengalis which catalysed the war to its conclusion on 16 December 1971.[108] This was marked by the surrender of 92,000 members of the Pakistan army to the joint command of the Bangladesh and Indian forces.[109] The victory of the Bengalis is largely attributed to their overwhelming participation in the war and the support they received from the neighbouring Indian Army.[110] In January 1972, all Pakistani POWs were transferred to war camps in India.[111] During the course of the war 10 million people fled across the border into India as refugees.[112] American

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[106] Gary J Bass, *The Blood Telegram Nixon, Kissinger and a Forgotten Genocide* (Knopf Publishing Group 2013) 85; Srinath Raghavan, *1971: A Global History of the Creation of Bangladesh* (Harvard University Press 2013); Jack Anderson and George Clifford, *The Anderson Papers from the Files of America's Most Famous Investigative Reporter* (1st edn, Random House 1973); Upon his return from Bangladesh Senator Edward Kennedy said, "The situation in East Bengal should particularly distress Americans, since it is our military hardware – our guns and tanks and aircraft delivered over a decade – which are contributing substantially to the suffering. And ever more shocking is the fact that these military supplies continue to flow – apparently under instructions from the highest officials of our land. Pakistani ships loaded with U.S. military supplies continue to leave American harbors bound for West Pakistan." See H.W. Brands, *The Devil We Knew: Americans and the Cold War* (1st edn, Oxford University Press 1993) 132.

[107] Chaudhuri (n 14) 1; Kalyan Chaudhuri was the grandson of the late Dhirendranath Datta, a public figure and former minister of East Pakistan. Datta was tortured and killed by the Pakistan Army in 1971 at the age of 85. For further analysis resonating with Chaudhuri's argument see, Bass (n 106) 85; Raghavan (n 106).

[108] Onkar Marwah, 'India's Military Intervention in East Pakistan, 1971-1972' (1979) 13(4) Modern Asian Studies 549, 560; Jahan, 'Genocide in Bangladesh' (n 86) 258.

[109] 'Instrument of Surrender of Pakistani Forces in Dacca' (Ministry of External Affairs, Government of India, 16 December 1971) < http://www.mea.gov.in/bilateral-documents.htm?dtl/5312/Instrument+of+Surrender+of+Pakistan+forces+in+Dacca > accessed 22 January 2014.

[110] Omi Rahman Pial, 'Freedom fighters won the war: Jacob' *bdnews24.com* (Dhaka, 13 January 2016) < http://bdnews24.com/politics/2008/03/28/freedom-fighters-won-the-war-jacob > accessed 23 September 2017.

[111] *Case Concerning Trial of Pakistani Prisoners of War (Pakistan v India)* (Request for the Indication of Interim Measures of Protection) [1973] ICJ Rep 328.

[112] David Myrad, *Sadruddin Aga Khan and the 1971 East Pakistani Crisis: Refugees and Mediation in Light of the Records of the Office of the High Commissioner for Refugees* (Global Migration Research

Senator William B Saxbe who visited the refugee camps during the war recalled: "You and I know when we visited these refugee camps, and I am sure Senator Kennedy saw the same thing. There were no young girls in those camps. You didn't see one. And now the truth is that they were kidnapped, held in brothels, held in camps, that they were murdered, and the extent of this atrocity is not known to the world."[113]

Local newspapers reported on 21 December, 1971 that in a last ditch attempt to cripple of the Bangladesh economy, the Pakistan army had set fire to Rupees worth 100/- crore.[114] The Pravda, on 3 January, 1972 reported the loss of three million lives at the hands of the Pakistan army.[115] Reverend Kentaro Buma an Asian relief secretary for the World Council of Churches learned first-hand the state of affairs during a two-week mission in war torn Bangladesh. Upon his return to Geneva, Buma on 17 January, 1972 held a press conference where he informed 200,000 women had been raped by Pakistani soldiers and they were now being ostracized by the Bengali Muslim community.[116] Buma further informed that the Mujib government was countering the

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Paper, 2010) 6 < http://graduateinstitute.ch/files/live/sites/iheid/files/sites/globalmigration/shared/Publications/GMC%20-%20Global%20Migration%20Research%20Paper%20Series%201.pdf > accessed 22 January 2014.

[113] 'Recognition of Bangladesh: Hearings before the Committee on Foreign Relations United States Senate 92nd Congress, March 6 and 7, 1972' (US Government Printing Office 1972) 53.

[114] Nurul Momen, *Bangladesh: The First Four Years (from 16 December 1971 to 15 December 1975)* (Bangladesh Institute of Law and International Affairs 1980) 2.

[115] With regard to the figure 3 million, Ziauddin Ahmed wrote, "This figure has been widely accepted to be nearer to the exact number of casualties. No systematic efforts have yet been made to determine the extent of the genocide." See Ziauddin Ahmed, 'The Case of Bangladesh: Bringing to Trial the Perpetrators of the 1971 Genocide' in Albert J Jongman (ed), *Contemporary Genocides: Causes, Cases, Consequences* (PIOOM 1996) 109; R J Rummel, *Death by Government* (Transaction Publishers 2002) 315-337. See also, David Bergman, 'Bangladesh's Opening for a New Beginning' (1991) 26(7) Economic and Political Weekly 382, 385

[116] '200,000 Bengali Women Raped in War Ostracized' *Lawrence Daily Journal* (Geneva, 17 January 1972) < http://news.google.com/newspapers?nid=2199&dat=19720117&id=ayUzAAAAIBAJ&sjid=H-cFAAAAIBAJ&pg=5897,1725550 > accessed 22 January 2014; '200,000 Raped Bengali Wives Ostracized' *Sarasota Journal* (Geneva, 19 January 1972) < http://news.google.com/newspapers?nid=1798&dat=19720119&id=OB8eAAAAIBAJ&sjid=Go0EAAAAIBAJ&pg=5551,3070792 > accessed 22 January 2014; Susan Brownmiller, *Against our Will: Men, Women and Rape* (1st edn, Bantam Books 1975) 81.

situation by glorifying the rape victims as national heroines and trying its best – albeit without much success - to break the age-old conservative tradition of not taking back a woman who had been touched by 'another' man.[117] Although Reverend Buma had based his numbers on government estimates, in reality, how many females were sexually abused at the hands of the Pakistan military may never be known. A War Rehabilitation Organization led by Justice K.M. Sobhan was formed in war-torn Bangladesh. Malekha Khan, a social worker assisting the rehabilitation process informed that no lists of the raped women were prepared because of societal pressures.[118] Maleka had herself read depositions of more than 5,000 women who had been sexually exploited.[119] Geoffrey Davis, a medical graduate from Australia, arrived in Bangladesh in March 1972 under the auspices of International Planned Parenthood, the UNFPA and the WHO.[120] Davis stayed in Bangladesh for six months during which he conducted numerous abortions and at the same time offered training on proper abortion procedures and techniques. His experiences led him to conclude that the government estimate of 200,000 rapes was a conservative one. Davis interviewed many Pakistani POWs who were behind bars at a prison in Comilla.[121] These interviews revealed that they were under instructions from the top brass of the Pakistan army that a good Muslim was duty bound to fight anyone other than his father.[122] This prompted them to impregnate as many Bengali women as they could so that there would be a whole generation of children in East Pakistan would be born with West Pakistani blood.[123] A correspondent of the Times in 'Pakistan: The Ravaging of

[117] '200,000 Bengali Women Raped in War Ostracized' (n 116)
[118] Shahriar Kabir, *The Intolerable Sufferings of Seventy One* (Dhaka Kazi Mukul 2009) 9-10.
[119] ibid.
[120] Bina D'Costa, '1971: Rape and its Consequences' *bdnews24.com* (Dhaka, 15 December 2010) < http://opinion.bdnews24.com/2010/12/15/1971-rape-and-its-consequences/ > accessed 22 January 2014.
[121] ibid.
[122] ibid.
[123] ibid.

Golden Bengal' quoted a US official admitting that what the Bengalis had endured was "the most incredible, calculated thing since the days of the Nazis in Poland."[124] A recent publication has revealed the presence of at least 618 mass graves throughout Bangladesh resulting from the atrocities of the Pakistan army and its auxiliaries.[125]

Therefore, while drawing clear lines between right and wrong may not be an easy task when interpreting modern day wars, many observers were able to take a clear position about the war that took place in 1971, which resulted in the creation of Bangladesh.[126] British MP Reg Prentice as a member of a parliamentary delegation visited both wings of Pakistan. In July 1971 urging that the time for "diplomatic niceties" was over, Prentice stressed the need to "stand up and be counted" by identifying with the "aspirations of the people of Bangladesh".[127] From 18-20 September, 1971, during a two-day international conference held in New Delhi, more than one hundred and fifty

[124] Dan Coggin, James Shepherd and David Greenway, 'Pakistan: The Ravaging of Golden Bengal' *Time* (2 August 1971) 98 (5) 24.
[125] Mutaba Hakim Plato (ed), *Boddhobhumir Goddo* (bdnews24.com 2013).
[126] In 1971, John Pilger served as the international correspondent of The Daily Mirror, London. On 16 June, 1971, he wrote: "[…] the Bengalis have not seceded or rebelled. They are the majority in Pakistan and they took part in the country's first-ever elections and they overwhelmingly voted for Sheikh Mujib's Awami League, which won 167 out of 169 Bengali seats in the National Assembly. The Sheikh's short-lived government was as democratically founded as Mr. Heath's government. […] Bangla Desh was declared only after the generals in panic invaded Dacca and began their rule of terror. A Parliamentary movement was put down by troops flown in from thousand miles away." See Ranjit Gupta and K S Radhakrishna (eds), *World Meet on Bangla Desh: Report of The International Conference on Bangla Desh, Held in New Delhi from September 18 to 20 1971* (International Committee of Friends of Bangla Desh 1972) 153-154; There were others who praised the self-government of the Bengalis during the non-cooperation movement in March 1971. An American who was evacuated from East Pakistan to Karachi on 4 April, 1971 said: "[..] in sharp contrast with the tranquillity [sic] and self-imposed discipline under which the people of Bangladesh governed themselves during the three weeks rule of the Awami League. I have never seen such proof of ability for self-government." See, 'Carnage in Dacca – An American's Account from V. M. Nair' *The Statesman* (21 July 1971). Eminent scholars, jurists, political leaders, journalists and peace activists from all over the world acknowledged the plight of the Bengalis. Among them were: Shri Jayaprakash Narayan, A.L. Basham, Professor of the Department of Asian Civilizations, The Australian National University; Laurent Schwartz, Professor of Mathematics, Sorbonne University; Robert Dorfman, Professor of Economics, Centre for Population Studies, Harvard University; Roger Nash Baldwin, Honorary President, The International League for the Rights of Man; William B. Saxbe, Member of the US Senate; Edward Kennedy, Member of the US Senate.
[127] Reg Prentice, 'The Repression of Bengal: What We Must Do' in Maudood Elahi (ed), *Assignment Bangladesh: A Chronology of Events as Seen by the World Press* (Momin Publications 1999) 336.

delegates from twenty four countries gathered together to extend their support to the struggle for freedom of the Bengalis.[128] On 25 January, 1972, the Berkeley South Asia Student Group issued a position paper titled 'United States Policy in South Asia, 1971: A Tragic Failure'. The authors of the paper, Ralph H Retzlaff and Thomas A Metcalf, Professors of Political Science and History at Berkeley wrote:

> The Bengali populace as a whole was subjected to a virtual reign of terror. […] Pakistan's actions throughout this long and bloody period were repeatedly described as genocide – by news reporters from many nations, by leading members of the U.S. Senate and the House of Representatives, and, it later developed, by the U.S. Consul General in Dacca at the time, Archer Blood. Whether the term "genocide" strictly appropriate to these events or not, there can be no doubt that the Pakistani authorities had embarked upon a carefully thought out plan of exterminating the intellectual and professional elite of East Bengal, and of cowing the remainder of the population by terror and intimidation.[129]

The crimes of the Pakistan Army and its auxiliaries were elaborately discussed at the hearings of the Committee on Foreign Relations of the United States Senate on 6-7 March 1972. Echoing the Pravda and Sheikh Mujibur Rahman, Senator Edward Kennedy stated that up to three million lives had perished during the war.[130] Some

[128] The renowned Indian politician Shri Jayaprakash Narayan on behalf of the Sarva Seva Sangh and the Gandhi Peace Foundation organized the conference. Delegates from the following countries attended: Afghanistan, Argentina, Australia, Belgium, Canada, Ceylon, Czechoslovakia, France, Guyana, India, Indonesia, Japan, Lebanon, Libya, Malaysia, Nepal, Nigeria, Norway, Sudan, Sweden, U.A.R., U.K., U.S.A. and Yugoslavia.
[129] 'Recognition of Bangladesh: Hearings before the Committee on Foreign Relations United States Senate 92nd Congress, March 6 and 7, 1972' (n 113) 39.
[130] ibid (60).

academics have challenged the Bengali peoples claim to victimhood. Among them, Indian author Sarmila Bose in 'Dead Reckoning: Memories of the 1971 Bangladesh War' offered an alternative narrative to mainstream historical accounts. Bose challenged the 'criminal' image and portrayed a humane side of the Pakistan Army.[131] She also placed emphasis on the acts of violence against Biharis by Bengalis and argued that the number of Bengali victims was much less than what has been claimed.[132] Bose's research methodology and findings have been described as "deeply problematic" and critiqued in the works of Srinath Raghavan, Nayanika Mookherjee and Naeem Mohaiemen.[133] Arnold Zeitlin who served as the Bureau Chief of Associated Press (AP) in Pakistan during 1971 described Bose's effort as "ingenuous - in terms of artless and naive" and that it was a distortion of history instead of being a revision of history.[134] Within the words of Zeitlin and others, the grieving Bengalis whose pains and sacrifices the world seemed to have forgotten, found a distant yet assertive voice of acknowledgement and support. This, however, does not negate the fact that violence was committed against Biharis by Bengalis and vice versa during scattered but nevertheless real instances of communal riots, mob violence and reprisals.[135] The International Commission of Jurists published a report in 1972 titled

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[131] Sarmila Bose, *Dead Reckoning: Memories of the 1971 Bangladesh War* (C Hurst & Co Publishers Ltd 2011).
[132] Jahan, 'Genocide in Bangladesh' (n 86) 262.
[133] Srinath Raghavan, 'A Dhaka Debacle' *The Indian Express* (30 July 2011) < http://archive.indianexpress.com/news/a-dhaka-debacle/824484/0 > accessed 10 March 2017; Naeem Mohaiemen, 'Flying Blind: Waiting for a Real Reckoning on 1971' (2011) 46 (36) Economic and Political Weekly 40; Sarmila Bose, ''Dead Reckoning': A Response' (2011) 46 (53) Economic and Political Weekly 76; Naeem Mohaiemen, 'Another Reckoning' (2011) 46 (53) Economic and Political Weekly 79; Nayanika Mookherjee, 'A Prescription for Reconciliation?' (2006) 41 (36) Economic and Political Weekly 3901; Nayanika Mookherjee, 'This account of the Bangladesh War should not be seen as unbiased' *The Guardian* (London, 8 June 2011) < https://www.theguardian.com/commentisfree/2011/jun/08/bangladesh-liberation-war-sarmila-bose > accessed 10 March 2017.
[134] Arnold Zeitlin, 'Book Event: Dead Reckoning: Memories of the 1971 Bangladesh War' (30 July 2013) < https://www.youtube.com/watch?v=zJgOn-WiL28 > accessed 22 January 2014.
[135] International Commission of Jurists, *The Events in East Pakistan, 1971: A Legal Study* (The Secretariat of the International Commission of Jurists 1972) 15-16; Jahan, 'Genocide in Bangladesh' (n 86) 257; Bass (n 106) 85.

'The Events in East Pakistan, 1971 A Legal Study'. The report acknowledged the directives and efforts of Sheikh Mujibur Rahman and the Awami League in containing violence against the Bihari community during and after the war.[136] In the immediate aftermath of the war, the Mujib Bahini[137] was commended by the foreign press for its role in protecting the Biharis from reprisals.[138]

With regard to the death toll, the report of the Hamoodur Rahman Commission (HRC), a commission constituted in Pakistan claimed that the death toll of 3 million as alleged by Bangladesh was highly exaggerated, and the accurate number was approximately 26,000.[139] The Commission led by the Chief Justice of Pakistan had completed drafting its supplementary report in 1974. Among other things, the Commission recommended that the Pakistan government set up a high-powered court or commission of inquiry to investigate allegations and to hold trials of those "who indulged in these atrocities, brought a bad name to the Pakistan Army and alienated the sympathies of the local population by their acts of wanton cruelty and immorality against our own people."[140] The report was immediately shelved and classified.[141] In

[136] International Commission of Jurists (n 135) 44; Niall Macdermot QC, 'Crimes Against Humanity in Bangladesh' (1973) 7 (2) The International Lawyer 476, 479; According to the website of the International Commission of Jurists, the study was "based partly upon published books, partly upon contemporary newspaper accounts, partly upon sworn depositions of refugees in India, and partly upon oral and written statements of evidence given to the International Commission of Jurists between October 1971 and March 1972." It adds further that "[n]early all these statements have been made by European and American nationals who were in East Pakistan at the time." See, 'The events in East Pakistan, 1971: a legal study' (*International Commission of Jurists*, 01 June 1972) < https://www.icj.org/the-events-in-east-pakistan-1971-a-legal-study/ > accessed 23 September 2017;

[137] The Mujib Bahini was an armed force formed during the Liberation War of Bangladesh comprising of activists drawn from the Awami League and its student front Chhatra League.

[138] 'Bangladesh: Mujib's Road from Prison to Power' in Fazlul Quader Quaderi (ed), *Bangladesh Genocide and World Press* (Fazlul Quader Quaderi 1972) 452; 'Recognition of Bangladesh: Hearings before the Committee on Foreign Relations United States Senate 92nd Congress, March 6 and 7, 1972' (n 113) 11.

[139] Hamoodur Rahman Commission, *Supplementary Report* (1974) 33, 36-37 <http://img.dunyanews.tv/images/docss/hamoodur_rahman_commission_report.pdf> accessed 22 January 2014.

[140] ibid 37.

[141] Cara Cilano, *National Identities in Pakistan: The 1971 War in Contemporary Pakistani Fiction* (Routledge 2011) 3; Zafar Abbas, 'Pakistan Declassifies 1971 War Report' *BBC News* (London, 31

1998, Bangladeshi historian and Professor of Dhaka University Muntassir Mamoon visited Pakistan. Mamoon interviewed the top Pakistani officials of the military and civilian administration who were present in Dhaka during the 1971 war.[142] Among them, the only one who condemned the atrocities committed by the Pakistan Army was Syed Alamdar Raza.[143] Raza, the last Pakistani Commissioner of Dhaka, had filed a writ petition before the Pakistan High Court petitioning the release of the Hamoodur Rahman Commission report and also seeking punishment for those who were responsible for stalling its publication.[144] Finally in 2000, after nearly two and a half decades, the government of Pakistan declassified the HRC report.[145]

2.2 *Local collaborators – the Razakars, Al-Badr and Al Shams*

The liberation war of Bangladesh lasted nine months during which the Pakistan military authorities found an ally in a group of local Bengalis belonging mainly to a right-wing Islamist party known as East Pakistan Jamaat-e-Islami.[146] Despite commanding negligible popular support throughout the conflict zone,[147] Jamaat contributed significantly in the formation of the Razakars, Al Badr and Al Shams as auxiliary forces of the Pakistan Army.[148] These auxiliary forces actively provided

December 2000) < http://news.bbc.co.uk/1/hi/world/south_asia/1094788.stm > accessed 22 January 2014.

[142] Shahriar Kabir, *The Intolerable Sufferings of Seventy One* (Dhaka Kazi Mukul 2009) 5-6.

[143] ibid.

[144] ibid.

[145] Abbas (n 141).

[146] Ali Riaz and Kh Ali Ar Raji, 'Who are the Islamists?' in Ali Riaz (ed), *Political Islam and Governance in Bangladesh* (Routledge 2011) 49; Stephen F Burgess, 'Political Islam and Radical Islam' in Michael Kindt, Jerrold Post and Barry Schneider (eds), *The World's Most Threatening Terrorist Networks and Criminal Gangs* (Palgrave Macmillan 2009) 57.

[147] In the general elections of December 1970, Jamaat-e-Islami's support in terms of percentage of votes obtained stood at 6% in East Pakistan.

[148] International Commission of Jurists (n 135) 31, 44-45; Macdermot (n 136) 476; Salik (n 72) 105; A A K Niazi, *The Betrayal of East Pakistan* (1st edn, Oxford University Press 1998); Julfikar Ali Manik and Emran Hossain, '1971 Liberation War Pak Major's Account Reveals Jamaat Role' *The Daily Star* (Dhaka, 28 October 2007) < http://archive.thedailystar.net/newDesign/news-details.php?nid=9188 >

local support to the Pakistan Army and collaborated with it in the commission of crimes throughout the nine month long war.[149] It also played a key role in the formation of local 'Peace Committees' that facilitated the above-mentioned auxiliaires.[150]

On 1 June, 1971, General Tikka Khan the Governor of East Pakistan issued the East Pakistan Razakars Ordinance, 1971 repealing the Ansars Act, 1948 with the view to provide for the constitution of a voluntary force called Razakars.[151] By July 1971, the Pakistan army had recruited at least 5000 persons they believed to be "good chaps, good Muslims and loyal Pakistanis" into the Razakars.[152] They were paid three rupees a day and received fifteen days training of learning how to shoot a police Lee-Enfield rifle.[153] Several months later in September 1971, members of the Razakars were given enhanced powers comparable to members of the Pakistan Army through another Ordinance.[154] The duties of the Razakars included but were not limited to performing "security checks" and guiding the Pakistani troops to the homes of supporters of the

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accessed 22 January 2014; Kamran Bokhari, 'Jama'at-i Islami in Pakistan' in Emad El-Din Shahin (ed), *The Oxford Handbook of Islam and Politics* (Oxford University Press 2013) 579; Navine Murshid, 'The genocide of 1971 and the politics of justice' in Ali Riaz and Mohammad Sajjadur Rahman (eds), *Routledge Handbook of Contemporary Bangladesh* (Routledge 2016) 52.

[149] Robert LaPorte Jr, 'Pakistan in 1971: The Disintegration of a Nation' (1972) 12(2) Asian Survey 97, 103; International Commission of Jurists (n 135) 31, 44-45; Macdermot (n 136) 478; Anne Noronha Dos Santos, *Military intervention and Secession in South Asia: the Cases of Bangladesh, Sri Lanka, Kashmir, and Punjab* (Praeger Security International 2007) 168; Bina D'Costa, *Nationbuilding, Gender and War Crimes in South Asia* (Routledge 2011) 103; Ben Whittaker, 'Stranded Pakistanis ("Biharis")' in Meghna Guhathakurta and Willem van Schendel (eds), *The Bangladesh Reader: History, Culture, Politics* (Duke University 2013) 286.

[150] Louis J. Smith (ed), *Vol XI South Asia Crisis, 1971* (Department of State U.S. Government 2005) 396 < http://history.state.gov/historicaldocuments/frus1969-76v11 > accessed 22 January 2014.

[151] M Mamoon, 'Razakar' (*Banglapedia*) <http://en.banglapedia.org/index.php?title=Razakar> accessed 22 January 2014; The East Pakistan Razakars Ordinance 1971.

[152] Murray Sayle, 'Terror in Bangladesh – I, Will The Refugees Return?' *The Statesman* (17 July 1971).

[153] ibid.

[154] Ordinance No. 100 of 1971; Lt. Genenral A.A.K. Niazi commanded the Pakistani forces in East Pakistan during the 1971 war. In his book Niazi wrote: "The proposal for raising an organized Razakar Force remained under consideration with HQ CMLA and GHQ for a long time. Although their recruitment had started earlier, sanction for the raising of this force was given at the end of August 1971. A separate Razakars Directorate was established, and the whole set-up started taking proper shape. Two separate wins called Al-Badr and Al-Shams were organized." Se, Niazi (n 148) 78.

Awami League.[155] A 'scorched earth policy' was adopted during joint operations between the Pakistan military and the Razakars.[156] Many members of the Razakars also came from the local Urdu speaking Bihari[157] community in Bangladesh.[158] In a letter by Badiul Alam, Secretary of the district Peace Committee of Chittagong during 1971, addressed to the Pakistani military authorities, he wrote on how to "eliminate the miscreants and to stop the anti-state activities in the city"[159] by involving the Razakars. The 'miscreants' referred to Alam's letter were those who represented the general masses of East Pakistan fighting to liberate Bangladesh. Alam wrote, "[…] all doubtful houses and buildings of the whole city should be cordoned at a time from morning to night by organising the under mentioned patriotic forces … 1) Local Rezakars [sic] who were trained up (embodied or unembodied) […]".[160]

Ghulam Azam as the Ameer of the East Pakistan Jamaat-e-Islami was one of the central figures offering key leadership to the auxiliaries. During a relentless yet ineffective campaign to sway the sentiments of the Bengali people against liberation, Azam and his cohorts argued that 'Islam' was being endangered through the Bengali struggle for liberation. During a press conference organized at the Jamaat-e-Islami office in Karachi, Ghulam Azam praised the role played by the Razakars. He said: "A good Muslim cannot be a supporter of the so called 'Bangladesh movement'. The one-

[155] Sayle (n 152).
[156] Thomas Fenton, 'Report on a Hamlet near Dhaka' *CBS News* (East Pakistan, 1 December 1971); Peter Hazelhurst, 'Terror Stalks Every Corner of East Bengal Today' *The Statesman* (26 May 1971).
[157] The Biharis are form an Urdu speaking Muslim minority group residing in Bangladesh. During the communal riots of the partition of India in 1947, many Biharis from the neighboring state of Bihar migrated to East Pakistan (now Bangladesh).
[158] Bass (n 106) 85; Caitlin Reiger, 'Fighting Past Impunity in Bangladesh: A National Tribunal for the Crimes of 1971' (International Center for Transitional Justice Briefing, 2010) < http://ictj.org/sites/default/files/ICTJ-BGD-NationalTribunal-Briefing-2010-English.pdf > accessed 22 January 2014; Macdermot (n 136).
[159] Hasan Hafizur Rahman (ed), *Bangladesher Swadhinota Juddher Dalilpatra* (Volume 8, Information Ministry of the People's Republic of Bangladesh, Dhaka June 1984) 727.
[160] ibid.

minded and patriotic citizens are working to eliminate the separatists of East Pakistan. The Razakars are also doing a very good job."[161]

The Razakars were divided into two wings, the Al Badr and the Al Shams.[162] During the second week of December 1971 when victory of the Bengalis appeared to be inevitable, the Al Badr – whose recruits originated from the Islami Chatra Shangha (ICS) the student wing of Jamaat-e-Islami, went out on calculated killing missions targeting eminent Bengali intellectuals.[163] The study conducted by the International Commission of Jurists in 1972 described the *modus operandi* of the Al Badr in the following manner:

> The Al Badr raids were carried out at night, the victims being led away blindfolded at gun point, never to return. Many were taken to the Dacca College of Physical Education building. A janitor at the College stated 'They brought in hundreds of people, all nicely dressed and tied up. We could hear the screaming all the time from the rooms.' The victims were later taken in trucks to a deserted brickyard near Mohammedpur.[164]

[161] Translation: "A good Muslim cannot be a supporter of the so called 'Bangladesh movement'. The one-minded and patriotic citizens are working to eliminate the separatists of East Pakistan. The Razakars are also doing a very good job." See, 'Bicchinotabadi rajnoitik dol nishiddho ghoshonar dabi – Karachi te Golam Azam' (Demand to ban separatist political parties – Golam Azam at Karachi) *The Daily Pakistan* (2 September 1971).
[162] Scott Gates and Kaushik Roy, *Unconventional Warfare in South Asia: Shadow Warriors and Counterinsurgency* (Ashgate Publishing 2016) 117; Whittaker (n 149) 285-286.
[163] 'Bicchinotabadi rajnoitik dol nishiddho ghoshonar dabi – Karachi te Golam Azam' (n 161); International Commission of Jurists (n 135) 44-45.
[164] International Commission of Jurists (n 135) 45; See also, 'Recognition of Bangladesh: Hearings before the Committee on Foreign Relations United States Senate 92nd Congress, March 6 and 7, 1972' (n 113) 30.

These killings crippled the Bengali intelligentsia. According to Ahmed Ziauddin the founder of the Bangladesh Centre for Genocide Studies, the Al Badr was "a Gestapo like organisation".[165]

Conclusion

This chapter demonstrates that the cultural domination and economic exploitation suffered by the Bengalis of the eastern wing at the hands of the Punjabi dominated western wing finally led to calls for independence and a backlash by the West Pakistan military. It was during this conflict that the Pakistan Army and its local auxiliaries inflicted mass atrocities against the Bengali people, which though disputed in some quarters is not seriously denied. The commission of these atrocities resulted in State led initiatives immediately after the conclusion of the war to hold the perpetrators responsible for their crimes.

The following chapter offers a legal and political history of the justice initiatives set in motion by the government of newly independent Bangladesh when it enacted the Bangladesh Collaborators (Special Tribunals) Order in 1972 and the International Crimes (Tribunals) Act in 1973. By encompassing the political developments of the four following decades this chapter then goes on to explain how and why successive governments failed to sustain and complete the justice processes that were set in motion in the early 1970s. It was this failure that nurtured and in the end cemented a

[165] Ahmed (n 115) 95.

deeply ingrained culture of impunity in Bangladesh, which was challenged for the first time in 2010 with the establishment of the International Crimes Tribunal.

Chapter II

The search for justice and Bangladesh's culture of impunity

Introduction

The previous Chapter, covering the period between 1947 and 1971, explained the circumstances leading to the "disintegration of Pakistan" and the birth of Bangladesh as a "nation state".[1] It offered an account of the nature and extent of the crimes committed by the Pakistan Army and their auxiliary forces[2] during the war of 1971, crimes of a level that would qualify as international crimes by any standard. In two parts, this chapter traces a host of local and international factors which thwarted the implementation of any meaningful and effective judicial mechanism aimed at delivering justice to the victims for the greater part of four decades. It argues that if there is to be an end to impunity for the crimes committed, the International Crimes Tribunals (ICTs) most likely represent the last opportunity to deliver justice to victims of 1971. Part I examines two justice initiatives that were set in motion in the early 1970s after the war. It explains why those initiatives failed and identifies the causes of a deeply rooted culture of impunity in Bangladesh. Part II gives an account of powerful civil society movements from the 1990s which gave voice to victims' demands for justice and pin points the year 2010 as the moment when the culture of impunity in Bangladesh was challenged for the first time in nearly four decades with the establishment of the first ICT.

[1] Rounaq Jahan, *Pakistan: Failure in National Integration* (Columbia University Press 1972) Preface.
[2] The role played by the auxiliary forces comprising of the Razakars, Al Badr and Al Shams had been discussed in Part 2.2 of Chapter I.

1. The search for justice after 1971

This part gives an account of how the volatile situation which prevailed throughout Bangladesh during the months immediately following the surrender of the Pakistan Army was handled by the Bangladesh Government. It documents the demands of the Bengali people to try members of the Pakistan Army and their auxiliary forces and discusses the incomplete and unsuccessful justice initiatives set up through the Bangladesh Collaborators (Special Tribunals) Order 1972 (Collaborators Order) and the International Crimes (Tribunals) Act 1973 (ICTA).[3] It identifies the amnesties and clemencies granted by Sheikh Mujibur Rahman in 1973, the Tripartite Agreement between Bangladesh, India and Pakistan in 1974, the unconditional release of all serious offenders convicted under the Collaborators Order after December 1975 and the political rehabilitation of Jamaat-e-Islami by military dictators Ziaur Rahman and Hussain Muhammad Ershad and former Prime Minister Begum Khaleda Zia, as the four main causes of the culture of impunity in Bangladesh.

1.1 *Justice versus revenge in independent Bangladesh*

After the surrender of the Pakistan Army and its auxiliary forces, the "euphoric celebration"[4] of the Bengali people was marred by the realization that their "liberation struggle" the ultimate achievement of which was the creation of an "independent,

[3] Muntassir Mamoon, 'Collaborators Tribunal Order, 1972' (*Banglapedia*, 26 May 2015) < http://en.banglapedia.org/index.php?title=Collaborators_Tribunal_Order,_1972 > accessed 15 March 2017; The International Crimes (Tribunals) Act 1973 [ACT NO. XIX OF 1973] < http://bdlaws.minlaw.gov.bd/pdf_part.php?id=435 > accessed 6 May 2014.
[4] 'Dacca Reported Quiet' *New York Times* (New York, 20 December 1971).

sovereign People's Republic of Bangladesh",[5] had come at the expense of immeasurable human sacrifice and destruction.[6] Demands to detain, try and punish the perpetrators of mass atrocities gained momentum. There were also well-grounded fears that local collaborators who had not surrendered or managed to flee would be victims of reprisals by Bengali mobs.[7]

After the signing of the Instrument of Surrender on 16 December, 1971, the Bangladesh government faced a set of delicate and competing responsibilities. These included, among others, the prevention of reprisals against local collaborators of the Pakistan Army and the setting up of judicial systems to try persons responsible for the atrocities of 1971. Throughout the war, non-Bengali minority groups particularly the Biharis, had enlisted in the Razakars, actively collaborated with the Pakistan Army in its onslaught against the Bengali people and in some cases had taken over their property, businesses and jobs.[8] Prior to the surrender of the Pakistan Army, there were legitimate fears that the Bengalis would take revenge on "non-Bengali 'Quislings', stray West Pakistan soldiers and pro-Government 'Razakar' militia men".[9] This necessitated the signing of a pact between the governments of Bangladesh and India

[5] Bangladesh Awami League, 'Bangabandhu Sheikh Mujibur Rahman at a Press Conference in London' (20 November 2013) < https://www.youtube.com/watch?v=2Gi5VkMxLsA > accessed 15 March 2017.
[6] Anthony Lewis, 'After Freedom Flight to London Mujibur Due in Dacca Today; Appeals for Recognition, Aid' in M D Husain (ed), *International Press on Bangladesh Liberation War* (Amader Bangla Press 1989) 404; Aubrey Menen, 'The Rapes of Bangladesh' *New York Times* (New York, 23 July 1972).
[7] James P Sterba, 'Dacca at War: Mixture of Calm and Confusion' *New York Times* (New York, 11 December 1971); 'Bangladesh Now' in Maudood Elahi (ed), *Assignment Bangladesh '71 – A Chronology of Events as Seen by the World Press* (Momin Publications 1999) 589; 'The Aftermath of War' in Maudood Elahi (ed), *Assignment Bangladesh '71 – A Chronology of Events as Seen by the World Press* (Momin Publications 1999) 617.
[8] Gary J Bass, *The Blood Telegram – Nixon, Kissinger and A Forgotten Genocide* (Knopf Publishing Group 2013) 84; Richard Sisson and Leo E Rose, *War and Secession – Pakistan, India, and the Creation of Bangladesh* (University of California Press 1990) 163 & 165.
[9] 'Bangladesh Pact Signed' in M D Husain (ed), *International Press on Bangladesh Liberation War* (Amader Bangla Press 1989) 369; Sydney H Schanberg, 'Two Men at a Table' *New York Times* (New York, 17 December 1971).

allowing Indian troops to work in concert with the Mukti Bahini[10] and the Bangladesh Army to "restore conditions of normalcy" and protect everyone in the areas under their control from "mob violence".[11] Leaders of Bangladesh's Provisional Government made repeated appeals to the Bengali people not to take the law into their own hands, and pledged that a "special war tribunal" would be established to try "traitors and Pakistani collaborators".[12] On 13 December, 1971, the Cabinet of the Provisional Government authorized local authorities to arrange for the "immediate arrest and safe custody of collaborators pending trial".[13] The Inter-Continental Hotel, Holy Family Hospital and Notre Dame College were designated as "neutral areas" in Dhaka where officials of the former East Pakistani administration who had allegedly collaborated with the Pakistan Army were kept for their protection.[14] Determined to prevent "summary executions and bloody reprisals" the Instrument of Surrender signed between the Pakistan, Indian and Bangladesh Forces on 16 December, 1971 gave a "solemn assurance" that all Pakistani military and paramilitary forces who surrendered would be "treated with dignity and respect […] in accordance with the provisions of the Geneva Convention" and their "safety and well-being" would be guaranteed.[15]

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[10] The Mukti Bahini was the name given to the forces of Bangladesh which fought against the Pakistan Army and its auxiliaries in 1971. See, Helal Uddin Ahmed, 'Mukti Bahini' (*Banglapedia*) < http://en.banglapedia.org/index.php?title=Mukti_Bahini > accessed 23 September 2017.

[11] 'Bangladesh Pact Signed' (n 9) 369.

[12] Peter Gill, 'Independent Bangladesh Government Takes Over in Jessore – Drive to Restore Law and Order First Priority' in M D Husain (ed), *International Press on Bangladesh Liberation War* (Amader Bangla Press 1989) 372; 'Appeal Against Reprisals' *New York Times* (New York, 28 December 1971).

[13] 'Appendix Dha – Extracts from the Minutes and Decisions of the Cabinet Meeting held on December 13, 1971' in Muyeedul Hasan, *Muldhara '71* (University Press Limited 2012) 291.

[14] 'India in Red Cross Accord' *New York Times* (New York, 15 December 1971); Fox Butterfield, 'India Weighs Bengali Plea To try Pakistani Officials' *New York Times* (New York, 27 December 1971); 'Dacca Reported Quiet' (n 2); John Humphreys, 'The Last Days of Dacca' in Maudood Elahi (ed), *Assignment Bangladesh '71 – A Chronology of Events as Seen by the World Press* (Momin Publications, 1999) 717-718.

[15] Charles Mohr, 'Dacca Captured – Guns Quiet in Bengali Area but War Goes On at Western Front' *New York Times* (New York, 17 December 1971); 'Text of Instrument of Surrender' in Hasan Hafizur Rahman (ed), *History of Bangladesh War of Independence: Documents* (Vol 7, Ministry of Information – Government of the People's Republic of Bangladesh 1984) 290.

Protection was also pledged to "foreign nationals, ethnic minorities and personnel of West Pakistan origin".[16]

After the surrender ceremony, Lieutenant-General Jagjit Singh Aurora the General Officer Commanding in Chief of the Indian and Bangladesh Forces voiced his concerns about the volatile mood that prevailed in Bangladesh. Aurora said: "[The security of the Pakistani prisoners of war] has now become my responsibility. We will move them into India as soon as we can. It is the local populace, not the Mukti Bahini, that I am worried about."[17] Although Bangladesh was not at the time a Party to the Geneva Conventions, its Provisional Government declared with immediate effect that it would honour the Conventions relating to the treatment of prisoners of war and civilians and all principles of the United Nations Charter.[18] Similar assurances came from the Mukti Bahini and orders to ensure the protection of prisoners of war were issued to its forces.[19]

While the governments of Bangladesh and India had assured to protect "foreign nationals, ethnic minorities and personnel of West Pakistan origin" as well as members of Pakistan's military and para-military forces who surrendered, they did not want to be accused of "harboring men" who had committed "horrendous crimes".[20] The assurances of safety ran parallel with the reality that the Bengalis held feelings of deep

[16] 'Text of Instrument of Surrender' (n 15) 290.
[17] Henry Stanhope, 'India and Pakistan – Pakistan Strategy at Fault, Says Gen. Aurora' in Maudood Elahi (ed), *Assignment Bangladesh '71 – A Chronology of Events as Seen by the World Press* (Momin Publications 1999) 606.
[18] 'Bangladesh to Observe Geneva Convention' in M D Husain (ed), *International Press on Bangladesh Liberation War* (Amader Bangla Press 1989) 383-384; 'Pledge on Preventing Reprisals' in Maudood Elahi (ed), *Assignment Bangladesh '71 – A Chronology of Events as Seen by the World Press* (Momin Publications 1999) 595-596.
[19] 'Pledge on Preventing Reprisals' ibid 596.
[20] 'Text of Instrument of Surrender' (n 15) 290; Fox Butterfield, 'India Weighs Bengali Plea To Try Pakistani Officials' (n 14).

resentment against not just the Pakistan Army but also its local collaborators.[21] Although the war was officially over, armed members from the Razakars, Al Badr and the Bihari community had entrenched themselves particularly in two suburbs of Dhaka and continued to fire upon Bengalis till March 1972.[22] This problem was compounded within a week of signing the Instrument of Surrender when mass graves were discovered throughout the country and bodies of several hundred Bengali intellectuals who had been "bayoneted, choked or shot" by the Pakistan Army and the Al Badr were found dumped in ditches.[23] Bengalis started to take part in reprisals and revenge killings "despite India's restraining military presence" and pacifying their unstable and violent mood was by no means an easy task.[24]

One of the worst incidents of this kind took place on 18 December, 1971 when a Bengali guerilla leader and self-styled "General" named Abdul Kader Siddique and

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[21] A report published in The Times on December 22, 1971 read: "*Mr Sarin* [correspondent of the Indian Express] *quoted one Bengali woman as saying: "India may be bound by the Geneva Convention, but the people of Bangladesh have no such obligations. Our wounds are still too deep and our thirst for the enemy's blood has yet to be quenched. Mr Sarin said that the signs of revenge were "unmistakable" and there had been quite a few incidents in Dacca during the past 48 hours.*" – See, 'Guerillas Join Hunt for the 'Tiger'' in Maudood Elahi (ed), *Assignment Bangladesh '71 – A Chronology of Events as Seen by the World Press* (Momin Publications 1999) 665; Khushwant Singh, 'Homecoming in Bangladesh – Some Hindus say: "If you have been bitten by a snake you are scared by a rope"' *The New York Times* (New York, 30 January 1972).

[22] Sydney H Schanberg, 'Bengalis Put Casualties At 100 in Dacca Fighting' *New York Times* (New York, 3 February 1972); 'Dacca Suburb Site of Sporadic Fighting' *New York Times* (New York, 4 February 1972); 'Toll in a Bengali-Bihari Clash Is Put at 200 Killed or Injured' *New York Times* (New York, 14 March 1972); Sydney H Schanberg, 'Bengalis Ashamed Of Burst of Revenge Against the Biharis' *New York Times* (New York, 17 March 1972); 'Bengali Backlash' *New York Times* (New York, 19 March 1972); Sohul Ahmed, 'Zahir Raihan: Nikhoj o Opekkhar Hajar Bochor' *bdnews24* (Dhaka, 20 August 2016) < http://opinion.bdnews24.com/bangla/archives/38705 > accessed 9 April 2017.

[23] Eastern News Agency, 'Bangladesh 1971 Intellectual Killings Trauma' (8 February 2015) < https://www.youtube.com/watch?v=7hEVjiQ0X_8 > accessed 6 April 2017; Fox Butterfield, 'A Journalist Is Linked To Murder of Bengalis' *New York Times* (New York, 3 January 1972); 'Dacca Murders Exposed – Bengal's Elite Dead in a Ditch' in M D Husain (ed), *International Press on Bangladesh Liberation War* (Amader Bangla Press 1989) 393; '125 Slain in Dacca Area Believed Elite of Bengal' *New York Times* (New York, 19 December 1971).

[24] David Loshak, 'How India Won 14-Day War' in Maudood Elahi (ed), *Assignment Bangladesh '71 – A Chronology of Events as Seen by the World Press* (Momin Publications, 1999) 655; 'Bangladesh: Peril of Delay' in Maudood Elahi (ed), *Assignment Bangladesh '71 – A Chronology of Events as Seen by the World Press* (Momin Publications 1999) 660; Sydney H Schanberg, 'Bengalis Land a Vast Cemetery' *New York Times* (New York, 24 January 1972).

several men under his command bayoneted four alleged collaborators to death at a public rally in Dhaka in front of thousands of people and foreign journalists.[25] Moments earlier, Siddique had urged the attendees of the rally "to preserve calm and discipline and not to take the law into their own hands" but changed his position after being swayed by the "popular demand" for revenge.[26] Following calls for his immediate arrest by the Indian Army and the Mukti Bahini, a "look alike" of Siddique was detained while the real Siddique escaped and took refuge amongst 16,000 guerilla fighters under his command in Tangail where he had fought during the war.[27] After Sheikh Mujibur Rahman returned to Bangladesh in January 1972, Siddique was pardoned and he re-emerged free as a "hero of the freedom movement".[28] Nevertheless, in the months following the signing of the Instrument of Surrender, most independent observers concluded that the Bengalis did not engage in "widespread revenge killing" and that the scale of violence against Biharis had been "relatively minor" and far less than many expected.[29] This came as a direct consequence of the protection offered to the Biharis by the armies of India and Bangladesh, Mukti Bahini and the Mujib Bahini as well as the adoption of unconventional measures to ensure

[25] 'The Kaderia Incident and Formal Surrender on 19th Dec' (21 May 2012) < https://www.youtube.com/watch?v=y_EoP5lM_8 > accessed 10 April, 2017; Horst Faas and Michel Laurent, '4 Tortured, Slain at Dacca Rally' *New York Times* (New York, 20 December 1971); 'India Censors Execution Photos As Harmful to 'National Interest'' *New York Times* (New York, 21 December 1971); Lawrence Lifschultz, *Bangladesh: The Unfinished Revolution* (1st edn, Zed Press 1979) 64.

[26] Faas and Laurent (n 25); Horst Faas and Michel Laurent, 'Torture and Execution After Bangla Desh War' *Chicago Tribune* (20 December 1971); James Yuenger, 'Indians Protect Pakistanis from Reprisals' *Chicago Tribune* (20 December 1971); H S Kler, *12 Days to Dacca* (Deejay Kler 2015) 73; Yasmin Saikia, *Women, War, and the Making of Bangladesh: Remembering 1971* (Duke University Press 2011) 257-258.

[27] H S Kler, *12 Days to Dacca* (Deejay Kler 2015) 73.

[28] ibid.

[29] Schanberg, 'Bengalis Ashamed Of Burst of Revenge Against the Biharis' (n 22); Indira Gandhi, 'A Word to America' in Indira Gandhi (ed), *India and Bangladesh – Selected Speeches and Statements March to December 1971* (Orient Longman 1972) 160; Gary J Bass, 'Bargaining Away Justice – India, Pakistan, and the International Politics of Impunity for the Bangladesh Genocide' (2016) 41 (2) International Security 140, 156.

their safety, which included housing Bihari families inside jails throughout Bangladesh.[30]

As the reprisals and private acts of retribution began to subside, the demand for formal trials of members of the Pakistan military and their local collaborators gained momentum.[31] The decision to arrange for trials of local collaborators was taken by the Cabinet of the Provisional Government of Bangladesh several days prior to the end of the war on 13 December, 1971.[32] It was proposed that a committee of jurists and legal experts constituted under the Ministry of Law and Parliamentary Affairs would advise the government as to whether or not there existed the need to draft a new law in order for the trials to move forward.[33] On 23 December, 1971, the Cabinet decided to arrest several categories of people, which included among others, "political leaders who collaborated with the enemy to suppress the people's liberation war", "individuals who committed crimes against humanity in collaboration with the enemy", "members of such organization as 'Al-Badr' and 'Al-Shams'" etc.[34] The first arrests took place the following day with the detention of Abdul Mutaleb Malik the former governor of

[30] The *Mujib Bahini* was an armed guerrilla force that fought alongside the *Mukti Bahini*. It was comprised of political activists of the *Awami League* and its student front the *Chhatra League*. For further information on the *Mujib Bahini*, see, Helal Uddin Ahmed, 'Mujib Bahini' (*Banglapedia*, 4 March 2015) < http://en.banglapedia.org/index.php?title=Mujib_Bahini > accessed 6 April 2017; James P Sterba, 'Joy and Marigolds' *New York Times* (New York, 17 December 1971); 'Mujib's Road from Prison to Power' in Maudood Elahi (ed), *Assignment Bangladesh '71 – A Chronology of Events as Seen by the World Press* (Momin Publications 1999) 692.

[31] Fox Butterfield, 'Demands for trials: India Weighs Bengali Plea To Try Pakistani Officials' *New York Times* (New York, 27 December 1971); Eastern News Agency, 'Dalalder Shompotti Bajeyapto Korar Dabi' *Doinik Bangla* (Dhaka, 1 January 1972) 3, 2.

[32] 'Appendix Dha – Extracts from the Minutes and Decisions of the Cabinet Meeting held on December 13, 1971' in Muyeedul Hasan, *Muldhara '71* (University Press Limited 2012) 291.

[33] ibid.

[34] 'Appendix Naw – Extract from the Decision of the Cabinet Meeting held on 23.12.1971 at Dacca in the Bangabhaban' (n 32) 292; AB Musa, 'Bangladesh Government Prepares for New Era' in Maudood Elahi (ed), *Assignment Bangladesh '71 – A Chronology of Events as Seen by the World Press* (Momin Publications 1999) 609; 'Dacca Hails Bangladesh Leaders' in M D Husain (ed), *International Press on Bangladesh Liberation War* (Amader Bangla Press 1989) 398; 'Bengali Tribunals Set' *New York Times* (New York, 25 December 1971).

East Pakistan and eight members of his cabinet.[35] By the end of December 1971, the Bangladesh authorities had arrested at least 30 of the top Pakistani civilian officials.[36]

Alongside the trials of local collaborators, demands were made to prosecute Pakistani military personnel for "heinous crimes" committed outside the performance of their duty.[37] With the transfer underway of thousands of members of the Pakistan Army to prisoner of war camps in India, the Indian authorities initially approached this demand with caution. Durga Prasad Dhar, at the time serving as Prime Minister Indira Gandhi's Special Envoy to Bangladesh, best described the Indian position. He said: "India wants to uphold its solemn obligations to protect its prisoners under the Geneva Convention. But at the same time, India does not want to be accused by the Bengalis of harboring men who have been proved to be guilty of 'horrendous crimes'".[38] Indira Gandhi subsequently clarified that the decision whether to establish a 'war crimes tribunal' to try members of the Pakistan Army for committing international crimes would be taken by the Bangladesh Government.[39]

On 8 January, 1972, Sheikh Mujibur Rahman was freed from imprisonment in Pakistan and flown to London. During his first exchange with the international press in over nine months Mujib expressed the need to hold "some sort of trial for mass murderers."[40] Two days later Mujib made his homecoming speech in liberated

[35] Sydney H Schanberg, 'Long Occupation of East Pakistan Foreseen in India' *New York Times* (New York, 26 December 1971).
[36] Fox Butterfield (n 31).
[37] Sydney H Schanberg, 'India Says She is Weighing Trials of Pakistani Troops' *New York Times* (New York, 28 December 1971).
[38] Fox Butterfield (n 31); Fox Butterfield, 'Pact To Disarm Bengali Rebels Reported' *New York Times* (New York, 28 December 1971); Omi Rahman Pial, 'Situation Dhaka and DP Dhar Interview' (1 August 2010) < https://www.youtube.com/watch?v=hCqWCq28ZYE > accessed 17 April 2017.
[39] 'Juddho Oporadh Tribunal Gothon Proshonge – Bangladesh Shorkar e Shiddhanto Neben: Indira' *Doinik Bangla* (Dacca, 2 January 1972) 2.
[40] Nicholas Carroll, 'Dawn Landing Drama' *The Sunday Times* (9 January 1972).

Bangladesh. He reiterated his pledge to try and punish collaborators before an "independent court" and appealed to the United Nations to conduct an enquiry "to determine the extent of genocide committed in Bangladesh by the Pakistan Army."[41] The Bangladesh Government had already set up a twelve-member Inquiry Committee led by the Deputy Inspector General of Police subsequent to which four casualty surveys were initiated to ascertain the exact extent of loss of life and property resulting from the atrocities of Pakistan army.[42]

On 18 January, 1972 during an interview with Sir David Frost, Sheikh Mujib referring back to the precedent of Nuremberg, said: "I always believe in forgive and forget, but it is impossible on my part to forgive and forget because these are cold-blooded murders [committed] in a planned way, a genocide to kill my people. Do you think any human being can tolerate these killings? These people must be punished. There is no question about it."[43] As a response to the victims demands for justice and to assuage their "passion for revenge", two separate and formal processes of 'justice' were set in motion.[44] The first initiative involved the setting up of Special Tribunals under the

[41] Sheikh Mujibur Rahman said "[...] However, those who have collaborated, those who have entered the homes of my people and killed them, they shall be tried and punished. Hand them over to the independent government of Bengal. Not a single person will be pardoned. However, I want that we try and punish them [in Bangladesh] as an independent State as independent citizens before an independent court. […] Forgive me, my brothers, forgive me. I don't hold feelings of vengeance against any one today. Please do not say anything to a single person. Those who have wronged will be punished. Do not take law into your own hands." See, Sumon Mahmud, 'BONGOBONDHU SPEECH_10th January, 1972' (6 March 2014) < https://www.youtube.com/watch?v=SD6_uLXV0VE > accessed 17 April 2017; Niall Macdermot, 'Crimes Against Humanity in Bangladesh' (1973) 7 (2) International Lawyer 476, 479; 'Gonohottar Todontey Antorjatik Commission Gothon Korun: Samad' *Dainik Bangla* (Dacca, 21 January 1972) 1.

[42] Nurul Momen, *Bangladesh The First Four Years – From 16 December 1971 to 15 December 1975* (Bangladesh Institute of Law and International Affairs 1980) 10; 'Four Casualty Surveys Initiated' *The Bangladesh Observer* (Dacca, 23 January 1972).

[43] 'Transcript of Interview in the David Frost Show, WNEW-TV, New York' in Sheelendra Kumar et al (eds), *Bangladesh Documents: Volume Two* (The University Press Limited 1999) 626; Omi Rahman Pial, 'Mujib with David Frost 2' (20 November 2009) < https://www.youtube.com/watch?v=hXZahA8D7JE > accessed 17 April 2017.

[44] 'Genocide Trials Planned' *New York Times* (23 February 1972) < https://nyti.ms/2oP08pZ > accessed 17 April 2017; 'Bangladesh Will Try 1,100 Pakistanis' *New York Times* (30 March 1972) < https://nyti.ms/2ptlN5h > accessed 17 April 2017.

Bangladesh Collaborators (Special Tribunals) Order 1972 and the second initiative strove to establish the International Crimes Tribunal under the International Crimes (Tribunals) Act 1973 to try Pakistani prisoners of war.

1.2 *Trials under the Bangladesh Collaborators (Special Tribunals) Order 1972*

The Collaborators Order was promulgated by the President of Bangladesh on the advice of Prime Minister Sheikh Mujibur Rahman on 24 January, 1972 for the purposes of trying collaborators of the Pakistan Armed Forces accused of murder, rape, plunder and other offences.[45] The Order created sixty-five offences most of which originated from the Bangladesh Penal Code, 1860. These offences acquired the status of "aggravated offences" carrying punishments more severe than the Penal Code because they were carried out by a "collaborator".[46] The Collaborators Order was not a complete code in itself. Its procedure was governed by the Code of Criminal Procedure, 1898 and its rules relating evidence came from the Evidence Act, 1872.[47]

The justice process created by the Collaborators Order was welcomed by the majority of the people of Bangladesh.[48] It was warmly received by the Bengalis because it created a judicial mechanism which promised to punish those who had wronged them during the 1971 war. The Biharis and other collaborators took the Order as a "great blessing" because it saved them from a "wrath of reprisals".[49] After the promulgation, the Bangladesh government summoned 15 political personalities known to have

[45] Mamoon (n 3)
[46] Naziruddin Ahmad, *Trial of Collaborators* (Book Society 1972) i & 1.
[47] ibid i.
[48] Moudud Ahmed, *Bangladesh: Era of Sheikh Mujibur Rahman* (The University Press Limited 1983) 50-51.
[49] ibid.

collaborated with the Pakistan Army to appear before Sub-divisional Magistrates.[50] By April 1972, nearly 10,000 suspected collaborators from the Jamaat-e-Islami, other right-wing Islamist parties, the Razakars, Al Badr and Al Shams were awaiting trial under the Collaborators Order.[51] The number of arrestees rose to 42,000 by October 1972.[52]

The Collaborators Order was not free from criticism. Specific provisions were condemned by international and domestic quarters for being unfair towards the accused, while others were critiqued for safeguarding them. The International Commission of Jurists criticized the Order's "retroactive" nature and demanded the release of those detained under it.[53] The excessive powers given to police officers to arrest anyone without a warrant, the suspension of habeas corpus in 'collaboration' cases, the wide definition of "collaborator",[54] the power to detain an accused for the first six months, trials in absentia, the right to confiscate the property belonging to wanted suspects or persons who had been arrested and the denial of the right to bail

[50] ibid 51.
[51] Sydney H Schanberg, 'Bangladesh, 4 Months Old, Is Struggling for Stability' *New York Times* (New York, 4 April 1972); 'Trials Sought in East' *New York Times* (New York, 16 January 1972).
[52] Amnesty International, *Annual Report 1972 – 73* (Amnesty International Publications 1973) 60 < https://www.amnesty.org/en/documents/pol10/001/1973/en/ > accessed 19 April 2017.
[53] Niall Macdermot (ed), 'ICJ Review No. 9' (International Commission of Jurists 1973) 8-10; Niall Macdermot (ed), 'ICJ Review No. 10' (International Commission of Jurists 1973) 2 < http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/07/ICJ-Review-10-1973-eng.pdf > accessed 22 January 2014; Niall Macdermot (ed), 'ICJ Review No. 11' (International Commission of Jurists 1973) 9-10 < http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/07/ICJ-Review-11-1973-eng.pdf > accessed 22 January 2014.
[54] The Collaborators Order defined the word "collaborator" as a person who "participated with or aided or abetted the occupation army in maintaining, sustaining, strengthening, supporting or furthering the illegal occupation of Bangladesh by such Army", "rendered material assistance in any way whatsoever to the occupation army by any act, whether by words, signs or conduct", "waged war or abetted in waging war against the people's Republic of Bangladesh", "actively resisted or sabotaged the efforts of the people, and the liberation forces of Bangladesh in their liberation struggle against the occupation army", "by a public statement or by voluntary participation in propagandas within and outside Bangladesh or by association or by participation in purported bye-elections attempted to aid or aided the occupation army in furthering its design of perpetrating its forcible occupation of Bangladesh." See, Ahmad (n 36) 6-7.

were perceived as provisions which could lead to miscarriages of justice.[55] Amnesty International expressed concern over the widespread arrests of alleged collaborators and requested that international observers be present at the trials of those charged as war criminals.[56] A prominent lawyer from Singapore investigating on behalf of Amnesty in July 1972 reported that the scope of the Collaborators Order was very wide because it simultaneously covered "cases of grave criminal offences and atrocities, as well as simple co-operation with the then government during the months after March 1971."[57] The Supreme Court Bar Association of Bangladesh described the Collaborators Order as "the most unethical law contrary to all established principles of jurisprudence and fundamental rights as recognized throughout the civilized world" for being "harsh and vindictive" and displaying a lack of confidence in Bangladesh's judicial system.[58]

In August 1972, Martin Ennals of Amnesty International pressed Sheikh Mujibur Rahman to grant amnesty to prisoners detained under the Order. Ataur Rahman Khan the former Chief Minister of East Pakistan and one of the founders of the Awami League was another advocate for granting an amnesty. Khan argued that the decision to prosecute a wide category of collaborators including those who held different political views but had not committed 'crimes' would impede "national reconstruction" and further divide the nation instead of forging of a "national unity".[59]

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[55] Ahmed (n 48) 51; Ziauddin Ahmed, 'The Case of Bangladesh: Bringing to Trial the Perpetrators of the 1971 Genocide' in Albert J Jongman (ed), *Contemporary Genocides: Causes, Cases, Consequences* (PIOOM 1996) 102; Amnesty International, *Annual Report 1972 – 73* (Amnesty International Publications 1973) 60 < https://www.amnesty.org/en/documents/pol10/001/1973/en/ > accessed 19 April 2017.

[56] Amnesty International, *Annual Report 1 June 1971 – 31 May 1972* (Amnesty International Publications 1972) 31

[57] Amnesty International, *Annual Report 1972 – 73* (Amnesty International Publications 1973) 60

[58] Ahmed (n 55) 102.

[59] Ahmed (n 48) 52.

He alleged that many people who had opposed the independence of Bangladesh in 1971 now held high positions in the Government and that the Awami League was using the Collaborators Order as a shield to imprison "political, social, family and economic rivals."[60] In the years immediately following independence, the government led by Sheikh Mujibur Rahman employed an inconsistent policy where a large section of collaborators belonging to the anti-independence camp were either prosecuted or punished, but others from the same camp were not. For instance, while 53 bureaucrats were identified as 'collaborators' and removed from employment in 1972, there were glaring instances where 'anti-independence' personalities some known for their criminal activities in 1971 were appointed to positions of power.[61]

The Collaborators Order was critiqued not just for being unfair towards the accused. On 23 July, 1972, a Bangladeshi newspaper named the Dainak Bangla ran a front page editorial calling for amendments to the law.[62] It argued that the provision in the Code of Criminal Procedure, 1898 which applied to the Order, empowering the Officer-in-Charge of Police Stations to investigate charges of collaboration was an impediment to justice because of the disproportionately low number of police personnel in the country.[63] The atrocities of 1971 were committed during war time, and the decision to utilize stringent rules of evidence usually applicable during times of peace was

[60] Ahmed (n 48) 52.
[61] M Sanjeeb Hossain, 'Know Your Friends and Foes' *bdnews24* (Dhaka, 3 November 2012) < http://opinion.bdnews24.com/2012/11/03/know-your-friends-and-foes/ > accessed 18 April 2017.
[62] 'Dalal Ainer Shongshodhon Proyojon' *Dainik Bangla* (Dacca, 23 July 1972) 1, 3.
[63] Code of Criminal Procedure 1898 Section 157 reads: "157.(1) If, from information received or otherwise, an officer in charge of a police-station has reason to suspect the commission of an offence which he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police-report, and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the Government may, by general or special order, prescribe in this behalf to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender." < http://bdlaws.minlaw.gov.bd/sections_detail.php?id=75&sections_id=20849 > accessed 19 April 2017.

questioned.[64] It was further argued that the highly technical rules of evidence as enshrined in the Evidence Act, 1872 were barriers to the ends of justice because they "safeguarded" perpetrators from convictions.[65]

Various shortcomings of the justice process under the Collaborators Order were addressed by the government of Bangladesh and the Supreme Court. To reduce the filing of frivolous cases, the government introduced amendments to the Order empowering the Special Tribunals and Magistrates to punish persons who filed false charges with imprisonment for a period of up to three years or fine or both.[66] The Supreme Court of Bangladesh intervened in multiple instances to enhance the rights of the accused and set important precedents that improved the overall fairness of trials under the Order.[67]

By 1973 the Government of Bangladesh was actively considering the "question of granting clemency to persons convicted for or accused of offences" under the Collaborators Order.[68] The first act of clemency for certain categories of collaborators was declared on 17 May, 1973. It did not extend to persons convicted for or charged with serious offences such as waging or attempting to wage war against Bangladesh, sedition, murder, rape, robbery, arson etc.[69] On 30 November, 1973, Sheikh Mujibur Rahman declared a general amnesty towards those who were being tried under the Collaborators Order, excepting those who were charged or convicted of murder,

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[64] 'Dalal Ainer Shongshodhon Proyojon' (n 62) 1, 3.
[65] Muktijuddho Chetona Bikash Kendro, *Ekattorer Ghatok O Dalalra Ke Kothay* (3rd edn, Muktijuddho Chetona Bikash Kendro 1988) 19-22.
[66] The Bangladesh Collaborators (Special Tribunals) (Third Amendment) Order 1972 (President's Order No. 103 of 1972), article 11C.
[67] Ahmed (n 48) 46-50.
[68] 'Certain categories excluded – Clemency for collaborators' *The Bangladesh Observer* (Dacca, 17 May 1973) 1, 8.
[69] ibid.

culpable homicide not amounting to "murder", "rape", "mischief by fire or explosive substance", "mischief by fire or explosive substance with intent to destroy house" or "mischief by fire or explosive substance to destroy any vessel".[70] Although the amnesty was 'conditional', it was allegedly subjected to abuse through "corruption, favouritism and misuse of powers" resulting in the release of prominent collaborators to whom the amnesty did not apply.[71] Sheikh Mujib's amnesty was an expression of his magnanimity and genuine belief that such a decision would facilitate national reconciliation.[72] The war-torn administration of Bangladesh was severely strained in possessing the bare minimum resources to continue trying thousands of accused who had been arrested under the Order. Organizations like Amnesty International and the International Commission of Jurists had been urging Mujib to "initiate a policy of reconciliation, enabling the Bangladesh government to harness the potential of those now in prison who at the time believed or acquiesced in the continuance of the status quo."[73] Mujib's general amnesty was praised by the International Commission of Jurists as "a generous act of statesmanship".[74] Amnesty International sent a telegram warmly congratulating Mujib on his decision. According to Ziauddin Ahmed, the amnesty was legally flawed because the Constitution of Bangladesh empowers the

[70] 'Over 30,000 will be freed by Dec. 15 – Clemency granted – Murder, Arson, Rape Cases Not Included' *The Bangladesh Observer* (Dacca, 2 December 1973) 1, 10.
[71] Ahmed (n 55) 103.
[72] 'Work as loyal citizens: Mujib' *The Bangladesh Observer* (Dacca, 2 December 1973) 1, 10; Ahmed (n 55) 102-103.
[73] Amnesty International, *Annual Report 1973-74* (Amnesty International Publications 1974) 49-50
[74] The International Commission of Jurists wrote: "*The decision of the Bangladesh government on November 30, 1973 to release under amnesty all those held or convicted under the Collaborators (Special Tribunals) Order, except for those charged with murder, rape or arson is warmly welcomed. It is estimated that approximately 35,000 will benefit from this amnesty including high officials of the former Pakistani administration in Bangladesh. This course which was urged in the last issue of the REVIEW, is a generous act of statesmenship* [sic] *which should help to bring peace and harmony in Bangladesh and in the sub-continent.*" See, Macdermot (ed), 'ICJ Review No. 11' (n 53).

President to grant pardons only to persons who have been 'convicted', not accused whose trials are ongoing.[75]

Statistics regarding the Collaborators Oder show that by 31 October, 1973, out of 37,471 accused the trials of 2,848 persons were completed.[76] 752 persons were convicted and sentenced to varying degrees of punishment and the remaining 2,096 persons received acquittals.[77] One person received the death penalty.[78]

1.3 *The failed attempt to try Pakistani prisoners of war under the International Crimes (Tribunals) Act 1973 (ICTA)*

After the signing of the Instrument of Surrender on December 16, 1971, demands were made to put the Pakistani POWs on trial for international crimes. As these demands were made, the POWs were transferred from Bangladesh to camps in India – a process that began on 28 December, 1971.[79] According to J N Dixit, India's first Head of Mission in Bangladesh, it was Sheikh Mujib who proactively supported such a transfer because Bangladesh was financially unable to maintain them.[80] Dixit stated that with the prisoners of war remaining in the safe custody of India, Bangladesh believed it would be in a position to use them as leverage to gain recognition of statehood from Pakistan and extract compensation for the economic losses it had incurred during the

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[75] Ahmed (n 55) 103.
[76] '73ti Bishesh Tribunal Jollad Bahinir Dalalder Bicharer Jonno Gothon Kora Hoyechey' *Dainik Bangla* (Dacca, 29 March 1972) 1, 7; 'Dalal Ainey Atok Bektider Mot Shongkha 17 Hajar 8 Shoto 71' *Ittefaq* (Dacca, 2 December 1973) 2, 7.
[77] Syeed Ahamed, 'Trials and Errors' (*ICSF Forum,* 30 September 2010) < http://icsforum.org/articles-en/335 > accessed 22 January 2014.
[78] On 9 June, 1972, a Special Tribunal in Kushtia sentenced Chikon Ali, a former Razakar, to death.
[79] 'Bengali Suggests Ties with The U.S. – But Chief Says Washington Must Take Initiative' *New York Times* (New York, 29 December 1971).
[80] J N Dixit, *Liberation and Beyond – Indo-Bangladesh Relations* (The University Press Limited 1999) 139.

war.[81] The plan was that Sheikh Mujibur Rahman would demand the return of POWs when the necessary evidence against them had been gathered.[82] A 'Joint Declaration' by India and Bangladesh was issued on 19 March, 1972 where India expressed full support towards the proposed war crimes trials. The declaration read: "The Prime Minister of India assured the Prime Minister of Bangla Desh that the Government of India will fully co-operate with the Government of Bangla Desh in bringing those guilty persons to justice who are responsible for the worst genocide in recent times. At the same time, the two Prime Ministers agree that seriously sick and wounded prisoners of war, who are not guilty of war crimes, will be repatriated to Pakistan as a matter of priority by mutual consent."[83] In the following months the Bangladesh government reduced its initial list of Pakistani POWs triable for international crimes from 1,100 to 195.[84] The list was prepared by Bengali prosecutors and investigators working under the guidance and leadership of Bangladesh's Law Minister Kamal Hossain, who gathered and examined evidence of the atrocities committed by prisoners of war.[85]

On 17 April, 1973, the Bangladesh Government declared its intent to put the POWs on trial "for serious crimes, which include genocide, war crimes, crimes against humanity, breaches of article 3 of the Geneva Conventions, murder, rape, and arson".[86]

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[81] ibid 148.
[82] ibid 153.
[83] 'Joint Declaration of the Prime Ministers of India and Bangladesh – March 19, 1972' in Sheelendra Kumar et al (eds) *Bangladesh Documents: Volume Two* (The University Press Limited 1999) 644.
[84] 'Bangladesh Will Try 1,100 Pakistanis' *New York Times* (New York, 30 March 1972); Dixit (n 80) 154.
[85] Kamal Hossain, *Bangladesh – Quest for Freedom and Justice* (Oxford University Press 2013) 219 & 242-243.
[86] 'May Masher Shesh Dikey Dhakay Bishesh Tribunaley 195 Jon Juddhaporadhir Bichar Hobey' *Dainik Bangla* (Dacca, 18 April 1973) 1; An English version of the press release published was reprinted in J Paust and A Blaustein, 'War Crimes Jurisdiction and Due Process: The Bangladesh Experience' (1978) 11 (1) Vanderbilt Journal of International Law 1, 2; The press release declared: "Trials shall be held in Dacca before a Special Tribunal, consisting of Judges having the status of judges

Niall Macdermot Q.C. a British Labor Party politician and Secretary General of the International Commission of Jurists tried to persuade the Bangladesh authorities to allow the envisioned trials to be held under international penal law. Macdermot, however, acknowledged that there was a considerable body of opinion from the Western world against the holding of such trials.[87] There were hardly any states capable and willing to set up an "international tribunal" of the kind Sheikh Mujib demanded after his return to Bangladesh. Critiquing the status quo Macdermot argued that there were "too many governments with too many skeletons for them to agree to any effective enforcement machinery for human rights."[88] He proposed that Bangladesh government themselves constitute an international court along the lines adopted by the victorious allied forces in Nuremberg and Tokyo after the Second World War. The Tribunal would be led by a majority of neutral judges and would try persons charged under international penal law as opposed to domestic law.[89] Two reasons were identified as to why such a proposal would resonate with the views of the international community. First of all, it did not require the passing of a retroactive law, which according to Macdermot was to be the only way of persuading world opinion that the trial was an act of justice not vengeance.[90] Secondly, by engaging the process of international enforcement of human rights, Bangladesh would be making legal history.[91]

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of the Supreme Court. The trials will be held in accordance with universally recognized judicial norms. Eminent international jurists will be invited to observe the trials. The accused will be afforded facilities to arrange for their defence and to engage counsel of their own choice, including foreign counsel. A comprehensive law providing for the constitution of the Tribunal, the procedure to be adopted and other necessary materials is expected to be passed this month. The accused are expected to be produced before the Tribunal by the end of May, 1973."

[87] Macdermot (n 41) 476.

[88] ibid 484.

[89] ibid 484.

[90] ibid 484.

[91] ibid 484.

Under these circumstances Bangladesh proceeded to enact domestic legislation incorporating international crimes to try Pakistani prisoners of war. To ensure added protection to the upcoming law, the Constitution (First Amendment) Bill was passed by the Parliament on 14 July, 1973.[92] The amendment added a third clause to Article 47 of the Constitution which allowed for the prosecution of any person accused of "genocide, crimes against humanity or war crimes and other crimes under international law".[93] A completely new Article (47A) was introduced which stipulated that the fundamental rights enshrined in Articles 31, 35(1), 35(3) and 44 of the Constitution would not be applicable to persons on trial for international crimes under Article 47(3). Such persons also lost their right to move the Supreme Court for any of the remedies offered by the Constitution.[94] According to Amir-ul Islam, a member of the committee that drafted Bangladesh's Constitution, the amendment served "to remove any doubt whatsoever or eradicate any foreseeable controversy in the future as to its applicability in identifying as well as investigating and trying such offences whenever and wherever it is committed."[95]

The International Crimes (Tribunals) Bill was placed for consideration before the Bangladesh Parliament on 17 July, 1973, and after three days of debate, the

[92] Parliamentary Debate on the International Crimes (Tribunals) Bill 1973, vol 2, part 35, 2244-2268.
[93] Article 47(3) after the amendment read: "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 any individual, group of individuals or organisation] 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."
[94] Article 47A read: "(1) The rights guaranteed under article 31, clauses (1) and (3) of article 35 and article 44 shall not apply to any person to whom a law specified in clause (3) of article 47 applies. (2) Notwithstanding anything contained in this Constitution, no person to whom a law specified in clause (3) of article 47 applies shall have the right to move the Supreme Court for any of the remedies under this Constitution."
[95] Amir-Ul Islam, 'Bringing the Perpetrators of Genocide to Justice' (Second International Conference on Genocide, Truth and Justice, Dhaka, 30-31 July 2009).

International Crimes (Tribunals) Act was passed to detain, prosecute and punish the perpetrators of international crimes committed during Bangladesh's "historic struggle for national liberation" so that the conscience of humanity could be cleared.[96] The necessity of passing the ICTA was explained by Serajul Huq during the parliamentary debates:

> If we were revengeful on them we could bring 70,000 for trial but only 195 persons will be tried only to vindicate our sense of justice. "The rarer action is in virtue than in vengeance". Mr. Speaker, we believe that we are going to bring these people into punishment not because they devastated our land but because we have a responsibility towards suffering humanity and the entire population of the world is looking to us.[97]

The ICTA was the end result of efforts by Bangladeshi parliamentarians, eminent academics, lawyers, and civil servants. Among them were German Professors Otto Triffterer and Hans-Heinrich Jescheck.[98] The draft legislation underwent further scrutiny at a symposium organized by the Bangladesh Institute of Law and International Affairs (BILIA) and a conference on international criminal law held in Bellagio, Italy.[99] Upon evaluation American law Professors Jordan Paust and Albert Blaustein concluded that the statutory provisions of the ICTA "adequately accorded the accused the full guarantees of international due process to which they are entitled"

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[96] The Constitution of the People's Republic of Bangladesh, Preamble; Parliamentary Debate on the International Crimes (Tribunals) Bill 1973, vol 2, part 37, 2356.
[97] Parliamentary Debate on the International Crimes (Tribunals) Bill 1973 (n 96) 2356-2357.
[98] Wali-ur Rahman, *A Brief History of the Framing of the International Crimes (Tribunals) Act 1973* (Bangladesh Heritage Foundation 2009) 37-39; 'Professor Dr. Otto Triffterer (1931-2015)' (*Bedford Row International*, 08 June 2015) < http://9bri.com/professor-dr-otto-triffterer-1931-2015/ > accessed 23 September 2017.
[99] Hossain (n 85) 223.

and trials under it would be fairly and public heard "by an independent and impartial Tribunal."[100] Paust and Blaustein were approached by the Bangladesh Government to prepare a memorandum on relevant provisions of the ICTA.[101] The purpose of the memorandum was that it would be received by the Tribunal as a "friend of the court" communication from the authors who were also representatives of the International League for the Rights of Man (subsequently known as International League for Human Rights).[102] It was agreed that Paust and Blaustein as observers of the trials would "use the memorandum as a basis for their observation" and subsequently offer comments on their proceedings and outcomes.[103]

Sheikh Mujibur Rahman's determination to prosecute Pakistani POWs in Bangladesh prompted the government of Pakistan to file an application at the International Court of Justice (ICJ) in 1973 seeking an interim injunction preventing India from transferring the POWs to the Bangladesh authorities.[104] As time passed and India's exhaustion over having to support thousands of prisoners of war began to take its toll, the doors of negotiation reopened and Pakistan filed another application before ICJ requesting it to postpone considering the injunction application.[105] Declassified documents of the United States Government reveal that in 1973, the US Secretary of State during a meeting with Bangladesh's Finance Minister Tajuddin, had observed that the "preventive effect of war crimes trials was questionable".[106] Instead, the

[100] Ahmed (n 55) 104.
[101] Paust and Blaustein (n 86) 1, 5.
[102] ibid.
[103] ibid.
[104] *Case Concerning Trial of Pakistani Prisoners of War (Pakistan v India)* (Request for the Indication of Interim Measures of Protection) [1973] ICJ Rep 328.
[105] *Case Concerning Trial of Pakistani Prisoners of War (Pakistan v India)* (n 104) 328; William A Schabas, *Genocide in International Law: The Crime of Crimes* (1st edn, Cambridge University Press 2009).
[106] 'Tajuddin's Call on the Secretary' (*The National Archives*, 30 June 2005) < https://aad.archives.gov/aad/createpdf?rid=15282&dt=2472&dl=1345 > accessed 23 September 2017.

Secretary of State emphasised on reconciliation by referring to the example set by President Yakubu Gowon of Nigeria who directly proceeded to a "constructive policy of reconciliation" after the Nigerian civil war despite the existence of widespread evidence of atrocities".[107]

In the end, the goal of bringing Pakistani prisoners of war before a justice initiative in Bangladesh remained unrealized. On 10 April, 1974, a tripartite agreement was signed by representatives of Bangladesh, India and Pakistan under which the 195 prisoners of war were repatriated to Pakistan without any trials. During the 1971 war, Bengalis were killed in racial riots in the Landi Mabimabad and Musa colony of Karachi in West Pakistan. Their houses were burned and their bank accounts were frozen.[108] After independence the Bangladesh government faced the issue of bringing back over 200,000 Bengalis hostages stranded in Pakistan and who had "ominous crosses chalked on their houses."[109] Bengalis were being assaulted and some even killed by Pakistanis and their belongings were being confiscated, while families were separated and sent to concentration camps.[110] By December 1972, over 2000 Bengalis were imprisoned without charge in Pakistan and "harassment and discrimination" had become a part of their everyday life.[111] As Bangladesh mounted pressure to try POWs,

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[107] ibid.
[108] '150 Bengali House in Karachi Burnt' *The Statesman* (21 May 1971); 'Bengali Officer Says: Several Hundred Killed in Karachi Racial Riots' *The Statesman* (26 June 1971).
[109] Nicholas Tomalin, Philip Jacobson, Nicholas Carrol, Henry Brandon, Murray Sayle and Anthony Mascarenhas, 'Victors of Bangladesh – How the War was Won – and Lost' in Maudood Elahi (ed), *Assignment Bangladesh '71 – A Chronology of Events as Seen by the World Press* (Momin Publications 1999) 630.
[110] M A Hamid, *Ekattorer Juddhey Joy Porajoy – Muktijuddhokaley Poshchim Pakistaner Drisshopot* (Mohona 1995) 32; Viggo Olsen and Jeanette Lockerbie, *Daktar: Diplomat in Bangladesh* (Moody Press 1975) 415-416; Sayeed Ahamed, 'The Curious Case of the 195 War Criminals' (2010) 3 (5) Forum < http://archive.thedailystar.net/forum/2010/may/curious.htm > accessed 14 April 2017; '150 Bengali House In Karachi Burnt' (n 108).
[111] 'Official Reports 2,000 Bengalis Held in Pakistani Jails' *New York Times* (New York, 13 December 1972) < https://nyti.ms/2osGKND > accessed 14 April 2017.

the Pakistani authorities threatened to try "Bengalis in Pakistan against whom there [was] evidence of the commission of such acts as subversion, espionage and high treason".[112] After independence, Bangladesh's commitment to try the prisoners of war for international crimes was demonstrated through strongly worded statements and the passing of the ICTA. As a 'new-born' state it was initially successful in manoeuvring itself through the games of diplomacy by quickly gaining membership in the Commonwealth and attaining recognition from over one hundred countries. Ultimately, Bangladesh was diplomatically coerced into retracting the claim on the Pakistani POWs, in order to pave way for the repatriation of Bangladeshi citizens stranded in Pakistan and also to ensure its membership in the United Nations, both of which were directly dependent upon the cooperation of Pakistan.[113] In exchange a conditional apology by Pakistan was incorporated in the text of the Tripartite Agreement of 1974 which read: "The Minister of State for Defence and Foreign Affairs of the Government of Pakistan said that his Government condemned and deeply regretted any crimes that may have been committed."[114] According to Kamal Hossain, after the signing of the Agreement the Foreign Minister of Pakistan pledged at a subsequent press conference that the prisoners of war would be tried on Pakistani soil if supporting evidence was found.[115] On a previous occasion, although Pakistan had opposed trials of POWs in Bangladesh and pledged "to constitute a judicial tribunal of such character and composition as will inspire international confidence", no such trials ever took place.[116]

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[112] S M Burke, 'The Postwar Diplomacy of the Indo Pakistani War of 1971' (1973) 13 (11) Asian Survey 1036, 1040.
[113] ibid (n 112) 1040.
[114] 'Agreement Between Bangladesh, India, And Pakistan' (New Delhi, 9 April 1974) 60 International Law Studies 817, 818.
[115] Shompriti Forum, 'War Crime 1971 – Shahriar Kabir' (24 March 2012) < https://www.youtube.com/watch?v=JURRnMWYpVc > accessed 19 April 2017.
[116] Burke (n 112) 1040.

Sheikh Mujbur Rahman promised the Bengali people that he would deliver justice. With the signing of the Tripartite Agreement, not only did Sheikh Mujib swallow his own words, but he also granted 'clemency' to 195 Pakistani prisoners of war against whom there were serious allegations of committing atrocities. On 25 September, 1974, Mujib made the following declaration at the twenty-ninth session of the United Nations General Assembly:

> We have spared no effort to liquidate the legacies of the past, and made our ultimate contribution by granting clemency even to those 195 prisoners of war against whom there was overwhelming evidence of their having committed grave crimes, including crimes against humanity. This was our investment towards the opening of a new chapter and towards the building of a future of peace and stability in our tormented subcontinent. In doing this we insisted on no pre-conditions, nor did we seek to strike any bargain, for we were influenced only by the vision of a better future for all our peoples.[117]

Common sense dictates that if the Bangladesh Government possessed the intent to put Pakistani prisoners of war on trial, it would have been appropriate to continue detaining them in Bangladesh instead of transferring them to India. It has been alleged that the Bangladesh Government was not expeditious when it came to gathering evidence or preparing case documents surrounding the 195 POWs.[118] According to J

[117] UNGA, 'Address by Sheikh Mujibur Rahman, Prime Minister of Bangladesh' Official Records of 2243rd Plenary Meeting of the Twenty-Ninth Session (1974) 161.
[118] Dixit (n 80) 154.

N Dixit, Sheikh Mujib had told P N Haksar the Principal Secretary Prime Minister Indira Gandhi, that in light of the difficulties of gathering evidence, he was disinterested in holding war crimes trials because they were a "waste of energy and time".[119] Bangladesh, despite possessing initial zeal had no doubt struggled and faltered as it crossed swords with the culture of impunity.

The year 1975 marked the beginning political assassinations of politico-military personalities who had given leadership to the war of liberation. On 15 August, 1975 martial law was declared throughout the country after Sheikh Mujibur Rahman and eighteen members of his family were murdered by a section of the Bangladesh Army acting in concert with a section of Mujib's own party, the Awami League. The Collaborators Order was completely repealed on 31 December, 1975, the same day General Ziaur Rahman became the Chief Martial Law Administrator of Bangladesh.[120] Chikon Ali, the only person against whom a death penalty had been passed and others serving time or were undergoing trial under the Order for crimes beyond the purview of the general amnesty were released from prison.[121] Under what legal framework these persons were released remains unanswered.

As a State, Bangladesh embraced nationalism, secularism, socialism and democracy as its guiding ideologies. By resorting to past lessons, a ban was imposed on politics based on religion.[122] The Jamaat-e-Islami was barred from taking part in active

[119] ibid 155.
[120] The Bangladesh Collaborators (Special Tribunals) (Repeal) Ordinance 1975 (Ordinance No. LXIII of 1975).
[121] Abu Saleh Roni, 'Prothom Fashir Rae Hoy Razakar Chikon Alir' *Samakal* (Dhaka 13 December 2013) < http://www.samakal.net/2013/12/13/25955 > accessed 22 January 2014.
[122] Article 12 of the newly adopted Constitution of the People's Republic of Bangladesh read: "The principle of secularism shall be realised by elimination of – (a) communalism in all its forms; (b) the granting by the State of political status in favour of any religion; (c) the abuse of religion for political purposes; (d) any discrimination against, or persecution of, persons practising a particular religion."

politics. For a country with an overwhelming majority of Muslim inhabitants, the political course Bangladesh had chosen for itself was 'progressive'. From 1975 to 1990, military dictators Ziaur Rahman and Hussain Mohammad Ershad usurped the secular and progressive nature of the Constitution and rehabilitated parties like Jamaat-e-Islami back into the mainstream political arena.[123] According to David Lewis the military governments during this period built links with political Islam "in an attempt to consolidate support for their unelected regimes".[124] In 1988 General Ershad, a former collaborator from 1971,[125] changed the non-communal nature of the Constitution by illegally inserting Islam as the state religion of Bangladesh. After failing to rally popular electoral support on its own, Jamaat-e-Islami forged a political alliance with Bangladesh Nationalist Party (BNP), a party founded by General Ziaur Rahman.

In the final analysis, the decision to grant amnesties to local collaborators and clemency to Pakistani prisoners of war was insensitive to the needs of the victims of 1971 atrocities and deprived them of their right to justice.[126] As a direct consequence, a "cleavage" was created within Bangladesh between those who continued to demand justice for the atrocities of 1971 and others who were beneficiaries of Mujib's amnesties and had been rehabilitated back into society by Zia and Ershad.[127] The

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See, Ahmed Ziauddin, 'Justice After Genocide: Ways to Deal with the Past' (*ICSF Forum*, 21 January 2014) < http://icsforum.org/articles-en/18480 > accessed 17 April 2017.

[123] Borhanuddin Ahmad, *The Generals of Pakistan & Bangladesh* (Vikas Publishing House 1993) 87.

[124] David Lewis, 'The Paradoxes of Bangladesh's Shahbag Protests' (*South Asia @ LSE,* 21 March 2013) < http://blogs.lse.ac.uk/indiaatlse/2013/03/21/the-paradoxes-of-bangladeshs-shahbag-protests/ > accessed 22 January 2014.

[125] Major Rafiqul Islam, *Shoiroshashoner Noy Bochor 1982-90* (1st edn, Agami Prokashoni University Press Limited 1991) 31-34.

[126] 'Shadharon Khoma Ghoshona: Sheikh Mujiber Protigga Bhongo' in Ahmed Sharif, Kazi Nuruzzaman and Shahriar Kabir (eds), *Ekattorer Ghatok o Dalalra Ke Kothay* (Muktijuddho Chetona Bikash Kendro 1988) 22.

[127] Ahmed (n 55) 105-106.

amnesties coupled with the unconditional release of all accused charged and convicted of serious offences under the Collaborators Order after 1975 and the political rehabilitation of Jamaat-e-Islami during the regimes led by Ziaur Rahman, Hussain Muhammad Ershad and Begum Khaleda Zia created an endemic culture of impunity in Bangladesh.

2. Resurgence of the demand for justice – civil society movements of the 1990s

By the time Bangladesh finished experiencing two consecutive military dictatorships, the quest for justice for the atrocities of 1971 had come to a complete standstill. Politicians belonging to the BNP who led the government in the early 1990s were uninterested in reviving any justice process because of their alliances with Jamaat-e-Islami. However, the trauma left by the war of 1971 had been transmitted from one generation to the next.[128] On 29 December , 1991 the wounds from these traumas came out into the open when Ghulam Azam was made Ameer of Jamaat-e-Islami. Common citizens came out to the streets protesting this development. The premise of these protests was that a person who had campaigned against the independence of Bangladesh and was known to have given leadership to organizations that collaborated with the Pakistan Army had no moral authority to lead a political party functioning inside the country. The movement culminated in the formation of the Ekattorer Ghatak Dalal Nirmul Committee under the leadership of the Jahanara Imam, whose eldest son had been captured and tortured to death by local collaborators in 1971.[129] Within three weeks a 'National Coordination Committee for the Implementation of the Spirit of the

[128] Nadine S Murshid, 'Bangladesh: The Shahbag Uprising – War Crimes and Forgiveness' (*South Asia Citizens Web*, 7 November 2013) < http://www.sacw.net/article3879.html > accessed 22 January 2014.
[129] Shahriar Kabir (ed), *Try the War Criminals of 71 at a Special Tribunal: Declaration of 71 Organisations* (Kazi Mukul 2008) 11-12.

Liberation War and Resisting Killers and Collaborators of 1971' comprising of all pro-liberation political, social, cultural bodies was formed.[130] The committee received widespread support from a cross-section of the Bengali populace. A symbolic People's Court was set up under the direction of the committee and on 26 March, 1992 Ghulam Azam was found guilty for committing international crimes during Bangladesh's liberation war. Before a mass rally, a death sentence on Azam was read out at the Suhrawardy Uddyan.[131] The then Bangladesh Prime Minister Begum Khaleda Zia retaliated by imposing a blackout on all news relating to the People's Court and filed a sedition case against its twenty-four organizers.[132] On 16 April, 1992, the movement for justice gained political traction when Sheikh Hasina the daughter of Sheikh Mujibur Rahman and the then Leader of the Opposition expressed her support to the People's Court and demanded formal trials under the International Crimes (Tribunals) Act, 1973.[133] In 1993, a 'National People's Inquiry Commission' was set up for the purpose of collecting evidence of crimes committed by fifteen prominent collaborators.[134] Led by Sufia Kamal, a leading poet of Bangladesh, the Commission over the next few years published extensive and incriminating reports on these persons. An important finding was that even after the passage of two and a half decades since the war, people in certain areas where the accused continued to reside suffered from fear and insecurity.

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[130] ibid 11-12.
[131] ibid 11-12.
[132] Ahmed (n 55) 107.
[133] Shahriar Kabir, '71-er Juddhaporadh Ebong '73-er Antorjatik Oporadh Tribunal Ain' in Shahriar Kabir (ed), *Juddhaporadhider Bichar 42 Bochorer Andolon* (Ananya 2014) 253.
[134] 'It's torturous' *The Daily Star* (Dhaka, 7 September 2012) < http://archive.thedailystar.net/newDesign/cache/cached-news-details-248768.html > accessed 6 May 2014; 'Report on the Findings of the People's Inquiry Commission on the Activities of the War Criminals and the Collaborator' (Forum for Secular Bangladesh, 26 March 1995) < https://www.scribd.com/document/130804097/REPORT-ON-THE-FINDINGS-OF-THE-PEOPLE-S-INQUIRY-COMMISSION-ON-THE-ACTIVITIES-OF-THE-WAR-CRIMNALS-AND-THE-COLLABORATORS > accessed 6 May 2014.

These events in Bangladesh drew global attention. In a resolution adopted in 1994, the European Parliament called upon the Government of Bangladesh "to refrain from taking repressive measures taken against representatives of the Nirmul Committee, headed by the writer Jahanara Imam" and supported the call to put "Ghulam Azam and other representatives of Islamic organizations on trial for the massacres they committed during the period from March until December 1971."[135] Channel 4 commissioned investigations into several British nationals of Bangladeshi origin who had allegedly committed serious crimes relating to abduction, torture and murder in 1971.[136] In 1995, a documentary called "The War Crimes File" was aired on British television.[137] The evidence collected by the team that produced the documentary was shared with Scotland Yard raising hopes that the British government would prosecute the accused under the Geneva Conventions Act, 1957.[138]

Following Jahanara Imam's demise in 1994 after a hard fought battle with cancer, other civil society organizations and activist forums including the 'Ghatak Dalal Nirmul Committee', 'Bangladesh Muktijoddha Sangsad', 'Liberation War Museum', 'Sammilito Sangskritik Jote', 'Prajanma '71', 'War Crimes Facts Finding Committee', and the 'International Crimes Strategy Forum' shared the responsibilities

[135] 'Resolution on the Threat to the Life of Taslima Nasrin and the Human Rights Violations against Women in Bangladesh' European Communities Minutes of Proceedings of the Sitting of Thursday (94/C 128/04, 21 April 1994) < http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOC_1994_128_R_0241_01&from=EN > accessed 19 April 2017.
[136] David Bergman, 'Generation 71' (1997) 26 (6) Journal Index on Censorship 97; Tamanna Khan, 'Defender of Justice' (2012) 11 (16) Forum < http://archive.thedailystar.net/magazine/2012/04/03/profile.htm > accessed 19 April 2017; 'British Muslim Leader Sentenced to Death for War Crimes' *Channel 4 News* (3 November 2013) < https://www.channel4.com/news/chowdhury-mueen-uddin-war-crimes-london-muslim > accessed 10 April 2017.
[137] 'Dispatches - The War Crimes Files' (9 February 2013) < https://www.youtube.com/watch?v=lvbotYo-6rI > accessed 19 April 2017.
[138] ibid.

of collecting evidence and campaigning for trials of the war criminals of 1971. Prior to the general elections of 2008, the Awami League under the leadership of Sheikh Hasina pledged justice to the victims of 1971 in its electoral campaign and swept into Parliament with a 3/4th majority. The International Crimes (Tribunals) Act, 1973 was set in motion for the first time since its inception and the first ICT was established in March 2010. The Bangladesh government approached the United Nations for assistance with regard to the trials. Following strong objections by Pakistan, United States and France, the possibility of any UN involvement came to an end.[139] One of the world's largest lobbying firms was hired to advocate in favour one of the Jamaat-e-Islami leaders on trial and against the ICTA.[140]

Conclusion

The thirty eight year preceding the establishment of the International Crimes Tribunals was marked by the failure of successive civilian and military governments to deliver justice to the victims of mass atrocities committed in 1971 and the political rehabilitation of the perpetrators of those atrocities. This chapter traced the post-independence years from 1972 to 2010 and examined the justice initiatives that were set in motion through the Collaborators Order and the ICTA. The failure of those

[139] 'Pakistani and US Envoys Criticize UN Involvement in Bangladesh War Crimes Process' (*WikiLeaks,* 12 May 2009) < https://www.wikileaks.org/plusd/cables/09DHAKA474_a.html > accessed 22 January 2014; Lawrence Lifschultz, 'A Man & History on Trial - The Case of David Bergman' *The Pamphleteers Press* (9 October 2014) < http://www.pamphleteerspress.com/the-case-of-david-bergman/ > accessed 19 April 2017.

[140] Arman Rashid, 'Lobbying to prevent justice?' *bdnews24* (Dhaka, 10 December 2012) < http://opinion.bdnews24.com/2012/12/10/lobbying-to-prevent-justice/ > accessed 22 January 2014; Shah Ali Farhad, 'ICT: Paradoxical Propaganda' *bdnews24* (Dhaka, 27 December 2012) < http://opinion.bdnews24.com/2012/12/27/ict-paradoxical-propaganda/ > accessed 19 April 2017; Rafe Sadnan Adel, 'Jamaat Lobbying against Aar Crimes Trials Again' *Dhaka Tribune* (Dhaka, 15 September 2014) < http://archive.dhakatribune.com/politics/2014/sep/15/jamaat-lobbying-against-war-crimes-trials-again#sthash.Xpxpw2Sd.dpuf > accessed 19 April 2017.

initiatives which came about through the amnesties of 1973, the Tripartite Agreement of 1974, the unconditional release of all serious offenders convicted under the Collaborators Order after December 1975 and the political rehabilitation of Jamaat-e-Islami, caused of a deeply ingrained culture of impunity in Bangladesh, a 'culture' was challenged for the first time in 2010 when the first ICT was established after a long drawn campaign for justice. Taking into consideration the past failures to prosecute, the increasing age of perpetrators and the limited availability of and accessibility to witnesses and credible evidence, the ICTs represent Bangladesh's last realistic opportunity to detain, prosecute and convict persons who were involved in the commission of serious crimes in 1971.

Over the years the legality and legitimacy of the ICTs have been questioned for allegedly failing to uphold international standards of justice.[141] The following Chapter (III) focuses on the principle of complementarity. It explores the *travaux préparatoires* and statutory provisions of the Rome Statute, policy papers published by the ICC's Office of the Prosecutor (OTP) and relevant decisions handed down by the ICC for the purposes of identifying the 'benchmark' in terms of which the legality and legitimacy of judicial proceedings before a national criminal jurisdiction, such as the ICTs, ought to be assessed.

[141] Abdus Samad, 'The International Crimes Tribunal in Bangladesh and International Law' (2016) 27(3) Criminal Law Forum 257, 262

Chapter III

The Principle of Complementarity and the tolerance of diversity and intolerance of egregious fair trial violations

Introduction

In the justice regime created by international criminal law, the *modus operandi* of ending impunity is 'complementarity', a principle which creates a system where the primary responsibility of investigating and prosecuting international crimes rests upon national justice systems. The International Criminal Court (ICC) takes up the role of a court of 'last resort' that intervenes only when a State is genuinely 'unwilling' or 'unable' to investigate or prosecute. Bangladesh was the first South Asian state to ratify the Rome Statute of the International Criminal Court (Rome Statute) on 23 March 2010, two days prior to the establishment of the first ICT.[1] The prospective nature of the Rome Statute precludes the ICC from trying the international crimes committed by the Pakistan Army and its auxiliary forces in 1971. Therefore, Bangladesh despite being a State Party to the Rome Statute had to initiate prosecutions against the alleged perpetrators of international crimes in 1971 through its own domestic legislation, i.e. the International Crimes (Tribunals) Act 1973 (ICTA).

This Chapter identifies the principle of complementarity and the "principles of due process recognized by international law" as the standards against which the legality and legitimacy of national criminal jurisdictions like the ICTs should be assessed. To

[1] 'Bangladesh' (*International Criminal Court*, 09 April 2010) < https://asp.icc-cpi.int/en_menus/asp/states%20parties/asian%20states/Pages/bangladesh.aspx > accessed 21 May 2017.

this end, this Chapter is structured into two parts. Part I traces the development and historical evolution of complementarity and unearths the motivations behind adopting the principle as the operative "cornerstone"[2] of the Rome Statute. Part II demonstrates that the ICC when assessing the 'independence', 'impartiality' and 'manner' of a national proceeding for the purposes of determining the admissibility of a case, should be receptive towards the "diversity of legal systems, traditions and cultures", but must ensure that "violations of the rights" of the accused that are of "egregious" nature are not permitted in the name of 'diversity'.[3] The benefits of such an exercise are twofold. Firstly, it sets the stage for the subsequent chapters of this thesis which determine the legality and legitimacy of the ICTs by analysing its major areas of contention. Secondly, it enhances the general understanding of the principle of complementarity by identifying some of its points of 'tension'.

1. Understanding the principle of complementarity

The Preamble of the Rome Statute emphasizes "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" and creates a "complementary" relationship between the International Criminal Court and national criminal jurisdictions where the former may prosecute only when the latter are "unwilling or unable genuinely" to do so.[4] This part explains that the struggle to end

[2] Richard Dickner and Helen Duffy, 'National Courts and the ICC' (1999) 6 Brown Journal of World Affairs 53, 54.
[3] Office of the Prosecutor, 'Paper on some policy issues before the Office of the Prosecutor' (*International Criminal Court*, September 2003) 5 < https://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf > accessed 24 September 2017; *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi") ICC-O1/11-01/11OA6 (24 July 2014) [3] < https://www.icc-cpi.int/CourtRecords/CR2014_06755.PDF > accessed 15 March 2016.
[4] William A Schabas, *An Introduction to the International Criminal Court* (4th edn, Cambridge University Press 2011) 187.

impunity was not always strategized in this way and it took the greater portion of a century for a majority of States to reach a consensus that the principle of 'complementarity' would be the *modus operandi* of prosecuting the worst kinds of large scale crimes. Drawing from the debates leading up to the framing of the 'principle' in the Rome Statute, it shows that there is a duality in the nature of complementarity, where on the one hand, complementarity ensures the primacy of national courts over the ICC, but also ushers an end to the "unfettered prerogative" of States to exercise criminal jurisdiction over international crimes.[5] Finally, it relies on the principled and practical motivations behind adopting complementarity to argue that delegating the primary responsibility to investigate and prosecute the most serious crimes to national courts was the only principled, practicable, efficient and politically acceptable way to convince State Parties to unite and establish a permanent international criminal court.

1.1 *From Leipzig to Rome: tracing complementarity's evolutionary journey*

Complementarity can be traced back to trials proposed after the First World War. Although Article 228 of the Treaty of Versailles granted the "Allies and Associated Powers" the right to try Germans before their own military courts, they subsequently agreed not to interfere as long as the trials held in Germany were administered in good faith and a fair punishment was imposed on the guilty.[6] The end results were just over

[5] Michael A Newton, 'Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court' (2001) 167 Military Law Review 20, 26-27; Bartram S Brown, 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals' (1998) 23 Yale Journal of International Law 383, 430.

[6] Mohamed M El Zeidy, 'The Genesis of Complementarity' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity – From Theory to Practice Volume I* (Cambridge University Press 2011) 79-83; Mohamed M El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2002) 23 Michigan Journal of International Law 869, 872-873; Immi Tallgren, 'Completing the "International Criminal Order": The

a dozen convictions, none of the accused serving their sentences, several prisoners escaping, the German public hailing the prison wardens for allowing them to do so, and when the Allies demanded "proper" second trials, the German public responding with outrage. The Leipzig trials were a testament to "the absence of a genuine will to investigate alleged war crimes charges"[7] and have since been described as a "poor precedent"[8] and a "glaring demonstration of non-implementation"[9] of justice.[10] Similarly, prior to the Treaty of Sevres which contained provisions much like the Treaty of Versailles, thirty-four persons were convicted by a Turkish Military Tribunal while forty-one prisoners were released by the Grand Vizier of the Ottoman Empire as a response to public opinion. When Britain requested the transfer of the remaining detainees to British custody, the Turkish Government objected on the grounds that such a transfer "would be in direct contradiction with its sovereign rights".[11]

The failure of these justice initiatives following the First World War instilled a fear within Allied and occupied European governments during and after the Second World War that they would not be in charge of impending justice processes. Nevertheless, in a "defining statement"[12] that came out of the Moscow Conference in 1943, it was declared that the "German officers and men and members of the Nazi party" involved

Rhetoric of International Repression and the Notion of Complementarity in the Draft Statute for an International Criminal Court' (1998) 67 Nordic Journal of International Law 107, 114.

[7] Claus Kress, 'Versailles – Nuremberg - The Hague: Germany and International Criminal Law' (2006) 40 (1) International Lawyer 15, 17 & 19.

[8] Andrew T Williams, *A Passing Fury: Searching for Justice at the End of World War II* (Jonathan Cape 2016) 41.

[9] Tallgren (n 6) 114.

[10] Theodor Meron, 'Reflections on the Prosecution of War Crimes by International Tribunals' (2006) 100 (3) American Journal of International Law 551, 558 & 564; Claude E Welch Jr and Ashley F Watkins, 'Extending Enforcement: The Coalition for the International Criminal Court' (2011) 33 (4) Human Rights Quarterly 927, 933-941.

[11] Mohamed M El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (n 6) 873.

[12] Williams (n 8) 41.

in the commission of mass atrocities would be "sent back to the countries in which their abominable deeds were done" for the purposes of being "judged and punished according to the laws of these liberated countries and of free governments".[13] This view was further tempered in the 'Memorandum to President Roosevelt and Justice Jackson's Report to the President on Atrocities and War Crimes' in 1945 which pledged that local governments would be allowed to perform local justice while the Nazi leadership responsible for crimes having "no particular geographical localization"[14] as part of the "Hitlerite conspiracy"[15] would be tried separately before an "international military commission or military court"[16]. This is why at the end of the Second World War, in addition to the trials of major war criminals in Nuremberg and Tokyo, thousands of so-called minor war criminals were tried by national courts in the European and Far Eastern Theatres applying local codes of law, thereby laying the groundwork for complementarity.[17]

In the following decades until the establishment of the *ad hoc* tribunals and the ICC, nation States and the international community as a whole did not make substantial progress in the cause for prosecuting and suppressing the most serious core international crimes.[18] Prosecutions, albeit rarely, did take place from time to time at

[13] 'The Moscow Conference; October 1943' (*The Avalon Project*) < http://avalon.law.yale.edu/wwii/moscow.asp > accessed 21 May 2017.
[14] 'Justice Jackson's Report to the President on Atrocities and War Crimes; June 7, 1945' (*Avalon Project*) < http://avalon.law.yale.edu/imt/imt_jack01.asp > accessed 21 May 2017.
[15] Robert H Jackson, 'Memorandum to Conference if Representatives if the Union if Soviet Sodalist Republics, the United Kingdom, the United States if America and the Provisional Government of France, Submitted by the United States To Accompany Redraft if Its Proposal (30 June 1945)' in *Report of Robert H Jackson United States Representative to the International Conference on Military Trials* (Department of State – United States of America 1945) 127.
[16] 'Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, January 22, 1945' (*Avalon Project*) < http://avalon.law.yale.edu/imt/jack01.asp > accessed 21 May 2017.
[17] Tallgren (n 6) 114-115; Zeidy 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (n 6) 875-76; Newton (n 5) 37-38.
[18] Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2011) 122; Paola Gaeta,

the national level. Germany continued to prosecute perpetrators of crimes from the Second World War.[19] The court-martial of Second Lieutenant William L Calley, Jr. for his involvement in the murdering of South Vietnamese civilians during the My Lai massacre is another example.[20] Other instances of prosecutions at the national level or attempts to do so include Bangladesh's efforts to prosecute local collaborators of the Pakistan Army through the Collaborators Order and the enactment of the ICTA.

The "years of silence"[21] came to an end in the 1990s when the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) emerged as the first 'international' courts after Nuremberg to investigate and prosecute international crimes. Their establishment was possible because of multiple reasons all more or less related to the end of the Cold War. This ushered in an era of improvement in the relationship between States divided by capitalist and communist lines, a convergence in the views of the permanent members of the UN Security Council, and an enhanced appreciation of the need to enforce human rights.[22] Created by the UN Security Council, the ICTY and ICTR were *ad hoc* responses to two distinct but serious conflicts. Their establishment tilted the responsibility of prosecuting international crimes in favour of international judicial bodies.[23] Both Tribunals were initially perceived as substitutes for national courts at a time when local judicial institutions had undergone extreme levels of disruption and

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'International Criminal Law' in Basak Cali (ed), *International Law for International Relations* (Oxford University Press 2009) 262-263.

[19] M Cherif Bassiouni, *Introduction to International Criminal Law* (2nd revised edn, Martinus Nijhoff 2014) 565.

[20] '1971: Calley Guilty of My Lai Massacre' *BBC News* (29 March 1971) < http://news.bbc.co.uk/onthisday/hi/dates/stories/march/29/newsid_2530000/2530975.stm > accessed 21 May 2017.

[21] Bassiouni (n 19) 565.

[22] Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law* (Oxford University Press 2013) 258-259.

[23] Brown (n 5) 385.

were considered ill equipped to investigate, prosecute and punish perpetrators of international crimes.[24] This perception was reflected in the governing Statutes of the ICTY and the ICTR which provided the Tribunals with "primacy"[25] over national courts.

Bartram Brown described this arrangement as the "high-water mark"[26] of the trend of prioritizing the 'international' over the 'national'. Even in this 'arrangement', traces of a complementary relationship are clearly visible in some of their statutory provisions. Although the Tribunals possessed 'primacy' over national courts, the latter held "concurrent" jurisdiction with the former in the effort to "prosecute persons for serious violations of international humanitarian law".[27] A decade after the establishment of the ICTY, the Tribunal's judges devised a plan known as the 'completion strategy' to ensure the "successful" and "timely" completion of its mission "in coordination with domestic legal systems in the former Yugoslavia".[28] This plan was endorsed by the UN Security Council, and as the years progressed, national courts became indispensable components in the 'completion strategy' of both

[24] Salvatore Zappalà, 'International Criminal Jurisdiction Over Genocide' in Paola Gaeta (ed), *The UN Genocide Convention - A Commentary* (Oxford University Press 2013) 269.
[25] Statute of the International Criminal Tribunal for the Former Yugoslavia, article 9(2); Statute of the International Tribunal for Rwanda, article 8(2).
[26] Brown (n 5) 385.
[27] (n 25) article 8(1).
[28] 'Completion Strategy' < http://www.icty.org/en/about/tribunal/completion-strategy > accessed 15 June 2016; Param-Preet Singh, 'Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina' (Human Rights Watch, Vol 18 No 1(D), February 2006) 5 < https://www.hrw.org/reports/2006/ij0206/2.htm > accessed 15 June 2016; Dominic Raab, 'Evaluating the ICTY and its Completion Strategy Efforts to Achieve Accountability for War Crimes and their Tribunals' (2005) 3 Journal of International Criminal Justice 82, 92; Office of the Prosecutor of the International Criminal Tribunal for Rwanda, 'Complementarity in Action: Lessons Learned from the ICTR Prosecutor's Referral of International Criminal Cases to National Jurisdictions for Trial' (ICTR, 2015) 7 < http://reliefweb.int/sites/reliefweb.int/files/resources/150210_complementarity_in_action.pdf > accessed 7 May 2016; Philippa Webb and Morten Bergsmo, 'International Criminal Courts and Tribunals, Complementarity and Jurisdiction' [2011] Max Planck Encyclopedia of Public International Law, para 5 < https://www.legal-tools.org/doc/6d0fe8/pdf/ > accessed 15 March 2016; Mohamed M El Zeidy, 'From Primacy to Complementarity and Backwards: (Re)-Visiting Rule 11 *Bis* of the Ad Hoc Tribunals' (2008) 57 (2) The International and Comparative Law Quarterly 403, 409 & 415.

Tribunals and the relationship that was originally based on 'primacy' transformed into being more 'complementary'.[29] For instance, the War Crimes Chamber of the Court of Bosnia and Herzegovina (WCC) was established in 2005 to prosecute crimes committed during the 1992-1995 conflict in "conjunction" with and at the same time "complement" the proceedings at the ICTY.[30] Similarly, the national courts in Rwanda including the Gacaca assisted the ICTR in delivering justice to thousands of victims.[31] In the final report of the ICTR to the UN Security Council, President Judge Vagn Joensen explicitly stated that by referring cases to national jurisdictions for trial, the Tribunal had given "practical effect to the principle of complementarity" and ensured the filling of a potential "gap in impunity".[32]

In addition to the above, Article 10(2)(b) of the ICTY Statute sets out that a person who had been tried by a national court may be subsequently tried by the Tribunal if it is evident that the national proceedings lacked "impartiality" or "independence" or were "designed to shield the accused from international criminal responsibility" or the

[29] Office of the Prosecutor of the International Criminal Tribunal for Rwanda, 'Complementarity in Action: Lessons Learned from the ICTR Prosecutor's Referral of International Criminal Cases to National Jurisdictions for Trial' (ICTR, 2015) 6 < http://reliefweb.int/sites/reliefweb.int/files/resources/150210_complementarity_in_action.pdf > accessed 7 May 2016; Philomena Cleobury, 'The Evolution of the Mandates of International Tribunals, Including a Move Towards Complementarity' (*Legacy Website of the International Criminal Tribunal for Rwanda*) 3 & 6 < http://unictr.unmict.org/sites/unictr.org/files/publications/compendium-documents/vi.%20The%20Evolution%20of%20the%20Mandates%20of%20the%20International%20Tribunals,%20Including%20a%20Move%20Towards%20Complementarity%20%5BCLEOBURY%5D.pdf > accessed 7 May 2016.

[30] Louis Mallinder, 'War Crimes Chamber of the Court of Bosnia-Herzegovina' in Lavinia Stan and Nadya Nedelsky (eds), *Encyclopedia of Transitional Justice, Volume 3* (Cambridge University Press 2013) 484; Bogdan Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court* (International Center for Transitional Justice, 2008) 1.

[31] Office of the Prosecutor of the International Criminal Tribunal for Rwanda, 'Complementarity in Action: Lessons Learned from the ICTR Prosecutor's Referral of International Criminal Cases to National Jurisdictions for Trial' (ICTR, 2015) 5 < http://reliefweb.int/sites/reliefweb.int/files/resources/150210_complementarity_in_action.pdf > accessed 25 July 2016.

[32] President of the ICTR, 'Report on the Completion of the Mandate of the International Criminal Tribunal for Rwanda as at 15 November 2015' (17 November 2015) UN Doc S/2015/884, 16 < http://unictr.unmict.org/sites/unictr.org/files/legal-library/151117_ictr_final_report_en.pdf > accessed 15 May 2016.

case was not prosecuted with "diligence".[33] On the basis of the same grounds, Rule 9(ii) allowed a Prosecutor to propose that a formal request be placed so that a court defers to the competence of the ICTY.[34] There are similarities between these provisions and those charting 'complementarity' in the Rome Statute because both sets of provisions permit 'international' courts to exercise jurisdiction as a response to flawed domestic proceedings.

The *ad hoc* tribunals reinvigorated the fight against impunity, but their selective nature and narrow mandate were criticized for being uneven, unfair and unequal.[35] Although judgments of the ICTY convicted persons belonging to all parties to the conflict, the majority of cases before the Tribunal have dealt with international crimes committed by Serbs and Bosnian Serbs resulting in persistent claims that the justice process is biased.[36] Similarly, the ICTR has been critiqued for not investigating and prosecuting crimes committed by Tutsi and the Rwandan Patriotic Front (RPF).[37] Some of these criticisms were remedied in the Treaty inclusive of the Statute for the International

[33] (n 25) article 10 (2)(b).
[34] ICTY Rules of Procedure, rule 9 (ii).
[35] M Cherif Bassiouni, 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court' (1997) 10 Harvard Human Rights Journal 11, 59-60; Brown (n 5) 386.
[36] 'About the ICTY' (*United Nations International Criminal Tribunal for the former Yugoslavia*) < http://www.icty.org/en/about > accessed 24 September 2017; Dan Saxon, 'Exporting Justice: Perceptions of the ICTY among the Serbian, Croatian, and Muslim Communities in the Former Yugoslavia' (2005) 4 Journal of Human Rights 559; Marija Ristic, 'Serbia Slams Hague Tribunal at UN Debate' (*Balkan Transitional Justice*, 11 April 2013) < http://www.balkaninsight.com/en/article/un-debate-turns-as-criticism-of-the-icty > accessed 15 March 2017; Zorana Suvakovic, 'The Politics of Justice at the Hague' *Al Jazeera Opinion* (28 January 2014) < http://www.aljazeera.com/indepth/opinion/2014/01/politics-justice-at-hague-201412114135953259 2.html > accessed 15 March 2017; Marko Milanovic, 'Understanding the ICTY's Impact in the Former Yugoslavia' (*EJIL: Talk*, 11 April 2016) < https://www.ejiltalk.org/understanding-the-ictys-impact-in-the-former-yugoslavia/ > accessed 15 March 2017.
[37] Klaus Bachmann and Aleksandar Fatić, *The UN International Criminal Tribunals: Transition Without Justice?* (Routledge 2015) xi.

Criminal Court which was adopted at the end of the United Nations Diplomatic Conference of Plenipotentiaries in 1998.[38]

On 18 July, 1998 at the 'Opening for Signature of the Convention on the Establishment of an International Criminal Court', M Cherif Bassiouni claimed that the world would "never be the same".[39] But Bassiouni qualified that the ICC would "not bring all perpetrators of major crimes to justice", only "some" of them.[40] The answer to why the ICC would try 'some' as opposed to 'all' perpetrators of the most egregious crimes rests partly in practicalities (a central court pursuing all international crimes being deemed patently impossible) and partly in the principle of complementarity – the operative cornerstone of the set of beliefs that define the relationship between the ICC and national criminal jurisdictions and gives shape to one of the most important judicial mechanisms functioning to end impunity.

The advent of complementarity set in place a framework where, national criminal jurisdictions were given "primacy"[41] over the ICC, together sharing a 'symbiotic' relationship based on mutual trust, dependency and cooperation.[42] Its emergence also acknowledged the readiness and maturity of States occupying a vital space within the international community to accept a permanent international criminal jurisdiction.[43] In 1998, while seven countries including the United States and China voted against

[38] Michael Scharf, 'Results of the Rome Conference for an International Criminal Court' (*ASIL Insights*, 11 August 1998) < https://www.asil.org/insights/volume/3/issue/10/results-rome-conference-international-criminal-court > accessed 25 September 2016.
[39] M Cherif Bassiouni, 'Opening Statement' (UN Diplomatic Conference on the Establishment of an International Criminal Court, Rome 15 June – 17 July 1998) < http://mcherifbassiouni.com/wp-content/uploads/MCB-Rome-Speech-18_July_1998.pdf > accessed 25 September 2016.
[40] ibid.
[41] Payam Akhavan, 'Complementarity' (2013) 107 Proceedings of the Annual Meeting (American Society of International Law) 90.
[42] Cassese and Gaeta (n 22) 303-308.
[43] Tallgren (n 6) 109 & 111.

the Treaty and twenty-one countries abstained from taking a side, an overwhelming majority of States, one hundred and twenty, voted in favour of creating a 'permanent' court that would give true meaning to the unfulfilled oath of "never again" made after the Holocaust.[44] The ICC was established four years later in 2002, and has since functioned to hold to account the perpetrators of international crimes within its jurisdiction and in the process worked towards fulfilling its mandate of mounting a formidable challenge to what Michael Scharf has described as the "golden age of impunity".[45]

1.2 *Framing the principle of complementarity within the Rome Statute*

One of the main issues of contention during the debates preceding the establishment of the ICC was how to frame the exact nature of the prospective relationship between the ICC and national courts of State Parties. In particular, parties held divergent views about what ought to be the balance of power between the 'national' and 'international', and there was an absence of clarity in the circumstances that would permit the 'international' to exercise jurisdiction over cases.

A close reading of the reports of the 'Working Group on the Question of an International Criminal Jurisdiction and the Ad Hoc and Preparatory Committee on the Establishment of an International Criminal Court' reveal that there were two broad

[44] The United States of America has not ratified the Rome Statute. Following the initial 'no' vote in 1998, President Bill Clinton signed the Rome Statute on 31 December 2000. See, Coalition for the International Criminal Court, 'Overview of the United States Opposition to the International Criminal Court' < http://www.iccnow.org/documents/CICCFS_US_Opposition_to_ICC_11Dec06_final.pdf > accessed 5 June 2017; Alan M Dershowitz, 'The Mixed Legacy of Nuremberg' (*Gatestone Institute*, 4 May 2016) < https://www.gatestoneinstitute.org/7983/nuremberg-legacy > accessed 25 September 2016.

[45] Scharf (n 38).

strands of arguments which were identified by Immi Tallgren. The first strand, which Tallgren calls "the Butler ICC interpretation," viewed complementarity as an expression of the primacy of national courts and a means to restrict the scope of the ICC's jurisdiction to exceptional circumstances.[46] *Butler* proposed that the Court should act as someone who remains "in the background and coordinates a scene just by his mere existence," entering only "when it is necessary".[47] Tallgren's *Butler* interpretation is similar to Bartram Brown's "simple complementarity" which advocated that the jurisdiction of the ICC be "fully subordinate" to that of national courts.[48] The second strand, known as "the Master ICC interpretation", placed confidence on the enhanced capacity of the ICC to adjudicate impartially as a "supranational" court.[49] It argued that the primary responsibility of prosecuting international crimes rested with the international community and advocated the using of complementarity as a tool to enforce the independence and authority of the proposed ICC.[50]

Proponents of the *Butler* thesis therefore called for clear provisions in the Rome Statute on complementarity that would ensure the primacy of States to investigate and prosecute core international crimes.[51] This view was opposed by the supporters of the *Master* thesis who argued for explicit provisions on complementarity, but those that would give the ICC a 'flexible' mandate and set out the minimum situations where it would have jurisdiction.[52] A "crime-specific" approach represented the third strand

[46] Tallgren (n 6) 124; Zeidy (n 6) 890.
[47] Tallgren (n 6) 124.
[48] Brown (n 5) 423.
[49] Tallgren (n 6) 130; Dickner and Duffy (n 2) 58; Zeidy (n 6) 890.
[50] Tallgren (n 6) 124.
[51] Tallgren (n 6) 126.
[52] Tallgren (n 6) 126.

which argued that the ICC would assert inherent and primary jurisdiction over a core set of crimes which included 'genocide', 'crimes against humanity', 'war crimes', 'serious violations of the laws and customs applicable in armed conflict' etc., while "non-core" crimes related to terrorism, drugs etc. would fall within the jurisdiction of national courts.[53] Ultimately, the Tallgren and Brown's versions of *Butler* and *simple* complementarity which ensured the primacy of national courts over the ICC was preferred over the ICC having 'primacy' or enjoying inherent jurisdiction over a specific list of crimes.[54]

Although the initial differences in the views of what kind of relationship the ICC and national courts would share with each other while fighting impunity, a dearth of clarity remained in the provisions relating to complementarity in the ILC's Draft Statute adopted in 1994. The first provision encapsulating 'complementarity' in this draft was the third paragraph of the Preamble which stated that the ICC would be "complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective".[55] The meanings of the 'unavailability' and 'ineffectiveness' of trial procedures were not stated. Delegates pointed out that the standards necessary to determine the 'effectiveness' of a domestic court were absent.[56]

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[53] Brown (n 5) 420-426.
[54] ibid 423-427.
[55] 'Draft Statute of an International Criminal Court with Commentaries' (1994) vol II (2) Yearbook of the International Law Commission 3 <http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1994.pdf> accessed 15 March 2016.
[56] UNGA 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court General Assembly Official Records' UN GAOR 50th Session Supp No 22 UN Doc A/50/22 (1995) para 41 <https://www.legal-tools.org/uploads/tx_ltpdb/doc21168.pdf> accessed 15 March 2016.

The second provision, namely draft Article 35 identified three scenarios where the ICC would be unable to initiate proceedings against an accused, firstly, where a State with jurisdiction had investigated the case and decided not to prosecute on "well founded" reasons, secondly, where a national investigation was ongoing and there were no reasons for the ICC to intervene in any way, and thirdly, the concerned case was not of "sufficient gravity" to justify the court's action.[57] Here again, explanations as to what constituted 'well founded' reasons or 'sufficient gravity' were not offered. These absences were acknowledged in a discussion paper drafted by the United Kingdom in 1996, which stated that the meaning of 'complementarity' as expressed in the draft statute was prone to "uncertainty and dispute".[58] The discussion paper proposed that the principle of complementarity meant the ICC respecting and not taking action with regards to "proper decisions" of national courts.[59] The irony here is that no explanations were offered as to what was meant by a 'proper decision'.

In the course of the negotiations, the language depicting 'complementarity' underwent further changes. While a 'complementary' relationship reflected the general will of the delegates, there were two outstanding concerns which needed to be addressed. Representatives of New Zealand, Jamaica and Georgia feared that the ICC would become "merely residual" to national jurisdictions.[60] Furthermore, the lingering possibility of 'sham trials' being conducted at the national level also remained. As a response to these concerns, the Preparatory Committee debates called for the need to

[57] *UK Discussion Paper on Complementarity* (29 March 1996) para 2 <http://www.iccnow.org/documents/UKPaperComplementarity.pdf> accessed 15 March 2016.
[58] Tallgren (n 6) 130; *UK Discussion Paper on Complementarity* (n 57) para 7
[59] *UK Discussion Paper on Complementarity* (n 57) para 10
[60] 'Jurisdiction of Proposed International Criminal Court Discussed in Preparatory Committee on its Establishment' *UN Press Release* (2 April 1996) <http://www.un.org/press/en/1996/19960402.l2772.html> accessed 15 March 2016; Oscar Solera, 'Complementary Jurisdiction and International Criminal Justice' (2002) 84 International Review of the Red Cross 145, 157.

set out basic and clearer conditions relating to national investigations and trials.[61] In the final form of the Rome Statute, the ICC was empowered to assess whether it can exercise jurisdiction over a case being investigated or prosecuted at the national level. Furthermore, the delegates of the Preparatory Committee session of August 1997 rejected 'effectiveness' on the grounds of vagueness, and agreed upon the word "genuinely" as the most appropriate criteria that would give the ICC a "large degree of flexibility" in making a subjective assessment of whether a State is "unwilling or unable" "genuinely" to investigate or prosecute.[62]

Howsoever the Rome Statute draft was conceived, the theoretical underpinnings of complementarity originate from the principles of jurisdiction based on 'territory' and 'nationality'.[63] The former maintains that States have jurisdiction over crimes perpetrated in their own geographical territory, while according to the latter, States have jurisdiction to prosecute its own nationals even with respect to crimes committed beyond its territory.[64] According to Mohamed M El Zeidy, States have consistently and exclusively exercised jurisdiction based on territoriality and have conceded that right only in exceptional circumstances.[65] Complementarity enshrined in various provisions of the Rome Statute is no different. Although the word 'complementarity' is absent from the text of the Rome Statute, it is strongly embedded as a principle

[61] 'UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' (17 July 1998) UN Doc A/CONF.183/10 (Vol II) <http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf> accessed 15 March 2016.
[62] Newton (n 5) 54.
[63] At the 4th plenary meeting held on Tuesday, 16 June 1998 and presided over by Mr. Conso of Italy, the representative of the Indian delegation Mr Lahiri stated that the principle of complementarity was "in conformity with the principles of territorial jurisdiction and the sovereignty of States." See, 'UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' (n 61) 86 para [49]; Zeidy (n 6) 870.
[64] Brown (n 5) 391.
[65] Zeidy (n 6) 870.

throughout its statutory provisions.[66] The role played by the ICC in relation to national criminal jurisdictions, and the importance of the latter within the complementarity system is abundantly clear from the texts of the fourth, sixth and tenth paragraphs of the Preamble along with Article 1 of the Rome Statute. Paragraph four affirms that the effective prosecution of the most serious crimes must be ensured at the national level and by enhancing international cooperation.[67] This is followed by the sixth paragraph which acknowledges that it is the duty of every State to exercise criminal jurisdiction over such crimes.[68] Paragraph ten and Article 1 states that the permanent International Criminal Court is mandated to play a role that is "complementary"[69] to the national courts of State Parties.

This role is further elucidated in Article 17 which specifies the circumstances in which a case becomes admissible before the ICC. The statutory provisions relating to complementarity relevant for the purposes of this chapter and the overall thesis are Articles 17(1)(a) and 17(2)(c). The former states that the ICC can admit a case if the concerned State "is unwilling or unable genuinely to carry out the investigation or prosecution". According to the latter provision, the ICC shall determine "unwillingness" by "having regard to the principles of due process recognized by international law" to see if the proceedings in question are not being "conducted independently or impartially" and are being "conducted in a manner which […] is inconsistent with an intent to bring the person concerned to justice". Therefore, the essence of complementarity is that in the global effort of ending impunity, the ICC

[66] Particularly in Paragraphs 4, 6 and 10 of the Preamble, and as well as Articles 1, 11, 15 17, 18, 19 and 80.
[67] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, Preamble, para 4.
[68] ibid Preamble, para 6.
[69] ibid article 1.

shall complement national criminal jurisdictions and possess the jurisdiction to try cases at a "subsidiary level"[70] when the concerned State that exercised jurisdiction is "unwilling or unable genuinely"[71] to proceed with an investigation or prosecution.

Overall, these statutory provisions reveal a 'duality' in the nature of complementarity. While on the one hand, complementarity ensures the primacy of national courts over the ICC, it also ushered an end to the "unfettered prerogative" of States to exercise criminal jurisdiction over international crimes.[72] This 'end' was cemented the moment when State Parties sacrificed a degree of their sovereignty by empowering the ICC to determine the 'unwillingness' of States to investigate and prosecute by considering the "principles of due process recognized by international law".[73] This acknowledgement of the existence of a body of 'due process' standards recognized by international law in turn assumed the existence of a *civitas maxima*. It may be argued, therefore, that complementarity is a 'compromise' between the need to respect national sovereignty and to establish a permanent international court that would act as a failsafe in case the national criminal jurisdictions functioning under the shelter of 'national sovereignty' did not genuinely investigate or prosecute.[74]

1.3 *The principled and practical motivations behind adopting complementarity*

[70] Christoph Safferling, *Towards an International Criminal Procedure* (Oxford University Press 2001) 85.
[71] Rome Statute of the International Criminal Court (n 67) article 17.
[72] Newton (n 5) 26-27; Brown (n 5) 430.
[73] Rome Statute of the International Criminal Court (n 67) article 17(2); See the comments of Mr M V Raditapole, Delegate of the Kingdom of Lesotho and Mr. Chung Tae-ik the Delegate representing the Republic of Korea at the 2nd plenary meeting held on Monday, 15 June 1998, 69 paras 70 & 84 <http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf> accessed 15 March 2016.
[74] Kevin Jon Heller, 'Radical Complementarity' (2016) 14 Journal of International Criminal Justice 637, 648

Under the ICC's complementarity regime, national criminal jurisdictions were expected to lead the first line of attack in the struggle against impunity because of principled as well as practical reasons. The principled reasons revolved mainly around the issues of sovereignty and the beneficial aspects of States actively engaged in fighting impunity, whereas the practical reasons took root in the need to deliver justice in an efficient manner.

Sovereignty over territory is perceived as one of the most important aspects of statehood.[75] It guarantees the right of States to exercise 'sovereign' will to create their own system of laws based on their cultural norms and values and set up judicial bodies to ensure that those laws are enforced. The powers of policing through criminal laws have traditionally been viewed as a prerogative of the State.[76] This is why an international judicial forum exercising authority and jurisdiction over crimes committed within a State's territory is generally perceived as an instance where the sovereignty of that State has been threatened and diminished.[77] The principle of 'complementarity' was a means of tempering the fears of States that the ICC would emerge as a "supranational entity" and preserving the integrity of individual criminal justice systems and the sovereignty of the States those systems belonged to.[78]

[75] Robert Cryer, 'International Criminal Law vs State Sovereignty: Another Round?' (2005) 16 European Journal of International Law 979; Markus Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity' (2003) 7 Max Planck Yearbook of United Nations Law 591; Federica Gioia, 'State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court' (2006) Leiden Journal of International Law 1095; Webb and Bergsmo (n 28); Brown (n 5) 393.
[76] Tallgren (n 6) 111; Brown (n 5) 424.
[77] Brown (n 5) 404.
[78] Leila Sadat Wexler, 'Committee Report of Jurisdiction, Definition of Crimes, and Complementarity' (1996) 25 Denver Journal of International Law and Policy 221, 232; Rodney Dixon, Karim A A Khan and Richard May (eds), *Archbold International Criminal Courts - Practice, Procedure & Evidence* (Sweet & Maxwell 2003) 30.

It is argued that local justice also honours that need for justice to be seen to be done in the presence of victims generally in the region where the crimes were committed. This fits in with the notion that an accused should not be removed from his "natural judge".[79] The idea of domestically prosecuting international crimes is also perceived to be in alignment with the principle of *jus de non evocando*. This principle, generally featured in the constitutions of civil law jurisdictions, favours the prosecution of an accused before "regular domestic criminal courts" instead of "politically inspired ad hoc criminal tribunals" or local "extraordinary courts" constituted to try political crimes during crimes of unrest devoid of the fair trial rights applicable in ordinary courts.[80] According to Michel Newton domestic prosecution not only assists in alleviating the wounds of a nation engulfed by mass atrocity, it also instils a sense of confidence and ownership over a judicial process aimed at undoing grave wrongs.[81]

Just as it is true that one of the reasons prompting the creation of the ICC was the lethargy of States to exercise jurisdiction over those responsible for international crimes, it is also a historical fact that the majority of prosecutions for violations of international humanitarian law, however limited, have been conducted not in international courts or tribunals but domestic ones.[82] The traditional expectation regarding nation States is that they are much better equipped at mounting an effective challenge to impunity because their courts would be founded on familiar precedents

[79] Kenneth S Gallant, *The Principle of Legality in International and Comparative Law* (Cambridge University Press 2009) 337.
[80] Kingsley Chiedu Moghalu, *Rwanda's Genocide the Politics of Global Justice* (Palgrave Macmillan 2005) 47; Virginia Morris, 'Prosecutor v. Kanyabashi, Decision on Jurisdiction. Case No. ICTR-96-15-T' (1998) 92 American Journal of International Law 66, 68; Roger O'Keefe, *International Criminal Law* (Oxford University Press 2015) 500.
[81] D.F. Orentlicher, 'Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles' (2004) 92 Georgetown Law Journal 1057, 1132.
[82] Newton (n 5) 38.

and rules and have much better access to evidence and witnesses and also resources.[83] In fact when the Rome Statute was being framed, the Committee of the International Law Association on a Permanent International Criminal Court acknowledged that domestic courts were at that point in time better equipped to prosecute core international crimes.[84]

Furthermore, given the limited resources and political capital of the ICC,[85] it does not make sense that one judicial body will be entrusted with the responsibility of effectively trying all perpetrators of international crimes. Granting primacy to the ICC, as was done in the case of the ICTY and the ICTR, might have ensured a stable and more coherent delivery of justice especially in situations where there were doubts about the "effectiveness and impartiality of national courts", the possibility of "sham trials" or even the absence of the necessary judicial structures at the domestic level.[86] Also, if the ICC were to enjoy primacy over national courts, the observance of "minimum standards of justice" would ensure "uniformity in the legal process".[87] On the other hand, 'primacy' would "erode" not just the responsibility of individual states to prosecute but also the sovereignty of those States.[88] It was also perceived as impractical in terms of adequately tackling the voluminous task of combatting impunity. This is why, under the 'complementarity' system of justice, national courts are obliged to play a much more significant role in the prosecution of international crimes.[89] It is argued that creating a system permitting an enhanced role of national

[83] Cryer, Friman, Robinson and Wilmshurst (n 18) 153.
[84] Wexler (n 78) 231; Cryer, Friman, Robinson and Wilmshurst (n 18) 153.
[85] Newton (n 5) 38.
[86] Zeidy (n 28) 406; Jennifer Trahan, 'Is Complementarity the Right Approach for the International Criminal Court's Crime of Aggression? Considering the Problem of "Overzealous" National Court Prosecutions' (2012) 45 Cornell International Law Journal 574.
[87] Brown (n 5) 398 & 408.
[88] Solera (n 60) 147.
[89] Cryer, Friman, Robinson and Wilmshurst (n 18) 162 & 580.

criminal jurisdictions would preserve sovereignty without compromising the goal of ending impunity. In addition, it would also encourage States to improve the standards of investigation and trial.[90]

The principle of complementarity in the Rome Statute marks a clear shift away from the notion that the responsibility to fight "the battle against impunity" rests on "international treaties and tribunals" and "national courts having no competence in such matters".[91] It reveals the presence of a persistent dialectical tension between the need to respect "national sovereignty" and the "universality of human rights" in the battle against impunity, but does not explicitly state what constitutes the principles of due process recognized by international law or what it means to genuinely carry out an investigation or prosecution.[92] In an unideal world where the rate at which perpetrators commit the most serious crimes is far greater than the rate at which they are held accountable, delegating the primary responsibility to investigate and prosecute international crimes to national criminal jurisdictions complementarity was the only principled, practicable, efficient and politically acceptable way to convince State Parties to unite and establish a permanent international criminal court.

2. Application of the principle of complementarity

This Part looks at several judgments of the ICC which explains further the phrase "unwilling […] genuinely to carry out the investigation or prosecution" enshrined in

[90] Dixon, Khan and May (eds) (n 78) 30.
[91] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* [2002] ICJ Rep 3, Joint Separate Opinion of Judges Higgins, Kooijmans and Bergenthal [51] <http://www.icj-cij.org/docket/files/121/8136.pdf > accessed 28 September 2016.
[92] Orna Ben-Naftali, 'The Obligations to Prevent and to Punishment Genocide' in Paola Gaeta (ed), *The UN Genocide Convention - A Commentary* (Oxford University Press 2013) 46.

the principle of complementarity. It acknowledges that a strict reading of Article 17 does not allow the ICC to hold that a State is unwilling or unable genuinely to carry out the investigation or prosecution because due process rights of the accused were not respected. It relies on the ICC Appeals Chamber's (AC) 'Decision on the admissibility of the case against Abdullah Al-Senussi', *travaux préparatoires* and statutory provisions of the Rome Statute and a policy paper published by the OTP to demonstrate that the ICC when assessing the 'independence', 'impartiality' and 'manner' of a national proceeding for the purposes of determining the admissibility of that case, should be receptive towards the "diversity of legal systems, traditions and cultures", but must ensure that "violations of the rights" of the accused that are of "egregious" nature do not take place in the name of 'diversity'.[93]

2.1 *Understanding "unwilling* […] *genuinely to carry out the investigation or prosecution" through ICC case law*

Statutory provisions relating to complementarity in the Rome Statute were subject to minimal judicial examination during the initial years of the ICC's operation.[94] This stemmed from the understandable reluctance on the part of the ICC to "make determinations on unwillingness or inability" because such an exercise would potentially place "an entire judicial system on trial".[95] Nevertheless since 2009, several judgments by the Appeals Chamber (AC) of the ICC have contributed to laying

[93] Office of the Prosecutor (n 3) 5; *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (n 3) [3]
[94] Ben Batros, 'The Evolution of The ICC Jurisprudence on Admissibility' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011) 559.
[95] Akhavan (n 41) 90.

the "foundations for our understanding of the principle of complementarity".[96] Several important principles can be derived from these judgments, which offer limited but nevertheless important guidance on how to interpret the phrase: "[…] unwilling or unable genuinely to carry out the investigation or prosecution".

In order to assess 'unwillingness or inability', the ICC must first check whether if there are ongoing judicial proceedings at the domestic level. If the answer to this assessment is affirmative, the ICC must then for the purposes of evaluation take into consideration the on-going domestic proceedings or domestic proceedings that have already been concluded. As part of the 'same person/same conduct' test, the concerned domestic proceeding must be tied to the "same individual and substantially the same conduct"[97] in order for a case to be inadmissible before the ICC.[98] In *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* ('*Katanga*'), the AC found that the question of unwillingness or inability of a State having jurisdiction can be considered only when at the time of an admissibility challenge there are ongoing domestic investigations or prosecutions or there have been such investigations subsequent to which the concerned State decided not to prosecute.[99] To search for 'unwillingness or inability' without first seeing whether there are ongoing investigations or proceedings or if investigations had been conducted in the past would be to "put the cart before the horse".[100]

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[96] Batros (n 94) 559.
[97] *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* (Judgment) ICC-01/09-01/11 OA (30 August 2011) [1] <https://www.icc-cpi.int/CourtRecords/CR2011_13814.PDF> accessed 15 March 2016.
[98] Nicola Palmer, 'Tensions in Domestic and International Criminal Justice' (*OUPblog*, 29 June 2015) <http://blog.oup.com/2015/06/tensions-in-domestic-and-international-criminal-justice/> accessed 18 January 2017.
[99] *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Judgment) ICC-01/04-01/07 OA 8 (25 September 2009) [1] & [75] <https://www.icc-cpi.int/CourtRecords/CR2009_06998.PDF> accessed 18 January 2017.
[100] ibid [78]

In *Katanga* the AC also found that the question of 'unwillingness or inability' did not arise when a State with jurisdiction was inactive, and that such 'inaction' rendered a case admissible before the Court under Article 17(1)(d).[101] The AC stressed that complementarity meant striking a balance between protecting the primacy of domestic proceedings vis-à-vis the ICC on the one hand, and the Rome Statute's goal of ending impunity on the other.[102] This is why the ICC, where necessary, will be able to "step in" when a State does not or cannot investigate.[103]

The issue of 'investigations' at the national level arose in *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*. Here the AC distinguished between the task of determining the existence of an investigation and the task of assessing whether the State is "unwilling or unable genuinely to carry out the investigation", and found that the former task preceded the latter when resolving the admissibility of a case.[104] The AC clarified that when assessing whether a State is truly investigating, merely asserting that investigations are ongoing would not suffice. Instead, the State must provide specific evidence bearing probative value demonstrating that it is indeed investigating the case.[105] Once the State adequately proved that investigations were ongoing, their 'genuineness' should be put to the test.

[101] ibid [2] & [78]-[79]; Office of the Prosecutor (n 3).
[102] *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (n 99) [85]
[103] ibid.
[104] *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* (Judgement) ICC-01/09-01/11 OA (30 August 2011) [42] <https://www.icc-cpi.int/CourtRecords/CR2011_13814.PDF> accessed 15 March 2016.
[105] ibid [2] & [42]; Chris Stephen, 'Clarifying the Principle of Complementarity: the ICC Confirms Admissibility of Case Despite Investigation by Kenya' (*EJIL: Talk*, 14 September 2011) <https://www.icc-cpi.int/CourtRecords/CR2011_13814.PDF> accessed 15 March 2016.

The three situations covered by Article 17(2) where a State may be found "unwilling […] genuinely to carry out the investigation or prosecution" include, national court proceedings "shielding the person concerned from criminal responsibility", proceedings subjected to "unjustified delay" which is "inconsistent with an intent to bring the person concerned to justice" and finally, proceedings smeared with a lack of independence or impartiality which are being conducted in a manner that is "inconsistent with an intent to bring the person concerned to justice".[106] It is worth taking note that although Article 17 clearly anticipates "irresponsible states"[107] that are not conducting proceedings "independently or impartially" because they do not have the intention of bringing the accused to justice or are trying to shield the accused from criminal responsibility, it does not appear to envision situations where national courts are conducting proceedings with a view to prosecute an accused but are doing so under conditions where the due process rights of the accused are not observed. In other words, these statutory provisions appear to address only circumstances that benefit the accused, not those that prejudice his or her rights.[108] In 2006, Kevin Jon Heller described this as the "shadow side of complementarity".[109]

This interpretation had led academics to argue that Article 17 does not envisage the possibility of States being found "unwilling" because its national proceedings failed to uphold the "principles of due process recognized by international law" protecting the accused.[110] In the words of Jennifer Trahan, the complementarity regime does not

[106] Trahan (n 86) 581.
[107] Newton (n 5) 26.
[108] Rome Statute of the International Criminal Court (n 67) article 17(2); Michele Tedeschini, 'Complementarity in Practice: the ICC's Inconsistent Approach in the Gaddafi and Al-Senussi Admissibility Decisions' (2015) 7 Amsterdam Law Forum 76, 79.
[109] Kevin Jon Heller, 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process' [2006] 17 Criminal Law Forum 255
[110] Sarah W. Nouwen, *Complementarity in the line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press 2014) 67.

address "overzealous" national prosecutions lacking in due process.[111] Not only is this evidenced by the absence of any statutory provisions indicating otherwise, the *travaux preparatoires* of the Rome Statute reveal that Italy's proposal to make the absence of "full respect for the fundamental rights of the accused" a ground for admissibility was defeated.[112] According to Kevin Heller, the ICC is empowered to find that a State is 'unwilling or unable' "only if its legal proceedings are designed to made a defendant more difficult to convict".[113] Therefore, it is argued that where the accused's right to a fair trial has been violated, attributing the task of 'supervising' domestic courts to the ICC would contravene the spirit and purpose of the Rome Statute.[114]

Not all academics, however, subscribe to this interpretation.[115] The Office of the Prosecutor's Informal Expert Paper titled "The Principle of Complementarity in Practice" in 2003 suggested that while the ICC was not a "human rights monitoring body" and it was not meant to play the role of ensuring "perfect procedures and compliance with all international standards", information pertaining to the "legal regime of due process standards, rights of accused, procedures" may be gathered among a list of other things "to inform an admissibility assessment" under the branches of 'unwillingness' or 'inability'.[116] Proponents of this "due process thesis"[117] maintain that the process of bringing a "person […] to justice" under Articles 17(2)(b)-

[111] Trahan (n 86) 569.
[112] Draft Proposal by Italy, 44, UN Doc. A/AC.249/1997/WG.3/IP.4 (Aug. 5, 1997) cited by Heller (n 109) 272.
[113] Heller (n 109) 257.
[114] Nouwen (n 110) 69; Rolf Einar Fife, 'The International Criminal Court – Whence It Came, Where It Goes' (2000) 69 Nordic Journal of International Law 66.
[115] According to the likes of M Cheriff Bassiouni, Jonathan O'Donohue, Mark S. Ellis, Darryl Robinson, Albin Eser, Jann K. Kleffner, and Carsten Stahn, a State can be found 'unwilling' under Article 17(2) if it fails to uphold the due process rights of the accused.
[116] 'Informal Expert Paper: The Principle of Complementarity in Practice' (ICC-OTP, 2003) 15, 28 <https://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf> accessed 15 March 2016.
[117] Heller (n 109) 273.

(c) does not merely encapsulate apprehending someone and trying that person before a court of law, but doing so in a manner that is 'fair'. This argument is then extended along the lines that failing to ensure 'fairness' in domestic proceedings would infer that the concerned State is 'unwilling' "genuinely to carry out the investigation or prosecution".[118] This argument is rationalized on the belief that the process of bringing an accused to "justice" under Article 17(2)(c) cannot "disregard the principles of the criminal process", i.e. delivering justice to victims does not preclude the responsibility of ensuring a fair trial.[119]

Furthermore, it is also argued that a national judicial system becomes competent to "genuinely" investigate or prosecute international crimes when it incorporates procedural rights guaranteed to the accused by the Rome Statute.[120] This position is rebutted by the likes of Sarah Nouwen and Jennifer Trahan who assert that the ICC is not statutorily permitted to apply its own procedural standards as benchmarks to determine the 'genuineness' of domestic judicial proceedings.[121] The absence of statutory provisions tackling "overzealous" domestic prosecutions is, therefore, a potential 'blind-spot' in the complementarity system of justice installed by the Rome Statute. Kevin Heller fears that the ICC turning a blind eye to unfair national proceedings, would allow States to "replace one kind of impunity with another".[122]

This is why he called for the incorporation of the 'due process thesis' in the Rome Statute in 2009 when State Parties would be able to propose amendments, but at the

[118] Nouwen (n 110) 68; Heller (n 109) 282.
[119] Frédéric Mégret Marika Giles Samson, 'Holding the Line on Complementarity in Libya'(2013) 11 Journal of International Criminal Justice 571, 585-586; Tedeschini (n 108) 80.
[120] Gioia (n 75) 1113.
[121] Trahan (n 86) 586; Nouwen (n 110) 67.
[122] Heller (n 109) 297.

same time expressed his preference towards a "court-initiated solution".[123] There is scope to suggest that Heller's wishes for a solution initiated by the court may have been answered to an extent in 2014 in the case *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*.[124]

In the admissibility challenge involving Abdullah Al-Senussi, the issue of how fair trial breaches within a national criminal jurisdiction effected the ICC's assessment of 'unwillingness' was touched upon.[125] In the judgment handed down following the appeal of Abdullah Al-Senussi against the admissibility decision of Pre-Trial Chamber I, the AC rejected the argument advocated by the Defence that if a State does not respect the fair trial rights of the accused *per se*, then that State must be found "unwilling genuinely to carry out investigation or prosecution".[126] It reiterated once again that for a State to be found "unwilling genuinely to investigate or prosecute" under Article 17(2)(c), it must be shown that the proceedings were not or had not been conducted independently or impartially and had been conducted in a manner which was inconsistent with the intent of bringing the accused to justice.[127] It went on to say that the process of making such a determination did not involve an assessment of whether the due process rights of the accused had been breached *per se* and that proceedings "being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice" should generally be interpreted as proceedings designed not to establish a suspect's criminal responsibility but allow him or her to evade justice.[128] In one of the Separate Opinions, Judge Anita Ušacka

[123] Heller (109) 295.
[124] *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (n 3).
[125] Tedeschini (n 108) 77.
[126] *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (n 3) [231].
[127] ibid (n 3) [1].
[128] ibid (n 3) [2].

explained that Libya did not have the "burden of showing that the proceedings are being conducted independently, impartially and fairly and with the intention of bringing Mr. Al-Senussi to justice".[129] Ušacka added that the "human right to a fair trial" despite its importance, "cannot play a central role in the determination of the admissibility of a case."[130] Nevertheless, the Appeals Chamber found that despite the above-mentioned principles, there may be circumstances where violations of the rights of an accused in domestic proceedings are so "egregious" that they cannot be regarded as capable of providing "any genuine form of justice" to the accused, and as a consequence should be deemed "inconsistent with the intent to bring the person to justice".[131] Although the Appeals Chamber did not explicitly define what constitutes "egregious" violations of the accused's rights, it did offer some guidance. For instance, judicial proceedings that are nothing more than a "predetermined prelude to an execution" would go against the "most basic understanding of justice", necessitating intervention by the ICC.[132] With specific regards to the *Al-Senussi* case, the Appeals Chamber found that the lack of access to a lawyer during the investigation stage of the proceedings was not a violation that would reach the "high threshold for finding that Libya is unwilling genuinely to investigate or prosecute" the accused.[133] However, supporting the position of the Pre-Trial Chamber the AC clarified that "alleged violations of the accused's procedural rights" would not amount to being "per se grounds for a finding of unwillingness or inability under article 17 of the Statute."[134]

[129] *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Separate Opinion of Judge Anita Ušacka) ICC-01/11-01/11-565-Anx2 (24 July 2014) [10] < https://www.icc-cpi.int/RelatedRecords/CR2014_06758.PDF > accessed 15 March 2016.
[130] ibid.
[131] *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (n 3) [3].
[132] ibid [230].
[133] ibid [191], [230].
[134] ibid [231].

2.2 *Complementarity and the tolerance of 'diversity' in national approaches to justice*

The complementarity system in the Rome Statute creates a range of obligations on State Parties, which include among others the duty to cooperate with the ICC's investigation and prosecution under Article 86, and the need to ensure the availability of procedures under national law to facilitate such cooperation under Article 88.[135] However, statutory provisions on complementarity or other provisions of the Rome Statute do not explicitly impose an obligation on State Parties to enact laws at the national level enabling the investigation and prosecution of international crimes.[136] Contrary to the position of Jann Kleffner,[137] there is no 'ambiguity' on this issue. Kleffner, however, offers compelling reasons to accept that such an 'obligation' is implied in the preamble of the Rome Statute.[138] In the fourth paragraph of the preamble, State Parties affirm 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". This is followed by the fifth and sixth paragraphs which express the determination "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes" and affirm "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". In light of the complementarity system of justice where the ICC

[135] William W Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49 Harvard International Law Journal 53, 82.
[136] Nouwen (n 110) 40-41.
[137] Jann K Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) 1 Journal of International Criminal Justice 86, 91.
[138] ibid 92-94.

'complements' national courts which are entrusted with the primary responsibility of tackling international crimes, the fact that States will set up domestic legislative frameworks to investigate and prosecute such crimes is no more than a natural consequence that gives meaning to the *preambular* mandates of the Rome Statute. This is precisely why scholars predicted early on that in the absence of comprehensive penal legislation capable of adequately covering the "*ratione materiae*" of the Rome Statute, it would not be possible to reap the benefits of complementarity and leave open the possibility for the ICC to determine that a State is 'unable' to 'genuinely' investigate and prosecute core international crimes.[139] This is why many States have enacted implementing legislation because national legal systems implementing the substantial provisions of the Rome Statute serve the cause of strengthening the principle of individual criminal responsibility, upgrading relevant provisions of domestic criminal laws, and enhancing the consciousness of citizens regarding the responsibility of States to prosecute international crimes.[140]

The existence of this 'implied' obligation to enact comprehensive domestic legislation does not mean that States must replicate the standards of justice emanating from the Rome Statute in their national laws. It should be recalled that the ICC complements national criminal jurisdictions and complementarity functions to preserve and protect the notion of state sovereignty. During the plenary meetings of the UN Diplomatic Conference of Plenipotentiaries held in June 1998, many delegates spoke on the proposed relationship between the ICC and national courts. During those meetings,

[139] Katherine L Doherty and Timothy L H McCormack, '"Complementarity" as a Catalyst for Comprehensive Domestic Penal Legislation' (1999) 5 UC Davis Journal of International Law & Policy 147, 149,152 & 165.
[140] Office of the Prosecutor (n 3) 5; M Cheriff Bassiouni, *Introduction to International Criminal Law: Second Revised Edition* (Martinus Nijhoff Publishers 2014) 26.

the ICC was not identified as an end in itself, but rather the means to an end – ensuring the end of impunity. Among others, James Crawford stated that as a consequence of the principle of complementarity, the ICC "would be integrated with the existing system of international criminal cooperation" and that "it was not intended to displace existing national systems that were capable of working properly".[141] This was reiterated by the delegates of Pakistan, Ghana, Brunei Darussalam, Ireland, India, China and other countries.[142]

Soon after its establishment, scholars acknowledged that the ICC was the culmination of efforts of a "diverse coalition of States from North and South".[143] As a result, the text of the Statute symbolized a merger of traditions from both 'common' and 'civil' systems of law.[144] A State exerts its sovereign will by enacting its own set of laws that are applied and enforced within its legal system. Since complementarity confirms that the "primacy" to investigate, prosecute and punish the perpetrators international crimes belongs to nation States with jurisdiction,[145] it is unrealistic to expect that they will adopt an identical set of laws and procedures to accomplish this. This was acknowledged in the "Paper on some policy issues before the Office of the Prosecutor" in 2003 which read:

> A major part of the external relations and outreach strategy of the Office of the Prosecutor will be to encourage and facilitate States to carry out

[141] 'UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' (n 61) 71 para [107].
[142] 'UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' (n 63) 78 para [91], 85 para [37], 92 para [15], 97 para [16], 86 para [49] 75 para [37].
[143] Dickner and Duffy (n 2) 53.
[144] Wexler (n 78) 221.
[145] Robert Roth, 'The Extradition of Génocidaires' in Paola Gaeta (ed), *The UN Genocide Convention - A Commentary* (Oxford University Press 2013) 308.

> their primary responsibility of investigating and prosecuting crimes. In any assessment of these efforts, the Office will take into consideration the need to respect the diversity of legal systems, traditions and cultures.[146]

An important characteristic of the Rome Statute is that it employs the phrase "for the purposes of" several times, thereby clarifying that the standards of justice adopted for the purposes of the Statute are not meant to be applied beyond the proceedings of the International Criminal Court, unless States apply their sovereign will and incorporate them in their own national laws. A couple of other provisions reinforce this understanding. The Preamble of the Rome Statute recalls that "it is the duty of every State to exercise its jurisdiction over those responsible for international crimes".[147] It is clear that this provision did not distinguish between States that had ratified the Rome Statute and States that had not, and left room for the element of diversity in the laws governing national criminal jurisdictions irrespective of whether they belonged to States that are party to the Rome Statute.[148] Furthermore, Article 80 clarifies that the penalties the ICC is entitled to inflict do not affect "the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in the statute."

Embracing diverse standards of justice of national criminal jurisdictions does not empower States to sacrifice the enforcement of due process norms "on the altar of state sovereignty".[149] States are bound by the confines of their constitutions, other laws and international obligations to guarantee that judicial process functioning to end

[146] Office of the Prosecutor (n 3) 5.
[147] Rome Statute of the International Criminal Court (n 67) preamble.
[148] Newton (n 5) 32.
[149] Brown (n 5) 389.

impunity is fair, impartial and independent. Prosecuting perpetrators of international crimes is not just in the interests of nation States, but is equally a matter of concern for the international community. Therefore, even when a domestic court conducts an investigation or decides to prosecute, there will invariably be some tension while balancing the interests of state sovereignty and the interests of the international community which find expression in the "principles of due process recognized by international law". Unless this 'balance' is treated with care, there is always the possibility that the ICC may admit a case on the basis that the proceedings in question are not being conducted with the purpose of bringing a perpetrator to justice. Not only does this take away the right of States to exercise national jurisdiction over international crimes, it also throws into question the legality and legitimacy of their own legal systems.

Conclusion

The ICC's prospective mandate prevents it from exercising jurisdiction over the crimes being tried by the ICTs. It is not in a position to determine the 'willingness' of the ICTs to 'genuinely' investigate and prosecute the perpetrators of international crimes in light of the "principles of due process recognized by international law".[150] This is why the Bangladeshi ICTs and the ICC share a unique relationship within the 'complementarity' system. While it may appear that the relationship the ICTs share with the ICC bears no real importance, using Bangladesh as a case study will assist the ICC and any other entity having an interest in the 'complementarity' system to make better sense of situations that may arise in the future where a State has allegedly

[150] Rome Statute of the International Criminal Court (n 67) article 17(2).

failed to uphold its side of the bargain to independently and impartially impart justice, resulting in the need for the ICC to assess whether if the concerned State prosecuting accused for international crimes is 'genuinely able' to do so in light of the "principles of due process recognized by international law".[151] Furthermore, the lessons and experiences gained from the ICTs become relevant for the purposes of identifying some of complementarity's points of 'tension' if, hypothetically speaking, any State Party chooses to investigate or prosecute perpetrators of international crimes that were committed after the adoption of the Rome Statute with legislation similar to that of the ICTA and through a judicial forum bearing resemblance with the ICTs. Of course, these benefits are in addition to the core aim of this thesis, i.e. to determine the legality and the legitimacy of the ICTs of Bangladesh through the prism of the principle of complementarity with particular reference to the "principles of due process recognized by international law".[152]

In March 2010, when Bangladesh decided to establish the first ICT under the ICTA, it went against the general tide of non-prosecution at the state level and emerged as a 'living' example of the 'first line of attack' against the perpetrators of the most serious crimes. Bangladesh's assertion of domestic jurisdiction over international crimes committed during the war of 1971 sent a strong message to the international community about its intention to implement the ethos of the Rome Statute, i.e. put an end to the culture of impunity. This effort has nevertheless been a 'precarious' one because critics have questioned the legality and legitimacy of the ICTs because they have been prosecuting international crimes at the expense of 'international standards'.

[151] ibid.
[152] ibid.

This Chapter has shown the principle of complementarity ensures the primacy of national courts over the ICC, but also ushers an end to the "unfettered prerogative" of States to exercise criminal jurisdiction over international crimes.[153] This 'end' was cemented the moment when State Parties sacrificed a degree of their sovereignty by empowering the ICC to determine the 'unwillingness' of States to investigate and prosecute by considering the "principles of due process recognized by international law".[154] In light of statutory provisions and *travaux préparatoires* of the Rome Statute, policy papers published by the OTP and relevant decisions handed down by the ICC, this Chapter has demonstrated that national criminal jurisdictions while prosecuting the most serious crimes do not need to mirror the standards of justice adopted in the Rome Statute. The passing of the ICC Appeals Chamber's (AC) 'Decision on the admissibility of the case against Abdullah Al-Senussi' has not eliminated the possibility of States to prosecute without observing the fair trial rights of an accused, but it has imposed restrictions on that possibility. This is why when assessing the 'independence' or 'impartiality', or in other words the 'fairness' of any domestic justice mechanism prosecuting international crimes, the ICC should be receptive towards the "diversity of legal systems, traditions and cultures", but also ensure that "violations of the rights" of the accused that are of "egregious" nature are not permitted in the name of 'diversity'.[155] If egregious violations of the rights of an accused take place in a case being tried before a national criminal jurisdiction, the ICC

[153] Newton (n 5) 26-27; Brown (n 5) 430.
[154] Rome Statute of the International Criminal Court (n 67) article 17(2); See the comments of Mr M V Raditapole, Delegate of the Kingdom of Lesotho and Mr. Chung Tae-ik the Delegate representing the Republic of Korea at the 2nd plenary meeting held on Monday, 15 June 1998. 'UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' (n 61) 69 paras [70] & [84].
[155] Office of the Prosecutor (n 3) 5; *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (n 3) [3].

may intervene on the grounds that the case is incapable of providing "any genuine form of justice" and is "inconsistent with an intent to bring the person to justice" under Article 17(2)(c) of the Rome Statute.[156]

The forgoing discussions have laid the foundations for the next four chapters of this thesis which evaluate the main areas of contention surrounding the Bangladeshi ICTs through the prism of the principle of complementarity with particular reference to the "principles of due process recognized by international law".[157] The following Chapter (IV) analyses the major criticisms of the ICTA relating to the principle of legality, also known as the rule against *ex post facto* or retroactive law.

[156] *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (n 3) [3].
[157] Rome Statute of the International Criminal Court (n 67) Article 17(2).

Chapter IV

Analysing the major criticisms of the ICTA (I)

Introduction

On 25 March, 2010 after a delay of thirty-seven years, the first International Crimes Tribunal (ICT) was established to detain, prosecute and punish "persons for genocide, crimes against humanity, war crimes and other crimes under international law"[1] committed in 1971 during Bangladesh's "historic struggle for national liberation".[2] The opinions of stakeholders regarding the overall fairness of the trial process applied in the ICTs are highly polarized. On multiple occasions, Ministries and other representatives of the Bangladesh Government have claimed that the trials are in accordance with "international standards" and the ICTA adheres "to most of the rights of the accused enshrined under Article 14 of the ICCPR".[3] In several of their own judgments, the ICTs have observed that the statutory provisions of the International Crimes (Tribunals) Act 1973 (ICTA) are "broadly and fairly compatible with current international standards".[4] According to several academics and justice forums, the

[1] The International Crimes (Tribunals) Act 1973 [ACT NO. XIX OF 1973], Preamble < http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=435 > accessed 6 May 2014.

[2] The Constitution of the People's Republic of Bangladesh, Preamble; Julfikar Ali Manik and Hasan Jahid Tusher, 'Stage Set for War Trial' *The Daily Star* (Dhaka, 26 March 2010) <http://www.thedailystar.net/news-detail-131639> accessed 06 August 2017.

[3] Ministry of Foreign Affairs, 'A Position Paper on ICT-BD Trials and Execution of Verdict against Mr. Abdul Quader Molla on 12 December 2013' (The Government of the People's Republic of Bangladesh, 2013) 2, 8 <http://www.mofa.gov.bd/media/position-paper-ict-bd-trials-and-execution-verdict-against-mr-abdul-quader-molla> accessed 8 August 2017; 'Int'l Crimes Tribunal Fair' *The Daily Star* (Dhaka, 17 January 2012) <http://www.thedailystar.net/news-detail-218712> accessed 7 August 2017; 'Shafique Dismisses Controversies Over War Crimes Trial' *Ittefaq* (Dhaka, 29 April 2013) <http://www.clickittefaq.com/shafique-dismisses-controversies-over-war-crimes-trial/> accessed 7 August 2017; 'War Trial Appreciated Abroad: Qamrul' *Bangladesh Sangbad Sangstha* (Dhaka, 7 December 2013) <http://www.bssnews.net/newsDetails.php?cat=0&id=375416$date=2013-12-07&dateCurrent=2013-12-14> accessed 8 August 2017.

[4] *The Chief Prosecutor v Delowar Hossain Sayeedi* (Judgment) ICT-1 (28 February 2013) ICT-BD Case No. 01 of 2011 [32] <http://www.ict-bd.org/ict1/ICT1%20Judgment/sayeedi_full_verdict.pdf> accessed 21 May 2017; *The Chief Prosecutor v Salauddin Quader Chowdhury* (Judgment) ICT-1 (1

governing statute and the rules of procedure of the ICTs uphold the "core tenets of the right to fair trial".[5] At the other end of the spectrum, critics ranging from counsel defending the accused, academics, international lawyers, human rights organizations to foreign State agencies claim that the domestic judicial process established by the ICTA is a case of "complementarity gone bad"[6] because it does not "comply with the norms and standards of international law"[7] and trials before the ICTs are "replete with violations of the right to a fair trial".[8] Toby Cadman, one of the foreign counsel defending the accused stressed as early as December 2011 that it was the responsibility of the international community to intervene if the Bangladesh Government was "either unwilling or unable to meet its international obligations."[9] This transformed into a direct call for intervention in December 2013 when Cadman demanded the establishment of an "internationally-supervised tribunal" that would serve as a bridge

October 2013) ICT-BD Case No. 02 of 2011 [38] <http://www.ict-bd.org/ict1/ICT1%20Judgment/ICT-BD%20Case%20No.%2002%20of%202011%20Delivery%20of%20judgment%20final.pdf> accessed 21 May 2017.

[5] Ridwanul Hoque, 'War Crimes Trial in Bangladesh: A Legal Analysis of Fair Trial Debates' (2016) 17 Australian Journal of Asian Law 1, 16; See also, M Rafiqul Islam, 'Trials for International Crimes in Bangladesh: Prosecutorial Strategies, Defence Arguments and Judgments' in Kirsten Sellars (ed), *Trials for International Crimes in Asia* (Cambridge University Press 2016) 306 & 317; International Crimes Strategy Forum, 'Stephen Rapp: of Misconceptions, Unrealistic Expectations and Double Standards' *bdnews24* (Dhaka, 22 May 2011) <http://opinion.bdnews24.com/2011/05/22/stephen-rapp-of-misconceptions-unrealistic-expectations-and-double-standards/> accessed 21 May 2017; International Crimes Strategy Forum, 'Legal Framework of ICT and Fair Trial Attributes' *bdnews24* (Dhaka, 28 March 2013) <http://opinion.bdnews24.com/2013/03/28/legal-framework-of-ict-and-fair-trial-attributes/> accessed 21 May 2017; Tureen Afroz (ed), *Genocide, War Crimes & Crimes Against Humanity in Bangladesh: Trial under International Crimes (Tribunals) Act, 1973* (Forum for Secular Bangladesh and Trial of War Criminals of 1971 2010).

[6] Beth Van Schaack, 'The Bangladesh International Crimes Tribunal (BICT): Complementarity Gone Bad'(*IntLawGrrls*, 8 October 2014) <https://ilg2.org/2014/10/08/the-bangladesh-international-crimes-tribunal-bict-complementarity-gone-bad/> accessed 6 August 2017.

[7] Abdus Samad, 'The International Crimes Tribunal in Bangladesh and International Law' (2016) 27 Criminal Law Forum 257, 290; See also, Abdur Razzaq, 'The Tribunals in Bangladesh: Falling Short of International Standards' in Kirsten Sellars (ed), *Trials for International Crimes in Asia* (Cambridge University Press 2016) 341-359; Suzannah Linton, 'Completing the Circle: Accountability for the Crimes of the 1971 Bangladesh War of Liberation' (2010) 21 Criminal Law Forum 191.

[8] 'Bangladesh: Halt Imminent War Crimes Executions Impose Immediate Moratorium on the Death Penalty' (*Human Rights Watch*, 1 September 2016) <https://www.hrw.org/news/2016/09/01/bangladesh-halt-imminent-war-crimes-executions> accessed 8 March 2017.

[9] Toby M Cadman, 'The International Crimes Tribunal Bangladesh: International Standards and Fundamental Freedoms' (*9 Bedford Row International*, 12 December 2011) 9 <http://tobycadman.com/files/ICT_BD_Memorandum2.pdf> accessed 7 August 2017.

between the conflicting camps seeking "prosecution of persons accused of atrocities" and those arguing that the judicial mechanism set in place in Bangladesh is "inherently flawed".[10] This view was echoed by several experts of international law in March 2016 when they recommended the staying of ongoing trials and unexecuted sentences "pending an independent international review" and the establishment of an "internationally supervised mechanism" by the United Nations that implements "recognised due process rights" and adopts "fair trial protections" guaranteed by the Constitution of Bangladesh and those international instruments to which Bangladesh is "obliged to observe" as a State Party.[11] Some academics and international law practitioners, nonetheless concede that while the ICTs have suffered from "teething problems"[12] and like any justice system is not devoid of shortcomings, many of the criticisms directed at them ought to be "ignored or dismissed" because they are based "more on supposition than substance" and are framed to "obstruct and undermine the judicial process for political ends".[13]

The aim of this thesis is to determine the legality and the legitimacy of the International Crimes Tribunals (ICTs) of Bangladesh through the prism of the principle of complementarity with particular reference to the "principles of due

[10] Toby M Cadman, 'Bangladesh International Crimes Tribunal: Commentary on the Application of International Standards' (*9 Bedford Row International*, December 2013) 24-25 <http://tobycadman.com/wp-content/uploads/2014/06/131121-Bangladesh-Briefing-Document-December.pdf> accessed 7 August 2017.

[11] 'International Legal Experts Express Concern Over the Lack of an Appropriate Accountability Mechanism in Bangladesh and Calls on the United Nations to Support an Internationally Supervised Mechanism' (*Toby Cadman*, 31 May 2016) <http://tobycadman.com/international-legal-experts-express-concern-over-the-lack-of-an-appropriate-accountability-mechanism-in-bangladesh-and-calls-on-the-united-nations-to-support-an-internationally-supervised-mechanism/> accessed 6 August 2017; Desmond de Silva, 'The Bangladesh War Crimes Tribunal Should be Internationalised - for the Sake of the Nation's Future' (*No Peace Without Justice*) <http://www.npwj.org/ICC/Bangladesh-War-Crimes-Tribunal-should-be-internationalised-sake-nation%E2%80%99s-future.html> accessed 6 August 2017.

[12] Islam (n 5) 317.

[13] Richard Rogers, 'International Crimes and the Tribunal in Bangladesh' (2012) 6(5) Forum <http://archive.thedailystar.net/forum/2012/May/international.htm> accessed 21 May 2017.

process recognized by international law".[14] For that purpose, the ongoing and subsequent Chapters analyse at length the major criticisms of the ICTs that have emerged from the international community. These criticisms include, the retroactive application of statutory provisions of the ICTA and the amendment enabling the Prosecution to appeal against the sentence of life imprisonment given to Abdul Quader Molla, the passing of the death penalty by the ICTs and the Supreme Court of Bangladesh, the application of Articles 47(3) and 47A of the Constitution of the People's Republic of Bangladesh, which provides constitutional protection to the ICTA and bars those charged with international crimes from moving the Supreme Court to benefit from the remedies guaranteed under Bangladesh's Constitution, the practice of limiting the number of defence witnesses, and finally the holding of trials in absentia. These criticisms have been grouped into two broad categories, namely, criticisms of statutory provisions of the ICTA which are analysed in the ongoing and subsequent Chapter (IV and V) and criticisms of the trial process under the ICTs which are analysed in Chapters VI and VII.

In three parts, this Chapter identifies and analyses the major criticisms relating to the principle of legality that have been directed towards the ICTA. Part I discusses the relationship between the ICTA and the general concept of "international standards" of justice. Part II offers a theoretical and historical appreciation of the principle of legality, which synonymously is known as the rule against *ex post facto* or retroactive law. Part III critiques three specific provisions of the ICTA that critics allege are incompatible with the principle of legality.

[14] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, article 17(2).

1. The relationship between the ICTA and international standards of justice

Critics argue that the overall fairness of the ongoing justice process in Bangladesh should be assessed against the "international standards"[15] of justice, fairness or due process which not only "imposes far greater demands on a process of accountability than it did in 1973" but has "redefined" our understanding of international criminal law.[16] This suggests assessing the major areas of contention surrounding the ICTA and the ICTs should start with an examination of the relationship between the ICTA and the general concept of "international standards" of justice.

The statutory provisions of the ICTA reflected the standards of justice that existed during the early 1970s.[17] Just as the German Tribunals formed in 1945 under Control Council Law No. 10 in Germany were an improvement on the proceedings of the Nuremberg trials, the Israeli Nazis and Nazi Collaborators (Punishment) Law 5710-1950[18] and the Bangladeshi ICTA have been interpreted as "progressive [...] for its time".[19] Members of the academic and legal community lauded Bangladesh for adopting the ICTA at a time when there was a "void in the world of international

[15] The phrase "international standards" has been used on countless occasions by critics of the trial process ongoing in Bangladesh. Linton (n 7) 191; 'Bangladesh International Crimes Tribunal Should Pursue Justice, Not Vengeance' (*International Commission of Jurists*, 28 February 2013) <https://www.icj.org/bangladesh-international-crimes-tribunal-should-pursue-justice-not-vengeance/> accessed 10 August 2017; 'Bangladesh: War Crimes Verdict Based on Flawed Trial' (*Human Rights Watch*, 22 March 2016) <https://www.hrw.org/news/2016/03/22/bangladesh-war-crimes-verdict-based-flawed-trial> accessed 10 August 2017.

[16] Linton (n 7) 209.

[17] Brad Adams, 'Letter to Prime Minister Sheikh Hasina Re: International Crimes (Tribunals) Act' (*Human Rights Watch,* 8 July 2009) <http://www.hrw.org/news/2009/07/08/letter-prime-minister-sheikh-hasina-re-international-crimes-tribunals-act> accessed 9 August 2017.

[18] Nazis and Nazi Collaborators (Punishment) Law 5710-1950 <https://www.icrc.org/applic/ihl/ihl-nat.nsf/0/aacf823ae32ab469c12575ae0034c1fe/$FILE/Law%20no.%2064.pdf> accessed 9 August 2017.

[19] Linton (n 7) 208.

machinery to prosecute perpetrators of international crimes" and described the effort as "remarkable and admirable".[20]

For nearly forty years, however, the key statutory provisions of the ICTA remained significantly unchanged.[21] In 2010, the Bangladesh Government established the first ICT to prosecute and punish the perpetrators of international crimes through a legislation that had never been applied since its creation. In the meantime, the *corpus juris* of international criminal law had gradually evolved through the trials and proceedings of multiple justice initiatives and the human rights movement had gained momentum resulting in the development of international human rights law.[22] This was acknowledged in a letter to the Bangladeshi Ministry of Foreign Affairs and the Law, Justice and Parliamentary Affairs, where Stephen J Rapp the former US Ambassador-at-Large for War Crimes Issues commented that it would be problematic to operate "a tribunal in 2011 using a law created forty years ago" because international humanitarian law had developed more fully since the Nuremberg Code "thanks to the Tribunals for Rwanda and Yugoslavia, the Special Court for Sierra Leone and the creation of the International Criminal Court."[23] The first criticism towards the ICTA relating to "international standards" was recorded in a report titled "Ignoring Executions and Torture - Impunity for Bangladesh's Security Forces."[24] Published by

[20] M Amir-Ul Islam, 'Towards the Prosecution of Core International Crimes Before the International Crimes Tribunal' in Morten Bergsmo and CHEAH Wui Ling (eds), *Old Evidence and Core International Crimes* (TOAEP 2012) 217 <http://www.toaep.org/ps-pdf/16-bergsmo-cheah> accessed 9 August 2017; Linton (n 7) 208.
[21] After 1973, a few amendments were introduced to the ICTA in 2009, 2012 and 2013. See, (n 3).
[22] Examples of justice initiatives include, the International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), Extraordinary Chambers in the Courts of Cambodia (ECCC), Special Court for Sierra Leone (SCSL) and other trials held in purely domestic settings of Germany, Bosnia and Herzegovina, Canada, Norway etc.
[23] Letter from Stephen J Rapp to Dr Dipu Moni and Barrister Shafique Ahmed (21 March 2011).
[24] Henrik Alffram, *Ignoring Executions and Torture Impunity for Bangladesh's Security Forces* (Human Rights Watch 2009) <http://www.hrw.org/sites/default/files/reports/bangladesh0509web.pdf> accessed 12 August 2017.

Human Rights Watch in May 2009, before the ICTs had been established, the report observed that the ICTA did not require the application of Bangladeshi laws relating to criminal procedure or evidence and expressed concern that the trials held under it "may not meet international fair trial standards and [...] be subject to political influence."[25] As the ICTs were set up and the trials were underway, the growing list of criticisms were all extensions of the initial criticism that "international standards" of justice were not being upheld.

Although the phrase "international standards" of justice has been used on many occasions to assess the ICTA and the ICTs, as a general concept it is not well-defined in international law. In a position paper by the Ministry of Foreign Affairs of the Bangladesh Government, it was argued that although the term "international standard" does not "connote any concrete definition as per international law", the ICTs have treated international human rights instruments such as the International Covenant on Civil and Politics Rights (ICCPR) as the benchmark to assess whether their proceedings comply with "so-called 'international standards'".[26]

Amongst critics, there is noticeable disagreement with regards to which set of "international standards" ought to be followed. In one of the earliest detailed examinations of the ICTA, Suzannah Linton cited "Article 33 new" of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia to point out that "international standards of justice, fairness and due process of law" were set out in Articles 14 and 15 of the ICCPR.[27] Some international lawyers including counsel

[25] ibid 12.
[26] Ministry of Foreign Affairs (n 3) 2.
[27] Linton (n 7) 290.

defending the accused have stressed that in addition to the guarantees of the ICCPR, the ICTA and the ICTs must employ the "spirit of the Statute of Rome" as a requirement under the principle of complementarity.[28] Others have called for the adoption of the rules and procedures followed by the "Special Court for Sierra Leone and similar bodies".[29] According to Geoffrey Robertson QC, the sources of "international standards of fairness" include the ICCPR, UN Economic and Social Council's Safeguards guaranteeing protection of the rights of those facing the death penalty 1984 and the General Comments of the UN Human Rights Committee.[30]

In light of these positions, it is worth taking a brief look at the relationship the legal system of Bangladesh shares with international law. The Bangladesh Constitution refers to international law on two occasions. Article 25 of the judicially unenforceable 'Fundamental Principles of State Policy'[31] of the Constitution states: "The State shall base its international relations on the principles of respect for national sovereignty and equality, non-interference in the internal affairs of other countries, peaceful settlement of international disputes, and respect for international law and the principles enunciated in the United Nations Charter, […]."[32] Article 145A which governs the

[28] Toby M Cadman and Sarah Bafadhel, 'Courting Controversy – Representing Accused Before the International Crimes Tribunal in Bangladesh' (2011) 3 Criminal Bar Quarterly 13; British Barrister John Cammegh said: "This is a fanciful notion to suggest that this was a mature Tribunal set up to try current modern offences. There was no modernity to it at all. There could have been, had the trial been run on consistent lines with the ICC. Now the International Criminal Court has very well laid down rules of evidence, definitions of crimes, rules of procedure." See, Al Jazeera English, 'Inside Story - Bangladesh Executions: Justice or Political Rivalry?' (22 November 2015) <https://www.youtube.com/watch?v=G-O2w18cYgA&t=13s> accessed 10 August 2017; Letter from Stephen J Rapp to Dr Dipu Moni and Barrister Shafique Ahmed (n 23); International Crimes Strategy Forum, 'Stephen Rapp: of Misconceptions, Unrealistic Expectations and Double Standards' (n 5).
[29] Sir Desmond de Silva (n 11).
[30] Geoffrey Robertson, *Report on the International Crimes Tribunal of Bangladesh* (International Forum for Democracy and Human Rights 2015) 72-75, 85 & 114.
[31] (n 2) article 8(2) explains that the principles set out in Part II "shall be fundamental to the governance of Bangladesh, shall be applied by the State in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the State and of its citizens, but shall not be judicially enforceable."
[32] ibid article 25.

adoption and codification of international treaties in domestic law and provides that a treaty shall be laid down by the President for discussion in the Parliament.[33] Both these provisions must be interpreted in light of Article 7(2) which sets out that the Constitution is the "supreme law of the Republic" and therefore overrides both national and international law.[34] As time has progressed, case-law has clarified that in case of conflict, national law shall prevail.[35] International law therefore has limited influence on Bangladesh's legal order.

According to Bianca Karim and Tirza Theunissen, since Bangladesh is a country with a "dualistic common law tradition", international treaties need to be incorporated into domestic legislation before they can become legally enforceable.[36] This has been acknowledged in multiple judgments including *Hussain Muhammad Ershad v Bangladesh*[37] where the Appellate Division of the Supreme Court of Bangladesh held: "it is [true] that Universal Human Rights norms, whether given in the Universal Declaration or in the Covenants, are not directly enforceable in national Courts. But if their provisions are incorporated into the domestic law, they are enforceable in national Courts."[38] In the absence of any constitutional provision clearly depicting the status of 'customary international law' in the legal order of Bangladesh, it remains a

[33] Bianca Karim and Tirza Theunissen, 'Bangladesh' in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press 2012) 3; ibid article 145A.
[34] (n 2) article 7(2) reads: "This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."; Bianca Karim and Tirza Theunissen, 'Bangladesh' in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press 2012) 10.
[35] Karim and Theunissen (n 33) 10.
[36] ibid 4.
[37] *Hussain Muhammad Ershad v Bangladesh & Ors* 21 BLD (2001) AD 69.
[38] Karim and Theunissen (n 33) 5; In *Bangladesh v Sombon Asavhan* 32 DLR (1980) AD 198, the Appellate Division of the Supreme Court held: "It is well settled that where there is municipal law on an international subject the national court's function is to enforce the municipal law within the plain meaning of the statute."

generally accepted principle that customary international law is binding as long as it does not contradict domestic law.[39] Therefore, in situations where courts are left with the option of enforcing either a municipal law or the customary international law on a given subject, the trend in Bangladesh is to give effect to the municipal law.[40]

The same principle applies for international covenants and conventions that have been ratified but are yet to form a part of the *corpus juris* of the State via incorporating domestic legislation.[41] This, however, does not prevent courts from utilizing relevant international law as an aid to interpreting provisions of Part III of the Constitution which enumerates the judicially enforceable fundamental rights. Justice Bimalendu Bikash Roy Choudhury has recognized that national Courts should not straightaway ignore international obligations undertaken by Bangladesh and that they "should draw upon the principles incorporated in the international instruments" when domestic laws are unclear or are silent on the issue at hand and that "beneficial provisions of international instruments should be implemented as is the obligation of a signatory State."[42] When it comes to interpreting the fundamental rights enshrined in Part III of the Constitution, Bangladesh Courts have referred to international covenants and conventions in the past.[43] For instance, in *Salma Sobhan v Government of Bangladesh*[44] the High Court Division of the Supreme Court referred to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

[39] Karim and Theunissen (n 33) 8; Karim and Theunissen have argued that Article 25 "has been interpreted as containing certain basic principles of customary international law which are considered to be jus cogens"; *Bangladesh v Unimarine S.A. Panama* 29 DLR (1977) 252.
[40] Karim and Theunissen (n 33) 10.
[41] *Chaudhury and Kendra v Bangladesh and Ors,* Writ petition, No 7977 of 2008, 29 BLD (2009) HCD; *Bangladesh v Sheikh Hasina* 60 DLR (2008) AD 90.
[42] *Hussain Muhammad Ershad v Bangladesh & Ors* (n 37); *State v Md Roushan Mondal Hashem* 26 BLD (2006) HCD 549 (Justice B B Roy Choudhury).
[43] Karim and Theunissen (n 33) 111.
[44] ibid (n 33) 53.

Punishment to conclude that the practice of chaining prisoners with bar fetters was a "cruel, inhuman and degrading treatment and therefore constituted a violation of fundamental rights."[45]

The Supreme Court has in the past relied upon the ICCPR, the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), General Comment No. 7 of the Human Rights Committee, a World Health Organization resolution and the Convention on the Reduction of Statelessness to interpret and apply the fundamental rights guaranteed by the Constitution. On appeal in *Abdul Quader Molla v The Chief Prosecutor*[46], Justice Surendra Kumar Sinha acknowledged the persuasive authority the judgments passed by international tribunals had on the proceedings of the ICTs. He explained that although the need to infuse provisions of international law did not arise because of the "fulsome, comprehensive and unambiguous" provisions of the ICTA, Judges when interpreting and applying the law could take the aid of the "ratio or observation[s]" and "decisions" of Nuremberg and Tribunals created by the United Nations as persuasive precedents as long as there was no conflict between them and the ICTA.[47]

It is important to note that the above discussion explains the relationship the legal system of Bangladesh shares with 'international law' and is relevant to this thesis only to the extent that it speaks to the legality of the ICTs, not their legitimacy. International standards of justice should not be ignored. However, if the requirement for trials taking

[45] ibid (n 33) 111.
[46] *Abdul Quader Molla v The Chief Prosecutor* (Appellate Division) Criminal Appeal No 24 - 25 of 2013 < http://www.supremecourt.gov.bd/resources/documents/601845_CrlA_24_25_2013.pdf > accessed 10 August 2017.
[47] ibid 574 – 575.

place within a national criminal jurisdiction to be described as 'independent' or 'impartial' is to adhere to the highest "international standards" of justice, it is possible that such trials will invariably fall short of the benchmark and as a result automatically be described as unfair or illegitimate. Chapter III has already demonstrated that the 'complementary' system of justice does not require national criminal jurisdictions to adopt the judicial standards of the Rome Statute. Rather, when assessing 'independence' or 'impartiality', or in other words the 'fairness' of any domestic justice mechanism prosecuting international crimes, the ICC is obligated by Article 17(2) to perform an evaluation using the "principles of due process recognized by international law" as the benchmark. While carrying out this assessment, the ICC should be receptive towards the "diversity of legal systems, traditions and cultures", but also ensure that "violations of the rights" of the accused that are of "egregious" nature are not permitted in the name of 'diversity'.[48] Therefore, the persistent and sweeping insistence by the representatives of the Bangladesh Government and critics that the ICTA and the ICTs either do or do not reflect "international standards" is not just an inaccurate position to take but is also the incorrect benchmark to adopt for the purposes of assessing the legality and legitimacy of the ICTs.

2. The principle of legality and the ICTA

[48] Office of the Prosecutor, 'Paper on some policy issues before the Office of the Prosecutor' (*International Criminal Court*, September 2003) 5 < https://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf > accessed 24 September 2017; *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi'") ICC-O1/11-01/11OA6 (24 July 2014) [3] < https://www.icc-cpi.int/CourtRecords/CR2014_06755.PDF > accessed 15 March 2016.

The principle of legality, also known as the rule against *ex post facto* or retroactive law, remains a recurring point of tension in the global struggle against impunity.[49] This Chapter analyses the major areas of contention surrounding the ICTA relating to the principle of legality. To that end, this part offers a theoretical and historical appreciation of the principle. It argues that although the amount of importance given to the principle of legality has significantly increased over the years, it does not prohibit the prosecution of international crimes by way of a retroactively applied law as long as the crimes defined in that law were criminalised under international law or the general principles of law recognised by the community of nations. The principle also doesn't bar the progressive development of the law, provided that the developed law retains the essence of the original crime.

2.1 *A theoretical and historical appreciation of the principle of legality*

The principle of legality is formulated as *nullum crimen, nulla poena sine lege*, a phrase coined by German scholar Anselm Feuerbach.[50] A fundamental tenet of "democratic criminal law"[51] that emerged as "a reaction against the system of absolute discretion in the sphere of legislation and jurisprudence",[52] it is also often alternatively expressed as the ban of analogy, principle of specificity and non-retroactivity.[53] The

[49] Shane Darcy, 'The Principle of Legality at the Crossroads of Human Rights and International Criminal Law' in Margaret de Guzman and Diane Amann (eds), *Arcs of Global Justice; Essays in Honor of William A. Schabas* (Oxford University Press 2016) 1.
[50] Paul J A Ritter von Feuerbach, 'The Foundations of Criminal Law and the Nullum Crimen Principle' (2007) 5 Journal of International Criminal Justice 1005, 1008.
[51] This phrase was coined by Stefan Glaser in his essay, 'Nullum Crimen Sine Lege' (1942) 24 (I) Journal of Comparative Legislation and International Law 29.
[52] ibid 30.
[53] Hans-Heinrich Jescheck, 'The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute' (2004) 2 Journal of International Criminal Justice 38, 40; Hans Kelsen, 'The Rule Against Ex Post Laws and the Prosecution of the Axis War Criminals' (1945) 2 (3) The Judge Advocate Journal 8.

principle of legality finds its origins in the doctrine of *strict legality*[54] and hence symbolizes the preference of *favour rei* over *favor societatis*[55] by placing a bar on the extension of scope and purport of a criminal rule to a matter that is unregulated by law and prohibiting the prosecution of crimes through *ex post facto* legislation.[56] Although its genesis remains a matter of limited academic debate, Antonio Cassese has argued that strict legality was initially expressed in Article 39 of the Magna Carta libertatum of 1205 and found its "philosophical and political underpinnings" in the works of the principal thinkers of the Enlightenment.[57] Definite traces of strict legality are also found within the writings of Montesquieu, Cesar Beccaria and Franz von Liszt and also legal instruments such as the American Declaration of Rights and Grievances, 1774 and the French Declaration of the Rights of Man and of the Citizen, 1789.

Evaluations of the 'past' reveal that *nullum crimen* was not always unanimously agreed upon across civil and common law jurisdictions. Over the years multiple considerations have gradually strengthened the foundations and cemented the universal acceptance of the principle of legality, all of which are founded on the notions of ensuring clarity of law coupled with among other things, the fair and foreseeable administration of justice.[58] One of the guiding principles of *nullum crimen* is that "the idea of guilt demands consciousness of illegality".[59] Therefore, as a

[54] See generally, Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law* (3rd edn, Oxford University Press 2013) 22-23; Glaser (n 51) 29-30; Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (2nd edn, Cambridge University Press 2011) 17-20.
[55] *Favour rei* imposes that in case of doubt a rule should be interpreted in such a manner as to favour the accused. Whereas *favour societas* favours the society over the individual. See, Cassese and Gaeta (n 54) 29.
[56] ibid 23 & 33.
[57] ibid 23.
[58] Kenneth Gallant presents the following four purposes: protection of individual human rights; legitimacy of governance; the separation of state powers; and the promotion of the purposes of criminalization.
[59] Glaser (n 51) 34.

principle, it bases itself on the idea that persons who reasonably believed their conduct was lawful from retroactive criminalization do not deserve to be prosecuted, unlike those who were aware that their conduct was of 'criminal' nature.[60] According to Andrew Ashworth, the essence of *nullum crimen* is that, "a person should never be convicted or punished except in accordance with a previously declared offence governing the conduct in question."[61] The objective underlying this bar on *ex post facto* prosecution is to safeguard citizens against the arbitrary power of the government and also the possibility of excessive judicial discretion.[62]

Franz von Liszt described *nullum crimen* as the "magna carta of the delinquent"[63] and emphasized the importance of this principle in uncompromising terms. Liszt argued that the reinforcing of maxims such as *nullum crimen sine lege* and *nullum poena sine lege*[64] in criminal codes protected "the bulwark of the citizen against the State's omnipotence, the individual against the ruthless power of the majority, against the Leviathan."[65] *Nullum crimen* over the years gained support from the Nuremberg judgments, Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) and has transformed from being a principle of justice to an internationally recognized human right that forms an integral

[60] Linton (n 7) 209.
[61] Andrew Ashworth, *General Principles of Criminal Law* (3rd edn, Oxford University Press 1999) 71; See also, Maggie Gardner, 'Piracy Prosecutions in National Courts' (2012) 10 Journal of International Criminal Justice 797, 818.
[62] Cassese and Gaeta (n 54) 24.
[63] Glaser (n 51) 34.
[64] Steven R Ratner and Jason S Abrams, *Acountability for Human Rights Atrocities in International Law* (2nd edn, Oxford University Press 2001) 21.
[65] Franz von Liszt, 'The Rationale for the Nullum Crimen Principle' (2007) 5 Journal of International Criminal Justice 1009, 1010; Glaser (n 51) 30.

part of our conscience of penal justice and must be observed in all circumstances in national and international tribunals.[66]

Early on, international criminal law was driven by the doctrine of *substantive justice* which prompted the legal order to prohibit and punish socially harmful conduct irrespective of whether that conduct was legally criminalized at the time it had taken place.[67] Cassese argues that this was not due to the presence of a totalitarian streak in international society but rather because states were not prepared to enter into treaties laying down criminal rules and customary international rules covering this area had not evolved.[68]

The preference towards strict legality was, however, manifest during the Paris Peace Conference in 1919 when the first international prosecutions were being conceived.[69] The Commission of Responsibilities pointed out that while the premeditation of a war of aggression was something the public conscience would reprove and history would condemn, it was not "an act contrary to positive law".[70] When the Commission contemplated the possibility of prosecuting individuals for the breach of the "laws and principles of humanity", American negotiators Robert Lansing and James Brown Scott objected on the grounds that "an act could not be a crime in the legal sense of the word,

[66] Kenneth S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press 2009) 3; Sara Wharton, 'The Evolution of International Criminal Law: Prosecuting 'New' Crimes before the Special Court of Sierra Leone' (2011) 11 International Criminal Law Review 217, 225; Glaser (n 51) 37.
[67] Wharton (n 66) 225.
[68] Cassese and Gaeta (n 54).
[69] William Schabas, *Unimaginable Atrocities - Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford University Press 2012) 49.
[70] ibid 49.

unless it were made by law, and that the commission of an act declared to be a crime by law could not be punished unless the law prescribed the penalty to be inflicted."[71]

It was only after the Second World War, as the "modern law of human rights"[72] began to gradually take centre stage, that the doctrine of *substantive justice* was replaced by *strict legality* – granting *nullum crimen* a stronger footing in the arena of international criminal law not just as a principle of justice but an internationally recognized human right.[73] In *Göring and others* the International Military Tribunal (IMT) faced strong objections of the German defence counsel on the grounds that it was not allowed to apply *ex post facto* law. Counsel representing the defendants argued in favour of *nullum crimen sine lege, nulla poena sine lege*[74] as a "fundamental principle of all law - international and domestic" and that:

> ex post facto punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time that the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.[75]

Whether the irony of this argument occurred to Hermann Wilhelm Göring and his colleagues is unknown. But in 1935 the Nazi regime had abolished the rule against

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[71] Paris Peace Conference, *Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports of America and Japanese Members of the Commission on Responsibilities, Conference of Paris, 1919* (Clarendon Press 1919); ibid 49.
[72] Cryer, Friman, Robinson and Wilmshurst (n 54) 18.
[73] Cassese and Gaeta (n 54) 24-27; Gallant (n 66) 3.
[74] n 50.
[75] 'Judicial Decisions, International Military Tribunal (Nuremberg), Judgment and Sentences October 1, 1946' (1947) 41 American Journal of International Law 172, 217.

retroactive criminal legislation, which had previously been enshrined in paragraph 2 of the German Criminal Code of 15 May, 1871 and Article 116 of the Weimar Constitution.[76] Hans Kelsen notes that this abolition was embraced in Nazi literature with high praise. When faced with the death penalty, Göring's lawyers had insisted upon the fundamental nature of the principle of legality – one that could not be compromised, yet during the ascension of Nazi Germany, its decrees in the Free City of Danzig had allowed courts to punish new crimes where they are "deserving of penalty according to the fundamental conceptions of a penal law and sound popular feeling".[77] Although these decrees were consistent with European codifications that extended legislation by analogy,[78] their scope was condemned by the Permanent Court of International Justice on the ground that they were irreconcilable with the bar on retroactive punishment in the Constitution of the Free City, which was approved and guaranteed by the League of Nations.[79]

Nuremberg did not leave this question unanswered. It was argued that the IMT was bound by its Statute, the London Agreement of 8th August 1945, which was "not an arbitrary exercise of power on the part of the victorious nations, but […] the expression of International Law existing at the time of its creation; and […] a contribution to International Law."[80] Intriguingly, the Tribunal did not shy away from expressing its

[76] Paragraph 2 of the German Criminal Code which originally read: "For no act may punishment be imposed unless such punishment is prescribed by statute before the act has been committed." On June 28, 1945, it was amended to read: "Anyone shall be punished who commits an act which is declared punishable by statute or which deserves a penalty according to the basic principles of a criminal statute and of the people's sound sense of justice." See, Kelsen (n 53) 11-12.
[77] Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, Series A/B No. 65 (1935), p. 52 cited in Schabas (n 69) 50.
[78] William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 411.
[79] John Brown Mason, *The Danzig Dilemma; a Study in Peacemaking by Compromise* (Stanford University Press 1946) 64.
[80] 'Judicial Decisions, International Military Tribunal (Nuremberg), Judgment and Sentences October 1, 1946' (n 75) 217.

reliance on the philosophical underpinnings of *substantive justice* when it acknowledged that there was a retroactive dimension to the prosecution of crimes against peace. Its decision to prosecute was justified on the grounds that allowing such wrongs to go unpunished would be unjust. Therefore, while one the one hand, Nuremberg recognized *nullum crimen* as general principle of justice,[81] it asserted on the other hand, that *nullum crimen* was a relative principle subject to exception in light of circumstances.[82] The judgment of the IMT delivered on October 1, 1946 read:

> […] the maxim "*nullum crimen sine lege*" is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring States without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.[83]

Other examples further disclose that the trial process did not completely disassociate itself from the mantra of *substantive justice*. For instance in *United States et al. v Araki et al.*, Dutch jurist and justice at the Tokyo War Crimes Tribunal Bernard Victor Aloysius Röling in his dissenting opinion described *nullum crimen* as a rule of policy rather than a non-derogable principle of justice.[84]

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[81] *United States v Josef Altstoetter et al. (The Justice Case)* 3 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No 10 1, 1–6 (US Government Printing Office 1951) 323; Jescheck (n 53) 42.
[82] Schabas (n 69) 50.
[83] 'Judicial Decisions, International Military Tribunal (Nuremberg), Judgment and Sentences October 1, 1946' (n 75) 217.
[84] Cassese and Gaeta (n 54) 25. See also, *United States et al. v Araki et al.* Judgment (Imternational Military Tribunal for the Far East 4 November 1948).

In 1947, Kelsen in "Will Nuremberg Constitute a Precedent?" conceded that the London Agreement had not respected the rule against retroactive punishment. This acknowledgement, however, bore no consequence to Kelsen's final analysis supporting the IMT because to him, the *nullum crimen* was "not valid at all in international law" and "valid within national law only with important exceptions." [85] Conscious of the irony within the argument advocated by counsel defending Göring and his associates, Kelsen in 1945 posed the question as to how the powers that had waged a war to destroy the Nazi regime could use the same detestable principle (i.e. the usage of *ex post facto* laws) that had once seriously discredited the Nazis before the civilized world.[86] Kelsen argued that making use of such a principle was not necessary because there were better arguments substantiating that the rule against *ex post facto* laws did not apply in the prosecution of German war criminals.[87]

The IMT has been subjected to a fair share of criticisms. In his dissenting opinion to the Tokyo judgment, Justice Radhabinod Pal was explicit when it came to expressing his reservations about creating crimes that were not in existence when the defendants acted.[88] Justice Pal disagreed with Lord Wright's assertion that the crimes enumerated in the Nuremberg Charter were already crimes under international law.[89] Kenneth

[85] Hans Kelsen, 'Will Nuremberg Constitute a Precedent?' (1947) 1 (2) The International Quarterly 164.
[86] Kelsen (n 53) 12.
[87] ibid 12; Kelsen did not count out the strength of this principle as a supplementary argument. He wrote: "But it may be not superfluous to use, as a supplementary argument, the idea that nobody has a right to take advantage of a principle of justice which he himself does not respect. Otherwise, a murderer could object against capital punishment the commandment "you shall not kill." Any sanction provided by law, be it deprivation of life, freedom, or property, is, by its very nature, the infliction of an evil which, if not carried out as a sanction, that is to say, a reaction against a wrong, is a wrong in itself. The non-application of the rule against ex post facto laws is just a sanction inflicted upon those who have violated this rule and hence have forfeited the privilege to be protected by it."
[88] Gallant (n 66) 1.
[89] ibid.

Gallant has argued that the Nuremberg judgment presenting *nullum crimen* as a nonbinding principle of justice "has a cynical ring to it" because it "carries with it the implication that individual human rights (especially of the evil) fade in the face of the collective powers that make up sovereignty."[90] Yet, what is interesting about Justice Pal's views on the principle of legality, which Gallant relied heavily upon, is that even he did not claim it to be a rule without exceptions. This was clear in Pal's writing:

> The rule denying retroactivity to a law is not that law cannot be made retroactive by its promulgator, but that it should not ordinarily be made so and that if such retroactive operation can be avoided courts should always do that.[91]

With the increasing importance of human rights law, the post-Nuremberg era noted the replacement of the flexible attitudes to the principle of legality with a more restrictive approach. The prohibition on retroactive prosecution is now "seemingly intransigent […] unless it can be shown that the crime existed under international law."[92] This is confirmed in the provisions of multiple instruments of international law, such as, Article 11(2) Universal Declaration of Human Rights, Article 7 European Convention on Human Rights, Article 9 American Convention of Human Rights, Article 15 ICCPR, Articles 99 and 67 of the Third and Fourth Geneva Conventions respectively and Article 75(4)(c) First Additional protocol of 1977 – which pay a "large degree of deference" to the approach adopted at Nuremberg but at the same

[90] ibid 1-2.
[91] Akira Nakamura (ed), *International Military Tribunal for the Far East – Dissenting Judgment of Justice Pal* (Kokusho-Kankokai Inc 1999) 19.
[92] Schabas (n 69) 70.

time implicitly acknowledge that it did not "faithfully respect the *nullum crimen* principle."[93]

Apart from the International Criminal Court which operates prospectively and is deprived of jurisdiction over cases arising before its creation,[94] most legal texts enabling prosecution of core international crimes, either internationally or locally, have been applied with retroactive effect.[95] Starting from the Charter of the International Military Tribunal, the legal instruments creating the ICTY, ICTR, SCSL, the Special Tribunal for Lebanon, the internationalized forums in Kosovo and East Timor, the Iraq Special Tribunal, the Extraordinary Chambers in Cambodia, to the national statutes like the ICTA which have enabled domestic prosecution of international crimes, all have served to retroactively deal with crimes committed in the past.[96] Although the statutes governing judicial forums like the ICTY, ICTR and the ECHR profess rigid adherence to the principle of legality, the approach taken in practice is relatively relaxed and bears an element of "malleability",[97] resembling the kind taken at Nuremberg. This is why their judgments reflect that the principle of *nullum crimen sine lege* "does not bar progressive development of the law, provided that the developed law retains the essence of the original crime."[98]

According to William Schabas, questions relating to retroactivity have "obsessed international criminal justice since its earliest days" and has resulted in "unceasing

[93] Schabas (n 69) 70-71; Cassese and Gaeta (n 54) 26.
[94] Rome Statute of the International Criminal Court (n 14) article 11 cited in Gallant (n 66) 320.
[95] Schabas (n 69) 64 & 66.
[96] ibid 320 & 369.
[97] ibid 71.
[98] Wharton (n 66) 225-226; Mohamed Shahabuddeen, 'Does the Principle of Legality Stand in the Way of Progressive Development of Law?' (2004) 2 Journal of International Criminal Justice 1007.

controversy",[99] so much so, that counsels defending accused charged with core international crimes have adopted the violation of *nullum crimen sine lege, nulla poena sine lege*[100] as a standard defence strategy. Schabas acknowledges, however, that defence challenges based on violations of the principle of legality are usually unsuccessful.[101] The core logic so far adopted by the UN mandated *ad hoc* tribunals has been that prosecutions based on a retroactively applied law does not violate the principle of legality because they reflect the rules of customary international law which were in existence at the time of the commission of the offence.[102] This was the case in *Celibici* where counsel representing Hazim Delic unsuccessfully demanded the dismissal of all counts in the indictment based on Article 2 of the Geneva Conventions on the grounds that "the application of the Geneva Conventions to acts which occurred before the date of Bosnia and Herzegovina's 'accession' would violate the principle of legality or *nullum crimen sine lege*."[103] The Appeals Chamber of the ICTY explained that the purpose of the principle of legality was "to prevent the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission" and that the accused's claim not to recognize the "criminal nature of the acts alleged in the Indictment" lacked credibility and the fact that they "could not foresee the creation of an International Tribunal which would be

[99] Schabas (n 69) 48; Cassese and Gaeta (n 54) 22.
[100] Steven R Ratner and Jason S Abrams, *Acountability for Human Rights Atrocities in International Law* (2nd edn, Oxford University Press 2001) 21.
[101] William A Schabas, *The UN International Criminal Tribunals – The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press 2006) 65; Valentina Spiga, 'Non-retroactivity of Criminal Law – A New Chapter in the Hissène Habré Saga' (2011) 9 Journal of International Criminal Justice 5, 11; Jordan J Paust, 'It's No Defence: Nullum Crimen, International Law and Gingerbread Men' (1997) 60 Albany Law Review 657, 664-671.
[102] Schabas (n 101) 65.
[103] *Celebici Case* (Judgment) ICTY-96-21-A (20 February 2001) [107].

the forum for prosecution" was inconsequential.[104] Similar pronouncements have been made by the Trials and Appeals Chamber of the ICTR and the SCSL.[105]

In 1998, ICTY President Theodor Meron offered a glowing tribute to the principle of legality claiming that it was "a customary, even peremptory, norm of international law that must in all circumstances be observed in all circumstances by national and international tribunals."[106] The granting of *jus cogens*-like status to *nullum crimen* is nevertheless perceived with unease, due to the already prevalent "varying interpretations as to the scope of the principle."[107] The belief that a strict application of *nullum crimen* in criminal law is "slightly unrealistic" has endured over the years in light of the harsh reality that gross violations of crimes should not go unpunished and evil of such proportions, as Gallant notes, "may not be fully predictable in advance."[108] This is why even the *Meronian* form of *nullum crimen* is not without qualifications, one of them being that prosecuting international crimes by way of a law adopted after the commission of the crimes does not violate the prohibition against retroactive prosecutions, as long as the crimes defined were criminalized under international law or according to the general principles of law recognized by the community of the nations.[109] Therefore, in order to prosecute international crimes and at the same time preserve the principle of *nullum crimen*, legislators need to first check

[104] ibid [179] - [180] & [817].
[105] See, *The Prosecutor v Laurent Semanza* (Trial Judgment) ICTR-97-20-T (15 May 2003) [353]; *Prosecutor v Brima et al.* (Written Reasons for the Trial Chamber's Oral Decision on the Defence Motion on Abuse of Process Due to Infringement of Principles of *Nullum Crimen Sine Lege* and Non-Retroactivity as to Several Counts) SCSL-04-16-PT (31 March 2004) [33]; *Prosecutor v Sesay, Kallon and Gbao* (Trial Judgment) SCSL-04-15-T (2 March 2009) [67] – [68].
[106] Theodor Meron (ed), *War Crimes Law Comes of Age* (Oxford University Press 1998) 244 cited in Kenneth S Gallant, *The Principle of Legality in International and Comparative Law* (Cambridge University Press 2009) 3.
[107] William A Schabas, *An Introduction to the International Criminal Court* (4th edn, Cambridge University Press 2011) 73 quoted in Shane Darcy (n 49) 3.
[108] Gallant (n 66) 320.
[109] Spiga (n 101) 12.

that the law being 'used' does not criminalize conduct that was previously not prohibited by a criminal rule and further ensure that the law being created reflects customary international law.[110]

Contemporary scholars like Valentina Spiga and Shane Darcy who have written on *nullum crimen* acknowledge that the principle is prone to speculation and interpretation because of the 'vagueness' of the content of its exceptions. It has been argued that attention should be given to the "degree of accessibility and foreseeability" of criminal rules that are allowed to be applied retroactively.[111] Although Spiga and Darcy are not against the idea of domestic courts resorting to these exceptions in order to try an accused without contravening the principle of *nullum crimen*, the exercise of referring to 'international customary law' or 'general principles of law' may transform into a "dangerous Pandora's box in the hands of a tyrannical judicial power."[112]

On the basis of this theoretical and historical appreciation, the following Part analyses the major areas of contention surrounding the ICTA which relate to the principle of legality.

3. The ICTA and the principle of legality – three strains of incompatibility

According to critics, three statutory provisions of the ICTA are incompatible with the principle of legality. Firstly, Section 3(1) ICTA which provides for the trial and punishment of persons who committed crimes "before or after the commencement" of

[110] Cassese and Gaeta (n 54) 34.
[111] Spiga (n 101) 12.
[112] ibid.

the Act violates Article 35(1) of the Constitution of the People's Republic of Bangladesh.[113] Secondly, the international crimes defined in Section 3(2) ICTA go beyond the state of customary international law that existed in 1971. Thirdly, the retroactive application of the amendment ensuring equality of arms in Section 21 ICTA[114] which allowed for the Prosecution to appeal against the life sentence passed on Abdul Quader Molla was a violation of the principle of legality. This part analyses these criticisms to determine whether these three provisions are compatible with the principle of legality or if they are in fact tools used by a tyrannical judicial power that opens a dangerous Pandora's Box.

3.1 *Does Section 3(1) ICTA violate Article 35(1) of the Constitution?*

Section 3(1) empowers the ICTs to "try and punish any individual or group of individuals, [or organisation,] or any member of any armed, defence or auxiliary forces, irrespective of his nationality, who commits or has committed, in the territory of Bangladesh, whether before or after the commencement of this Act, any of the crimes mentioned in sub-section (2)."[115] Article 35(1) of the Bangladesh Constitution by prohibiting *ex post facto* laws protects persons from facing retroactive prosecution of crimes.[116] It states: "No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than, or different from, that which might have been inflicted under the law in force at the time of the commission of the offence."

[113] Soli J Sorabjee, 'Opinion' (19 May 2010) 7.
[114] (n 1) s 21.
[115] ibid s 3.
[116] Mahmudul Islam, *Constitutional Law of Bangladesh* (3rd edn, Mullik Brothers 2012) 286.

Former Attorney General of India, Soli J Sorabjee has described Section 3(1) as the "most serious infirmity" of the ICTA because it contravenes Article 35(1) "whose thrust is directed against retrospective application of criminal laws."[117] Suzannah Linton equates the Constitutional prohibition against retroactive criminal prosecution to throwing "a spanner in the works".[118]

In order to ascertain the spirit of the Bangladesh Constitution with regard to the detention, prosecution or punishment of core international crimes, Articles 35(1), 47(3) and 47A must be read and interpreted together. Article 47(3) and 47A are directly relevant to and assist in the existence and smooth functioning of the ICTA. Article 47(3) of the Constitution reads:

> 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 any individual, group of individuals or organisation] 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.[119]

[117] Sorabjee (n 113) 7.
[118] Linton (n 7) 214.
[119] (n 2) article 47(3).

Although this does not specifically mention the ICTA or for that matter any law in particular, the fact that the ICTA is the only legislation in Bangladesh with jurisdiction to try persons for committing "genocide, crimes against humanity or war crimes and other crimes under international law", implies that it enjoys enhanced 'constitutional protection' under Article 47(3).[120]

Alongside 47(3), Article 47A takes away an accused's right to challenge the provisions of the ICTA on the ground that they violate the right to protection of the law (Article 31), protection in respect of trial and punishment (Article 35) and the right to enforce fundamental rights guaranteed by the Constitution (Article 44).[121] It is worth recalling at this point that both Articles 47(3) and 47A were inserted into the Constitution through Sections 2 and 3 of the Constitution (First Amendment) Act in 1973 (First Amendment). The 'protection' ensured through these Articles are complemented by Section 26 ICTA which reads: "The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."[122]

When a Constitution embodying the principle of legality sets up a condition to its application with regard to the prosecuting of core international crimes, the setting up of that condition does not automatically run afoul of the principle of legality.[123] When

[120] Mizanur Rahman and S M Masum Billah, 'Prosecuting 'War Crimes' in Domestic Level: The Case of Bangladesh' (2010) I The Northern University Journal of Law 18.
[121] (n 2) article 47(A) reads: (1) The rights guaranteed under article 31, clauses (1) and (3) of article 35 and article 44 shall not apply to any person to whom a law specified in clause (3) of article 47 applies. (2) Notwithstanding anything contained in this Constitution, no person to whom a law specified in clause (3) of article 47 applies shall have the right to move the Supreme Court for any of the remedies under this Constitution.
[122] (n 1) s 26.
[123] Kate Louise Parker, 'Expediency over Fundamental Rights: An Assessment of the Bangladesh International Crimes (Tribunal) Act 1973 (as amended)' (*9 Bedford Row International,* 30 December 2010) <http://www.internationallawbureau.com/blog/wp-

it comes to understanding the exceptions to the prohibition of *ex post facto* criminal laws, Jordan Paust acknowledges that the *nullum crimen* is not violated if "a new forum or a new jurisdictional competence for prosecution of what was criminal at the time of the alleged offense" is created.[124] National and international courts have repeatedly affirmed that the general principles of international criminal law and criminal justice and principles common to major legal systems may be employed to regulate matters that are not covered by specific rules or provisions.[125]

The experiences of members of the Commonwealth as well as countries that have embraced Civil law traditions aid in correctly interpreting the situation in Bangladesh. In 2004 the Supreme Court of Canada in *R v Finta*[126] found that a forty five year delay in initiating prosecution under Canadian war crimes legislation did not amount to an "unreasonable delay" under the Canadian Charter of Rights and Freedoms (Canadian Charter). Although the challenge to the constitutionality of the Canadian war crimes law in *R v Finta* was based on six distinctive constitutional questions, its core challenge revolved around the issue of retroactivity.[127] Similar to the argument adopted by Linton and Sorabjee, *Finta* contended albeit unsuccessfully that the Canadian war crimes law because of its 'retroactive' nature violated Sections 7 and 11(g) of the Canadian Charter. Although, like the Bangladesh Constitution, the Canadian Charter ensures a resolute presumption against *ex post facto* prosecution, Finta's argument failed because Section 11(g) of the Charter reiterates that any person

content/uploads/2011/02/Expediency_over_Fundamental_Rights_-_An_Assessment_of_the_Bangladesh_International_Crimes_Tribunal_Act_1973_as_amended_K._Parker2.pdf> accessed 27 June 2016.

[124] Jordan J Paust, 'Nullum Crimen and Related Claims' (1997) 25 Denver Journal of International Law & Policy 321, 326.

[125] Cassese and Gaeta (n 54) 34.

[126] *R v Finta* (1994) 1 SCR 701, 805.

[127] Judith Hippler Bello and Irwin Cotler, 'Regina v. Finta' (1996) 90 The American Journal of International Law 460, 462.

charged with an offense has the right "not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations."[128] Thus, to the Supreme Court, it was abundantly clear that Section 11(g) was designed to express Parliament's intention to reflect not just Canadian practices and heritage but also the State's international obligations related especially to war criminals.[129] The parallel of Section 11(g) of the Canadian Charter in the Bangladesh Constitution is Article 25 which reads: "The State shall […] respect for international law and the principles enunciated in the United Nations Charter"[130] along with Articles 47(3) and 47A, which confirm that it was and remains the Parliament's intent to detain, prosecute and punishment persons responsible for the commission of core international crimes.

The Australian precedent although distinct in nature from *R v Finta* deserves consideration. In *Polyukhovich v The Commonwealth*, the High Court of Australia upheld the validity of the War Crimes Act 1945 despite being retroactive in nature. In this case, Ivan Polyukovich who was charged with war crimes allegedly committed during the Second World War challenged the constitutional validity of the War Crimes Act 1945 on the ground that it operated retroactively. In the judgment, Justice Daryl Dawson held:

> The ex post facto creation of war crimes may be seen to be justifiable in a way that is not possible with other ex post facto criminal laws, particularly

[128] Constitution Act 1982.
[129] Bello and Cotler (n 127) 462-463.
[130] (n 2) article 25.

> where the conduct proscribed would have been criminal conduct had it occurred within Australia. The wrongful nature of the conduct ought to have been apparent to those who engaged in it even if, because of the circumstances in which the conduct took place, there was no offence against domestic law. And, of course, if the conduct amounted to genocide or a crime against humanity, that comment would be the stronger. This justification for a different approach with respect to war crimes is reflected in the International Covenant on Civil and Political Rights to which Australia became a signatory on 18 December 1972. Article 15(1) of that Covenant forbids the ex post facto creation of criminal offences, but Art. 15(2) provides: "*Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations*.[131]

The *stare decisis* of *Finta* bears more resemblance to Bangladesh's attempt at prosecuting core international crimes than *Polyukovich* because unlike the Canadian Charter and Bangladesh Constitution, the Australian Constitution does not have an express bar against retroactive criminal prosecution. Chronologically speaking, the ongoing application of the International Crimes (Tribunals) Act 1973 in Bangladesh is of *ex post facto* nature. Like the Canadian Charter, the Constitution of Bangladesh embodies the principle of legality but an interpretation of relevant provisions show clearly that the principle will not disallow laws that prosecute core international crimes as long as the conduct in question was "criminal" under international law. Not only

[131] *Polyukhovich v The Commonwealth of Australia and Another* (1991) 172 CLR 501 FC 91/026 [18].

does this amount to an unequivocal expression of "constitutionally ensured" intent, Bangladesh remains obligated also to uphold Article 15(2) of the ICCPR - ratified in 2000, along with the Geneva Conventions of 1949 - ratified immediately after independence in 1972. It is, therefore, fair to conclude that Section 3(1) ICTA does not violate Article 35(1) of the Bangladesh Constitution. What must be ensured that the crimes defined in Section 3(2) of the Act reflect the shape and form of crimes of the likes of genocide, war crimes and crimes against humanity that existed in 1971.

Kelsen observes that an unrestricted prohibition of retroactive legislation leads to "unbearable consequences" and that *nullum crimen*, despite being a basic principle of jurisprudence, was never perceived without "the admission of important exceptions".[132] Sorabjee and Linton's position is suspect because it relies on an isolated reading of Article 35(1) that fails to accommodate other equally important mandates in the form of exceptions enunciated in Bangladesh's Constitution.

3.2 *Does the definition of 'crimes against humanity' in the ICTA violate the principle of legality?*

International crimes enumerated in Section 3(2) ICTA have been under scrutiny for the way they have been defined. Critics allege that definitions lack specificity, preventing the accused from identifying their 'ingredients' and raising a comprehensive defence.[133] The absence of 'ingredients' is the reason some critics have concluded that the framers of the ICTA had done no more than pass off ordinary

[132] Kelsen (n 53) 8.
[133] Cammegh (n 28).

murders as 'war crimes' or 'crimes against humanity' simply because they were committed during wartime.[134] This dearth of 'specificity' that would have otherwise explicitly laid out the elements of crimes, has added fuel to the claim that the ICTA definition of 'crimes against humanity' does not conform to the body of international law as it existed in 1971 or contemporary international law.[135]

The main thrust behind these criticisms is the demand for a revision of these definitions so that they reflect 'international standards'. A unanimous position is yet to be reached with regard to which set of standards should be reflected if the definitions were to be 'revised'. One argument stresses that ICTA crimes should mirror the crimes defined in the ICC Statute which reflect current international standards. The other argument lends weight to the idea that definitions of crimes in the ICTA should reflect crimes as they existed in customary international law when they were committed in 1971.

Interestingly some critics have lent support to both positions at different points in time which adds further confusion to the matter. Human Rights Watch (HRW), for instance, has in the past identified with both camps as is evident in its diverging nature of recommendations. On 8 July, 2009, in a letter to Prime Minister Sheikh Hasina, Brad Adams of HRW suggested that "the definition of genocide, crimes against humanity and war crimes, and the definition of liability for crimes, be amended to be the same as those under the Rome statute of the International Criminal Court so that the court's

[134] Toby Cadman, 'Human Rights in Bangladesh: Hearing Before the Tom Lantos Human Rights Commission House Representatives – One Hundred and Twelfth Congress – Second Session' (Tom Lantons Human Rights Commission 19 July 2012) 46 <https://humanrightscommission.house.gov/sites/humanrightscommission.house.gov/files/documents/Bangladesh_07_19_2012.pdf> accessed 7 January 2017; Robertson (n 30) 96.
[135] Robertson (n 30) 94.

verdicts will be internationally recognized."[136] A departure from this position is noted in a subsequent letter to Sheikh Hasina on 18 May, 2011, where HRW urged the Bangladesh Government to "articulate the relevant definitions of war crimes, crimes against humanity and genocide as they existed under domestic or international law at the time of the offense."[137]

Counsel defending the accused at the ICTs have also supported both positions. Toby Cadman has argued that the definitions of ICTA crimes are "outdated and incorrect when held against the current definitions employed by the ICC and ad hoc International Tribunals" and unless the revised definitions referred to current acceptable standards as seen in the ICC Elements of Crimes, Bangladesh would be "ignoring the vast progress made in international criminal law."[138] This position was echoed by another foreign counsel who argued that the ICT trials could have "been run on consistent lines with the ICC" using ICC terms, definitions and rules of procedure and evidence.[139] Bangladeshi counsel defending the accused have also demanded that since the offences in the ICTA are not well defined and "jurisprudence on these issues have evolved", it can take refuge in decisions of the ICTY, ICTR, ICC and SCSL to fill in the gaps.[140]

This position of modelling the ICT along ICC lines can be distinguished from Toby Cadman's subsequent commentary in December 2011. Arguing that the Bangladesh

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[136] Adams (n 17).
[137] ibid. Linton observes: "It is not known why Human Rights Watch called for the ICC definitions to be used, rather than the law that was actually applicable in 1971." See, Linton (n 7) 210.
[138] Cadman and Bafadhel (n 28) 13; Geoffrey Robertson has also described crimes defined in the ICTA as being "out of date". See, Robertson (n 30) 55.
[139] Cammegh (n 28).
[140] *The Chief Prosecutor v Delwar Hossain Sayeedi* (Order No 23) ICT-1 (3 October 2011) ICT-BD Case No 01 of 2011, 5-6.

Constitution bars *ex post facto* laws without exceptions,[141] Cadman emphasized that Bangladesh as a State Party to the ICCPR was obligated to ensure that the ICTA adhered to the principle of *nullem crimen sine lege* by carefully considering "what the definition of a crime against humanity or genocide was at the time of commission of the alleged offence", an exercise that would require "analysis of the elements of the offence of crimes against humanity, as an example, during the relevant time period."[142]

The former position calling for the adoption of ICC definitions or incorporating elements from contemporary definitions of international crimes conflicts with the "strictures of *nullum crimen sine lege*".[143] This 'conflict' is generally acknowledged by critics. Rapp, for instance urged in 2011 that when determining guilt, ICTs could consider taking guidance from courts that defined core international crimes in the recent past and also the ICC Elements of Crimes, to an extent that it did not "expand criminal responsibility".[144] Linton admits that although a "skilled and serious" attempt was made to define core international crimes in the ICTA, in several instances they did not "reflect the state of customary international law at the time of the commission of the offences."[145] Robertson alleges that ICT judges failed to appreciate that the rule against retrospective punishment could be avoided by examining the state of international customary law in 1971.[146]

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[141] Toby M Cadman, 'The International Crimes Tribunal Bangladesh: Nullem Crimen Sine Lege - A Response To The Critics' (*International Forum for Democracy & Human Rights,* 21 December 2011) <http://www.ifdhr.org/2013/03/principle-of-retroactivity-under-international-law/> accessed 15 January 2017; There is substantial scope to question Cadman's position that the Constitution of Bangladesh imposes a blanket bar on *ex post facto* laws. This has been discussed in detail in previous sections of this chapter.
[142] ibid.
[143] UN Group of Experts for Cambodia, 'Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135' (16 March 1999) UN Doc A/53/850-S/1999/231.
[144] Letter from Stephen J Rapp to Dr Dipu Moni and Barrister Shafique Ahmed (n 23) 3.
[145] Linton (n 7) 214.
[146] Robertson (n 30) 95.

Specifically, critics have objected to the absence of the requirement of a "widespread or systematic attack" and the nexus with armed conflict in the ICTA's definition of 'crimes against humanity' and the addition of "political groups" as one of the protected groups in the ICTA's definition of 'genocide' as violations of the principle of legality. The following sections evaluate what elements constituted 'crimes against humanity' and 'genocide' under customary international law in 1971 and whether those elements were accommodated in the statutory provisions of the ICTA.

3.2.1 *Tracing the development of the definition of 'crimes against humanity' to 1971*

Academic texts introducing 'crimes against humanity' (CAH) generally tend to refer to the joint statement by Britain, France and Russia in 1915 denouncing the massacre of Armenians in Turkey as the first instance the wording 'crimes against […] humanity' was used on an international scale.[147] This of course came after Leon Trotsky's usage of 'crimes against humanity' in 1911 when he described it as "all the indignities to which the human body and spirit are subjected" in his essay 'Against Individual Terrorism'.[148] The concept of 'crimes against humanity' can be traced back to the preamble of the 1907 Hague Convention Concerning the Laws and Customs of War on Land, where the Martens Clause referred to the "laws of humanity".[149] All

[147] Joint Declaration of France, Great Britain and Russia (28 May 1915) reprinted in United Nations War Crimes Commission (London HMSO 1948) 35*;* The statement read: "[…] In view of these new crimes of Turkey against humanity and civilization, the Allied Governments announce publicly to the Sublime Porte that they will hold personally responsible for these crimes all members of the Ottoman Government, as well as those of their agents who are implicated in such massacres."
[148] Leon Trotsky, 'The Marxist Position on Individual Terrorism' in Will Reissner (ed), *Leon Trotsky – Against Individual Terrorism* (Pathfinder Press 1974) 9.
[149] Phylilis Hwang, 'Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court' (1998) 22 Fordham Journal of International Law 457, 458-459.

these appearances of the phrase and concept were "abortive"[150] in the sense that they touched upon existence of 'crimes against humanity' but did not lead to the creation of a punishable offence under law when the Treaty of Versailles and Treaty of Lausanne declined to prosecute.[151] This is why although CAH has been dubbed to be as old as humanity itself,[152] as an "international legal prohibition" it is a relatively new concept which blossomed in the latter half of the 20th century after it emerged for the first time as a cognizable offence in 1945 – ironically in a law called *Nazi Verbotsgesetz*. i.e. The Nazi Prohibition Law.[153] No one was prosecuted under this law passed by the provisional government of the Third Reich, and soon after, CAH materialized in positive international law under the *Charter of the International Military Tribunal*.[154] The definition of CAH in Article 6(c) read:

> namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[155]

[150] Beth Van Schaack, 'The Definition of Crimes Against Humanity: Resolving the Incoherence' (1999) 37 Columbia Journal of Transnational Law 787, 789.
[151] Hwang (n 149) 459.
[152] Jean Graven, 'Les Crimes Contre I'Humanite' (Vol 76) in *Collected Courses of the Hague Academy of International Law* (The Hague Academy of International Law 1950) 433; Cryer, Friman, Robinson and Wilmshurst (n 54) 230; Schaack (n 150) 789.
[153] Cryer, Friman, Robinson and Wilmshurst (n 54) 230; M Cherif Bassiouni, *Introduction to International Criminal Law* (2nd Revised Edition, Brill 2013) 668-669.
[154] G. Werle and J. Bung, 'Crimes against Humanity' Summary (Crimes Against Humanity) International Criminal Justice Sommersemester 2010 < http://werle.rewi.hu-berlin.de/04_Crimes%20against%20Humanity-Summary.pdf > 1.
[155] Charter of the International Military Tribunal 82 United Nations-Treaty Series 280.

This definition was framed in response to the classical definition of 'war crimes' which did not encompass crimes by governments committed against their own citizens.[156] The inclusion of "crimes committed against a country's own population"[157] in CAH was one of its three essential features identified by Robert Cryer. The two remaining features required CAH to take place in the context of an armed conflict, and the reference to 'population' meant "to create some requirement of scale", although the Charter and the Nuremberg Judgment did not specify the precise threshold.[158] Whether this definition contravened the principle of *nullum crimen* has been a matter of debate.[159] Many of those who felt that a new crime had been created justified this 'juridical invention' on the reasoning that the principle of non-retroactivity had to give way to "superior exigencies" such the overriding need for accountability for crimes committed by the Nazi regime.[160] Kelsen argued that such crimes amounted to "open violations of the principles of morality generally recognized by civilized peoples and […] morally not innocent or indifferent when they were committed" and "according to the public opinion of the civilized world, it is more important to bring the war criminals to justice than to respect, in their trial, the rule against *ex post facto* law […]."[161] The beginning of 'crimes against humanity' as a new category of crime signaled by offering protection to individuals whose rights had been trampled upon by the State "in a manner that [outraged] the conscience of mankind" the international

[156] Cryer, Friman, Robinson and Wilmshurst (n 54) 231.
[157] ibid.
[158] ibid.
[159] Cassese and Gaeta (n 54) 87.
[160] Jescheck (n 53) 39 & 50. According to Jescheck, the law of occupation at that time only provided for the prosecution of an occupied state's official organ for war crimes. See, Cassese and Gaeta (n 54) 88; Cryer, Friman, Robinson and Wilmshurst (n 54) 231.
[161] Hans Kelsen, 'The Rule Against Ex Post Laws and the Prosecution of the Axis War Criminals' (1945) 2 (3) The Judge Advocate Journal 8, 10-11.

community was expanding the category acts deemed worthy of "meta-national" concern[162] and also imposing limits on the "omnipotence of the State".[163]

In the period immediately following the formulation of the London Agreement, the "criminalization" of CAH took place through treaties, customary rules and pieces of national legislation.[164] CAH was adopted in the Control Council Law No. 10 of 1945 adding 'rape', 'imprisonment' and 'torture' to the list of inhumane acts and shedding the need for the crime to take place in the context of an armed conflict.[165] In 1946, CAH was adopted in the Tokyo Charter where its provisions were modelled after the Nuremberg definition but was subject to the slight modification that it did not include persecutions on religious grounds.[166] The basis for this exclusion was probably the fact that such crimes had not been committed by the Japanese on a large scale.[167] "Crimes against humanity' was endorsed in the same year by the United Nations when it unanimously affirmed the principles of international law recognized by the Nuremberg Charter.[168] In 1950, the International Law Commission (ILC) was entrusted with the responsibility to formulate the "principles of international law

[162] Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law* (3rd edn, Oxford University Press 2013) 87.
[163] HM Stationery Office, *Speeches of The Chief Prosecutors at the Close of the Case Against Individual Defendants* (Cmd 6964, 1946) 63 quoted in Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law* (3rd edn, Oxford University Press 2013) 87.
[164] Antonio Cassese, 'Balancing the Prosecution of Crimes Against Humanity and Non-Retroactivity of Criminal Law - The Kolk and Kislyiy v. Estonia Case before the ECHR' (2006) 4 Journal of International Criminal Justice 410, 415.
[165] Cryer, Friman, Robinson and Wilmshurst (n 54) 232.
[166] In the 2nd edition of *An Introduction to International Criminal Law and Procedure*, Robert Cryer and others claim that 'racial and religious persecution' was omitted from Article 5(c) of the Tokyo Charter defining the CAH because "such crimes had not occurred in that theatre of conflict". It was further claimed that the phrase "any civilian population" was also deleted. However, a careful reading of the full text of the definition of CAH in Article 5(c) shows that the phrases "persecution on […] racial grounds" and "any civilian population" were present.
[167] Mohamed E. Badar, 'From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes against Humanity' (2004) 73 San Diego International Law Journal 82 cited in Göran Sluiter, '"Chapeau Elements" of Crimes Against Humanity in the Jurisprudence of the UN Ad Hoc Tribunals' in Leila Nadya Sadat (ed), *Forging a Convention for Crimes against Humanity* (Cambridge University Press 2011) 106.
[168] UNGA Res 95(I) (11 December 1946).

recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal."[169] In its report, the ILC dropped the phrase "before or during war" from the definition of 'crimes against humanity' but at the same time observed that this did not mean the crime could be "committed only during war" but also "before a war in connection with crimes against peace."[170] Many of the Nuremberg Principles were reflected in several international instruments, such as the Peace Treaties with Italy, Romania, Hungary, Bulgaria and Finland, all of which improved upon and expanded the definition of CAH in the Nuremberg Charter.[171] Over the years, a limited number of cases dealt with CAH at the national level, which include among others *Eichmann*, *Barbie*, *Touvier*, and *Finta*.[172] Since the late 1960s, several treaties and instruments such as the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity 1968, the International Convention on the Suppression and Punishment of the Crime of Apartheid 1973, the UN Declaration on Enforced Disappearance 1992 and the Inter-American Convention on Enforced Disappearance 1994 cemented the presence of CAH in customary international law.[173]

The final decade of the 20th century witnessed the reaffirming of the customary character of CAH in the Statutes of the ICTY, ICTR and the International Criminal Court and the emergence of the modern definition of 'crimes against humanity'. According to Robert Cryer this modern definition encompasses "the commission of certain inhumane acts, such as murder, torture, rape, sexual slavery, persecution and

[169] 'Text of the Nuremberg principle Adopted by the International Law Commission' (1950) II Yearbook of the International Law Commission 374.
[170] UNGA, 'Report of the International Law Commission' UN GAOR 5th Session Supp No 12 UN Doc A/1316 (1950) 124 cited in Hwang (n 149) 462.
[171] Cassese and Gaeta (n 54) 90.
[172] Linton (n 7) 232; *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v Barbie* (20 December 1985) Court of Cassation (Criminal Chamber) 78 ILR 125; *Touvier* (13 April 1992) Cour de Cassation 100 ILR 338; *R v Finta* (1994) 1 SCR 701.
[173] Cryer, Friman, Robinson and Wilmshurst (n 54) 232.

other inhumane acts" in the context of a "widespread and systematic attack directed against a civilian population".[174] Definitions of 'crimes against humanity' in the ICTY and ICTR Statutes are similar to each other.

The ICTY Statute was not an exercise of law 'creation' but rather an application of "rules of international humanitarian law which are beyond any doubt part of customary law".[175] CAH in the ICTY tried "to stay close to the IMT's definition" by retaining the requirement for the crimes to be committed in an armed conflict.[176] This nexus was subsequently severed in the *Tadić* Decision on the 'Defence Motion for Interlocutory Appeal on Jurisdiction' which acknowledged that the requirement was merely a jurisdictional one and did not form a part of the contemporary definition of 'crimes against humanity'. Absent from the definition are the elements of "widespread and systematic attack" and discriminatory grounds, although they are seen in the parallel definition in the Report of the Secretary-General which accompanies the ICTY Statute as an explanatory memorandum.[177]

When the ICTR Statute was adopted by the UN Security Council, the adoption benefitted from the existence of the ICTY Statute and the Secretary-General's Report. Nevertheless, 'crimes against humanity' in the ICTR parted ways with the ICTY definition in several important aspects. The ICTR definition of CAH dropped the nexus to armed conflict but added the nexus to "widespread and systematic attack". It also introduced the element of discriminatory grounds by requiring that "the attack on

[174] ibid 230.
[175] UNGA, 'Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808' (1993) UN Doc S/25704, 34.
[176] Sluiter (n 167) 102-141.
[177] ibid 106.

the civilian population had to be committed on national, political, ethnic, racial, or religious grounds."[178]

'Crimes against humanity' in Article 7 of the ICC Statute is different in 'character' from previous versions of the crime because of its 'prospective' nature. While it largely remained an 'IMT-inspired' definition, there were some notable differences. The nexus to armed conflict embedded in the definitions of CAH in the Statutes of the IMT, Tokyo and ICTY and the requirement of discriminatory grounds in the ICTR were removed.[179] Emphasis was placed more on *mens rea* elements, i.e. "knowledge of the attack". Enforced disappearance and apartheid were included as new punishable acts. The scope of already punishable acts like deportation, imprisonment and rape were expanded. A policy requirement with regard to the attack on the civilian population was introduced, something which was never a part of past definitions of CAH and had in fact been explicitly rejected in ICTY case law.[180] The presence of the *Elements of Crimes* combined with the Statute assisted in creating a comprehensive definition of 'crimes against humanity'.[181]

Taking the above into account, there is no doubt about the status 'crimes against humanity' enjoys as a core international crime. It is also clear that a unanimous definition of the crime is yet to develop and there are differences in all major definitions of the crime, so much so that differences exist even when the definitions emanated from the same source within a short span of time.[182]

[178] ibid 106.
[179] ibid 108.
[180] ibid 108.
[181] ibid 108.
[182] ibid 107; Linton (n 7) 232.

3.2.2 *Crimes against humanity in the ICTA and its interpretation by the ICTs*

Section 3(2)(a) of the ICTA defines 'crimes against humanity' as:

> namely, murder, extermination, enslavement, deportation, imprisonment, abduction, confinement, torture, rape or other inhumane acts committed against any civilian population or persecutions on political, racial, ethnic or religious grounds, whether or not in violation of the domestic law of the country where perpetrated;[183]

On 17 July, 1973 Manoranjan Dhar, the Minister of Law, Justice and Parliamentary Affairs of the Bangladesh Government stressed in Parliament that the definition of 'crimes against humanity' in the ICTA was identical to the definition employed at Nuremberg.[184] Dhar's claim was inaccurate. A close inspection of the definition of CAH and its historical background as is evident from the parliamentary debates that preceded the enactment of the ICTA reveal that the framers were by and large inspired by Article 6(c) of the Nuremberg Charter. However, this "adaptation"[185] or "adoption"[186] came with certain caveats. For instance, in addition to 'murder', 'extermination', 'enslavement', 'deportation' and 'other inhumane acts', the ICTA definition of 'crimes against humanity' added the specific acts of 'imprisonment', 'abduction', 'confinement', 'torture' and 'rape'.[187] 'Ethnicity' was added to the

[183] (n 1) s 3(2)(a).
[184] Dhar said, "*If my friend Mr Larma looked at these words, he would see that the definition of crimes against humanity is not our own. It is the definition used at Nuremberg.* […] *We did not change a single word and if he read it he would understand.*" Manoranjan Dhar, Parliamentary Debate on the International Crimes (Tribunals) Bill 1973, vol 2, part 35, 2367.
[185] Linton (n 7) 231.
[186] Robertson (n 30) 94.
[187] Linton (n 7) 231.

provision relating to persecution and the link to armed conflict was shed by dropping the phrase "before or during the war".[188]

'Crime against humanity' in the ICTA has been criticized for the manner in which its language has been framed. The absence of the requirement of a "widespread or systematic attack", the "hallmark" which distinguishes CAH from other ordinary crimes, has been criticized.[189] There are disagreements as to whether the element of "widespread or systematic attack" constituted a part of the customary international law of 'crimes against humanity' in 1971. Geoffrey Robertson's position on this matter is clear and unequivocal. He argues that "murder, rape and arson are run-of-the-mill, common or garden national crimes" and "cannot be elevated into international crimes unless the prosecution proves an additional element […] that these murders and tortures […] are committed as part of a widespread or systematic attack on a civilian population."[190] Linton, on the other hand, imposes responsibility on the ICTs to "establish the state of customary law in 1971" and rule whether 'crimes against humanity' then "had to be committed as part of a ''widespread or systematic attack'' on the civilian population."[191] She tilts towards accepting Robertson's position by drawing from the United National War Crimes Commission's (LCUNWCC) confirmation of the "prototype" of the 'widespread or systematic attack' when it observed that "systematic mass action […] was necessary to transform a common crime, punishable only under municipal law, into a crime against humanity, which thus became also the concern of international law."[192] Linton cites *Almonacid-*

[188] ibid 231.
[189] ibid 233.
[190] Robertson (n 30) 96.
[191] Linton (n 7) 234.
[192] Doudou Thiam (Special Rapporteur), 'Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind' (1986) UN Doc A/CN.4/398, 58; Guénaël Mettraux, 'The Definition

Arellano et al v Chile where the Inter-American Court of Human Rights demonstrated that 'crimes against humanity' were found to have been committed as part of a "systematic and general pattern against the civilian population" as early as 1973.[193] Linton also points out that the element of a "widespread or systematic attack against the civilian population" was incorporated in the definition of 'crimes against humanity' in Article 5 of the Law on the Establishment of Extraordinary Chamber in the Courts of Cambodia for the purposes of trying crimes committed during the years 1975-1979.[194]

There is scope to argue that the element of "widespread or systematic" attack had not become a part of customary international law by 1971. In the *Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind* published in 1986, Doudou Thiam described in detail the views contrary to the LCUNWCC's recognition of "systematic mass action" as a prerequisite to 'crimes against humanity'. Thiam notes that the exercise of incorporating "systematic mass action" was opposed by the 'Congrès international du Mouvement national judiciaire français' in 1946 in its resolution on the punishment of Nazi 'crimes against humanity'. Opposition was also documented in the reports submitted by the delegates of Brazil, Netherlands, Poland, Holy See and Switzerland at the eighth International Conference for the Unification of Penal Law held in 1947.[195] The "mass element" was discussed at length by Henri Meyrowitz who put forward that "a plurality of victims or a plurality of acts" was no

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of Crimes Against Humanity and the Question of a "Policy" Element' in Leila Nadya Sadat (ed), *Forging a Convention for Crimes against Humanity* (Cambridge University Press 2011) 158.

[193] Linton (n 7) 234; *Case of Almonacid-Arellano et al v Chile,* Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights, Series C No 154 (26 September 2006).

[194] Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea 2001 (amended in 2004).

[195] Thiam (n 192) 59.

longer necessary for the elevation of a crime to 'crimes against humanity'.[196] This disagreement persisted in judicial practices as well. For instance, the "mass element" was not considered essential to the definition of 'crimes against humanity' by the Supreme Court of the British Occupied Zone. In contrast, the military tribunals of the United States considered it to form an integral part of CAH.[197] Thiam concluded: "The distinction resulting from the mass nature of the act is, in any case, not conclusive. There are those who still consider that the systematic violation of a single human right is a crime against humanity."[198]

Therefore, legitimate suspicions may be raised as to whether the element of 'widespread or systematic attack' which found its origins in the LCUNWCC report and was developed further in *Almonacid-Arellano et al v Chile* emerged as an accepted rule of customary international law in 1971. According to Robert Cryer, the requirement of a 'widespread or systematic attack' directed against any civilian population gained acceptance as the appropriate way of determining the "contextual threshold" of 'crimes against humanity' in the 1990s.[199]

That 'crimes against humanity' under the ICTA does not need a nexus with armed conflict, whether internal or international, has been raised by critics as a weakness.[200] According to Geoffrey Robertson "the judgment of Nuremberg made clear" that 'crimes against humanity' "could only be committed at times of an international armed

[196] ibid.
[197] In the *Justice* case, the Tribunal found senior officials of the Nazi judicial system guilty of "conscious participation in a nation-wide Government-organized system of cruelty" and further held that the definition of crimes against humanity "should not cover isolated cases of atrocities or persecution".
[198] Thiam (n 192) 60.
[199] Cryer, Friman, Robinson and Wilmshurst (n 54) 236.
[200] Linton (n 7) 237; Robertson (n 30) 94.

conflict" and "[i]t was not until the appeal judgment in the *Tadic* case in 1995 that an international court confirmed that crimes against humanity could also be committed in an internal conflict such as a civil war."[201] This differs from Linton's analysis who acknowledges that while the nexus to an 'international' armed conflict had been severed by 1971, there remains a degree of uncertainty as to whether "armed conflict per se" had been discarded with altogether by that time.[202]

It is now well settled that contemporary definitions of 'crimes against humanity' do not require a nexus to armed conflict.[203] Originally, however, CAH in the Nuremberg and Tokyo Charters was connected with 'war crimes' and 'crimes against peace' and required a nexus with armed conflict. Egon Schwelb and Antonio Cassese perceived this close linkage between different crimes as one of the major shortcomings of the definition of 'crimes against humanity'. This meant that the Allies would punish only those criminal activities which "directly affected the interests of other States" and the infliction of inhuman acts committed within national boundaries was not of interest to other states until and unless they had "spill-over effects".[204] Although this may have been one of the reasons the nexus with armed conflict was dropped in the Control Council Law No. 10, the military tribunals operating under this law were divided as to whether or not this nexus was necessary. In *United States v. Flick* and *United States v. Ernst von Weizsäcker et al* the nexus to armed conflict was retained[205] whereas in *United States v. Ohlendorf* and *United States v Josef Altstoetter et al* the nexus was

[201] Robertson (n 30) 94.
[202] Linton (n 7) 237.
[203] Cryer, Friman, Robinson and Wilmshurst (n 54) 235.
[204] Cassese and Gaeta (n 54) 86; E Schwelb, 'Crimes Against Humanity' (1946) 23 British Yearbook of International Law 207.
[205] UN Group of Experts for Cambodia (n 143) para 71.

deemed unnecessary.[206] The "indispensable link" between 'crimes against humanity' and war, which was envisaged in the International Law Commission's 1951 Draft Code of Offences Against the Peace and Security of Mankind was severed in the amended definition of CAH in the 1954 Draft Code.[207]

In that era, a couple of national legislations also shed the nexus to armed conflict. This included the Nazi and Nazi Collaborators (Punishment) Law, 5710-1950 which expanded the subject matter jurisdiction to crimes committed not just during the period of the Second World War but also during the period of the Nazi regime[208] and also the Penal Code of Ethiopia 1957.[209] International conventions such as the Genocide Convention 1948, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity 1968 and the Apartheid Convention 1973 also "indicated that a nexus to armed conflict was not required."[210]

Cassese marks the Convention on the Non-Applicability of Statutory Limitations in the late 1960s as the point in time when the "gradual crystallization" of customary international law propagating CAH during peace time "was set in motion".[211] According to the Group of Experts for Cambodia, the bond between CAH and armed conflict had severed by 1975.[212] It is worth noting that Pakistan voted in favour of the

[206] Cryer, Friman, Robinson and Wilmshurst (n 54) 234.
[207] Hwang (n 149) 464.
[208] Nazis and Nazi Collaborators (Punishment) Law, 5710-1950, s 1(a)(1)(2) & 1(b) <https://www.icrc.org/applic/ihl/ihl-nat.nsf/0/aacf823ae32ab469c12575ae0034c1fe/$FILE/Law%20no.%2064.pdf> accessed 9 August 2017.
[209] The Penal Code of Ethiopia 1957, s 281.
[210] Cryer, Friman, Robinson and Wilmshurst (n 54) 234.
[211] Antonio Cassese, 'Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law – The Kolk and Kislyiy v. Estonia Case before the ECHR' (2006) 4 Journal of International Criminal Justice 410.
[212] UN Group of Experts for Cambodia (n 143) para. 71

1968 Convention on the Non-Applicability of Statutory Limitations. With respect to this, Niall Macdermot had argued that although Pakistan did not ratify the Convention, its affirmative vote reflected "acceptance that crimes against humanity" was not "restricted to international war situations".[213]

Being mindful of the principle of legality requires the ICTs to interpret the definitions of crimes in a manner that does not go beyond the standards of customary international law that existed in 1971. On 11 December, 2011, Toby Cadman argued that an accused "must be entitled to advance the retroactive argument in any given case".[214] While the soundness of this argument cannot be challenged, there is sufficient scope to doubt Cadman's subsequent allegation that a blanket ban had been issued to raise this argument at the ICTs.

The argument on retroactivity has been raised by defence counsel on multiple occasions in multiple cases before the ICTs. The International Crimes Tribunal on 3 October, 2011, passed Order No. 23 framing charges against accused Delowar Hossain Sayeedi.[215] In it the ICT chaired at the time by Justice Md Nizamul Huq, addressed the retroactivity argument relating to crimes defined in the ICTA and its relationship with customary international law[216] by reiterating that international crimes proscribed in the ICTA "were regarded as crimes under international law long before the Act was enacted."[217] In response to the allegation that crimes were

[213] Niall Macdermot, 'Crimes Against Humanity in Bangladesh' (1973) 7 (2) The International Lawyer 476, 482-483.
[214] Cadman (n 141).
[215] *The Chief Prosecutor v Delwar Hossain Sayeedi* (Order No 23) ICT-1 (3 October 2011) ICT-BD Case No 01 of 2011.
[216] ibid 1.
[217] ibid 9.

inadequately defined and lacked clarifying elements such as the Elements of Crimes assisting the ICC Statute, the Tribunal held that the ICTA was drafted in an era "when the crimes enumerated therein were fairly known and understood to the world, and were very much part of customary international law" and were "quite clear and complete without any ambiguity".[218] The Tribunal refused to borrow definitions from recent international tribunals not only because it felt it was not obligated to do so, but also because it felt the definitions were "adequate in all aspects".[219] The argument that Article 15(1) ICCPR issued a blanket prohibition on the retroactive application of law was rejected because Article 15(2) had an overriding effect over principle against retroactivity "in cases of crimes proscribed by general principle of law recognized by the community of nations". Most importantly, the Tribunal observed that if "indispensably required in the interest of fair justice", it would seek the guidance of "jurisprudential" and "normative" developments from other jurisdictions.[220]

In Part VI of the trial judgment in the case of *The Chief Prosecutor v Delowar Hossain Sayeedi*, the ICT dealt with the consistency of 'crimes against humanity' defined in the ICTA with contemporary definitions of the crime in the ICTY, ICTR and the ICC Statutes. Upon perusal these definitions and their development through case-law,[221] the Tribunal assessed that the definitions of 'crimes against humanity' across the board lacked in consistency and differed in "legal technical nitty-gritty" but shared a "common spirit".[222] The Tribunal extrapolated the "proper construction" of 'crimes against humanity' under the ICTA and chalked out the following 'characteristics': a)

[218] ibid 8.
[219] ibid.
[220] ibid 8-9 & 38.
[221] ibid 10-18.
[222] ibid 10.

existence of an armed conflict is not mandatory, and that CAH can be committed during peace time (the Tribunal added, however, that one could nevertheless not deny that an armed conflict had taken place in 1971); b) although the ICTA does not explicitly require the attack to be widespread or systematic, the phrase "any civilian population" instead of "civilian population" exudes a "collective" quality of the attack implying that it excludes "single or isolated acts" and implies that the attack must be of widespread or systematic nature. The requirement is "disjunctive" as opposed to being "cumulative". 'Widespread' represents the qualitative threshold of the crime, i.e. it refers to the large-scale nature of the attack which is reflected in the number of victims. On the other hand, 'systematic' acts as the qualitative element, indicating the organized nature of violence or the "non-accidental repetition of a similar conduct on a regular basis" reflected by "some form of a governmental, organizational or group policy"; c) the phrase "any civilian population" is to be interpreted broadly and includes "population that is predominantly civilian in nature". The presence of "non-civilians" such as armed resistance groups or former combatants who have laid down their arms, amongst the civilian population would not "alter its civilian nature"; d) *mens rea* is satisfied if the perpetrator possessed knowledge of the context within which he took his actions; e) in case of persecution, the attack must be committed on discriminatory grounds.[223] On the basis of these 'characteristics', the ICT concluded that the ICTA's definition of 'crimes against humanity' was "fairly consistent" with recent definitions of the crime as seen in the ICTY, ICTR, ICC and the SCSL Statutes and "broadly and fairly compatible with current international standards."[224]

[223] ibid 18-20.
[224] ibid 19-20 & 37.

In a recent paper titled "The Tribunals in Bangladesh – Falling Short of International Standards", Abdur Razzaq a lead defence counsel claimed that the Appellate Division of the Supreme Court of Bangladesh (AD) on appeal from judgments passed by the ICTs, had "in an Austinian [sic] attack" held that international law could not "qualify as law" because it lacked "anything by way of sovereign legislature or of sanctions", nothing beyond the boundaries set by the Bangladesh Constitution could be treated as 'law', and finally, international obligations or responsibilities undertaken by the Government did not possess the force of law within the jurisdiction of Bangladesh.[225] According to Razzaq, the AD on the basis of this 'embargo' "explicitly rejected" the applicability of the "international definition of crimes against humanity" to the *Abdul Quader Molla* case (*Molla*)[226] and barred the application of customary international law to "trials conducted under the 1973 Act".[227]

It is more than arguable that Razzaq's position is a misinterpretation of the Appellate Division's views on customary international law. In *Molla* the AD invited written submissions from seven amicus curiae in order to provide an answer as to whether customary international law was applicable to ICT cases.[228] Upon evaluation, the AD reasoned that while the ICTA was "based on the foundation of international legal instruments" and "structured in conformity with international standards in consultation with international experts", including 'international' crimes within the jurisdiction of the ICTs did not alter its 'domestic' identity or create scope for customary international law to be its "guiding principles".[229] As a result, the AD would

[225] Razzaq (n 7) 351.
[226] ibid 352.
[227] ibid 350-351.
[228] (n 46) 83.
[229] ibid 87.

not be bound to follow CIL during trials involving the offences mentioned in Sections 3(2)(a)-(e), i.e. 'crimes against humanity', 'crimes against peace', 'genocide', 'war crimes' and 'violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949'. However, an accused charged with committing "any other crimes under international law" under Section 3(2)(f) would remain entitled to claim the right to have customary international law followed during trial.[230]

The AD adopted several reasons to justify 'conditional' reliance on CIL. First of all, 'crimes against humanity' envisaged in Section 3(2)(a) had two categories of crimes. The first category includes 'murder, 'rape', 'abduction', 'enslavement' and 'confinement' and the second category includes 'extermination', 'imprisonment', 'deportation', 'torture' and 'other inhumane acts'. The AD observed that unlike the second category, crimes belonging to the first were well defined by the Penal Code 1860 which had not been excluded by the ICTA.[231] It noted that, in the past, domestic legislation tailored to prosecute international crimes had taken the aid of pre-existing criminal laws to clarify definitions. This was seen in the Nazis and Nazi Collaborators (Punishment) Law adopted by the Israeli Knesset in 1950, where "general provisions of the Penal Code" applied to offenses under it which included 'crimes against the Jewish people', 'crimes against humanity' and 'war crimes'.[232] Secondly, the contemporary prosecutions of international crimes is premised on the principle of complementarity which places primary responsibility on national legal systems to domestically carry out prosecutions.[233] The judicial system of Bangladesh was

[230] ibid 86.
[231] ibid 576.
[232] Hans W Baade, 'The Eichmann Trial: Some Legal Aspects' [1961] Duke Law Journal 400, 401.
[233] (n 46) 90.

'willing' and 'able' to prosecute because its legacy of administration of justice dated back for more than four centuries and was largely based on "concepts, principles, rules and traditions of English Common Law". This included the Penal Code passed in 1860 and the Criminal Procedure Code of 1882, the first of its kind that was uniformly applied across the Indian subcontinent.[234] Furthermore, since the ICTA was devoid of any explicit provisions requiring guidance to be taken from the ICC's Elements of Crimes or for that matter any other judicial entity – all of which were different in scope and content from the ICTA, the ICTs need not be dependent on them.[235]

The Appellate Division also explained the circumstances under which international law became locally enforceable within Bangladesh. It clarified that in order for a ratified international covenant or convention to be enforceable in local courts, it would first have to be incorporated in the municipal laws.[236] The AD cited multiple British, American and Indian court decisions to substantiate that those jurisdictions also held similar views.[237] The AD cited from, among others, Halsbury's Laws of England which states: "[…] A state may not rely on an insufficiency in its domestic law as a justification for failing to comply with an international obligation. However, international law does not, of its own effect, have an impact directly in national law so that, for instance, rules of national law which are incompatible with a state's

[234] ibid 89-90.
[235] ibid 92-93.
[236] *Bangladesh v Sheikh Hasina* 60 DLR (2008) AD 90 and *M/s Supermax International Private Ltd v Samah Razor Blades Industries* II ADC (2005) 593 cited in (n 46) 100-101 & 107.
[237] *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry and Others* (1990) 2 AC 418 (500); *Apparel Export Promotion Council v V A K Chopra* (1999) AIR (SC) 625; *R v Home Secretary ex. P Brand* (1991) 1 AC 696; *British Airways Board v Laker Airways Ltd* (1985) AC 58; *Trawnik v Lennox* (1985) 1 WLR 532; *Knuller v DPP* (1972) 2 All ER 898, 905; *Knuller (Publishing, Printing and Promotions) Ltd v DPP* (1973) AC 435, 457-458; *Sosa v Alvarez-Machain* (2004) 159 L Ed 2d 718, 765; *R v Reyn (The Franconia)* (1876) 2 Ex D 63; *Mortensen v Peters* (1906) 8F (J) 93 (Scotland: Court of Justiciary); *Commercial and Estate Co of Egypt v Board of Trade* (1925) 1 KJB 271; *Thakrar v Home Secretary* 1974 QB 684; *Chung Chi Chung v R* (1939) AC 160; *Boos v Barry* (1988) L Ed 2d 333, 345-7 cited in (n 46) 100-106.

international obligations will remain valid instruments in national law".[238] Referring back to its own decision in *Hussain Mohammad Ershad v Bangladesh*, the AD clarified that national courts should not "straightway ignore international obligations" undertaken by a country and that the principles incorporated in international instruments could be drawn upon if the domestic laws were 'unclear'. Where 'clear' domestic laws appeared inconsistent with the international obligations of the State, the national courts "will be obliged to respect the national laws, but shall draw the attention of the lawmakers to such inconsistencies".[239]

The Appellate Division took refuge in Emmerich De Vattel's eighteenth century treatise *The Law of Nations, or, The Principles of Natural Law* and the more recent contributions of Curtis Bradley and Mitu Gulati in *Withdrawing from International Custom* to conclude that rules of CIL were binding only on those nations that expressed acceptance of those rules as binding obligations through "tacit consent" and they remained "binding only those nations that continued to accept them."[240] Distinguishing between international practices that do not constitute peremptory norms, i.e. *jus cogens*, and rules of customary international law that are accepted and recognized as peremptory norms, the AD observed even the breach of the latter did not invariably result in the imposition of penal sanctions upon the State that commits the violation.[241] Similarly, while customary international law significantly contributed to the development of international crimes, the scope of penal sanction would be significantly reduced unless international crimes were 'assimilated' or 'incorporated'

[238] *Halsbury's Laws of England* (5th edn, vol 25, LNUK 2016) cited in (n 46) 108-109.
[239] (n 46) 100.
[240] Curtis A Bradley & Mitu Gulati, 'Withdrawing from International Custom' (2010) 120 The Yale Law Journal 202, 219 cited in (n 46) 109-111.
[241] Bradley & Gulati (n 240) 219 cited in (n 46) 112-113.

in domestic laws. This is why when the objective to make crimes established in customary international law domestically enforceable, the practice is to legislate.[242]

In this connection, the AD referred again to Halsbury's Laws of England which states: "Crimes under customary international law of treaties are not crimes in English law without implementing legislation to make them so."[243] It also expressed agreement with Sir Franklin Berman who argued that "international law could not create a crime triable directly, without the intervention of Parliament, in an English court."[244] The AD acknowledged, for instance, the persuasive precedent set by the European Communities Act 1972 which gave direct effect to provisions of community law but did not negate the British Parliament's need to promulgate the Human Rights Act 1998.[245] Therefore, in case of conflict between international and national law, the AD observed that as a 'dualist' system, Bangladesh "would apply national law" or at least decide which rule would prevail.[246]

The Appellate Division also justified its 'positivist-dualist' approach by relying on provisions of the Bangladesh Constitution entrenching its supremacy over other laws within its jurisdiction and the writings of among others, Ian Brownlie and Malcolm N. Shaw. Shaw concluded that "any alleged rule of customary law must be proved to be a valid rule of international law, and not merely an unsupported proposition", and even

[242] The AD refers to several examples, which include: Geneva Conventions Act 1957 and the Geneva Conventions (Amendment) Act 1995, giving effect to certain branches of the Geneva Conventions 1949 and the Additional Protocols 1977; the Genocide Act 1969, giving effect to the Genocide Convention 1948; Section 134 of the Criminal Justice Act 1988 giving effect to the Convention against Torture 1984; the War Crimes Act 1991, giving jurisdiction to try war crimes committed abroad by foreign nationals; See, Bradley & Gulati (n 240) 219 cited in (n 46) 124.
[243] (n 46) 120.
[244] *R v Jones (appellant) (On Appeal from the Court of Appeal (Criminal Division)) (formerly R v J (Appellant)), Etc.* (2006) UKHL 16.
[245] (n 46) 126.
[246] James Crawford, *Brownlie's Principles of International Law* (8th edn, Oxford University Press 2012) 48 cited in (n 46) 127-128.

then "a British court would have to heed the terms of an Act of Parliament even if it involved the breach of a rule of international law."[247] Writing in reference to *Pinochet (No. 3)*[248], Roger O'Keefe, has traced a gradual change to this approach where English courts, in light of boundaries set by the constitution have started to permit "customary international law a limited direct applicability".[249] The fact that the AD is open to this approach is evidenced in its deliberations in *Molla* where it clarified that despite the inapplicability of CIL in interpreting certain aspects of the definition of 'crimes against humanity', it would not be prevented from relying on the "ratio or observation made by tribunals" and "treating them as persuasive […] authorities"[250] or using "provisions of international law" to assist in the exercise of interpretation[251] in the absence of domestic authorities.

Based on this reasoning, the Appellate Division rejected the direct applicability of customary international law to ICTA trials and elements of 'crimes against humanity' derived from customary international law – mainly, 'widespread or systematic attack' in the context of an 'international armed conflict' on the grounds that these 'elements' were not only "misleading" but also "foreign to the [ICTA]".[252] It noted, however, that the Prosecution had proved "by adducing reliable evidence beyond a shadow of doubt" that the acts of killing and rape committed in 1971 against an "innocent unarmed civilian population" were "widespread and systematic".[253] This reflects that the Appellate Division in *Molla* was on occasion in two minds about the role of customary

[247] Malcolm N Shaw, *International Law* (7th edn, Cambridge University Press 2014) 102-103.
[248] *Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* (1999) 2 WLR 827 cited in Roger O'Keefe, 'Customary International Crimes in English Law' (2001) 72 British Yearbook of International Law 293.
[249] O'Keefe (n 248) 335.
[250] (n 46) 575.
[251] ibid 572.
[252] ibid 79 & 159.
[253] ibid 242.

international law in ICT trials. The AD could have shed CAH's nexus with armed conflict solely on the 'positivist-dualist' ground that the nexus was clearly not required in Section 3(2)(a). Instead of doing that the AD tried to reinforce its position by drawing support from 'foreign' laws like the Allied Control Council Law, ICC Statute and the precedent set by the ICTY in *Tadic*, which had done the same. If the AD is free to exclude 'armed conflict' from 'crimes against humanity' referring to examples beyond its jurisdiction, one may legitimately ask why it did not include 'widespread or systematic attack' by referring to contemporary similar examples from the past and present. After all, both these elements are absent from ICTA's definition of CAH. This is potentially one aspect where the Appellate Division of the Bangladesh Supreme Court erred in interpreting what 'crimes against humanity' meant in the ICTA. The AD was correct to exclude the two elements but had done so on reasoning that was partially flawed. Alongside, the 'positivist-dualist' approach, the AD ought to have taken the approach of Justice Nizamul Huq in Order No. 23 in 2011. It ought to have engaged the principle of *nullum crimen* to argue that in 1971 the elements in question did not form parts of 'crimes against humanity' in the customary international law of that time and hence was not reflected in the ICTA.

3.3 *Does the inclusion of 'political group' as a protected group in 'genocide' violate the principle of legality?*

The definition of genocide in the ICTA includes 'political group' as one of the protected groups. Venturing beyond the four protected groups mentioned in the Genocide Convention (namely, national, ethnical, racial and religious) has been

interpreted as a violation of the principle of legality.[254] Linton has argued that political groups were "deliberately excluded from the ambit […] of genocide […] in the Genocide Convention" and efforts to reinsert it into ICC definition of 'genocide' at the Rome Conference was "resoundingly defeated".[255] Out of the twenty-eight cases tried to date, nine accused have been found guilty of 'genocide'.[256] All of them have been found guilty of destroying in whole or in part Hindus as a 'religious group'. Since no accused has been charged with destroying in whole or in part 'political groups', the proceeding analysis as to whether the inclusion of 'political group' violates the principle of legality is a purely 'theoretical' exercise. Nonetheless, the importance of this exercise cannot be understated given that "Awami League activists and students" alongside Hindus were "special targets" of the Pakistan Army in 1971 and on 11 March 2017 the Bangladesh Parliament passed a resolution granting recognition to March 25 as 'Genocide Day'.[257] The targeted killing of members of the Awami League featured prominently in the atrocities that occurred. It is likely, therefore, that there

[254] Linton (n 7) 246.
[255] ibid 244.
[256] *The Chief Prosecutor v Sheikh Sirajul Haque alias Siraj Master et al.* (Judgment) ICT-1 (11 August 2015) ICT-BD Case No 3 of 2014 <http://www.ict-bd.org/ict1/Judgment%20part%202/ICT-BD%20Case%20No%20Sheikh%20Sirajul%20Haque.pdf> accessed 15 July 2016; *The Chief Prosecutor v Syed Md Hachhan alias Syed Md Hasan alias Hachhen Ali* (Judgment) ICT-1 (9 June 2015) ICT-BD Case No 2 of 2014 <http://www.ict-bd.org/ict1/Judgment%20part%202/ICT-BD%20Case%20No%2002%20of%202014.pdf> accessed 15 July 2016; *The Chief Prosecutor v Md Abdul Jabbar Engineer* (Judgment) ICT-1 (24 February 2015) ICT-BD Case No 1 of 2014 <http://www.ict-bd.org/ict1/Judgment%20part%202/ICT-BD.Case%20No%2001%20OF%202014.pdf> accessed 15 July 2016; *The Chief Prosecutor v A T M Azharul Islam* (Judgment) ICT-1 (30 December 2014) ICT-BD Case No 5 of 2013 <http://www.ict-bd.org/ict1/Judgment%20part%202/ICT-BD%20Case%20No%205-2013.pdf> accessed 15 July 2016; *The Chief Prosecutor v Md Abdul Alim @ M.A Alim* (Judgment) ICT-1 (9 October 2013) ICT-BD Case No 1 of 2012 < http://www.ict-bd.org/ict2/ICT2%20judgment/ALIM-FINAL.pdf > accessed 12 August 2017; *The Chief Prosecutor v. Abul Kalam Azad* (Judgment) ICT-2 (9 October 2013) ICT-BD Case No 1 of 2012 <http://www.ict-bd.org/ict2/ICT2%20judgment/full_judgement_azad.pdf> accessed 15 July 2016.
[257] Donald Beachler, 'The Politics of Genocide Scholarship: The Case of Bangladesh' (2007) 41 Patterns of Prejudice 467, 475 & 477; Frank Chalk, 'Definitions of Genocide and their Implications for Prediction and Prevention' (1989) 4 Holocaust and Genocide Studies 149, 151; Stanly Johny, 'Why Bangladesh Has Announced a Genocide Day' *The Hindu* (23 March 2017) <http://www.thehindu.com/opinion/op-ed/remembering-1971/article17588759.ece> accessed 15 August 2017.

will be trials in the future where the accused are charged with genocide committed against a political group. At that point the critique may be of particular relevance to determining the legitimacy of the ICTs. This section analyses whether the inclusion of 'political group' in the ICTA's definition of genocide violates the principle of legality. To this end, the following account traces the development of the definition of genocide to 1971. It shows that 'political group' was always in the minds of those who played a role in framing the definition of genocide but was ultimately excluded from the Genocide Convention because of political reasons. It argues, why the framers of the ICTA may have been justified to include 'political groups' in the definition of the genocide.

3.3.1 *Tracing the development of the definition of 'genocide' to 1971*

In October 1933, Raphael Lemkin submitted a report to the Fifth International Conference for the Unification of Penal Law. The conference was held in Madrid in cooperation with the Fifth Committee of the League of Nations. Lemkin formulated the creation of two new international crimes, namely, the crime of *barbarity* and the crime of *vandalism*, which were aimed at the "destruction of and oppression of populations".[258] In the end, these proposals which amounted "to the actual concept of genocide" were not adopted and hence were not introduced into penal legislation.[259] Eleven years later in 1944, Lemkin as Adviser to the United States War Ministry, coined the term 'genocide' for the first time in his book *Axis Rule in Occupied Europe – Laws of Occupation, Analysis of Government, Proposals of Redress*. He proposed

[258] Raphael Lemkin, *Axis Rule in Occupied Europe – Laws of Occupation, Analysis of Government, Proposals of Redress* (Carnegie Endowment for International Peace 1944) 91.
[259] ibid 91.

that 'genocide' had originated from "the ancient Greek word *genos* (race, tribe) and the Latin *cide* (killing)" and entailed the "destruction of a nation or of an ethnic group".[260] It signified a coordinated plan of multiple actions "aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves."[261] Genocide took place in two phases. The first phase involved the destruction of the national pattern of the oppressed group, and this was followed by the second phase where the oppressor imposed its own national pattern on the oppressed.[262]

Lemkin theorized 'genocide' as the "antithesis" of the Rousseau-Portalis Doctrine which held that war was "directed against sovereigns and armies, not […] subjects and civilians" and by waging "total war" "not merely against states and their armies, but against people" and advocating the predominance of "nation" over "state" in the name of National Socialism, Germany had "widely practiced" genocide.[263] The need for considering 'genocide' as a distinct international crime stemmed from the fact that the laws of humanity in the Hague Regulations did not fully encompass all forms of 'genocide'. These included, for instance among other things, "ingenious measures for weakening or destroying political, social, and cultural elements in national groups" which were not "expressly prohibited by the Hague Regulations".[264] In his August 1941 broadcast, Winston Churchill acknowledged the unprecedented nature and scale of "Nazi butchery" by stating: "We are in the presence of a crime without a name".[265]

[260] ibid 79.
[261] ibid.
[262] ibid 80.
[263] ibid 80-81.
[264] ibid 92.
[265] Raphael Lemkin, 'Genocide' (1946) 15 The American Scholar 227.

Lemkin proposed that 'genocide' as defined in the amended Hague Regulations would comprise of two parts:

> in the first should be included every action infringing upon the life, liberty, health, corporal integrity, economic existence, and the honor of the inhabitants when committed because they belong to a national, religious, or racial group; and in the second, every policy aiming at the destruction or the aggrandizement of one of such groups to the prejudice or detriment of another.[266]

The Second World War necessitated the need to review international law in light of German practices which had "surpassed in their unscrupulous character any procedures or methods imagined a few decades ago by the framers of the Hague Regulations".[267] Unlike 1933, Raphael Lemkin's treatise was this time taken very seriously. 'Genocide' was included in the indictment of major war criminals in the Nuremberg trials. It read:

> They (the defendants) conducted deliberate and systematic genocide – viz, the extermination of racial and national groups – against the civilian populations of certain occupied territories in order to destroy particular races and classes of people, and national, racial, or religious groups, particularly Jews, Poles, Gypsies and others.[268]

[266] (n 258) 93.
[267] ibid 90.
[268] Lemkin (n 265) 229.

This indictment gave recognition to the principle that "every national, racial and religious group [had] a right of existence" and attacks upon groups violated this "right to exist and to develop within an international community as free members of international society."[269]

Although there was no dearth of evidence to substantiate the commission of genocide, the IMT in a narrow interpretation of its Charter decided that "acts committed before the outbreak of the war were not punishable".[270] In light of this, Lemkin proposed that an international treaty be formulated at the initiative of the United Nations criminalizing 'genocide' as an international crime which would provide for its "prevention and punishment in the time of peace and war".[271] In 1946 during discussions on 'genocide' at the UN General Assembly (UNGA), the UK Attorney General Sir Hartley Shawcross conceded that the failure to adopt Raphael Lemkin's proposals in 1933 had "made it impossible to punish some of the serious Nazi crimes."[272] A resolution on 'genocide' drafted by Lemkin was sponsored by Cuba, India and Panama and placed before the UNGA with the strong support of the United States.

On 11 December, 1946, the UNGA unanimously adopted Resolution 96(I) affirming 'genocide' as an international crime. In addition to 'national', 'racial' and 'religious' groups, i.e. the three protected group identified by Lemkin, the General Assembly recognized 'political' as the fourth protected group and more importantly observed

[269] ibid 229.
[270] Raphael Lemkin, 'Genocide as a Crime under International Law' (1947) 41 American Journal of International Law 145, 149.
[271] Lemkin (n 265) 230.
[272] Lemkin (n 270) 147.

that genocide could be committed against "other groups" beyond the four explicitly recognized ones. Pursuant to this resolution, the UNGA in 1948 approved the 'Convention on the Prevention and Punishment of the Crime of Genocide', the first human rights instrument adopted by the United Nations.[273] In its definition of 'genocide', 'political' and 'other groups' were dropped from the list of protected groups. It is worth noting that preliminary draft Convention prepared by the UN Secretariat, the product of deliberations involving the United Nations Division of Human Rights, Donnedieu de Vabres, Vespasian Pella, Raphael Lemkin, John Humphrey, Emile Giraud and others, retained 'political' groups alongside 'racial', 'national', 'linguistic' and 'religious'. The objective of this draft was to encompass "all the points likely to be adopted, it being left to these organs to eliminate what they wished."[274] The first to recommend the exclusion of 'political groups were the World Jewish Congress. The recommendation was made to avert any delay in acceptance of the Convention which might have been induced by variances of opinion as to what constituted a 'political group'.[275]

Experts held diverging opinions with respect to the retention of 'political' groups. Lemkin felt that political groups were devoid of "permanency" and lacked "specific characteristics of the other groups referred to" and that the eventual Convention "should not run the risk of failure by introducing ideas on which the world is deeply divided."[276] He also added that an appreciation of history would reveal that human groups most likely to be a victim of genocide were racial, national and religious

[273] Matthew Lippman, 'The Drafting of the 1948 Convention on the prevention and Punishment of the Crime of Genocide' (1985) 3 Boston University International Law Journal 1.
[274] ibid 9.
[275] 'Genocide: A Commentary on the Convention Source' (1949) 58 The Yale Law Journal 1142, 1145.
[276] Lippman (n 273) 11.

groups.[277] Vabres opposed this view on the ground that "genocide was an odious crime, regardless of the group which fell victim to it, and that the exclusion of political groups might be regarded as justifying genocide in the case of such groups."[278]

On 7 April, 1948, the Ad Hoc Committee (AHC) on Genocide convened at Lake Success. The text of the new draft convention, the AHC "unanimously voted to protect national, racial and religious groups […] and voted four-to-three to protect political groups."[279] By the smallest margin the majority viewed that political groups require protection because they were special targets of government repression. The minority represented by the Soviet Union, Poland and Venezuela opposed because political groups lacked stability, homogeneity and were not properly defined. It was argued that such an inclusion was "contrary to the fundamental conception of genocide as recognized by science."[280] In the words of the Soviet Union: "crimes committed for political motives are crimes of a special kind and have nothing in common with the crimes of genocide. The very word 'genocide' derived from the word 'genus' – race, people – shows that it concerns the destruction of nations or races as such, for reasons of racial or national persecution and not for the particular political opinions of such human groups."[281] One member from the minority expressed that the inclusion of political groups would make the Convention "inacceptable to certain governments" on the basis of the fear that actions taken against "domestic subversive movements" would expose governments taking such actions to "unjustified accusations".[282]

[277] UN Secretary-General, *Draft Convention on the Crime of Genocide* (UNESC 1947) 22.
[278] Lippman (n 273) 11-12.
[279] ibid 30.
[280] UN Ad Hoc Committee on Genocide, 'Report of the Committee and Draft Convention Drawn up by the Committee/Ad Hoc Committee on Genocide' (UNESCO 1948) 13.
[281] ibid 16.
[282] ibid 14.

The draft of the Ad Hoc Committee was transmitted by the Economic and Social Council to the UN General Assembly which then referred the Convention to the Sixth Committee. In the seventy-fifth meeting of the Sixth Committee, political groups was retained in the definition of 'genocide' by 29 votes to 13, with 9 abstentions – Pakistan being one of the abstaining countries.[283] Several reasons warranted this retention. The delegate of Netherlands, de Beus recalled that the Nazis had exterminated members of opposition political parties in addition to killing national, ethnic, racial and religious minorities.[284] Ecuador argued that the exclusion of political groups could result in governments suppressing dissident groups alleging that they posed as a threat.[285] It expressed doubt that its inclusion would assist subversive elements to revolt against State authorities, because there was a gulf of difference between measures undertaken to maintain order and measures employed to perpetrate genocide.[286] The United States maintained that 'genocide' defined in the Convention should take direct inspiration from the UNGA Resolution 96(I) which had specifically included the concept of 'political group'. Responding to the allegation that political groups were difficult to define, the US delegate Mr Gross pointed out that the history of Nazism showed clear examples that it was "perfectly possible to identify political groups".[287] This was 'possible' when the German government outlawed the German Social Democratic Party and established the Nationalist Socialist Party as the only legal party in Germany by decree. Identifying political groups was possible once again when the Allied

[283] United Nations General Assembly, 6th Committee, Official Records - Summary records of Meetings (21 September-10 December 1948), 3rd sess, part. 1, 1948 115 < https://www.legal-tools.org/doc/c7b34c/pdf/ > accessed 12 August 2017.
[284] Lippman (n 273) 42.
[285] ibid.
[286] United Nations General Assembly, 6th Committee, Official Records - Summary records of Meetings (21 September-10 December 1948), 3rd sess, part. 1, 1948 101 < https://www.legal-tools.org/doc/c3530c/pdf/ > accessed 12 August 2017.
[287] ibid 102.

Control Council following the defeat of Nazism abolished the Nazi Party. This argument has the unhappy consequence of possibly marking as 'genocide' the suppression of the Nazi Party. Nevertheless, it confirms that 'identifying' a 'political group' is not really a problem.

At the 128th meeting of the Sixth Committee, Egypt, Iran and Uruguay for "practical reasons" proposed to reconsider excluding 'political groups' and the Committee decided by 26 votes to 4 with 9 abstentions to reconsider the issue.[288] Mr Raafat from Egypt explained that in the course of considering other articles of the Convention, the necessity was felt to revisit Article II enumerating the definition of 'genocide', because it had become clear that if political groups were included among protected groups it would pose as a serious obstacle to the ratification of the Convention by a large number of States.[289] Iran expressed support to this argument by pointing to a convention on terrorism in 1935 drafted under the auspices of the League of Nations which failed to secure more than three ratifications because abstaining States perceived that the convention had political implications.[290] It was at this meeting the United States deviated away from its long-standing position of including political groups. The US delegate reiterated that although it still believed in the correctness of its point of view, it would support the proposal to delete 'political group' out of "conciliatory spirit" in order to ensure maximum participation of States in the ratification of the Convention.[291] It added however, upon ratification of the

[288] Philippa Webb, *International Judicial Integration and Fragmentation* (Oxford University Press 2013) 36.
[289] United Nations General Assembly, 6th Committee, Official Records - Summary records of Meetings (21 September-10 December 1948), 3rd sess, part. 1, 1948 661 < https://www.legal-tools.org/doc/c2ef7a/pdf/ > accessed 12 August 2017.
[290] ibid 662.
[291] ibid.

Convention by UN Member States, "improvements" to it could be made by including 'political groups'.[292] As a result, 'political groups' was voted out of Article II of the Genocide Convention as part of a 'compromise' by 22 votes to 6 with 12 abstentions. This time, Pakistan did not abstain. Rather, it voted for its exclusion. By 1971, a total of 72 States, including Pakistan, ratified the Genocide Convention 1948.

On the face of it, it may appear therefore, that Bangladesh had violated the principle of legality by including 'political groups' as one of the protected groups in the ICTA definition of genocide. There are, however, arguments to suggest that Bangladesh was within its right to 'include', as opposed to 'exclude' 'political groups'. Excluding 'political groups' from the definition of genocide has been criticized by several quarters. M Cherif Bassiouni has described this 'exclusion' as one of the "main weaknesses" of the Genocide Convention,[293] while Beth Vaan Schaack has termed this 'absence' the Convention's "blind spot".[294] The debates preceding adoption of the Convention to reveal 'compromises' which Schaack feels were "born of politics and the desire to insulate political leaders from scrutiny and liability" when 'political groups' was dropped from the definition of 'genocide'.

It is true that Pakistan voted against the inclusion of 'political groups' in the definition of 'genocide' at the very end of the deliberations surrounding the Genocide Convention. However, having actively participated in the drafting of the Convention and being fully aware of the circumstances in which 'political genocide' was dropped from the Convention by departing from the 'spirit' of UN General Assembly

[292] ibid.
[293] Bassiouni (n 153) 154.
[294] Beth Van Schaack, 'The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot' (1997) 106 Yale Law Journal 2259.

Resolution 96(I), there is scope to doubt whether Pakistan can claim that it legitimately believed that trying to destroy in whole or in part a 'political group' was "innocent conduct, undeserving of prosecution".[295] Keeping in mind Judge Shahbuddeen's assertion that "the principle of *nullum crimen sine lege* does not bar progressive development of the law, provided that the developed law retains the essence of the original crime"[296] it may be argued that Bangladesh by granting protection to 'political groups' within the scope of 'genocide' had increased the potential for accountability and made an advancement in the struggle against impunity.

3.4 *Did the retroactive amendment of Section 21 ICTA allowing the Prosecution to appeal against the life sentence passed on Abdul Quader Molla violate the principle of nullum crimen?*

On 17 February 2013, twelve days after the Shahbag movement had set off, the Parliament of Bangladesh passed the International Crimes (Tribunals) (Amendment) Act, 2013.[297] The amendment introduced three important changes relating to the trial of organizations,[298] the Prosecution's right to appeal any sentence passed by the ICT[299] and the Supreme Court's obligation to dispose any appeals from the ICTs within sixty

[295] William A Schabas, 'Judgments on Genocide from the European Court of Human Rights' (*OUP Blog,* 7 December 2015) <http://blog.oup.com/2015/12/judgments-genocide-european-court-human-rights/> accessed 22 May 2017.
[296] Shahabuddeen (n 98) 1013.
[297] 'What's New in Law and Case Law Around the World?' (2013) 95 (891/892) International Review of the Red Cross 748.
[298] (n 1) s 3(1)(A) after the amendment read: "Tribunal shall have the power to try and punish any individual or group of individuals, [or organisation,] or any member of any armed, defence or auxiliary forces, irrespective of his nationality, who commits or has committed, in the territory of Bangladesh, whether before or after the commencement of this Act, any of the crimes mentioned in sub-section (2)."
[299] (n 1) section 21(1) after the amendment read: "21. (1) A person convicted of any crime specified in section 3 and sentenced by a Tribunal may appeal, as of right, to the Appellate Division of the Supreme Court of Bangladesh against such conviction and sentence."

days of its filing.[300] These changes were given retrospective effect from 14 July 2009 bringing the ICT's judgment and sentence in the case of *Chief Prosecutor v Abdul Quader Molla* within the purview of the amendment.[301] Toby Cadman, Mahin Khan and others denounced the demands of Shahbag and the changes in the ICTA that it compelled the Parliament to introduce as "laws of passion" and the rule of the "mob".[302]

A prominent area of contention has been the process through which the Appellate Division of the Supreme Court imposed the maximum punishment, i.e. the death penalty on the accused in *Abdul Quader Molla v The Chief Prosecutor*. Passed on 17 September 2013, the *Molla* judgment came nearly seven months after 'Shahbag', a justice movement that gained the support of Bangladeshis within and beyond state boundaries but was 'defined' by the slogan: '*fashi, fashi, fashi chai – Razakar er fashi chai'* - meaning '*we want the noose for the Razakars'*.[303]

[300] (n 1) s 21(4) after the amendment read: "The appeal shall be disposed of within 60 (sixty) days from the date of its filing."
[301] 'Against Inadequate Sentence: Govt Mulls Change in Appeal Scope – Jurists Advise Consultation with Legal Experts on ICT Law Amendment' *The Daily Star* (Dhaka, 10 February 2013); 'Amendment of International Crimes Tribunal Act of 1973' *The Bangladesh Trial Observer* (Dhaka, 7 March 2013).
[302] Toby M Cadman, 'Response To David Bergman' (*International Forum for Democracy and Human Rights*, 06 March 2013) <http://www.ifdhr.org/2013/03/response-to-david-bergman/> accessed 22 May 2017; Mahin Khan, 'Laws of Passion: The Shahbag Protests' (*Open Democracy*, 11 February 2013) <https://www.opendemocracy.net/opensecurity/mahin-khan/laws-of-passion-shahbag-protests> accessed 22 May 2017.
[303] David Lewis, 'The Paradoxes of Bangladesh's Shahbag Protests' (*South Asia@LSE*, 21 February 2013) <http://blogs.lse.ac.uk/southasia/2013/03/21/the-paradoxes-of-bangladeshs-shahbag-protests/> accessed 22 May 2017; 'Bangladesh: Gonojagoron Moncho, Including Origin, Purpose, Structure, Membership, Areas of Operation and Activities (April 2013-January 2014)' (*Canada: Immigration and Refugee Board of Canada*, 24 January 2014) <http://www.refworld.org/docid/542a80df4.html> accessed 22 May 2017; Jim Yardley, 'Politics in Bangladesh Jolted by Daily Demonstrations' *The New York Times* (New York, 12 February 2013) <http://www.nytimes.com/2013/02/13/world/asia/politics-in-bangladesh-jolted-by-huge-protests.html> accessed 23 May 2017; 'Bangladesh: Mass dissatisfaction' *Economist* (16 February 2013) <http://www.economist.com/news/asia/21571941-huge-protest-capital-against-islamist-party-and-its-leaders-mass-dissatisfaction> accessed 22 May 2013.

This part evaluates two aspects of the judgment handed down by the Appellate Division of the Supreme Court in the *Molla* case. Attention is given to the maintainability of the appeal filed by the Prosecution on the basis of the retrospective application of the amended Section 21(1) ICTA. Furthermore, it also critiques how the Supreme Court justified the enhancement of Molla's punishment on appeal from life imprisonment to the death penalty.

It is worth noting that on 5 February 2013 when the ICT handed down its initial verdict, Molla's Chief Defence Counsel Abdur Razzaq confirmed before the press that the defence themselves would file an appeal against the judgment before the Supreme Court because it was "perverse" and "the charges of crimes against Molla had not been established".[304] In short, after the Parliament introduced the amendments to the ICTA on 17 February 2013, Abdul Quader Molla and the Chief Prosecutor both filed separate appeals against the original sentence passed by the ICT.[305] In the course of twenty hearings spread over the next eight months, the Supreme Court of Bangladesh heard the appeals. On 17 September 2013, Molla's punishment was enhanced on appeal from life imprisonment to the death penalty. The full judgment was published on 5 December 2013.[306] In response, Molla directed his lawyers to file a petition to review the Supreme Court's judgment under Article 105[307] of the Bangladesh

[304] Caroline Macpherson, 'ICT Convicts A. Q. Molla of 5 Charges And Sentences Him to Life Imprisonment' (*International Criminal Law Bureau*, 5 February 2013) <http://www.internationallawbureau.com/index.php/ict-convicts-a-q-molla-of-5-charges-and-sentences-him-to-life-imprisonment/> accessed 22 May 2017; 'Molla Sentenced to Life in Jail' *bdnews24* (Dhaka, 5 February 2013) <http://bdnews24.com/bangladesh/2013/02/05/molla-sentenced-to-life-in-jail> accessed 22 May 2017.

[305] *Abdul Quader Molla v The Chief Prosecutor* (Appellate Division) Criminal Review Petition Nos 17-18 of 2013, 1-2.

[306] (n 46).

[307] (n 2) Article 105: "The Appellate Division shall have power, subject to the provisions of any Act of Parliament and of any rules made by that division to review any judgment pronounced or order made by it."

Constitution. After two hearings, the Supreme Court dismissed the 'review' on 12 December 2013. Later that night, Abdul Quader Molla was executed by hanging inside the Dhaka Central Jail.

Toby Cadman who had been serving as one of Molla's lawyers since January 2011 claimed that his client had been "judicially murdered" as a direct consequence of the Shahbag movement.[308] Critics believe that had it not been the enormity of the mass gatherings at Shahbag, the legal provision ensuring the equality of arms allowing the Prosecution to appeal would have not found a place in the ICTA. Had the relevant statutory provision not been amended, the Prosecution would be unable to appeal against the sentence of imprisonment passed on Molla. This is precisely why it has been alleged that the hanging of Abdul Quader Molla on 12 December 2013 is an example of penal populism and a representation of populist justice.

It has also been argued that when the retroactive changing of laws leads to the altering of the final outcome of a case in a manner that is detrimental to the accused - as was the case with regard to Abdul Quader Molla, it not only goes against the prohibition on retroactivity, but also undermines the independence and impartiality of the judiciary and raises serious questions about the political motivations behind the trial process.[309] The words of Brad Adams of Human Rights Watch aptly sum up the

[308] 'Barrister Toby Cadman after the Execution of Abdul Quader Mollah - Washington, DC, December 12, 2013' (12 December 2013) <https://www.youtube.com/watch?v=i-OAEt-bYZA> accessed 22 May 2017; 'Abdul Quader Molla's Lawyer: This was a Politically-Motivated Judicial Murder' (*5 Pillars*, 13 December 2013) <http://5pillarsuk.com/video/abdul-quader-mollahs-lawyer-this-was-a-politically-motivated-judicial-murder/> accessed 22 May 2017; 'Bangladesh Justice: Damned if you do, damned if you don't' (*Open Democracy*, 5 March 2013) <https://www.opendemocracy.net/opensecurity/toby-m-cadman/bangladesh-justice-damned-if-you-do-damned-if-you-dont> accessed 22 May 2017.

[309] 'Bangladesh: Stop the Execution of Abdul Quader Mollah' (*International Commission of Jurists*, 10 December 2013) <https://www.icj.org/bangladesh-stop-the-execution-of-abdul-quader-mollah/> accessed 22 May 2017.

critical voices against retroactive application of law in the *Molla* case: "A government supposedly guided by the rule of law cannot simply pass retroactive laws to overrule court decisions when it doesn't like them. The Bangladesh government should pause, take a deep breath, and repeal the proposed amendments, which make a mockery of the trial process."[310] There is scope to argue that such allegations did not fully appreciate the fundamental notions of separation of powers in Bangladesh and the Supreme Court's mandate to ensure 'complete justice' under Article 104 of the Constitution.

While the Parliament did give retrospective effect to this amendment, the Appellate Division of the Supreme Court of Bangladesh did not automatically accept that it would apply to the *Molla* case. Seven of the most senior lawyers of Bangladesh were invited as Amicus Curiae and asked to make submissions on whether the amendment allowing the Prosecution to appeal before the Supreme Court on the basis of a retrospectively applied amendment was maintainable and also whether the enhancement of punishment was possible on appeal. It was on the basis of the submissions made by the Amicus Curiae that the Supreme Court concluded that the amendment in question would apply to *Molla*. Subsequently, when the sentence on Molla was enhanced from a sentence of life imprisonment to a death penalty, the SC maintained that increasing a sentence on appeal was very much within its powers, and that by doing so it was in fact performing "complete justice".[311]

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[310] 'Bangladesh: Post-Trial Amendments Taint War Crimes Process' (*Human Rights Watch*, 14 February 2013) <http://www.hrw.org/news/2013/02/14/bangladesh-post-trial-amendments-taint-war-crimes-process> accessed 22 May 2017; 'Bangladesh: Death Sentence Violates Fair Trial Standards' (*Human Rights Watch*, 18 September 2013) <https://www.hrw.org/news/2013/09/18/bangladesh-death-sentence-violates-fair-trial-standards> accessed 22 May 2017.

[311] (n 46) [174]; (n 2) Article 104 reads: "The Appellate Division shall have power to issue such directions, orders, decrees or writs as may be necessary for doing complete justice in any cause or matter pending before it, including orders for the purpose of securing the attendance of any person or the discovery or production of any document."

The moot question is 'how' the Supreme Court reached these conclusions. For the purposes of determining whether the retroactive application of the amendment allowing the Prosecution to appeal had offended the principle of *nullum crimen*, the SC assessed the impugned amendment against the four guidelines issued by the United States Supreme Court in *Calder v Bull* describing the "characteristics of an unconstitutional ex-post facto law": 1) "Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes an action."; 2) "Every law that aggravates a crime, or makes it greater than it was, when committed."; 3) "Every law that changes punishment, and inflicts a greater punishment, than the law, annexed to the crime, when committed."; and 4) "Every law that alters the legal rules of evidence, and receives less or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender."[312]

The Supreme Court relied on the persuasive precedents of multiple foreign cases. It agreed with Jagannadhadas J in *Rao Shiv Bahadur Singh v The State of Vindhya Pradesh* who observed that a trial conducted under a procedure different from what was in place at the time of the commission of the offence was not 'ipso facto' unconstitutional.[313] In *Dobbert v Florida* the death penalty was invalidated as a form of punishment soon after Ernest Dobbert murdered his two children. However, five months later when the Florida legislature enacted a revised statute allowing for the death penalty for murder in the first degree, Dobbert was convicted and sentenced to

[312] *Calder v Bull* (1798) 3 US (3 Dall) 390 cited in (n 46) [165].
[313] *Bahadur Singh v State of Vindhya Pradesh* AIR 1953 SC 394 cited in (n 46) [164] - [165].

death. On appeal, the U.S. Supreme Court held:

> The changes in the death penalty statute between the time of the murder and the time of the trial are procedural, and, on the whole, ameliorative, and hence there is no ex post facto violation. […] The existence of the earlier statute at the time of the murder served as an 'operative fact' to warn petitioner of the penalty which Florida would seek to impose on him if he were convicted of first-degree murder.[314]

The Supreme Court of Bangladesh held that the appeal filed at the instance of the Prosecution was "maintainable" because the amendment to Section 21(1) ICTA had merely enlarged the class of persons competent to appeal against sentences passed by the ICTs.[315] The retroactive application of this 'enlargement' of class of persons did not violate the principle of *nullum crimen* because it did not in any way attach criminality to any act previously done which happened to be innocent when it had been done. The amendment also did not provide a greater punishment than was prescribed at the time of its commission or for that matter alter the degree or lessen the amount of measure of proof which was necessary to convict when the crime was committed.[316] The statutory provisions of the ICTA stating the crimes with which Molla was charged, the punishment prescribed for those crimes and finally the degree of proof necessary to establish his guilt remained unaffected despite the retroactive application of the procedural amendment brought to Section 21(1).[317] The Supreme Court also took refuge in the *ratio decidendi* of *Tarique Rahman v Government of*

[314] *Dobbert v Florida* (1977) 432 US 282 cited in (n 46) [165] – [166].
[315] (n 46).
[316] *Carmell v Texas* (98-7540) 529 US 513 (2000).
[317] *Thompson v State of Missouri* (1898) 171 US 380.

Bangladesh and *Government of Bangladesh v Sheikh Hasina*.[318]

Both cases were heard by the Supreme Court in the past and had dealt with the issue of retroactive application of law. In *Rahman* the SC held that Article 35(1) of the Constitution "envisages the prohibition on conviction or sentence under ex-post facto law, not trial of the offence alleged to have been committed or the procedure to be followed in the investigation, inquiry in respect of an offence alleged to have been committed."[319] In *Hasina*, the Supreme Court held that procedural laws would not contravene the ban on *ex-post facto* law merely because retroactive effect had been given to it. The Parliament, therefore, was empowered to give retroactive effect to procedural laws but not to laws which retroactively created offences and or increased punishment. In the *Molla* case, the amendment to Section 21(1) ICTA had not created any new offences or new forms of punishment. The death penalty was always open for the ICTs to apply to any of the accused if found guilty. The amendment was of a 'procedural' nature the application of which allowed the Appellate Division to analogously dispose of two appeals – one that had been initiated at the instance of the Government and the other at the instance of the convicted accused.

Justice Surendra Kumar Sinha who wrote the leading judgment in *Molla* observed that the dispute over the maintainability of the appeal filed by the Prosecution was "academic" in nature.[320] This was because even if the Prosecution's appeal filed on the basis of a retrospective law was held to be 'unmaintainable' on the grounds that it violated the principle of *nullum crimen*, the Supreme Court would still have to hear

[318] *Tarique Rahman v Government of Bangladesh* 63 DLR (AD) 18; *Government of Bangladesh v Sheikh Hasina* 60 DLR (AD) 90.
[319] (n 46).
[320] ibid [173].

the appeal filed by the Defence during which it would evaluate if the ICT had "awarded a proper sentence to the accused" on the basis of powers conferred by Section 21 ICTA and Article 104 of the Constitution.[321] In effect, the amendment to Section 21(1) allowing the Prosecution to appeal was wholly unnecessary. In the end, the Supreme Court heard both appeals on their merits and applied its inherent power to determine whether if the ICT had "awarded a proper sentence to the accused".[322] With respect to Charge No. 6, the SC found that the ICT had erred in law by sentencing Molla to life imprisonment. Noting that Molla did not at any point show any sort of "repentance" for his "acts and deeds", the Supreme Court held that it "completely offset" Molla's young age at the time of the offence, which was identified by the court as the only mitigating factor.[323] As a result, the Supreme Court exercised its power conferred by Section 21 of the ICTA along with its powers under Article 104 of the Constitution to pass an order as was necessary for "the ends of justice" and enhanced the sentence from life imprisonment to death on the count of killing of Hazrat Ali, his wife Amena, his two minor daughters Khatija and Tahmina and two year old son on 26 March, 1971.[324] The Supreme Court drew support from *Bachan Singh v State of Punjab* and *Machhi Singh v State of Punjab* where the constitutional validity of the death penalty in India was tested and it was observed that the death penalty could be invoked only in the rarest of cases.[325] In *Molla* the Supreme Court held:

> We noticed the atmosphere that was prevalent during the recording of the evidence of P.W.3 from the note sheet of the tribunal. She was narrating

[321] ibid [173] – [174].
[322] ibid [173].
[323] ibid [786].
[324] ibid [183].
[325] *Bachan Singh v State of Punjab* (1980) 2 SCC 684; *Machhi Singh v State of Punjab* (1983) 3 SCC 470 cited in (n 46) [784].

> the events of brutal killing of her mother and siblings; two of them were so much ravished that they fell into the jaws of death and the other - a child of two years was dashed to death. She was lamenting at the time of deposing as evident from the remarks noted by the tribunal like a baby, and then lost her sense. A pathetic heart breaking atmosphere seized the proceedings of the tribunal. If one reads her testimony it will be difficult to control emotion. The murders were extremely brutal, cold blooded, diabolical, revolting so as to arouse intense and extreme indignation of the community. It was perpetrated with motive. On a close reading of the evidence of P.W.3 one can instantaneously arrive at a conclusion that there is something uncommon about the incidents of murder which render sentence of imprisonment for life inadequate and deserve for a death sentence. […] If the gravity of the offence is taken as the basis for awarding sentence to the appellant, it is one of the fittest case to award the appellant the highest sentence in respect of the charge no.6 in which the killing and rape were brutal, cold blooded, diabolical and barbarous. If the tribunal does not award the maximum sentence considering the gravity of the charge, it will be difficult to find any other fit case to award such sentence.[326]

Of course, enhancement of a sentence is a recognized capability for appeal courts in other jurisdictions and in international criminal law.[327] A close parallel to the *Molla*

[326] (n 46) [248] - [249] & [252].
[327] 'Tadic Sentence increased to 25 Years Imprisonment' (*The Hague*, 11 November 1999) <http://www.icty.org/en/press/tadic-sentence-increased-25-years-imprisonment> accessed 22 May 2017; 'War Criminal Loses Appeal' *BBC News* (24 March 2000) <http://news.bbc.co.uk/1/hi/world/europe/689147.stm> accessed 22 May 2017; Marija Ristic, 'Serbia Gives Ex-Fighter Maximum War Crimes Sentence' (*Balkan Transitional Justice*, 12 March 2013)

appeal is *Case 001* heard by the Extraordinary Chambers in the Courts of Cambodia where Kaing Guek Eav alias Duch's sentence was increased from thirty five years to life imprisonment on appeal.[328] The reasoning adopted by the Supreme Court Chamber was that the Trial Chamber had "attached undue weight to mitigating circumstances and insufficient weight to gravity of crimes and aggravating circumstances" resulting in an "error on a question of law" and the imposing of a "manifestly inadequate sentence."[329] It is also worth noting that after *Molla*, the ICTs and the Supreme Court passed sentences of life imprisonment on Ghulam Azam, Abdul Alim and Delwar Hossain Sayeedi. In *Sayeedi*, the Appellate Division of the Supreme Court on appeal from the ICT reduced the accused's punishment from the death penalty to a sentence of life imprisonment and the Prosecution's review application to enhance the punishment was also dismissed.

On the basis of abovementioned analysis, there is scope to conclude that the decision of the Appellate Division of Bangladesh's Supreme Court in *Molla* has some validity. Nonetheless, the enhancement of Molla's sentence after the Shahbag movement reveals two important points of tension in the principle of complementarity. Firstly, while the complementary system created by the Rome Statute identifies national courts as having priority in addressing the culture of impunity, the national context prevailing at the time of judgment may prompt these courts to succumb or be perceived to succumb to populist demands for justice. Secondly, while the principle of

<http://www.balkaninsight.com/en/article/belgrade-increase-sentence-for-war-crimes-in-bosnia> accessed 22 May 2017; Sven Milekic, 'Croatian Police Official's War Crimes Sentence Increased' (*Balkan Transitional Justice*, 13 February 2017) <http://www.balkaninsight.com/en/article/croatian-police-official-war-crimes-sentence-pro-longed-02-13-2017> accessed 22 May 2017.

[328] 'Shock for Khmer Rouge Leader Duch as his Sentence is Increased to Life' *The Telegraph* (03 February 2012) <http://www.telegraph.co.uk/news/worldnews/asia/cambodia/9058823/Shock-for-Khmer-Rouge-leader-Duch-as-his-sentence-is-increased-to-life.html> accessed 22 May 2017.

[329] *Summary of Appeal Judgment (Kaing Guek Eav, alias Duch)* Case File 001/18-07-2007/ECCC/SC, Extraordinary Chambers in the Courts of Cambodia 3 February 2012 [35], [44].

complementarity requires the ICC to be receptive to the diverse standards of justice of national criminal jurisdictions, to what extent does it accommodate national courts that have embraced the challenge to fight impunity but apply the death penalty while doing so?

Conclusion

This Chapter has analysed three criticisms directed at various statutory provisions of the ICTA, all of which are related to the principle of legality. This has been conducted in light of Bangladesh's national and international obligations which includes the fair trial guarantees enshrined in Bangladesh's Constitution, the ICTA and its Rules of Procedure and the "principles of due process recognized by international law". Using the above standards as the benchmark to assess the veracity of the three significant criticisms relating to the principle of legality, this Chapter concludes that all criticisms are by no means incontrovertible. Section 3(1) ICTA empowering the ICTs to prosecute "any individual or group of individuals, […] whether before or after the commencement of this Act" does not violate Article 35(1) of the Bangladesh Constitution. By and large, the definitions of 'crimes against humanity' and 'genocide' in the ICTA reflect the customary international law surrounding those definitions in 1971. Any variation falls within the boundaries of reasonable discretion exercised by a national legal system. Finally, Bangladesh's Supreme Court relied on established judicial principles and precedents to justify the enhancement of Molla's punishment on appeal from life imprisonment to the death penalty.

Valentina Spiga and Shane Darcy warned that the non-observance or the misuse of the

principle of legality may result in the opening of a "dangerous Pandora's box in the hands of a tyrannical judicial power."[330] While the 'process' through which Molla's punishment was enhanced revealed two important points of tension in the principle of complementarity, it is doubtful the ICTs or the Supreme Court of Bangladesh qualify as 'tyrannical judicial powers'. Since 2010, the justice system established in Bangladesh to try and punish the perpetrators of international crimes has come a long way. This is indicated in the Supreme Court's reduction of Sayeedi's punishment on appeal from the death penalty to life imprisonment and also the fact that the ICTs have not always handed down the death penalty to the accused but have imposed varying sentences of imprisonment as well.

The following Chapter analyses the last major criticism that has been directed towards the ICTA. It evaluates the critical views regarding Section 20(2) ICTA which empowers the ICTs to "award sentence of death" if they feel that such punishment is "proportionate to the gravity of the crime".[331] It answers whether if the principle of complementarity can accommodate national courts handing down the death penalty as they fight impunity.

[330] Spiga (n 101) 12.
[331] (n 1) s 20(2).

Chapter V

Analysing the major criticisms of the ICTA (II)

Introduction

One of the more important challenges to the legitimacy or legality of the ICTs has been its adoption of the death penalty as a possible punishment for those convicted of international crimes. Section 20(2) of the International Crimes (Tribunals) Act 1973 (ICTA) empowers the sentencing of "death or such other punishment proportionate to the gravity of the crime" which appears "just and proper" to the Tribunal.[1] As of 2017, a total of 242 charges have been brought against 55 accused under Section 3(2) of the ICTA. The accused have been acquitted in 73 of these charges. Death penalties were passed in 67 charges against 31 of the accused. In the remaining charges, a wide range of punishments starting from imprisonment of five years to life imprisonment were passed. Following appeals filed by 7 of the accused, the Appellate Division of the Supreme Court of Bangladesh (SC)[2] has passed the sentence of death against 6 of them resulting in the executions of, namely, Abdul Quader Molla (Molla), Muhammad Kamaruzzaman (Kamaruzzaman), Ali Ahsan Muhammad Mujahid (Mujahid), Salauddin Qader Chowdhury (Chowdhury), Motiur Rahman Nizami (Nizami) and Mir Quasem Ali (Ali).[3] On appeal, the SC commuted Delwar Hossain Sayeedi's punishment from the death penalty to a sentence of life imprisonment.[4]

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[1] The International Crimes (Tribunals) Act 1973 [ACT NO. XIX OF 1973] s 20(2) < http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=435 > accessed 6 May 2014.
[2] The Appellate Division of the Supreme Court of Bangladesh is the country's apex court.
[3] 'Bangladesh Hangs Islamist Mir Quasem Ali for 1971 War Crimes' *BBC News* (4 September 2016) <http://www.bbc.co.uk/news/world-asia-37268320> accessed 7 January 2017.
[4] 'Bangladesh Islamist Delwar Sayeedi death Sentence Commuted' *BBC News* (17 September 2014) <http://www.bbc.co.uk/news/world-asia-29233639> accessed 7 January 2017.

There are deep divisions amongst stakeholders over the presence and application of the statutory provision allowing the death penalty in the ICTA. The Bangladesh Government maintains that the death penalty has been retained in the ICTA in light of the country's "socio-political realities and legal system" and that it is handed down only where the accused are convicted of the "most heinous crimes" and after all "relevant legal safeguards" available to an accused have been exhausted.[5] On the other hand, the retaining and imposing of the death penalty has been criticized from several perspectives by lawyers representing the defendants, a few practitioners of international law, human rights and non-governmental organizations such as Amnesty International (Amnesty), Human Rights Watch (HRW) and the International Commission of Jurists (ICJ) as well as major bodies of the United Nations including the Office of the United Nations High Commissioner for Human Rights (OHCHR). These criticisms can be divided into two broad categories, which are, the principled opposition to the death penalty as an inhumane and degrading form of punishment and the alleged failure of the ICTs to ensure fair trial safeguards enshrined in Article 14 of the International Covenant on Civil and Political Rights (ICCPR).[6]

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[5] Ministry of Foreign Affairs, 'A Position Paper on ICT-BD Trials and Execution of Verdict against Mr. Abdul Quader Molla on 12 December 2013' (The Government of the People's Republic of Bangladesh, 2013) 6 <http://www.mofa.gov.bd/media/position-paper-ict-bd-trials-and-execution-verdict-against-mr-abdul-quader-molla> accessed 8 August 2017

[6] 'Press Briefing Notes on Nepal and Bangladesh' (*UN High Commissioner for Human Rights*, 24 November 2015) <https://perma.cc/GJS9-XRE8> accessed 25 April 2016; 'Press Briefing Notes on Bangladesh' (*UN High Commissioner for Human Rights*, 8 April 2016) <https://perma.cc/PU69-HRHA> accessed 19 April 2016; 'Bangladesh: Suspend Death Penalty for War Crimes Convict' *Human Rights Watch* (New York, 9 May 2016) <https://www.hrw.org/news/2016/05/09/bangladesh-suspend-death-penalty-war-crimes-convict> accessed 19 April 2016; Toby M Cadman, 'Barrister Toby Cadman after the Execution of Abdul Quader Mollah - Washington, DC, December 12, 2013' (12 December 2013) <https://www.youtube.com/watch?v=i-OAEt-bYZA> accessed 19 April 2016; 'Bangladesh International Crimes Tribunal: Commentary on the Application of International Standards' (*9 Bedford Row International,* December 2013) 15 & 21 <http://tobycadman.com/wp-content/uploads/2014/06/131121-Bangladesh-Briefing-Document-December.pdf> accessed 19 April 2016; 'Co-Chairs Urge Stay of Execution in Bangladesh Case for Lack of Due Process' (*Tom Lantons Human Rights Commission United States Congress*, 6 May 2016) <https://humanrightscommission.house.gov/news/press-releases/co-chairs-urge-stay-execution-

In two parts, this Chapter analyses whether the passing of the death penalty by the ICTs and the Supreme Court of Bangladesh violates the principle of complementarity. To this end, Part I briefly traces the global movement for abolition of the death penalty and identifies the categories of crimes against which the passing of the death penalty is still permissible under contemporary standards of international law. Part II asks if the 'complementary' system of justice created by the Rome Statute of the International Criminal Court (Rome Statute) permits domestic courts of State Parties to apply the death penalty as punishment for international crimes.

1. The death penalty's 'place' in international law and the 'complementary' system of justice

This part briefly traces the strides that have been made towards the 'abolition' of the death penalty. It argues that while there is a strong global movement against capital punishment, consensus on 'abolition' does not yet command universal support. The absence of this 'consensus' is reflected not only in the 'views' expressed by countries that retain the death penalty but is also acknowledged in multiple instruments of international law which allow the imposing of capital punishment for the 'most serious crimes'.

1.1 *Cesare Beccaria and the campaign for abolition of the death penalty*

bangladesh-case-failing-due-process-standards> accessed 19 April 2016; 'Bangladesh: Halt Imminent Execution of Motiur Rahman Nizami' (*ICJ News,* 9 May 2016) < https://www.icj.org/bangladesh-halt-imminent-execution-of-motiur-rahman-nizami/> accessed 19 April 2016.

Cesare Beccaria at the age of twenty-five published a treatise titled *Dei delitti e delle penne* (Essay on Crimes and Punishments) and in doing so cemented his place in history as one of the pioneers who advocated for the abolition of the death penalty in a "concerted fashion".[7] This 'contribution' came at a time when the 'abolition of man' was "virtually unchallenged" and was handed down for offences as 'petty' as stealing turnips or cutting down trees.[8] In the chapter discussing the 'punishment of death', Beccaria boldly posed a fundamental question: "What right, I ask, have men to cut the throats of their fellow creatures?"[9] Answering that this was not "authorised by any right", he claimed that the death penalty was no more than "a war of a whole nation against a citizen" whose destruction was perceived as "necessary or useful to the general good".[10] Beccaria argued that if he could demonstrate that the death penalty was "neither necessary nor useful", he would win the "cause of humanity".[11]

Emphasizing the need for the "efficiency of punishment",[12] Beccaria advocated the proportionate determination of punishment which would refrain from inflicting extreme pain and needless cruelty on criminals. He explained that inflicting excessive pain was "counter-productive"[13] because awareness that excessively severe punishments would be applied incited men to perpetrate "other crimes, to avoid the punishment due to the first."[14] Referring back to the "experience of all ages", Beccaria

[7] Berand van Niekerk, 'Hanged by the Neck Until you are Dead: Some Thoughts on the Application of the Death Penalty in South Africa' (1969) 86 South African Law Journal 457, 461; Paul Friedland, *Seeing Justice Done: The Age of Spectacular Capital Punishment* (Oxford University Press 2012) 205, 207.
[8] James B Christoph, *Capital Punishment and British Politics: The British Movement to Abolish the Death Penalty 1945-57* (George Allen & Unwil Ltd 1962) 13-14.
[9] Cesare Beccaria, *An Essay on Crimes and Punishments* (New edn, W C Little & Co 1872) 97.
[10] ibid 98.
[11] ibid.
[12] Paul Friedland, *Seeing Justice Done: The Age of Spectacular Capital Punishment* (Oxford University Press 2012) 205.
[13] ibid 206.
[14] Beccaria (n 9) 94.

took note of the simple reality that capital punishment had "never prevented men from injuring society" and hence was incapable of having a deterrent effect on crime.[15] He proposed, that the "traditional spectacle" of the death penalty be replaced by "perpetual slavery", an alternate penal spectacle that would effectively deter "the most hardened and determined" criminals and simultaneously be of productive use to the society at large.[16] This 'alternative', however, failed to gain acceptance, despite support from thinkers of the likes of Montesquieu, Voltaire and Jacques Pierre Brissot.[17]

Interestingly, Cesare Beccaria was not an 'abolitionist' to the extent he was "fashioned" to be.[18] Despite being convinced of its ineffectiveness, Beccaria conceded that the death penalty could be applied in certain circumstances, maintaining a 'conditional' stance on abolition which was in effect very similar to the views of Montesquieu or Jean-Jacques Rousseau who believed in the sovereign's right to take the life of a criminal "when it was a matter of collective self-defence"[19]:

> The death of a citizen cannot be necessary but in one case. When, though deprived of his liberty, he has such power and connections as may endanger the security of the nation; when his existence may produce a dangerous revolution in the established form of government. But even in this case, it can only be necessary when a nation is on the verge of

[15] ibid 99.
[16] ibid 101; Friedland (n 12) 206.
[17] Beccaria (n 9) 193-195; Friedland (n 12) 211-212.
[18] Friedland (n 12) 207.
[19] ibid 208.

> recovering or losing its liberty; or in times of absolute anarchy, when the disorders themselves hold the place of laws.[20]

Beccaria's treatise inspired significant changes in the penal landscape. In the following years and decades, penal reform embraced a combination of 'humanitarianism' and 'utilitarianism'.[21] This process enhanced the "positive value" of the individual, including those who had committed crimes.[22] Capital punishment underwent a process of 'delocalization' whereby it transformed from being a 'spectacular' community ritual to a "discreet, hidden, almost abashed"[23] event controlled by state authorities.[24] These 'changes' did not come about easily and without resistance. Beccaria's treatise was staunchly rebutted at the time by Pierre-Francois Muyart de Vouglans. In defence of capital punishment, Muyart argued that it would be a "sovereign injustice not to make murderers suffer the same penalty that they inflict on others" and by "taking it upon himself to sketch the Laws of all nations from the depths of his office", Beccaria had undermined "natural law and the law of nations" based on centuries of experience, which established the death penalty's position as a legitimate form of punishment.[25]

Nonetheless, as of 2017, 141 countries are abolitionist either in law or in practice representing more than two-thirds of all States.[26] This does not mean application of

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[20] Beccaria (n 9) 98.
[21] Friedland (n 12) 210.
[22] Lynn Hunt, *Inventing Human Rights: A History* (W W Norton 2007) 76, 82, 112; Kenneth Younger, 'The historical perspective' in Louis Blom-Cooper (ed), *The Hanging Question: Essays on the death penalty* (Gerald Duckworth & Co 1969) 7.
[23] Friedland (n 12) 217.
[24] David Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition* (Oxford University Press 2010).
[25] Muyart de Vouglans, *Réfutation des principes hasardés dans le Traité des délits et peines* (Lausanne 1767) 18, 22, 86-7 cited in Friedland (n 12) 214.
[26] 'The Death Penalty in 2016: Facts and Figures' (*Amnesty International,* 11 April 2017) <https://www.amnesty.org/en/latest/news/2017/04/death-penalty-2016-facts-and-figures/> accessed 25 May 2017.

the death penalty has universal support. In 2015, responding to General Assembly resolution 69/186 entitled "Moratorium on the use of the death penalty", Bangladesh and 26 other countries urged the United Nations to view the death penalty from a "broader perspective" that took into account the "rights of victims" and the "right of the community to live in peace and security".[27] According to these countries, the retention of the death penalty formed a part of their inalienable right to choose their "political, economic, social, cultural, legal and criminal justice systems" without external interference.[28] Pointing out that no Member State of the UN had the right to impose its point of views on others, it was argued that countries that still applied the death penalty had the right to determine the path that corresponded with their "own social, cultural and legal needs".[29] While there is a growing consensus that the death penalty is lacking in 'deterrent value'[30], resistance to this claim has not completely waned.[31] According to Paul Friedland, in the eighteenth century there was a general agreement amongst 'protagonists' of abolition and 'supporters' of the death penalty that if it ought to be applied at all, it be applied 'sparingly' and only to dangerous

[27] UNGA, 'Note verbale dated 28 July 2015 from the Permanent Mission of Egypt to the United Nations addressed to the Secretary-General' (29 July 2015) UN Doc A/69/993, 3-5; Rayhan Rashid, 'ICT and the 'death penalty' debate' (*ICSF Forum,* 18 March 2013) <http://icsforum.org/articles-en/892> accessed 15 May 2017.
[28] UNGA (n 27).
[29] ibid 3-5.
[30] See generally, Carolyn Hoyle and Roger Hood, 'Deterrence and Public Opinion' in Ivan Simonovic (ed), *Moving Away from the Death Penalty: Arguments, Trends and Perspectives* (United Nations 2014) 70-74; John Lamperti, 'Does Capital Punishment Deter Murder? A Brief Look at the Evidence' (2010) Dartmouth College Research Paper, 6 <https://www.dartmouth.edu/~chance/teaching_aids/books_articles/JLpaper.pdf> accessed 28 April 2016; John Donohue and Justin J Wolfers, 'The Death Penalty: No Evidence for Deterrence' (2006) 3 (5) The Economists' Voice <http://www.deathpenaltyinfo.org/DonohueDeter.pdf> accessed 28 April 2016; John Donohue and Justin J Wolfers, 'Uses and Abuses of Empirical Evidence in the Death Penalty Debate' (2006) NBER Working Paper No 11982 <http://www.nber.org/papers/w11982.pdf> accessed 28 April 2016; 'The Death Penalty and Deterrence' (*Amnesty International*, 2016) <http://www.amnestyusa.org/our-work/issues/death-penalty/us-death-penalty-facts/the-death-penalty-and-deterrence> accessed 28 April 2016.
[31] Cass R Sunstein and Adrian Vermeule, 'Is Capital Punishment Morally Required? - Acts, Omissions, and Life-Life Tradeoffs Ethics and Empirics of Capital Punishment' (2006) 58 Stanford Law Review 703, 706.

criminals.[32] The intriguing aspect of this 'agreement' is that it embodied what would dominate the contemporary standard of handing down the death penalty under international law, i.e. international law's permissiveness of the death penalty as punishment for the 'most serious crimes'.

1.2 *The death penalty for the 'most serious crimes'*

Despite support for 'abolition' during the debates of the Third Committee, the Universal Declaration of Human Rights (UDHR) recognized the "right to life" and the right not to be subjected to "torture or to cruel, inhuman or degrading treatment or punishment", but did not explicitly prohibit the death penalty.[33] This changed in the 1950s and the 1960s when international human rights treaties such as the ICCPR, European Convention on Human Rights (ECHR) and the American Convention on Human Rights (ACHR) prohibited the death penalty for crimes that were not "sufficiently serious" but allowed it "under carefully defined circumstances".[34] For instance, Article 6(2) ICCPR restricts countries that have not abolished capital punishment to apply it only with respect to the 'most serious crimes'. Similar provisions are seen in Article 4(2) ACHR.[35] The protocols to these treaties, namely, Protocols 6 and 13 to the ECHR, the additional protocols to the ICCPR and the ACHR proceeded in advancing the cause for abolition and presently count nearly one hundred

[32] Friedland (n 12) 215.
[33] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 3 and 5 <http://www.un.org/en/universal-declaration-human-rights/> accessed 1 May 2015; William A Schabas, 'International Law and the Death Penalty' in Peter Hodgkinson and William A Schabas (eds), *Capital Punishment: Strategies for Abolition* (Cambridge University Press 2004) 36-37, 40.
[34] Schabas (n 33) 41.
[35] Schabas (n 33) 46.

states that have signed or ratified them.[36] While the protocols to the ICCPR and the ACHR permit the application of the death penalty during war time, Protocol 13 of the ECHR extended upon its predecessor and abolished the death penalty not just during peace time but also during times of war.[37] These numbers point towards the definitive presence of an abolitionist norm in Europe and Latin America.[38] In 2004, when a total of sixty states had signed the protocols in question, William Schabas argued that the search for a 'global' customary norm prohibiting capital punishment for all crimes was "premature", but in the same breath predicted the crystallization of such a norm in the next few decades.[39] Taking into consideration that a further 37 countries have signed the protocols since 2004, there is little scope to doubt the realistic chances of Schabas's estimate.

Experts on the death penalty like Roger Hood and Carolyn Hoyle have called for the "dynamic interpretation" of the concept 'most serious crimes'.[40] Inferring from the phrase "in countries that have not abolished the death penalty" in Article 6(2) and the contents of Article 6(6) which does not "delay or prevent the abolition of capital punishment by an State Party to the Covenant", it has been argued that the term 'most serious crimes' in the ICCPR was a "marker" that signified "the policy of moving towards abolition through restriction".[41] As a result, the list of 'most serious crimes'

[36] Schabas (n 33) 42; Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, UNTS vol 1642, 414; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights "Protocol of San Salvador", Signatories and Ratifications <http://www.oas.org/juridico/english/sigs/a-52.html> accessed 15 May 2017; Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in All Circumstances, ETS No 187 <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/187/signatures?p_auth=p9GUofJE> accessed 1 May 2016.
[37] Schabas (n 33) 43.
[38] ibid 44.
[39] ibid 41.
[40] Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edn, Oxford University Press 2015) 151.
[41] ibid 25-26, 151.

has undergone a process of "evaluation and re-evaluation" and has gradually narrowed down with the passage of time.[42] Hood and Hoyle's assertion complements the opinion of the UN Human Rights Committee (HRC) which has called for "restrictive" interpretation of Article 6(2) implying that the application of the death penalty is an "exceptional measure".[43]

Although the reference to 'most serious crimes' has been criticized on the grounds of being too permissive towards wide-ranging state practices and for failing to curb the tendency of pro-death countries to execute persons convicted of a crime,[44] rights based bodies have, over the years, clarified to a significant extent what crimes do not qualify for the 'most serious' threshold.[45] Article 4(4) ACHR stipulates that capital punishment cannot be inflicted for "political offences or related common crimes".[46] The UN Commission on Human Rights (UNCHR) has imposed additional restrictions on sentencing to death persons guilty of 'non-violent financial crimes' or 'non-violent religious practices or expressions of conscience'.[47] Crimes related to 'opposition to order' and 'national security violations' as well as 'threats against national security', and 'broadly written definitions of terrorism' have also been found to be "excessively vague" and "inconsistent" with the ethos of Article 6(2) ICCPR.[48] Philip Alston's compilation of crimes determined by the Commission on Human Rights and the

[42] ibid 26.
[43] Human Rights Committee, General Comment 6, Article 6 (Sixteenth Session 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev.1, at 6 (1994) <https://www1.umn.edu/humanrts/gencomm/hrcom6.htm> accessed 1 May 2016.
[44] Schabas (n 33) 46.
[45] Hood and Hoyle (n 40) 152.
[46] American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32) <https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm> accessed 1 May 2016.
[47] UNCHR, 'Commission on Human Rights Resolutions 2004/67: Question of the Death Penalty' (21 April 2004) E/CN.4/RES/2004/67.
[48] Decisions on Procedures of the Human Rights Committee, UN Doc A/54/40, para 128.

Human Rights Committee to have fallen beyond the scope of 'most serious crimes' include: 'abduction not resulting in death', 'abetting suicide', 'adultery', 'apostasy', 'corruption', 'drug-related offences', 'economic crimes', 'the expression of conscience', 'financial crimes', 'embezzlement by officials', 'evasion of military service', 'homosexual acts', 'illicit sex', 'sexual relations between consenting adults', 'theft or robbery by force', 'religious practice' and 'political offences'.[49]

A significant attempt to provide a clear understanding of the concept of 'most serious crimes' was made by the UN Economic and Social Council (ECOSOC) in the early 1980s. In the 'Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty' which was adopted without opposition in 1984, the ECOSOC and the UN General Assembly stipulated that 'most serious crimes' "should not go beyond intentional crimes with lethal or extremely grave consequences".[50] Thirty years later in 2014, the UN Secretary-General in the Report titled "Question on the Death Penalty" explained that 'most serious crimes' in international human rights jurisprudence has been interpreted to allow "the death penalty to be applied only to the crime of murder or intentional killing."[51] Hood and Hoyle acknowledge that the developments so far with respect to the narrowing down of what is understood as 'most serious crimes' under international law are moving "undoubtedly […] in the right direction".[52]

[49] Philip Alston, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' UN Doc A/HRC/4/20, para 51.
[50] Alston (n 49) paras 49 and 51.
[51] Report of the Secretary-General, 'Question of the death penalty' (30 June 2014) A/HRC/27/23.
[52] Hood and Hoyle (n 40) 154.

2. Death penalty for 'international crimes' and the 'complementary' system of justice

This part briefly examines the practice of applying the death penalty for international crimes. It questions whether the 'complementary' system of justice created by the Rome Statute permits domestic courts of State Parties to apply the death penalty as punishment for international crimes even though modern 'international' tribunals no longer employ the death penalty as a form of punishment.

Since international law is permissive towards the infliction of capital punishment on the 'most serious crimes' (as discussed in the previous section), customary international law as a natural consequence cannot be said to explicitly prohibit the passing of the death penalty as a punishment for international crimes.[53] When determining the punishment for persons guilty of international crimes, courts enjoy more "judicial discretion".[54] A general consensus about a "tariff" of sentences for international crimes is yet to be achieved because of the divergent views States hold about the gravity of crimes, the attachment of guilt for each offence, and the degree of severity of punishment.[55] Consequently, although the ICC, the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the internationalized panels in Kosovo, the Special Panels for Serious Crimes of East Timor (SPSC), Special Court for Sierra Leone (SCSL) and Extraordinary Chambers in the Courts of Cambodia (ECCC) have set the cap of

[53] Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (2nd edn, Cambridge University Press 2011) 20.
[54] Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law* (3rd edn, Oxford University Press 2013) 36; Margaret M deGuzman, 'Harsh Justice for International Crimes' (2014) 39 Yale Journal of International Law 1, 7.
[55] Cassese and Gaeta (n 54) 36.

maximum punishment at life imprisonment, capital punishment for international crimes has been applied in the distant and recent past.[56]

After World War II, capital punishment was handed down by the International Military Tribunal (IMT) and International Military Tribunal for the Far East (IMTFE) for war crimes and for crimes that did not involve killings such as torture and rape. Twelve of the accused in the 'Trial of Major War Criminals' before the IMT were hanged.[57] Seven defendants before the IMTFE faced the same fate.[58] A general agreement persists that the Nuremberg principles were not reflections of victors' justice but "constituted a development vital for the survival of mankind and the stability of the world order."[59] Therefore, the death penalty was perceived to have applied been at that time not out of vengeance but because the practice formed a part of the laws and customs of war.[60]

[56] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, article 77; Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, article 24(1); Statute of the International Criminal Tribunal for Rwanda, article 23; Regulation No. 2000/59, UNMIK/REG/2000/59 (27 October 2000) article 1.5 <http://www.unmikonline.org/regulations/2000/reg59-00.htm> accessed 17 January 2017; Statute of the Special Court for Sierra Leone, s 3.3; SPSC Statute (East Timor) Article 19; Statute of the SCSL; Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, article 3 new; Steven Freeland, 'No Longer Acceptable: The Exclusion of the Death Penalty under International Criminal Law' (2010) 15 (2) Australian Journal of Human Rights 1, 3.

[57] William A Schabas, *Genocide in International Law* (Cambridge University Press 2000) 463.

[58] Freeland (n 56) 3.

[59] Gideon Hausner, *Justice in Jerusalem* (Schocken Book 1968) 441.

[60] 'Annex II – United States Law and Practice Concerning Trials of War Criminals by Military Commissions and Military Government Courts' in United Nations War Crimes Commission (ed), *Law Reports of Trials of War Criminals: Volume I* (English edn, His Majesty's Stationary Office 1948) 120; 'Trial of General Tomoyuki Yamashita' in United Nations War Crimes Commission (ed), *Law Reports of Trials of War Criminals: Volume IV* (His Majesty's Stationary Office 1948) 95; 'Trial of Hauptsturmfurer Oscar Hans' in United Nations War Crimes Commission (ed), *Law Reports of Trials of War Criminals: Volume V* (His Majesty's Stationary Office 1948) 86; 'Punishment of Criminals' in United Nations War Crimes Commission (ed), *Law Reports of Trials of War Criminals: Volume XV Digest of Laws and Cases* (English edn, His Majesty's Stationary Office 1948) 200-202; 'Trial of Kriminalassistent Kal-Hans Hermann Klinge' in United Nations War Crimes Commission (ed), *Law Reports of Trials of War Criminals: Volume III* (8th edn, His Majesty's Stationary Office 1948) 3.

The national courts of Allied States also applied the death penalty. For instance, even though there were no provisions under the national law to pass death sentences on quislings, Norwegian judges enforced them nonetheless stating that the death penalty for war crimes was permissible under customary international law.[61] Similarly, the UK and US prosecutions of 'minor' war criminals across Germany and other parts of Europe from 1945-1948 resulted in numerous death penalties being handed down. Although prosecutions led by the USSR did not result in the passing of the death penalty, the punishment of transportation for hard labour in Siberia amounted to the same thing. However, the application of the death penalty in national prosecutions during the post-Nuremberg era have been "historically rare"[62] with only a few noteworthy cases (including the executions of Adolf Eichmann by Israel in 1962 and the twenty-two Rwandan 'genocidaires' in 1998 and the unenforced death sentences passed against Khmer Rouge leader Pol Pot and his Deputy Prime Minister in 1979).[63] According to unofficial estimates, death sentences were also passed in 40% of the sentences passed by the Rwandan domestic courts in the first 150 trials.[64] In recent times, domestic courts in Bangladesh, Iraq and Libya have passed the death sentence against persons found guilty of international crimes. These include sentences passed against Iraq's Saddam Hussein in 2006 and Libya's Abdullah al-Senussi in 2015.[65]

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[61] William A Schabas, 'Death Penalty (International Crimes)' in Antonio Cassese, Guido Acquaviva and Dapo Akande (eds), *Oxford Companion to International Criminal Justice* (Oxford University Press 2009) 425.

[62] Ben Saul, 'The Implementation of the Genocide Convention at the National Level' in Paola Gaeta (ed), *The UN Genocide Convention – A Commentary* (Oxford University Press 2013) 74.

[63] ibid 74; 'Rwanda Scraps the Death Penalty' *BBC News* (8 June 2007) <http://news.bbc.co.uk/1/hi/world/africa/6735435.stm> accessed 15 January 2017; Freeland (n 56) 8-9.

[64] Freeland (n 56) 24.

[65] Ellen Knickmeyer, 'Hussein Sentenced To Death By Hanging' *The Washington Post* (6 November 2006) <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/05/AR2006110500135.html> accessed 2 May 2016; Mariam Karouny and Ibon Villelabeitia, 'Iraq Court Upholds Saddam Death Sentence' *Reuters* (26 December 2006) <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/26/AR2006122600297_pf.html> accessed 2 May 2016.

But in general the application of the death penalty for international crimes has been the exception since the late 1940s.

According to Steven Freeland, the dramatic reduction in the frequency and practice of handing down the death penalty over the past half-century is a consequence of 'micro' and 'macro' reasons.[66] He suggests that the 'micro' reasons are founded on practical considerations. International tribunals require financial support and they have been unlikely to receive that if adopting punishment which contravenes the principles of major contributing states or organisations.[67] More convincingly, the 'macro' reasons relate primarily to the evolution and influence of international human rights over the past six decades and the progress nation-states have made in the campaign for abolition.[68]

Despite this marked shift, the 'complementary' system of justice created by the Rome Statute does not prohibit domestic courts of State Parties from punishing the perpetrators of international crimes by applying the death penalty. In the third Chapter of this thesis, it was demonstrated that the ICC is receptive towards the 'diverse' standards of justice in national criminal jurisdictions when assessing the 'independence', 'impartiality' and 'manner' of those jurisdictions. These 'diverse' standards include the application of punishments like the death penalty. Although proposals calling for the Rome Statute to incorporate the death penalty were ultimately unsuccessful, the President of the Rome Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court reiterated that there was "no

[66] Freeland (n 56) 26-27.
[67] ibid 21.
[68] ibid 27.

international consensus on the inclusion or non-inclusion of the death penalty".[69] It was clarified that the ICC would not "affect national policies" relating to punishment and its non-inclusion of the death penalty would not "have a legal bearing on national legislations and practices with regard to the death penalty" or influence "development of customary international law" or the "legality of penalties imposed by national systems for serious crimes".[70] This position is clearly expressed in Article 80 of the Rome Statute which explicitly provides that none of its provisions affect "the application by States of penalties prescribed by their national law".[71]

Countries that still apply the death penalty for international crimes include Belarus, States belonging to the Caribbean Commonwealth, Democratic Republic of Congo, Ethiopia, Ghana, Indonesia, Iraq, Nigeria Saint Vincent and the Grenadines, Singapore, Sudan, USA and Zimbabwe.[72] From the courts of these States alongside the Bangladeshi ICTs, the Iraqi High Tribunal (IHT) has passed a range of sentences some of which had led to the executions of at least five of the accused.[73] Courts in Libya have also passed the death penalty on perpetrators of international crimes. When

[69] 'UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' (17 July 1998) UN Doc A/CONF.183/10 (Vol II), 124-125 & 356 <http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf> accessed 15 March 2016; 'UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' (17 July 1998) UN Doc A/CONF.183/10 (Vol III), 317, 319 <http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v3_e.pdf> accessed 15 March 2016.

[70] 'UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' (Vol II) (n69) 125; 'UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' (Vol III) (n 69) 314.

[71] Rome Statute of the International Criminal Court (n 56) article 80; Sarah M H Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press 2013) 70.

[72] 'The Death Penalty and the "Most Serious Crimes": A Country-by-Country Overview of the Death Penalty in Law and Practice in Retentionist States' (International Commission against the Death Penalty, 2013) <http://www.icomdp.org/cms/wp-content/uploads/2013/02/Most-serious-crimes_final_6Feb2013.pdf> accessed 15 March 2016; Schabas (n 57) 469; deGuzman (n 54) 7.

[73] Stephen J Rapp, 'Remarks by Ambassador-at-Large for war Crimes Issue at Question and Answer Session at the Forum Hosted by the Women of Ateneo' (10 May 2011) <https://2009-2017.state.gov/j/gcj/us_releases/remarks/2011/165259.htm> accessed 15 March 2016.

asked whether if it would have been better to try Saddam Hussein before the ICC, Stephen J Rapp the US Ambassador-at-Large for War Crimes Issues explained that the cases before the IHT were beyond the temporal jurisdiction of the ICC. He added further:

> We have to remember that this is a national system. It is theirs. It is their national norms. It may not be to everybody's liking, but that is the world we live in. We try to work at the national level first and foremost, and we cannot always expect it to be perfect. We want to have something that as good as we can.[74]

The most recent development in this area has been Iraq's Supreme Judicial Council's decision to open a "special judicial body to investigate the terrorist crimes committed against Yezidis" by alleged members of ISIS.[75]

However, critical of the level of fairness ensured during the domestic trials of Saif Al-Islam Gaddafi and Abdullah al-Senussi in Libya, Jennifer Trahan has described the ICC's "role in allowing domestic executions" as "troubling" and has called upon State Parties to "request the Court to adopt a policy of requesting diplomatic assurances of non-use of the death penalty in any ICC cases ruled inadmissible."[76] According to Geoffrey Robertson, the cases of Gaddafi and al-Senussi reveal a "design fault in the

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[74] ibid.
[75] 'Yazidis Cautiously Welcome Iraq Court Tasked with Prosecuting ISIS' (*Rudaw,* 12 June 2017) <http://www.rudaw.net/english/middleeast/iraq/12062017> accessed 15 March 2016.
[76] Jennifer Trahan, 'Rethinking the Death Penalty and Complementarity' (*Intlawgrrls,* 9 July 2016) <https://ilg2.org/2016/07/09/rethinking-the-death-penalty-and-complementarity/> accessed 20 January 2017.

ICC".[77] Despite these critical views, the statutory provisions of Article 80 remain unchanged and it cannot plausibly be said that the 'complementary' system of justice created by the Rome Statute does not preclude States or future international tribunals from applying the death penalty as punishment for international crimes.[78]

Conclusion

As of 2017, a total of 141 States are abolitionist in law or practice, revealing a clear trend that the global community is moving away from the practice of applying the death penalty and has made important strides towards reaching a consensus that the death penalty violates the prohibition on "torture and other cruel, inhuman or degrading treatment".[79] Nevertheless, the complete prohibition of the death penalty in all circumstances has not assumed the status of a "customary norm" and is therefore still absent in international law.[80] Contemporary standards of international law, therefore, are still permissive of the passing of the death penalty for the 'most serious crimes' which are limited to murder or intentional killing. Although international justice systems such as the ICTY, ICTY, SPSC, SCSL, ECCC and the ICC are statutorily barred from applying the death penalty, the 'complementary' system of

[77] Muammar Gaddafi, 'Extradition of Abdullah al-Senussi is a Blow to International Justice' *The Guardian* (London, 5 September 2012) <https://www.theguardian.com/commentisfree/2012/sep/05/extradition-abdullah-al-senussi-justice> accessed 20 January 2017.
[78] Jens David Ohlin, 'Applying the Death Penalty to Crimes of Genocide' (2005) 99 The American Journal of International Law 747, 777.
[79] 'The Death Penalty in 2016: Facts and Figures' (n 26).
[80] UNGA 'Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 2012) UN Doc A/67/279 <http://www.refworld.org/docid/509a69752.html> accessed 1 May 2016; Schabas (n 33) 40; International Bar Association, *The Death Penalty under International Law: A Background Paper to the IBAHRI Resolution on the Abolition of the Death Penalty* (IBA 2008) 16 <https://www.ibanet.org/Document/Default.aspx?DocumentUid=5482860b-b9bc-4671-a60f-7b236ab9a1a0> accessed 15 September 2017; UNGA 'Capital Punishment not Prohibited under International Law, Third Committee Told' (30 October 2007) UN Doc GA/SHC/3897 <https://www.un.org/press/en/2007/gashc3897.doc.htm> accessed 15 September 2017.

justice created by the Rome Statute does not preclude the domestic courts of State Parties from applying the death penalty as punishment for international crimes. This position is explicit in Article 80 of the Rome Statute. Therefore, although the trend towards the global abolition of the death penalty is undeniable, the divergence in the approach between international and domestic courts when it comes to sentencing persons for international crimes is apparent.[81]

Critics of the ICTA and the ICTs have questioned the legitimacy of the ICTs of Bangladesh because they apply the death penalty. Their main objection originates from a principled opposition to the death penalty as form of punishment. In a press release issued following the executions of Chowdhury and Mujahid, the OHCHR claimed that the UN opposed the death penalty "in all circumstances" and "even for the most serious international crimes".[82] In light of this and other similar criticisms, this Chapter began by asking whether the passing of the death penalty by the ICTs and the Supreme Court of Bangladesh violates the principle of complementarity. The question is complex, but the answer is simple. They do not, as international criminal law currently stands. The application of the death penalty has not been a fundamental benchmark of the principle of complementarity as a starting principle.

However, critics have also expressed reservations towards the death penalties by the ICTs and the Supreme Court because of their alleged failure to uphold the fair trial safeguards ensured in Article 14 ICCPR. In May 2016 after the Supreme Court dismissed Matiur Rahman Nizami's petition to review its previous decision upholding

[81] Steven Freeland, 'International Criminal Justice and the Death Penalty' in Jon Yorke (ed), *The Right to Life and the Value of Life: Orientations in Law, Politics and Ethics* (Routledge 2010) 214.
[82] 'Press Briefing Notes on Nepal and Bangladesh' (*UN High Commissioner for Human Rights,* 24 November 2015) <https://perma.cc/GJS9-XRE8> accessed 25 April 2016.

his death sentence, the International Commission of Jurists (ICJ) issued a call to the President of Bangladesh to halt Nizami's execution. The ICJ argued that an execution carried out "on the basis of a flawed trial" would be "inconsistent with international human rights standards".[83] An identical call came from HRW and other human rights organizations. Brad Adams, the Asia Director of HRW pointed out that the death sentence was "problematic" because there were questions whether "fair trial standards" were ensured during Nizami's trial.[84]

These criticisms set the stage for the next chapter of this thesis which shifts focus away from the most contentious objections of law to the most contentious objections relating to the trial procedures at the ICTs. It analyses three important fair trial concerns that revolve around Bangladesh's struggle against impunity. These include an assessment of Article 47A(1) of the Bangladesh Constitution which critics believe have deprived those accused of international crimes "of their fundamental rights"[85], the practice of limiting the number of defence witnesses and finally holding trials in the absence of the accused.

[83] 'Bangladesh: Halt Imminent Execution of Motiur Rahman Nizami' (n 6).
[84] 'Bangladesh: Suspend Death Penalty for War Crimes Convict' (n 6).
[85] ibid.

Chapter VI

Analysing the major criticisms of the trial process (I)

Introduction

Alongside some of the most contentious objections of law surrounding the International Crimes (Tribunals) Act 1973 (ICTA), the legality and legitimacy of the International Crimes Tribunals of Bangladesh (ICTs) have also been challenged on the grounds that they failed to uphold fair trial safeguards ensured in the International Covenant on Civil and Political Rights (ICCPR). While the Bangladesh Government maintains that the ICTA and its Rules of Procedure (RoP) adhere "to most of the rights of the accused enshrined under Article 14 of the ICCPR", critics state that the trials have been unfair because of some "significant omissions of accepted international standards".[1]

The overarching purpose of this thesis is to determine the legality and legitimacy of the ICTs through the prism of the principle of complementarity in the context of national criminal jurisdictions prosecuting international crimes. This Chapter and the one immediately following explore the extent to which due process concerns have violated the principle of complementarity and compromised the legitimacy of the

[1] Ministry of Foreign Affairs, 'A Position Paper on ICT-BD Trials and Execution of Verdict against Mr. Abdul Quader Molla on 12 December 2013' (The Government of the People's Republic of Bangladesh, 2013) 8 < http://www.mofa.gov.bd/media/position-paper-ict-bd-trials-and-execution-verdict-against-mr-abdul-quader-molla > accessed 8 August 2017; International Bar Association, 'Consistency of Bangladesh's International Crimes (Tribunals) Act 1973 with International Standards' in Tureen Afroz (ed), *Genocide, War Crimes & Crimes Against Humanity in Bangladesh: Trial under International Crimes (Tribunals) Act, 1973* (Forum for Secular Bangladesh and Trial of War Criminals of 1971 2010) 271; 'Bangladesh: Government Backtracks on Rights' (*Human Rights Watch,* 1 February 2013) < https://www.hrw.org/news/2013/02/01/bangladesh-government-backtracks-rights > accessed 8 August 2017.

ICTs. To that end, they take a deeper look at three of the most contentious objections relating to the trial process of the ICT's, namely, the application of Articles 47(3) and 47A of the Constitution of the People's Republic of Bangladesh, which provides constitutional protection to the ICTA and bars those charged with international crimes from moving the Supreme Court to benefit from the remedies guaranteed under Bangladesh's Constitution, the practice of limiting the number of defence witnesses, and finally the holding of trials in absentia. In three parts, this Chapter specifically analyses the first two areas of contention. Part I identifies the fair trial safeguards that are guaranteed to those who are charged with international crimes in Bangladesh under the ICTA. Part II asks whether Articles 47(3) and 47A deprive those charged with international crimes of their fair trial rights and alter the 'basic structure'[2] of Bangladesh's Constitution. Part III examines the ICTs practice of limiting the number of defence witnesses and assesses the extent to which this practice has affected the rights of the accused. Throughout, the recurring question remains to what extent any variation in application of fair trial standards (or breach thereof) renders a national process invalid from the perspective of the principle of complementarity.

1. Fair trial safeguards guaranteed in the International Crimes (Tribunals) Act 1973 and its Rules of Procedure

Mirroring Articles 14(1) and (2) ICCPR, the ICTA and its RoP place a positive obligation on the ICTs to exercise their judicial functions independently and ensure

[2] The doctrine of basic structure is a principle that certain basic features of the Constitution cannot be altered or destroyed through amendments initiated by the Parliament.

that their hearings are "fair" and "public".[3] This is achieved through a range of safeguards that uphold the rights of the accused during the various stages of a case relating to arrest, investigation, detention, trial and punishment.

The ICTA ensures certain safeguards when it comes to the recording of statements or confessions by accused persons which may be made to him during the course of the investigation or at any time prior to the commencement of the trial.[4] It stipulates that a First Class Magistrate before recording any statement or confession is legally obliged to explain to the accused that he is not bound to make a confession and that if he does opt to make such a confession, it may be used against him as evidence.[5] In addition to this, the Magistrate is also barred from recording any confessions unless he has reason to believe that the person making it is doing so voluntarily.[6]

Although the ICTA empowers the Investigation Officer (IO) to secure through the Prosecution an arrest warrant from the Tribunal at any stage of the investigation, he must do so by satisfying the Tribunal that "such arrest is necessary for effective and proper investigation."[7] This reduces the possibility of carrying out arbitrary arrests. In adherence to Articles 9(2) and 14(3)(a) ICCPR which requires an arrestee to be informed of the reasons for his arrest at the time of his arrest and to be promptly informed of the charges against him, the ICTA and the RoP ensure that the accused is aware of the crimes he is charged with by serving of a copy of the allegations upon

[3] The International Crimes (Tribunals) Act 1973 [ACT NO. XIX OF 1973] s 6(2A) and 10(4) < http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=435 > accessed 6 May 2014; International Crimes Tribunal Rules of Procedure 2010 Bangladesh Gazette 15 July 2010, rule 43(4).
[4] The International Crimes (Tribunals) Act 1973 (n 3) s 14(1).
[5] ibid s 14(2).
[6] ibid s 14(2).
[7] International Crimes Tribunal Rules of Procedure 2010 (n 3) rule 9(1).

him when a warrant of arrest is being executed.[8] Furthermore, the Chief Prosecutor is obliged to provide copies of the Formal Charge, a list of witnesses along with the recorded statements of such witnesses and other documents he intends to rely on in support of the charges at least three weeks before the commencement of the trial for the purposes of allowing the accused to prepare his defence.[9] These provisions are similar to the Nuremberg and IMTFE Charters as well as the Statutes governing the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) which provided the accused with "reasonable" or an "adequate" amount of time to prepare.[10]

Critics argue that the statutory provision giving a minimum preparation period of three weeks to the accused does not comply with Article 14(3)(b) ICCPR which stipulates that the accused must be given "adequate time and facilities for the preparation of his defence". According to Geoffrey Robertson, a minimum period of three months should be given to the accused to prepare his defence and that the existing three week period is "hopelessly inadequate" given the lengthy nature of the trials involving dozens of charges.[11] However, a cursory glance over the timelines of some of the trials

[8] ibid rule 9(3).
[9] (n 3) s 9(3) and 16(2); International Crimes Tribunal Rules of Procedure 2010 (n 3) rule 18(4).
[10] Charter of the International Military Tribunal (Nuremberg Charter), article 16(a); International Military Tribunal for the Far East (IMTFE Charter), article IV(a); Statute of the International Tribunal for Rwanda (ICTR Statute), article 20(4)(b); Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute), article 21(4)(b).
[11] Anbarasan Ethirajan, 'Bangladesh Finally Confronts War Crimes 40 Years on' *BBC News* (20 November 2011) < http://www.bbc.co.uk/news/world-asia-15794246 > 9 July 2016; David Bergman, 'Defence Walkout: Wise Heads Must Prevail' (*Bangladesh War Crimes Tribunal Blog,* 19 November 2011) < http://bangladeshwarcrimes.blogspot.co.uk/2011/11/defence-walkout-wise-heads-must-prevail.html > 9 July 2016; Geoffrey Robertson, *Report on the International Crimes Tribunal of Bangladesh* (International Forum for Democracy and Human Rights, 2015) 114; Surabhi Chopra, 'The International Crimes Tribunal in Bangladesh: Silencing Fair Comment' (2015) 17 Journal of Genocide Research 211, 213; Toby M Cadman, 'Bangladesh International Crimes Tribunal: Commentary on the Application of International Standards' (*9 Bedford Row International*, December 2013) 13, 22, 37 < http://tobycadman.com/wp-content/uploads/2014/06/131121-Bangladesh-Briefing-Document-December.pdf > accessed 7 August 2017.

that have been completed show that the amount of time given in practice to the accused to prepare was considerably longer than the minimum three week period.[12] In *Chief Prosecutor v Delowar Hossain Sayeedi*, the counsel representing the accused were given roughly three months to prepare.[13] After the judgment by the ICT-1 was handed down on 28 February 2013, the hearings before the Supreme Court began on 24 September 2013, giving the accused nearly seven months to prepare for the appeal.[14] In *Chief Prosecutor v Md Kamaruzzaman*, the counsel representing accused were given five months to prepare.[15] After the judgment by the ICT-2 was handed down on 9 May 2013, the hearings before the Supreme Court began on 5 July, 2014 giving the counsel of the accused around fourteen months to prepare for the appeal.[16] In *Chief Prosecutor v Mir Quasem Ali*, the counsel representing the accused were given just over three months to prepare.[17] After the judgment by the ICT-2 was handed down on 2 November 2014, the hearings before the Supreme Court began on 09 February, 2016 giving the counsel of the accused around fifteen months to prepare for the appeal.[18]

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[12] Mary Kozlovski, 'Bangladesh's way: Dhaka's Controversial International Crimes Tribunal' (*International Bar Association,* 4 July 2013) < https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=AA9E9993-62BA-4E44-A177-DF51CA884C19 > accessed 7 August 2017.

[13] *The Chief Prosecutor v Delwar Hossain Sayeedi* (Order No 10) ICT-1 (18 August 2011) ICT-BD Case No 01 of 2011, 5; *The Chief Prosecutor v Delowar Hossain Sayeedi* (Order No 23) ICT-1 (3 October 2011) ICT-BD Case No 01 of 2011, 18.

[14] *The Chief Prosecutor v Delowar Hossain Sayeedi* (Judgment) ICT-1 (28 February 2013) ICT-BD Case No 01 of 2011, 1 < http://www.ict-bd.org/ict1/ICT1%20Judgment/sayeedi_full_verdict.pdf > accessed 12 August 2017; *Delwar Hossain Sayeedi v The Chief Prosecutor* (Appellate Division) Criminal Appeal No 39-40 of 2013, 1 < http://www.supremecourt.gov.bd/resources/documents/617564_CRIMINAL_APPEAL_NO.39-40_OF_2013_2.pdf > accessed 12 August 2017.

[15] *The Chief Prosecutor v Muhammad Kamaruzzaman* (Order No 8) ICT-2 (9 May 2013) ICT-BD Case No 03 of 2012, 4 & 17.

[16] *The Chief Prosecutor v Muhammad Kamaruzzaman* (Judgment) ICT-2 (9 May 2013) ICT-BD Case No 3 of 2012, 1 < http://www.ict-bd.org/ict2/ICT2%20judgment/MKZ.pdf > accessed 12 August 2017; *Muhammad Kamaruzzaman v The Chief Prosecutor* (Appellate Division) Criminal Appeal No 62 of 2013, 1 < http://www.supremecourt.gov.bd/resources/documents/650628_CRIMINALAP62_of_2013.pdf > accessed 12 August 2017.

[17] *The Chief Prosecutor v Mir Quasem Ali* (Order No 12) ICT-2 (5 September 2013) ICT-BD Case No 03 of 2013, 4 & 18.

[18] *The Chief Prosecutor v Mir Quasem Ali* (Judgment) ICT-2 (2 November 2014) ICT-BD Case No 3 of 2013, 1 < http://www.ict-bd.org/ict2/ICT2%20judgment/Mir%20Quasem-judge-02.pdf > accessed

While the Tribunals formed after the Second World War did not give the accused more than a few weeks to prepare his/her defence, the UN sponsored Tribunals of the modern era have given more time.[19] According to Robert Cryer, modern day international investigations and prosecutions are more time-consuming than domestic ones because the latter are "very complex, factually, legally and politically".[20] Several judgments of the ICTR and ICTY clarify the theoretical underpinnings of the right to adequate time and facilities to prepare the defence. The Appeals Chamber of the ICTR in *Kayishema and Ruzindana* and the ICTY in *Kordić and Cerkez* explained that the accused's right to have adequate time and facilities to prepare the defence does necessitate a "parity of resources between the parties, such as the material equality of financial or personal resources."[21] In the Appeal Judgment of *Nahimana et al.* it was held that when considering the accused's right to have adequate time and facilities for the preparation of the defence, the Appeals Chamber must assess whether the Defence as a whole was deprived of adequate time and facilities, not any individual counsel.[22] In agreement with the Human Rights Committee (HRC), the Appeals Chamber in *Krajišnik* held that "adequate time" for the preparation of the defence depended on the circumstances of the case and could not be "assessed in the abstract".[23] In *Tadić*, the Appeals Chamber of the ICTY held that respecting the right to adequate time and

12 August 2017; *Mir Quasem Ali v The Chief Prosecutor* (Appellate Division) Criminal Appeal No 144 of 2014, 1 < http://www.supremecourt.gov.bd/resources/documents/824674_Crl_A_No_144_2014_final.pdf > accessed 12 August 2017.

[19] Richard May and Marieke Wierda, *International Criminal Evidence* (Transnational Publishers 2002) 272.

[20] Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2010) 436.

[21] ibid 435.

[22] *Nahimana et al. v The Prosecutor (Media case)* (Appeals Judgment) ICTR-99-52-A (28 November 2007) [220].

[23] *The Prosecutor v Momčilo Krajišnik* (Appeals Judgment) ICTY-00-39-A (17 March 2009) [80].

facilities meant that the conditions of the trial did not place the accused "at a substantial disadvantage as regards his or her opponent".[24]

Additional assessments of the HRC provide a clearer sense of when violations of Article 14(3)(b) ICCPR take place. In *Rayos v The Philippines*, the accused had been sentenced to death for rape and murder. The HRC found that the accused's right to adequate time and facilities had been violated because he had initially been forced to sign an extra-judicial confession prior to which he did not have a lawyer. Furthermore, he was only allowed to communicate with his lawyer for a few minutes every day during the trial itself.[25] In *Ndong Bee and MicAbogo v. Equatorial Guinea*, the notification of charges two days prior to the reading out of the indictment was ruled by the HRC to have deprived the accused of sufficient time to prepare their defence.[26] In *Hill and Hill v. Spain*, the HRC found that the complainants right to adequate time and faculties to prepare had not been violated despite having only one 20-minute consultation with their legal aid lawyer, because the hearing was subsequently adjourned to allow the lawyer to prepare the defence.[27] In light of the abovementioned guidelines, there is scope to doubt the claim that the accused before the Bangladeshi ICTs were deprived of their right to adequate time and facilities to prepare their defence to such an extent that they were substantially disadvantaged when compared to the Prosecution. Nevertheless, it is understandable that the statutory provision stipulating a minimum period of three weeks in the ICTA and its RoP may not be

[24] William A Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press 2006) 514.
[25] *Rayos v Philippines* (27 July 2004) UNHRC 1167/2003 cited in 'Case Digests: International Standards on Criminal Defence Rights: UN Human Rights Committee Decisions' (Open Society Justice Initiative, April 2013) 22 < https://www.opensocietyfoundations.org/sites/default/files/digests-arrest%20rights-human-rights-committee-20130419.pdf > accessed 7 August 2017.
[26] *Ndong Bee and MicAbogo v Equatorial Guinea* (31 October 2005) UNHRC 1152/2003 and 1190/2003 cited in (n 25) 22.
[27] *Hill and Hill v Spain* (2 April 1997) UNHRC 526/1993 cited in (n 25) 22.

perceived as an adequate amount of time and ought to be increased by an amendment so that the revised time period reflects the length of time the ICTs have provided to the accused in practice.

Multiple provisions of the ICTA and RoP protect the accused's right to be tried without undue delay, a right enshrined in Article 14(3)(c) ICCPR. Following an accused's arrest, the Police are obliged to produce him before the Tribunal within twenty-four hours.[28] When an investigation is being carried out against an accused who is detained, that investigation must be concluded within a period of one year.[29] Only under exceptional circumstances can the Tribunal extend the period of investigation by six months after showing reasons recorded in writing.[30] The IO through the Prosecutor is required to submit progress reports of the investigation every three months before the Tribunal so that it may review its order of detention issued against the accused.[31] If the investigation process extends beyond the one year limit, the Tribunal may grant the accused bail subject to the fulfilment of certain conditions.[32] Furthermore, Sections 11(3)(a)-(b) along with Rules 43(5) and 53(iii) oblige the ICTs to "confine the trial to an expeditious hearing of the issues raised by the charges" and prevent actions "which may cause unreasonable delay" to the trial proceedings.

Once arrested and detained, an accused cannot be subjected to any form of coercion, duress or threats of any kind while he is questioned or his case is investigated by the

[28] International Crimes Tribunal Rules of Procedure 2010 (n 3) rule 34(1).
[29] ibid rule 9(5).
[30] ibid.
[31] ibid rule 9(6).
[32] ibid rule 9(5).

IO.[33] When an IO searches and seizes any documents or things under a seizure list, he is required to carry out such activities in the presence of two witnesses.[34] This provision serves to ensure that the IO does not abuse his power when a search or seize is being carried out.

In consonance with Article 14(3)(d) ICCPR which provides an accused with the right of representation, the ICTA and its RoP uphold the accused's right to be represented by counsel of his choosing.[35] This includes the right to be defended not just by Bangladeshi lawyers but also by foreign counsel who may appear before the ICTs in person subject to permission granted by the Bangladesh Bar Council.[36] Although multiple foreign counsel have been formally appointed to represent many of the accused facing trial before the ICTs, their involvement has remained restricted to activities formulating defence strategies, drafting legal briefs and lobbying on behalf of the accused. This is because the Bangladesh Bar Council has not yet granted any foreign counsel the permission to physically present their arguments before the ICTs.[37] While this embargo has affected the accused's right of representation to an extent, it would be an overstatement to claim that the embargo delegitimizes the justice process in Bangladesh, keeping in mind that foreign counsel have participated in all aspects of preparing the defence of the accused save for physically presenting arguments before the ICTs.

[33] ibid rule 16(2).
[34] ibid rule 10.
[35] International Crimes (Tribunals) Act 1973 (n 3) s 10 A(2), 12 and 17(2); International Crimes Tribunal Rules of Procedure 2010 (n 3) rules 42 and 43.
[36] (n 3) rule 42.
[37] David Bergman, 'Bar Council Not to Allow Foreign Counsel in War Crimes Tribunal' *New Age* (Dhaka, 2 November 2010) < http://www.9bedfordrow.co.uk/87/records/25/Bar%20Council%20not%20to%20allow%20foreign%20counsel%20in%20War%20Crimes%20Tribunal.pdf > 7 August 2017.

The ICTA and its RoP ensure further protections to the accused. The ICTs are obliged to presume the innocence of an accused until proven guilty beyond reasonable doubt by the Prosecution.[38] Reflecting Article 14(3)(e) ICCPR, the ICTA empowers an accused "to present evidence at the trial in support of his defence, and to cross-examine any witness called by the prosecution".[39] The right of appeal enshrined in Article 14(5) ICCPR is guaranteed in Section 21(1) of the ICTA which grants a person convicted and sentenced by the ICTs to appeal against such conviction and sentence before the Appellate Division of the Supreme Court of Bangladesh. The right to have "the free assistance of an interpreter" enshrined in Article 14(3)(f) ICCPR is guaranteed through Sections 10(2) and 10(3) ICTA. Finally, the right not to be compelled to testify against oneself or to confess guilt enshrined in Article 14(3)(g) ICCPR is protected in Sections 8(5) and 18 ICTA. The right to receive compensation for unnecessary punishment suffered as a consequence of a miscarriage of justice guaranteed in the Articles 9(5) and 14(6) ICCPR remains unaccommodated in the ICTA.[40] The legal system of Bangladesh as a whole does not provide for compensation to victims of miscarriage of justice.[41] In 2010, Tureen Afroz argued against incorporating this right into the statutory provisions of the ICTA because doing so

[38] International Crimes Tribunal Rules of Procedure 2010 (n 3) rules 43(2), 50 and 51.
[39] International Crimes (Tribunals) Act 1973 (n 3) s 10(1)(e) and 17(3); International Covenant on Civil and Political Rights, article 14(3)(e) reads: "To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".
[40] International Covenant on Civil and Political Rights (n 39) article 9(5) reads: "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation"; International Covenant on Civil and Political Rights (n 39) article 14(6) reads: "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him".
[41] Mohammad Shahabuddin, *The International Covenant on Civil and Political Rights: A Study on Bangladesh Compliance* (National Human Rights Commission 2013) 53 < http://nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/page/348ec5eb_22f8_4754_bb62_6a0d15ba1513/Study%20Report%20ICCPR.pdf > accessed 7 September 2016.

would "distort the national criminal jurisprudence" of Bangladesh.[42] The Government of the People's Republic of Bangladesh does not oppose "the principle of compensation for miscarriage of justice", but maintains that it "is not in a position to guarantee a comprehensive implementation of this provision for the time being."[43] Since 2010, Bangladesh has made important strides in the effort to compensate people who were victims of miscarriages of justice. The most prominent example was the compensation some of the victims received after the Supreme Court of Bangladesh in 2011 declared that the trial and execution of Lt Colonel M A Taher Bir Uttam's by a Special Martial Law Tribunal in 1976 was illegal and unconstitutional.[44] Moreover, The Torture and Custodial Death (Prevention) Act, 2013 obliges a person convicted of torture to pay an amount of compensation to the victim which cannot be less than Taka 25,000/-.[45] As a State that has ratified the ICCPR and has expressed its commitment to "ensure full implementation" of the right to be compensated for unnecessary punishment suffered following a miscarriage of justice "in the near future", the absence of this right in the ICTA and its RoP is a shortcoming that needs to be addressed.[46]

From the preceding discussion, there is scope to conclude that despite a few omissions

[42] Tureen Afroz, 'Let There be Light: Commentary on IBA Fatwas' in Tureen Afroz (ed), *Genocide, War Crimes & Crimes Against Humanity in Bangladesh: Trial under International Crimes (Tribunals) Act, 1973* (Forum for Secular Bangladesh and Trial of War Criminals of 1971 2010) 194.
[43] UN Human Rights Committee, 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant Initial Reports of States Parties Due in 2001 (Bangladesh)' (3 September 2015) UN Doc CCPR/C/BGD/1, para 7 < https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/198/21/PDF/G1519821.pdf?OpenElement > accessed 15 August 2016.
[44] Julfikar Ali Manik, '5th Amendment Verdict Paves Way for Justice' *The Daily Star* (Dhaka, 25 August 2010) < http://www.thedailystar.net/news-detail-152188 > accessed 15 September 2016; Ashutosh Sarkar, 'Taher Trial Illegal' *The Daily Star* (Dhaka, 23 March 2011) < http://www.thedailystar.net/news-detail-178777 > accessed 15 September 2016.
[45] Torture and Custodial Death (Prevention) Act 2013, s 15.
[46] UN Human Rights Committee (n 43) para 7.

concerning the statutory provision allowing an accused a minimum period of three weeks to prepare his defence, the inability of foreign counsel to physically place their arguments before the ICTs and the absence of the right of compensation to victims of miscarriage of justice, an accused charged with international crimes under the ICTA enjoys a range of fair trial safeguards which mirror most of the rights enshrined in ICCPR.

2. Does the 'scheme' created by Articles 47(3) and 47A deprive those charged with international crimes of their fair trial rights and alter the 'basic structure' of the Bangladesh Constitution?

Article 47(3) of the Bangladesh Constitution extends "special treatment" to the ICTA by giving "constitutional protection" to any law or provision that functions to detain, prosecute or punishment any person "for genocide, crimes against humanity or war crimes and other crimes under international law."[47] This is followed by Article 47A which takes away an accused's right to challenge the provisions of the ICTA on the ground that they violate the right to protection of the law, protection in respect of trial and punishment and the right to enforce fundamental rights guaranteed by the Constitution.[48] Both these articles were inserted into the Constitution through the First

[47] The Constitution of the People's Republic of Bangladesh, article 47(3) reads: "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 any individual, group of individuals or organisation] 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" < http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=367 > accessed 12 August 2017; Mizanur Rahman and S M Masum Billah, 'Prosecuting 'War Crimes' in Domestic Level: The Case of Bangladesh' (2010) I The Northern University Journal of Law 14, 18.

[48] The Constitution of the People's Republic of Bangladesh (n 47) article 47A reads: "(1) The rights guaranteed under article 31, clauses (1) and (3) of article 35 and article 44 shall not apply to any person to whom a law specified in clause (3) of article 47 applies. (2) Notwithstanding anything contained in

Amendment in 1973. The protection ensured through these Articles are complemented by Section 26 ICTA which provides that the statutory provisions of the ICTA "shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."[49]

Critics of the ICTA maintain that reading Articles 47(3) and 47A together creates a 'scheme' that represents one side of the 1971 conflict, a side which is biased towards the Bangladesh Government and causes detriment to those facing trial. Questions have been raised about the extent to which the principles of fairness, equality and the responsible use of power are applicable to the accused because this 'scheme' blocks their ability to rely on the Bangladesh Constitution to protect their fundamental rights.[50] Referring to the precedent set by Nazi Germany, Suzannah Linton has warned how unchecked Parliamentary supremacy – the signs of which she sees in Bangladesh, can lead to the ruin of a nation.[51] Linton points out that a state of emergency did not exist when the ICTA came into existence in 1973 just as it does not exist today, leaving no justifiable reason for denying an accused being tried before the ICTs the right to seek remedies available under the Constitution.[52] Linton relies on the writings of Gustav Radbruch and H.L.A Hart to explain what she perceives is a 'constitutional predicament'. Radbruch belonged to a school of thought that rejected the positivist argument permitting legislation of any kind, even legislation that is manifestly

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this Constitution, no person to whom a law specified in clause (3) of article 47 applies shall have the right to move the Supreme Court for any of the remedies under this Constitution."

[49] The International Crimes (Tribunals) Act 1973 (n 3) s 26.

[50] Suzannah Linton, 'Completing the Circle: Accountability for the Crimes of the 1971 Bangladesh War of Liberation' (2010) 21 Criminal Law Forum 191, 217.

[51] ibid 216.

[52] ibid 218-219; Steven Kay QC, 'Bangladesh its Constitution & the International Crimes (Tribunals) (Amendment) Act 2009' (Bangladesh Supreme Court Bar Association Human Rights Conference, Dhaka, 13 October 2010).

immoral.[53] He argued that "[w]here there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely 'flawed law', it lacks completely the very nature of law."[54] In 2010, when Linton penned a detailed evaluation of the prospect of trials under this problematic 'scheme' created by the First Amendment, she stopped short of classifying it as manifestly immoral, but did comment that it was, as a whole, contrary to the spirit of the Constitution.[55] Linton predicted that if trials were to proceed under this 'scheme', they would likely be a matter of concern for the UN Human Rights Committee in light of Bangladesh's compliance with the ICCPR and also the Committee on the Elimination of Racial Discrimination.[56] Linton concludes that the resulting 'scheme' is unnecessary and disproportionate.[57]

Steven Kay QC, a lawyer specializing in international law who has represented several members of the Jamaat-e-Islami who have been tried by the ICTs, has described this 'scheme' as one that introduced "inequality" into the Bangladesh justice system by a "Constitution that claimed to promote equality".[58] Ambassador Stephen Rapp and Nicholas Koumjian have lent support to the position taken by Linton and Kay. Both have argued that Article 47A is inconsistent with Bangladesh's obligations under the ICCPR which requires all persons the same set of privileges during trial. In the absence of any compelling reasons justifying its presence in the Constitution, Rapp and Koumjian believe that Article 47A "severely damages the perception of the ICT(s)" and benefits the critics of Bangladesh's struggle against impunity giving them

[53] Linton (n 50) 216-217.
[54] ibid 217.
[55] ibid 219.
[56] ibid 220.
[57] ibid 219.
[58] Kay (n 52).

leverage to make the claim that the concerned trial proceedings are not intended to be held in a manner that is fair.[59] Human Rights Watch has adopted a similar position and petitioned for the repeal of Article 47A because it bears the potential to "form the basis for complaints that fair trial standards are not met under the ICT Act."[60]

There is truth in Rapp and Koumjian's assertion that the 'scheme' resulting from Articles 47(3) and 47A has had an adverse effect on the way the ICTs have been perceived by critics. The problem, nonetheless, rests in the fact that this 'perception' is constructed on an inadequate appreciation of why the First Amendment was introduced into the Constitution. When passing 'judgment' on this 'scheme', critics may have forgotten to take into consideration the purpose it serves, i.e. ensuring an unencumbered judicial process for the detention, prosecution and punishment of persons committing core international crimes. It was on the foundation of this 'purpose' that the First Amendment was introduced and the ICTA was enacted in 1973. There would have been grounds to object to such a 'judicial process' resulting from such a 'scheme' if it truly deprived an accused of fundamental fair trial rights otherwise ensured by the Bangladesh Constitution. The ICTA's compliance with the rights of an accused enshrined in the ICCPR has been discussed in the first part of this Chapter. Therefore, there is legitimate scope to question the allegation that the 'scheme' created by Articles 47(3) and 47A is biased towards the Government and impairs the capacity of the ICTs to fairly conduct judicial proceedings.

[59] 'International War Crimes Tribunal, Notes from Stephen Rapp and Nick Koumjian to the Office of the Chief Prosecutor of the International Crimes Tribunals' 1-2.

[60] Brad Adams, 'Letter to the Bangladesh Prime Minister Regarding the International Crimes (Tribunals) Act' (*Human Rights Watch*, 18 May 2011) < https://www.hrw.org/news/2011/05/18/letter-bangladesh-prime-minister-regarding-international-crimes-tribunals-act > accessed 17 September 2016.

A parallel line of reasoning critiques the 'scheme' created by Articles 47(3) and 47A on the grounds that it may potentially alter the 'basic structure' of Bangladesh's Constitution, the kind of alteration which has been deemed illegal by the Appellate Division (AD) of the Supreme Court in *Anwar Hossain Chowdhury v Bangladesh*, also known as the *8th Amendment Case*. In 1988, the Constitution (Eighth Amendment) Act was passed amending Article 100[61] of the Constitution resulting in "fragmentation" of the High Court by the setting up of permanent regional Benches outside Dhaka, the capital of Bangladesh.[62] The judgment of the 8th Amendment case is 'celebrated' in the legal history of Bangladesh because it was the first of its kind where the Supreme Court struck down an amendment to the Constitution made by the Parliament. The central argument made by a 3-1 majority of the Appellate Division was that the provisions of Article 7[63] ensuring the basic and unalterable supremacy of the Constitution places an implied limitation on the Parliament's power to amend the Constitution under Article 142.[64] Since the Supreme Court (comprising of the High Court Division and Appellate Division) vested with judicial power over the Republic is a basic structure of the constitution, it cannot be altered through an amendment made by the Parliament.[65] Therefore, the 8th amendment by compromising the "oneness" of the High Court Division had altered the 'basic structure' of the Constitution and left an irreconcilable conflict with other Constitutional provisions.[66]

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[61] The Constitution of the People's Republic of Bangladesh (n 47) article 100 reads: "The permanent seat of the Supreme Court shall be in the capital, but sessions of the High Court Division may be held at such other place or places as the Chief Justice may, with the approval of the President, from time to time appoint".
[62] *Anwar Hossain Chowdhury v Bangladesh (Eighth Amendment Case)* 41 DLR (AD) 165; Opinion of Michael J Beloff QC on War Crimes Tribunal in Bangladesh, 24 para 6.7.
[63] The Constitution of the People's Republic of Bangladesh (n 47) article 7.
[64] ibid article 142; Opinion of Michael J Beloff QC on War Crimes Tribunal in Bangladesh (n 62) 24 para 6.7.
[65] *Anwar Hossain Chowdhury v Bangladesh (Eighth Amendment Case)* (n 62); Soli J Sorabjee, 'Opinion' (19 May 2010) 8.
[66] *Anwar Hossain Chowdhury v Bangladesh (Eighth Amendment Case)* (n 62).

Statutory provisions of the ICTA are not subject to constitutional challenges because they are protected by Articles 47(3) and 47A. The nature of this protection is slightly different from the kind of protection accorded to multiple pieces of legislation under the First Schedule of the Bangladesh Constitution. The First Schedule contains at least twenty-eight laws which are beyond the scope of judicial review.[67] The protection accorded to the ICTA is different because the ICTA is not one of the laws listed under the First Schedule. The ICTA enjoys 'protected status' because it happens to be the only law in Bangladesh providing for the "detention, prosecution or punishment of any person […] for genocide, crimes against humanity or war crimes and other crimes under international law" and such laws shall not "be deemed void or unlawful, or ever to have become void or unlawful, on the ground that such law […] is inconsistent with, or repugnant to, any of the provisions of this Constitution."[68]

Providing constitutional protection to laws is not uncommon in the legal parlance in South Asia. For example, the 9th Schedule of the Constitution of India reveals a total of two hundred and eighty-four pieces of legislation which have been accorded 'constitutional protection' under Article 31B. Until 2007 the understanding with regard to laws included in the 9th Schedule was that their provisions could not be declared void on the ground that they are inconsistent with any of the fundamental rights enshrined in Part III of the Indian Constitution. This changed following a landmark judgment in 2007 where a nine-member Bench of the Indian Supreme Court took refuge in the doctrine of basic structure and held that "there could not be any

[67] The Constitution of the People's Republic of Bangladesh (n 47) First Schedule.
[68] ibid.

blanket immunity from judicial review of laws inserted in the Ninth Schedule of the Constitution."[69] The judgment read:

> The power to grant absolute immunity at will is not compatible with the basic structure doctrine and, therefore, after April 24, 1973 the laws included in the Ninth Schedule would not have absolute immunity. The validity of such laws can be challenged on the touchstone of basic structure […].[70]

Taking into account the extent of rights extended to an accused under the ICTA and its RoP, it is unlikely that provisions of the ICTA will be successfully challenged on the grounds that they contravene fundamental rights enshrined in the Constitution. However, due to the precedent left by the *8th Amendment Case* and the persuasive authority of the Indian case discussed above, one cannot completely rule out the possibility that the First Amendment may be subjected to judicial review to ascertain if it has altered the 'basic structure' of the Bangladesh Constitution. This will be set in motion if and when "a provision of the Constitution or a law is violated" and the Court having exercised "great restraint" and weighed "all the consequences that may follow from its order" exercise its power of review "not *suo muto*, but at the instance of an aggrieved person".[71] Whether such a 'review' will succeed is a different question altogether and matter of speculation.

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[69] J Venkatesan, 'IX Schedule Laws Open to Review' *The Hindu* (12 January 2007) < http://www.thehindu.com/todays-paper/IX-Schedule-laws-open-to-review/article14705323.ece > accessed 17 September 2016.
[70] ibid.
[71] Mahmudul Islam (ed), *Constitution 8th Amendment Case Judgment – with Summary of Submissions* (Special Issue, Bangladesh Legal Decisions 1989) 180.

According to Suzannah Linton, the basic structure and features of the Bangladesh Constitution that cannot be altered include "independence of the judiciary and fundamental rights" and the "rule of law".[72] Although the *8th Amendment Case* bases its reasoning on the doctrine of basic structure, what actually constitutes the 'basic structure' of the Bangladesh Constitution is scattered across multiple paragraphs of the judgment. Justice Badrul Haider Chowdhury listed 21 "unique features" of the Constitution, some of which are "basic features of the Constitution" not "amendable by the amending power of the Parliament."[73] He goes on to write: "In the scheme of Article 7 and therefore of the Constitution the structural pillars of Parliament and Judiciary are basic and fundamental."[74] In subsequent parts of the judgment Justices Shahabuddin Ahmed and M. H. Rahman identify the basic structures of the Constitution which include: supremacy of the Constitution as the solemn will of the people, democracy, Republican government, Unitary State, separation of powers, independence of the judiciary, fundamental rights and the rule of law.[75] The judgment of the *8th Amendment Case* went to great lengths to identify what constitutes 'basic structure' and concluded that many of them are enunciated in the Preamble of the Constitution of Bangladesh which is "something different from that of an ordinary statute" and "is not merely the outline of the governmental structure" but also "the embodiment of the hopes and aspirations of the people" which "includes the nation's high and lofty principles and people's life philosophy."[76] The first two sentences of the Preamble reads:

[72] Linton (n 50) 218.
[73] Islam (ed) (n 71) 109, 111.
[74] ibid 111.
[75] ibid 156, 171.
[76] ibid 147.

> We, the people of Bangladesh, having proclaimed our independence on the 26th day of March, 1971 and through [a historic struggle for national liberation], established the independent, sovereign People's Republic of Bangladesh; [Pledging that the high ideals of nationalism, socialism, democracy and secularism, which inspired our heroic people to dedicate themselves to, and our brave martyrs to sacrifice their lives in, the national liberation struggle, shall be the fundamental principles of the Constitution;][77]

It is evident from the quoted lines that unblemished importance has been placed on the Proclamation of Independence and the sacrifices of the martyrs of the Liberation War of Bangladesh in 1971 in the Preamble of the Bangladesh Constitution. This is the same Proclamation that unambiguously mentioned the "ruthless and savage war" and the "numerous acts of genocide and unprecedented tortures, amongst others on the civilian and unarmed people of Bangladesh" committed by the Pakistani authorities.[78] Although the judgment of the *8th Amendment Case* did not attempt to provide a comprehensive list of past amendments that had destroyed the basic structure of the Constitution, it did acknowledge that mishaps of such nature had taken place in the past. This included the Fourth Amendment Act dated 25 January 1975 which had "changed the Constitution beyond recognition in many respects" and had brought about overnight "a Presidential form of Government authoritarian in character on the basis of a single party" replacing "a democratic Parliamentary form of Government on the basis of multiparty system".[79] Also included were the Martial Law

[77] The Constitution of the People's Republic of Bangladesh (n 47) Preamble.
[78] Sajahan Miah, 'Proclamation of Independence' (*Banglapedia*) < http://en.banglapedia.org/index.php?title=Proclamation_of_Independence > accessed 22 January 2016.
[79] Islam (ed) (n 71) 139.

Proclamation Orders which had "badly mauled" the Constitution on ten occasions, all of which were incorporated in and ratified by the Constitution Fifth Amendment Act in 1979.[80] These included, the replacement of secularism as one of the Fundamental State Principles with "Bismillah-er-Rahman-Ar-Rahim" and the giving of a different meaning to socialism.[81]

This does not automatically negate the possibility that the First Amendment Act, 1973, i.e. the 'scheme' created by the First Amendment may be added to the list of amendments that had fundamentally altered the 'basic structure' of the Bangladesh Constitution. However, keeping in mind that the fair trial guarantees enshrined in the ICTA and its RoP, the absence of any provisions in the ICTA which gives undue preference towards the Government and against the accused, the text of the Preamble of the Constitution placing a great deal of weight on international crimes committed against the Bengali populace and finally the absence of the First Amendment in the initial list of 'unconstitutional' amendments compiled in the course of the *8th Amendment Case*, it is possible to argue that the 'scheme' created by Articles 47(3) and 47A does not create a 'scheme' that alters the 'basic structure' of Bangladesh's Constitution.

The 'scheme' created by Articles 47(3) and 47A does not deprive those charged with international crimes of their fair trial rights guaranteed in the ICTA. However, it has had an adverse effect on the way the ICTs have been perceived by critics. On balance

[80] ibid 140.
[81] ibid 140.

this criticism may have some weight but it is insufficient to cause concern under the principle of complementarity.

3. Does the practice of limiting the number of defence witnesses delegitimise the justice process of the ICTs?

The ICTs have in about forty percent of its cases restricted the number of defence witnesses permitted to give evidence during trial. Various quarters, including counsels defending the accused and international human rights organizations along with international lawyers and journalists observing the trials, have been critical of this practice. The premise underlying this stance is that limiting the number of defence witnesses adversely impacts the equality of arms at the expense of the accused. The restrictions imposed by the ICTs have been described as "systematic"[82], "arbitrary"[83], made "without justification"[84] and "perhaps the most significant set of decisions […] impacting upon the question of the fairness of the trials".[85]

The following account is an assessment of the ICTs practice of limiting defence witnesses. This analysis is divided into two sub-sections. The first section briefly

[82] David Bergman, 'Has Bangladesh Finally Buried the Ghosts of 1971 War Crimes Along with Motiur Rahman Nizami?' *Scroll.in* (13 May 2016) < http://scroll.in/article/808023/has-bangladesh-finally-buried-the-ghosts-of-1971-war-crimes-along-with-motiur-rahman-nizami > accessed 21 June 2016.
[83] 'Bangladesh: War Crimes Verdict Based on Flawed Trial' (*Human Rights Watch*, 22 March 2016) < https://www.hrw.org/news/2016/03/22/bangladesh-war-crimes-verdict-based-flawed-trial > accessed 21 June 2016.
[84] Ilia Maria Siatitsa, 'National Trials of International Crimes in 2013: Procedural and Fair Trial Guarantees' in Stuart Casey-Maslen (ed), *The War Report: Armed Conflict in 2013* (Oxford University Press 2014) 481.
[85] David Bergman, 'Are the Tribunals Justified in Restricting Defence Witness Numbers?' (*Bangladesh War Crimes Tribunal Blog*, 25 November 2013) < http://bangladeshwarcrimes.blogspot.co.uk/2013/11/are-tribunals-justified-in-restricting.html > accessed 21 June 2016.

sketches an overview of how and the extent to which ICTs limited the number of witnesses listed by the defence. The second section offers an assessment of the ICTs.

3.1 *Limiting of the number of defence witnesses by the ICTs – a brief overview*

The right of an accused to present evidence in his defence – a right safeguarded in the ICTA, is a guarantee that assists in ensuring the 'equality of arms' and in turn preserving the overall 'fairness' of an adversarial trial.[86] This includes, the right to adduce and examine witnesses and documents which the accused intends to rely upon, and which he or she must submit to the Tribunal and the Prosecution when the trial commences.[87] An important qualification to this 'guarantee' is that, it is not an 'unfettered' one. In fact, the ICTs are empowered to limit the number of witnesses where it appears that they have been listed by the defence with a purpose abusing and causing unreasonable delay to the judicial process.[88]

Counsel representing the accused are correct to argue that the ICTA and its RoP do not 'explicitly' provide for the right of Tribunals to place a 'cap' on the number of defence witnesses.[89] The ICTs have, however, relied on several provisions in justification of their 'limiting' Orders. One such provision is Section 9(5) ICTA, which reads: "A list of witnesses for the defence, if any, along with the documents or copies thereof, which the defence intends to rely upon, shall be furnished to the Tribunal and

[86] International Crimes (Tribunals) Act 1973 (n 3) s 17(3) reads: "An accused person shall have the right to present evidence at the trial in support of his defence, and to cross-examine any witness called by the prosecution".
[87] ibid s 9(5) reads: "A list of witnesses for the defence, if any, along with the documents or copies thereof, which the defence intends to rely upon, shall be furnished to the Tribunal and the prosecution at the time of the commencement of the trial".
[88] International Crimes (Tribunals) Act 1973 (n 3) s 11(3)(b).
[89] *The Chief Prosecutor v Mohammad Kamaruzzaman* (Order No 114) ICT-2 (20 February 2014) ICT-BD Case No 03 of 2012, [3].

the prosecution at the time of the commencement of the trial." In *Kamaruzzaman*, the Tribunal reasoned that the words "if any" in this Section meant that the right of the defence to furnish witnesses is not obligatory or mandatory.[90] This is coupled with Section 11(3) ICTA and Rules 43(5), 46A and 53(iii) of the RoP which oblige the Tribunals to arrange for "effective and expeditious" trials by preventing actions "which may cause unreasonable delay" and simultaneously rule out "irrelevant issues and statements" by exercising their inherent power to issue orders "necessary to meet the ends of justice or prevent abuse of the process."[91] Finally, these provisions are supplemented by Rule 51A(2) which requires the Tribunal to issue orders compelling the attendance of witnesses listed by the accused but also grants the power to refuse to do so if it appears that the application was made with a "purpose of vexation or delay or for defecting the ends of justice".[92]

These provisions have formed the bedrock of the ICTs orders limiting the number of defence witnesses in eleven of the twenty-seven cases that have been completed. In the cases of *Molla*, *Sayeedi*, *Kamaruzzaman*, *Azam*, *Mujahid*, *Chowdhury*, *Alim*, *Nizami*, *Ali*, *Forkan* and *Razzak et al*, the 'limiting' orders passed by the Tribunals

[90] *The Chief Prosecutor v Mohammad Kamaruzzaman* (Order No 114) ICT-2 (20 February 2014) ICT-BD Case No 03 of 2012, [7].

[91] International Crimes (Tribunals) Act 1973 (n 3) s 11(3) reads: "A Tribunal shall – (a) confine the trial to an expeditious hearing of the issues raised by the charges; (b) take measures to prevent any action which may cause unreasonable delay, and rule out irrelevant issues and statements"; International Crimes Tribunal Rules of Procedure 2010, rule 43(5) reads: "The accused shall be tried without undue delay" while rule 46A reads: "Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Tribunal to make such order(s) as may be necessary to meet the ends of justice or to prevent abuse of the process".

[92] International Crimes Tribunal Rules of Procedure 2010 (n 3) rule 51A(2) reads: "If the accused applies for the issuance of process for compelling the attendance of any witnesses proposed by him, the Tribunal shall issue such process unless it considered that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defecting the ends of justice." *The Chief Prosecutor v Professor Ghulam Azam* (Order No 72A) ICT-1 (9 October 2012) ICT-BD Case No 6 of 2011, 2.

allowed the Defence to call a maximum of 6, 20, 5, 12, 3, 5, 3, 4, 3, 4 and 7 witnesses respectively.[93]

3.2 *Assessing the practice of limiting of the number of defence witnesses by the ICTs*

Does the practice of limiting the number of witnesses the defence is permitted to call "inevitably preclude" the accused's ability to present his or her case and compromise the principle of 'equality of arms'?[94] Was the number of defence witnesses 'systematically', 'arbitrarily' and 'unreasonably' limited by the ICTs? Did the 'limiting' practice impede the accused from determining the nature of evidence that would be presented through witnesses of his or her own choosing?[95] This section starts

[93] *The Chief Prosecutor v Abdul Quader Molla* (Judgment) ICT-2 (5 February 2013) ICT-BD Case No 2 of 2012, [25], [27] and [29] < http://www.ict-bd.org/ict2/ICT2%20judgment/quader_full_verdict.pdf > accessed 12 August 2017; *The Chief Prosecutor v Delowar Hossain Sayeedi* (Judgment) ICT-1 (28 February 2013) ICT-BD Case No 01 of 2011, [36] < http://www.ict-bd.org/ict1/ICT1%20Judgment/sayeedi_full_verdict.pdf > accessed 12 August 2017; *The Chief Prosecutor v Muhammad Kamaruzzaman* (n 16) [28], [35]-[38] & [151]; *The Chief Prosecutor v Professor Ghulam Azam* (Judgment) ICT-1 (15 July 2013) ICT-BD Case No. 6 of 2011, [35] - [36] < http://www.ict-bd.org/ict1/ICT1%20Judgment/ICT%20BD%20Case%20NO.%2006%20of%202011%20_Delivery%20of%20Judgment__final_.pdf > accessed 12 August 2017; *The Chief Prosecutor v Ali Ahsan Muhammad Mujahid* (Judgment) ICT-2 (17 July 2013) ICT-BD Case No 4 of 2012, [29]-[30] < http://www.ict-bd.org/ict2/ICT2%20judgment/AAMMujahid.pdf > accessed 12 August 2017; *The Chief Prosecutor v Salauddin Quader Chowdhury* (Judgment) ICT-2 (01 October 2013) ICT-BD Case No 2 of 2011, [41]-[42] < http://www.ict-bd.org/ict1/ICT1%20Judgment/ICT-BD%20Case%20No.%2002%20of%202011%20Delivery%20of%20judgment%20final.pdf > accessed 12 August 2017; *The Chief Prosecutor v Md Abdul Alim @ M A Alim* (Judgment) ICT-2 (9 October 2013) ICT-BD Case No 1 of 2012, [25]-[29] < http://www.ict-bd.org/ict2/ICT2%20judgment/ALIM-FINAL.pdf > accessed 12 August 2017; *The Chief Prosecutor v Motiur Rahman Nizami* (Judgment) ICT-1 (29 October 2014) ICT-BD Case No 3 of 2011, [50]-[51] < http://www.ict-bd.org/ict1/ICT1%20Judgment/ICT-BD%20Case%20No.%2003%20of%202011%20dated.....%20.12.pdf > accessed 12 August 2017; *The Chief Prosecutor v Mir Quasem Ali* (Judgment) ICT-2 (2 November 2014) ICT-BD Case No 3 of 2013, [32]-[34] and [50] < http://www.ict-bd.org/ict2/ICT2%20judgment/Mir%20Quasem-judge-02.pdf > accessed 12 August 2017; *The Chief Prosecutor v Md Forkan Mallik @ Forkan* (Judgment) ICT-2 (16 July 2015) ICT-BD Case No 3 of 2014, [13] < http://www.ict-bd.org/ict2/Judgment%20ICT%202%20part%202/Forkan-Judgment.pdf > accessed 12 August 2017; *The Chief Prosecutor v Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Md. Abdur Razzak* (Judgment) ICT-1 (1 June 2016) ICT-BD Case No 3 of 2015, [38] < http://www.ict-bd.org/ict1/Judgment%20part%202/3%20of%202015.pdf > accessed 12 August 2012.

[94] David Bergman (n 85).

[95] David Bergman, '5 Nov 2012: Tribunal Order Reduces Molla Witnesses' (*Bangladesh War Crimes Tribunal Blog,* 17 February 2013) < http://bangladeshwarcrimes.blogspot.co.uk/2013/02/5-nov-2012-tribunal-order-reduces-molla_17.html > accessed 17 July 2016.

by addressing the first 'general' question and then moves on to the subsequent 'specific' questions.

3.2.1 *Setting an upper limit on the number of defence witnesses and the 'equality of arms'*

While the opportunity to comprehensively present one's case is an essential fair trial attribute, a trial that succumbs to unnecessary delay undermines another basic right of the accused – the right to a speedy trial. 'Expedited' trial proceedings were a point of interest during the 'historic' trials of Nuremberg.[96] In the past, the European Commission of Human Rights has curbed defence evidence for the sake of preserving procedural efficiency and economy.[97] In these cases, it was held that the principle of equality of arms did not give an accused an "unlimited right to obtain the attendance of witnesses" and courts were entitled not to summon witnesses whose statements do not bear any relevance to the case or were unlikely to assist in the ascertainment of the truth.[98] In that vein, the Pre-Trial and Trial Chambers of the *ad hoc* tribunals and the ICC have over the years developed a 'culture' where the Prosecution and the Accused are required to submit the minimum amount of evidence necessary to sufficiently prove their case.[99] This is done so that a balance is maintained between protecting the accused's right to effectively present his case and ensuring the overall

[96] Mark Klamberg, *Evidence in International Criminal Trials – Confronting Legal Gaps and the Reconstruction of Disputed Events* (Martinus Nijhoff 2013) 458.
[97] Christoph Safferling, *Towards an International Criminal Procedure* (Oxford University Press 2001) 288; Klamberg (n 96) 458.
[98] *Austria v Italy* App no 788/60 (Commission Decision, 11 January 1961) and *Hopfinger v Austria* App no 524/59 (Commission Decision, 19 December 1960) 390-392; quoted in Klamberg (n 96).
[99] Josée D'Aoust, 'The Conduct of Trials' in José Doria, Hans-Peter Gasser and M Cherif Bassiouni (eds), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (Martinus Nijhoff 2009) 875; Gideon Boas, James L Bischoff, Natalie L Reid and B Don Taylor III, *International Criminal Procedure Volume 3* (Cambridge University Press 2011) 264.

'expeditiousness' of a trial. This was reiterated by the Pre-Trial of the ICC in *Mathaura et al* where it was "convincingly emphasised" that the "expeditiousness" of a trial was not incompatible with the rights of the accused.[100] Originally rooted in civil law traditions, the practice of limiting defence witness numbers has now become a standard "procedural tool" of case management.[101]

The culture of 'limiting' witnesses, however, is not beyond reproach. In fact, disputes regarding the number of defence witnesses permitted during trial are common in the annals of international criminal law. Critics believe that the practice of 'limiting' is "problematic" because it creates a tension between the "principle of equality of arms and […] judicial economy"[102] and leaves the defence at a "significant disadvantage vis-à-vis the prosecution".[103] Bennett L. Gershman maintains that the 'limiting' practice is one of the ways judges impede the defence counsel's ability to "effectively challenge the prosecution's case" and "make independent decisions about how to present the defence."[104]

Criticisms of such nature have been acknowledged and addressed in multiple decisions of the *ad hoc* Tribunals and the ICTs, where it has been held that the practice of imposing 'caps' on the number of defence witnesses does not "inevitably preclude" the accused's ability to present his or her case, nor does it automatically compromise

[100] Klamberg (n 96) 460.
[101] Richard May and Marieke Wierda (n 19) 279-280; Cryer, Friman, Robinson, and Wilmshurst (n 20) 462.
[102] Geert Jan Alexander Knoops, 'The Dichotomy between Judicial Economy and Equality of Arms within International and Internationalized Criminal Trials: A Defence Perspective' (2006) 2 (4) International Studies Journal 1, 2.
[103] Boas, Bischoff, Reid and Taylor III (n 99) 242-243 & 248; Charles Chernor Jalloh and Amy DiBella, 'Equality of Arms in International Criminal Law: Continuing Challenges' in William A Schabas, Yvonne Mcdermott and Niamh Hayes (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate 2013) 268.
[104] Bennett L Gershman, *Trial Error and Misconduct* (LexisNexis 2007) 1-4(d)(1).

the principle of equality of arms. In *Orić*, the Appeals Chamber of the ICTY stressed that the rights of parties to a fair trial should not be encroached by the need for judicial economy, but at the same time clarified that setting a limit on the number of defence witnesses did not by default violate the rights of the accused. The rationale justifying this view was neatly summed up by the Appeals Chamber in the following manner:

> At a minimum, "equality of arms obliges a judicial body to ensure that neither party is put at a disadvantage when presenting its case," certainly in terms of procedural equity. This is not to say, however, that an accused is necessarily entitled to precisely the same amount of time or the same number of witnesses as the Prosecution. The Prosecution has the burden of telling an entire story, of putting together a coherent narrative and proving every necessary element of the crimes charged beyond a reasonable doubt. Defence strategy, by contrast, often focuses on poking specifically targeted holes in the Prosecution's case, an endeavour which may require less time and fewer witnesses. This is sufficient reason to explain why a principle of basic proportionality, rather than a strict principle of mathematical equality, generally governs the relationship between the time and witnesses allocated to the two sides.[105]

Since the Prosecution is burdened with telling the "entire story", it is generally the case that the number of witnesses it relies on during trial exceed the number of witnesses listed by the defence. As a result, in *Kanyabashi*, despite the fact that the

[105] *Prosecutor v. Naser Orić (Interlocutory Decision on Length of Defence Case)* (Appeals Chamber) IT-03-68-AR73.2 (20 July 2005) [7] – [8].

number of Prosecution witnesses had not been reduced, the accused's persistent demands to establish the equality of arms which he perceived as "the ability to summon more witnesses" were rejected by the ICTR.[106]

3.2.2 *Limiting defence witness numbers at the ICTs – systematic, arbitrary and unreasonable?*

Were the ICTs 'arbitrary' or 'systematic' in curtailing the number of witnesses listed by the Defence? A reason 'common' to all 'limiting' orders issued by the ICTs was that the number of witnesses listed by the defence was viewed by the Tribunals as "excessive" and furnished with the "intention to delay the trial".[107] If one appreciates the number of witnesses initially listed by the defence in light of the number of charges brought against the accused and the number of witnesses the Prosecution listed to substantiate them, there is scope to find merit in the claim that witnesses were listed with a purpose of delaying the trial process. As has been stated earlier, the number of defence witnesses have been limited in 11 of the cases tried so far by the ICTs. In the cases of *Molla*, *Sayeedi*, *Kamaruzzaman*, *Azam*, *Mujahid*, *Chowdhury*, *Alim* and *Nizami*, the ICTs framed 6, 20, 7, 5, 7, 23, 17, and 16 charges respectively against the accused. In addition to documentary evidence, the Prosecution listed 12, 20, 7, 5, 7, 23, 17 and 16 witnesses respectively to substantiate those charges. In these cases, the number of witnesses originally listed by the defence were 965, 48, 1354, 2939, 1315,

[106] *Prosecutor v Ndayambaje et al. (Decision on Joseph Kanyabashi's Appeal against the Decision of Trial Chamber II of 21 March 2007 concerning the Dismissal of Motions to Vary his Witness List)* (Appeals Chamber) ICTR-98-42-AR73 (21 August 2007) [27] – [28] cited in Jalloh and DiBella (n 103) 268.

[107] David Bergman, '14 Aug 2012: Sayedee 20 Defence Witness Order' (*Bangladesh War Crimes Tribunal Blog*, 20 November 2012) < http://bangladeshwarcrimes.blogspot.co.uk/2012/11/14-aug-2012-sayedee-20-defence-witness.html > accessed 27 June 2016.

1153, 3328 and 10,111 respectively.[108] As a consequence of the 'limiting' Orders issued by the Tribunals, the Defence was allowed to list a maximum of 6, 20, 5, 5, 12, 3, 5, 3 and 4 witnesses in these cases. Out of the 11 cases where 'caps' were imposed, the Defence were unable to bring the maximum number of witnesses permitted in the 'limiting' Orders in *Molla*, *Sayeedi*, *Azam*, *Mujahid*, and *Chowdhury*.[109] Although Geoffrey Robertson has been critical of the 'extent' of reduction by the ICTs, he has acknowledged that the act of listing over a thousand witnesses was a "vexatious […] delaying tactic".[110]

The Trial Chamber of the ICTY has applied an "objective standard or test" when evaluating the "reasonableness" of the 'limit' imposed.[111] This test requires the Tribunal to consider whether the number of witnesses allowed was "objectively adequate" in light of the "complexity" of the subject matter of the case.[112] For instance in *Orić*, a case where it was necessary to resolve complex issues such as "military necessity", the Appeals Chamber of the ICTY held that the Trial Chamber's allotment of 30 witnesses and 27 days of testimony to the Defence in comparison with the allotment of 50 witnesses over 100 days of testimony to the Prosecution, was unjustifiably disproportionate.[113] It is possible to gain a perspective on the degree of

[108] *The Chief Prosecutor v Abdul Quader Molla* (n 93) [29]; *The Chief Prosecutor v Delowar Hossain Sayeedi* (n 93) [36]; *The Chief Prosecutor v Muhammad Kamaruzzaman* (n 16) [38] & [151]; *The Chief Prosecutor v Professor Ghulam Azam* (n 93) [35]; *The Chief Prosecutor v Ali Ahsan Muhammad Mujahid* (n 93) [29], [41]; *The Chief Prosecutor v Md Abdul Alim @ M A Alim* (n 93) [25]; *The Chief Prosecutor v Motiur Rahman Nizami* (n 93) [51]; *The Chief Prosecutor v Mir Quasem Ali* (n 93) [50]; *The Chief Prosecutor v Md Forkan Mallik @ Forkan* (n 93) [13]; *The Chief Prosecutor v Mohibur Rahman alias Boro Mia et al.* (n 93) [180].
[109] In *Molla*, *Sayeedi*, *Azam*, *Mujahid* and *Chowdhury*, a total of 5, 17, 1, 1 and 4 witnesses testified for the Defence, when in fact, the ICTs had allowed the Defence to bring in 6, 20, 12, 3 and 5 witnesses in those cases.
[110] Robertson (n 11) 118.
[111] Knoops (n 102) 12.
[112] ibid 12-13.
[113] ibid 12-13.

'proportionality' and 'reasonableness' of the allocation of witnesses and time from the transcripts of *Kamaruzzaman*. In this case, the 18 Prosecution witnesses were given 20 days to testify, while the cross-examinations of those witnesses by the Defence spanned 39 days.[114] For example, the examination-in-chief of the Investigation Officer in *Kamaruzaman* was completed in three hours. The defence cross-examined him over a period of four days over nearly ten hours.[115] The 5 witnesses who testified for the defence did so over a period of 5 days.[116] In *Kamaruzzaman*, the Tribunal felt that it was unnecessary to substantiate the defence's plea of *alibi* with a many witnesses because the "adjudication of facts in issue does not depend upon the success or failure in proving defence".[117] The Tribunal explained the burden of proof with respect to the Prosecution and the Defence in a criminal trial:

> […] it is settled jurisprudence that in a criminal trial the burden or obligation of proof of the guilt of the accused is place squarely on the prosecution. The burden rests upon the prosecution in respect of every element or essential facts that makes up the offence with which the accused has been charged. That burden never shifts to the accused. It is of course not for the accused to prove his/her innocence. […] It is quite misconceived that the defence is burdened to 'disprove' the prosecution case. An alibi, in contrast to a defence, is intended to raise reasonable doubt about the presence of the accused at the crime site, this being an

[114] Orders No. 22-132 (22 July 2012 – 18 March 2013) *The Chief Prosecutor v Muhammad Kamaruzzaman* (Orders) ICT-2 ICT-BD Case No 3 of 2012.
[115] *The Chief Prosecutor v Muhammad Kamaruzzaman* (n 16) [34].
[116] ibid [29], [34]-[38].
[117] *The Chief Prosecutor v Mohammad Kamaruzzaman* (Order No 114) ICT-2 (20 February 2014) ICT-BD Case No 03 of 2012, [9].

element of the prosecution's case, thus the burden of proof is on the prosecution.[118]

This brings us to the final point of contention of whether the ICTs Orders limiting witnesses had engaged in "judicial meddling" and determined the "nature of the defence's legal strategy".[119] In the ICTY and the ICTR, the Trial Chamber sets an upper limit on the number of defence witnesses prior to the commencement of the trial during the pre-defence conference. During this 'stage', the Chamber decides whether to limit witnesses by taking into account the 'will-say' statements of the witnesses listed by the defence.[120] It has been alleged that the Tribunals had reduced the number of defence witnesses without possessing any knowledge on the "relevance of the witnesses on substantive issues".[121] The ICTA and its RoP do not provide for any mechanism that is similar to a 'pre-defence conference'. Section 9(3) ICTA requires the Chief Prosecutor to furnish to the Tribunal a list of witnesses intended to be produced during the trial along with recorded statements of such witnesses.[122] The Act

[118] *The Chief Prosecutor v Mohammad Kamaruzzaman* (Order No 114) ICT-2 (20 February 2014) ICT-BD Case No 03 of 2012, [4] & [10].
[119] Boas, Bischoff, Reid and Taylor III (n 99) 249; Bergman (n 85).
[120] Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, rule 73 ter (c); Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, rule 73 ter (d); Nancy Amoury Combs, 'Legitimizing International Criminal Justice: The Importance of Process Control' (2012) 33 Michigan Journal of International Law 321, 330; Daryl A Mundis, 'Improving the Operation and Functioning of the International Criminal Tribunals' (2000) 94 The American Journal of International Law 759, 765; Knoops (n 102) 5; Håkan Friman, Fabricio Guariglia, Claus Kress, John Rason Spencer and Vladimir Tochilovsky, 'Measures Available to the International Criminal Court to Reduce the Length of Proceedings' (ICC, 2003) 4, 9 < https://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281982/length_of_proceedings.pdf > accessed 30 June 2016; Sometimes, the Tribunals limit the number of defence witnesses indirectly. For instance, at the pre-defence conference in *Milosevic*, the ICTY refrained from limiting the number of witnesses the accused could call, but insisted that the case in question be limited to 150 working days. As a result, Slobodan Milosevic was compelled to be judicious while selecting who to call from his list of 1631 witnesses to testify in his case. See, 'Unlimited Number of Witnesses, but in Limited Time' *Sense Tribunal* (The Hague, 17 June 2004) < http://www.sense-agency.com/icty.29.html?news_id=8642 > accessed 30 June 2016.
[121] Bergman (n 85).
[122] International Crimes (Tribunals) Act 1973 (n 3) s 9(3) reads: "The Chief Prosecutor shall, at least three weeks before the commencement of the trial, furnish to the Tribunal a list of witnesses intended

does not, however, impose a similar responsibility on the defence, which under Section 9(5) is obligated only to provide the Tribunal and the Prosecution with a list of witnesses it intends to reply upon.[123] Nevertheless, previous orders and judgments of the ICTs have clarified that the Tribunals limited the number of defence witnesses on the basis of the "defence-case" that could be "extracted" from the trend of cross-examinations of Prosecution witnesses carried out by the counsels representing the accused.[124] Therefore, while the allegation that the ICTs enforced an upper limit on the number of defence witnesses without 'knowing' what they would say is 'technically' true, their decisions were based on the line of questioning adopted by the accused's counsel during the cross-examinations of Prosecution witnesses.

It must be acknowledged, however, that there is a definite scope to improve this 'exercise'. This will be achieved if a mechanism similar to that of the 'pre-defence conference' is introduced into the ICTA during which the Tribunal will have the opportunity to evaluate the 'will-say' statements of each witness. Alternatively, if legislators perceive that incorporating a 'pre-defence conference' will amount to too significant a change in the system of the ICTs, a simple amendment to Section 9(5) may be introduced requiring the Defence to submit not just a list of witnesses, but also "a summary of the facts on which each witness will testify" as is the case with respect to the ICTY and the ICTR.[125]

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to be produced along with the recorded statement of such witnesses or copies thereof and copies of documents which the prosecution intends to rely upon in support of such charges".

[123] ibid s 9(5) reads: "A list of witnesses for the defence, if any, along with the documents or copies thereof, which the defence intends to rely upon, shall be furnished to the Tribunal and the prosecution at the time of the commencement of the trial".

[124] *The Chief Prosecutor v Abdul Quader Molla* (n 93) [29] & [404]; *The Chief Prosecutor v Ali Ahsan Muhammad Mujahid* (n 93) [43].

[125] Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, rule 73 ter (b)(iii)(b).

To sum up, the practice of limiting the number of defence witnesses creates an inevitable tension between the need to ensure the equality of arms and judicial economy. Nevertheless, the practice of curbing of the amount of evidence provided by the defence which includes the number of defence witnesses is not uncommon in international criminal law. This is why UN sponsored Tribunals have held that that the practice of imposing 'caps' on the number of defence witnesses does not inevitably preclude the accused's ability to present his or her case or automatically compromise the principle of equality of arms. With regards to the 11 cases before the Bangladeshi ICTs where a cap was imposed on the number of defence witnesses, the Tribunals performed this task on the basis of case presented by the defence and from the trends of cross-examination of Prosecution witnesses carried out by the defence counsel. This system is not perfect.

Conclusion

This Chapter found that other than a few omissions concerning the statutory provision allowing an accused a minimum period of three weeks to prepare his defence, the inability of foreign counsel to physically place their arguments before the ICTs and the absence of the right of compensation to victims of miscarriage of justice, an accused facing trial before the ICTs enjoys a range of fair trial safeguards which mirror most of the rights enshrined in ICCPR. There have been other criticisms of trial procedures adopted by the ICTs. Due to constraints of space, this Chapter analysed two of the most contentious objections, namely the application of Articles 47(3) and 47A of the Constitution of the People's Republic of Bangladesh and the ICTs practice of limiting the number of defence witnesses. The 'scheme' created by Articles 47(3)

and 47A of the Bangladesh Constitution does not deprive those charged with international crimes of their fair trial rights under the ICTA, nor does it alter the 'basic structure' of the Constitution. While the criticisms of this 'scheme' may have some weight because they create an 'image' crisis of the ICTs, they remain insufficient to cause concern under the principle of complementarity. This Chapter also examined the ICTs practice of imposing caps on the number of defence witnesses on the basis of the case presented by the defence and from the trends of cross-examination of Prosecution witnesses carried out by the defence counsel. Although the practice of limiting the number of defence witnesses is not uncommon in international criminal justice and other local jurisdictions, the process through which this is done at the ICTs is not perfect and needs to be improved. Furthermore, the ICTs can allow the defence to introduce more witnesses if they are convinced that more defence witnesses are not being prayed for as a delaying tactic. However, the claim that this practice is systematic, arbitrary and unreasonable appears to be an exaggeration.

Article 14(3)(d) ICCPR upholds the accused's right "to be tried in his presence". In nearly half of the cases heard by the ICTs, the accused were absconding. The following Chapter analyses the last contentious objection relating to the trial process of the ICTs, i.e. the legality and legitimacy of the ICTs practice of trying an accused in his absence.

Chapter VII

Analysing the major criticisms of the trial process (II)

Introduction

The trial of the Muslim cleric named *Abul Kalam Azad*, did not just result in the first ever judgment of the International Crimes Tribunals of Bangladesh (ICTs) in January 2013, but was also the first of a series of trials that were conducted in the physical absence of the accused. Till date, twenty-eight persons accounting for nearly half of all the accused who have been tried and sentenced or are currently on trial before the ICTs were physically absent during the proceedings, resulting in those trials to be conducted *in absentia*.[1] One cannot count out the possibility that there will be more trials in absentia (TIA) in the future. Since 2016, 62% of all accused who have been tried and sentenced and are currently facing trial before the ICT have been physically absent from the proceedings, noting a clear rise in the usage of TIA.[2] The demands to hold to account the 195 Pakistani military personnel identified in the early 1970s as the principal perpetrators of the 1971 war remains unfulfilled.[3] The formation of a

[1] International Crimes Tribunal-1, Bangladesh < http://www.ict-bd.org/ict1/judgments.php > accessed 7 July 2016; International Crimes Tribunal-2, Bangladesh < http://www.ict-bd.org/ict2/judgments.php > accessed 7 July 2016; 'War Crimes Tribunal Concludes Trial of Jamaat Leader Aziz' *Bdnews24* (Dhaka, 9 May 2017) < http://bdnews24.com/bangladesh/2017/05/09/war-crimes-tribunal-concludes-trial-of-jamaat-leader-aziz > accessed 25 August 2017.

[2] Since 2016, judgments have been handed in 7 trials against 31 accused amongst whom 18 were physically absent. Of the trials that are ongoing where charges have been framed against 29 accused, 19 amongst them are physically absent. This amounts to a total of accused 37 (out of 60) who have been tried or are currently being tried by the ICT in their absence. See, International Crimes Tribunal-1 and International Crimes Tribunal-2 (n 1).

[3] Zulfiqer Russell, 'Tribunal to Investigate 195 Pakistani Soldiers' *Dhaka Tribune* (Dhaka, 28 December 2013) < http://www.dhakatribune.com/law-amp-rights/2013/dec/28/tribunal-investigate-195-pakistani-soldiers > accessed 7 July 2016; 'Bangladesh Committee to Conduct 'Symbolic Trials' of 195 Pakistan Army Men' *Bdnews24* (Dhaka, 18 December 2015) < http://bdnews24.com/bangladesh/2015/12/18/bangladesh-committee-to-conduct-symbolic-trials-of-195-pakistan-army-men > accessed 7 July 2016.

five-member committee by the ICT in 2016 to collate information about the crimes committed by Pakistani soldiers and Bangladesh's intention conveyed in 2017 to seek the extradition of 195 former POWs from Pakistan to face "trial on charges of genocide" show that the prospect of trying Pakistani military personnel is being treated with seriousness.[4] In the likely event that Pakistan will refuse to extradite, the mechanism of *in absentia* trials will be employed again by the ICTs.[5]

Critics have identified the ICTs practice of conducting TIA as "possibly the most evident and palpable proof that, […] justice has ended at the gallows in Bangladesh".[6] This conclusion is foregrounded on the claims that the accused were not given effective notice of impending proceedings, were deprived of effective assistance of counsel, and were denied the right to re-trial during the trials conducted *in absentia* which led to death sentences passed against thirteen of the accused.[7] The possibility that an absconding accused will be hanged to death if apprehended has been described as "extreme and undoubtedly unfair".[8] These criticisms remain unaddressed by the Bangladesh Government.

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[4] Haroon Habib, 'Probe on 195 Pakistani 'War Criminals' Begins' *The Hindu* (21 January 2016) < http://www.thehindu.com/news/international/Probe-on-195-Pakistani-%E2%80%98war-criminals%E2%80%99-begins/article14010444.ece > accessed 15 July 2017; 'Bangladesh to Demand Handover of 195 Pakistani POWs' *Newage Bangladesh* (Dhaka, 30 March 2017) < http://www.newagebd.net/article/12331/bangladesh-to-demand-handover-of-195-pakistani-pows > accessed 15 July 2017.

[5] 'Can They be Tried!' *Bdnews24* (Dhaka, 26 January 2014) < http://bdnews24.com/bangladesh/2014/01/26/can-they-be-tried > accessed 15 July 2017.

[6] 'Justice at the Gallows: The Regulation of Trials in Absentia in the International Crimes Tribunal of Bangladesh' (*Toby Cadman,* 9 July 2016) < http://tobycadman.com/justice-at-the-gallows-the-regulation-of-trials-in-absentia-in-the-international-crimes-tribunal-of-bangladesh/ > accessed 15 July 2017.

[7] 'Report on the 'Experts' Rountable on Trials in *Absentia* in International Criminal Justice' (International Bar Association, September 2016) 10.

[8] Surabhi Chopra, 'The International Crimes Tribunal in Bangladesh: Silencing Fair Comment' (2015) 17 Journal of Genocide Research 211, 213-14; Geoffrey Robertson, *Report on the International Crimes Tribunal of Bangladesh* (International Forum for Democracy and Human Rights, 2015) 56-57; Elizabeth Herath, 'Trials in Absentia: Jurisprudence and Commentary on the Judgment in Chief Prosecutor v. Abul Kalam Azad in the Bangladesh International Crimes Tribunal' (2014) 55 Harvard International Law Journal 1.

The scope and purpose of this chapter is to analyze these criticisms against Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR) which asserts the right of an accused to be tried 'in his presence' and the principle of complementarity which dictates that the International Criminal Court (ICC) should be receptive towards the 'diverse' standards of justice in national criminal jurisdictions when assessing the 'independence', 'impartiality' and 'manner' of those jurisdictions. To this end, this Chapter is divided into two parts. Part I asks if the 'complementary' system of justice created by the Rome Statute of the ICC permits domestic courts of State Parties to prosecute the alleged perpetrators of international crimes through trials in absentia. Part II analyses the specific criticisms directed towards the trials in absentia held before the ICTs for the purposes of determining whether they have rendered illegitimate the justice process in Bangladesh created by the ICTA.

1. Balancing the accused's right to be present against *trials in absentia*

The right to be tried in one's own presence, expressed in the Latin phrase *audi alteram partem* (let the other side be heard as well) is acknowledgment of one of the innate notions of fairness and is asserted in Article 14(3)(d) ICCPR, other major instruments of international law such as the European Convention on Human Rights (ECHR) and is explicitly recognized as a fundamental right in many national constitutions.[9]

[9] European Convention on Human Rights, article 6; 'Customary IHL, Practice Relating to Rule 100. Fair Trial Guarantees, Section I. Presence of the Accused at the Trial' < https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter32_rule100_sectioni > accessed 27 February 2017; Thilo Marauhn, 'The Right of the Accused to be Tried in his or her Presence' in D Weissbrodt and Rudiger Wolfrum (eds), *The Right to a Fair Trial* (Springer 1997) < http://hrlibrary.umn.edu/fairtrial/wrft-tm.htm > accessed 12 August 2017; Council of Europe, *Judgments in Absentia,* European Committee on Crime Problems (CDPC) Committee of Experts on the Operation of European Conventios in the Penal Field (PC-OC), Secretariat Memorandum prepared by the Directorate of Legal Affairs, 3 March 1998m (Doc PC-OC(98)7) 4 <

Nevertheless, *trials in absentia* persist in limited circumstances. In fact, trials in the absence of the accused have been carried out for centuries and their "actual roots" go back as long as the French Criminal Ordinance of 1670.[10] This part explains the importance of ensuring the presence of an accused during his or her trial. It then identifies the circumstances in which trials in absentia are permitted. This will then help determine whether trials in absentia to prosecute alleged perpetrators of international crimes are permitted within the 'complementary' system of justice created by the Rome Statute.

1.1 *Why is the right to be 'present' important?*

There are many reasons why an accused's 'presence' during trial is desirable. Most are based on the apparent disadvantages of trying a person in his or her absence. The absence of an accused has been described as "inherently unfair" because it precludes his "effective participation" during trial and prevents him from being adequately defended.[11] It has been said that determining the culpability of an accused in his absence is tantamount to "hearing half the story" and prevent courts from objectively determining the guilt or innocence of an individual.[12] When an accused is 'present', it

http://www.coe.int/t/dghl/standardsetting/pc-oc/Standards_extradition_en_files/07E.98%20trial%20absentia.pdf > accessed 27 February 2017.

[10] Ralph Riachy, 'Trials in Absentia in the Lebanese Judicial System and at the Special Tribunal for Lebanon' (2010) 8 Journal of International Criminal Justice 1295, 1296; M Cherif Bassiouni, 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions' (1993) 3 Duke Journal of Comparative & International Law 235, 279-80.

[11] M Cherif Bassiouni, *Introduction to International Criminal Law* (2nd revised edn, Martinus Nijhoff 2013) 818; 'Letter to Secretariat of the Rules and Procedure Committee Extraordinary Chambers of the Courts of Cambodia' (*Human Rights Watch*, 17 November 2006) 1-2 < https://www.hrw.org/sites/default/files/related_material/Letter%20Cambodia-HRW-ECCC%20Rules%2011.17.06_0.pdf > accessed 17 February 2017.

[12] Mark Kersten, 'Defendants on the Run — What's a Court to do?' (*Justice in Conflict,* 16 April 2012) < http://justiceinconflict.org/2012/04/16/defendants-on-the-run-whats-a-court-to-do/ > accessed 17 February 2017; David Krieger, 'A Permanent International Criminal Court and the United Nations System' in Najeeb Al-Nauimi and Richard Meese (eds), *International Legal Issues Arising under the*

serves a dual purpose. First of all, the "public" interest in the accurate adjudication of a case is satisfied.[13] Secondly, it serves the "individual" interest of influencing the outcome of the case by allowing an accused to appreciate the evidence stacked against him, advise his counsel and also confront witnesses.[14]

When an accused is not present, the State appointed counsel is deprived of the opportunity to know the wishes of his client, or discuss with him the strategy of defence.[15] Since an accused who is absent during trial in unable to benefit from a "full defence", the reliability of the judgment is 'questioned' and justice may not be "seen" to be done.[16] According to Christoph Safferling, an accused's absence frustrates the "modern understandings of criminal prosecution" because it treats him as a passive "object" as opposed to an active "subject" of judicial proceedings.[17] Concerns have also been raised about the practicability of enforcing judgments passed *in absentia*. It has been argued that imposing judgments that have little or no chance of being enforced will present courts as forums that sponsor "show trials".[18] This brings "disrepute" to the court and results in the "progressive loss" of the court's "authority

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United National Decade of International Law (Martinus Nijhoff 1995) 788; 'The International Criminal Court: Making the Right Choices – Part II: Organizing the Court and Ensuring a Fair Trial' (Amnesty International, 30 June 1997) 117 < https://www.amnesty.org/en/documents/IOR40/011/1997/en/ > accessed 17 February 2017.

[13] Marauhn (n 9).

[14] Lucas Tassara, 'Trial in Absentia: Rescuing the "Public Necessity" Requirement to Proceed with a Trial in the Defendant's Absence' (2009) 12 Barry Law Review 153, 169-170.

[15] 'STL Defence in Absentia Will Mean Uncharted Waters' *The Daily Star* (Dhaka, 29 May 2011) < http://www.stl-tsl.org/en/news-and-press/selected-interviews/head-of-the-defence-office/717-29-05-2011-stl-defence-in-absentia-will-mean-uncharted-waters-daily-star > accessed 17 February 2017.

[16] 'The International Criminal Court: Making the Right Choices – Part II: Organizing the Court and Ensuring a Fair Trial' (Amnesty International, 30 June 1997) 118 < https://www.amnesty.org/en/documents/IOR40/011/1997/en/ > accessed 17 February 2017.

[17] Christoph Safferling, 'Trial in Absentia' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009) 543.

[18] 'Draft Code of Crimes against the Peace and Security of Mankind' in *Yearbook of the International Law Commission 1994 Volume II Part Two* (UN Publication 1996) 53 < http://legal.un.org/ilc/publications/yearbooks/english/ilc_1994_v2_p2.pdf > accessed 17 February 2017.

and effectiveness" before the general people.[19] Lucas Tassara adds to this argument by pointing out the possibility that confidence in the justice system will erode if *trials in absentia* are arbitrarily applied.[20]

1.2 *An exception to the right to be present – trials in absentia*

In a global order where States are often reluctant to transfer accused and in the absence of an effective global policing system, proponents argue that *trials in absentia* "dictated by realism" are effective means of preventing the "undue" and "indefinite" delay of justice.[21] Supporters contend that a State that counts out the option of holding an *in absentia* trial if an accused can avoid being apprehended, indirectly encourages the accused to "become a fugitive" and "play" the system by intentionally avoiding a trial.[22] In the context of Christoph Safferling's rather alarming claim that "it is the plain right of the accused to try to avoid prosecution by absconding", the justice system's right to be open to *trials in absentia*, seems all the more necessary.[23] As a matter of policy, an accused should not be allowed to "make a mockery of […] justice" by deliberately absenting himself from trial and essentially "vetoing" a legitimate court's jurisdiction.[24]

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[19] Marauhn (n 9); 'Draft Code of Crimes against the Peace and Security of Mankind' (n 18) 53.
[20] Tassara (n 14) 171.
[21] UNSC, 'Letter Dated 10 February 1993 from the Permanent Representative of France to the United Nations Addressed to The Secretary-General' (10 February 1993) UN Doc S/25266; Mark Kersten, 'Defendants on the Run — What's a Court to do?' (*Justice in Conflict*, 16 April 2012) < http://justiceinconflict.org/2012/04/16/defendants-on-the-run-whats-a-court-to-do/ > accessed 17 February 2017.
[22] Safferling (n 17) 743; Sarah C Sykes, '"Defence Counsel, Please Rise": A Comparative Analysis of Trial *In Absentia*' (2013) 216 *Military Law Review* 170, 208.
[23] Safferling (n 17).
[24] Martin Wahlisch, 'Introductory Note to the Special Tribunal for Lebanon, Appeals Chamber: Decisions on the Legality of the Special Tribunal for Lebanon and *Trials in Absentia*' (2013) 52 International Legal Material 163, 165; James G Starkey, 'Trial in Absentia' (1979) 53 St. John's Law Review 721, 743; Federal Rules of Criminal Procedure 2016, rule 43; 'Report of the Working Group on a Draft Statute for an International Criminal Court' in *Yearbook of the International Law Commission 1993 Volume II Part Two* (UN Publication 1995) 120 <

The approach of not pursuing a trial until and unless an accused is physically present before the court has disadvantages. The "prolonged delay" caused by the absconding of the accused may result in the loss of evidence by "accident or carelessness", diminishing memories and the unavailability of witnesses.[25] In 1993, Doudou Thiam cautioned that a complete prohibition on *trials in absentia* in the proposed ICC Statute could "paralyse the work of the court".[26] Thiam's view has been prophetic in light of the reality that a good number of accused indicted by the ICC have avoided trial by evading the custody of the court.[27] When detractors claim that pursuing trial in an accused's absence gives off the essence of a "show trial", it has been countered that the ICC does not gain 'credibility' by indicting an accused but not having a trial at all.[28] Herman Schwartz and Lloyd Cutler argue that untried indictments are nothing more than unproven charges, which is why verdicts rendered through *trials in absentia* are necessary "formal condemnations", especially where the probative value of evidence is determined after careful consideration.[29] Such judgments act as "moral sanctions" and influence the "isolation and ultimate capture" of the accused.[30] Gary

http://legal.un.org/ilc/publications/yearbooks/english/ilc_1993_v2_p2.pdf > accessed 15 February 2017.

[25] Starkey (n 24) 743; 'Report of the Working Group on a Draft Statute for an International Criminal Court' (n 24) 120.

[26] Doudou Thiam, 'Eleventh Report on the Draft Code of Crimes Against the Peace and Security of Mankind' in Document A/CN.4/449 *Yearbook of the International Law Commission 1993 Volume II Part One* (UN Publication 2000) 121 < http://legal.un.org/ilc/publications/yearbooks/english/ilc_1993_v2_p1.pdf > accessed 15 february 2017.

[27] Gary J Shaw, 'Convicting Inhumanity *In Absentia*: Holding Trials In Absentia at the International Criminal Court' (2012) 44 The George Washington International Law Review 107, 130.

[28] ibid 138.

[29] Herman Schwartz and Lloyd N Cutler, 'Try them In Absentia' *The Washington Post* (27 August 1996) < https://www.washingtonpost.com/archive/opinions/1996/08/27/try-them-in-absentia/c6b0e05b-ae16-4026-86b9-92243ff3820f/ > accessed 25 February 2017.

[30] 'Report of the International Law Commission on the work of its forty-fifth session, 3 May - 23 July 1993, Official Records of the General Assembly, Forty-eighth session, Supplement No. 10' UN Doc A/48/10 in *Yearbook of the International Law Commission 1993 Vol II Part Two* (UN Publication 1995) 1.

Shaw posits that while verdicts rendered through TIA will not lead to instant punishment, they do pave way for a "sense of vindication for victims and their families".[31] These considerations have prompted the idea that an accused who consciously declines to participate in a trial he has been informed about has "little standing to complain" as to why *in absentia* proceedings were conducted.[32] Restricting TIA would create an imbalance between the interests of victims and the rights of the accused and the pursuit of 'justice' would be compromised by catering to the interests of an accused who has purposefully evaded trial.[33]

This is why, despite the undoubted preference for the accused to be present during trial, *trials in absentia* are permitted under exceptional circumstances. There are a number of situations where an accused may not participate in a trial 'in person'. These include, when he has for instance, conducted himself in a manner that disrupted the trial; appeared initially during the pre-trial stage but absconded afterwards; explicitly waived his right to appear; or deliberately declined to participate.[34] Other reasons include when the accused is in hiding from the very beginning, where the court is unable to ensure the accused's presence because of the non-cooperation of the State where he is located, and also when the court decides that the accused's absence serves the interests of justice.[35] The collective attitudes of critics, those who appreciate the usefulness of trials in absentia and decade's worth of judicial precedence have shaped the way TIA have been interpreted by major international treaties such as the ICCPR

[31] Shaw (n 27) 138.
[32] Starkey (n 24) 742.
[33] Göran Sluiter and William Schabas, 'Fourth Report of the Hague Conference 2010' (International Law Association, 2010) 7-8 < http:/bit.ly/22ucW3T > accessed 25 February 2017.
[34] Emily Given, 'Dissolving the Arrest Problem: Trials in Absentia at the International Criminal Court' (*ICC Forum*, 24 March 2014) < http://iccforum.com/forum/permalink/93/4090 > accessed 25 February 2017.
[35] ibid.

and the European Convention on Human Rights (ECHR) and bodies such as the Human Rights Committee (HRC) and the European Court of Human Rights (ECtHR) which are entrusted to interpret and enforce such treaties. Through multiple guidelines and pronouncements, procedures relating to *trials in absentia* have evolved over time and have been found to be compatible with human rights treaties when certain safeguards are respected in three particular aspects of the trial: procedure notifying an accused of impending proceedings; the accused's right to be defended in his absence; and the scope of appeal/review/retrial once an accused surrenders or is apprehended.

1.3 *Tracing the application of trials in absentia in the aftermath of mass crimes*

Justice initiatives at the end of both World Wars involved *trials in absentia* to a limited degree. At the end of the Great War the French President Alexander Millerand's proposal to try the Kaiser *par contumace* (in absentia) in 1920 failed to gain international support.[36] Although *in absentia* trials were permitted in French domestic law, British law at the time "had no equivalent procedure" leaving France unable to pursue the trial on its own.[37] No trials were held and *Kaiser* Wilhelm II lived a long life, eventually passing away of old age in Holland.[38] Despite this initial failure to prosecute, several *trials in absentia* did take place after the Great War. In 1919, French courts at Amiens sentenced Hermann Rochling to ten years imprisonment *in absentia* for causing destruction to French factories.[39] The trial of Bulgarian Prime Minister

[36] Gary J Bass, *Stay the Hand of Vengence: The Politics of War Crimes Tribunals* (Princeton University Press 2000) 87.
[37] ibid.
[38] ibid.
[39] Captain Jody M Prescott, 'In Absentia War Crimes Trials: A Just Means to Enforce International Human Rights?' (The Judge Advocate General's School, United States Army 1994) 102 < http://www.dtic.mil/dtic/tr/fulltext/u2/a456639.pdf > accessed 2 February 2017; Ruth Hanna Sachs, *White Rose History, Volume I [Academic Version]: Coming Together (January 31, 1933 - April 30, 1942)* (Exclamation Publishers 2003) ch 4, p 5.

Radoslavov Vasil held in the years 1921-23, where he was sentenced to life imprisonment, was also held in his absence.[40] Held 'locally' in Turkey at the direction of Allied Powers,[41] thirty-four leaders of the Committee of Union and Progress (CUP) responsible for orchestrating the Armenian massacre were tried by the Special Court Martial between 1919 and 1920.[42] Eleven of them were tried *in absentia*, seven of whom were found guilty of "first degree mass murder" and sentenced to death.[43]

Trials in absentia were applied for the first time in international criminal law under Article 12 of the Charter of the International Military Tribunal (IMT).[44] At the time, *absentia* provisions were "grudgingly accepted" by common law powers US and the UK.[45] However, once its place was cemented within the Charter, American Chief Prosecutor Robert Jackson conceded that although *absentia* trials did not "comply with the constitutional standard for citizens" in US proceedings, he would not object to pursuing such trials at Nuremberg in the interests of justice.[46] Sir Hartley Shawcross also argued in favor of taking "advantage" of TIA, although they were impermissible under British domestic laws.[47] Fabián Raimondo argues that the provisions of Article

[40] Patrycja Grzebyk, *Criminal Responsibility for the Crime of Aggression* (Routledge 2010) 133-34; Yannis Sygkelos, *Nationalism from the Left The Bulgarian Communist Party during the Second World War and the Early Post-War Years* (Brill 2010) 266.
[41] M Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press 2011) 93.
[42] Vahakn N. Dadrian and Taner Akçam, *Judgment at Istanbul – The Armenian Genocide Trials* (Berghahn 2011) 120.
[43] Vahakn N Dadrian, 'The Turkish Military Tribunal's Prosecution of the Authors of the Armenian Genocide: Four Major Court-Martial Series' (1997) 11 Holocaust and Genocide Studies 28, 45 & 49-50; Dadrian and Akçam (n 42) 196; Bassiouni (n 41) 93.
[44] Geert-Jan Alexander Knoops, *An Introduction to the Law of International Criminal Tribunals – A Comparative Study* (Brill 2003) 332.
[45] B F Smith, *Reaching Judgment at Nuremberg* (Basic Books Inc 1977) 229-232 cited in Antonio Cassesse and Paola Gaeta, *Cassese's International Criminal Law* (3rd edn, Oxford University Press 2013) 359.
[46] William A Schabas, '*In Absentia* Proceedings before International Criminal Courts' in Göran Sluiter and Sergey Vasiliev (eds), *International Criminal Procedure: Towards a Coherent Body of the Law* (Cameron May 2009) 337.
[47] ibid 339.

12 reflected the adopting of 'inquisitorial' attitudes by the IMT Charter, permitting *trials in absentia* under certain circumstances, as opposed to the adversarial proceedings which are based on the "effective presence of both parties".[48] The only person tried *in absentia* by the IMT was *Martin Bormann* whom the Allies failed to capture.[49] In the end, Bormann who was likely to have not been alive at the time, was found guilty for war crimes and crimes against humanity and sentenced to death.

Provisions for *trials in absentia* were also kept in the decree of 22 January, 1946, which established the Supreme National Tribunal of Poland. There is at least one recorded instance of a trial *in absentia* involving war crimes in post WWII Yugoslavia. Convened in 1946 by the Military Council of the Yugoslavian Supreme Court, twenty-four defendants were tried, ten of whom were not present during the trial.[50] A significant number of accused were tried *in absentia* by the Permanent Military Tribunal created by France. In February 1947, twenty-one of the twenty-four accused in the case of *France v Major Franz Holstein and others* were tried *in absentia* at Dijon.[51] Later that year in July, the Permanent Military Tribunal at Lyon tried seventeen of the twenty accused *in absentia* in *France v. Gustav Becker, Wilhelm Weber, Karl Schultz and others*.[52] In 1953, the *Bordeaux* trial prosecuting the massacre of villagers from Oradour-sur-Glane, forty-four of the defendants were tried *in*

[48] Fabián Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Brill 2008) 76.
[49] Grzebyk (n 40) 135.
[50] Prescott (n 39) 55-57.
[51] 'Case No. 46: Trial of Franz Holstein and Twenty-Three Others' in The UN War Crimes Commission, *Law Reports of Trials of War Criminals* (Volume III, His Majesty's Stationery Office 1949) 22 [1].
[52] 'Case No. 40: Trial of Gustav Becker, Wilhelm Weber and 18 Others' in The UN War Crimes Commission, *Law Reports of Trials of War Criminals* (Volume II, His Majesty's Stationery Office 1948) 67 [1].

absentia.[53] An estimated 956 individuals were tried *in absentia* by French military tribunals based in France and Algeria.[54] In the Soviet Union, the first *in absentia* trials for World War II war criminals took place in 1962. An Estonian court sentenced three defendants to death for crimes committed at the Tartu concentration camp.[55] Among them, Karl Linnas and Erwins Viks were tried *in absentia* as they had escaped to the US and Australia respectively.[56]

Although *trials in absentia* continued to be held throughout local jurisdictions, they went through a long hiatus in the post-*Nuremberg* era until the establishment of the Special Tribunal for Lebanon (STL) in 2009. One example that stood out at the national level was the *in absentia* trial of Khmer Rouge Leaders Pol Pot and Ieng Sary in 1979 at the People's Revolutionary Tribunal of Cambodia (PRTC). Prior to the establishment of the STL, TIA were permitted only on a very limited scale. In 1993, the Report of the UN Secretary General relating to the establishment of an international tribunal for the "prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991"[57] read:

> A trial should not commence until the accused is physically present before the International Tribunal. There is a widespread perception that trials in absentia should not be provided for in the statute as this would be

[53] Frédéric Mégret, 'The Bordeaux Trial: Prosecuting the Oradour-sur-Glane Massacre' in Kevin Jon Heller and Gerry Simpson (eds), *The Hidden Histories of War Crimes Trials* (Oxford University Press 2013) 142-143.
[54] Prescott (n 39) 49.
[55] Jerome S Legge Jr, 'The Karl Linnas Deportation Case, the Office of Special Investigations, and American Ethnic Politics' (2010) 24 Holocaust and Genocide Studies 26.
[56] Prescott (n 39) 55.
[57] UNSC, 'Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993)' (1993) UN Doc S/25704, para 1.

> inconsistent with article 14 of the International Covenant on Civil and Political Rights which provides that the accused shall be entitled to be tried in his presence.[58]

The ICTY Statute was adopted soon after and this was followed by the ICTR Statute, both of which ruled out the possibility of trials *in absentia*. Antonio Cassesse's attempt to incorporate *trials by default* under "exceptional circumstances" in the Statute's Rules of Procedure and Evidence was also unsuccessful.[59] Paul Tavernier described the absence of TIA as a reflection of the "wishes of countries of the common law tradition" and emphasized that this "regrettable rejection" had caused great disappointment to the "civil law experts" who had included the concept of *in absentia* trials in the French draft of the ICTY Statute.[60] In light of multiple pronunciations by the Human Rights Committee confirming that Article 14 does not prohibit *trials in absentia*, Herman Schwartz has argued that the UN Secretary-General's reasoning in 1993 was based on a "mistaken understanding" of the ICCPR.[61] With regard to the ICCPR not ruling out *trials in absentia*, there is a convergence between the assessments of Cassese and Schwartz.[62] As a result of pressure from the judges belonging to 'civil' law countries, the ICTY through Rule 61 of its Rules of Procedure

[58] ibid para 101.
[59] Paola Gaeta, 'Trial in *Absentia* Before the Special Tribunal for Lebanon' in Amal Alamuddin, Nidal Nabil Jurdi and David Tolbert (eds), *The Special Tribunal for Lebanon* (Oxford University Press 2014) 233-234.
[60] Paul Tavernier, 'The Experience of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda' [1997] International Review of the Red Cross < https://www.icrc.org/eng/resources/documents/misc/57jnyy.htm > accessed 15 January 2017.
[61] Herman Shcwartz, 'Point: Trials in Absentia' (1996) 4 (1) Human Rights Brief 12; *Daniel Monguya Mbenge et al. v Zaire* (Communication No 16/1977) UN Doc CCPR/C/OP/2 (1990) 76; *Hiber Conteris v Uruguay* (Communication No 139/1983) UN Doc Supp No 40 (A/40/40) (1985) 196; *Dieter Wolf v Panama* (Communication No 289/1988) UN Doc CCPR/C/44/D/289/1988 (1992) 80; *Raphael Henry v Jamaica* (Communication No 230/1987) UN Doc CCPR/C/43/D/230/1987 (1991).
[62] Cassesse and Gaeta (n 45) 358-359.

and Evidence provided an "alternative" to TIA.[63] Set in motion when the court fails to execute an arrest warrant, Rule 61 allows "an ex parte public hearing of evidence against an accused" with a view to ultimately issue an international arrest warrant and to stimulate arrests by States.[64] Rule 61 does not empower the Tribunal to make a determination of the guilt of the accused. Due to an increasing number of arrests have been made by States and NATO forces in recent years, this rule has not been relied upon by the ICTY apart from five instances in 1995-96.[65] The Appeals Chamber of the ICTY has heard contempt cases in *trials by default*.[66]

Trials in absentia were also prohibited in the internationalized panels in Kosovo.[67] The Special Panels for Serious Crimes (SPSC) established by the UN Transitional Authority in East Timor (UNTAET) have also enforced a 'limitation' on *trials in absentia*. Section 5 of Regulation 2000/30 allows proceedings to proceed where the accused flees or keeps himself voluntarily absent after any stage following the preliminary hearing. In addition, proceedings under the Special Panels could also continue in the absence of the accused if he conducted himself in a disruptive manner.[68] Like the SPSC, the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Court for Sierra Leone (SCSL) also allows for *trials in*

[63] M Cherif Bassiouni, 'Principles of Legality in International and Comparative Criminal Law' in M Cherif Bassiouni (ed), *International Criminal Law Vol III – International Enforcement* (3rd edn, Martinus Nijhoff 2008) 94.
[64] Safferling (n 17) 787-788; Bassiouni (n 63) 94; Cassesse and Gaeta (n 45) 361.
[65] Cassesse and Gaeta (n 45) 361.
[66] Gaeta (n 59) 235.
[67] On the Prohibition of Trials in Absentia for Serious Violations of International Humanitarian Law, Regulation No 2001/1 cited in Anne Klerks, 'Trials in Absentia in International (Criminal) Law - What is the Exact Position of the In Absentia Principle in International (Criminal) Law and What is the Influence of the Special Tribunal for Lebanon on this Position?' (Master Thesis, Tilburg University 2008) < http://arno.uvt.nl/show.cgi?fid=81103 > accessed 17 February 2017.
[68] Klerks (n 67) 49.

absentia on a 'controlled' scale.[69] Although the Statute of the International Criminal Court (ICC) does not allow trials *in absentia*, this position was reached after a significant amount of debate. The final form of the ICC Statute does not feature *trials in absentia* because States advocating for and against its inclusion failed to reach a compromise because of constraints of time facing them.[70]

Where the proponents of the traditions of 'civil law' failed to accommodate TIA in the major UN sponsored tribunals, they succeeded when framing the Statute of the Special Tribunal for Lebanon (STL). Therefore, the post-Nuremberg era categorized by the "uninterrupted custom and practice" of not allowing 'total' *trials in absentia* came to an end with the establishment of the STL, the fourth UN created international criminal tribunal.[71] This was the consequence of the "apparent insistence" of the Lebanese delegation[72] resulting in a 'fusion' of the elements of "civil law and common law systems".[73] Alongside the reason that *trials in absentia* were entrenched in various civil legal systems including Lebanon, the UN Secretary-General emphasized on ensuring that the legal process was not "unduly or indefinitely delayed" due to the absence of the accused.[74] In a shift away from the former UNSG's position in 1991,

[69] Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, article 35(d), The Internal Rules of the Extraordinary Chambers in the Courts of Cambodia, rules 37 and 81; Rules of Procedure and Evidence of the Special Court for Sierra Leone, rule 60.
[70] Egypt, Iraq, Libyan Arab Jamahiriya, Oman, Qatar, Sudan and Syrian Arab Republic, Colombia voted in favor of keeping *trials in absentia*. Schabas (n 46) 364-365.
[71] Chris Jenks, 'Notice Otherwise Given: Will in Absentia Trials at the Special Tribunal for Lebanon Violate Human Rights?' (2009) 33 Fordham International Law Journal 57, 98; William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 752.
[72] Cecile Aptel, 'Some Innovations in the Statute of the Special Tribunal for Lebanon' (2007) 5 Journal of International Criminal Justice 1107, 1121.
[73] UNSC, 'Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon' (2006) UN Doc S/2006/893, 8.
[74] ibid 8 para 32(b).

the Secretary-General in 2006 acknowledged that the ECtHR had "determined the regularity of [trials in absentia] in full respect for the rights of the accused."[75]

From the preceding discussion it is clear that while the right to be present during trial is recognized as a core fair trial guarantee, trials in the absence of the accused can be, and have been, held under exceptional circumstances. TIA are employed not just at the domestic level, but also by international courts and tribunals prosecuting international crimes. Therefore, it would be absurd to suggest that the 'complementary' system of justice created by the Rome Statute could prohibit national criminal jurisdictions from trying alleged perpetrators of international crimes in their absence, provided, of course, that TIAs were used for objectively acceptable reasons.

2. Analysing the areas of contention surrounding *trials in absentia* at the ICTs

The major brunt of criticisms about the *in absentia* trials before the ICTs focus on the extent to which an accused can unequivocally waive his right to be present under the existing notification procedure, the right to be effectively defended by counsel in the accused's absence and the deficiency of the right to a retrial if the accused surrenders or is apprehended. This part analyses these specific criticisms for the purposes of determining whether they have violated the principle of complementarity and rendered illegitimate the trials held *in absentia* and also the justice process in Bangladesh created by the ICTA as a whole.

2.1 *Trials in absentia before the ICTs – from beginning to end*

[75] ibid 9 para 33.

In Bangladesh, although the majority of trials like any other jurisdiction take place in the presence of the accused, the right to be 'present' during trial is not explicitly acknowledged in the Bangladesh Constitution. In 2000 when ratifying the ICCPR, Bangladesh expressed a reservation to Article 14(3)(d) which read:

> […] while the existing laws of Bangladesh provide that, in the ordinary course a person, shall be entitled to be tried in his presence, it also provides for a trial to be held in his absence if he is a fugitive offender, or is a person, who being required to appear before a court, fails to present himself or to explain the reasons for non-appearance to the satisfaction of the court.[76]

The ICTA, on the other hand, does provide the accused with the right to be present during his/her trial, but this right is not an unqualified one.[77] Section 10A ICTA empowers the Tribunal to carry out a trial in the absence of the accused only if it has reason to believe that the accused has "absconded or concealed himself so that he cannot be produced for trial".[78] This section also stipulates that during such a trial the

[76] International Covenant on Civil and Political Rights, Signatories, Parties, Declarations and Reservations < https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en#EndDec > accessed 27 February 2017.

[77] The International Crimes (Tribunals) Act 1973 [ACT NO. XIX OF 1973] s 17 < http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=435 > accessed 6 May 2014. Section 17 reads: "(1) During trial of an accused person he shall have the right to give any explanation relevant to the charge made against him. (2) An accused person shall have the right to conduct his own defence before the Tribunal or to have the assistance of counsel. (3) An accused person shall have the right to present evidence at the trial in support of his defence, and to cross-examine any witness called by the prosecution".

[78] ibid s 10A reads: "(1) Where a proceeding is commenced under sub-section (1) of section 9, the tribunal, before fixing the date for the trial under sub-section (2) of the said section, has reason to believe that the accused person has absconded or concealed himself so that he cannot be produced for trial, may hold the trial in his absence following the procedure as laid down in the Rules of Procedure made under section 22 for such trial.

Tribunal shall appoint counsel to defend the accused at the expense of the Government. Under Rule 29(1) of the Rules of the Procedure (RoP), the ICTs take cognizance of an offence against an accused if a prima facie case for trial is revealed upon examination of the Formal Charge and other "papers, documents and evidence" prepared and submitted by the Office of the Chief Prosecutor. During this process, the Tribunal also takes into consideration the Investigation Report (IR) prepared by the Investigation Agency (IA). Once the Tribunal has taken cognizance of an offence, it follows a two-pronged procedure with regard to notifying the accused of impending proceedings.

First, the Tribunal sets a date for the accused's appearance and issues either a summons or a warrant of arrest in his/her name.[79] The designated form (ICT-BD Form No. 1) issuing a summons states clearly that the attendance of the accused "is necessary to answer to a charge of offence punishable under Section 3 ICTA and that the accused is "required to appear in person" before the Tribunal at the time and date set for appearance.[80] Similarly, if a warrant of arrest is 'issued', the accused is served with a copy of the allegations against him by the law enforcement agency of the area where he resides.[81]

The second prong of notifying an accused comes into play if the summons or the warrant is "unserved", i.e. if the summons or the warrant is not executed because the accused is not at his address or cannot be found. The Tribunal under these

(2) Where the accused person is tried under sub-section (1), the Tribunal may direct that a Counsel shall be engaged at the expense of the Government to defend the accused person and may also determine the fees to be paid to such Counsel."

[79] International Crimes Tribunal Rules of Procedure 2010 (Bangladesh Gazette 15 July 2010), rule 22.

[80] ibid ICT-BD Form No. 1 – 'Summons to an accused person' 7392.

[81] ibid rule 9(3).

circumstances orders for the publication of a 'notice' in two daily newspapers, one in English and the other in Bengali, asking the accused to appear before the Tribunal on the date stated in the newspaper 'notice'.[82] The standard with regard to notification adopted at the ICTs is similar to that exercised with respect to *trials in absentia* under the Code of Criminal Procedure, 1898.[83] If the accused "fails to appear" before the Tribunal on the date and time specified in the 'notice', coupled with the Tribunal having reason to believe that the accused has "absconded or concealed himself" in order to evade arrest and face trial and the fact that there is no "immediate prospect" of his arrest, a trial *in absentia* shall commence.[84] After the ICTs hand down a judgment following the conclusion of a trial in absentia, it is the responsibility of the absconding accused to file an appeal before the Appellate Division of the Supreme Court of Bangladesh (AD-SC) within 30 days "from the date of conviction and sentence, or acquittal or any sentence and no appeal shall lie after the expiry of the aforesaid period."[85]

2.2 *On notification*

In a critique of the trial of *Abul Kalam Azad*, Elizabeth Herath argues that the requirement to publish in two national dailies is insufficient "to meet the requirement that the accused must properly be informed of the proceedings before absconsion [sic] can be concluded."[86] Referring to the HRC and the European Court of Human Rights (ECtHR), Herath asserts that the jurisprudence on the point of 'notification' requires

[82] ibid rule 32.
[83] The Code of Criminal Procedure 1898, s 339B(1) requires the publication of notice in at least two Bengali newspapers of wide circulation.
[84] (n 79) rule 32.
[85] (n 77) s 21(3).
[86] Herath (n 8) 10.

that "the prosecution must clearly demonstrate that the accused has been notified".[87] While the requirement of 'clear demonstration' stands the test of scrutiny, there is scope to question the veracity of conclusions Herath reaches about notification procedures during *trials in absentia* at the ICTs.

Notfying an accused of impending prosecution has been a requirement for trials in absentia to proceed since the Nuremberg trials and what qualifies as clear notification has varied from one jurisdiction to another. Prior to the trial of *Martin Bormann*, the IMT issued a notice trying to inform the accused of impending proceedings and that he would be tried in absentia if he did not surrender. The notice was aired over the radio once a week over a period of four weeks and was published in four separate issues of a newspaper circulated in Bormann's city of residence.[88] In recent times, an absconding accused before the Iraqi Special Tribunal (IST) shall be considered to have been properly notified if the warrant of arrest or summons is "pinned up" at his residence if known, and published in two local newspapers and announced via radio or television depending on the gravity of the crime.[89] Under the Statute of the Special Tribunal for Lebanon (STL), the accused's possession of actual knowledge of the charges can be established indirectly by giving notice "through publication in the media or communication to the State of residence or nationality."[90] If the accused remains at bay even after the passage of 30 days since the 'publication' or 'communication' because he has either waived his right to be present or is yet to be

[87] ibid.
[88] Schabas (n 46) 328.
[89] The Statute of the Iraqi Special Tribunal, article 143(C); Rules of Procedure and Evidence of the Statute of the Iraqi Special Tribunal, rule 56.
[90] Maggie Gardner, 'Reconsidering Trials in Absentia at the Special Tribunal for Lebanon: An Application of the Tribunal's Early Jurisprudence' (2011) 43 George Washington International Law Review 91, 127-128.

transferred by State authorities or his whereabouts are unknown, the Trial Chamber of the STL shall "initiate proceedings *in absentia*."[91] There are some similarities between STL's provisions on notification and the relevant provisions of the Dutch Code of Criminal Procedure under which *trials in absentia* have been carried out for nearly a century. The rules relating to notifying the accused of the particulars of his impending trial are elaborated in Article 585-590 which provide that even if it is not certain whether an accused is aware of the existence of the "judicial notice" sent to him, such notice will be construed "valid" if attempts were made to have it left at his registered address or any other address that the authorities are aware of.[92]

The HRC and ECtHR have considered cases where the issue of notifying the accused of impending proceedings featured prominently and the principles that can be derived from those cases assist in explaining when an accused is fully enabed to waive his right to participate during trial.[93] In *Maleki*, the HRC clarified that mere 'assumption' by the State that the accused had been informed of the proceedings by his counsel was not enough to justify a decision to move forward with *in absentia* proceedings. In *Colozza v. Italy*, the ECtHR held that the accused's status of "*latitante*" (a fugitive) was not sufficient enough basis to infer that that he had waived "his right to appear and to defend himself".[94] Emphasising on the importance of informing an accused about a posecution, it stressed that the sending of judicial notice to the actual location

[91] International Law Middle East and North Africa Programmes, 'Meeting Report: The Special Tribunal for Lebanon and the Quest for Truth, Justice and Stability' (Chatham House, 2010) 22 <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Middle%20East/1210_stl.pdf > accessed 17 July 2017.
[92] E F Stamhuis, 'In Absentia Trials and the Right to Defend: The Incorporation of a European Human Rights Principle into the Dutch Criminal Justice System' (2001) 32 Victoria University Wellington Law Review 715, 717.
[93] Emily Given, 'Dissolving the Arrest Problem: Trials in *Absentia* at the International Criminal Court' (*ICC Forum,* 24 March 2014) < http://iccforum.com/forum/permalink/93/4090 > accessed 15 July 2017.
[94] *Colozza v. Italy* App No 9024/80 (ECtHR, 12 February 1985) 10 para 28.

of the accused was imperative and that the accused possessing "vague and informal knowledge" about impending proceedings would not suffice.[95]

According to the HRC and the ECtHR, an accused will be considered to have been notified only when he is fully 'enabled' to waive his right to participate during trial.[96] This is guaranteed when the court takes steps to inform the accused of the charges against him and to notify him of the spatial and temporal details of impending proceedings.[97] This 'notification' obliges courts to provide 'actual notice' to an accused giving him the opportunity either to face trial or waive his right to participate.[98] However, the 'obligation' to give 'actual notice' does not preclude the possibility that an accused may be notified 'indirectly'. Both the HRC and the Grand Chamber of the ECtHR have maintained that, if the State authorities perform their duties relating to notification but fail to 'actually' notify an accused, it may still be possible to infer that an accused has waived his right to take part in trial if, he publicly states or writes that he has no intention to do so; manages to elude an attempted arrest; there is irrefutable evidence confirming that the accused is in fact aware of the proceedings; or when notice is provided through members of the accused's family.[99]

During the pre-trial stage of the *Abul Kalam Azad* case, the IA filed an application for the arrest of the accused on 25 March, 2012 for the purposes of an "effective and

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[95] Shaw (n 27) 127-128.
[96] ibid 127 & 129.
[97] Human Rights Committee, 'General Comment No 32: Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial' (2007) UN Doc CCPR/C/GC/32 < https://www1.umn.edu/humanrts/gencomm/hrcom32.html > accessed 7 March 2017; *Daniel Monguya Mbenge et al. v Zaire* (Communication No 16/1977) UN Doc CCPR/C/OP/2 (1990) 76, para 14.1; *Maleki v Italy* (Merits) (Communication No 699/1996) UN Doc CCPR/C/66/D/699/1966 (1999), para 9.3.
[98] *Maleki v Italy* (n 97).
[99] Gaeta (n 59) 241-242; Gardner (n 90) 126-127; *Sejdovic v Italy* (2004) 42 EHRR 360 cited in Shaw (n 27) 128.

proper investigation".[100] In response, the Tribunal directed the IA to submit a report stating the progress of the investigation against *Azad* and fixed the 3 April, 2012 for disposal of the application. On 3 April, 2012, the Tribunal perused the progress report and issued an arrest warrant.[101] The Dhaka Metropolitan Police (DMP) was unable to execute the warrant because Azad had absconded "on sensing the matter of issuance of arrest".[102] Quoting Azad's sons, law enforcement agencies claimed that he had fled to India on 2 April, 2012.[103] In the months that followed the IA completed its investigation and the Chief Prosecutor on the basis of the Report prepared submitted a 'Formal Charge' against *Azad* on 2 September, 2012. The Tribunal took cognizance of offences and issued a second warrant of arrest against the accused. The DMP was unable to arrest the accused this time as well. The execution report of the DMP confirmed that Azad could not be arrested because he had "absconded" and had left the country.[104]

The second 'notification' asking *Azad* to appear before the Tribunal was published in two national dailies on 25 September, 2012.[105] After he did not respond to the notification and attempts to locate him were unsuccessful, the Tribunal on 7 October, 2012 decided to proceed with a trial *in absentia* because *Azad* had either absconded or had concealed himself.[106] It appointed Abdus Shukur Khan, an Advocate of the Supreme Court of Bangladesh as *Azad's* defence counsel who received a copy of the

[100] *Chief Prosecutor v Abul Kalam Azad* (Judgment) ICT-2 (21 January 2013) ICT-BD Case No 5 of 2012 [18] < http://www.ict-bd.org/ict2/ICT2%20judgment/full_judgement_azad.pdf > accessed 12 August 2017.
[101] ibid.
[102] ibid.
[103] 'Azad flees to India His - 2 sons held' *The Daily Star* (Dhaka, 10 April 2012) < http://www.thedailystar.net/news-detail-229714 > accessed 1 March 2017.
[104] (n 100) [20].
[105] 'Chief Prosecutor v Moulana Abul Kalam Azad' (*International Crimes Database*) < http://www.internationalcrimesdatabase.org/Case/169/Azad/ > accessed 1 March 2017.
[106] (n 100) [21].

Formal Charge along with statements of witnesses and other documents submitted by the Prosecution on 11 October, 2012. The accused was indicted on eight charges of genocide and crimes against humanity on 21 October, 2012. The trial commended on 4 November, 2012. *Azad* was convicted and sentenced to death on three counts of crimes against humanity and one count of genocide on 21 January, 2013.[107] Till this date, he remains at large and attempts to apprehend him have been unsuccessful.[108]

In *Azad* the ICT concluded that the accused had absconded after he managed to evade arrest following the issuance of two arrest warrants spread out over a period of seven months and had refrained from responding to the notice to appear before the Tribunal published in two national dailies. In light of practices covered in this Part which allow a court to infer that an accused has waived his right to be present at his trial if he manages to evade arrest, there is nothing to suggest that the ICT had acted inappropriately in its attempts to notify *Azad* of impending proceedings. In all pertinent respects it appears to have followed similar procedures adopted at international and domestic tribunals.

In the remaining cases that the ICTs have tried *in absentia*, the processes adopted to issue arrest warrants and publish notice in newspapers were by and large similar to the

[107] (n 100) [333].
[108] Mohammad Jamil Khan, 'Convicted 3 years back, Bachchu Razakar still traceless' *Dhaka Tribune* (Dhaka, 30 March 2015) < http://www.dhakatribune.com/crime/2015/mar/30/convicted-3-years-back-bachchu-razakar-still-traceless > accessed 1 March 2017; 'Move on to return Azad' *Bdnews24* (Dhaka, 25 January 2013) < http://bdnews24.com/politics/2013/01/25/move-on-to-return-azad > accessed 1 March 2017; Mohammad Zakaria, 'Government unaware about Azad's whereabouts: FM' *Dhaka Tribune* (Dhaka, 23 April 2013) < http://www.dhakatribune.com/crime/2013/apr/23/government-unaware-about-azad%E2%80%99s-whereabouts-fm > accessed 1 March 2017; 'Where is Bachchu Razakar?' *Bdnews24* (Dhaka, 21 January 2013) < http://bdnews24.com/bangladesh/2013/01/21/where-is-bachchu-razakar > accessed 1 March 2017; 'Task force for fugitives' *Bdnews24* (Dhaka, 27 March 2014) < http://bdnews24.com/bangladesh/2014/03/27/task-force-for-fugitives;.pre14 > accessed 1 March 2017.

ones adopted in the *Azad* case. One case that stands out with respect to the issue of waiving the right to presence is *Chief Prosecutor v Ashrafuzzaman Khan and Chowdhury Mueen Uddin*. Khan and Mueen Uddin had fled Bangladesh after the end of the 1971 war.[109] When the trial commenced against them in 2013, they were both well-known Muslim clerics residing in the United States and United Kingdom. Khan was an active member of the Islamic Circle of North America (ICNA).[110] Mueen Uddin, who had played an important role in the setting up of the Muslim Council of Britain and served as the Director of Muslim Spiritual Care in the NHS was accused of being involved in war crimes in a 1995 Channel 4 documentary called *War Crimes Files*.[111] After being indicted by the ICT, Mueen Uddin spoke to the BBC's Asian Network and informed that he had "supported the unity of a sovereign nation" in 1971 but was not involved in the "kind of crimes alleged" by Bangladeshi Prosecutors.[112] He claimed that he would be "happy to respond" to the charges against him but would not do so before the ICT as it was incapable of ensuring a fair trial.[113] This position was reiterated by the accused's foreign counsel Toby Cadman on 3 November, 2013 who claimed that the justice process in Bangladesh was "far below even the minimum standards of fairness" and that his client was "prepared to stand trial and establish his innocence" before an independent and impartial court.[114] Unlike Mueen Uddin, co-

[109] Robertson (n 8) 56.
[110] Ellen Barry, 'Bangladesh Sentences 2 Expatriates to Death for War Crimes' *The New York Times* (New York, 3 November 2013) < http://www.nytimes.com/2013/11/04/world/asia/bangladesh-sentences-2-to-death-for-war-crimes.html?mcubz=0 > accessed 1 March 2017.
[111] 'British Muslim Leader Sentenced to Death for War Crimes' *Channel 4 News* (3 November 2013) < http://www.channel4.com/news/chowdhury-mueen-uddin-war-crimes-london-muslim > accessed 1 March 2017; 'Dispatches: War Crimes Files' (9 February 2013) < https://www.youtube.com/watch?v=lvbotYo-6rI > accessed 1 March 2017.
[112] Divya Talwar, 'War crimes-accused Chowdhury Mueen-Uddin 'will clear name'' *BBC Asian Network* (19 June 2013) < http://www.bbc.co.uk/news/uk-england-london-22959927 > accessed 1 March 2017.
[113] ibid.
[114] Toby M Cadman, 'A Farce and a Mockery of Justice: Defence Team Responds to the Recent Decision of Bangladesh's 'International' Crimes Tribunal' (*Chowdhury Mueen Uddin,* 3 November 2013) < http://www.chowdhurymueenuddin.com/responding-to-the-death-sentence-verdict.html > accessed 1 March 2017.

accused Ashrafuzzaman Khan has tried to steer clear of acknowledging awareness of the proceedings against him. When asked about the charges during a brief telephone interview, Khan claimed to be unaware of what was going on in Bangladesh and that he was not a Bangladeshi citizen.[115] However, other facts indicate that Khan may be aware of the judicial proceedings that have been initiated against him in Bangladesh. In 2012 expatriate Bangladeshis have organised protests outside the Queens Branch of the ICNA demanding his extradition to Bangladesh.[116] In 2013, the Coordinator of the Investigation Agency of the ICTs personally visited the ICNA office at Queens to know the whereabouts of Khan.[117] Furthermore, a warrant of arrest has been issued against Khan by Interpol.[118] In light of these facts, there is sufficient scope to argue that Chowdhury Mueen Uddin had unequivocally waived his right to be present during his trial before the ICT.

On the other hand, an unequivocal waiver cannot be definitively inferred from the facts surrounding Ashrafuzzaman Khan's case. Nevertheless, it is worth recalling that contrary to the precedents set by multiple cases adjudicated by the ECtHR and interpreted by the HRC, the ICTA much like the Statute of the STL and the Dutch Code of Criminal Procedure does allow the ICTs to infer awareness of impending trial proceedings if the accused does not respond to publications issued in the media, or communications made to the State of the accused's residence or nationality, or judicial

[115] Srila Nayak, 'Bangladesh Tribunal Accuses New York Imam of War Crimes' *Global City* (13 December 2012) < http://globalcitynyc.com/2012/12/13/bangladesh-tribunal-accuses-new-york-imam-of-war-crimes/ > accessed 1 March 2017.
[116] Tamanna Khan, 'Bangladesh in New York Demand his Deportation' *The Daily Star* (Dhaka, 24 December 2013) < http://www.thedailystar.net/bangladeshis-in-new-york-demand-his-deportation-3738 > accessed 1 March 2017.
[117] 'Investigator in US for Ashrafuzzaman' *Bdnews24* (Dhaka, 24 June 2013) < http://bdnews24.com/bangladesh/2013/06/24/investigator-in-us-for-ashrafuzzaman > accessed 1 March 2017.
[118] 'Khan, Ashrafuzzaman' (*Interpol*) < https://www.interpol.int/notice/search/wanted/2015-59050 > accessed 1 March 2017.

notice sent to the accused's registered address or other addressed the authorities are aware of.

2.3 *On the right to be 'effectively' defended*

Critics have raised concerns about the adequacy of time given to prepare the case and the 'quality' of state appointed defence counsel during the trials *in absentia* .[119] Section 9(3) ICTA requires the Chief Prosecutor to furnish to the Tribunal, at least three weeks prior to the commencement of the trial, all evidence he intends to rely on.[120] This includes lists of witnesses, their recorded statements and other documents. The previous Chapter (VI) demonstrated that the statutory provision stipulating a minimum period of three weeks is unlikely to be accepted as an adequate amount of time and ought to be increased by an amendment so that the revised time period reflects the length of time the ICTs have provided to the accused in practice. The timelines of the *trials in absentia* at the ICTs show that the amounts of time given to counsel appointed by the State to prepare were considerably longer than the minimum requirement of three weeks. *Azad's* counsel Abdus Shukur Khan had seven weeks to prepare his defence.[121] Counsel appointed by the state in the remaining trials were given similar time frames to prepare their cases. In *Chief Prosecutor v Md. Abdul*

[119] David Bergman, 'Azad Judgement Analysis 1; 'in-absentia' Trials and Defence Inadequacy' (*Bangladesh War Crimes Tribunal,* 26 January 2013) < http://bangladeshwarcrimes.blogspot.co.uk/2013/01/azad-judgement-analysis-1-in-absentia.html > accessed 1 March 2017.
[120] International Crimes (Tribunals) Act 1973 (n 77) s 9(3).
[121] Shukur was appointed as counsel for Abul Kalam Azad on October 7, 2012. He received copies of the Formal Charge and all evidence to be used by the Prosecution on October 11, 2012. Azad's trial commenced on November 26, 2012. See, *Chief Prosecutor v Abul Kalam Azad* (n 100) [20]-[21]; Bergman (n 119).

Jabbar Engineer, counsel for the accused was appointed on 7 July, 2014.[122] The trial commenced eight weeks later on September 7, 2014.[123] In the end, the Tribunal sentenced *Jabbar* to "imprisonment for life till his natural death".[124] In the case of *Ashrafuzzaman Khan and Chowdhury Mueen Uddin*, the two counsel appointed by the state, Abdus Shukur Khan and Salma Haye had roughly six weeks to prepare before the trial commenced on 15 July, 2013 when the Prosecution placed its opening statement and began to "adduce and examine witnesses".[125] In *Chief Prosecutor v Zahid Hossain Khokon*, the counsel was appointed on 14 August, 2013. Zahid's trial commenced on 19 November, 2013, giving the state appointed counsel over ten weeks to prepare for the case.[126] In *Chief Prosecutor v Syed Md. Hachhan*, the defence counsel for the accused was appointed on 15 September, 2014. Hearings to frame charges began on 22 September, 2014 and the trial commenced with the Prosecution making its opening statement on 7 December, 2014, giving *Hacchan's* counsel nearly ten weeks to prepare for the case.[127] Furthermore, the state appointed defence counsel were able to cross-examine all of the 224 witnesses relied upon by the Prosecution

[122] *Chief Prosecutor v Md Abdul Jabbar Engineer* (Judgment) ICT-1 (24 February 2015) ICT-BD Case No 1 of 2014 [28] < http://www.ict-bd.org/ict1/Judgment%20part%202/ICT-BD.Case%20No%2001%20OF%202014.pdf > accessed 12 August 2017.

[123] 'War Crimes Trial of Er Jabbar Begins' *Prothom Alo* (Dhaka, 7 September 2014) < http://en.prothom-alo.com/bangladesh/news/53197/War-crimes-trial-of-fugitive-Engineer-Jabbar > accessed 1 March 2017; 'Jabbar Gets Jail until Death' *The Daily Star* (Dhaka, 24 February 2015) < http://www.thedailystar.net/online/jabbars-war-trial-court-reading-summary-verdict-3688 > accessed 1 March 2017.

[124] *Chief Prosecutor v Md Abdul Jabbar Engineer* (n 122) [310].

[125] *Chief Prosecutor v Ashrafuzzaman Khan and Chowdhury Mueen Uddin* (Judgment) ICT-2 (3 November 2013) ICT-BD Case No 1 of 2013 [22]-[25] < http://www.ict-bd.org/ict2/ICT2%20judgment/CM%20&%20AK.pdf > accessed 12 August 2017.

[126] 'Jahid-er Biruddhe Shuchona Boktobbo Uposthapon' (*International Crimes Tribunals Watch,* 19 November 2013) < https://ictwatchbd.wordpress.com/2013/11/19/%E0%A6%9C%E0%A6%BE%E0%A6%B9%E0%A6%BF%E0%A6%A6-%E0%A6%B8%E0%A7%82%E0%A6%9A%E0%A6%A8%E0%A6%BE-%E0%A6%AC%E0%A6%95%E0%A7%8D%E0%A6%A4%E0%A6%AC%E0%A7%8D%E0%A6%AF-%E0%A7%A9/ > accessed 15 March 2017.

[127] ''Razakar' Hasan Ali's Trial Begins' *Bdnews24* (Dhaka, 11 November 2014) < http://bangla.bdnews24.com/bangladesh/article879885.bdnews > accessed 15 March 2017.

during the trials were the accused were absent.[128]

Over the years, States have held divergent views about the necessity of ensuring that legal assistance is provided to the absconding accused during *trials in absentia*. For instance, 'civil' law countries such as The Netherlands and France did not grant an accused the opportunity to be defended by counsel in his absence for the greater part of the 20th century.[129] After the First World War, leading perpetrators of the Armenian massacre from the Committee of Union and Progress (CUP) were represented by sixteen lawyers led by Celaleddin Arif, the President of the Turkish Bar Association.[130] The 'inquisitorial' nature of the proceedings based on the French legal system proved advantageous to the prosecution because it barred the defence counsel from gaining access to their interned clients or "pre-trial styled evidence".[131] The court "examined" and "verified" the massacres committed throughout the Ottoman Empire to conclude that they had been "organized and carried out" by the CUP leaders.

[128] *The Chief Prosecutor v Md Moslem Prodhan and Syed Md Hussain alias Hossain [absconded]* (Judgment) ICT-1 (19 April 2017) ICT-BD Case No 1 of 2016 [20] < http://www.ict-bd.org/ict1/Judgment%202016/ICT-BD%201%202017.pdf > accessed 12 August 2017; *The Chief Prosecutor v Md Idris Ali Sardar et al.* (Judgment) ICT-1 (5 December 2016) ICT-BD Case No 6 of 2015 [31] < http://www.ict-bd.org/ict1/Judgment%202016/ICT%20No%2006.pdf > accessed 12 August 2017; *The Chief Prosecutor v Advocate Md Shamsul Haque et al.* (Judgment) ICT-1 (18 July 2016) ICT-BD Case No 2 of 2015 [40] < http://www.ict-bd.org/ict1/Judgment%20part%202/ICT-BD%20Case%20No%20Sheikh%20Sirajul%20Haque.pdf > accessed 12 August 2017; *The Chief Prosecutor v Ashrafuzzaman Khan @ Naeb Ali Khan [absconded] et al.* (n 125) [25]; *Chief Prosecutor v Abul Kalam Azad* (n 100) [28]; *The Chief Prosecutor v Syed Md Hachhan alias Syed Md Hasan alias Hachhen Ali* (Judgment) ICT-1 (9 June 2015) ICT-BD Case No 2 of 2014 [32] < http://www.ict-bd.org/ict1/Judgment%20part%202/ICT-BD%20Case%20No%2002%20of%202014.pdf > accessed 12 August 2017.

[129] Stamhuis (n 92) 719, 722 & 723; *Lala v The Netherlands* (1994) ECHR Series A 297-A; Riachy (n 10) 1296-1297; Michel Raffray, 'Trials in Absentia and International Criminal Justice' (11 March 2014) < https://www.youtube.com/watch?v=hRnWaqPpSbc > accessed 15 July 2017; *Kormbach v France* App No 29732/96 (ECtHR, 13 February 2001) [85] & [88]-[90].

[130] Dadrian (n 43) 45.

[131] Dadrian and Akçam (n 42) 128.

Geoffrey Robertson has described these proceedings as "independent" and "genuine". He emphasized that although the *trials in absentia* were "deficient by our standards", they were not "unusual or unfair by local standards" and remained a "legitimate exercise" which held former leaders and officials accountable under domestic law in an era when international law did not offer the means to punish persons liable for mass crimes against their own people.[132] Although Robertson's comments describe trials that took place a century ago, his analysis is important because it echoes the central claim of Chapter III that the principle of complementarity dictates the ICC to be receptive towards the 'diverse' standards of justice in national criminal jurisdictions when assessing the 'independence', 'impartiality' and 'manner' of those jurisdictions.

The ECtHR faced the question whether the absconding accused's right under Article 6 ECHR to receive legal assistance had been infringed in many cases. In *Artico v Italy*, the European Court held that the accused's request for legal aid which was granted did not amount to any "effective assistance" because the newly appointed lawyer was "unable to act" because of other commitments and his state of health.[133] The Statute of the STL also ensures that the accused's right to counsel is protected. Article 22(2) of the Statute guarantees the accused's right to choose his/her own defence counsel, to have the Tribunal remunerate such counsel if the accused is financially unable to do so, and finally if the accused "refuses or fails to appoint a defence counsel" the right to be assigned one by the Tribunal.[134]

[132] Geoffrey Robertson, 'Was there an Armenian Genocide' (Policy Memorandum, Foreign & Commonwealth Office to Minister, 1999) 19-20, paras 40, 42.
[133] *Artico v Italy* App No 6694/74 (ECtHR, 13 May 1980) 4-5 [13], 13 [33].
[134] Statute of the Special Tribunal for Lebanon, article 22(2).

The ICTs of Bangladesh unconditionally appoint counsel for an absconding accused and bear his expenses.[135] The question remains whether they were able to provide effective assistance. A definite weakness, one which Justice Obaidul Hassan acknowledged during the course of the *Azad* trial, was the inability of the State appointed Defence counsel to produce witnesses favoring their clients.[136] In the absence of available literature on this issue, it is a daunting task to comprehensively ascertain what caused this weakness. A British journalist, David Bergman, has explored this 'limitation' during the course of the *Azad* trial. When asked why "investigations or inquiries on behalf of his client" had not been undertaken, Abdus Shukur Khan informed him that his preparation was based on "papers provided by the prosecution" because Azad's family had not offered him any cooperation with respect to the trial.[137] Furthermore, the accused's son Zahid Azad had declined Shukur's offer to appear as a defence witness or provide any documents in support of his father.[138] Shukur Khan did not visit the crime scenes because of the lack of cooperation from Azad's family and also because he was unfamiliar with the Faridpur district where the crimes in question had been committed.[139] In light of these shortcomings, Bergman questioned whether *Azad* had received a "proper defence".[140]

[135] International Crimes (Tribunals) Act 1973 (n 77) s 10A(2).
[136] David Bergman '19 Dec 2012: Azad Trial 22nd Witness Continued' (*Bangladesh War Crimes Tribunal Blog*, 24 January 2013) < http://bangladeshwarcrimes.blogspot.co.uk/2013/01/19-dec-2012-azad-trial-22nd-witness.html > accessed 15 January 2017.
[137] David Bergman, 'Azad Judgment Analysis 1; 'in-absentia' Trials and Defence Inadequacy' (*Bangladesh War Crimes Tribunal Blog*, 26 January 2013) < http://bangladeshwarcrimes.blogspot.co.uk/2013/01/azad-judgement-analysis-1-in-absentia.html > accessed 15 January 2017; Abdus Shukur Khan as state appointed defence counsel in the case of Zahid Hossain Khokon made the same claim that the accused's family members had not offered him any assistance. 'Khokon's Family did not Help: Defence' *Bdnews24* (Dhaka, 13 November 2014) < http://bdnews24.com/bangladesh/2014/11/13/khokons-family-did-not-help-defence > accessed 15 January 2017.
[138] Bergman (n 137).
[139] Bergman (n 137).
[140] ibid.

The failure on the part of defence lawyers to access crime scenes or bring defence witnesses to testify is not a problem unique to the ICTs. According to Kai Ambos, the experiences of Ad Hoc tribunals also reveal a crisis of 'equality of arms' because the scarcity of "human resources" make it nearly impossible to "dispatch" persons to crime scenes to carry out investigations.[141] Although the problem slowly "diminished" over time, the ICTY in particular suffered from these problems during its formative years when the defence counsel had to secure witness testimonies and evidence in environments that were "hostile and uncooperative".[142] However, it needs to be pointed out that the context surrounding the inaccessibility of crime scenes during the formative years of the ICTY and the circumstances preventing State appointed defence counsel of the ICTs from visiting crime scenes are very different, given that crime scenes from 1971 still exist, but the evidence there does not.

The inability of the state appointed counsel in *Azad* and other cases where the accused were tried *in absentia* either has jeopardized the 'sharpness' of the defence the accused received. However, the contention that this delegitimized the whole trial is likely to be interpreted as an exaggeration, especially because defence counsel were able to cross-examine and challenge witnesses relied on by the Prosecution.

2.4 *On the right to a retrial*

[141] Kai Ambos, 'The Structure of International Criminal Procedure: 'Adversarial', 'Inquisitorial' or Mixed?' in M Bohlander (ed), *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (Cameron May 2007) 501.
[142] Mark S Ellis, 'Achieving Justice Before the International War Crimes Tribunal: Challenges for the Defence Counsel' (1997) 7 Duke Journal of Comparative and International Law 519, 533.

Critics correctly claim that the ICTs do not provide a right to a retrial after an absconding accused is apprehended or if he surrenders himself. However, this position does not fully appreciate that the right to a retrial is not an 'unfettered' one and that pre-requisites and procedures relating to 'retrial' vary from one jurisdiction to another. There are also differences in opinion as to whether the 'right' involves a trial *de novo* or a normal appeal. According to Thilo Marauhn, precedents set by national courts do not point to any clear tendencies.[143]

In November 2012, the Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters ("PC-OC") sent out a questionnaire relating to *trials in absentia* to all members of the PC-OC and parties to the European Convention on Extradition ("ECE").[144] Replies arrived from a total of 26 States including 22 States which had ratified the Second Additional Protocol to the ECE. When asked about the scope of retrial in case of a judgment passed *in absentia*, 18 States responded affirmatively.[145] However, it was clarified that the right to a retrial is not 'automatic' or 'unfettered' and its scope is "restricted to an appeal procedure" and specific legal conditions.[146] Irrespective of whether the 'right' in question constitutes a right to appeal or a fresh trial altogether, it is not 'absolute'. The Council of Europe recommends that retrial rights be offered only to those accused who were unable to attend trial due to reasons beyond his control. Under the HRC and the ECtHR, an accused is entitled to a retrial or a review only if he did not explicitly waive his right to take part in the trial. Worth recalling is the reasoning applied in *Demebukov*

[143] Marauhn (n 9).
[144] European Committee on Crime Problems (CDPC), 'Questionnaire concerning judgments in absentia and the possibility of retrial Summary and Compilation of Replies' PC-OC (2013) 01, 5.
[145] ibid 7.
[146] ibid 7.

v Bulgaria (Demebukov), where the ECtHR found that it would not amount to a denial of justice if the court refused to reopen criminal proceedings against an accused tried *in absentia* who had deliberately absconded to avoid prosecution.[147]

Under multiple national jurisdictions, the right of an accused to submit an application for a retrial is subject to time-limits. The fulfilling of various conditions contribute to a successful application, which include but are not limited to situations where: the *in absentia* trial was not judicially exercised, i.e. there were errors of judgment; the availability of new evidence; the case in question bears 'public importance'; the accused was absent because of reasons beyond his control etc.[148] Under the Article 22(3) of the Statute of the STL, an accused is entitled to a retrial only when he had not appointed counsel of his own choosing or finds the judgment passed unacceptable.[149] It is evident, therefore, that an absconding accused's right to a retrial is by no means an unfettered one.

An accused, whether convicted in his presence or tried *in absentia* by the ICTs, is entitled to file an appeal before the Appellate Division of the Supreme Court of Bangladesh within 30 days of date of "conviction and sentence".[150] Unlike the 'conditional' character of the right to retrial in pronouncements of the HRC, ECtHR and the Council of Europe, the right to prefer an 'appeal' before the highest court of Bangladesh within the stipulated deadline is an 'unconditional' right. Provisions relating to appeal further stipulate that the accused shall lose the opportunity to lodge an appeal upon expiration of the 30 day time limit and that the Appellate Division

[147] *Demebukov v. Bulgaria* App No 68020/01 (ECtHR, 28 February 2008) 11 [56], 8-9 [45].
[148] European Committee on Crime Problems (CDPC) (n 144) 82-85.
[149] Statute of the Special Tribunal for Lebanon (n 134) article 22(3).
[150] International Crimes (Tribunals) Act 1973 (n 77) s 21(3).

shall dispose of the appeal within 60 days of its filing.[151] When the appeal is filed, the accused is allowed to submit all documents he intends to rely on.[152] A parallel may be drawn with the relevant British provision which requires an accused to file an appeal within 28 days of the passing of a judgment *in absentia* which may be allowed if the court is satisfied that one or more of the grounds of appeal submitted in writing by the accused are arguable.[153]

By engaging in a 'literal' interpretation of the time limit to file an appeal, critics of the likes of Geoffrey Robertson have reached the conclusion that if the accused tried *in absentia* were to return to Bangladesh "at any time in the future", they could be "immediately marched to the gallows" once a death warrant is issued by the International Crimes Tribunal.[154] In theory, Robertson's conclusion is correct. However, if one takes into account the norms practiced by the Supreme Court with regard to appeal, it is not impossible to reach a different but nonetheless plausible conclusion. Although Section 21(5) states clearly that an appeal before the Supreme Court shall be disposed of within 60 days of its filing, not a single appeal has so far been completed within this 'clearly defined' time limit. On average, an appeal before the Supreme Court followed by another 'review' of the decision of the Appellate Division takes at least sixteen months.[155] In addition to this, Article 104 of the

[151] ibid s 21(3)(4).
[152] ibid s 21(5).
[153] European Committee on Crime Problems (CDPC) (n 144) 90 & 94.
[154] Robertson (n 132) 57.
[155] *The Chief Prosecutor v Motiur Rahman Nizami* (Judgment) ICT-1 (29 October 2014) ICT-BD Case No 3 of 2011, 1 < http://www.ict-bd.org/ict1/ICT1%20Judgment/ICT-BD%20Case%20No.%2003%20of%202011%20dated.....%20.12.pdf > accessed 12 August 2017; *Motiur Rahman Nizami v The Chief Prosecutor* (Appellate Division) Criminal Appeal No 143 of 2014, 1 < http://www.supremecourt.gov.bd/resources/documents/808562_Criminal_Appeal_No._143_Of_2014.pdf > accessed 12 August 2017; *The Chief Prosecutor v Delowar Hossain Sayeedi* (Judgment) ICT-1 (28 February 2013) ICT-BD Case No 01 of 2011, 1 < http://www.ict-bd.org/ict1/ICT1%20Judgment/sayeedi_full_verdict.pdf > accessed 12 August 2017; *Delwar Hossain*

Constitution of the Bangladesh empowers the Appellate Division of the Supreme Court to do virtually 'anything' in order to ensure that "complete justice" is served. It reads:

> The Appellate Division shall have power to issue such directions, orders, decrees or writs as may be necessary for doing complete justice in any cause or matter pending before it, including orders for the purpose of securing the attendance of any person or the discovery or production of any document.[156]

Sayeedi v The Chief Prosecutor (Appellate Division) Criminal Appeal No 39-40 of 2013, 1 < http://www.supremecourt.gov.bd/resources/documents/617564_CRIMINAL_APPEAL_NO.39-40_OF_2013_2.pdf > accessed 12 August 2017; *The Chief Prosecutor v Salauddin Quader Chowdhury* (Judgment) ICT-1 (1 October 2013) ICT-BD Case No 2 of 2011, 1 < http://www.ict-bd.org/ict1/ICT1%20Judgment/ICT-BD%20Case%20No.%2002%20of%202011%20Delivery%20of%20judgment%20final.pdf > accessed 12 August 2017; *Salauddin Qader Chowdhury v The Chief Prosecutor* (Appellate Division) Criminal Appeal No 122 of 2013, 1 < http://www.supremecourt.gov.bd/resources/documents/700203_Criminal_Appeal_No.122_of_2013.pdf > accessed 12 August 2017; *The Chief Prosecutor v Mir Quasem Ali* (Judgment) ICT-2 (2 November 2014) ICT-BD Case No 3 of 2013, 1 < < http://www.ict-bd.org/ict2/ICT2%20judgment/Mir%20Quasem-judge-02.pdf > accessed 12 August 2017; *Mir Quasem Ali v The Chief Prosecutor* (Appellate Division) Criminal Appeal No 144 of 2014, 1 < http://www.supremecourt.gov.bd/resources/documents/824674_Crl_A_No_144_2014_final.pdf > accessed 12 August 2017; *The Chief Prosecutor v Ali Ahsan Muhammad Mujahid* (Judgment) ICT-2 (17 July 2013) ICT-BD Case No 4 of 2012, 1 < http://www.ict-bd.org/ict2/ICT2%20judgment/AAMMujahid.pdf > accessed 12 August 2017; Ali Ahsan Muhammad Mujahid v The Chief Prosecutor (Appellate Division) Criminal Appeal No. 103 of 2013, 1 < http://www.supremecourt.gov.bd/resources/documents/675857_Crl._A.No.103_of_2013.pdf > accessed 12 August 2017; *The Chief Prosecutor v Muhammad Kamaruzzaman* (Judgment) ICT-2 (9 May 2013) ICT-BD Case No 3 of 2012, 1 < http://www.ict-bd.org/ict2/ICT2%20judgment/MKZ.pdf > accessed 12 August 2017; *Muhammad Kamaruzzaman v The Chief Prosecutor* (Appellate Division) Criminal Appeal No 62 of 2013, 1 < http://www.supremecourt.gov.bd/resources/documents/650628_CRIMINALAP62_of_2013.pdf > accessed 12 August 2017; *The Chief Prosecutor v Abdul Quader Molla* (Judgment) ICT-2 (5 February 2013) ICT-BD Case No 2 of 2012, 1 < http://www.ict-bd.org/ict2/ICT2%20judgment/quader_full_verdict.pdf > accessed 12 August 2017; *Abdul Quader Molla v The Chief Prosecutor* (Appellate Division) Criminal Appeal No 24-25 of 2013, 1 < http://www.supremecourt.gov.bd/resources/documents/601845_CrlA_24_25_2013.pdf > accessed 12 August 2017.

[156] The Constitution of the People's Republic of Bangladesh, article 104. < http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=367 > accessed 12 August 2017.

Therefore, an accused tried and convicted *in absentia* who misses the 30-day deadline, may subsequently file an application before the Appellate Division explaining the reasons causing the delay. This was asserted by the state appointed counsels of *Abdul Jabbar Engineer* and *Zahid Hossain Khokon* when they were found guilty and sentenced by the ICT.[157] The discretion, would of course, remain with Bangladesh's "apex court" to allow or reject the accused's application to file an appeal.[158] If allowed, the 'appeal' due to its comprehensive nature would potentially remedy any shortcomings of the previous trial *in absentia* relating to 'notification' or 'effectiveness' of counsel. The fact that the appeal at the Appellate Division would be tried by a panel of 'new' judges who had the case before, gives organizations like Amnesty and Human Rights Watch one less reason to worry about because the judges would be in a much better position to presume the 'innocence' of the accused.

Conclusion

This Chapter analysed the core criticisms of the ICTs *trials in absentia* against Article 14(3)(d) ICCPR which asserts the right of an accused to be tried 'in his presence' and the principle of complementarity which requires the ICC to be receptive towards diverse standards of justice. It identified the weaknesses of these trials and the areas where the rights of an absconding accused may be improved. More importantly, it showed that these trials possess the minimum safeguards necessary (i.e. notifying an accused of impending proceedings, ensuring that the State appoints and pays for legal

[157] Mahbubur Rahman Khan, 'JAIL Until Death for Ex-JP Lawmaker Jabbar' *The Daily Star* (Dhaka, 15 March 2015) < http://www.thedailystar.net/frontpage/jail-until-death-3855 > accessed 1 June 2017; 'Khokon Razakar's Appeal Period Expires Today' *New Age* (Dhaka 12 December 2014) < http://newagebd.net/75859/khokon-razakars-appeal-period-expires-today/ > accessed 1 June 2017.
[158] Khan (n157).

counsel, and provides an absconding accused the right of appeal) to not violate the principle of complementarity.

According to Michail Wiadimiroff, the lawyer who represented Dusko Tadic at the ICTY, "the concept of a fair trial should and can only be understood in the context of the system in which it functions."[159] The context and climate in which *trials in absentia* have been held before the ICTs deserve attention. Under the principle of universal jurisdiction, the Government of the United Kingdom has for many years been in a position to investigate the case of Chowdhury Mueen Uddin. It is in this environment that the ICTs have carried out *trials in absentia*. All of the twenty-eight accused who were tried *in absentia* at the International Crimes Tribunals of Bangladesh had either managed to evade arrest or stated in clear terms that they had no intention to face 'ICT justice' because of its apparent lack of 'fairness'. The ICTs utilized the concept of *trials in absentia* as one of several tools to break that cycle which was being perpetuated by twenty-eight individuals who voluntarily absented themselves "in defiance of their obligations under international law".[160] If the objective and purpose is to serve 'justice' through the collection of evidence, establishment of truth, the punishment of wrongdoers and the vindication of victims or family members of victims, the *trials in absentia* discussed in this chapter may not have been far off the mark.

[159] Michail Wiadimiroff, 'The Prosecutor v. Dusko Tadic' (1998) 13 American University International Law Review 1441, 1449.
[160] Schwartz and Cutler (n 29).

Conclusion

The aim of this thesis is to determine the legality and the legitimacy of the International Crimes Tribunals (ICTs) of Bangladesh through the prism of the principle of complementarity with particular reference to the "principles of due process recognized by international law".[1] This final Chapter is structured into three parts. Part I provides an overview of the thesis by weaving together its core findings. On the basis of these, Part II states the key propositions concerning the legality and legitimacy of the ICTs. Finally, Part III sheds light on the future scholarship of the principle of complementarity by identifying some of its points of tension which were revealed while writing this thesis.

1. An overview of the thesis and its core findings

The ICTs were established for the purposes of trying the perpetrators of international crimes committed during the war of 1971. In order to comment on the legality and legitimacy of the ICTs, it is imperative to understand the context in which they were established. This context was explored in the first two chapters. Chapter I detailed the nature and extent of mass atrocities committed by the Pakistan Army and its local auxiliaries against the Bengali population. It found that although the extent of crimes has been disputed in some quarters, this is not something that is seriously denied in academia. Chapter II traced a host of local and international factors which thwarted the implementation of any meaningful and effective judicial mechanism aimed at

[1] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, article 17(2).

delivering justice to the victims for the greater part of four decades. This absence of justice came at a great cost; the rise of a culture of impunity and a continuing failure to provide redress for those victims of the atrocities.

In the 'complementary' system of justice created by the Rome Statute, national criminal jurisdictions are entrusted with the primary responsibility of prosecuting the most serious crimes, leaving the ICC with the ability to intervene "only where a State is unable or unwilling genuinely to carry out the investigation and prosecute the perpetrators."[2] Noting that the crimes committed during the war of 1971 were beyond the temporal jurisdiction of the ICC, Bangladesh as a State Party of the Rome Statute established the first ICT in 2010 to challenge the culture of impunity. Concerns that a justice process initiated through the ICTA "may not meet international fair trial standards" were raised on the eve of the establishment of the Tribunal.[3] As the trials went through the hurdles of completion and judgements began to be handed down and enforced, stakeholders from the international community comprising of prominent human rights and non-governmental organisations, foreign States, international lawyers and several academics, managed to capture the narrative that has defined the justice process ongoing in Bangladesh, that there is a deficit in the legality and legitimacy of the ICTs because they have failed to uphold international standards of justice.[4] Chapter III of this thesis identified the principle of complementarity and the "principles of due process recognized by international law" as the standards against

[2] 'Understanding the International Criminal Court' (*International Criminal Court*) 1 < https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf > accessed 25 September 2017.
[3] Henrik Alffram, *Ignoring Executions and Torture Impunity for Bangladesh's Security Forces* (Human Rights Watch 2009) 12 <http://www.hrw.org/sites/default/files/reports/bangladesh0509web.pdf> accessed 12 August 2017.
[4] Abdus Samad, 'The International Crimes Tribunal in Bangladesh and International Law' (2016) 27(3) Criminal Law Forum 257, 262

which this alleged deficit would and should be assessed. It demonstrated that while the Rome Statute requires the Office of the Prosecutor of the ICC to be receptive towards the "diversity of legal systems, traditions and cultures" when assessing the efforts of national criminal jurisdictions to investigate and prosecute crimes, domestic proceedings of an individual case may be regarded as incapable of providing "any genuine form of justice" and hence be deemed to be "inconsistent with an intent to bring the person to justice" if the "violations of the rights" of the accused were of "egregious" nature.[5]

The fourth, fifth, sixth and seventh chapters then identified and analysed the most contentious criticisms of the statutory provisions of the ICTA and trial process of the ICTs in terms of the principle of complementarity and the "principles of due process recognized by international law". Chapter IV analysed three specific criticisms related to the principle of legality, otherwise known as *nullum crimen sine lege*. Firstly, it found that Section 3(1) of the ICTA which empowers the ICTs to prosecute "any individual or group of individuals, […] whether before or after the commencement of this Act" does not violate Article 35(1) of the Constitution of the People's Republic of Bangladesh which protects persons from facing retroactive prosecution of crimes by prohibiting *ex post facto* laws. Secondly, the definitions of 'crimes against humanity' and 'genocide' in the ICTA by and large reflect the customary international law surrounding those definitions in 1971 and that variations in the definitions

[5] Office of the Prosecutor, 'Paper on some policy issues before the Office of the Prosecutor' (*International Criminal Court*, September 2003) 5 < https://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf > accessed 24 September 2017; *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi") ICC-O1/11-01/11OA6 (24 July 2014) [3] < https://www.icc-cpi.int/CourtRecords/CR2014_06755.PDF > accessed 15 March 2016.

provided for in the ICTA fall within the boundaries of reasonable discretion exercised by a national legal system. Finally, the Supreme Court of Bangladesh relied on established judicial principles and precedents while justifying the enhancement of Abdul Quader Molla's punishment on appeal from life imprisonment to the death penalty. However, the enhancement of Molla's sentence in the aftermath of the Shahbag movement revealed an important point of tension in the principle of complementarity. Courts of national criminal jurisdictions in the 'complementary' system of justice may succumb or be perceived to succumb to populist demands of justice made in the national context prevailing at the time of judgment. Chapter V showed that despite clear trends showing that the global community is moving away from practicing the death penalty, contemporary standards of international law are still permissive of the passing of the death penalty for the 'most serious crimes' which are limited to murder or intentional killing. More importantly, Article 80 of the Rome Statute confirms that the 'complementary' system of justice does not preclude domestic courts such as the ICTs and the Supreme Court of Bangladesh from applying the death penalty as punishment for international crimes.

Chapters VI and VII analysed three key objections relating to the trial process of the ICT's. Chapter VI found that apart from a few omissions concerning the statutory provision allowing an accused a minimum period of three weeks to prepare his defence, the inability of foreign counsel to physically place their arguments before the ICTs and the absence of the right of compensation to victims of miscarriage of justice, an accused charged with international crimes under the ICTA enjoys a range of fair trial safeguards which mirror most of the rights enshrined in ICCPR. The 'scheme' created by Articles 47(3) and 47A of the Bangladesh Constitution does not deprive

those charged with international crimes of their fair trial rights under the ICTA, nor does it alter the 'basic structure' of the Constitution. While the criticisms of this 'scheme' may have some weight because they create an 'image' crisis of the ICTs, it is argued that they remain insufficient to cause concern under the principle of complementarity. This Chapter also examined the ICTs practice of imposing caps on the number of defence witnesses on the basis of the case presented by the defence and from the trends of cross-examination of Prosecution witnesses carried out by the defence counsel. Although the practice of limiting the number of defence witnesses is not uncommon in international criminal justice and other local jurisdictions, the process through which this is done at the ICTs is not perfect. Furthermore, the ICTs can allow the defence to introduce more witnesses if they are convinced that more defence witnesses are not being prayed for as a delaying tactic. However, the claim that this practice is systematic, arbitrary and unreasonable appears to be an exaggeration. Chapter VII found that the 'complementary' system of justice does not prohibit national criminal jurisdictions from trying alleged perpetrators of international crimes in their absence, provided, that *trials in absentia* were used for objectively acceptable reasons. It showed that *trials in absentia* under the ICTs ensure the minimum safeguards necessary (i.e. notifying an accused of impending proceedings, ensuring that the State appoints and pays for legal counsel, and provides an absconding accused the right of appeal) to not violate the principle of complementarity. However, the failure on the part of State appointed defence counsel to access crime scenes or bring defence witnesses to testify, though not a problem unique to the ICTs, is a weakness.

2. The legality and legitimacy of the International Crimes Tribunals of Bangladesh

Conducting an assessment of the legality of a judicial proceeding can be a fairly simple and uncomplicated exercise. The justice system in Bangladesh created by the International Crimes (Tribunals) Act 1973 was designed to break the cycle of impunity by detaining, prosecuting and convicting persons responsible for the commission of international crimes during the war of 1971. To suggest that this exercise is 'illegal' in terms of either municipal or international law would be hard if not impossible to substantiate. However, conducting an assessment of the legitimacy of the International Crimes Tribunals is a slightly harder task.

The search for legitimacy is a theoretical question the answer to which is intertwined with the ideas of what is perceived as moral and fair. It would be difficult to argue that the observance of human rights are of secondary concern to the idea of justice, which is why there is a general consensus that during the pursuit of justice, the principles of due process must be observed out of respect to morality and fairness. In the 'complementary' system of justice created by the Rome Statute, the legitimacy of a trial process taking place within a national criminal jurisdiction is determined by assessing its judicial standards. In order to make this determination, one must unearth the extent to which the standards adopted during a domestic trial process deviate from the "principles of due process recognized by international law" and determine whether that deviation can be accommodated within the need to respect "diversity of legal systems, traditions and cultures" or not be accommodated because the "violations of the rights" of the accused which came about through those deviations were of the

"egregious" kind.

It is difficult to ascertain the moment when the principle of complementarity might be violated giving reason for the ICC to step in; the Rome Statute or the cases tried by the ICC offer limited guidance on what constitutes egregious violations of the rights of an accused. The norms of common sense dictate that summary trials, trials that deprive the accused of knowing the charges against him/her, trials that do not offer the accused access to counsel, any time to prepare his case or the right to appeal to a higher court, will be deemed as trials where the rights of the accused have been egregiously violated, necessitating the intervention of the ICC. Such trials in academia are often identified as 'show trials'. To what extent did the standards of justice adopted at the ICTs deviate from the "principles of due process recognized by international law"? To what extent were they 'show trials'?

To answer these questions, the model adopted in this thesis has been to engage in a detailed exploration of the historical context behind the ICTs and a comprehensive unpicking of the major areas of contention surrounding Bangladesh's struggle against impunity. This assists in identifying the genuine weaknesses of the ICTs and seeing if those weaknesses translate to egregious violations of the rights of an accused. Of course, every trial whether they are conducted internationally or at the domestic level can be critiqued for breach of principles of due process. The idea to seek perfection, remains illogical. The quality of justice that a legal system will be able to offer is dependent on the legal traditions and cultures of that system. This is why the declared goal of the 'complementary' system of justice is not to achieve 'perfect' justice that upholds the highest standards, but to end impunity by prosecuting the perpetrators of

international crimes in a manner that does not egregiously violate the rights of the accused.

Many criticisms have been directed towards the statutory provisions of the ICTA and the trial process of the ICTs. Due to constraints of space this thesis analysed the major criticisms and its key proposition is that while the judicial standards of justice adopted at the ICTs are not in harmony with the highest international standards, they are followed to a reasonable degree. If it is possible to reach a consensus that the word egregious means 'gross', 'outrageous', 'notorious', 'shocking' or 'outstandingly bad', then it is unlikely that the genuine weaknesses of the ICTs will qualify as egregious violations. The extent of the deviations of the standards of justice adopted by the ICTs do not appear sufficient for the trials before the ICTs to be described as show trials. This is why the justice system in Bangladesh that was created by the ICTA and comprises of the ICTs cannot be deemed as illegitimate from the perspective of international criminal law, because it does not overthrow the principle of complementarity.

The question that remains though, is whether the ICTs are 'legitimate'. The answer to this question cannot be answered immediately, simply because any assessment of legitimacy requires that the subject of the assessment has reached the stage of completion. The justice process initiated through the ICTs is a living entity and its trials are ongoing. The ICTs are not 'illegitimate', but in order to provide a definitive answer on whether they are 'legitimate', we may have to wait till the trials come to a complete close and stakeholders will have the chance to assess the ICTs from a healthy distance which is something only the passage of time can ensure. On this matter of the

legitimacy of the International Crimes Tribunals, the jury is still out. Of course, the constant evaluation of national criminal jurisdictions prosecuting the most serious crimes is a necessity and should be welcomed because it assists in improving the quality of justice and documents important lessons for future justice processes. However, criticisms that do not take into account the context within which a judicial system operates and fumbles in appreciating the rules of assessing the legality and legitimacy of domestic courts functioning within the 'complementary' system of justice, may end up shielding the culture of impunity. In the future, after the proceedings of the ICTs have come to a close, perhaps this is what should guide the final assessment of the legitimacy of Bangladesh's struggle against impunity.

3. The tension points of the principle of complementarity

As this thesis strived to assess the legality and legitimacy of the ICTs, it revealed certain points of tension that prevail within the principle of complementarity. These points of tension deserve attention during future scholarship that focuses on complementarity as a principle and the 'complementary' system of justice as a whole.

One of the reasons why the principle of complementarity identifies national criminal jurisdictions as the first line of attack against the culture of impunity is because it allows justice not just to be done, but be seen to be done by those who were directly and indirectly affected by the most serious crimes. The first point of tension is that complementarity does not account for the possibility that the processes of local justice are prone to be influenced by the sentiments of victims. By demanding what it understood as 'justice', the Shahbag movement which sparked off in February 2013

put to the test the very notions of independence of the judiciary in Bangladesh. If more movements like Shahbag emerged after the judgments failed to satisfy the victims idea of justice following which laws were amended and punishments enhanced, the political interference to ongoing justice processes would be apparent and such events would certainly derail the whole justice process and strip itself of any legitimacy.

While the death penalty is not practiced by the ICC, the Rome Statute does not prevent State Parties from prosecuting the most serious crimes at the domestic level and punishing the guilty by handing down the death penalty. This brings us to the second point of tension that the principle of complementarity cannot make a State Party that has abolished the death penalty to extradite an accused to another State Party where he/she has been sentenced to death through a trial conducted *in absentia*. This is the main reason the United Kingdom has not extradited Chowdhury Mueen Uddin to Bangladesh. This begs a deeper question of how far an unenforced sentence fulfils the goal of fighting impunity.

What do these points of tension reveal about the principle of complementarity? The objective behind creating a 'complementary' system of justice was to bring an end to impunity. However, the above-mentioned points of tension reveal that the principle enshrined in Article 17 of the Rome Statute is trying to marry several competing interests. The first relates to challenging impunity by prosecuting the perpetrators of the most serious crimes. The second converges on the need to ensure that the trials taking place within a national criminal jurisdiction observe the principles of due process recognized by international law so that egregious violations of the rights of the accused do not take place. The third competing interest is the need to respect the

"diversity of legal systems, traditions and cultures" while carrying out the assessment listed in the second interest. Juggling these competing interests is by no means an easy task, and currently there is insufficient clarity on the principle of complementarity in international criminal law to answer how all three can be achieved collectively without upsetting any of them individually. The fact remains that the Rome Statute does not envision the International Criminal Court to be a court that assesses human rights. The question that stems from this reality is to what extent should the ICC compel national criminal jurisdictions to improve their principles of due process? If the objective of the principle of complementarity is to end impunity, how will the ICC balance this objective against the need to observe the fair trial rights of individuals? If the ICC attempts to marry these competing principles as opposed to prioritising the ending of impunity and due process criticisms are allowed to weigh in at every level of a national trial, the possibility exists that the principle of complementarity will be perceived as a weak defender of State Parties trying to prosecute their own.

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