

**REPORT ON THE INTERNATIONAL  
CRIMES TRIBUNAL OF BANGLADESH**

**By**

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## NOTES ON PUBLICATION

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This report has been commissioned and published by the International Forum for Democracy and Human Rights, a group of international lawyers some of whose members have been involved in giving advice to counsel defending those accused in the International Crimes Tribunal in Bangladesh.

The detailed work of this war crimes court, which has passed a number of death sentences on opposition political leaders for crimes allegedly committed in the 1971 civil war, has received scant attention in the West although its first decision to execute a defendant was condemned by the UK Government, the U.S. Government, the EU, the UN High Commissioner of Human Rights, Amnesty International and Human Rights Watch. It was therefore decided to invite a distinguished international lawyer, renowned for his independence, to assess the Tribunal's origins and work to date (January, 2015).

Mr Geoffrey Robertson QC has had a celebrated career in practicing and developing the international law of human rights. He was the first President of the UN war crimes court in Sierra Leone, and his textbook *Crimes Against Humanity* has been an inspiration for the global justice movement. It was repeatedly cited as authoritative by the Supreme Court of Bangladesh in the first case decided by the Tribunal. For that reason alone, Mr Robertson's opinion must be taken seriously by the government and the legal establishment of Bangladesh.

Mr Robertson has no professional or personal connection to those that have commissioned this report, nor to any of the defendants or their counsel at the Tribunal. He has been provided with transcripts of the judgments in all the Tribunal cases, and was requested to provide his own views on Bangladesh's efforts to bring justice to the victims of international crimes. Mr Robertson appointed a legal assistant, Mr Toby Collis, and Mr Harrison Lanigan-Coyte helped with historical research. Mrs Judy Rollinson, his personal assistant, has worked on the publication of the Report,

which sets out the background to the Tribunal and evaluates its published judgments and the Appellate Division of the Supreme Court appeals thus far.



## INTRODUCTION: LONG AGO AND FAR AWAY

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The mass killings of many hundreds of thousands of Bengalis in East Pakistan in 1971, accompanied by widespread torture with rapes designed to affect the ethnic balance and the subsequent exodus of millions of refugees, has a special place in the history of the world's unrequited horrors. What stands out is the full-on barbarity of "Operation Searchlight", in which a monstrous regiment, with the latest military hardware, emerged behemoth-like from its barracks to kill the poor and burn down their houses and then to exterminate the intelligentsia. That was the beginning of the war. At the end, a few days before Pakistan's foreseeable surrender, came the most spiteful killings – of the professionals, teachers and community leaders who might have made a contribution to the nascent state of Bangladesh. There was genocide too, aimed at extinguishing or extirpating the large minority (ten million) Hindu population.

But these 1971 atrocities are remembered for not being remembered: the main perpetrators (195 Pakistani army officers) were transformed from war criminals to hostages in a game of cold-war diplomacy, and then hailed as home-coming heroes in Pakistan where they have never faced trial. Some of their accomplices were apprehended in the new state of Bangladesh, and in 1973 its *International Crimes (Tribunal) Act* established a procedure and a court for trying those accused of the crimes against humanity committed in the course of the 1971 attack on East Pakistan<sup>1</sup>. It had been drafted with the assistance of the International Commission of Jurists, to ensure that the trials were fair by being truly international, with some foreign judges and defence counsel and proper rules of evidence. The Prime Minister, Sheikh Mujibur Rahman, resisted strong international pressure to dismantle it:

“How can you expect me to abandon it? Three million people were cold-bloodedly murdered. Two hundred thousand girls have been raped by the Pakistan army. Ten

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<sup>1</sup> M.Silva, 'Bangladesh War Crimes Tribunal' (2013)3(1) *International Journal of Rights and Security*, p75

million people had to migrate to India and another 15 million moved from place to place out of fear. The world should know what has happened”.<sup>2</sup>

Forty years later, the world still did not know what had happened. *The International Crimes (Tribunal) Act* went into the cold-storage of the Cold War. Sheikh Mujib was assassinated in 1975 and Bangladesh fell to a succession of military governments interspersed by periods of democracy.

There seemed little government interest in reviving the issue, although in 1994 a “Peoples Court” took evidence and found some Pakistani generals and Bangladeshi collaborators guilty *in absentia* of crimes against humanity. This had no legal effect but jogged some memories and re-kindled local animosity in Bangladesh against the *Bangladesh Jamaat-e-Islami*, a democratic political party whose leaders in 1971 supported the Pakistani army and opposed independence. At the 2008 elections the Awami League (led by Mujib’s daughter, Sheikh Hasina) won a resounding victory, with a more than two-thirds majority in Parliament, giving it power to change the Constitution. It won on a platform that included a promise to prosecute war criminals<sup>3</sup>. In due course the *International Crimes (Tribunal) Act* 1973, which had lain dormant for so many years, was reactivated, amended and brought into operation in 2010, with a tribunal presided over by Judge Huq. A second Tribunal, with a similar jurisdiction, was established by Parliament in 2012.

A number of men associated with the *Jamaat-e-Islami* were immediately detained for a lengthy period<sup>4</sup> before being charged variously with genocide, crimes against humanity and war crimes: they were all convicted in the course of 2013 and most were sentenced to death. The trials continue today (January 2015) in relation to others accused and suspects are still being arrested. A number of appeals are still being heard, although one defendant, Abdul Quader Molla, was hanged on 12 December 2013. He had been sentenced to life imprisonment by the Tribunal, under whose rules there could be no appeal against sentence by the prosecution. Mass demonstrations by Awami

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<sup>2</sup> Mujib says ‘Trials are set for Pakistani POW’s’, *The New York Times*, June 21, 1972

<sup>3</sup> Ignoring Executions and Torture: Impunity for Bangladesh’s security forces. *Human Rights Watch* (May 2009), p17

<sup>4</sup> The UN Working Group on Arbitrary Detention ruled in 2012 that all of the accused were detaining arbitrarily and in breach of international law.

League supporters, demanding a death sentence, followed his trial and Parliament rushed through an amendment retrospectively permitting a prosecution appeal. It was immediately lodged and soon upheld by the Supreme Court. This was not justice, but a form of lynch law, and understandable protests came from foreign governments and human rights organisations, and on the streets from supporters of the *Jamaat*.

There can be no objection, in principle, to any nation determining to provide a measure of justice to surviving victims and family descendants who have suffered the traumatic consequences of atrocious crimes committed long ago. The crimes against humanity perpetrated in the course of the war of 1971 are unforgiveable: they are international crimes which brook no time limits or statute of limitations. In this respect, the Government of Bangladesh is to be congratulated on reactivating a Tribunal which was properly established in 1973 but prevented from doing any work by pressure from Pakistan's then allies, the United States and China, which withheld recognition from the new state until it dropped its demand to put the main Pakistani perpetrators on trial. At the time, this behaviour by the great powers and the UN was a betrayal of the promise of Nuremberg, that never again would holocausts go without retribution. But the Bangladesh holocaust came before the world had any will to intervene in far away countries of which the major powers knew little and the attempt by the International Commission of Jurists and Sheikh Mujibar Rahman to establish an international court in 1973 was politically premature. This was the era of impunity – for mass killings in Indonesia, for General Pinochet's tortures, for the Argentinian Junta's death squads, for Idi Amin's butchery in Uganda, Mugabe's massacres in Matabeleland, for Papa Doc and (for thirty years) for the genocidal behaviour of the Khmer Rouge.

It was not until 1994 that the Nuremberg legacy began to be delivered – for the mass murders by Milošević in the Balkans (the ICTY), and the genocide in Rwanda (the ICTR) and later for Charles Taylor (the UN Special Court in Sierra Leone) and, finally, for Pol Pot's lieutenants in Cambodia (the ECCC). Now, with the International Criminal Court, (ICC) established with 132 member states, it is broadly accepted that crimes against humanity committed in civil war should receive punishment, however belatedly. It is for this reason that the Awami League government of

Bangladesh cannot be criticised for reactivating the Tribunal that was bravely but fruitlessly set up in 1973, to punish such perpetrators as could be found and convicted after a fair trial before independent and impartial judges.

That was the original objective, but regrettably the current Bangladeshi government has eschewed all offers of international assistance, including that of UN legal advisers, because this help was contingent upon abandoning the sentence of death (which no international court can impose) and on sticking to international fair trial standards. Despite the title of the law establishing this “International Tribunal”, there is nothing “International” about it: the judges and the prosecutors are government-appointed local lawyers while foreign counsel have been banned from appearing for the defence. And it is not, strictly speaking, a Bangladeshi court, because the 2010 amendments have removed constitutional protections available to all defendants in local courts. This Tribunal appears to have no rules about admissibility of evidence: many of the convictions have been based on hearsay, and in effect, on guilt by association. Nor does it provide the basic guarantees required by international human rights treaties – the rule about providing adequate time and facilities to prepare a defence, for example, has been consistently breached by allowing only three weeks for defence preparation after disclosure of prosecution evidence and by restricting access to counsel.

Various aspects of the Tribunal’s behaviour have already been condemned by important and informed organisations such as the UN High Commission for Human Rights, the International Commission of Jurists (which played an important part in setting up the Tribunal in 1973), Amnesty International, Human Rights Watch, The International Center for Transitional Justice and the International Bar Association.

It has been noted that all the defendants so far are members of political parties that are rivals to the Awami League government, mainly the *Jamaat-e-Islami*, although several are members of the main opposition party, the BNP. The crimes alleged to have been committed by local accomplices of the Pakistan army in 1971 were certainly not limited to members of the *Jamaat*. Some who fought on the side of the victorious Awami League have been exempted from investigation as a result of Sheikh Hasina’s pledge, in her 2008 election manifesto, that the Tribunal would restore

“the dignity and status of the freedom fighters...the greatest sons of the nation”. This amounts to a promise of “victor’s justice”, but it is now a principle of international law that those who fight for a winning side cannot for that reason be immune from prosecution: At the Sierra Leone War Crimes Court, for example, a true hero of the battle to preserve democracy, Chief Hinga Norman, was prosecuted for recruiting child soldiers. There is genuine concern that the view of the US Embassy in Dhaka, expressed in a cable leaked by Wikileaks after the Tribunal was reactivated in 2009, is proving correct:

“There is little doubt that hard-line elements within the ruling party (the Awami League) believe that the time is right to crush *Jamaat* and other Islamic parties”.<sup>5</sup>

For all the criticism that has been levelled at the Tribunal<sup>6</sup>, there has been as yet no comprehensive study of its background or its work. Bangladesh has not been “in the news” much, internationally, other than as a result of the tragic Rana Plaza garment factory collapse in 2013 which killed 1,129 people. Although the Tribunal verdicts and especially the execution of Abdul Quader Molla have provoked protests, riots and strikes, at which almost two hundred people have lost their lives, the drawn-out proceedings have not been reported in any detail outside the country. For that reason I was approached in March 2014 by Toby Cadman, one of the English barristers who had been advising the defence (necessarily, from abroad) and asked to review all the cases concluded so far and to provide an independent opinion on their fairness and on the Tribunal’s proceedings and conduct. To this end I have been provided with several thousand pages of court transcripts and have acquainted myself with the historical background both to the 1971 massacres and to the initial attempt to prosecute collaborators in 1972-3. I make no findings as to the guilt or innocence of the men who have already been convicted by this Tribunal, as I have not attended their trials – my

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<sup>5</sup> See Joseph Allchin, ‘The Midlife Crisis of Bangladesh’ *Foreign Policy*, 21 December 2012

<sup>6</sup> There are in fact two Tribunals – ICT(1) and ICT(2) – but they were established for the same purpose and work under similar rules, both subject to appeal to the Supreme Court. Judges are sometimes moved from one to the other. In this Report (as in most news reporting) I have referred to them collectively as “the Tribunal”.

concern is with the procedures adopted by the court and the pressure brought upon it by the government, which might conduce to miscarriages of justice.

As always when charges of genocide are under consideration, it has been necessary to say something about the long-standing ethnic and religious roots of the hatreds that erupted amongst different groups in 1971, unleashed by “Operation Searchlight”, and which resulted in previously happy neighbours quite literally hacking each other to death. As will appear, I am no advocate of the policies of the *Jamaat* or of the Awami League or of the Bangladeshi or Pakistani governments, then or now, and contemporary Bangladeshi politics are not my concern. This study focuses on whether the trials can be fair, and if not, whether there is a more satisfactory way to bring to justice the perpetrators of what were undoubtedly crimes against humanity.

Geoffrey Robertson QC

Doughty Street Chambers

4 February 2015



## CHAPTER 1 - PAKISTAN, EAST AND WEST: A SHORT HISTORY

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To understand the ethnic and religious roots of the communal violence that was unleashed by “Operation Searchlight” in March 1971 it is necessary to go back to the later period in British colonial rule over greater India, before its partition in 1947 into predominantly Muslim Pakistan (West and East) and predominantly Hindu India. There was little historic animosity between the main religious groupings, but the nationalist politics which emerged in the lead up to decolonisation and independence (i.e. the period between 1932 and 1947) gave them separate political identities, by attracting support to nationalist movements with separate aims and different leaders<sup>7</sup>. Hindus mainly rallied to Mr Nehru’s Congress Party, while Muslims, who lived throughout the geographical area of colonial India, supported the All-India Muslim League led by Mr Jinnah. The latter’s “Lahore Resolution” in 1940 called for the creation, within an independent India, of two autonomous Muslim states, in the North West (the Punjab, especially) and the North East (Bengal). Many historians argue that Mr. Jinnah did not want partition: he wanted representation for all the Muslims of South Asia and regarded this as easiest to achieve by a constitutional arrangement that gave them two independent states within a large and powerful Confederacy of Pakistan and Hindustan, welded together as post-colonial India<sup>8</sup>.

This idealistic construction met difficulties in Bengal, i.e. East Pakistan, a crowded state with a population of about 75 million in 1971 (more people than West Pakistan), 15% (about 10 million) of whom were Hindu, as well as 3 million Biharis (Muslims who had fled to Bengal from India just after Partition). East and West Pakistan was geographically separated by India, and there were pronounced socio-economic differences between the two regions. In the East, the Bengali peasantry was overwhelmingly Muslim, and the landlords mainly Hindu. This began to matter in the run-up to independence, when the Congress Party and the Muslim League played on the

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<sup>7</sup> Bidyut Chakrabarty, *The Partition of Bengal and Assam, 1932-1947: Contour of Freedom* (Routledge, 2004), p1

<sup>8</sup> Sugata Bose, *Modern South Asia: history, culture, political economy* (Psychology Press, 2004), p144

differences to garner support, thereby strengthening the religious identities of the two main groups and laying the ground for future antagonism<sup>9</sup>.

It was the Lahore resolution of 1940 that prompted the formation of the *Jamaat-e-Islami* (the Islamic Society) in opposition to it. Maulana Maududi, a journalist, Islamic scholar, and political philosopher with a small coterie of supporters, formed the Society on 26 August 1941 with the objective of revitalising Islamic belief and rejecting the nationalist – almost secular - views of Mr Jinnah<sup>10</sup>. They regarded his “Western” ideas as subversive of the true loyalty of Muslims, which should not be owed to a nation but to the religion of the Koran and the Sunnah, where Allah was the only lawgiver and the only sovereign. The Lahore resolution sought the creation of a Muslim state within a secular federation dominated by Hindus along with Sikhs and Christians. The Jamaat wanted a polity that excluded people of these religions, who would never benefit from an Islamic way of life that Muslims could achieve through allegiance to a worldwide Caliphate. In other words, the Jamaat were opposed to an “unislamic” Pakistan and to Mr Jinnah, perceived as a “Western infidel”. In Maududi’s own words:

*“Being a Muslim I am not at all interested that Muslim governments are formed in areas where Muslims are in a majority. For me the most important question is whether in your Pakistan the system of government will be based on sovereignty of God or popular sovereignty based on Western democratic theories. In case of the former, it will certainly be Pakistan otherwise it will be na-Pakistan (unholy land),... where non-Muslims rule. But in the eyes of God it will be much more reprehensible and unholy than even that. Muslim nationalism is as reprehensible in the sharia of God as Indian Nationalism.”<sup>11</sup>*

The *Jamaat* was not at this point overly influential, and nor was it a force in Bengal. After partition, however, Maududi moved to West Pakistan and his movement grew in popularity and power, entering the democratic process to champion a move to Islamization and agitating for

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<sup>9</sup> Chakrabarty, above n 5, pp36-50

<sup>10</sup> Pooja Joshi, *Jamaat-i-Islami: The catalyst of Islamisation in Pakistan* (Kalinga Publications, 2003), p15

<sup>11</sup> Ibid, p19

constitutional changes - notably the declarations of an 'Islamic' republic in 1956 and 1962<sup>12</sup>. The *Jamaat's* East Pakistan wing, founded immediately after partition in 1948, languished for some years before it came to supplant the Muslim League<sup>13</sup> and develop policies that were to make it a natural ally of the Pakistan army in 1971. But the *Jamaat* had played no part in the push to independence, whereas the Muslim League had to choose between the alternatives offered by the colonial British and the Hindu Congress Party: either an undivided India, where there would be no guarantee of Muslim power, or a separate Pakistan carved out of the Punjab (the West) and Bengal (the East). They chose the latter. It was not what Jinnah had wanted – he had derided this idea of an independent state as “a shallow and a husk – a maimed, mutilated and moth-eaten Pakistan”<sup>14</sup>. But this, eventually, was the state he had to accept.

Partition took place on 14-15 August, 1947 and hundreds of thousands of Muslims, Hindus and Sikhs died in the immediate aftermath, as the result of communal violence, especially in the Punjab, where Sikhs and Hindus viciously and systematically attacked Muslim towns, partly in reprisal for Muslim League disruption of the provincial coalition government<sup>15</sup> but also as a means of forcing them to leave the state<sup>16</sup>. This highly organised killing after partition etched a deep scar into the collective memory of Punjabi Muslims which remained long after the assailants had mainly departed for India. The Pakistan army in 1971 was largely made up of Punjabi Muslims<sup>17</sup>, with a folk memory about the Hindu religion of those who had murdered their families in these post-partition massacres.

The new state of Pakistan, West and East, was not a success, either as a democracy or as a homeland for Muslims who did not form a homogenous community - especially in the East, where a strong

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<sup>12</sup> Ibid, pp 49-57

<sup>13</sup> B.M. Kabir, *Politics and Development of Jamaat-e-Islami Bangladesh*(New Delhi, 2006), p63

<sup>14</sup>Bose, above n6, p146

<sup>15</sup> Barbara Metcalf and Thomas Metcalf, *A Concise History of Modern India*, (Cambridge 2006), pp217- 221

<sup>16</sup> Paul R. Brass, 'The partition of India and retributive genocide in the Punjab, 1946-47: Means, methods, and purposes 1'(2003) 5(1) *Journal of Genocide Research*,71-101, p82

<sup>17</sup> Tanweer Akram, *A Critical Evaluation of International Commission of Jurists' Report on Bangladesh Genocide* (2007).

cultural identity as Bengalis transcended their new identity as Pakistanis<sup>18</sup>. Bengali Muslims and Hindus alike shared a culture<sup>19</sup> based first and foremost on their Bengali language, and had common traditions ranging from rice-painted flower decorations to offerings at holy shrines – traditions despised in the increasingly Islamised West Pakistan<sup>20</sup>. Moreover, as one social commentator put it, “The Bengali Muslim intelligentsia were more at home with the Bengali Hindus than with their fellow countrymen from West Pakistan”.<sup>21</sup> The first stirrings of independence for “Bangladesh”, which means “Bengal Nation” in Bengali, can be traced to a ham-fisted effort by the central government, run from West Pakistan (the capital was Karachi) and dominated by West Pakistanis, to impose Urdu as the national language. In 1952 this provoked student protests in Dhaka, which were brutally dispersed by riot police who killed several demonstrators<sup>22</sup>. Mass protests and a general strike followed and “Bengali nationalism” was born, led by student members of the Awami Muslim League, which had broken away from the Muslim League in 1949 to demand recognition of Bengali as a national language.

Although in 1956 Bengali was recognised as an additional national language, the issue had undermined the idea of a united and homogenous (‘one language, one nation’) Islamic republic. It contributed to a “psychologic rift” between the two regions, accentuated by their distance, divided as they were by India (after the war over Kashmir in 1965, overflight rights were withdrawn by India and the air travel between Karachi and Dhaka could take up to seven hours). Political and economic, as well as geographical, isolation added to the rise of Bengali nationalism – the disparity in wealth and economic development became a source of serious Bengali complaints<sup>23</sup>. This had come to a head in the provincial elections of 1954, in which the Muslim League was trounced by

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<sup>18</sup> Bose, above n6, p158

<sup>19</sup> G.W. Choudhury, ‘Bangladesh: Why it Happened’ (1972) 48(2) *International Affairs*242, p247

<sup>20</sup> Talbot & Singh, *Region and partition: Bengali, punjab and the partition of the subcontinent* (Oxford University Press; September 9, 1999), p352

<sup>21</sup> Choudhury, above n17, p248

<sup>22</sup> Tariq Rahman ‘The Medium of Instruction Controversy in Pakistan’, (1997) 18(2) *Journal of Multilingual and Multicultural Development*145, p149

<sup>23</sup> Ian Talbot, *Pakistan: A modern history* (Hurst, 2009), p163

a United Front led by the Awami League<sup>24</sup>, which had been demanding greater autonomy for East Pakistan. The *Jamaat-e-Islami* had a small branch in Dhaka, but at this point was politically insignificant in the East, whilst growing in influence in the West.

Meanwhile, in West Pakistan, run by incompetent Punjabi politicians, democracy was dying<sup>25</sup>, despite a constitution which was finally agreed in 1956. Under the growing influence of the *Jamaat* it proclaimed the country an Islamic republic, and gave the more populous East Pakistan no more seats than the West in the national Parliament<sup>26</sup>. This democratic inequality issue became moot in 1958, when Pakistan experienced its first military *coup d'état*. Army commander Ayub Khan, with a cabinet of technocrats and military officers drawn mainly from the Punjab (none of his key aides were from Bengal<sup>27</sup>) became for the next decade the country's virtual dictator. Political parties were banned. Sheikh Mujibar Rahman and other Bengali leaders were put in prison, and the Eastern wing was heavily under-represented in the country's governance<sup>28</sup> (for example, in all the enquiry commissions set up in this decade of dictatorship, only 75 of the total of 280 commissioners were appointed from the more populous East).

Ayub's regime fostered considerable economic development in the West but little in the East<sup>29</sup> and this became a cause of repeated complaints by the Awami League after Mujibar was released from prison in 1962. The war with India over Kashmir in 1965 was a further wake-up call to Bengali nationalism: for 17 days the East was left virtually defenceless whilst the Pakistan army was deployed in battle over a region to which Bengalis had no geographical or emotional attachment<sup>30</sup>. The economic depression which followed the war hit them hard, since most of the available central

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<sup>24</sup> Rashiduzzaman, M. "The Awami League in the political development of Pakistan" (1970) 10(7) *Asian Survey* 574, p577

<sup>25</sup> Talbot, above n21, pp143-147

<sup>26</sup> Ibid, p25

<sup>27</sup> Ibid, p162

<sup>28</sup> Id

<sup>29</sup> Ibid, p163

<sup>30</sup> Ibid, p189

government resources were diverted to the army<sup>31</sup>. It was stationed in the West, and overwhelmingly comprised soldiers and officers from the Punjab – only 5% of its members were Bengalis, who were concentrated in the regiment of the East Bengali Rifles. From Lartana in the Sind came a preening but capable and self-confident politician whose career Ayab promoted once political parties were unbanned and permitted to prepare for democratic elections. His name was Zulfikar Ali Bhutto, of whom much more was to be heard.

Ayab's rule had begun with several years of martial law, and its most pronounced impact was upon Pakistan's military, which power corrupted so thoroughly that by 1971 it could conceive and implement the barbarities of "Operation Searchlight". This transformation only became apparent many years later, when leaked copies of a secret judicial enquiry set up by Prime Minister Bhutto in 1974 were made public.<sup>32</sup> It was, ironically, an inquiry into the army's surrender, in December 1971, to the Indian army, which had intervened to end the civil war and permit the creation of Bangladesh. What this Report revealed was just how rotten – morally as well as professionally – the military had become through its exercise of untrammelled civil and political power during Ayab Khan's military rule and its impunity from prosecution. Not only were its senior officers indulging in bribe taking, illegal commissions and nepotism, but they had become users and traffickers in prostitution and drugs. Many (including Ayab's successor, Yahya Khan) were drunkards. They had sunk so low, from Islamic and all other moral standards, that cowardice in battle should have been expected and so should cruelty and an insouciance about committing war crimes.

This was, after all, a large modern fighting force, equipped with all the lethal weaponry that money could buy or aid programmes supply, from the UK and especially and predominantly from the US – Pakistan's main allies (along with China) at this period in the Cold War, when India was cold-shouldered by the West because of its support for and by the Soviet Union. The judicial commission painstakingly interviewed many army witnesses, analysed internal documents and

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<sup>31</sup> Id

<sup>32</sup> Hamoodur Rahman Commission of Inquiry into the 1971 War, July 1972, and Supplementary Report (1974), published in Lahore in 2001 by Vanguard,

recommended (in vain) the prosecution of high-ranking officers. Its report illuminates the corrupted mind-set of the commanders who ordered their troops out of barracks in March 1971 to “teach the Bengalis a lesson”, and to commit what the report concluded were “a very large number of unprovoked and vindictive atrocities”.<sup>33</sup> The Western fire power with which that lesson was taught was under the command of depraved dissipated who had, during a military dictatorship, come to believe they were above the law.

The lesson was to be taught to the leaders and supporters of the Awami League, which under Mujibar had become so overwhelmingly popular in East Pakistan, by demanding an end to political and economical discrimination by the regime in Karachi, that it swept the region when democracy was restored in 1970<sup>34</sup>. It had particularly firm support from the Hindu minority<sup>35</sup> (about 15% of the Eastern population) who had not seen Mr Jinnah’s vision of equality between Muslim and Hindu realised and were wary of any growth in Islamic fundamentalism: the secularism of the Awami League had particular appeal, as did the prospect of autonomy from an “Islamic republic”. The Awami League, whose leaders were Bengali Muslims, drew intellectual support from the professional classes, businessmen and students, amongst which groups Hindus were over-represented, and the Hindu Minority Conference pledged that it would work closely with the League<sup>36</sup>. This public declaration meant that they were identifiable in 1971 as League supporters and were perceived by the army and by the *Jamaat* and other minority Islamic parties as potential threats to the unity of Pakistan.

Meanwhile Sheikh Mujibar, in between prison terms, had managed in 1966 to promulgate a six-point programme for East Pakistan autonomy, which would allow the central government to control defence and foreign affairs, but nothing else. There would be separate but freely convertible currencies, separate tax regimes, and East Pakistan would have a military academy and

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<sup>33</sup> See Gary J Bass, “The Blood Telegram” (Hurst & Co, 2014) p.329

<sup>34</sup>SrinathRaghavan, *1971: A Global History of the Creation of Bangladesh*(Harvard University Press, 2013), pp28-33

<sup>35</sup> Ibid,p31

<sup>36</sup> Id

a naval base<sup>37</sup>. This programme was perceived as a recipe for secession by the central government and by the leader of West Pakistan's most popular political party, the Pakistan Peoples Party (PPP), and that leader, Zulfikar Ali Bhutto, reacted by announcing that "a majority alone does not count in national politics"<sup>38</sup>. The stage was set for the battle between East and West.

But what of the *Jamaat* in East Pakistan? They had been inconsequential, and largely run from the West, until a Bengali leadership emerged in the late 1950's which included Ghulam Azam (he was the oldest of the trial defendants and died in prison at the age of 91 in October 2014)<sup>39</sup>. It then began to flourish, and replace the Muslim League as the dominant Islamic political force in the region, vying for support with the Awami League<sup>40</sup>. It stood for a unified Islamic Pakistan, against the Bengali nationalists whose "six-point programme", it feared, would lead to secession and to defence ties with the India/Soviet bloc. However, despite this clear ideological difference, it joined with the Awami League and other nationalist parties in opposing Ayub Khan and West Pakistani dominance, and had joined the Combined Opposition Parties (1964-5); the Pakistani Democratic Movement (1966-8) and then the Democratic Action Committee, working in each case alongside the Awami League in calling for reinstatement of democracy<sup>41</sup>. Critics point out that it had little alternative if it wanted credibility within the movement for democracy in order to check the rise of Bengali nationalism after the elections and provide opposition to the secularism of the Awami League. But the *Jamaat's* commitment to democracy does appear genuine, as a basis for trying to prevent the break-up of Pakistan and securing a central elected government which would be run in accordance with Islamic law. Its support, initially strong, was quickly eroded once democracy was reinstated; out of 200 available seats it could only secure 4. In the West, it suffered an even

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<sup>37</sup> Rashiduzzaman, above n22, p583

<sup>38</sup> Talbot, above n21, p205

<sup>39</sup> Kabir. Above n11, p63

<sup>40</sup> Id

<sup>41</sup> Ibid, p65

worse collapse with the rising popularity of Bhutto, and managed only 2.9% of the vote<sup>42</sup>.  
Democracy, its declared objective, had not worked at this point in favour of fundamentalist Islam.

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<sup>42</sup> Joshi, above n8, p69



## CHAPTER 2 – COUNTDOWN TO MASS MURDER

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In March 1969 Ayub Khan resigned, and was replaced by his Chief of Staff, Yahya Khan, a product of Sandhurst replete with clipped accent and swagger stick. For the preceding two years Pakistan, both East and West, had been wracked by protests demanding democracy and better economic management - over 9 million were unemployed. In the East demonstrations had been particularly virulent, and the Awami League's student supporters had been calling explicitly for independence<sup>43</sup>. To calm the protests, Yahya announced that he would hold free and fair elections. But after his first broadcast to the nation, he is reported to have sat down, with his head in his hands, muttering, "What do we do now?"<sup>44</sup>. He was not over-bright, frequently drunk, and neither morally nor professionally up to the near-impossible task of giving leadership to a fractured and fractious nation. He was, however, supported through thick and thin by President Nixon and his advisor Henry Kissinger, who were to turn a blind eye to his later atrocities and supply him with weapons to commit further war crimes.<sup>45</sup>

What he did not do was to alleviate any of the problems of inequality or joblessness that had been behind the protests and had hastened the growth of Bengali nationalism. He did organise a relatively free and fair election, towards the end of 1970, but lacked the intelligence either to predict the growing support for the Awami League or to find some common ground with Mujib. Nor could he cope with a natural disaster that hit the Bengali Delta in the same year – the Bohola cyclone, which claimed hundreds of thousands of lives<sup>46</sup>. The government's response, of "gross neglect, callous and utter indifference" as the nationalist parties jointly described it, increased their hostility to being a part of any 'Pakistan' that continued to be dominated by its West wing and its Punjabi army. Perhaps, by underlining the cheapness of life, the cyclone contributed to a mentality

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<sup>43</sup> Raghavan, above n30, pp22-23

<sup>44</sup> Talbot, above n21, p193

<sup>45</sup> Gary J Bass, in "The Blood Telegram: Nixon, Kissinger and a Forgotten Genocide" (Hurst, 2014) explains at length how Nixon and Kissinger ignored the pleas of US diplomats on the ground and schemed to circumvent arms.

<sup>46</sup> Ibid, pp194-195

among the populace that death was no big deal – a mentality that became apparent in the internecine killing sprees a few months later.

The long-awaited election took place in December 1970, having been postponed because of the cyclone. In the West, Bhutto's well-organised PPP campaigned on a patriotic platform, belligerently promising "a thousand year's war with India". In the East, Mujib condemned Ayub's treatment of the region as a 'colony' and campaigned on the basis of the six point programme, although Yahya had made clear that his army would not permit the central government to be denuded of its powers of taxation or of its right to control internal as well as external affairs. Yahya, cocooned in Karachi, had no notion of the popular support for the Awami League until the votes were counted: it won 75% of them, which gave it 160 of 162 seats from the East in the National Assembly<sup>47</sup>. In the West, Bhutto captured 81 of the 138 available seats<sup>48</sup>. As the election had been held on a "one-man, one vote" basis, the East's greater population gave Mujib an overall majority - 160 seats out of 300.

This was a staggering result, which Yahya and his army advisors had not predicted and could not comprehend<sup>49</sup>. They were implacably opposed to the six point programme and could not bring themselves to negotiate in good faith any amendment with Mujib, who made a celebrated speech at Ramma racecourse on January 3<sup>rd</sup> 1971, demanding the democratic right for his party to avail itself of its parliamentary majority and form the nation's government. He promised to cooperate with Bhutto and the other West Pakistan partners, but he wanted a constitution based on the six points<sup>50</sup>.

The countdown to civil war began with Yahya flying to Dhaka to meet Mujib, and then taking a long journey to the Bhutto estate to go duck shooting with the army's favourite politician<sup>51</sup> – an

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<sup>47</sup> L. F. Rushbrook Williams, *The East Pakistan Tragedy*(London: Tom Stacey, 1972), p44

<sup>48</sup> Talbot, above n21, p200

<sup>49</sup> Ibid, p193

<sup>50</sup> Ibid, p204

<sup>51</sup> Raghavan, above n30,p38-39

expedition that frightened the Awami League, whose members feared they might become the next ducks. Eventually the two party leaders met in Dhaka at the end of January and Yahya announced that the National Assembly would finally meet there on March 3<sup>rd</sup>. It was Bhutto who then pulled back, but only after he enlisted the support of all the other West Pakistan parties. They would all boycott the new parliament, he announced, in case its Awami majority acted in the interests of the enemy, India, by ramming through a new constitution based on the six points<sup>52</sup>.

Yahya throughout February seemed to be seeking a political solution to allow the parliament meeting to take place, but his sincerity was belied by a military build-up of West Pakistan forces in the East. On February 19 the army began to set up checkpoints and machine gun posts in Dhaka and on February 21 Yahya dismissed his civilian cabinet. He is reliably reported at this time to have declared “I am going to sort that bastard (Mujib) out” and when warned that any “sorting out” would involve military action, he replied “so let it be”<sup>53</sup>. When told that military action would be a disaster, he replied that a “whiff of the grapeshot” would bring “the bastard” to heel<sup>54</sup>. On February 28 Bhutto announced that if the parliament went ahead, he would call a general strike and the very next day, Yahya postponed parliament indefinitely.

Now it was Sheikh Mujib’s turn to call a general strike, and he did so with complete success<sup>55</sup>, as East Pakistan closed down and its people took to the streets in answer to his call to “foil the conspiracy against Bangladesh” led by “anti-people forces”. The army then showed its anti-people credentials by killing 172 unarmed civilian demonstrators, but on 3<sup>rd</sup> March it was recalled to barracks and stayed there for three weeks of relative calm, while political agreements were brokered and broken. There was some inter-communal violence, as Awami League militants attacked Bihari “blacklegs” who declined to join the strike, and they in turn retaliated. Sheikh Mujib ordered an end to Awami League rioting, and the extremist factions of his movement concentrated on

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<sup>52</sup> Ibid, p40

<sup>53</sup> Ibid, p41

<sup>54</sup> Ibid, p42

<sup>55</sup> Ibid, p43

collecting arms and ammunition and making petrol bombs for possible future use. At a press conference on 2<sup>nd</sup> March he outlined “a programme for achieving the right of self-determination for the people of Bengal”. This was the first time that he had gone beyond the “autonomy” that had been vaguely sought in his six-point programme – he had decided that nothing succeeds like secession.

Yahya and Bhutto were determined that he should neither succeed nor secede, and proclaimed their commitment to the integrity of Pakistan, East as well as West. Yahya was sufficiently frightened by the general strike, however, to announce that parliament would now meet on 25 March<sup>56</sup>. The objectives of the army-backed P.P.P. and the Awami League were irreconcilable, but they held secret negotiations, ostensibly to find agreement over a new constitution<sup>57</sup>. No agreement was found, and historians find it impossible to give an objective account of the failure, for which the parties blame each other. The Awami League did put forward (merely as a negotiating position, it later claimed) an advance on the six-point programme which called for a separate province of Bangladesh with its own constitution, albeit in a loose confederation with West Pakistan. To the army this smacked of treason, and provided the green light for “Operation Searchlight”.

In the White Paper subsequently written to justify that operation, the Pakistan Government claimed to have discovered an Awami League conspiracy involving the use of local police and the East Bengali regiment to occupy Dhaka and Chittagong and then invite the Indian army in to protect the “Bangladeshi revolution”. There has never been the slightest evidence of such a plan. Another justification for “Operation Searchlight” was to prevent the breakdown of law and order, although law and order had not broken down until the operation began.

In this frantic negotiating period, 15-24 March, Yahya, Bhutto and Mujib were to-ing and fro-ing with their delegations in Dhaka. The Awami Leaguers were negotiating in good faith over the draft

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<sup>56</sup> Talbot, above n21,p206

<sup>57</sup> Raghavan, above n30, pp47-49

of a constitution, as was Bhutto although he must have known that the army was getting ready to attack. On 24<sup>th</sup> March he and his party leaders advised Yahya that “military action was necessary”<sup>58</sup>, although they did not necessarily know what form of military operation the army had already planned. In any event, Yahya had already decided, on the previous evening, to take it. He had told his commanding general, Tikka Khan, on 15 March that “The bastard is not behaving. You get ready” and after an inconclusive meeting with Mujib on 23 March he gave the order for what was termed “the army crackdown”. It was to commence on 25 March, at the time his own flight out of Dhaka was expected to reach the safety of Karachi. At 11.30pm, “Operation Searchlight” began<sup>59</sup>. The army came out of its barracks in full battle order – an armoured battalion, an infantry battalion and an artillery battalion. They first arrested Mujib, and then made for the University where they began a murderous 2-day assault first on the students and then on the civilian population. Thousands would die from bombings and firings, and from targeted executions<sup>60</sup>.

Nothing can possibly justify “Operation Searchlight”. At the University, where students were strong supporters of the Awami League, three halls of residence were shelled by mortars and tanks and then their occupants were murdered by machine gun. Hundreds were killed, offering no resistance other than occasional rifle fire from one hall. Then came the raids on the residences of University staff, where officers with “liquidation lists” identified and executed ten professors<sup>61</sup>, although they spared several who spoke to them in Urdu. The University library was specifically targeted for destruction. Clearly, Tikka Khan’s perverted plan was first to murder the intellectual leaders of the nationalist movement, At dawn, the attackers moved on to what they called “slum clearance”, the slaughter of the poorer members of the community living in the old part of Dhaka and who were solidly behind the Awami League – they set alight their bamboo-matted homes, and then killed any civilians they could find on the streets. Several hundred who were waiting for a ferry were machine-gunned to death. Then came specific attacks on the local forces of law and

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<sup>58</sup> Ibid, p50

<sup>59</sup> Ibid, p51

<sup>60</sup> Talbot, above n21, pp208-209

<sup>61</sup> Raghavan, above n30, p52

order: the police, and the East Pakistan Rifles<sup>62</sup>, a largely Bengali force that was notionally a division of the attacking army itself. Tanks were used against the police barracks, and few of the several hundred recruits who were stationed there survived. Even the eight guards at the President's house, who had until a few hours previously been faithfully protecting Yahya Khan, were mercilessly executed.

The main casualty of "Searchlight" was the Hindu population of Dhaka<sup>63</sup>. The army first destroyed a Hindu temple, and then moved on to attack sections of the city where Hindus lived and the bazaars where they shopped. Although they constituted 15% of the East Pakistan population, the army from the very outset of the civil war targeted Hindus as if they were an armed enemy. After the first day of the assault, the US Consul in Dhaka, Archer Blood, reported to Washington that

"evidence of a systematic persecution of the Hindu population is too detailed and too massive to be ignored. While the Western mind boggles at the enormity of a possible planned eviction of ten million people, the fact remains that the officers and men of the army are behaving as if they had been given *carte blanche* to rid East Pakistan of these 'subversives'"<sup>64</sup>.

"Operation Searchlight" was a planned act of butchery of civilians and, in the case of Hindus, of genocide. Its perpetrators quickly attempted to justify the crime to the Pakistanis of the West, where reports of the event had been heavily censored. The officers involved received congratulatory cables from their commanders, saying "You have saved Pakistan", a theme taken up publicly by Bhutto: "Pakistan is saved" Yahya Khan made a broadcast to the nation that should be treated as a confession – he had ordered the armed forces to "do their duty and fully restore the authority of the government". What he had ordered was a barbaric attack on poor civilians

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<sup>62</sup> Talbot, above n21,p208

<sup>63</sup> Raghavan, above n30, p52

<sup>64</sup> Archer K. Blood, *The Cruel Birth of Bangladesh: Memoirs of an American Diplomat*(University Press, 2002),pp271-22

and bright students and anyone of Hindu religion, for exercising a democratic choice to support the Awami League.

Without doubt, “Operation Searchlight” was a crime against humanity: a deliberate and systematic attack on a civilian population by the state and its military agency, which killed and seriously injured thousands of men, women and children (the exact number is impossible to estimate). It went far beyond any conceivable defence of “military necessity”: the government had the option of continuing negotiations, of imposing martial law, or (if there was any evidence of a treasonable conspiracy) of interning or prosecuting the Awami League leaders. Instead it opted to terrorise the civilians of Dhaka by persecuting intellectuals and community leaders, killing law enforcement officers and making genocidal attacks on Hindus that forced millions of them to flee the country. Although the operation lasted only 48 hours, it remains an international crime whose perpetrators have never been punished.

President Yahya Khan, who gave the order, was replaced by Bhutto after Pakistan’s surrender to India in December 1971. He was put under house arrest, but this disgrace was punishment for losing the war and not for unleashing “Searchlight”. For that crime he was never prosecuted, and he died in 1980. General Tikka Khan, architect of the operation and commander of the eastern military, bears even greater responsibility than his President: he was not drunk and was not stupid. His callous calculations of the groups to be killed – Professors and students, non-Urdu speakers, Hindus - made this “Butcher of Bengal” as guilty as General Mladic, the Bosnian Serb who “ethnically cleansed” Srebrenica. Tikka Khan went straight into Bhutto’s cabinet, as Defence Minister and later (after Bhutto’s own execution in 1979) became Secretary General of the P.P.P. and later the Governor of the Punjab. When he died in 2002, he was given a State funeral with full military honours. Considering how high his reputation still stands in Pakistan, he might be an appropriate candidate for a posthumous prosecution – to set out authoritatively the calculated inhumanity of “Operation Searchlight”.<sup>65</sup>

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<sup>65</sup> International Courts have never been tasked with posthumous prosecutions, although the Lebanon Tribunal is undertaking trials *in absentia* and there is not much difference – indeed, a posthumous prosecution would be a form of

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*in absentia* proceeding, in which the deceased would be represented as effectively as possible, the prosecution would collect and present damning evidence which might not otherwise be made public, and the judges would deliver a verdict that would carry weight with historians. Any unfairness would be mitigated, unlike the Bangladesh Tribunal *in absentia* trials, (see later) by the fact that the defendant could not be execute or suffer at all, other than by an indelible blot on an undeserved posthumous reputation.

## CHAPTER 3 – THE CIVIL WAR

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“Operation Searchlight” was an international crime, although the world was very slow to acknowledge this, initially because of news blackouts and censorship. This did not affect diplomats, however: Archer Blood immediately informed Washington that it constituted a “selective genocide” and two weeks later, together with his foreign service personnel in Dhaka, he took the unprecedented and career-damaging step of formally protesting Dr Kissinger’s decision to refrain from any criticism of an ally. This posture, they argued, “serves neither our moral interests broadly defined nor our national interests” – it was, in fact, “moral bankruptcy” to ignore a conflict “in which unfortunately the overworked term ‘genocide’ is applicable”<sup>66</sup>. But human rights formed no part of U.S. foreign policy under President Nixon, and Kissinger actually expressed pleasure that Yahya’s atrocity had (so it seemed at first) succeeded. “The use of power pays off... 30,000 well-disciplined people can take 75 million any time... I wish Yahya well – we must be Machiavellian and accept what looks like a *fait accompli*”. This amoral, and, as it turned out, wrong-headed *realpolitik* set US policy in Cold-War stone throughout the ensuing conflict. Nixon “tilted to Pakistan”, built bridges to China (a friend to Pakistan) and threatened India (friend to Bangladesh and the Soviets). There was no mention of the Nuremberg trial, or the precedent it had set for international justice.

It soon became obvious that the “30,000 well-disciplined people” – Tikka Khan’s army – could not take 75 million (the people of Bangladesh) at this or any other time. On 26 March the “Bangladesh Liberation Army Radio” crackled into action, declaring Bangladesh a sovereign and independent State and calling on its people to resist<sup>67</sup>. Many did so – in mobs that came out over the next eight months to massacre groups that were collaborating with the army<sup>68</sup>, or were merely

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<sup>66</sup> Telegram, 6 April 1971, from Archer Blood, Consulate General to the State Department. See Gary J Bass “*The Blood Telegram: Nixon, Kissinger and a Forgotten Genocide*” (Hurst & Co, 2014) Chapter 5.

<sup>67</sup> Talbot, above n21,p209

<sup>68</sup> Rushbrook Williams, above n42,pp66-74

suspected of doing so – most notably the ethnic group of *Biharis*, refugees from India at the time of Partition, Urdu speakers who wanted to remain within a united Pakistan. More strategically, a Liberation Army (the *Mukti Bahini*) was established to wage guerrilla warfare and later, when trained and equipped in and by India, to engage in open battle<sup>69</sup>. Its nucleus was provided by surviving Bengali policemen and soldiers from the East Pakistan Rifles, and twelve-day training camps were held for Bengali recruits across the Indian border so that by October they were numerically equal to the army, and were, of course, highly motivated by their independence struggle and hailed by their communities as “freedom fighters”. They were supplied with arms by India, and offered facilities for training camps, giving an international aspect to the conflict from early on<sup>70</sup>. The leaders of the Awami League, other than Mujib, had escaped arrest and found their way over the border to set up a “government in exile”<sup>71</sup>.

“Operation Searchlight”, concentrated in Dhaka, had not restored calm: it turned what was a constitutional debate into one of the twentieth century’s most brutal civil wars. The army began it, and once it realised that the “whiff of grapeshot” had set off a Bengal-wide conflagration, it inhumanely and foolishly decided to replicate the attacks throughout the country, targeting Awami League members, students and intellectuals, and Hindus<sup>72</sup>. When rebel-held Bengali towns were captured, the civilians were massacred – men, women and children, with some of the cruellest killings carried out by local *Biharis*, in revenge for massacres that they had suffered at the hands of the *Mukti Bahini*. As the year dragged on, the army (now commanded by General Niazi) committed atrocity after atrocity. Civilians (especially Hindus) who had been captured were then lined up for execution on the banks of rivers, which would wash their blood away, as well as their bodies. Evidence (some from Pakistan’s own judicial enquiry) confirms that Hindus as such were specifically targeted in army commands thus supporting the US Consulate allegation of genocide.

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<sup>69</sup> Talbot, above n21, p209

<sup>70</sup> Willem Van Schendel, *A history of Bangladesh*(Cambridge: Cambridge University Press, 2009), p164

<sup>71</sup> Raghavan, above n30, p62

<sup>72</sup> International Commission of Jurists, *The events in East Pakistan, 1971* (Geneva, 1972)p24

There was mob violence on the other side, involving Bengali mob attacks on *Biharis* who were seen as army accomplices. As the International Commission of Jurists notes, however

“The atrocities committed against the population of East Pakistan were part of a deliberate policy by a disciplined force. As such they differed in character from the mob violence committed at times by the Bengali’s against the *Bihari’s*”<sup>73</sup>.

This is true of the early response to ‘Operation Searchlight’, although as the year progressed and the *Mukti Bahini* struck back with assistance from India, this force of nationalist fighters was also guilty of atrocities and of atrocities that were in some cases no different in kind or description to those which are being punished in the ICT – a Tribunal prohibited from investigating war crimes committed by *Mukti Bahini* “freedom fighters” whom its judges invariably hail as heroes. The Hamoodur Rahman Commission, admittedly a view from Pakistan, found evidence of “large scale massacres and rape” attributable to Awami League zealots in raids on peaceful villages in East Pakistan, “not only in order to cause panic and disruption and carry out their plans of subversion, but also to punish those East Pakistanis who were not willing to go along with them”. Nonetheless, given the scale of Pakistan army atrocities and evidence of command responsibility for them, the Report concludes that “No amount of provocation could justify retaliation by a disciplined army against its own people”.<sup>74</sup>

By mid-year when the army and its local supporters had temporarily regained control of the region, West Pakistan sources estimated that 250,000 had already been killed in the conflict. By this time, millions of refugees, predominantly Hindus, had fled over the border to India (the number was reliably estimated at ten million by the end of the year). Death was not the only fate of Bengali and *Bihari* civilians – many more were seriously injured, and a particularly obnoxious war crime, ethnic rape, was deployed by this morally rotten Pakistani army. Estimates of hundreds of thousands of women subjected to these assaults may not be wild exaggerations: Western doctors

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<sup>73</sup> Ibid, p37

<sup>74</sup> Hamoodur Rahman Commission, Supplementary Report (1974) p33 & 36

were enlisted to perform 70,000 terminations. (One leading Sydney abortionist, Dr. Geoffrey Davis, became a hero of Bangladesh for providing such services, and it is his estimate of 200,000 rapes that the government has accepted). The new government had to run a campaign to encourage village communities to forgo their traditional taboos and to stop ostracising women violated by the soldiers.

West Pakistan censorship prevented the full horror being reported in the Western world until June, when a Pakistani journalist who had been 'embedded' in the army on the assumption that he would comply with its ethos escaped with his family to London and told what he had seen and carefully noted: the *Sunday Times* ran his eye-witness account under the front-page headline "GENOCIDE". Anthony Mascarenhas had been privy to admissions by military officials that they were "determined to cleanse East Pakistan once and for all of the threat of secession, even if it means killing two million people"<sup>75</sup>. He later summarised his army experience for an enquiry by the International Commission of Jurists:

*"What struck me was the impression I got, a very hard impression, that this was a regular pattern. It wasn't somebody venting his spleen, but he had clear orders to clean up. It was the pattern of the killing. You killed first Hindus, you killed everyone of the East Pakistan Rifles, the police, or the East Bengal Regiment you found, you killed the students, the male students, if you got a woman student you probably did something else, the teachers... are supposed to have been corrupted by the Hindus. It is the pattern that is most frightening. I have seen the partition riots in Delhi in 1947. That was mob frenzy. It was completely different here. This was organised killing, this is what was terrifying about it. It was not being done by mobs. It was a systematic organised thing"<sup>76</sup>.*

It is this evidence of system, of deliberate and lethal targeting of students and intellectuals, Bengalis and Hindus, that makes the army leaders guilty of crimes against humanity. One such crime was genocide, because the war was conducted with an intention to destroy part of a racial or religious

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<sup>75</sup> Raghavan, above n30,p132

<sup>76</sup> ICJ, above n66, p37

group, namely the Hindu people. They committed the crime of extermination, or ‘politicide’ because the intention was to mass murder political enemies who supported the Awami League<sup>77</sup>. On any view, the *Sunday Times* was reporting an international crime, of the kind first punished at Nuremberg in 1946 and worse than any committed in the world in the 25 years since that iconic trial, which had established an international criminal law available to punish such atrocities. Its reporting was echoed in the *New York Times*, by veteran correspondent Sydney Schanberg, where sources would tell him of how houses occupied by Hindus were specifically marked for the army’s lethal attention, and how Hindus were ‘called out’ and killed during army raids. “It was a genocide” Schanberg concluded, as did the US Consulate.<sup>78</sup> It was a measure of the power of Kissingerian *realpolitik* that nothing was ever done about this genocide other than by India, whose help to the Bangladeshi “freedom fighters” was severely criticised by the US and by a China concerned about any blowback from its army’s crushing of the independence movement in Tibet. India deserves credit for absorbing up to ten million, mainly Hindu, refugees - it could have closed its borders, and although its generosity was linked to its political and emotional sympathies to the refugees, it nonetheless deserves humanitarian applause.

An international crime was pre-eminently the responsibility of the United Nations, led at the time by the weak and meek Thai diplomat, U Thant. He received information from his representatives in Dhaka that the March “negotiations’ had been a sham – a cover for the army build-up, and was told in grisly detail of its attack on the poor (“No living thing could be found in these burned quarters afterwards... Army trucks loaded with the dead bodies of civilians have been seen by UN personnel”). But he refused to speak out, and merely wrote a private letter to Yahya, which conceded that the UN had no right to interfere in a member State’s “internal problems” (although it certainly did, if international crimes were being committed there). He offered instead “purely humanitarian assistance”. Yahya accepted some food aid (so long as Pakistani agencies delivered it) and blocked all further action that India tried to initiate at the UN, repeating the mantra (which

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<sup>77</sup> Raghavan, above n30,p52

<sup>78</sup> See Bass, “*The Blood Telegram*” supra, at p 203.

many African members eagerly endorsed) that “a sovereign state has the right to suppress secession”. At ECOSOC the UK, under its new Conservative government, kept a shameful silence as the reports of the atrocities mounted, and only New Zealand called for discussion of “massive violations of human rights”. In other committees, the friends of Pakistan - the US, China, African and Arab countries – blocked any debate on the grounds that the issue was “political”. The fact that it was criminal they never mentioned. The calculation and the cowardice of all major states at the UN makes the Bangladeshi war one of its most shameful failures. It provides a reason, as late as 2015, for the UN to do something about this crime against humanity, or at least to ensure that what Bangladesh is doing about it is effective and even-handed.

It is a measure of the UN’s failure that so much more was done to bring this bloodbath to the world’s attention by Ravi Shankar, George Harrison and Bob Dylan, who played the “Concert for Bangladesh” at Madison Square Gardens in August. It raised not only \$250,000 for refugee relief, but public consciousness, with an album which told its millions of purchasers, accurately enough, that the Pakistan army was responsible for “a deliberate reign of terror”, and for perpetuating “the greatest atrocity since Hitler’s extermination of the Jews”. Although the impact of pop culture is always difficult to gauge, it may be said that the concert (followed by the songs of Joan Baez and the poems of Allen Ginsberg) did have an effect on international opinion, and took some diplomatic pressure off India when, for what it correctly termed humanitarian reasons (although these were not the only reasons), it decided to invade.

By November, the casualties were massive, if incalculable. Yahya refused all peace proposals. He held rigged elections for national and provincial assemblies, in which most Awami League candidates were disqualified, set up a puppet East Pakistan government<sup>79</sup> (which included *Jamaat* members) and refused to release Sheik Mujib, the only person who could diffuse the violence by agreeing a political settlement. In August he had actually put Mujib on trial, but it was a secret trial that served no purpose. Meanwhile, the killings continued in a war in which the guerrillas, fighting

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<sup>79</sup> Kabir, above n11, p67

for their homeland with Indian-supplied arms, provoked further army atrocities on Bengali communities. In these assaults, it has been alleged that the army was frequently accompanied by members of paramilitaries recruited locally by the Pakistan government – the *Razakers* and sometimes *Al Shams* and *Al Badr*, a pro-Pakistan grouping that, the prosecution claimed, organised assassinations of Awami League supporters.<sup>80</sup> Most of the defendants in the present trials are accused of being members of these paramilitary groups, so it is important for the prosecution to prove the role of the *Jamaat-e-Islami* in establishing them, although there is no doubt that it generally supported the West Pakistan forces throughout the civil war.

Although badly defeated in the 1970 election, the *Jamaat* had initially supported the proposal for constitutional power-sharing between the Awami League, the P.P.P. and the military<sup>81</sup>, but after “Operation Searchlight” it declared its allegiance to the army and to the concept of a united Pakistan<sup>82</sup>, on the grounds that Bengal would be subjugated by India if it became independent. It should be stressed that the *Jamaat* was not alone in this concern: it was shared by other Islamic parties, and a number of scholars and intellectuals and by the West Pakistan establishment. It positioned itself as the most patriotic party, concerned to prevent the emergence of an economically unviable Bangladesh with a significant Hindu population that would invite Indian intervention<sup>83</sup>. It participated in the rigged “by-elections” and was recruited to join the ‘puppet’ government, together with the other Islamic parties<sup>84</sup>. In April these parties met with Tikka Khan and publicly declared over Dhaka radio their loyalty to United Pakistan and the army<sup>85</sup>. Tikka Khan announced that the *Jamaat*, the Muslim League and other right-wing parties would form a “Peace Committee” to support the army, and in due course the “East Pakistan Central Peace Committee” was established at the residence of Khaja Khayr, a prominent Muslim League leader, to campaign

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<sup>80</sup> Van Schendel, above n64,p167

<sup>81</sup> Kabir,above n11, p14

<sup>82</sup> Ibid, p66

<sup>83</sup> Id

<sup>84</sup> Ibid, p67

<sup>85</sup> A. Sharif et al, *Genocide 71:An account of the Killers and Collaborators*(Dhaka, 1988), p 39

against the “enemies of Pakistan” – i.e. the Awami League nationalists<sup>86</sup>. Jamaat members are alleged to have become informers for, and collaborators with, the army, accompanying the soldiers and identifying Hindus and Bengali nationalists who would be appropriate candidates for appropriate candidates for execution<sup>87</sup>. Peace Committees were set up throughout the country, with liaison officers whose role was to propagate for a united Pakistan although it is being alleged at the current trials that they also drew up target lists for the army, and for *Al Shams* and *Al Badr*, the paramilitaries whose members are alleged to have actually participated in killing the targets<sup>88</sup>. These accusations have been made in many books about the conflict, and the prosecution case at the trials has been that defendants who are now leaders of the *Jamaat*, began as youth leaders of paramilitaries.

The *Jamaat* during the civil war was not an underground organisation. It publicly promoted, as did others, the cause for Pakistan and its army were fighting – on 18 June, for example, Ghulam Azam flew to Lahore and the next day met Yahya Khan in Rawalpindi, giving him advice that he repeated at a press conference: “Miscreants” were active and must be resisted by arming patriotic citizens. (This was interpreted by the prosecution at the Tribunal hearings as an incitement to mass murder: Azam’s defence said it was no more than a statement in favour of the unity of Pakistan). Razakar forces, mainly comprising Islamists and Biharis, were deployed throughout the country, and were bolstered by police sent from West Pakistan. A government ordinance (the East Pakistan Razakar Ordinance of 1971) formally provided that Razakars be given firearms and training<sup>89</sup>.

It must be said that the evidence for Jamaat involvement in the physical killing of Hindus and Bengali nationalists, as produced in the current trials, depends on eye-witness and hearsay reports – there are no documents or photographs that prove they were involved in actual killings, although the prosecution argued that as they were present on a number of death raids, they must have known

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<sup>86</sup> M.A Hassan, *Beyond Denial: The Evidence of a Genocide*(Millennium Publications, 2013),p74

<sup>87</sup> A. Sharif, above n77, p51

<sup>88</sup> Ibid, pp69-70

<sup>89</sup> Ibid, p124

what was likely to happen to people they identified as targets, or whose arrests they witnessed. There was certainly close collusion with the military, although the extent to which *Jamaat* leaders joined in the army killings is highly disputed. There are many allegations that they did so, certainly towards the end of the war, and at the trials some survivors have identified *Jamaat* leaders as the commanders who ordered their torture and the death of their comrades. *Jamaat* leaders insist that their own role went no further than making speeches and statements in favour of a united Pakistan.

The end came very quickly. By November India was ready to invade, to staunch the massive flow of refugees, and it had already chosen a date for its “humanitarian intervention”. Stupidly, the Pakistani military launched an ineffectual air attack on India first, giving that nation the excuse to blame them for starting a war that was over very soon<sup>90</sup>. In two weeks the Pakistanis were subdued, and its army commander, General Niazi, was forced to surrender himself and his 93,000 troops<sup>91</sup> on 16 December – now celebrated in Bangladesh as ‘Victory Day’. Mujib, still on secret trial, was released, and declared the independence of Bangladesh. In Karachi, the angry crowds demanded Yahya’s resignation. Bhutto, who had been representing Pakistan at the UN, hurried home to accept the position of President in his place.

This all happened in mid-December. But in the few days before the surrender, when everyone knew it to be inevitable, there was one final atrocity, alleged to have been committed by the *Al Badr paramilitaries*, directed by Major General Rao Farman Ali of the Pakistani army (who was arrested with the hit list, in his handwriting)<sup>92</sup>. The civil war ended, as it had begun, with the deliberate destruction of those best equipped to lead a new nation. They rounded up University professors, journalists, and other intellectual leaders, and cold-bloodedly murdered them.

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<sup>90</sup> Raghavan, above n30, p205

<sup>91</sup> Ibid, p235

<sup>92</sup> Sarmila Bose, ‘Anatomy of Violence: Analysis of Civil War in East Pakistan in 1971, (2005)*Economic and Political Weekly*: 4463-4471.





## CHAPTER 4 – RETRIBUTION

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The State of Bangladesh came into being on 16 December 1971. It was immediately recognised by India and, in the course of the following year, by twenty foreign governments including the United Kingdom. Pakistan and its allies continued to block recognition, however, and in 1972 China actually cast its first great power veto in the Security Council to bar it from UN membership. This was a serious set-back for the new nation, desperate for international assistance to recover from the war, and came to impact upon the fate of the Pakistani officer and soldiers – 93,000 of them – who had surrendered and had been taken, as prisoners of war, to India. One hundred and ninety-five had been identified by Bangladesh as war criminals, including General Niazi and Rao Forman Ali Khan, and it opposed any agreement to return them to Pakistan pending their trial in Bangladesh. For its part, Pakistan wanted all its soldiers back, and it held – virtually as hostages – several hundred thousand Bengalis, who wanted to transmigrate to their new state.

After a series of diplomatic meetings between Pakistan and India, it was finally agreed that the 93,000 POW's should be returned without the 195 alleged war criminals, and that Pakistan would allow its Bangladeshis to leave and would in addition accept some tens of thousands of Biharis who no longer wanted to remain in a country where so many of their people had been killed. The fate of the “war criminals” remained a fraught diplomatic issue: none of the agreements thus far had contemplated an amnesty for them, and although Pakistan insisted that they fell within the Geneva Convention rule (Article 118) that POW's should be repatriated as soon as possible, it was plain that they did not: Article 119 provides that “Prisoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment”.

Although the impasse over the army suspects held in India continued, Bangladesh soon moved against the war criminals within its domain – those who are alleged to have collaborated with the army through membership of the Razakars or Al Badr. Sheikh Mujibar's government brought in the *Bangladesh Collaborators (Special Tribunal) Order 1972*. Many thousands were arrested for all kinds

of offences in the course of the civil war, and proceedings were launched against 2,848<sup>93</sup>. The strain on the makeshift judicial system was too great, and in 1973, amnesties were announced for all collaboration crimes except rape, murder and arson. 752 defendants were convicted and sentenced to jail terms – in at least one case, to a death sentence (that of Chikon Ali, a Razakar from Kushtia) and those who had been punished for petty offences before the amnesty were pardoned.

There has been no proper study of the collaboration proceedings, 1972-3, although it would appear that there was a good deal of confusion and over-reach in prosecution targets. This would explain the February 1973 *Bangladesh National Liberation Struggle (Indemnity) Order*, which granted “Freedom Fighters” Immunity from prosecution for any act committed in the course of the “Liberation Struggle” – a statutory immunity for members of the *Mukti Bahini*, the East Bengal Rifles and ill-assorted guerilla groups who could claim they were killing and torturing in support of the Awami League objective of independence. This amnesty covered the same categories of crime – murder, arson and rape – for which those who collaborated with the army would still face punishment. It laid a dubious legal basis, very apparent in the current trials, for “victor’s justice”: those on the right side of history would be forgiven their war crimes, whilst those who fought for a united Pakistan would always be treated as traitors.

Bangladesh was now a sovereign state, and there can be no doubt of its right to punish those of its citizens who had, under a different regime, committed crimes that were common to both, such as murder or rape. Nor can it be criticised for offering immunities or compromises or pardons under pressure of circumstances. But the implementation of the Collaboration Order in 1972-3 is relevant to the arrest of *Jamaat* members almost forty years later, pursuant to evidence which was often hearsay and accusations which could have been prosecuted – and defended – on evidence that was fresh. It would seem that at least some *Jamaat* members who are now being prosecuted were denied the opportunity of asserting their innocence at the time when they might have had the

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<sup>93</sup> Silva, above n1, p75

witnesses and the evidence to support their case. It seems to me that the Tribunal should require the prosecution to give a credible explanation, in relation to each defendant, as to why he was not arrested under the Collaboration Order, failing which their trial today, when the evidence is stale, would amount to an abuse of process. There may, of course, be reason why they were not prosecuted at the time. Ghulam Azam, for example, left the country and in due course was given refuge by the UK, while others may have remained in hiding<sup>94</sup>. But unless there is some explanation in relation to each defendant of why no action was taken in 1972/3, it would presumptively breach their right to a fair trial and be unfair and discriminatory to bring criminal proceedings against them now.

The collaborator trials were low-key: for the many million victims, retribution should have come by prosecuting the 195 army officers held in India. On April 17, 1973, the State of Bangladesh announced that it would proceed to try these men “for genocide, war crimes, crimes against humanity, breaches of Article 3 of the Geneva Convention, murder, rape and arson”.<sup>95</sup> The government’s press release explained:

*“Trials shall be held in Dhaka before a Special Tribunal, consisting of judges having the status of judges of the Supreme Court. The trials will be held in accordance with universally recognised judicial norms. Eminent international jurists will be invited to observe the trials. The accused will be offered facilities to arrange for their defence and to engage counsel of their choice, including foreign counsel.”*<sup>96</sup>

This announcement remains of importance: it was the prelude to the *International Crimes (Tribunals) Act* of July 19, 1973 under which the present defendants are being tried, before a Tribunal which is very different to the independent and impartial body, with foreign judges, observers and counsel, that was envisaged by Sheikh Mujibur. Nonetheless, although the legislation which established this tribunal promised trials that were fair according to the standards of the time, any form of foreign

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<sup>94</sup> Id

<sup>95</sup> Press release, April 17, 1973

<sup>96</sup> See Jordan J Paust & Albert P Blaustein, ‘War Crimes, Jurisdiction and Due Process: The Bangladesh Experience’, (1978) 2(1) *Vanderbilt Journal of International Law*, 1

trial of its army officers was a spectacle that Pakistan was not prepared to accept. It claimed that such a trial would be in breach of Article 118 of the Geneva Convention, although Article 119 makes clear that prisoners of war must face trial for war crimes, so long as that trial is fair. It also disputed Bangladesh's jurisdiction, because "the alleged criminal acts were committed in a part of Pakistan".<sup>97</sup> This does not prevent a successor state - or any other state - taking jurisdiction to try war crimes, genocide, or crimes against humanity. Nonetheless, Pakistan launched a legal action at the International Court of Justice in an attempt to stop the trials of its army officers, and Bhutto sneered that the Tribunal would deliver "palm tree justice" - which he threatened to emulate by putting some of the stranded Bengalis on trial for treason. There were fears that the army would again run amok if its senior officers faced justice, even international justice, and some UN members (most notably China, nervous about the prospect of retribution for its own massacres in Tibet in 1960) denounced the proposed trials as a breach of the UN Charter - which of course they were not, although the UN had turned a blind eye while international crimes were being perpetrated by Pakistan's army.

In the end, diplomacy diffused the crisis with its usual compromises and lack of attention to principle. There was a "Tripartite Conference" between India, Pakistan and Bangladesh convened in April 1974. Sheikh Mujibur spoke of reconciliation and agreed to drop his demand to put the 195 army officers on trial<sup>98</sup>. In return, he received an apology from Pakistan, which "condemned and deeply regretted any crimes that may have been committed"<sup>99</sup> and renewed a pledge to "constitute a judicial Tribunal of such character and composition as will inspire international confidence" to consider evidence of army criminality.<sup>100</sup>

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<sup>97</sup> See A. Dirk Moses, "The United Nations, Humanitarianism & Human Rights - War Crimes/Genocide Trials for Pakistani Soldiers in Bangladesh, 1971-4", in Hoffman (ed) *Human Rights in the Twentieth Century* (Cambridge University Press, 2013), p276

<sup>98</sup> Silva, above n1, p76

<sup>99</sup> Bernard Weinraub, "Pakistan Offers Apology to Bangladesh" *New York Times*, 11April 1974

<sup>100</sup> S.M. Burke, "The Post-War Diplomacy of the Indo-Pakistani War of 1971" (1973) 13*Asian Survey*, 1038

And so the Delhi deal was done, and the 195 alleged war criminals were repatriated to Pakistan, where of course they were never put on any sort of trial. Bhutto had set up an Inquiry, chaired by Chief Justice, Hammodur Rahman, into the East Pakistan military disaster, and had hinted that they might be prosecuted on its recommendations, but he had no intention of following through and in any event he was afraid to challenge the army, beyond retiring some of the officer responsible for the defeat. He received the Judicial Commission's report – which was so devastating that he dared not publish it - and actually promoted Tikka Khan who had been responsible for “Operation Searchlight”. Bhutto needed the army to maintain internal order, and it did not object when he secured the release of its officers in return for recognising Bangladesh.

Bhutto made the mistake, on Tikka Khan's retirement in 1976, of appointing a seeming yes-man, General Zia-ul-Haq, as Chief of Army Staff, who soon took the opportunity to seize power and put Bhutto himself on trial for conspiracy to murder a rival politician. The trial was a travesty, and four cowardly judges (three dissented) in the Supreme Court confirmed the death sentence. The petitions for mercy from the world's political leaders were hastily dismissed, so that Bhutto could be rushed to the gallows. It would be ironic if this indelible stain on Pakistani justice – execution of a political opponent after an unfair trial despite mercy pleas from world leaders - should now be replicated in the nation that succeeded in liberating itself from Pakistan.

By forgoing the war-crimes trial planned for the Pakistani prisoners, Sheikh Mujibur achieved recognition for Bangladesh and a seat at the UN, but he was careful not to repeal the 1973 *International Crimes (Tribunal) Act (ICTA)*. It was still in force when he and his family were assassinated by a group of army officers with links to Islamists, who went on to murder four top Awami league leaders (Mujibur's daughter, Hasina, now Prime Minister, was abroad).<sup>101</sup> The new (and guilty) military government did repeal the *Collaborator's Order*<sup>102</sup>, and then passed the

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<sup>101</sup> Silva, above n1, p77

<sup>102</sup> Id

disgraceful “*Indemnity Act*” giving everyone involved in the President’s assassination immunity from legal action. Surprisingly, and probably by oversight, the ICTA was not repealed.

Notwithstanding the agreements between India and Pakistan in 1972-3, and the Delhi Tripartite Agreement in 1974, and the devious dealings after Mujibur was killed, I can find no evidence in these events that any amnesty binding in law was offered or granted for crimes against humanity committed during the civil war. There were many declarations of goodwill on both sides, and promises to forgive and even forget, but there is no declaration that would constitute a legal amnesty. Although the Tripartite Agreement made in Delhi in 1974 is often described as an “amnesty”, at least for the Pakistani suspects, it is no such thing. It has been described by historians as “implicitly recognising” that none of the 195 “would ever be tried or held accountable,” but any binding amnesty must be clearly expressed and not merely “implicit”.<sup>103</sup> True it is that Bangladesh agreed to abandon its demand for the 195 prisoners in Indian custody, but it did not thereby abandon the idea of putting them, or others, on trial at some time in the future. There can, in any case, be no amnesty for an international crime like genocide. The deal in Delhi was not a bar to prosecutions, however many years later, under ICTA.

The bad and sad story of the new nation of Bangladesh was taken up again with Mujibur’s assassination. He had become increasingly autocratic and in 1975 banned all political parties<sup>104</sup>. His assassination in August of that year did not presage a return to democracy, but (after a series of coups and counter-coups) the emergence of a military ruler, General Ziaur Rahman. He not only repealed the *Collaborator’s Order*, but he put a number of those released following the amnesty in high government positions<sup>105</sup>. The best-known *Jamaat* leader, Ghulam Azam, was permitted to return to Bangladesh to resume work with the *Jamaat*. The military regime renounced the secularism of the Awami League and declared the country an Islamic Republic. General Rahman was assassinated in 1981, but the conservative forces he represented and the party he established,

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<sup>103</sup>*Lennox Phillip v Attorney General of Trinidad and Tobago* [2009] UKPC 18

<sup>104</sup> Silva, above n1, p76

<sup>105</sup> Id

the Bangladesh National Party (BNP), was later led by his widow, Begum Khaleda Zia<sup>106</sup>. Democracy was not restored until 1991, and in the intervening years the nation's politics divided between the Awami League (now led by Mujibur's daughter Sheikh Hasina) and the BNP under Rahman's widow – a bitter rivalry which endures today. The *Jamaat* joined neither grouping, although its political (and theological) affinity was with the BNP. At the 1991 elections, the Awami League, much to its surprise, was beaten by the BNP, and made overtures to the *Jamaat*<sup>107</sup> – a number of defendants have spoken volubly at the trials about the warmth of their relationship with Sheikh Hasina and her advisers at this time. This was, of course, a strategy by the League to court more popularity by moving to the right, which paid off at the 1996 elections when they were restored to power<sup>108</sup>.

Democracy brought in to the open a deep popular desire to punish the war criminals, and a civil society movement with the all-embracing title of the “National Committee for the Realisation of the Bangladesh Liberation War Ideals and Trials of Bangladeshi War Criminals of 1971” had begun to agitate as soon as military rule ended. It set up a “Peoples’ Court” which symbolically indicted Ghulam Azam, the *Jamaat* chief and by then a powerful politician. There was also at this time a “People’s Inquiry Commission” which investigated war crimes – one member of its Secretariat, Mohamed Nizamul Huq, later became presiding judge of the ICT, and would be presented with the Report to which he had contributed, as a prosecution exhibit.<sup>109</sup>

When Sheikh Hasina became Prime Minister in 1996 she advocated trials<sup>110</sup>, but gave priority to indicting the Bangladeshi army officers who had assassinated her father. Their trials were still underway when she was voted out of office in 2001, and her government was replaced by the BNP, now in coalition with the *Jamaat* and led by Begum Khaleda Zia, who ended the trials of the assassins and released the accused. Sheik Hasina and the Awami League were returned to power

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<sup>106</sup> Ibid, p77

<sup>107</sup> A. Riaz, *Islamist Militancy in Bangladesh*,(New York, 2008), p19

<sup>108</sup>Ibid, p20

<sup>109</sup> The Peoples Inquiry Commission Report was published in 2005 by the Ghatak Dalal Nirmul Committee.

<sup>110</sup> Silva, above n1, p63

in 2009, on a platform which included a commitment to trying war criminals<sup>111</sup>, and with a rhetoric which insinuated that BNP figures (and the BNP was in a coalition with the *Jamaat*) might well be implicated.

The BNP government, 2001-2006, had been a coalition with the *Jamaat*, and two *Jamaat* MPs (Nizami and Mojaheed) served as Cabinet Ministers. There was no doubt that it was a thorn in the Awami League's flesh: as one commentator has observed, "Since the democratic era began in 1991, the *Jamaat-e-Islami* has played a significant role either in helping political parties assume office or in bringing them down"<sup>112</sup>. Its importance was highlighted by an Awami League campaign against it after the attack on the US on 9/11: they were accused, without evidence, of being linked to Al Qaeda and intending to turn Bangladesh into "a hot-bed of Taliban-infested Islamic Military"<sup>113</sup>. There was some Islamic terrorism in this period, but the *Jamaat* was never connected to it. The attempts to defame it have given some credence to the claim that the trials were re-launched by the Awami League to destroy a party which could not defeat it but, through alliance with the BNP, could bring it down. However, it is right to point out that the current trials followed a 2008 report from a respected research body, the War Crimes Facts Finding Committee, which issued a list of 1,597 persons suspected of 1971 atrocities, including a number of senior politicians from the *Jamaat* and the BNP<sup>114</sup>. So the Awami League promise in its "Charter for Change" election manifesto did not have the objective of eliminating the opposition: there was a genuine desire for justice, and there were grounds to investigate some of the *Jamaat* leaders. The pledge to try war criminals was certainly popular: the Awami League won 229 of the 300 seats in the national Parliament, and in 2009 formed a new government.

The rivalry between the Sheikh and the Begum is virtually pathological, and is reflected in national politics – the Awami League government has fourteen coalition partners, all committed to the trials,

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<sup>111</sup> Human Rights Watch, 'Ignoring Executions and Torture' May 2009 P17

<sup>112</sup> Riaz, above n100, p33

<sup>113</sup> Kabir, above n11, p187

<sup>114</sup> Human Rights Watch: above n3, p11

while the BNP opposition, with nineteen parties including the *Jamaat*, is totally opposed, arguing that they are politically motivated (all defendants are connected to the BNP or *Jamaat*) and are procedurally unfair. The political opposition do not behave like a normal democratic opposition – it boycotts parliament and makes it case through strikes and demonstrations – and in 2013, 259 demonstrators were killed in clashes between the two parties, mainly over the “war criminal” trials. There was a speed-up in the trials towards the end of 2013 and there was a hasty amendment of the ICTA that permitted the execution of *Molla* in December, shortly before the January 2014 election. This has been interpreted as a bid for electoral popularity by the Awami League, although it need not have worried – the BNP (and the *Jamaat*) boycotted the elections, and the Awami League took 234 seats, half of them by default, in circumstances that have been widely criticised by the international community, giving them the two-thirds majority necessary to push through changes to the Constitution. There can be no doubt that prosecuting the war criminals is a popular platform for the Awami coalition, although it has turned into a demand to kill the “war criminals”, which is a different matter.

## CHAPTER 5 - THE INTERNATIONAL CRIMES (TRIBUNALS) ACT 1973 – 40 YEARS ON

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In 2009, the first parliamentary session of Sheikh Hasina’s new Awami League coalition government resolved to establish a court to try “war criminals” - those responsible for crimes committed during the 1971 War of Liberation - and it tasked the Bangladesh Law Commission with reviewing the legislation put in place by Sheikh Mujib in 1973, *The International Crimes (Tribunal) Act* (ICTA). This was a mistake, because that law was an anachronism, a well-meaning but now out-dated prototype for post-Nuremberg war crimes court, which had by 2009 been superseded by the constitutions of international tribunals which reflected modern human rights standards – e.g. the courts for former Yugoslavia (1993), Rwanda (1994) and Sierra Leone (2002) and the International Criminal Court (2002). These bodies have modern rules of evidence and provisions to ensure that defendants are properly represented, that there is scope for objecting to judges who are partial or lack independence; special units to protect witnesses, a defence office to counteract the power of the prosecution, and so forth. These were little heard of in 1973, and the Bangladeshi Law Commission did not fully understand what international standards of fairness required and it failed to recommend amendments to accommodate them. The whole exercise was damaged by the government’s underfunding – it allocated only \$1.4 million to deliver “international standard” justice.<sup>115</sup>

That is not to say that the 1973 law was bad. It was something of a wonder of its time – the first legislation devised to deliver on the legacy of Nuremberg. ICTA was in part the work of Niall MacDermott Q.C., a barrister who had been Minister of State at the British Home Office, and had moved on to work in Geneva as the widely respected Secretary General of the International Commission of Jurists. He had produced what is still the most comprehensive report on human

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<sup>115</sup> C Reiger, ‘Fighting Past Impunity in Bangladesh: A National Tribunal for the Crimes of 1971’ *International Center for Transitional Justice* (2010), p4

rights violations during the war, published in June 1972<sup>116</sup>, and had been asked to advise on the Act (although his advice was not always taken in its drafting). The Awami League in 2009 was no doubt proud of Sheikh Mujibur's old law, which had survived the military regimes and provided in 2009 a symbolic link with his "liberation" regime. But what the government – and the Law Commission – overlooked was its 1973 context. It had been devised to prosecute and punish 195 Pakistani army officers, held in custody in India, which was ready to send them for trial in Dhaka. For that reason, the Act adopted definitions (now out of date) of international crimes that had been charged against Nazi generals at Nuremberg, and had a jurisdiction limited to "any member of an armed, defence or auxiliary force" (s3(1)) – i.e. any officer or soldier of the Pakistani army, although whether the Razakars, for example, would count as an "auxiliary force" might be open to argument.

It must be remembered that in 1973, those who had fought with the Razakars or Biharis or other local squads supporting the army, were being prosecuted under the *Collaborator's Order*, before courts which applied local criminal laws for murder, arson and rape. In 2009, in respect of *Jamaat* members and others who had escaped arrest as collaborators in 1972/3, the government could simply have had them prosecuted in civilian courts for murder, rape and arson. The proper alternative was to set up a modern international court (preferably on the "hybrid" lines of the Sierra Leone War Crimes Court, with UN judges sitting alongside local judges). In that case the court could have received financial and resource assistance from the UN, and there would have been international support for the arrest of former officers of the Pakistani army who were still alive and had been implicated in war crimes. Why was this proper course rejected? Because, so I understand, the Awami League leaders appreciated that a genuine international court would not (because it could not) impose the death penalty.

The Law Commission recommended some amendments to the 1973 Act, but mainly to widen its scope: jurisdiction was extended to "any individual or group of individuals" the prosecutor might

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<sup>116</sup> ICJ, above n66

wish to charge, so it no longer applied only to “auxiliaries” of the Pakistani army. The most outdated aspect of the 1973 law was, however, retained, namely the removal of all of the constitutional protections for basic human rights – to speedy trial; to independent judges; to be tried under laws that are not retrospective; even to the right of appeal to the Supreme Court if those rights or any other of those rights were violated. It may have been acceptable in 1973 to remove Bangladeshi citizen protections from prisoners of war who were not Bangladeshi citizens but were nonetheless protected by the Geneva Conventions, but it was oppressive to remove them from fellow citizens of Bangladesh who were to be tried and hanged if convicted. Most damagingly, the government kept the wording of s.20(2): “*Upon conviction of an accused person, the Tribunal shall award sentence of death or such other punishment...*”. The sentence of death, acceptable in most countries in 1973, had ceased to be so by 2009, and had been removed from the power of international courts, but Awami League leaders had a visceral wish to execute the leaders of those who had sided with the army forty years before. Its supporters – those who came out in their tens of thousands in 2013 to demand Molla’s execution – were led to expect executions.

The 1973 Act has other sections that read uncomfortably today, because they presage unfair trials. Section 10A, for example, permits trial *in absentia*. This is anathema to British law, inherited both in statute and common law by Bangladesh, although it is available in some European and Arab nations (France and Jordan, for example) and in the international court dealing with the Harari assassination in Lebanon. But in such courts, and under international human rights rules, a trial is only permissible if, once the defendant convicted in his absence turns up, he can be tried again in his presence – the *in absentia* verdict will not count against him. Section 10A has no such provision. A final verdict and sentence can be imposed if the Tribunal is satisfied that the accused has “absconded or concealed himself” or, as its first such trial showed, has gone abroad and decided not to return to face Awami League justice. Thus Ashrafuzzaman Khan and Chowdury Mueen Uddin, (allegedly heads of *Al Badr*) had fled abroad, to New York and London after the war. The government announced it would apply for their extradition, which was the correct procedure, but it failed to do so, perhaps because its evidence was insufficient to show a *prima facie* case. Instead, after a peremptory advertisement in a local (not an international) newspaper to which they did not

respond, the Tribunal convicted them *in absentia* and ordered their execution. Should they return at any time in the future, the Tribunal could issue their death warrant and have them immediately marched to the gallows.

There is no provision for international judges, as Sheikh Mujibur promised in 1973 – only those who belong to, or are qualified for, the Supreme Court of Bangladesh are permitted to sit<sup>117</sup> and there is no provision for independent foreign observers, as promised back in 1973. The Awami League government, whose Ministers have fiercely attacked the defendants, picks the judges who will try them. There is a curious provision, much abused in this Tribunal, which allows the government to replace a judge who resigns or is relocated at any stage of the trial. The replacement judge need not hear any of the evidence, and could even come in at the stage of closing speeches in order to vote for the verdict – which actually happened in the *Nizami* case. This is the wrong way to deal with the need to replace a judge who falls ill or resigns in the course of a long trial: the only acceptable measure is to appoint a substitute judge who will sit with the panel and so will have heard all the evidence if he is called upon to replace a colleague. The number of judicial replacements in this Tribunal has been a cause for serious concern, and verdicts have been rendered by judges who have not heard the evidence and cannot be expected to understand it from incomplete transcripts.

There are other provisions of the 1973 Act, as amended, that extinguish or remove fair trial rights. Most notably, as already mentioned, under Article 47A it excludes the constitutional protections available to all Bangladeshi citizens. These include the fundamental right to protection of law (Article 31), the right not to suffer conviction or sentence retrospectively (Article 35(1)), the right to a speedy and public trial (Article 35(3)); and the right to bring actions in the High Court for *habeus corpus* or to seek redress for any violation of the aforesaid rights (Article 44). The Constitution itself had been amended in 1973 to remove this right from the potential Pakistani army defendants (i.e. from members of “Any armed or defence or auxiliary forces”) and it was further amended in 2011

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<sup>117</sup> ICTA, s6(2)

to remove the right to constitutional redress from “any individuals, group of individuals, or organisation” charged with genocide or crimes against humanity or war crimes. Of course, the more serious the crime the more important it is to have a constitutional remedy against violation of a citizen’s fundamental rights to a fair trial, and all the more so when defendants are not members of a foreign army but citizens of the state that is denying them the protection of their own constitution.

There are other aspects of the ICTA, as amended, which conduce to unfairness. Section 8(5), for example, forces suspects to answer police questions without lawyers present and removes a right against self-incrimination (although the answer cannot be used in evidence, it can be used by the police.). There is no provision for adequate time and facilities to prepare a defence - the prosecutor is only obliged to produce witness statements and disclose evidence three weeks before the start of the trial (Section 9(3)) – a minimum period, which has become routine in the case of all defendants and is obviously inadequate for preparation to defend wide-ranging allegations of the commission of atrocities so many years ago. What makes the procedure so unfair is that the defence is required to state its case and list its witnesses on the first day of the trial, only three weeks after receiving the prosecution’s evidence. The Tribunal “may at any stage of the trial without previously warning the accused person, put such questions to him as the Tribunal considers necessary” (s11(2))– a provision, in effect, that allows trial by ambush. Even if the accused is not bound to answer, his failure to do so will allow the Tribunal to draw an inference that he is guilty.

So far as the rules of evidence are concerned, the ICTA Tribunal (referred to in short as the ICT or simply as “the Tribunal”) is unique in having none. Section 19 provides that it “shall not be bound by technical rules of evidence... (it) may admit any evidence, including reports and photographs published in newspaper periodicals and magazines... which it deems to have probative value”. This is the kind of provision that appeared in the initial Guantanamo Bay Commissions set up by the Bush administration, which were so derided for unfairness that they were eventually replaced. As if to emphasise the distinction between trials before the Tribunal and

the fairness of proceedings in the local criminal courts, section 23 of the Act excludes the operation of both the *Bangladeshi Evidence Act* and the *Criminal Procedure Act* – the rules of evidence and procedure before the Tribunal are entirely of its own devising. As will become apparent, some of the convictions thus far have been secured on hearsay evidence, which needs careful treatment if miscarriages of justice are to be avoided. Hearsay evidence – some statement or report which cannot be subjected to cross-examination (e.g. a newspaper report where the journalist is unavailable for questioning) should be given very little weight unless it is confirmed (i.e. “corroborated”) by other reports from demonstrably reliable sources. In international tribunals ‘hearsay’ is not *per se* inadmissible, but there are strict rules governing its use and the credibility that should attach to it. In this Tribunal, the prosecution relies on hearsay all the time, proving ‘facts’ stated in books and newspapers without calling the authors, and sometimes without corroborative or circumstantial evidence and without examining the reliability of the source. The result is that convictions can be based on *guilt by association*: findings of genocide or war crimes are made on the basis of newspaper reports or local gossip that a defendant was associating with an army battalion committing war crimes, without any direct evidence that he was actually participating in them. This allows the Tribunal to convict after dismissing his defence of alibi (and it is usually difficult to prove an alibi after forty years).

Critics of the Tribunal, academics and NGO’s in particular, have pointed out the inadequacy of its 1973 statute, and of the rules of evidence and procedure which it has decided to adopt,<sup>118</sup> but it must be emphasised that the 2009 amendments included section 6(2)(A):

“The Tribunal shall be independent in its judicial functions and shall ensure fair trial”.

This provision is the Tribunal’s saving grace, at least on paper. For all the inadequacy and unfairness of its statute, independent judges are still left with enough discretion to ensure the overriding objective of fair trial. It is necessary, therefore, to examine each of the ten trials that have so far

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<sup>118</sup> See, for example, ‘Letter to the Bangladesh Prime Minister regarding the International Crimes (Tribunals) Act’ *Human Rights Watch*, 18 May 2011

taken place, all of them resulting in convictions returned in 2013-14, to see whether the judges have in practice behaved consistently with the fundamental rules in s6(2)(A).

The Tribunal commenced its work on 25 March 2010 – and it was not a coincidence that this date was the anniversary of “Operation Searchlight”. The government appointed Justice Mohamed Nizamul Huq as chairman – a mistake, as he had been a member of the secretariat of the “Peoples Inquiry Commission” and so left him open to claims that he lacked impartiality. These duly came, from the Sayadee defence team, who sought Justice Huq’s recusal on the grounds of perceived bias. On 14 November 2011 the Court (the other judges were ATM Fazle Kabir and AKM Zahir Ahmed) ruled, astonishingly, that it had no power to entertain the application, because there was no recusal provision in the 1973 law. I say “astonishingly” because every judge, and every court, has an inherent power of recusal if a judge is likely to be biased. This is fundamental British common law, inherited by Bangladesh.

The defendant was denied his constitutional right to appeal the decision, but it should never have been made. Section 6(2)(A) of the Act guarantees a fair trial and the Tribunal would fail in its duty if it did not investigate and rule, on the merits, as to whether there was actual or perceptual bias. By pretending (and it was a pretence) that they did not have the power to even consider the application, these judges were claiming they did not have an inherent power which, as experienced lawyers, they should have known was within their remit. The government had appointed Justice Huq – a poor beginning for a court that relied so much on its members being perceived as having no propensity to pre-judge guilt.

A second tribunal – ICT 2 – was established on 25 March 2012 (note the obsessive symbolism of this date) and although the Tribunal issued its first arrest warrants – against Abdul Quader Molla and two other *Jamaat* leaders - in July 2010, their cases were transferred to the ICT 2 in April 2012. They had been held in custody for over a year under the Penal Code, and the UN’s Working Group on Arbitrary Detention had already found that their continued detention without charge and without any sensible ground to deny them bail was a breach of Article 9 both of the Universal Declaration and of the International Covenant on Civil and Political Rights, to which Bangladesh

was a signatory.<sup>119</sup> They could and should have been prosecuted for murder – that was the gist of the evidence against them, and there was no need to elevate their cases into an international crime. But for symbolic reasons, or simply because the prosecutor could not be confident of a conviction if they were accorded their rights under the Constitution, they were the first citizens of the country to be put on trial without those protections. They had, under Section 6 of the Tribunal’s Act, a general right to be tried fairly before independent and impartial judges, but the judges of this Tribunal refused even to hear an application that one of their number was biased.

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<sup>119</sup> UN Working Group on Arbitrary Detention, Opinion No 66/2011 (Bangladesh), 23 November 2011



## CHAPTER 6 – IMPARTIALITY: THE MASK SLIPS

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There could be no citizen judge in Bangladesh left unaffected by the trauma of the civil war in 1971. Their families and probably their own youth would have been blighted by it and the government's refusal of offers from the UN and other countries to provide some international jurists meant they would have to put aside righteous anger at the behaviour of the Pakistan army's collaborators. Judges are trained to do that, but with difficulty when political and patriotic passions run deep. It was a mistake for the Tribunal to pretend that it had no power of recusal. Judge Huq should at very least have undertaken not to sit as Chairman on any Tribunal considering the case of a person he had investigated when he worked for the "Peoples Inquiry Commission". But he did not, and revelations about his behind-the-scenes conduct rocked the Tribunal in December 2012 and forced his resignation. They showed the extent to which it had become a tool of a government determined to get convictions, and to get one conviction by December 16 – the "Victory Day" commemoration of the surrender of the Pakistani army in 1971.

The revelations, published by *Amar Desh*, a local news agency, and then by *The Economist* were transcripts of seventeen hours of Skype recordings and two hundred and thirty emails between Justice Huq and the prosecution, government Ministers and most significantly, Dr Ahmed Ziauddin, Professor of Law in Brussels and head of the Bangladesh Centre for Genocide Studies. He was an old and close friend of Huq: the two had campaigned for decades to bring the 1971 perpetrators to justice. These newspapers published the "leaks" which revealed that in the course of the trial of Delwar Hossein Sayeedi, leader of the *Jamaat*:

- Dr Ziauddin, an outsider with links to the prosecution, secretly drafted key documents for the court – notably the decision rejecting Sayeedi's application to recuse Huq, and had prepared the final draft of indictment charges.
- Huq confided his embarrassment that one of the Tribunal's judges was bent on applying international fair trial standards, and received Ziauddin's advice that he should be sacked:

*“Huq: I am a bit afraid about Shabinur (Shabinur Islam, a Tribunal judge). Because he is too inclined to the international standard. It... was in my mind and prosecutors also complained to me – that he brought in references to foreign tribunals every day.*

*Ziauddin: He has to be stopped from doing that or he has to be removed...If he does not stop he has to go...because it is too harmful to us”.*

- Ziauddin was serving as an expert adviser to the prosecution, and copying his advice to the judge. He may also have been coaching a prosecution witness, “supplying (her) with relevant information” as he told Huq.
- Huq admitted to Ziauddin that he was under government pressure to bring down a conviction by “Victory Day”. “They (the government) want a judgement by 16 December ...it’s as simple as that”. Huq tells his friend that a government member “came to visit me... He asked me to pass this verdict fast. I told him “how can I do that?”. He said “Try as quick as you can”.
- Ziauddin appears to have collaborated with Huq on an early draft of the judgement in the Sayeedi case – there is evidence that he prepared a framework decision while the defence case was still going on, with the final headings: CONVICTION/BASIS and SENTENCE.<sup>120</sup>

The authenticity of this cache of private documents, evidently leaked by a “whistleblower”, has not been denied. Their interpretation should obviously be a matter for a proper inquiry, which the government has refused to establish, perhaps because it might confirm its own attempts to put pressure on the Court. The conversations appear open to question: it is all very well for a judge to discuss the law with an expert who is a friend, but he should not engage closely with a prosecution expert. The government’s law Minister excused Huq by saying “he sought help on procedural

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<sup>120</sup> See “Trying War Crimes in Bangladesh” – *The Economist*, 15 December 2012.

matters from an expert. That's not illegal or uncommon"<sup>121</sup>. However that may be, it is certainly uncommon for a judge to seek help (or allow it to be given) secretly without telling the defence, and through collusion with a prosecution expert, and to discuss, the need for "us" to sack a judge who is inconveniently trying to be fair. The reasonable observer would perceive bias, and appeal courts in most commonwealth countries would be likely to quash any conviction handed down by Judge Huq if it were proved that he had engaged in such if it were proved that he had participated in discussions about the case with members of government or persons involved with the prosecution.

What gives the exposure a particularly unattractive aspect is the way in which the court and the government colluded in reprisals against *The Economist* and *Amar Desh*. There were attempts to injunct publication. *The Economist* was summoned for contempt of court and *Amar Desh* was ordered to stop publishing and its editor was charged with sedition. All they were doing was revealing, in the public interest, evidence that the government was improperly trying to pressure the Tribunal Chairman, who was himself in close communication with a prosecution expert and was worried about a judge who was trying to apply international standards of fairness. The Tribunal does have power under s11(4) to punish those who bring it into "hatred or contempt" or who commit the obsolete crime of "scandalising the court" which has been abolished in the UK and the U.S. and has been limited in other Commonwealth countries by the recent Privy Council decision in *Dhoobarika v DPP of Mauritius*.<sup>122</sup> But in this case, it was the Tribunal that brought itself into contempt by its witch-hunt against the newspapers which exposed its chairman. This over-reaction was a sign of extreme nervousness at being found wanting. The Tribunal has also overreached in bringing contempt charges against Human Rights Watch for honest and objective reports of its flaws. The Tribunal itself frames and brings these charges, which is obviously wrong (they should be brought, if at all, by an independent prosecuting authority) and are couched in bombast – Human Rights Watch is accused of making "biased, baseless, utterly false, fabricated

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<sup>121</sup> 'Bangladesh War Crimes Tribunal Faces Turmoil' *Wall Street Journal*, 13 December 2012

<sup>122</sup> *Dhoobarika v DPP of Mauritius* [2014] UKPC 11

and ill-motivated allegations”.<sup>123</sup> In 2014 the Tribunal initiated another prosecution against a reporter for posting allegedly derogatory and disparaging comments about its work and against a television station over critical comments made by interviewees.<sup>124</sup>

The Tribunal’s misuse of its s14(3) power is a breach of the free speech guarantee in Article 39(2)(a) and (b) of the Constitution. To proceed against *The Economist*, for an article that was scrupulously fair (it had contacted Justice Huq and had quotes from Professor Ziauddin, explaining that he was only trying to help an under-resourced Tribunal) was manifestly a violation of free speech, even though its editor was merely convicted of *lèse-majesté* (it was ruled to be a contempt for any reporter to try to contact a judge by telephone, if only to ask about the authenticity of his emails). Justice Huq’s replacement as Chair, Judge A.T.M. Fazle Kabir, and his colleagues also ruled that:

“Both press and electronic media should restrain themselves in circulating an ordinary news as a big sensational news about the court proceedings”.<sup>125</sup>

Whatever this may mean, it did not bode well for the future objective coverage of the Tribunal, and by 2014 the judges have become even more thin-skinned and protective of nationalist assumptions. This is demonstrated by their contempt proceedings against David Bergman, an experienced journalist whose work (notably an award-winning Channel 4 film “War Crimes File”) has helped to draw international attention to the need for justice in respect of the 1971 atrocities, and whose blog has provided reliable information about the course of the trials.<sup>126</sup> He was indicted, simply for questioning whether as many as three million civilians were killed in 1971.<sup>127</sup> This figure has become a government shibboleth, but is probably exaggerated, like most estimates of war deaths made in the absence of sound demographic evidence. The original source of the 3 million figure appears to have been a report in *Pravda*, which at the time was providing propaganda support

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<sup>123</sup> ‘Bangladesh prosecutors accuse US rights group of contempt’ *AFP*, 20 August 2013

<sup>124</sup> See ‘Manna, Zafrullah, Mahfuzullah and Channel 24 face contempt charges’, *BDINN*, 24 September 2013

<sup>125</sup> *State v Adam Roberts and anor*, ICT – BD Misc. Case No 17 of 2012, 29 December 2013

<sup>126</sup> See generally, <http://bangladeshwarcrimes.blogspot.co.uk/>

<sup>127</sup>For the post, see <http://bangladeshwarcrimes.blogspot.co.uk/2011/11/sayedec-indictment-analysis-1971-death.html>

for the Indian government (which has put the death toll at about one million). Most, if not all, independent studies challenge the 3 million estimate,<sup>128</sup> although the likelihood is that there were at least a million casualties, not all of them were victims of the army and its associates. But even to question the official mantra that three million died was considered to be a crime. “Why did he create this controversy?” “Why did he write about this issue at this time?” were questions put to Bergman’s counsel by the judges who, when they convicted him in December 2014, showed themselves ignorant of the fundamental rule of free speech which permits questioning of any historical “fact” if done without intent to stir up racial hatred.

Merely for questioning the ‘official’ death toll of three million, the Tribunal judges ruled that Bergman had “hurt the feelings of the nation” and wrongly accused him of having “neither good faith nor an issue of public interest”.<sup>129</sup> This finding, in respect of a journalist of good repute writing on an obvious matter of historic interest, whose calculations are supported by most independent studies, does raise questions about the ability of these judges to make accurate findings of fact when “national honour” is perceived to be at stake. The presiding judge, Obeidal Hassan, went so far as to claim that Bergman “has a perverse mindset about the 1971 war. Let the government carefully scan the matter”. This is language which betrays the court’s closeness to government. It should not be heard from any judiciary bound, under its common law, to suffer the scrutiny of honest critics.<sup>130</sup> It is fair to say that Bergman was only fined the equivalent of £41, but the case reveals a defensiveness on the part of a Tribunal that cannot abide criticism. It does not, of course, matter whether the casualties were 500,000 or three million – that these judges think it matters sufficiently to convict a respected journalist of a crime for challenging, like other experts, the three million figure, shows their own lack of judgment.

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<sup>128</sup> The various estimates of scholars of the genocide are most recently set out by Bass in “*The Blood Telegram*” (above) p 350-1, footnote 6. He too describes the 3 million figure as “inflated”.

<sup>129</sup> See *The Guardian*, 2 December 2014, “Bangladesh court convicts British journalist for doubting war death toll”.

<sup>130</sup> Because “Justice is not a cloistered virtue”. See Lord Atkin in *Amard v A.G. for Trinidad & Tobago*, (1936) A.C. 322 at 335.

Bergman's indictment on a second charge of contempt, for criticizing the Tribunal's defence of trials *in absentia*, provides another example of injudiciousness. The judges had defended the holding *in absentia* of Abul Kalam Azad's trial on the ground that the Lebanon Tribunal and certain European countries also permitted such trials. Bergman pointed out, quite rightly, that this was misleading, because in those courts the absent defendant, when captured or voluntarily returning, was entitled to have the verdict put aside and to be tried in his presence – a right which was not vouchsafed by the ICTA.<sup>131</sup> To be indicted for criminal contempt for pointing out factual errors in its decision is Kafka-esque, and provides a further example of the Tribunal's over-sensitivity to justified criticism.

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<sup>131</sup> For these posts, see <http://bangladeshwarcrimes.blogspot.co.uk/2013/01/azad-judgement-analysis-1-in-absentia.html>, and <http://bangladeshwarcrimes.blogspot.co.uk/2013/01/azad-judgment-analysis-2-tribunal.html>



## CHAPTER 7 – DEATH SENTENCES: THE FATAL FLAW

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The 1973 Act provided for the penalty of death for any member of “any armed, defence or auxiliary forces” (i.e. of the Pakistani army) convicted of genocide, war crimes or crimes against humanity, under Section 20(2), *viz*

“Upon conviction of an accused person, the tribunal shall award sentence of death, or such other punishment proportionate to the gravity of the crime as appears to the Tribunal to be just and proper”.

On the generally accepted basis that the worst punishment is reserved for the worst offenders, this was clearly aimed at the senior army officers who devised and implemented “Operation Searchlight” and who gave orders, at the end of the war, for extermination of intellectuals and community leaders. When the Act was re-activated in 2009, for use against those who had assisted the Pakistani army, their guilt, although heavy, was clearly of a lesser order. International law bodies and NGO’s, including those strongly supportive of the trials, pleaded with the government to abjure the death penalty<sup>132</sup>. Had it done so, it would have received considerable assistance (including UN financial assistance) in establishing the court. But it refused all offers, evincing a determination that the *Jamaat* leaders – its political enemies – should hang if convicted of assisting the army’s atrocities. The Prime Minister made clear that there would be no investigation of, or retribution for, the atrocities committed by the “heroes of the revolution”, the freedom fighters of the *Mukti Bahini* who had been involved in massacres of the Biharis.

The issue of the death penalty, and the political manipulation of the 1973 Act, came to the crunch in the case of *Abdul Quader Molla*, the first (and, so far, the only) defendant to be executed. He had actually been spared the death penalty by the Tribunal, which on 5 February 2013 convicted him of a number of crimes against humanity and jailed him for life. This meant, as the law (s21 of

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<sup>132</sup> See Human Rights Watch, above n110; ICTJ, above n107, ‘Bangladesh: Death penalty in war crimes tribunal “extremely regrettable”’, *Amnesty International*, 17 July 2013

ICTA) then stood, that his life was safe: the prosecution had no right of appeal against sentence. It was a longstanding tradition in British and colonial law that the prosecution should not be involved in sentencing issues, and rightly or wrongly, the law on the issue as of 5 February 2013 was crystal clear: the prosecution had no right of appeal. But supporters of the Awami League felt cheated of the punishment they expected (and had been led by the government to expect) and they turned out in their tens of thousands in Shabagh Square in the days after the sentence, to demand that Molla be put to death. On 14 February Parliament hurriedly introduced an amendment to allow the prosecution to appeal, and passed it three days later, backdated to July 2009. The Prime Minister declared in parliament that the judges should “understand the sentiment of the people”<sup>133</sup> and the prosecution immediately used this new power to lodge an appeal at the Supreme Court. At the end of this appeal hearing on 17 September, the court announced that the sentence of death would replace the life sentence on one of the counts, and on 5 December it delivered a 790 page judgement which included its reasons, which made specific reference to the sentiments of the people. This was forwarded to the Tribunal on 8 December, which duly issued the death warrant and despatched it to the Central Dhaka jail, where Molla was in the death cell. He was strung up on the prison gallows on December 12<sup>th</sup>. Although Article 49 of the Constitution gives the President the power to grant pardons or commutations, there was no prayer for mercy made by the defendant in the short time allowed before his execution.

The bare recital of these facts demonstrates how the Tribunal’s independence is vulnerable to popular pressure and to a government which seeks to exploit that pressure (in this case, there was an election coming up in January 2014 and no less than four of the prosecutors were Awami League candidates). Instead of defending the Tribunal’s right to decide on the appropriate sentence, the government bent to the demands of the crowd (demands that it stirred up in the first place) and passed what can literally be described as a lynch law, retrospectively depriving the convict of a legitimate expectation that his sentence would not be increased. It did so in barefaced defiance of

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<sup>133</sup> ‘A travesty of justice in Bangladesh’, *Asia Times Online*, 20 September 2013

the rule (in ICCPR Article 14(5)) that every death sentence must be capable of appeal: from the death sentence imposed for the first time by the Supreme Court, there was no appeal.

Many human rights organisations claimed that this was in breach of Article 15(1) of the ICCPR, which reads “Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed” but this criticism is mistaken – the death penalty was not imposed retrospectively, because it was available to the Tribunal as a punishment at the time of Molla’s trial. The Supreme Court was right to reject this ground of appeal. What it did not appreciate was that Molla had a legitimate expectation, at the time of his sentencing, that his punishment would not be increased as the result of any prosecution appeal which was not permitted at that point, and this expectation should have been honoured by the Court by permanently staying the death warrant.<sup>134</sup> This result has nothing to do with international law or standards – ‘legitimate expectation’ is a fundamental feature of administrative law in Britain and in Bangladesh, and the Supreme Court justices (who are competent enough lawyers) should have been alive to this basic principle.

As far as international standards are concerned – and there is no evidence that the Bangladeshi government is concerned about them - there are two principles that were breached by Molla’s execution. The first is that a death sentence should not be carried out unless there is a right of appeal against that specific sentence.<sup>135</sup> The government, by rushing through the amendment providing for a prosecution appeal, achieved in Molla’s case a situation where the death penalty was for the first time imposed by the Supreme Court, in a decision from which there could be no appeal. The Court itself should have taken this into account as a reason not to substitute the death penalty. It was in clear breach of the ICCPR 14(5) and of the Economic and Social Council’s 1984 “minimum safeguards” for imposing a death penalty, namely that “anyone sentenced to death shall

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<sup>134</sup> Counsel for Molla argued that there being no provision for appeal by the State against the life sentence, the matter had reached its finality and that Molla’s rights (as accrued to him on the date of the verdict) could not be taken away by Parliament through retrospective legislation.

<sup>135</sup> Human Rights Committee, General Comment on Article 6, para 7, “The Right to Review by a Higher Tribunal”

have right to appeal to a court of higher jurisdiction”. As there was no court higher than the Supreme Court, which imposed the penalty, execution should have been stayed indefinitely.

There is another international standard, requiring that a death penalty should not be executed unless and until the prisoner has had an opportunity to ask for mercy – from the President or preferably a committee established for this purpose. The government afforded Molla, in law or in practice, no such opportunity: it had excluded from ICTA the commutation provisions of the 1898 Code of Criminal Procedure (sections 401 and 402)<sup>136</sup> and section 54 of the Penal Code and there was no procedure for the President to consider a mercy petition under Article 49 of the Constitution. (Such a procedure would in fairness have to include the allowance of at least a week from the decision to file a mercy petition: Molla was given no opportunity to consult with his lawyers about a plea for mercy). This lack of procedure for the Presidential prerogative of mercy is a serious defect in Bangladeshi law: the High Court, in a judgement (*Sarwar Kamal v State*) a few days before the Supreme Court delivered its *Molla* decision, ruled that the prerogative must be exercised fairly and rationally, and urged the government to “frame rules and guidelines and even amend the code, as has been done in our neighbouring countries”.<sup>137</sup> It is difficult to resist the suspicion that Molla was despatched so quickly, and at 10pm at night, so that his lawyers would not have time to use the *Sarwar Kamal* judgment as a basis for staying the death warrant until a proper mercy procedure was established. It is an argument that should be deployed in the other death penalty cases: the ICCPR, which Bangladesh has ratified, is very clear on the subject: Article 6(4) provides:

“Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation may be granted in all cases”.

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<sup>136</sup>See Section 23 of ICTA.

<sup>137</sup>*Sarwar Kamal v State* (2012) 64 DLR 331, at 342

The Human Rights Committee (HRC) has decided a number of cases against States whose mercy procedures are inadequate or non-existent.<sup>138</sup> It is plain that this is the case in respect of ICTA appellants who cannot (like Sarwar Kamal) obtain redress in the High Court against any decision of the Tribunal. But the monstrously unfair provision of ICTA to this effect (section 24) would not in my view prevent a challenge to the prerogative of mercy, because this is a power of the President and not of the Tribunal. Lawyers for the other men under sentence of death might explore this last-ditch possibility. There are others, because although the *Code of Criminal Procedure* (1898) provides for execution by hanging, the Code is not applicable to ICTA which consequently has no execution process provided by law. Hanging on any view, is an inhumane and primitive method of dispatch.

Last ditch efforts were made to save Molla – politically, appeals were made by the European Union, the British government, and the UN High Commissioner for Human Rights, but not even a call from US Secretary of State to Sheikh Hasina could alter the government’s determination to proceed with hanging, which was scheduled for 11 December. An hour and a half before the time fixed for his execution, Justice Hossain granted his lawyers a last-minute stay so the full court could decide the next day whether their application to review the Supreme Court’s decision was arguable, on the ground that there were serious errors in the judgement. The Supreme Court decided that it did have jurisdiction to entertain the application, and allowed Molla’s counsel to argue it. They did so, by reference to an inconsistent statement made by the 13 year old witness to an investigating officer which had not been disclosed by the prosecution, and they asked for further time to consider the 790 page judgment. At 12.47pm, the Court dismissed the application without giving reasons. Molla requested access to his lawyers for advice as to whether he should submit an application to the President for clemency: they attended at the prison but were refused access to their client. He was instead allowed to commune with an Imam, and was taken to the gallows with a district magistrate

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<sup>138</sup> See *Kennedy v Trinidad and Tobago* (Communication no 845/98), 22 March 2002; *Chikunov v Uzbekistan* (Comm no 1043/02), 16 March 2007; *Chisanga v Zambia* (Comm no 1132/02), 18 October 2005.

and a surgeon in attendance. At 10.01 he was hanged, and under the grisly prison rules for such occasions his body remained hanging for 30 minutes before he was cut down.<sup>139</sup>

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There is another international standard, adopted by ECOSOC in 1984:

“Capital Punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts”.<sup>140</sup>

This provision has been the most common ground for criticising the death sentences passed by the Tribunal; some of them based on convictions where the main evidence relied upon were hearsay. In Molla’s case, there was at least an eye-witness who had been aged 13 at the time, and who told the court how Molla had led a group of Biharis and Pakistani soldiers towards their house. She testified that her father, Hazarat Ali Lasker, a tailor who support the Awami League, saw them coming, locked the door and told his three girls to hide under a cot. Molla, at the door, threatened to bomb the house unless the door was opened. He killed her mother and brother, her sisters were raped by the soldiers and he dragged her father from the house saying that he would not be able to be involved in Awami League politics any more. She was later that day told by two friends that Molla had killed her father. She was accepted by the Tribunal as an honest witness, despite having previously told an investigator that she had not been present at all.

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<sup>139</sup> For the chronology see generally, <http://bangladeshwarcrimes.blogspot.co.uk/2013/12/mollas-impending-execution.html>

<sup>140</sup> ECOSOC (1984) Safeguards guaranteeing the protection of the rights of those facing the death penalty (ECOSOC Safeguards). Resolution 1984/50, 25 May 1984

Molla set up a defence of alibi, claiming he had never been in the area, but this was denied by witnesses who testified that he had worked there with the *Jamaat's* local parliamentary candidate (Ghulam Azam) and at the time of the attack was in the area with a Razakar group and had been previously seen, rifle in hand, in front of an army training centre. I do not consider that the prosecution case was 'flimsy' (as it was described by *The Economist*) and the victim's story was certainly horrific. There were, however, clear inconsistencies in her previous statements, and I make no judgment upon Molla's guilt.

The real importance of his case turns on the grounds that the Supreme Court judges used to increase Molla's sentence. Having dismissed objections to Parliament's retrospective amendment which permitted the prosecution to appeal, the Court turned to examine the sentencing provision. Chillingly, Justice Sinha interpreted the language of section 20(2) as having the "plain meaning" that "if the Tribunal finds any person guilty of any of the offences...awarding a death sentence is the rule and any sentence of imprisonment is an exception."<sup>141</sup> This is obviously wrong – the plain meaning of s20(2) (set out above) is that the Court has a choice – it may select any sentence which is "just and proper", i.e. which is "proportionate to the gravity of the crime". In other words, the perpetrators of the gravest crimes (the Pakistani officers who gave the orders) are liable to death, but the 'auxiliaries' who carried them out would, as a matter of proportion, be more appropriately sentenced to imprisonment for life or for a term of years. Sinha J's interpretation requires the Tribunal to *presume* that a death sentence is appropriate in every case, irrespective of the defendant's place in the command structure or responsibility for the widespread or systematic perpetration of atrocities. His approach was endorsed by Justice AHM Shamsuddin Choudhury who actually thought that Parliament had favoured the death penalty "by placing death penalty at top of list of sentences in section 20(2)" so that "sparing the appellant from the gallows would be tantamount to frustrating the general will of the Parliament".<sup>142</sup> Justice Sinha declared (as had the Prime

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<sup>141</sup>*Prosecutor v Molla*, Criminal Appeal Nos 24-25 of 2013, judgment 17 September 2013, p247

<sup>142</sup> *Ibid*, p787

Minister) that “the Tribunal must respond to the society’s cry for justice”<sup>143</sup> – the cry, in Molla’s case, of the lynch mob.

There is an important legal point that arises from this wrong-headed interpretation of s20(2) and the Supreme Court decision that under it “awarding a sentence of death is the rule”. This would mean that the sentence of death as punishment for an ICTA crime is virtually mandatory, unless there is an “exceptional” circumstance. The Privy Council<sup>144</sup> and a number of Commonwealth courts have held that a mandatory death sentence is unconstitutional, and these decisions were endorsed and applied in Bangladesh by the High Court in 2010 in the case of *Sukur Ali*. It was held that the Constitution required the exercise of judicial discretion in capital cases, because of its “duty...to take into account [an accused’s] character and antecedents in order to come to a just and proper decision”.<sup>145</sup> By imposing in Molla’s case a *rule*, or at least a strong presumption, that the death penalty should be inflicted, the Supreme Court removed the judicial discretion that the Constitution requires, by excluding the alternative which s20(2) purports to permit (“or such other punishment...as appears to the Tribunal to be just and proper”). By excluding, unnecessarily, justice and propriety (not to mention mercy) from the death penalty decision, the Supreme Court made a grave error – of law, of common sense and of morality.

The Supreme Court having wrongly and unnecessarily interpreted s20(2) as creating a presumption in favour of imposing a death sentence for every crime against humanity, then proceeded to justify the substitution of a death sentence for Molla’s murder of Hazarat Ali Laker and members of his family. These murders were horrific and the judges did not lack adjectives to describe them. They pointed out that Molla had shown no remorse, but since he was claiming an alibi and maintaining his innocence this was hardly surprising and was not a rational basis for increasing his sentence to that of capital punishment. That basis was purportedly found in the consideration that “if no such sentence is passed on the facts of the case, it will be difficult to inflict a death sentence in other

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<sup>143</sup> Ibid, p247

<sup>144</sup> *Reyes v The Queen* [2002] AC 235

<sup>145</sup> *Bangladesh Legal Aid and Services Trust (on behalf of Sukur Ali) v Bangladesh* (30) BLD 194 (HCD), 208-9

cases”.<sup>146</sup> In other words, capital punishment must be visited on the worst class of crime. But in applying this principle, the judges went demonstrably wrong. The worst class of crime was genocide, and other crimes against humanity ordered by the Pakistani generals – Tikka Khan, Amir Abdullah Khan Niazi and Rao Farman Ali. The Razakar and other paramilitaries were ‘auxiliaries’, provided with opportunistic impunity by the army to slaughter Awami League supporters (some of whom would, given the chance, slaughter them). It is no coincidence that most of the direct evidence against Molla and the other defendants was from eye-witnesses who saw them in support roles with Pakistani soldiers – historians of the war say that the Razakar and Al Badr atrocities were encouraged and authorised, and often committed on the orders of, the Pakistani army. This does not begin to excuse any collaborators, or to refute the obvious inference that those Awami League supporters they put on army death lists, or whose houses they identified to the Pakistani forces, would in consequence be killed. But it does mean, invidious though it may be to distinguish between iniquities, that there is a distinction to be made. s20(2) calls for such a distinction, namely that the most severe penalty should be reserved for the commanders, and not for their local auxiliaries or collaborators.

The lengthy Supreme Court judgment in *Molla’s* case conscientiously and correctly charts the development of international law and examines the evidence in some detail. But it is impossible to avoid the impression that the judges came to this case with a mind-set fashioned by the trauma of 1971, by the unbearable cruelties committed in the course of the birth of their nation and with a pride in the struggle that was won at the expense of so many lives. When Justice Sinha evaluates the credibility of an eyewitness who says he saw Molla with a rifle outside an army torture centre, he notes that the witness was a freedom fighter:

“There is no doubt that freedom fighters are the best sons of our soil. Risking their lives they fought against one of the most organised forces in the region, against economic

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<sup>146</sup> *Molla* (appeal), above n130, p250

exploitation and for political liberation of the people of the country. Thus there is no earthly reason to disbelieve the testimony of this vital witness”.<sup>147</sup>

Well, there is: freedom fighters committed some atrocities too, and their memories after 40 years do not have the gift of total recall. It is authoritatively recognised that “fleeting glance” identification of this kind requires corroboration, irrespective of the moral calibre of the identifier.<sup>148</sup> This is just one of many examples in the judgements handed down by judges of the Tribunal and by the Supreme Court, of an overriding assumption that “freedom fighters” could do no wrong and that those who opposed them for reasons that seemed to many at the time to be sensible politically and strategically, were capable of murderous and malicious conduct. The language of the court gives its nationalist bias away: Motiur Rahman Nizami, for example, is described by the ICT as having a purpose “to apprehend valiant and brave guerrilla fighters to vanish them forever so that they could not liberate the country”.<sup>149</sup> In sentencing Nizami to death, the Tribunal condemned him for never having “expressed repentance for his anti-liberation activities or paid respect to the departed souls of 3 million martyrs”. It went on, unnecessarily and overtly politically, to condemn the BNP for appointing Nizami, as a Minister in its coalition government with the *Jamaat*:

“It is very much hard to believe that a person who actively opposed the very Liberation War of Bangladesh, was appointed a Minister of the republic. We are led to observe that the appointment of the accused as a Minister, by the then government, who happened to be an anti-liberation leader, was a great blunder as well as a clear slap in the face of the Liberation War as well as three million martyrs and two hundred thousand women who sacrificed their chastities for the liberation of Bangladesh. And as such this shameful act was disgraceful for the nation as a whole.”<sup>150</sup>

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<sup>147</sup> Ibid, p227

<sup>148</sup> See the Privy Council decision in *R v Reid & Dennis* (1990) A.C. 363

<sup>149</sup> *Nizami* judgment, ICT-BD Case No 03 of 2011, 29 October 2014 para 414.

<sup>150</sup> Ibid para 415

The Tribunal here shows quite clearly its endogenous bias against Awami League political opponents, i.e. against all the defendants. These judges, biased against those they describe as “anti-liberationists” who fought to maintain the territorial integrity of Pakistan, come to court with a political antipathy to the defendants. This is “victor’s justice”, where judges imbued with the story of their nation have an animus against the losers who tried to prevent that nation from coming into existence. This lack of impartiality – an essential quality for an international Tribunal – could have been overcome, as in the ‘hybrid’ courts of Sierra Leone and Cambodia, by the appointment of international judges and prosecutors. By refusing to accept that offer, which would have brought UN funding and prestige, the Government of Bangladesh ensured that trials of its political opponents would be open to question on grounds of fairness. It also ensured that those opponents would be executed.

I do find in the perhaps unconscious mind-set of these jurists, in both the Tribunal and the Supreme Court, a sense that ‘heroes’ who fought for independence are always right, and that national pride necessarily requires the Tribunal to vindicate them. There is a patriotic culture in the courts of these nations, which tilts them against those who were so recently on the wrong side of their history. This does not mean they will always be found guilty without sufficient evidence, but they may be and for that reason all the judgments of this Tribunal, and of the Appeal Court, must be closely scrutinised. It certainly should not mean that defendants must as a rule be sentenced to death. Many citizens will share the strong feelings Justice Chaudhury expressed in his sentencing homily, if not the over-wrought language in which they were couched.

“Having underscored the egregious and beastly nature of the offences the Appellant committed leaving behind trail of pain and sorrow for the victims or their families and indeed for the nation as a whole, which may last forever, a question of lenient sentence cannot arise. The offences he committed can only be perpetrated by a person of diabolic perception. In the light of the decadent and draggy relics his horrendous acts left behind, the misery he unleashed, there is no punishment in worldly laws grave enough to match the offences he had committed...His monstrosity must have stunned all the righteous

people, not only in 1971 but also afterwards, maybe through eternity, not only in Bangladesh but beyond. As such death is the only appropriate sentence. His acts were inconceivably ominous, frenzied and demon-like. Traumatic wounds his paws caused for the whole society, will never be healed.”<sup>151</sup>

It is the function of criminal law, even after 40 years, to provide some justice to the victims of historic wrongs and to set out an undeniable account of how and why the defendant’s crimes against humanity came about. It provides for retribution, but not for revenge – otherwise the society will descend again in a vicious cycle of violence. As the poet Auden says,

*I and the public know*

*What all schoolchildren learn,*

*Those to whom evil is done*

*Do evil in return.*<sup>152</sup>

After Molla’s execution, there were protest riots in which several hundred people were killed.<sup>153</sup> 1971 was all about killing, of as many possibly as three million human beings. How can a society move forward by more killing, or by killing Islamist leaders who are alleged to have supported that killing, but were on the losing side? The death penalty, in political cases like this, dresses up in judicial form an act of revenge, and one is likely, counterproductively, to provoke further rage. The judges, for all their learning, and the government for all its claim to overcome divisions in society, overlook the simple wisdom of John Bright: “If you wish to teach the people to reverence human life, you must first show that you reverence it yourself.”

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<sup>151</sup> Ibid, p788

<sup>152</sup> W.H. Auden, ‘September 1, 1939’

<sup>153</sup> ‘Riots over Molla execution in Bangladesh leads to more deaths as government promises crackdown’ *The Telegraph*, 15 December 2013





## CHAPTER 8 – TRIALS IN THE ABSENCE OF THE DEFENDANTS

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There have been three men tried and convicted in their absence from the entirety of the proceedings: Abdul Kalam Azad, a former leader of the *Jamaat* and Ashrafuzzaman Khan and Chowdury Mueen Uddin, who were allegedly leaders of *Al Badr*, the organisation said to have helped the army to wipe out intellectuals and community leaders shortly before the ceasefire. All had fled abroad, but were ‘notified’ of the proceedings against them by advertisements in local newspapers, and their failure to return had given the Tribunal “reason to believe that the accused person had absconded or concealed himself” (ICTA section 10A(1)). In the case of persons who have left the country many years before, and were not dealt with under the *Collaborators Order* of 1972, this is clearly no reason to try them in their absence, especially under a law which has no provision for retrial and re-sentencing when they return. Indeed, no civilised country would extradite a person to face a death sentence delivered at a trial he had not attended, and the Tribunal conduct in this respect will mean that Bangladesh has forgone the opportunity to have them apprehended and extradited from other countries in the future.

It is a basic “fair trial” right to be present at any trial which imposes penal sanctions, and a trial *in absentia* cannot possibly be ‘fair’ unless there is an effective right of retrial. The defendant will have had no opportunity to instruct counsel, to confront witnesses, or to give evidence as to his innocence. The proceedings become a farce if “state appointed counsel” are required, for appearance’s sake, to make (or guess at) a defence and to question prosecution witnesses without knowing what information to elicit which might assist the accused. The European Court has made very clear that unless there exists an unfettered and effective right of retrial, an *in absentia* trial cannot be fair.<sup>154</sup> The only exceptions are when the defendant is removed for disrupting the proceedings, or where he escapes from custody or deliberately disappears after the trial has started. There may be other situations where the accused ‘voluntarily waives’ his right to attend, but in such

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<sup>154</sup> *B v France*, App no 10291/82 (1994) 16 EHRR 1

cases he must be served with a summons or impressed with actual knowledge of the impending trial – and any waiver must be unequivocal.<sup>155</sup> None of these situations applied to the three defendants, who simply stayed abroad.

The defendant's right to be present at trial is guaranteed by article 14(3)(d) of the ICCPR and the Tribunal was wrong to rule that these three cases were any exception. What it did not notice, however, was that Bangladesh was not bound by the rule, for on ratifying the ICCPR it made the following reservation:

“The Government of the People's Republic of Bangladesh reserve paragraph 3(d) of Article 14 in view of the fact that, 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.”

Even under this reservation, however, it is doubtful whether the three men should have been tried: they were not “fugitive offenders” and had not been personally notified so they could not ‘fail’ to present themselves. At any event, the imposition of a death sentence after a trial in a person's absence, allowing him no access to a court to stop an execution when he is later apprehended, is so obviously wrong, so grossly and gravely unfair, that it is an indictment of both the Government and the Law Commission that the ICTA was not amended to provide a right of re-trial. The more satisfactory way of proceeding, if a defendant is not in the country, is to hold not a trial but a judicial inquiry, in which the evidence against him will be unveiled and tested on his behalf, and the judge will if it is credible (i.e. if there is a *prima facie* case) issue a warrant for arrest. In this way the public interest will be served without damaging the rights of the potential defendant: he can be

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<sup>155</sup> *Sejdovic v Italy* (2008) ECHR 620

subject to an Interpol ‘Red Notice’ requiring his arrest and there should be no difficulty in obtaining his extradition to Bangladesh for trial if he is apprehended abroad.

The *in absentia* trials themselves had only one advantage – they were short.

*Azad* was the first judgment delivered, on 21 January 2013. A state lawyer appointed to defend him might well, as a matter of ethics, have refused the brief, and thereby refused to lend his presence to give legitimacy to an adversary process which was not truly adversary. In this case, the assigned state counsel called no defence witnesses, pointing out that Azad’s family had refused to have any contact with him.<sup>156</sup> The allegation that Azad was a chief in the *Razakars* and *Al Badr* was ‘proved’ by hearsay claims, newspaper clippings, and reports the contents of which the Tribunal did not disclose, and the Tribunal took ‘judicial notice’ of the widely published ‘fact’ that this group attached itself to the army in order to kill civilian supporters of the Awami League.<sup>157</sup> Five witnesses saw him with an army unit soon before it killed nine inhabitants in a Hindu village: this was sufficient for the Tribunal to infer his culpability of genocide. The fact that genocide occurred in Bangladesh “is the history of common knowledge and need not be proved by adducing evidence”<sup>158</sup> – although genocide certainly did need to be proved before anyone could be convicted and executed for participating in it.

So far as cross-examination was concerned, in some occasions the answers to the defence counsel’s questions assisted the prosecution – which is always likely when barristers cross-examine without instructions. One witness was challenged on the basis that he had never set eyes upon Azad, only to be told that they studied together at school.<sup>159</sup> There were other examples. The assigned defence counsel argued that international criminal cases could not be tried *in absentia*<sup>160</sup> – the Tribunal

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<sup>156</sup> *Prosecutor v Abul Kalam Azad*, para 28

<sup>157</sup> *Ibid*, para 108

<sup>158</sup> *Ibid*, para 154

<sup>159</sup> *Ibid*, para 125

<sup>160</sup> *Ibid*, para 40

responded by pointing to the Lebanon Tribunal, ignorant of the fact that unlike ICTA, its statute provides for a retrial.<sup>161</sup> He also took the point that the accused could have been tried under the *Collaborators Order* but had not been indicted – an important argument, as shall see, but one which the Tribunal brushed aside.<sup>162</sup> The evidence mainly comprised eyewitness sightings of Azad with army detachments or Razakars, and the verdicts were based on guilt by these associations. Given that he was associating with forces that were massacring Hindus, he may well have been involved in collaboration offences, but these did not warrant the death penalty and had he been able to defend himself and call witnesses, there may have been a reasonable doubt about his guilt on any or all of the particular charges. If in the future he is captured and executed, that would certainly violate the principle that in capital cases, guilt must be established to a high level of certainty.

Khan and Uddin were charged on the basis of joint criminal enterprise. It was alleged by the Prosecution that, as leaders of *Al Badr*, they were held jointly responsible for its members who joined in army atrocities. The Tribunal found, through overbroad use of the device of ‘judicial notice’, that *Al Badr* was responsible for ‘purging’ the intellectuals;<sup>163</sup> Uddin was “operationally in charge” and Khan was “chief executor”<sup>164</sup>, and both were implicated for that reason in the joint criminal enterprise. Incorrectly, the Tribunal found that their culpability could be inferred from the fact that they fled the country after the war – but so did many thousands of *Jamaat* supporters, because they had lost it - not necessarily because they had committed war crimes. Counsel for Khan said that he had stayed long enough to be prosecuted under the *Collaborators Order*, but was not: the only evidence of his leadership of *Al Badr* came from newspaper clippings. Counsel for Uddin denied that he had belonged to *Al Badr*. Although there was some evidence on some counts against these men, it did not go beyond ‘guilt by association’ with the army and it would be preposterous to hang them without giving them the opportunity to enter a defence.

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<sup>161</sup> See *ibid*, paras 49-54

<sup>162</sup> *Ibid*, paras 65-70

<sup>163</sup> *Prosecutor v Ashrefuzzaman Khan and Chowdhury Mueen Uddin*, ICT-BD Case No 01 of 2013, 3 November 2013, para 74

<sup>164</sup> *Ibid*, para 188

The Tribunal's insouciance about proceeding in a defendant's absence was apparent during the *Sayeedi* case.<sup>165</sup> In mid-trial, the accused suffered a heart attack and was admitted to hospital. An application for adjournment was made due to the accused's necessary absence from the courtroom. After an adjournment for 3 days, the Tribunal insisted that the trial recommence without him. It stated: "Normally in other Courts adjournment is allowed in case of illness of the accused; but in this case it is not required to be present in case of ailment and the Tribunal may run its own procedures".<sup>166</sup>

This was a circumstance where the accused's absence was not due to any wilful refusal to attend trial, but for a reason wholly outside of his control. That the Tribunal ruling constitutes an infringement of the right to be present at trial is confirmed by the ICTR case of *Nzizorera*, when the accused, absent due to illness, requested that cross-examination of a prosecution witness be suspended, but was refused in the interests of expeditious proceedings. On appeal, it was held that this ruling impermissibly overrode the accused's right to be present at trial, as the need for expeditious proceedings was not "sufficient to outweigh the statutory right of the Appellant to be present at his own trial when the absence of the Appellant was due to no fault of his own".<sup>167</sup> The same reasoning should have applied in *Sayeedi's* case.

It is to be hoped (although it is probably a vain hope) that the Supreme Court will negate these unfortunate so-called "trials" by applying section 6(2A) of ICTA, namely that "the Tribunal...shall ensure fair trial." Although trial *in absentia* was permitted by the 1973 Act, this 'fair trial' provision was inserted in 2009 and it is by the standard of 2014 that fairness must be judged. There is nothing to stop the Parliament from amending the Act again, to allow a re-trial if any of the absentees came into the jurisdiction. This would ensure that Bangladesh could extradite them from abroad if they were discovered.

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<sup>165</sup> *Prosecutor v Deloviar Hossain Sayeedi*, ICT-BD Case No 01 of 2011, 28 February 2013

<sup>166</sup> Orders of 20 June 2012

<sup>167</sup> *Prosecutor v Karamera et al*, ICTR-98-44-AR73.10, Decision on Nzirorera's Interlocutory Appeal Concerning his Right to be Present at Trial, 5 October 2007, para 15





## CHAPTER 9 – OBJECTIONS OF LAW

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The Tribunal has already decided nine cases, in which it has imposed the death penalty – two defendants were said to be deserving of execution but were spared (i.e. imprisoned for life) because of old age and illness. All were or are opposition politicians – mainly from the *Jamaat* while several have been MPs for the main opposition party, the BNP. A number of trials of *Jamaat* officials are continuing,<sup>168</sup> and there have been further arrests of “war criminals”. The Supreme Court, in October 2014, announced its decision to hang in one case (Kamaruzzaman) and to commute in another (Sayadee) but has unaccountably failed, at the time of writing (early January) to produce its reasons. This is unacceptable, and has given rise to fears that Kamaruzzaman may be rushed to the gallows before a mercy petition can be lodged related to the Supreme Court’s reasons for upholding the death penalty in his case.

All the trials have been proceeded by legal arguments – similar in each case, and similarly rejected, several by the Supreme Court in the *Molla* decision so they are foreclosed in future appeals. They are of a kind that would be called in England an attempt to stay a trial for “abuse of process”, namely an appeal to the inherent powers of a criminal court to safeguard an accused from oppression or prejudice, in circumstances where it would be seriously unjust to continue. The Tribunal has not seemed cognizant that it has this inherent power, although it has heard (and rejected) the following legal arguments which have been based on its statutory duty to deliver a fair trial:

*a. A Delay of 40 Years Frustrates a Fair Trial*

It certainly makes the trial more difficult, although it has to be said that eye-witnesses to atrocities do have them etched in their memory for life. The Tribunal blandly responds that crimes against humanity have no time limits, which is true (Germany is still prosecuting Nazi war criminals) but

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<sup>168</sup> The most recent death sentences were imposed on 22 December 2014, on Syed Mohammed Quaisar, and on 29 December 2014 on ATM Azharul Islam.

this rule may be overborne if the government itself is responsible for the delay – e.g. if it could or should have prosecuted under the *Collaborators Order*. The Tribunal does not seem aware of this exception and privileges the rights of victims over those of defendants. It has explicitly ruled that: “considerations of material justice for victims should prevail when prosecuting crimes of the extreme magnitude is on the process” (sic)<sup>169</sup>

- b. *That the inclusion of “individuals and groups” by a 2009 amendment can only have prospective effect, and ICTA can only apply to the 195 Pakistani war criminals for which it was originally designed.*

The Tribunal rejects these arguments by reference to the bar on constitutional challenge to the Act – a bad reason – but also by reference to Parliament’s right to extend its jurisdiction retrospectively. I will not take issue with its reasoning, because although ICTA was drafted with the 195 officers in mind, it included ‘auxiliaries’ and that in my opinion is wide enough to include the *Razakar* forces, which were set up under a government Ordinance, and *Al Badr* volunteers when they operated with or under the direction of the army.

- c. *The Tripartite Agreement gave immunity to the 195 Pakistani POWs and this immunity extends to all who could be prosecuted under ICTA*

The Tribunal’s reasoning in rejecting this argument is difficult to follow, although it does find that the Tripartite Agreement “amnesty” does not apply to other “individuals and groups” brought within ICTA’s jurisdiction in 2009 and that in any event it cannot validly apply to bar proceedings for crimes against humanity. I do not consider that the Tripartite Agreement affords any binding amnesty to anyone: it is a political arrangement to facilitate the repatriation of prisoners of war and does not preclude their subsequent prosecution – indeed, the agreement was in part induced by Pakistan’s promise that those of the 195 implicated in war crimes by its own judicial inquiry would be prosecuted subsequently in Pakistan. Moreover, an amnesty cannot avail to bar proceedings for

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<sup>169</sup> *Azad*, above n142, para 48

genocide or crimes against humanity, which is why suspected Pakistani war criminals still alive should be subject to investigation and trial, as well as their Bangladeshi accessories.

*d. The Accused should have been prosecuted under the Collaborators Order*

This argument elaborates a classic abuse of process – if a defendant was arrested and/or was tried under the Collaborators (Special Tribunal) Order 1972, he should certainly not be re-arrested and tried for the same or similar offences forty years later under ICTA. There were, in all, 37,400 persons investigated under the *Collaborators Order* in 1972/3, and several thousand were tried, pursuant to the Bangladeshi Penal Code, for criminal offences of murder, rape, arson etc.<sup>170</sup> It would be an abuse of process to retry those who had been convicted or acquitted in 1972-3, or indeed those who had been investigated and not proceeded against in those years, because it would be oppressive to put them on trial forty years later for offences for which they may have been acquitted (many were) at a time when evidence (especially evidence to prove alibi) could have been fresh and available. Of course, this argument would only avail those who had been subject to a prosecution process under the Order – it would not run for those who had run away, or hidden, or had not been investigated, although those in the latter category should be permitted to argue that the unavailability of evidence against them in 1972 raises a reasonable doubt about the credibility of evidence produced 40 years later.

The Tribunal did not deal with this argument satisfactorily. It was rejected on the pettifogging ground that the offences with which collaborators were then prosecuted – murder, rape and arson – were different to the charges of genocide and crimes against humanity they faced under ICTA.<sup>171</sup> But this is a distinction without a difference: the ICTA trials related to allegations of particular murders, rapes and arsons which had been elevated to “crimes against humanity” because there had been a number of examples or simply because they had been committed in cahoots with an army engaged in a “widespread” and “systematic” rampage. There is an element of intellectual

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<sup>170</sup> International Centre for Transitional Justice, “Fighting Past Impunity in Bangladesh – A National Tribunal for the Crime of 1971” (July 2010), p3

<sup>171</sup> See for eg, *Azad*, above n142, paras 65-70

contortion in the claim that a murder is no longer a murder but an ‘international crime’ because it is being tried by an ‘international tribunal’ (and ICTA is not in fact international). Although the defence argued this issue on the grounds of double jeopardy, a better approach is to claim an abuse of process. The issue then would turn on whether the accused had been subject to formal processes under the *Collaborators Order* in 1972-3 in respect of allegations of crimes similar to those underlying the ICTA indictment: if so, then the indictment should be stayed – in which case, the trial would not proceed further.

*e. Retrospective Law*

It was forcibly argued, in all cases, that ICTA’s definition of a ‘crime against humanity’ did not conform with international law 1) in 1973 or 2) today. This argument was lengthy and technical, and it was not properly addressed or answered by the Tribunal, although the Supreme Court attempted to provide some answers in *Molla*.

To cut a long legal story short, ICTA (1973) adopted the definition of a “crime against humanity” in s6 of the Nuremberg Charter of 1945. However, as the judgment of Nuremberg made clear, such crimes could only be committed at times of an *international* armed conflict – which the Second World War had undoubtedly been. It was not until the appeal judgment in the *Tadić* 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.<sup>172</sup> Moreover, by that time the definition of the crime under the ICTY and ICTR statutes had somewhat narrowed, to require the prosecution to prove not only an attack on a civilian population, but that this attack was part of a “widespread or systematic” attack on such a population.<sup>173</sup> Hence the Tribunal, before it could convict under the ICTA definition, had to be satisfied (issue 1) that *either* the conflict in 1971 was international, *or* that customary international law had by 1971 developed in the way that *Tadić* many years later had confirmed,

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<sup>172</sup>*Prosecutor v. Tadić*, Decision on The Defence Motion For Interlocutory Appeal on Jurisdiction, Appeals Chamber, Case IT-94-1, (Oct. 2, 1995)

<sup>173</sup> See *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment (15 July 1999), para 248; *Prosecutor v. Akayesu*, (Trial Chamber), September 2, 1998, para 578

namely that such crimes could be committed in a civil war as well. As for issue 2, the Tribunal had to decide whether it was necessary for the prosecution to prove the ‘widespread or systematic’ pattern of murders, tortures, persecutions etc, despite the absence of this element from the definition in the ICTA statute. A great deal of learning was expended on these international law issues, which raised nettles that the Tribunal never grasped. The judges were not international lawyers (hence, it seems, Judge Huq’s requests for secret assistance from an expert in Brussels) and they appeared not to understand that in order to avoid the rule against retrospective punishment, they had to examine the state of international customary law in 1971.

Had they essayed this necessary exercise on issue one, they might have concluded that these “Nuremberg” crimes came with the 1945 caveat that they could only be crimes committed in connection with an *international* armed conflict. As Bangladesh was not a state, at the time the conflict began with “Operation Searchlight” it was a purely internal, all-Pakistan internecine war. By its end, however, it was certainly international – India had invaded. India had, indeed, supplied arms and training to the rebels from fairly early on, so the prosecution might prove that by the date charged in each count in each indictment, the conflict had become international and the crime had been committed in connection with it. However, the prosecution was never put to this proof. Alternatively the Tribunal could have decided (and the Supreme Court went down this track in *Molla*) that a “crime against humanity” could always be committed in a civil war, and the limitation in the Nuremberg Statute was no more than a limitation for the particular tribunal which tried the Nazis for crimes committed in the war they had inflicted on Europe. The ‘crime against humanity’ grew out of the ‘Martens’ clause in the 1899 and 1906 Hague Conventions relating to international armed conflict, and was applied as a description of the Armenian massacres by Allied declaration in 1915.<sup>174</sup> That was an internal genocide by the Ottoman Turks against their own citizens, although carried out against the backdrop of World War I.

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<sup>174</sup> Joint Declaration of France, Great Britain and Russia, 28th May 1915. United Nations War Crimes Commission, London HMSO 1948, p35

What the Tribunal had to establish was that by 1971 the crime had shed the Nuremberg requirement of a connection with a war between states, and had been available (but not availed of) for civil wars before its true scope was identified in *Tadic*. This exercise might be satisfactorily done but this tribunal did not do it, and it did not go on to establish a connection between the separate criminal acts charged in the indictment and the necessary element of international criminality, namely that those criminal acts were not isolated or sporadic, but part of an overall plan of attack on the civilian population. Indeed, in the *Azam* case, it said “we hold that ‘nexus’ is not required to prove genocide and widespread killing which attack was directed against unarmed civilian population”<sup>175</sup>. It certainly was required, and the Tribunal’s failure to insist that the prosecution prove the linkage was a blatant error of law – even if the prosecution could readily have proved it.

On the second issue, namely the Tribunal’s interpretation of ICTA as excluding any need for the prosecution to prove connection with a “widespread or systematic” attack, this too revealed an ignorance of international law and its development. The Tribunal is somewhat schizophrenic in this argument – at times it identifies itself as an international tribunal applying national law, although more often as a national tribunal applying international law. The simple fact is that murder, rape and arson are run-of-the-mill, common or garden *national* crimes. They cannot be elevated into *international* crimes unless the prosecution proves an additional element, namely that these murders and tortures are particularly heinous and of international interest because they are committed as part of a widespread or systematic attack on a civilian population. The Tribunal cannot have it both ways – *either* they are national crimes (in which case, why not prosecute for murder and torture in ordinary courts, when the defendant has constitutional protection?) or they are international crimes, in which case a special tribunal with special rules is acceptable, so long as the prosecution proves an added ‘international’ element, i.e. that they were committed as part of a widespread and systematic attack on a civilian population. The prosecution must prove that each charge in the indictment refers to an incident in the course of such an attack.

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<sup>175</sup> *Prosecutor v Professor Gbulam Azam*, ICT-BD Case No. 06 of 2011, 15 July 2013, para 288

The Tribunal did not approach its cases in this way, and fell into error – most blatantly in convicting in one count in the case of *Sayeedi*, whom it found guilty of a crime against humanity by forcibly converting Hindus to Islam.<sup>176</sup> There had been no allegation that it was any part of the Pakistan army’s purpose to force religious conversion, and Sayeedi’s alleged individual efforts in this respect were not proved to have been part of a “widespread or systematic attack”. The Tribunal’s difficulty in appreciating the issues under international law led to this egregious error. Had the trials proceeded properly, the prosecution might have had no difficulty in proving the widespread and systematic nature of the attack on civilians, and the Supreme Court in *Molla* said as much. The point, however, is that it did not appreciate the need to link every underlying crime to the overall attack, and this amounts to an error in its jurisprudence.

International criminal law disputes tend to be over how to prefer arguments that are better over arguments that are good. There is a welcome movement away from sophistry towards positivism: “crimes against humanity” boil down to mass murder and mass torture, wrongs that are appreciated by everyone as heinous, so long as they are proved with full attention to the traditional guarantees of fair criminal trial. The overall question is not whether the technical arguments are correct, but whether their rejection by the Tribunal caused real unfairness to the trials of these men. In this respect, I am unsettled by the rejection of all arguments relating to the *Collaborators Order*. I cannot accept that it is right to deal with a man through a legal process in 1972, and then put him in jeopardy of the death penalty forty years later on the pretext that the murders for which he was previously cleared are now characterised as “crimes against humanity”. This is an abuse of process. At the very least, the Tribunal must require the prosecution to explain why each defendant was not charged back in 1972/3: if it can show that he fled the country or went into hiding, or perhaps if fresh evidence has become available in the intervening years, then the trial should go ahead. But unless it can show good reason to subject him to subsequent proceedings, the case should be stayed as an abuse.

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<sup>176</sup> *Sayeedi*, above n151, see paras 214-223



## CHAPTER 10 – GUILT BY ASSOCIATION?

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Thus far, the Tribunal has completed the trials of sixteen defendants, including Molla and the three *in absentia*. The judgments are several hundred pages long. They generally begin with an emotive and somewhat one-sided account of the conflict, followed by a brief description of the accused, an outline of the procedural history of the case, an account (dismissive) of the defence case which is usually alibi, and then a description and evaluation of the prosecution case. They are full of quotations from books and newspaper articles, not all of which appear to have been properly sourced, and liberal use is made of a flexible notion of ‘judicial notice’ to include any fact (such as the commission of genocide) which the judges have read about and believed, rather than investigated and decided for themselves (for example, the ‘special intention’ that must be proved in genocide must be clearly and separately established). The Court has said that it is not an ‘international tribunal’: “merely for the reason that the Tribunal is preceded by the word ‘International’ and possessed jurisdiction over crimes such as crimes against humanity, crimes against peace, genocide and war crimes, it would be wrong to assume that the Tribunal must be treated as an ‘International Tribunal’”.<sup>177</sup> This rather begs the question of what it *is* to be treated as, but can be read as an insistence that it is not to be judged by international trial standards. As it cannot be judged by Bangladeshi trial standards because ICTA excludes the local legislation regulating court procedures, it is *sui generis*. But that does not mean it cannot be judged (although those who judge it critically may, like the *Economist* and Human Rights Watch and David Bergman, find themselves charged with ‘scandalisation’ offences).

The Tribunal’s most high-ranking defendant has been the late Professor **Ghulam Azam**, who helped to found the *Jamaat* in East Pakistan in 1954 and was its leader during the crucial crucible years, 1969-71. He had led it during and after ‘Operation Searchlight’ and had travelled to Karachi in June 1971 to meet Yahya Khan to discuss the war and the treatment of the “miscreants”, i.e. the

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<sup>177</sup> *Prosecutor v Abdul Quader Molla*, ICT-BD Case No 2 of 2012, 5 February 2013, para 5

Awami League guerrillas, always referred to by the Tribunal as “freedom fighters”. The prosecution had no shortage of newspaper accounts of his speeches and press statements urging support for Pakistan unity and the danger of secession – this, after all, had been the policy of the political party that he led, and his views were shared by most in West Pakistan and by a considerable minority in the East. It is sometimes difficult to discern, from the extracts of his speeches introduced in evidence by the prosecutor, at what point he could be said to have crossed the red line, from honest political comment to the incitement of genocide and war crimes. He was not a military leader nor the head of any armed faction. He was reported to have established the Razakars, and was certainly a member of the Central Peace Committee. His counsel argued that he had no command or control over other “Peace Committees”, nor over the actual operations of the Razakars or Al Badr. It was admitted that he had described Awami League freedom fighters variously as “miscreants, rebels, separatists, anti-state elements, enemies and intruders”<sup>178</sup> which, on what was the official view at the time, they were.

Nonetheless, the prosecution ‘threw the book’ at him, with 61 counts charging crimes the length and breadth of East Pakistan, and put his culpability on the basis of the doctrine of command responsibility, although he was not proved to be a direct commander of operations, as distinct from the political leader. The case was notable for judicial dissatisfaction with the prosecution – one judge (Kabir) commented “the prosecution did not provide us with much” and “the documents submitted as evidence are not adequate”.<sup>179</sup> They were, however, adequate enough for the judges to convict him on all counts – it would seem, from Kabir’s comments, that they had satisfied themselves by undertaking their own research. This is acceptable, so long as the judge shares his research with the defence, which Judge Kabir does not appear to have done.

For all the public hostility to Azam, the Tribunal mercifully spared him the death penalty because of old age and illness, and sentenced him to 90 years imprisonment. The prosecution, not satisfied with the spectacle of him soon dying in jail, exercised its new-found right of appeal and would

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<sup>178</sup> Azam, above n160, para 383

<sup>179</sup> ‘Bangladesh: Azam trial concerns’, *Human Rights Watch*, [16 August 2013](#)

probably have succeeded (on the *Molla* basis that the death penalty must be the rule rather than the exception) had Azam not cheated the executioner and died of heart failure in October 2014.

The other defendant spared the death penalty was **Abdul Alim**, aged 84 and infirm, who had been an MP for the BNP and had actually served as a cabinet minister in one of their governments. As a lawyer in private practice in 1971 he was accused of setting up a ‘peace committee’ and directing a group of Razakar paramilitaries. As in the cases of other defendants, his legal team was only given three weeks to study the prosecution evidence before trial, and he was severely limited in the witnesses the Tribunal were prepared to hear in his defence (only three were allowed). He was convicted on nine counts, including genocide (laying waste to a Hindu village and giving speeches to the effect that “the Hindus would not be forgiven”<sup>180</sup>) and crimes against humanity. He was accused of ordering Razakars to hand civilians over to the army, of being present when the army killed them, and announcing that those “miscreants” captured by the army “would not be spared”. He denied forming the Razakar group and pointed out that in any event the Razakars were formed under an Ordinance which was a valid law in East Pakistan at the time.

Alim had one good procedural point: he had actually been arrested under the *Collaborators Order* 1972, but his prosecution was dropped. The Tribunal, quite wrongly in my judgment, brushed this aside:

“Admittedly accused Alim was prosecuted under the *Collaborators Order* 1972 but later on released. But there has been no proof that he was released on full trial of the case. Additionally, the offences enumerated in the Act of 1973 are quite distinct from those scheduled in the Order of 1972...”<sup>181</sup>

This is a fudge. The Order covered murder and arson, which were the underlying acts charged in 2013 as the basis for the counts of genocide. For reasons I have already given, to revive charges

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<sup>180</sup> *Prosecutor v Md. Abdul Alim*, ICT-BD Case 01 of 2012, 9 October 2013, para 374

<sup>181</sup> *Ibid*, para 103

concerning the acts for which he had been prosecuted, albeit unsuccessfully, in 1972, should count as an abuse of process.

**Delwar Hossain Sayeedi** had been elected as an MP in 1999 and again in 2001: he is a prominent Islamic author and a Vice-President of the *Jamaat*. The prosecution alleged that in 1971 he was a Razakar member. Most of its charges were based on eye-witness accounts that he was seen consorting with the army, and on hearsay reports that he had identified for them shops and houses owned by Hindus or Awami supporters, which were subsequently looted and burned, and he was accused of helping to kill survivors. He was also accused of rape. Again, the evidence consisted of placing him at or near the crime site, and by reports by persons not called to give evidence that he had committed the crime. One count, on which he was convicted, was that by use of threats he converted 20 Hindus to Islam. This was certainly not a crime against humanity in 1973, and may not be now (although the court in Sierra Leone in 2008 found that forcible marriage would qualify<sup>182</sup>). His defence was an attack on the prosecution witnesses (most were receiving government benefits, notably government pensions granted to ‘freedom fighters’) and like other defendants he pleaded an alibi, which he failed to prove (the Tribunal’s reversal of the burden of proof for alibi defences will be commented upon later). He was found guilty of eight charges and sentenced to death. At the time of writing this report, the Supreme Court has announced that this sentence will be replaced by life imprisonment, but has yet to give its reasons.

**Muhammed Kamaruzzaman** is the senior assistant Secretary General of the *Jamaat*, and like the others was given just three weeks to absorb the prosecution evidence. He had to make an application to the court every time he wished to see his counsel.<sup>183</sup> He was alleged to be the commander of Al Badr, and his defence was alibi – he said he remained in his native village at all material times. Among the charges of ‘crimes against humanity’ was the allegation that he had forced a schoolteacher to walk the streets “almost undressed” with lime on his face, head shaven

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<sup>182</sup> *Prosecutor v Brima, Karama and Kanu*, SCSL-2004-16-A, Appeals Chamber, Judgment, 22 February 2008

<sup>183</sup> *Prosecutor v Muhammad Kamaruzzaman*, ICT-BD Case No 3 of 2012, para 58

and hands tethered.<sup>184</sup> The prosecution claimed that this was an inhuman act, but it was far from a crime against humanity, then or now. He was sentenced to death on two counts. The first for directing an Al Badr massacre at a village: the prosecution witnesses identified him as being present; although none could say he gave the orders (one was ‘told’ he was the chief). The second related to the killing of a single victim: the evidence here was strongly circumstantial (he was alleged to have taken his prisoner outside, then returned with a companion who congratulated him on his aim). The court found him guilty of mass murder by virtue of his position as an Al Badr leader, “predictably knowing the consequence of the criminal acts of fellow Al Badrs, in execution of a common design he was either reckless or provided moral support for the accomplishment of the crimes”<sup>185</sup> Most of the evidence against him was hearsay, and the court ruled that hearsay does not require corroboration.<sup>186</sup> In October 2014 the Supreme Court announced that it would uphold the death sentence, but by the time of writing it has not delivered its judgment setting out its reasons.

**Ahsan Muhammad Mujahid** had held various offices in the *Jamaat* youth league, and was accused of being a local leader of Al Badr. The prosecution sought to establish his link with the Pakistan army through eyewitnesses who had seen him consorting with soldiers. After only three weeks to prepare, he faced seven charges, mainly relating to the extermination of intellectuals towards the end of the war. He was allegedly heard at a rally urging that doctors and journalists “should not be spared” and had called Al Badr members “angels of death”, thereby, said the court, “explicitly disseminating unholy organisational purpose...common sense goes to say that only a person holding a superior position and authority can deliver such an inciting and provocative speech”.<sup>187</sup> There was no evidence linking him to any particular atrocity, although the Tribunal found that his speeches and his *Jamaat* position “offer an unambiguous inference” as to his involvement in the joint enterprise of killing intellectuals. There were newspaper reports of speeches condemning ‘miscreants’ and ‘Indian agents’: but in so far as he called for retaliation or fight back against armed

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<sup>184</sup> Ibid, see paras 253-290

<sup>185</sup> Ibid, para 454

<sup>186</sup> Ibid, para 140

<sup>187</sup> *Prosecutor v Ali Ahsan Muhammad Mujahid*, ICT-BD Case No 04 of 2012, 17 July 2013, para 149

Bengali insurrectionists, the defence argued that he was expressing a legitimate opinion. There was no direct evidence that he was a leader of Al Badr, but his alleged presence with the army and his rabble-rousing speeches were enough to earn him the death penalty. Interestingly, on one count, he was charged with killing a man named Hossain, whom he had called “an agent of India”. The defence pointed out that under the *Collaborators Order*, a different man had been convicted of this very crime. The Tribunal made no effort to investigate.

**Salauddin Quader Chowdhury**<sup>188</sup> was the son of a famous Muslim League figure – a former cabinet minister during the Ayub Khan regime and Speaker of the National Assembly. His son was a member of Lincoln’s Inn who had himself been six times elected an MP, and was serving as such at the time of his trial. He demanded the right to defend himself, which was granted and then withdrawn, and against his wishes and his repeated protests he was at first represented by a state-appointed attorney. (Later, he was allowed a counsel of his choice). Most of the charges related to abducting and torturing Bangladeshis at Goods Hill and visiting Hindu villages with the army in order to destroy them. There was little direct evidence of the commission of offences by Chowdhury – the prosecution primarily relied on rumour and on statements taken from deceased witnesses.

The defence was alibi – Chowdhury said he was studying in West Pakistan in 1971, which he undoubtedly was at some points in that year and the Tribunal adopted the position it had taken in other trials, namely that it was for him to prove his alibi, and not for the prosecution to negative it. Although he had called several witnesses, and submitted a number of documents that the Tribunal affected not to notice. In this case it is fair to say that the prosecution did call evidence to dispute the alibi – namely that Chowdhury had a car accident at Goods Hill, was taken to hospital and fourteen witnesses deposed to having seen him there, or at Goods Hill or with the army, during the time he had said he was in Karachi.

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<sup>188</sup> *Prosecutor v Salauddin Quader Chowdhury*, ICT-BD Case No 2 of 2011, 1 October 2013

Chowdhury is the only defendant thus far to have disrupted the Court: it said he conducted himself without “rightness, decency or good behaviour.”<sup>189</sup> It is not clear whether this was as a result of the Tribunal’s refusal to allow him to defend himself, or whether that refusal was as a result of his disruptiveness.

**Motiur Rahman Nizami** was President of the student wing of Jamaat (*Islami Chhatra Sangha*) during the war, and at the time of his arrest was the ‘Ameer’ (chief) of the Jamaat itself. He had been elected an MP in 1991 and again in 2001, when he had held ministerial positions in the coalition with the BNP government. He was accused of a range of atrocities, allegedly committed by Al Badr – killing Hindu villagers *en masse*, running a torture camp and, most appallingly, rounding up intellectuals, professionals, teachers and potential Bengali leaders at the very end of the war and killing them to deprive the new nation of leadership. On some of the counts, alleging torture, victims were called to identify him, and he was clearly a student leader with a dominant power in his organisation, although his Al Badr leadership position was not established by evidence other than hearsay reports in books and newspapers. His trial miscarried when one judge left the court after the hearings but before the judgement: counsel were recalled to give the new judge a flavour of the arguments by making their final speeches again. He was duly allowed to call four alibi witnesses (ironically some of their evidence was rejected on the grounds that it was hearsay) and the court declined to act after a number of prosecution witnesses in subsequent media interviews retracted their testimony, which they claimed to have given under government pressure. The court shrugged this off as a “malafide product of collusion” without undertaking any investigation. On one count, (no 7) he was accused of killing in 1971 a man who had disappeared, although the defence was able to produce a record of the birth of that man’s daughter in 1976. The court ignored this official record, preferring to rely on the hearsay evidence called by the prosecution. Overall, while it cannot be doubted that Nizami held influential positions during the war, and that forces with which he had been publicly associated were engaged in brutal civil war fighting with the *Mukhti Bahini*, the retractions by prosecution witnesses after his trial leave open the possibility

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<sup>189</sup> Ibid, para 260

that he may, at least in some counts of his indictment, have killed “freedom fighters” without breaching the laws of war. The Tribunal, however, seems to view every killing of a “freedom fighter” as an international crime, overlooking the fact that there must be some additional element – e.g. torture, or killing of a prisoner of war – that would make it a war crime or crime against humanity.

**Mir Quasem Ali** was nineteen at the time of the war: the prosecution alleged that he was a commander of Razakar and Al Badr forces, and in particular held sway at a “torture camp” at the Dalim hotel in Chittagong. This was a jail where, so the prosecution alleged, “non-combattant freedom-fighters” (i.e. captured guerrillas) were held on the ground floor, and taken to the first floor to be tortured in order to obtain information about guerrilla forces and movements. The defendant was identified as a leader by a number of survivors, whom the defence alleged had been coached to give false evidence. The death sentence was passed on one count, where he was found to have supervised the torture of a seventeen-year-old “freedom fighter” so severely that he was near death. His body was brought downstairs and thrown among other prisoners who had to watch the boy die, so they could “understand the consequence of not disclosing the truth”. This was certainly a war crime – torturing a prisoner to death – and there was eye-witness identification of the accused by several survivors at trial.

The defendant pleaded an alibi, but the court ruled that this could only be considered after the prosecution had established his guilt, and that “the plea of alibi has to be proved with absolute certainty so as to completely exclude the possibility of the presence of the accused in the crime locality of Chittagong at the relevant time”.<sup>190</sup> This is not only to put the cart before the horse, but to drive it backwards: no alibi could ever be proved if the prosecution has already established guilt. Although, as explained in the next chapter, the Tribunal rules lay down that “the onus of proof as to the plea of alibi....shall be on the defence”, this does not require proof to the degree of absolute ‘certainty’ as the ICT judges seem to think: indeed, if there is a reasonable possibility

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<sup>190</sup> *Prosecutor v Mir Quasem Ali* ICT-2, Case No 3 of 2013, Judgement 2 November 2014, paras 695-698

that the alibi is true, the prosecution has failed, at the end of the day, to prove guilt. In this respect, the Tribunal has adopted the wrong approach in law. Nonetheless, the defendant was convicted on a number of counts relating to the maltreatment of “non-combatant freedom-fighters” (although as rebels in a civil war, they were ‘combatant’ when captured) and sentenced to death on the one count of torturing and killing the seventeen-year-old prisoner. Horrific as this single incident must have been, it was a lesser crime than the mass murders that had elicited the death penalty in other cases. The court in this case adopted the vague sentencing guidelines it had enunciated in the earlier case of, *Ali Absan Muhammad Mujabid*, which indicated the death penalty for those who behaved violently towards prisoners or who were in “culpable affiliation” with the army.<sup>191</sup>

**Syed Mohammed Quaisar** was indicted on sixteen counts of crimes against humanity in February 2014, and was convicted and sentenced to death on December 22<sup>nd</sup> 2014 – the speediest trial to date.<sup>192</sup> The lengthy judgement of the Tribunal proceeds in much the same fashion as the other cases, principally on inferences from the defendant’s alleged collaboration with the Pakistan army. He had fled to London in 1971 so there was no question of prosecuting him after the war. He returned following Sheikh Mujib’s assassination and in 1979 was elected as an MP for the BNP and later became Minister of Agriculture. It has not been possible to analyse this case in any detail and it is understood it will now proceed to appeal.

**ATM Azharul Islam.** This defendant, a 19 year-old student during the war, was Assistant Secretary General of the *Jamaat* when he was arrested, and in late December 2014, was convicted of genocide for murdering hundreds of Hindus in Rangpur. “I am innocent” he shouted in court as the presiding judge was ordering him to be hanged by the neck until dead”.<sup>193</sup> The verdict was met with spontaneous “victory” celebrations in Rangpur and Dhaka – an indication of how hyped-up the public has become about death sentences. The *Jamaat*, in its turn, called a strike to protest

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<sup>191</sup> *Prosecutor v Ali Absan Muhammad Mujabid*, ICT Case No 4 of 2012.; Judgement 17 July 2013, para 635

<sup>192</sup> *Dhaka Tribune*, December 23<sup>rd</sup>, 2014.

<sup>193</sup> “Jamaat leader sentenced to death for war crimes”. *The Gulf Times*, December 20, 2014.

the verdict. By the beginning of 2015, about 500 citizens had been killed in demonstrations for and against ICT death sentences.

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Most of these cases involved men who were leading members of a long-standing and legitimate political party *within* a democratic system, committed in 1971, like the government and some other political parties, as well as many public figures, to maintain the unity of Pakistan. Although, as it turns out, they were on the wrong side of history, they were entitled at the time to agitate against secession, to support the army and to join auxiliary forces recruited by Government Ordinance. What they were not entitled to do, when involved in those lawful activities, was to incite or to participate in the killing of civilians or prisoners of war, or to do so on the basis of their race or religion or their pro-secessionist leanings. The line can be thin, and over forty years later the proof beyond reasonable doubt that they crossed it can be difficult to establish, and must not be affected by the prejudice that attaches to them as opponents of those now hailed officially as “heroes” and “freedom fighters”. Given the importance and legitimacy of the line-drawing exercise, the Tribunal which is tasked with undertaking it must scrupulously afford due process and comply with recognised standards or the delivery of criminal justice. In the ways I indicate in the following chapter and notwithstanding the genuineness of the efforts of individual judges, I do not consider that this Tribunal has thus far achieved this purpose.



## CHAPTER 11 – PROCEDURAL JUSTICE

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There is no newly established tribunal, local or international, that does not encounter teething problems, procedural difficulties or questions of law that can take years to work out. ICTA is, in one sense, no exception, although in another sense it is an exception because it has so many. Its independence is constrained by the fundamental problem of the malleability of the Bangladeshi Constitution. Unlike many other countries, constitutional changes do not require approval by referendum, but merely by a two-thirds majority of MPs.<sup>194</sup> That means that when one party sweeps the polls, as the Awami League did in 2008, or (as was the case at the 2014 elections) the main opposition parties refuse to stand, that majority turns the constitution to putty in the hands of the government. Hence the amendments to Articles 47 and 47A of the Constitution, which removed vital protections, available to all others in peril in the courts, from defendants in ICTA. For this reason alone, and primarily, the Tribunal is an unsatisfactory body for delivering criminal justice. It may well be thought that these 2009 amendments breached the principle in *Anwar Hussein Choudbury* that amendments fundamentally inconsistent with the values embodied in the Constitution are themselves unconstitutional.

There are a number of other ‘fairness’ issues that arise on a reading of the cases to date:

*a. Treatment of Alibi*

Most defendants have set up alibis – a claim that not only denies that they committed the crime charged, but which positively asserts they were somewhere else when that crime was committed. Obviously the prosecution cannot be expected to refute that claim unless an accused calls some evidence (from himself, and/or witnesses who saw him at the other place) to support it. Once he has done that (as the defendants did) the burden shifts to the prosecution to negative it, in order to prove guilt beyond reasonable doubt. If the court thinks the alibi *may* be true, then it has a

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<sup>194</sup> Article 142

reasonable doubt and cannot convict. But this is not the approach taken by the Tribunal judges, who have adopted a rule (rule 51) to the following effect: “the onus of proof as to the plea of ‘alibi’...shall be upon the defence”<sup>195</sup>. This is wrong, both at common law and in international law, but was endorsed in *Molla* (“the burden of proving the special defence of alibi is on the accused setting it up”<sup>196</sup>). The correct position was set out in the ICTR Appeal Chamber in the *Protais Zigiranyirazo* case:<sup>197</sup>

“Where an alibi is properly raised, the Prosecution must establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true. The Prosecution may do so, for instance, by demonstrating that the alibi does not in fact reasonably account for the period when the accused is alleged to have committed the crime. Where the alibi evidence does *prima facie* account for the accused’s activities at the relevant time of the commission of the crime, the Prosecution must eliminate the reasonable possibility that the alibi is true - for example, by demonstrating that the alibi evidence is not credible.”

Frequently, in the Tribunal’s jurisprudence, it is asserted or implied that the defendant who raises an alibi carries the burden of proving it “with absolute certainty” – not “on the balance of probabilities” - and this approach no doubt derives from their interpretation of rule 51. This is a wrong interpretation, as a matter of law. It is a wrong approach in common sense, because inevitably, even true alibis after 40 years can be discredited in the absence of documentary evidence that may well by then have been destroyed. The Tribunal’s insistence that defendants must establish their alibis beyond reasonable doubt overlooks the principle that the burden of proof remains on the prosecution.

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<sup>195</sup> Rule 51(1)

<sup>196</sup> *Molla* (appeal), above n130, p234

<sup>197</sup> *Protais Zigiranyirazo v The Prosecutor* (Appeal Judgment), ICTR – 01-73-A, 16 November 2009, para18

b. *Burden of Proof*

In a criminal court, especially in deciding a capital case, the burden is on the prosecution to prove its case “beyond reasonable doubt”. In *Molla*, however, Justice Sinha said that when the defendant denies complicity in a crime, “it is to be looked into whether the story introduced by the prosecution is reliable or the story introduced by the defence is probable”.<sup>198</sup> This is to cut “the golden thread of the criminal law”, namely the duty of the prosecution to prove guilt as a matter of certainty. The question is not whether the prosecution story is unreliable, but whether it is true: if the defendant’s story is possible, he should be acquitted.

The Tribunal frequently uses language that falls short of certainty. In the *Sayeedi* case, for example, its findings on every charge are less than conclusive: “it is evident that”, “it sufficiently indicates”, “we find no reason to disbelieve”, “the evidence remains unshaken”, “the evidence...cannot be disbelieved” and so on. This may indeed reflect the evidence, which was largely hearsay, but if so the defendant should be given the benefit of any doubt. In this Tribunal, where no defendant has been acquitted, there is rarely any benefit given to defendants.

c. *Use of Judicial Notice*

This is a rule that permits a court to accept, without hearing evidence, facts which are common knowledge or are not reasonably subject to dispute. The Tribunal has incorrectly applied the doctrine by relieving the prosecution from proving key facts and elements of crimes, on the pretext that they are indisputable. In the *Azam* case, for example, it took judicial notice:

- 1) That the auxiliary groups to the Pakistan army provided moral support, assistance and substantially contributed and physically participated in the commission of atrocities;<sup>199</sup>
- 2) The “fact of common knowledge that thousands of incidents happened throughout the country as part of organised and planned attack. Target was the pro-

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<sup>198</sup> *Molla* (appeal), above n130, p202-3

<sup>199</sup> *Ibid*, para 35

liberation Bangalee civilian population, Hindu community, pro-liberation political group, freedom fighters and finally, the intellectuals”<sup>200</sup>

- 3) That the war of liberation constituted an ‘attack’ and that it was systemic;<sup>201</sup>
- 4) “That the Pakistani occupation army organised Razakar, Al-Badr for the purpose of operational support in implementing its atrocious activities in furtherance of policy and organised plan”;<sup>202</sup>
- 5) The fact that genocide occurred in Bangladesh;<sup>203</sup>
- 6) That there was a policy and plan to commit genocide<sup>204</sup>

Genocide must be proved – not assumed. So too must the purpose of Al Badr and the Razakars. So too must the allegation that these auxiliaries physically participated in atrocities. Although these are ‘facts’ that appear in many books and other media, in court they are key and core elements of a charge that the Prosecution must establish, if not in every trial then at least in one, so the others can rely on the precedent. The difference between a court and a newspaper is that a court requires to be satisfied to a certain standard that an event happened, and should not act until it is.

If the Tribunal took account of international guidance, they would have recognised that judicial notice can be taken only for material that is notorious, or facts that are not reasonably subject to dispute.<sup>205</sup> Whilst in the ICTR, judicial notice was eventually taken of the fact of genocide in Rwanda, this was only in later cases, after a finding of fact was amply made in an initial test case.<sup>206</sup>

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<sup>200</sup> Id

<sup>201</sup> Ibid, para 78

<sup>202</sup> Ibid, para 108

<sup>203</sup> Ibid, para 154

<sup>204</sup> Ibid, para 165

<sup>205</sup> *Prosecutor v Semanza*, ICTR-97-20-I, Decision on the Prosecutor’s motion for Judicial Notice and Presumptions of Facts pursuant to Rules 94 and 54, 3 November 2000, para 23

<sup>206</sup> *Prosecutor v Kayishema*, Trial Judgment, ICTR-95-1-T, 21 May 1999, para 273

Where the Tribunal takes a ‘fact’ on judicial notice, it gives the defence no opportunity to challenge what may be a widespread, but false, assumption.

*d. Time and Facilities to Prepare Defence*

It will be noted that almost all defendants were given the prosecution evidence against them just three weeks before the start of their trial. This was the minimum period of notice required by the statute. The prosecution was wrong to adopt it in every case, and the Tribunal was wrong to endorse their actions. For a lengthy trial, often involving dozens of charges, three weeks notice is hopelessly inadequate. The Tribunal practice of giving only three weeks notice appears to derive from s9(3) of ICTA which requires the prosecution evidence to be served ‘at least three weeks’ before trial. This was meant as an absolute minimum – obviously for cases where there are numerous counts of serious crimes over 6-9 months in 1971, at least three months notice is necessary. Instead, the Tribunal has misread the section as setting a normative rather than minimum period; in *Kumaruzzaman* the court actually seemed to boast that “three weeks time is given to the defence to prepare”<sup>207</sup> as though this was an indicia of its fairness.

Article 14(3) of the ICCPR requires a defendant to have “adequate time and facilities for preparation of the defence and to communicate with counsel of his own choosing”. There have been a number of breaches of this ‘fair trial’ right, which the Human Rights Committee has said should “include all materials the prosecution plans to offer in court” as well as exculpatory evidence in its possession.<sup>208</sup> In the *Kamaruzzaman* case, the Tribunal mistakenly said that communication with counsel was a privilege not a right and regarded it as satisfactory that a defendant denied bail had “been permitted to have privileged communication with his counsel, thrice – first at pre-trial stage, next at trial stage and finally at the state of summing up of case”.<sup>209</sup> This is wholly

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<sup>207</sup>*Kumaruzzaman*, above n168, paras 55 and 57

<sup>208</sup> UN Human Rights Committee (HRC), General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007, CCPR/C/GC/32

<sup>209</sup>*Kumaruzzaman*, above n168, para 58

unsatisfactory: at Scheveningen prison in The Hague, where ICC and ICTY prisoners are held, counsel normally have regular access to their clients, and do not need the court's permission for what, in law, is a right rather than a privilege. A number of complaints about denial of access were made in *Sayeedi*, where the Tribunal again spoke of communication with counsel as a "privilege", which it withdrew at the close of the defence case, ruling that it would "not allow any further privileged communication as it creates a problem...There is no further scope for the accused to explain the charges. The next step is argument. You do not need instruction for legal argument".<sup>210</sup>

This is wrong. An accused has a right to present his defence through counsel, and counsel's final speech is the critical statement of that defence. To exclude an accused from having any contact with his counsel before and during the final presentation, which after a long trial will last some days, is to deny him the basic right of participation in his own adversarial trial. That right is destroyed if he cannot instruct his counsel on which points to make or emphasise, which witnesses to attack, which concessions to make and so on. In this ruling, the Tribunal appeared blind to the basic principle that a defendant is responsible for his own defence.

*e. Hearsay Evidence*

Extensive introduction of hearsay evidence is inevitable in dealing with events of forty years ago, and is not in itself objectionable. International war crimes tribunals admit hearsay, but have developed rules (notably, a corroboration requirement and an insistence that the original source be reliable) for testing its truth and limiting its probative force. ICTA judgments are notorious for taking it at face value, with the result that rumour and gossip are all too often accorded probative value. "The crowd said" or "I was told by someone at the scene of the crime" are statements allowed to identify defendants and, for example in several of the counts upon which Molla was convicted, remain the only evidence of guilt, because "the reality is that 41 long years after the incident took place live witness may not be available and also the incident might not have been

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<sup>210</sup> *Kumaruzzaman*, proceedings of hearing 23 October 2012

witnessed by any person for valid reason of frightened situation existing at that time”<sup>211</sup>.<sup>211</sup> There has been no use of the common law rule that requires a balance between probative value and prejudicial effect<sup>212</sup> – i.e. whether, having regard to all the circumstances, the admission of second-hand hearsay would have such an adverse effect on the fairness of the trial that the court should not place any reliance upon it. The same objection does not apply to the Tribunal’s use of circumstantial evidence, which (contrary to popular belief) is often a powerful indicator of guilt and can be relied upon to eliminate any reasonable doubt. The danger of uncorroborated hearsay, echoed in the phrase “give a dog a bad name and hang him”, is that the allegation may have arisen from public prejudice or unchecked and malicious rumour. The failure to apply rules for safeguarding the defendant against such accusations is a serious defect in this Tribunal’s jurisprudence.

*f. Capacity of the Judges*

Criticism has been made of the apparent lack of understanding by the Tribunal members of the requirements of international criminal law, and of Justice Huq’s secret communications with an expert on the subject in Brussels (the objection being principally to the secrecy and to the expert’s connections with the prosecution, rather than to the judge’s wish for some academic enlightenment). Of greater concern has been the fluid composition of the bench – judges come and go without any requirement that they should be present throughout the trial in which they give final judgement. This became intolerable in the case of *Sayeedi* at the point when Justice Huq resigned. He was the only remaining judge from the original three-judge panel that had been constituted to hear the case – the other two judges had already been replaced in the course of the trial. Huq’s replacement, Judge Kabir, who had been a member of the initial panel but transferred early in the trial, came back on the bench after the conclusion of the final speeches, and had only

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<sup>211</sup> Molla (trial), above n162, para 193

<sup>212</sup> *Selvey v DPP* [1970] AC 304

heard an early part of the prosecution evidence and none of the defence evidence. In *Sayeedi*, none of the three judges who delivered the final decision had sat through the full trial.

Equally unacceptable was the judicial ‘musical chairs’ in the *Azam* trial, which began in June 2012 with Judges Nizamul Huq, Ahmed and Kabir. Ahmed resigned in August, and was replaced by Judge Jahangir, who had not heard the initial (and important) witnesses. Kabir was replaced before the trial started by Anwarul Huque, the only judge to sit throughout the evidence. Judge Nizamul Huq resigned in December, replaced by Kabir, who heard none of the prosecution witnesses.<sup>213</sup> In the *Nizami* case, Justice Fazle Kabir withdrew halfway through the prosecution evidence and was replaced by Justice Anwarul Huque who had heard none of the previous testimony.

One reason why this changing of the composition is unfair to the defence can be appreciated by reference to the Supreme Court decision in *Molla*, namely that an appeal court could not disturb the Tribunal’s factual findings about the credibility of witnesses, because it had seen and heard them, compared them with other witnesses, and observed their demeanour on oath and under cross-examination. How can this appellate approach possibly stand with the fact that no individual member of the Tribunal has actually heard all the evidence? No court of justice can do justice if its judges drop in and out in the course of proceedings. But ICTA does not even permit the defence to protest: Section 6(8) bars challenges to the composition of the Tribunal, its chairman or its members. This is an obnoxious provision, which precludes any complaint on appeal that justice has not been seen to be done.

*g. The Defence*

Any fair reading of the trial and appeal transcripts would show that the defendants have been represented by capable and courageous counsel, especially in most of the *Jamaat* cases, where defence teams have been led by Abdur Razzaq, a Lincoln’s Inn barrister. I question whether the state-appointed counsel should ethically have accepted appointment in the *in absentia* trials, where

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<sup>213</sup> ‘Bangladesh: Azam trial Concerns’, *Human Rights Watch*, 16 August 2013

they could not take their client's instructions. I have to say that counsels' dedication got the better of their discretion when, in a number of cases, they nominated lists of over a thousand witnesses they wished to call for the defence – this was obviously vexatious and the Tribunal was right to criticise it as a delaying tactic. Otherwise, their conduct made the trials a genuine adversarial exercise. However, I have been disturbed by a number of credible reports of harassment, especially by police who have entered Mr. Razzaq's office without a search warrant and intimidated his staff and their clients. Police have also refused to provide necessary protection to enable defence teams to make crime site visits. Complaints to the ICTA about police intimidation have been met by the Tribunal with the dusty response that such complaints should be directed to the police.

There is particular concern about witness tampering and intimidation. Because of the government's stubborn insistence on the death penalty, it has had no international financial support and the Tribunal must manage on a limited budget. This has not been enough, apparently, to set up the 'victims and witnesses unit' which is a feature of every international court, necessarily so when defence witnesses are vulnerable to violent reprisals and especially where local police are hostile, as Bangladeshi police are to those accused of collaboration with the army that attacked and killed many police officers. One *Sayeedi* witness – Mustafa Howlader – was killed by machete at his home after police refused to provide protection unless he gave them food (which he could not afford).<sup>214</sup>

A witness named Shukhoranjan Bali was said to have been abducted at the gates of the courthouse. Bali was due to give evidence as a prosecution witness, but then changed his evidence and deposed that Sayeedi was not involved in the murder of his brother. The Attorney General, in answer to a *habeas corpus* application filed on Bali's behalf, said that the abduction was fabricated to bring the court into disrepute, although this is strongly denied and the abduction claim is supported by Human Rights Watch.<sup>215</sup> There has been no satisfactory investigation or outcome. Nine defence witnesses currently face criminal charges based on complaints made by prosecution witnesses.

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<sup>214</sup> 'Investigate Killing of Witness', *Human Rights Watch*, 23 December 2013

<sup>215</sup> 'Protect Bangladesh War Crimes Trial Witness', *Human Rights Watch*, 16 May 2013

Some prosecution witnesses have said that they were coerced into providing statements and were warned by police against helping the defence.<sup>216</sup>

These matters are disturbing. Witnesses for the defence of the *Jamaat* leaders can be intimidated in an atmosphere where the Prime Minister repeatedly describes the defendants as “war criminals”, Awami League supporters harbour hostility and hatred to anyone seen to support them and the Bangladeshi police force is reluctant to provide protection. This situation cannot be blamed on the Tribunal judges, who have no power to direct the police, but the lack of a protective unit does undermine confidence in the Tribunal’s ability to receive any testimony that may be available to support the defendant or his alibi.

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<sup>216</sup> ‘Stop Harassment of Defence at War Tribunal’, *Human Rights Watch* 2 November 2011



## CONCLUSION

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This study of the background to and the work of the International Crimes Tribunal of Bangladesh has demonstrated the tension between the two forces that led to its creation and are now pulling it apart: the entirely legitimate demand for retribution for one of the world's most monstrous crimes and the entirely illegitimate wish to take vengeance on, really to kill, the leaders of an opposition political party. The international community must work out a way of disentangling these two objectives – to applaud and support the former and to deprecate and prevent the latter. The ethnic violence that has characterised this region goes back to the racial and religious passions inflamed by the partition of India, and will continue so long as visceral blood feuds are perpetuated by politicians and ideologues on both sides. The *Molla* execution provoked protests in which several hundred were killed,<sup>217</sup> and there is every indication that further executions will have the same result, and bring in turn further reprisals. It is clear that Bangladesh cannot alone solve the problems caused by its history and in particular by the behaviour of the depraved officers of the Pakistan army in 1971: there will be no peace without justice, but only justice that is two-sided, equitable and can be seen to have been done. How can these trials be transformed to serve that purpose?

They have already had one positive achievement. They have established, beyond any doubt, the scale and the bestiality of the murders and rapes in East Pakistan in 1971. Whether three million or half a million died hardly matters – their deaths resulted primarily from a calculated and in part, genocidal attack by a modern army on defenceless civilians. The perpetrators of that crime – the worst since the Second World War – were senior officers of the Pakistan army. They have never been punished – some have actually been honoured - and many are now dead. Despite Mr Bhutto's promises before the Tripartite Agreement, the report of his judicial commission, which identified some of the criminals, was (until 2001) suppressed, and its recommendations to the Pakistan

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<sup>217</sup> See “Bangladesh: A Tragic Backward Slide on Human Rights”, *Human Rights Watch*, 21 January 2014

government have never even been discussed. It called on that government to set up a “high powered court” 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”. This was the view of the then Chief Justice and two fellow judges, and it must be the view of anyone who rakes over the evidence about “Operation Searchlight” and its consequences, although the “collective amnesia” that has settled over Pakistan in respect of the 1971 army crimes has meant that no references are included in school textbooks.

<sup>218</sup> A prosecution of surviving war crimes suspects would serve to jog memories. There has been no reckoning at all for their victims in Bangladesh other than an initial, and now a belated, attempt to incriminate their collaborators. This is a worthy exercise, because the evidence suggests that Razakars and Al Badr forces joined with the army, using its promise of impunity as cover for the most horrific crimes. It is not clear, and perhaps does not matter, whether they acted under army direction or simply availed themselves of the army’s protection to kill on their own initiative those they hated for political or religious reasons. They were united in a legitimate political wish to prevent the break-up of Pakistan, but the ferocity of the murders of Awami Leaguers and Hindus indicated the visceral hatreds that were unleashed in the wake of “Operation Searchlight”, and reached their climax in the calculated killings of intellectual and political leaders at the war’s end. Even if the defendants are guilty, can such hatred be eradicated by putting them on trial now, and/or by putting them to death?

There is, of course, another side to this story, seen in the equally ferocious murders of Biharis by pro-liberation mobs and later by their guerrilla force. To some extent it may be said that the behaviour of the Pakistani army provoked reprisals in kind against groups in East Pakistan who supported its objective, but once again the ferocity of the killings shows that they were rooted in racial and religious hatreds. What is notable about the trials is that they will never feature a “freedom fighter” accused of a war crime: ‘heroes’ of the revolution have been given immunity. No doubt some future BNP coalition government will move to put them on trial: blood will have

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<sup>218</sup> See Bass, *The Blood Telegram* (supra) p329-30.

blood until every survivor of 1971 has passed away. It may be that then Bangladesh will be able to rise above its historic hatreds, but only if history is permitted to tell both sides of the story. It is not a story about the advantages and disadvantages of East Pakistan independence, although that was the political debate. It is not the story about an army whose barbarism started the war, or about politicians whose corruption and incompetence failed to stop it, because those stories have already been told. It is a story about how fellow Bangladeshis, often neighbours, came to tear each other apart, and how the international community – India excepted – did absolutely nothing to stop it.

The UN, under U Thant, was culpable, although it can only do what its major powers permit and they permitted nothing. Very belatedly the UN has set up a Tribunal to deal with surviving perpetrators of the next genocide, eight years later in Cambodia. Its dereliction of duty in 1971 might now be remedied by the Security Council, for all the urgency of its current concerns, establishing an *ad hoc* international criminal Tribunal to investigate and punish international crimes committed in the course of the 1971 war of Bangladeshi independence. It could sit in The Hague, or in some more geographically convenient city with access to good legal services - Perth or Singapore or Mauritius come to mind. It should have the power to examine witnesses and take evidence in Pakistan, India and Bangladesh, and to prosecute those it finds bear significant responsibility for crimes against humanity, whether they be Pakistani officers, Razakars or “freedom fighters”. It would take over the function of the ICT prosecution, using its databases and its expertise, with the power to review the finished trials and to order a retrial in any case where it concludes that the original proceedings miscarried or delivered verdicts where there is a real doubt about guilt. It could be tasked as Bhutto’s judicial Commission recommended, to report on the culpability of Tikka Khan and other deceased suspects – if not quite a “posthumous prosecution” at least a public judgement after considering everything that could be argued in his favour. Only in this way – or through some similar mechanism – can the international community make up for turning a blind eye to mark the horrors of the civil war in 1971, and ever after, and correct the mistakes that have been made, whether or not made in good faith, by the Awami League government in the establishment and running of the ICT.

A UN Tribunal would not, of course, have the power of capital punishment. The vicious cycle of killing in Bangladesh cautions against this ever being an appropriate or effective retribution: liquidating the leaders of the *Jamaat*, whatever their past crimes, offers only to renew the cycle of violence that has been the country's curse. Already there have been many deaths as the result of protests against Molla's hanging, and the international community must do its utmost to dissuade the government from carrying out further executions. This report catalogues the defects in the trials thus far, and the breaches of international law involved in the unavailability of appeal, the lack of mercy procedures, the almost mandatory (and therefore illegal under Bangladeshi law) death sentences by virtue of the mistaken interpretation given to ICTA's statute by the Supreme Court. This is an unacceptable way for any state to behave, and because Bangladesh purports to behave according to the determination of an 'international' court applying 'international' law, it follows that the international community is entitled to intervene. All the more so when the government has exploited the goodwill attached to international justice for the ulterior purpose of having its political enemies eliminated by judicial process. I am sorry to say this, for I think the exercise itself laudable and necessary, and many of its participants have been doing their best to make it work, but the evidence set out in this report drives me to the conclusion that this trial process is calibrated to send defendants – all from the *Jamaat* or the BNP – to the gallows. The Supreme Court, by interpreting s20(2) in a way that presumes a death penalty, has conducted to this illegitimate objective. The way in which Sheikh Hasina and her Attorney General ignored all international pleas to stop Molla's execution and rushed him to the gallows is dramatic enough evidence of their determination to avenge. But vengeance can come at the expense of peace and democracy in a country which has not enjoyed many years of either. The UN has in its power two levers that may work to close the trapdoor: stopping its aid supplies to Bangladesh, and refusing to employ Bangladeshis as UN Peacekeepers (a threat which has succeeded in the past). Both levers should be considered, to put pressure on the government to stop the hangings.

The Tribunal has made conscientious efforts, within the unfair confines of the ICTA and their shoestring budget, and it has collected evidence of some of the crimes against humanity committed in 1971. There are other ways that Bangladesh society may benefit from this Tribunal's work, other than by executing its prisoners. A Truth and Reconciliation Commission, with some independent overseas members, could identify the background causes I have sketched in the earlier chapter of the Report and suggest ways of preventing their recrudescence. Its work could pave the way for appropriate memorialisation of the victims – by adding to the Liberation War Museum in Dhaka (where the Tribunal records should be stored, with all the prosecution databases); by sponsoring the publication of an objective and exhaustive history of the war; by recommending symbolic initiatives (blue plaques, street and park names, and so on) to commemorate the valiant and the merciful. Although it has not been part of my study, I note that in 1974 Pakistan brought an action against Bangladesh and India at the International Court of Justice over the detention of the 195 war crimes suspects. Perhaps it is time for Bangladesh to seek reparations, in the same or some other forum, for the Pakistan army crimes of genocide that so blighted its birth and its future as a nation. I do not discount the legal difficulties, but a civil case for reparations should certainly be considered. But most urgently, the Government of Bangladesh must end the spectacle of execution of political opponents after trials which have, for the reasons explained in this Report, fallen short of international standards.

## Note About the Author

Geoffrey Robertson QC is founder and co-head of Doughty Street Chambers, the UK's largest human rights practice. He has appeared as counsel in many leading cases in constitutional, criminal and international law, and served as first President of the UN War Crimes Court in Sierra Leone, where he authored landmark decisions on the limits of amnesties, the illegality of recruiting child soldiers and other critical issues in the development of international criminal law.

In 2008 he was appointed by the Secretary General as one of three distinguished jurist members of the UN's Internal Justice Council and in 2011 received the New York Bar Association award for achievement in international affairs and law. His books include *Crimes Against Humanity: The Struggle for Global Justice*; *The Justice Game* (a Memoir); *Mullahs without Mercy: Human Rights and Nuclear Weapons*; *The Case of the Pope*; *Stephen Ward Was Innocent, OK* and *The Tyrannicide Brief* – the story of how Cromwell's lawyers put Charles I on trial. He is a Master of the Middle Temple and a visiting professor at London University and at the New College of the Humanities.

He is the author of thematic papers published by the International Bar Association on *Ethics in Human Rights Fact-Finding* (2010) and *The Independence of the Judiciary* (2014) and conducted an inquiry for the English Bar into the removal of Sri Lanka's Chief Justice. His latest book is *An Inconvenient Genocide – Who Now Remembers the Armenians?*