WHAT LESSONS MAY BE LEARNT FROM THE OPERATION OF THE ICT-BD IN THE AREAS OF INTERNATIONAL CRIMINAL LAW AND TRANSITIONAL JUSTICE?

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TABLE OF CONTENTS

CHAPTER 3 – LITREATURE REVIEW AND THEORETICAL FRAMEWORK

CHAPTER 4 – FEATURES OF THE ICT-BD

CHAPTER 6 – DUE PROCESS

CHAPTER 7- EVIDENTIAL MATTERS OF THE ICT-BD

CHAPTER 8 – WITNESS PROTECTION

CHAPTER 9 – SENTENCING AND CAPITAL PUNISHMENT

CHAPTER 10 – KEY FINDINGS AND LESSONS FOR ICL AND TJ

APPENDIX GUIDANCE

ABSTRACT

This thesis considers delayed prosecutions in the context of transitional justice and the Liberation War of Bangladesh in 1971. In response to the atrocities committed in that conflict, Bangladesh government set up a domestic tribunal after 39 years since the atrocities were committed, called the International Criminal Tribunal of Bangladesh (ICT-BD). The International Crimes (Tribunals) Act 1973 is the governing Act of ICT-BD. The substantive crimes under the Act include War crimes, Genocide, Crimes against humanity, Crimes against peace and any other crimes under international law.

The thesis primarily considers the role and contribution of the ICT-BD in international criminal Law (ICL) and transitional justice. The researcher adopted a qualitative legal analysis approach and employed a semi-structured interview technique to collect data from judges, lawyers and politicians who are involved with the ICT-BD.

The ICT-BD seeks to undertake delayed prosecutions and achieve delayed justice for the victims of 1971 through a domestic judicial forum and at the same time created an avenue for the victims to come forward and seek justice. Initial findings of the research indicate that, as a domestic tribunal, the ICT-BD has several lessons to contribute to international criminal law in terms of its fight against the culture of impunity, delayed justice, its engagement with old evidence, witness protection, sentencing principles and other procedural and substantive law challenges.

Despite many criticisms, the interviews undertaken indicated that the ICT-BD has been widely accepted by the interviewees in this study. As of July 2019, the Tribunal had delivered 38 judgments in less than 10 years of its existence. By delivering justice within a domestic, Bangladeshi context, the ICT-BD has several contributions to make to international criminal law. This thesis will analyse both its strengths and limitations in decreasing the culture of impunity in Bangladesh.

Key words: ICT-BD, War crimes, Genocide, Culture of impunity, Delayed justice, International Criminal Law

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List of Abbreviations

AD	Appellate Division
AL	Awami League, Political party in Bangladesh
BNP	Bangladeshi Nationalist Party
CrPC	Code of Criminal Procedure
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European convention on human rights
GD	General Diaries
ICT- BD	International Crimes Tribunal Bangladesh
ICT	International Crimes Tribunal
ICT ACT 1973	The International Crimes Tribunal Act of 1973
ICC	International Criminal Court
ICL	International Criminal Law
ICCPR	International Convention of Civil and Political Rights
IRA	Individual Risk Assessment
IRS	Initial Response System
ICTR	International Crimes Tribunal for Rwanda
ICTY	International Criminal Tribunal for former Yugoslavia
IHL	International Humanitarian Law
IMT	International Military Tribunal
IMT Tokyo	International Military Tribunal, Tokyo
POW	Prisoner of war
RoP	Rules of Procedure
Rome Statue	Rome statute of the International Criminal Court
RPE	Rules of Procedure and Evidence
SCSL	Special Court for Serra Leone
SRA	Security Risk Assessment

STL	Special Tribunal for Lebanon
TRC	Truth and Reconciliation Commission
TVF	Truth Fund for Victims
ICT1/Tribunal 1	Tribunal 1 of the International Crimes Tribunal of Bangladesh
ICT2/Tribunal 2	Tribunal 2 of the International Crimes Tribunal of Bangladesh
UN	United Nations
UNDP	United Nations Development Programme
UDHR	Universal Declaration of Human Rights
UNODC	United Nations Office on Drugs and Crime
WVS	Witnesses and Victims section

CHAPTER 1

GENERAL INTRODUCTION

1.1 Introduction

This thesis considers the delayed transitional justice process in the context of the Liberation War of Bangladesh in 1971. Bangladesh, a South Asian country, which may be little known to many, is only 47 years old. This country became independent from West Pakistan in 1971, paying a high price of blood.[1] During the country's Liberation War in 1971, three million people were reportedly killed, thousands of women were raped, 10 million people had become refugees in the neighbouring country India, in nine months.[2] According to Doak, the context of post-conflict situations varies considerably from each other, and the features of transitional justice also differ depending on the particular context.[3] In the particular context of Bangladesh, a domestic criminal tribunal was chosen to address the atrocities of the 1971 conflict. As a result, this research focuses on the operation of domestic tribunal and on the lessons that may be learnt in the area of International Criminal Law (hereinafter ICL) and transitional justice.

Bangladesh, previously known as East Pakistan, gained independence from West Pakistan.[4] It is reported that during the Liberation War, the Pakistan army and their local collaborators launched numerous systematic and planned attacks against the pro-liberation Bengali population.[5] Many people including children were killed and a large number of women were raped.[6] The nature of the mass atrocities include crimes against humanity, war crimes,

1 'Blood of Bangla Desh' *New Statesman* (London, 16 April 1971)
2 *The Chief Prosecutor v Mir Quasem Ali,* ICT-BD Case No. 03 of 2013 [ICT-2 Judgment of 2 November 2014] para. 6.
3 Jonathan Doak, 'Enriching trial justice for crime victims in common law systems: Lessons from transitional environments' (2015) 21(2) International Review of Victimology 139, 154.
4 *Mir Quasem Ali* (n 2) para. 6.
5 Ibid.
6 *The Chief Prosecutor v Ghulam Azam,* ICT-BD Case No. 06 of 2011 [ICT-1 Judgment of 15 July 2013] para. 11.

crimes against peace, genocide and other crimes under ICL.[7] Soon after the end of the Liberation War, the authority of Bangladesh attempted to investigate the atrocities committed during the country's transition. However, as a war-damaged country, and on account of the prevailing political context of the time, Bangladesh was not successful in prosecuting the perpetrators of 1971.

Although the war was between East Pakistan and West Pakistan, there were international stakeholders too.[8] The Soviet Union and India played an important role in the creation of Bangladesh.[9] On the other hand, strategically, the USA and China were against the independence of Bangladesh.[10] As a result, these countries and their allies paid little attention to assist Bangladesh to try and assess the perpetrators of 1971.[11] For this reason, in 1973, the Parliament of Bangladesh legislated the 'International Crimes (Tribunals) Act 1973' (hereinafter ICT Act 1973) to try and assess international crimes under a domestic tribunal. This constituted one of the world's first domestic enactments concerning international crimes. However, after 1974, on account of changes in the political landscape, the policymakers of Bangladesh lost interest in the process of prosecution. This was because the then President Sheikh Mujibur Rahman was assassinated and his party the Awami League (AL), was overthrown by a military coup in August 1975 after which a new regime came into power. As a result, political stability and peace-making took priority over accountability, tribunals were disbanded, prisoners were released, and the ICT Act 1973 was abandoned. As a result, perpetrators of 1971 enjoyed long-term impunity.[12] However, there was always a demand for justice from the people of Bangladesh. Nevertheless, the government of Bangladesh could not establish any tribunal until 2010 because there was no stable

7 International Commission of Jurists, 'The Events in East Pakistan, 1971: A Legal Study' (1972) 61.
8 Safdar Mahmood, *Pakistan Divided* (Alpha Bravo, New Delhi 1984) 157.
9 Ibid.
10 Ibid 166 and I77.
11 Gary Bass, 'Bargaining Away Justice: India, Pakistan and the International Politics of Impunity for the Bangladesh Genocide' (2016) 42(2) International Security 140, 148.
12 Ibid 144.

democratically elected government until 1991. The AL party lead by Sheikh Mujibur Rahman's daughter, Sheikh Hasina came into power in 1996, however its primary focus during its office term between 1996 - 2001 was to improve the infrastructure and to create a pathway to a stable government after years of instability. Yet, there were nationwide campaigns for justice from 1991 until 2008 and subsequently, the AL party which came back into power in December 2008, included an agenda in their 2008 election manifesto to establish a special tribunal with the aim of prosecuting the perpetrators of 1971.[13] Thereafter, in response to past atrocities, the Bangladesh Government set up a domestic tribunal in 2010, 39 years after the atrocities were committed. The ICT Act 1973 is the governing Act of International Criminal Tribunal for Bangladesh (hereinafter ICT-BD) which covers a wide range of jurisdiction over gross violations of human rights including 'War crimes', 'Genocide' 'Crimes against humanity' and any other crimes under international law. In analysing the performance of the ICT-BD, this research brings to light the inherent tensions between fighting impunity and seeking delayed justice in Bangladesh.

1.1.1 The International Crimes (Tribunals) Act 1973

The ICT Act 1973 was enacted by the parliament of Bangladesh after a thorough analysis and scrutiny. At the same time, the Constitution of Bangladesh was amended for the first time to give special protection to this particular Act.[14] This particular Act adopted the definition of crimes under customary international law. It is said that the ICT Act 1973 is the first domestic legislation which was based on Nuremberg principles. The enactment of this Act itself was a great contribution in its time when the principles of ICL was underdeveloped. In the context of 1973, this Act created a possibility to expand the enforcement of international law at the domestic level. The Act was carefully designed to establish a domestic tribunal within the national judicial body, in the particular context of Bangladesh. This particular Act is a

[13] *The Chief Prosecutor v Abdul Quader Molla,* ICT-BD Case No. 02 of 2012 [ICT-2 Judgment of 5 February 2013] para. 9.
[14] Preamble of the International Crimes (Tribunals) Act 1973.

constitutionally protected legislation which was ensured by the first amendment of the constitution of Bangladesh. That means, under Article 47(3) of the Constitution of Bangladesh, no law can declare the ICT Act 1973 as unconstitutional on the ground of retroactivity.[15]

1.1.2 The International Crimes Tribunal(s) of Bangladesh (The ICT-BD)

Over the last few decades, international criminal tribunals have gained considerable attention since the formation of ICTY (International crimes tribunal for the former Yugoslavia) and ICTR (International crimes tribunal for Rwanda). The Prime Minister of Bangladesh made a formal request in 2009 to the officials of UNDP and the UN Coordinator in Dhaka for assistance from the UN in establishing a criminal tribunal in Bangladesh.[16] However, due to strong lobbying by Pakistan and its allies such as the US, France, China and other Islamic countries, this attempt was unsuccessful.[17] Bass, in his article titled 'Bargain Away Justice' depicted how short term impunity in Bangladesh became long term due to the 'Politics of Impunity'; in his own words 'Without international support, Bangladesh had few viable alternatives for seeking justice for the 1971 atrocities'. [18]

Finally, the Government of Bangladesh established the ICT-BD in March 2010 comprising of domestic judges, lawyers and investigators. A second Tribunal was established in 2012 to deal with the initial caseload and to give a boost to the speed of prosecution. However, currently, only Tribunal 1 is functioning, and Tribunal 2 ceased to function since 15 September 2015 once it had achieved its short-term goal.

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15 Article 47(3) of the Constitution of Bangladesh.
16 Rashidul Hasan, 'Jamaat to take on war crime trial' (30 January 2009) *The Daily Star* available from < https://www.thedailystar.net/news-detail-73558> Last accessed 15 November 2017.
17 M Rafiqul Islam, *National Trials of International Crimes* (The University Press, Dhaka 2019) 412
18 Bass (n 11) 145 & 180.

1.2 Aims, Objectives and Statement of Problem

This study will contribute to our contextual understanding of ICL and TJ on how a Muslim majority country like Bangladesh dealt with criminal prosecution of international crimes under a domestic judicial mechanism. The hypothesis of this study is that, 'A critical analysis of the ICT-BD's operation can provide us important lessons in terms of due process, handling old evidence, witness protection and sentencing principles in the areas of ICL and TJ'.

The aim of the thesis is to explore the harmonisation process of the domestic judicial mechanism of Bangladesh to deal with the crimes under international criminal law. The core aim of the research is to concentrate on the prosecution of war crimes, crimes against humanity and genocide and does not directly address why those took place. It analysed the process of the ICT-BD, not simply as a criminal justice process that prosecutes international crimes in a domestic context, but also as a domestic legal system within the wider concept of transitional justice. The thesis, therefore, examines the contribution that the ICT-BD has made in the areas of ICL and transitional justice, notably the role of ICT-BD in fighting the culture of impunity in Bangladesh and serving delayed justice. It examines the lessons, strengths and weaknesses emerging from the Tribunal's approach to due process, handling old evidence, witness protection and sentencing principles. The thesis has also analysed the effectiveness of the ICT-BD as an avenue of transitional justice through which mass atrocities can be addressed and impunity fought. This study has three specific objectives:

a) To examine the contribution that the ICT-BD has made in the areas of ICL and transitional justice, notably the role of the ICT-BD in fighting the culture of impunity in Bangladesh and serving delayed justice.

b) To assess the lessons, strengths and weaknesses emerging from the Tribunal's approach to due process, handling old evidence, witness protection and sentencing principles.

c) To analyse the effectiveness of the ICT-BD, in light of specificities (domestic criminal tribunal in a Muslim majority country trying crimes that occurred 40 years prior) as an avenue of transitional justice through which mass atrocities can be addressed and impunity fought.

It is important to prosecute the perpetrators of genocide, crimes against humanity, war crimes, crimes against peace and other grave violations of human rights irrespective of where and when those crimes have been committed. However, due to lack of judicial forum, the victims of the Bangladeshi Liberation War of 1971 have had to wait over 40 years to get justice. The significant delay, domestic nature of the tribunal and particular cultural context of Bangladesh (e.g. being a Muslim majority country faced with issued such as death penalty) made it challenging for the ICT-BD to conduct trials. In analysing the delayed prosecutions of mass violence at the ICT-BD, this thesis attempts to undertake a closer examination of the ICT-BD data, collected through semi-structured interviews, judgments delivered by the ICT-BD, the legal framework on which it is based and ultimately answer the question: 'What lessons may be learnt from the operation of the ICT-BD in the areas of International Criminal Law and Transitional Justice?'.

The study addresses the following key questions:

a. How can the transitional justice processes be transposed from the international setting to a Muslim-majority country like Bangladesh?

b. Is the ICT-BD an appropriate mechanism for the specific circumstances in Bangladesh in the context of transitional justice? And why?

c. What is the nature of due process in the particular context of Bangladeshi TJ?

d. How is ICT-BD appropriately handling old evidence?

e. To what extent is the ICT-BD providing protection to the witnesses?

f. To what extent is the ICT-BD consistent in its sentencing practices?

This thesis will utilize academic literature and analytical data to examine and respond to the key questions. The researcher endeavours to present the ICT-BD as an effective avenue of justice to the reader by exploring the resources required to facilitate the smooth operation of the ICT-BD, current limitations, arguments and the resources required to address these issues.

The questions in the thesis has been presented with the objective that the discussions, clarity, and criticisms can serve as grounds for further research and development of the ICT-BD. Moreover, recent global conflicts such as the Arab Spring has shown that there is a growing need for a role model of a transitional justice system that has adapted domestic laws based on local practices to serve as an example to countries with a similar conflict history, culture and populace, mainly in Muslim majority countries or countries where similar time delays for prosecutions exist. The approach of the ICT-BD in the context of transitional justice and international law will be explored to determine if the ICT-BD can be looked upon as an example to such countries as, by achieving international relevance and acceptance from other countries, and by recognizing and addressing the gaps in the system, the ICT-BD and can cement its future as part of a valid, functioning point of reference internally as well as in the wider world.

1.3 Significance of research and reason for selection

This study examines whether, from the perspective of some of the actors involved in the ICT-BD process (judges, lawyers and politicians), the approach adopted in Bangladesh has been comprehensive enough in providing justice, uncovering the truth, providing reparation and promoting reconciliation which is considered as fundamental elements of transitional justice. Thus, the study examined historical, legal and political issues related to transitional justice in general and the model adopted by Bangladesh in particular. Also, this study examined the lessons which could be learnt from the operation of the ICT-BD, including the judgments it has delivered, and their contribution to the development of ICL and Transitional Justice.

There is a need for academic research that focuses on the domestic prosecution of persons who stand accused of genocide, war crimes and crimes against humanity. In the aftermath of grave human rights abuses, many states in transition have opted to overlook the actions and responsibility of perpetrators, while others have provided amnesty to individuals who perpetrated crimes. Supporters of a non-interventionist strategy and of amnesty claim that these are practical and necessary means to ensure the reconciliation of people.[19] Other nations have opted for selective prosecutions, while others have opted for truth and reconciliation commissions (TRC's) or a combination of these. Countries like Spain and Chile have not taken the path that Bangladesh has taken, that is, of instituting delayed prosecutions almost forty years after the original crimes. Moreover, even in the case of countries that have taken a similar path to that of Bangladesh, such as Cambodia, the criminal mechanisms they have instituted (Extraordinary Chambers in the Courts of Cambodia - ECCC) differ in important respects from the mechanism adopted in Bangladesh. This is because, the ECCC receives international assistance through the United Nations Assistance to the Khmer Rouge Trials

[19] Diba Majzub, 'Peace or Justice? Amnesties and the International Criminal Court' (2002) 3(1) MEL. J. INT'L L 247, 250.

(UNAKRT) and included international actors while the Tribunal in Bangladesh is a domestic mechanism which is formed, governed and funded by the Bangladeshi Government and domestically staffed. It is for these reasons that the operation of the ICT-BD needs to be researched.

Although there is extensive literature on restorative justice, retributive justice as well as reconciliation, this thesis offers an in-depth analysis and assesses these theories in the particular context of Bangladesh. This study has recognised the importance and use of domestic mechanisms to deal with crimes and crime prevention in society.

This research is particularly important to the researcher; partly because he is a Bangladeshi National, but also because he believes in the need to fight impunity even in the case of crimes committed several decades ago. By assessing Bangladesh's past and its collective actions following the 1971 atrocities, future crimes similar in nature may be avoided. There is a growing demand for pluralistic, culture-specific approaches to criminal justice in the fields of ICL and transitional justice, and it is important to analyse the contribution made by the ICT-BD in this regard. It is also important to analyse the nature of delayed justice in Bangladesh; its strengths and weaknesses would guide the future tribunals in a similar nature. This research is also important because it has provided an avenue for the victims of mass atrocities to come forward and seek justice.

The researcher also thinks that emphasis should be placed on the ICT-BD's handling of evidence of crimes committed decades ago, which can in future offer lessons for evidence in prosecuting similar crimes. This study will highlight the difficulties faced by the ICT-BD in achieving its stated objectives, it offers an important starting point that other systems can adapt and improve on, with the shared goal of fighting a culture of impunity.

Aside from its wider international significance, this study is also important on an internal level in Bangladesh because it has uncovered the strengths and weaknesses of the ICT-BD and suggests how the tribunal could have improved in terms of witness protection and

developing supplementary mechanisms to complement the criminal prosecution. This detailed study will also invite the stakeholders of the ICT-BD to improve their operational practices in terms of due process.

1.4 Contribution to knowledge

There is little academic research available on the specific circumstances of Bangladesh partly due to the language barrier as most of the research was published in Bengali. Historically, the International Commission of Jurists conducted an investigation in 1972 to identify the nature of atrocities and the legal position under national and international penal law.[20] In a 1973 article, Niall Macdermot suggested that the Bangladeshi authorities should try the high-ranking Pakistani generals and officials on charges of war crimes and crimes against humanity under international penal law.[21] Subsequently, in 1973, the Bangladeshi Parliament legislated a domestic law incorporating international crimes under a domestic tribunal. Later, in 1978, Jordan J Paust and Albert P Blaustein assessed the War Crimes Jurisdiction and Due Process in Bangladesh under the ICT Act 1973.[22]

Linton also contributed to the literature on this subject in her article titled '*Completing the Circle: Accountability for the Crimes of the 1971 Bangladesh War of Liberation*.' In her work, she analysed the ICT Act 1973 just before the ICT-BD was established in 2010.[23] Robertson in 2015 also prepared the '*Report on the International Crimes Tribunal of Bangladesh'* where he attempted to assess the procedural aspect of the ICT-BD. Also, Menon has critically evaluated a certain aspect of the ICT-BD and has contributed towards the growing literature of the transitional justice mechanism.[24] Further, Rajon in his article titled

[20] The Events in East Pakistan (n 7).
[21] Niall Macdermot, 'Crimes against Humanity in Bangladesh' (1973) 7 INT'L L 476, 476
[22] Jordan Paust and Albert Blaustein, 'War Crimes Jurisdiction and Due Process: The Bangladesh Experience' (1978) 11 VAND J TRANSNAT'L L 1.
[23] Suzzanah Linton, 'Completing the Circle: Accountability for the Crimes of the 1971 Bangladesh War of Liberation' (2010) 21(2) CLF 191, 191.
[24] Parvathi Menon, 'International Crimes Tribunal in Bangladesh' (2017) MPILux Working Paper 11, 11.

'*Domestication of International Criminal Law: International Crimes Tribunal of Bangladesh, A Case Study*' assessed the viability of the ICT-BD as a domestic mechanism.[25] Other notable contributions to the literature include Professor Mizanur Rahman's article titled '*Prosecuting 'War Crimes' in Domestic Level: The Case of Bangladesh*'[26] where he analysed the jurisdiction, constitutionality of the governing Act and the due process aspect of the ICT-BD; and Amirul Islam's book Chapter titled '*Old Evidence and the context of Bangladesh*' where he depicted the historical background of the ICT-BD and the contextual evidential aspect of the ICT-BD.[27] To date, there is a lack of systematic academic research on the operation of the ICT-BD. This research, therefore, aims to address this gap in the knowledge by addressing the question: *What lessons may be learned from the operation of the ICT-BD in the areas of International Criminal Law and Transitional Justice?* This research is based on empirical data gathered from semi-structured interviews with judges, lawyers, and politicians of Bangladesh. The findings from the data would contribute to the growing literature of transitional justice and ICL. This research has topicality because the ICT-BD is still undertaking criminal prosecutions and lessons from this research may inform future prosecutions in this tribunal. Lessons on delayed prosecutions from the ICT-BD may also be relevant to other jurisdictions where atrocities were committed but, similar to Bangladesh, immediate criminal prosecutions were not possible.

This research has conducted an in-depth analysis of how the ICT-BD proposes to hold accountable, the alleged perpetrators responsible for the 1971 atrocities after 42 years. The study has been conducted at a time when trials in ICT-BD are still ongoing. The researcher has investigated how the evidence is gathered and how the trials are conducted. The research is based on original, empirical data, collected from a series of semi-structured interviews with

[25] Sanoj Rajan, 'Domestication of International Criminal Law: International Crimes Tribunal of Bangladesh, A Case Study' (2012-2013) 12 ISIL YB INT'L HUMAN & REFUGEE L 132.
[26] Mizanur Rahman & Masum Billah, 'Prosecuting 'War Crimes' in Domestic Level: The Case of Bangladesh' (2010) 1(1) NUJL 5.
[27] Morten Bergsmo and CHEAH Ling (Eds), *Old Evidence and Core International Crimes* (Torkel 2012) 215.

judges, lawyers and politicians who were closely involved with the process of ICT-BD. The key findings of the interview data enrich our knowledge in respect to a domestic tribunal's efficacy to serve justice for the victims of mass atrocities and we can learn important lessons from the operation of the ICT-BD in terms of delayed prosecution. The researcher is originally from Bangladesh and is familiar with the local culture and speaks both English and Bengali; it was possible for the researcher to conduct some interviews in the Bengali language and translate them into English. As a result, the interview data will be a valuable contribution to knowledge. These translations are valuable documents for research in the greater context. As such, this thesis will provide a new insight into the practice of domestic courts to try and assess international crimes. It also provides a fresh assessment of how transitional societies such as Bangladesh use the domestic mechanism to deal with international crimes drawing from existing theories of retributive justice.

1.5 Methodology

To conduct this study, the researcher collected data through desk research and semi-structured interviews. The researcher adopted a doctrinal approach to analyse cases, legislation, and regulations related to the ICT-BD. In order to supplement this analysis, the researcher analysed relevant literature on post-conflict issues, justice, truth, reconciliation, reparation, and transitional justice.

In writing Chapter 8, subsection 8.4.1, data has been collected mainly from news articles due to the limited set of data available from other sources that examine how the witnesses of the ICT-BD have been intimidated and the difficulties that they faced. However, the newspaper articles have been selected cautiously in order to ensure credibility.

This doctrinal approach was supplemented with empirical data from the semi-structured interviews. While desk-based research was important to analyse the laws and cases related to the ICT-BD, this approach alone could not serve the purpose of understanding the operation of this Tribunal. As a result, the researcher needed to collect data using interview

techniques. The rationale for the empirical study is that it enabled the researcher to collect open-ended data from hard to reach individuals, e.g. judges, lawyers and politicians of Bangladesh to explore their thoughts about the operation of the ICT-BD. The initial literature review revealed that there is insufficient reliable data available in English on the Bangladeshi Tribunal and for this reason, the research adopted a semi-structured interview technique to collect reliable and comparable qualitative data. The objective of the interviews was to secure information from stakeholders who have been involved in establishing or in the operation of the ICT-BD, but their voices and perspectives have so far, been missing from the academic literature on the ICT-BD.

After careful consideration of the nature of the research to be conducted, the researcher decided to use qualitative rather than quantitative research methods. Bryman suggests that qualitative research concerns itself with understanding and interpreting people's views and their particular circumstances.[28] Also, interviews produce rich insights into people's experience, opinions, values and feelings.[29] In this particular study, it was important to know the views of the judges, prosecution lawyers, defence lawyers and politicians belonging to different parties in Bangladesh to understand the operation of the ICT-BD.

Interviews are an appropriate method of data collection for this particular research study as they uncover people's experiences, perspectives and textual descriptions about transitional justice processes in Bangladesh. Also, the data collected through the semi-structured interviews added originality to this study because the views of the judges, lawyers, and politicians of Bangladesh were not subjected to a systematic study before. Furthermore, qualitative interviewing involves the construction or reconstruction of knowledge.[30] Mason suggests that qualitative interviewing usually relies on in-depth semi structured or loosely

[28] Alan Bryman, *Social Research Methods* (6th Edn, Oxford: Oxford University Press, 2008) 28.
[29] Darren G Lilleker, 'Interviewing the political elite: Navigating a potential minefield' (2003) 23(3) Politics 207, 208.
[30] Ibid 29.

structured interviewing techniques.[31] Qualitative interviewing aims to discover and develop new concepts, rather than impose preconceived categories on the people and the events they observe. So, data collection through semi-structured interviews would add significant value in this study to understand the nature of delayed prosecutions in Bangladesh.

This study did not interview any victims, perpetrators or members of affected communities despite acknowledging the importance of the voices of these groups. As these groups are quite large, and the inclusion of a few members would add little value to this research. This is one of the limitations of this research. Also, additional ethical approval and training would be required to conduct interviews with victims, perpetrators and affected communities. The researcher is of the opinion that there may be a separate, victim-focused study where the views of those large groups can be reflected through qualitative interview techniques. Such a study of victims would undoubtedly be very valuable. Nevertheless, it is considered that making available the voices of key stakeholders involved in the ICT-BD, as this research does (particularly, given the absence of these voices in the scholarship) is also an important and worthwhile endeavour, and this is why this research has focused on key stakeholders. Further to that, elite interviewing is another limitation of the semi-structured interview method and this current study had faced the same problem because interviews were conducted only with judges, lawyers and politicians.

The term 'elite' has been used in a research context to refer to the people who hold a significant amount of power within a group.[32] Conducting elite interviewing is a challenging task and the researcher mitigated those challenges by following authoritative guidance e.g. Harvey's article titled '*Strategies for conducting for conducting elite interviews'*. From the very beginning, the researcher attempted to gain the trust of the interviewees so that he could obtain high quality data. The researcher attempted to be transparent and provided as much

[31] Jennifer Manson, *Qualitative Researching* (2nd Edn, SAGE Publications London 2002) 17.
[32] Willian S Harvey, 'Strategies for conducting elite interviews' (2011) 11(4) Qualitative Research 431, 432

information as he could to the interviewees. He explained his identity and using an information sheet, provided clear information to the interviewees about the aims and objectives of this research. Since the researcher is a Bangladeshi citizen, it was easier for him to gain the trust of his interviewees. Also, the researcher conducted his own homework before conducting the interviews with a view that the interviewees may challenge him on the subject. During the interview, the researcher tried to assess the behaviour, speaking voice and mannerisms of the interviewees and asked them questions accordingly. The researcher avoided asking close ended questions to the interviewees so that they had the opportunity to comfortably answer questions. To obtain important data, the researcher asked supplementary questions as some of the interviewees did not answer the primary questions asked. Keeping in mind the elite interviewing environment, the researcher designed the questionnaire in a way that asked simple, “lead-in” questions at the beginning and the more difficult questions in the middle of the interview so that he could establish rapport quickly. The researcher noted that towards the end the interviews the interviewees could get tired and may provide a less detailed answer. To mitigate this issue, the researcher occasionally mentioned how long the interview would take.

The qualitative interview method employed in this study has some benefits and drawbacks. Interviews may provide us insights into events and activities that take place out of the public eye.[33] It gives greater flexibility to collect data and data can be collected according to the need of the research. In this particular study, the semi-structured interview method helped the researcher to arrive at a more valid conclusion regarding the research questions. This method helped to understand the perspectives of the sections of people who are associated with the ICT-BD. Also, the researcher had the opportunity to observe the credibility of the data provided by the interviewees. This method was useful for this particular research because it helped to understand and analyse the experience of Judges, lawyers and

[33] Lilleker (n 29) 208.

politicians of Bangladesh who are associated with the ICT-BD. Using this method, the researcher took the opportunity to pursue in-depth information to answer the research questions. This technique is also helpful for further research and follow up research.

There are some disadvantages of qualitative interview methods and this cannot be relied upon as a sole methodology.[34] For instance, given the limited number of interviews undertaken, the interview findings may at most be said to be indicative of broader patterns within the ICT-BD. As a result, the researcher reinforced the collected data with the Judgments of the ICT-BD and other literatures. Another shortcoming of this method is that the interviewees may not offer objective data but rather provide subjective views on the effectiveness of the ICT-BD depending on which side they sit. In order to address this matter, in the selection of key stakeholders, the researcher made a deliberate effort to select stakeholders from different camps (e.g. politicians from different affiliations, both defence and prosecution lawyers, etc).

In the semi-structured interviews conducted, the researcher had asked several specific major questions, but the respondents were free to provide responses beyond those queries. From the start, the emphasis was on attaining an understanding of the operation of the ICT-BD based on the perspectives of the various stakeholders (judges, lawyers, and politicians). The researcher therefore allowed the interviewees to decide what issues they considered to be more important for them and to speak at more lengths on those issues.

Interviewees were selected from among various politicians, judges, and lawyers. Both purposive sampling and snowball sampling were used to select and recruit interviewees. Initially, the researcher found the names of the judges and lawyers from the Judgments delivered by the ICT-BD and the researcher selected one prosecution lawyer, one defence lawyer and one Judge considering their wider role within the ICT-BD's operation. The

[34] Ibid.

researcher used his own judgment when creating a profile of the individuals who would provide information according to the research need. Using the snowball sampling technique, each of the selected interviewees were requested to recommend 1-3 interviewees for recruitment purposes. In recruiting politicians, the researcher initially used purposive sampling and selected 2 politicians from two major parties (Awami League and BNP - Together these two parties represent bulk of the other political parties in Bangladesh). Employing snowball sampling, those two politicians were requested to recommend other politicians who would be able to provide valuable data to this study. The researcher also considered diversity in terms of age, religion, gender and political views when recruiting the interviewees. Among the participants two people were from the Hindu religion and 16 of them were Muslims, the politicians represented 6 different political ideologies, 6 participants were below the age of 45, 6 participants were between 50-60 and 6 participants were over the age of 60. The researcher was able to recruit only one female interviewee due to the nominal presence of women in the legal and political sector and the other 17 participants were male. To mitigate personal and political bias, the researcher recruited equal number of defence and prosecution lawyers and participants from six different political parties. A total of 18 people participated in the interviews (5 recruited through purposive sampling and 13 recruited through snowball sampling) with their prior written consent. However, out of the 18 participants, one participant withdrew consent from the study before the researcher started analysing the data. Accordingly, all the data relating to that participant was securely destroyed. The respondents were given code numbers to keep their identities anonymous.

Before conducting the semi-structured interviews, the researcher tested the interview questions through a pilot study involving 3 participants and updated those questions which did not seem effective in the pilot study. Following the pilot study, technical words were removed from the questionnaire and two questions were rephrased. The interview questions have been annexed to this thesis.

There were two main limitations of the interview technique employed in this research. Firstly, due to the elite nature of the participants, the interview data may not be entirely representative of the Bangladeshi society. Secondly, this study excluded the views of the victims, perpetrators and the affected community, so the interview data may not represent an important section of the society.

All the semi-structured interviews were audio-recorded. Some interviewees spoke in English while answering the questions, others spoke in Bengali (the official language of Bangladesh). The researcher has transcribed all the interview recordings in English. Since the researcher can speak the native language of Bangladesh, it was not a problem for him to translate the Bengali audio recordings of the interview to English.

Once the transcription process was complete, the researcher analysed and coded the data based on a thematic analysis. He analysed the interview transcripts for commonalities and patterns emerging from the data and found seven main themes that emerged from the interview data, such as the culture of impunity; delayed justice; due process; evidential matters; witness protection; reparation and sentencing principles. These themes were used to organise chapters five to nine of this thesis.

The researcher has used the following codes to analyse the data thematically:

Table 1: Code names of the participants

Code of the Participant	Short code
Judges:	
Judge 1	J1
Judge 2	J2
Judge 3	J3
Judge 4	J4
Prosecution Lawyers:	
Prosecution Lawyer 1	PL1
Prosecution Lawyer 2	PL2
Prosecution Lawyer 3	PL3
Prosecution Lawyer 4	PL4
Defence Lawyers:	
Defence Lawyer 1	DL1
Defence Lawyer 2	DL2
Defence Lawyer 3	DL3
Politicians:	
Bangladesh Nationalist Party (BNP)	P1-BNP
Bangladesh Jamaat-e-Islami Party (BJI)	P2-BJI
Janiya Party (JAPA)	P3-JAPA
Gono Forum	P4-GF
Ghatak Dalal Nirmul Committee	P5-GNDC
Awami League- AL	P6-AL

Table 2: Codes of the questions answered by the participants

The answers of the interviewees were analysed following the below codes:

Questions	Code
A A1 A2 A3 [please see attached the questionnaire in the appendix for details]	Q-A Q-A1 Q-A2 Q-A3
B B1 B2 B3 [please see attached the questionnaire in the appendix for details]	Q-B Q-B1 Q-B2 Q-B3
C C1 C2 C3 [please see attached the questionnaire in the appendix for details]	Q-C Q-C1 Q-C2 Q-C3

Table 3: Understanding the references to interview data

Example: J1-Q-B1- means 'Judge 1' provided information in answering questions relating to B1

1.5.1 Ethical approval and Risk Management

Ethical approval was obtained from the Anglia Ruskin University's Research Ethics Committee before conducting the interviews. The researcher was required to undertake two specific training courses as part of the ethical approval. The first training course was titled '*Ethics 1: Good research Practice'* and the second training course was titled '*Ethics 2: Research with humans in the health and social sciences'*. Both training courses enabled the researcher to comply with the good research practice requirements and consider the ethical aspect when interviewing humans. The researcher made it clear in the ethical approval application form that he must follow all the ethical requirements of the University's ethics committee. For the interviews, the researcher travelled to Bangladesh and conducted pre-arranged interviews with judges, lawyers, and politicians of Bangladesh, who had been involved with the establishment or operation of the ICT-BD.

The researcher also conducted appropriate risk assessments as part of the ethical approval application because this research required the researcher to conduct a field trip to Bangladesh. As part of the risk assessment, the researcher considered the welfare of the participants during interviews, duration and type of questions to be asked, method of transport (e.g. airplane, vehicle and train) for the field trip and road traffic incidents in Bangladesh. The research identified other risk factors and hazards such as hot weather, food poisoning, Hepatitis A, diarrhoea and typhoid in Bangladesh. To manage those risks, the researcher considered the emergency services in Bangladesh e.g. medical and security. The researcher obtained Anglia Ruskin University's public liability insurance and considered the university's risk assessment policy. The researcher also obtained travel insurance. Weighing up all the risk factors, the researcher determined that the risk level was low. The researcher pre-planned an itinerary of the interview dates, time, locations and participants name and that information was provided to the Supervisor of this study.

1.5.2 Scope of the thesis

In order to understand the historical context of the ICT-BD, it is important to understand the history of Bangladesh and the causes of the atrocities so as to establish a context for the prosecution of crimes under the international criminal justice system.

However, although the researcher has carried out extensive research on the contested history of Bangladesh within the thesis, it has been used purely for analytical purposes and was not the central focus of reference for this research. This is due to the core aim of the research, which will concentrate on the prosecution of war crimes, crimes against humanity and genocide and does not directly address why those took place. However, there is a great deal of literature available on the history of Bangladesh and the liberation war of Bangladesh. The researcher will elaborate on the justification of the research method in Chapter 3.

This research has some limitations. Firstly, in relation to interview data, it was not possible to interview a large number of people due to time restrictions and limited funding. As a result, the researcher had to rely on the limited set of data to assess important aspects of the ICT-BD. In the end, the researcher managed to recruit 4 judges, 8 lawyers and 6 politicians for the empirical component of this study. While this may not be a large number, these individuals are considered hard-to-reach figures, whose voices have not yet been extensively represented in the available literature on the ICT-BD. Therefore, though the findings of this thesis may only be indicative, the interview data offers an in-depth and detailed perspective on the operation of the ICT-BD which has not been made available before. Limitation of resources in the English language was another constraint to this research because there was a lack of extensive literature on the ICT-BD such as academic books or journals. Another limitation was the geographical distance; this research was mainly undertaken in the UK and the subject matter of the research was in Bangladesh. As a result, it was not possible to make an actual observation of the trial process over the course of this research.

However, the researcher was able to visit Bangladesh for a short period of time to collect data between 6 -20 May 2017 and he had made three visits to the ICT-BD to observe the physical settings.

1.6 Structure of the Thesis

This research is divided into 10 Chapters. Chapter one provides an overview of the thesis including a brief introduction, significance of the research, and the methodology used for this research. Chapter two deals with the context of the ICT-BD including the nature of the atrocities, the alleged perpetrators of the crimes and earlier failed attempts at prosecution and reconciliation.

Chapter three explains the relevant literature reviews and the theoretical framework. This chapter focuses on discussing the theoretical foundation of this research and the ICT-BD will be assessed through the lens of Transitional Justice.

Chapter four deals with the features and legal framework of the ICT-BD. This chapter firstly discusses the nature of national prosecutions of international crimes and categories of ICT's. Secondly, it discusses the parliamentary debate surrounding the ICT Act 1973. Thirdly, it has analysed the substantive laws of the ICT-BD. Finally, it has examined the procedural aspects of the ICT Act 1973 and the rules of procedure (RoP) of the ICT-BD.

Chapters five to nine presents an analysis of the interview data collected through semi-structured interviews with reference to relevant literature and the judgments of the ICT-BD. Chapter five is dedicated to analysing the interview data in relation to fighting the culture of impunity, delayed justice and reparations. Chapter six analyses the interview data in relation to the due process aspect of the ICT-BD. Chapter seven presents the interview data in relation to the evidential matters of the ICT-BD on how the judges have assessed the old evidence in the particular context of Bangladesh. Chapter eight analysed the interview data relating to the witness protection aspect of the ICT-BD. This particular chapter explains that the ICT-BD could not come with an effective mechanism of witness protection measures. Chapter nine

presents the interview data relating to the sentencing principles and capital punishment with reference to the judgments delivered by the ICT-BD.

Chapter ten offers some concluding remarks and important findings based on the interview data, substantive laws of the ICT-BD and procedural rules. In relation to culture of impunity, the major finding is that although the prosecutions were delayed, the ICT-BD has taken a substantial step to end the culture of impunity. In regard to due process, the most important finding is that the ICT-BD has defined due process in line with the national wishes, long denial of justice and recognised international norms and jurisprudence. In relation to witness protection, this study finds that the ICT-BD did not take appropriate measures in keeping the identities of witnesses safe. Other notable findings are that the ICTBD judges refused to accept hearsay evidence due to lack of corroborative evidence and in assessing the punishment, the judgements of the ICT-BD referred to the national wishes and the long wait of the victims.

CHAPTER 2

THE CONTEXT IN DETAIL

2.1 Introduction

This chapter illustrates a descriptive account of the context of the Liberation War of Bangladesh and the crimes committed in 1971. This is to provide the reader with a clear and cohesive understanding of the injustice many went through and why obtaining justice was so important to the people of Bangladesh even decades later. This will also provide the reader with a time frame of the events, initial steps and the subsequent creation of the ICT-BD and will give the reader an insight into why the memory of the liberation war is still very fresh and the pursuit for justice is enshrined in the minds of the people of Bangladesh.

Several studies have documented that the world had seen the biggest casualties during World War II, which occurred over three continents and killed about sixty million people in six years.[35] The second largest mass killing was seen during first World War which took the lives of 20 million people.[36] During the war in Vietnam, three million people were killed.[37] The birth of Bangladesh was equally devastating; the country emerged through the bloodshed of three million people within a short period of nine months.[38] It is officially recorded that more than 200,000 Bangladeshi women were raped.[39] However, the context of Bangladeshi transitional justice is not well known in many parts of the world. The ICT-BD was established decades after the atrocities that were committed by the Pakistani army and local auxiliary forces.

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[35] Susan Brownmiller, *Against our will: men, women and rape* (Simon & Schuster 1975) 81, Gary Bass, 'Bargaining Away Justice: India, Pakistan and the International Politics of Impunity for the Bangladesh Genocide' (2016) 42(2) International Security 140, and *International Commission of Jurists*, 'The Events in East Pakistan, 1971: A Legal Study' (1972) 61.

[36] Brownmiller (n 35) 81.

[37] Ibid.

[38] Ibid.

[39] Ibid.

Following the independence of Bangladesh, there were several attempts to make the perpetrators accountable and those failed due various reasons or did not achieve the desired outcome. Attempts of prosecution, reconciliation and amnesty were taken which gave rise to several legal debates. International politics had further created various obstacles towards justice. The United States and China were against the establishment of any criminal tribunals because they were allies of West Pakistan during the 1971 war. China was primarily concerned about the Indian military support that Bangladesh was receiving from the Indian government at that time and as the relationship between China and India was tense and due to the Indian-Sino war of 1962, it feared an attack from India. On the other hand, the United states provided military supplies to East Pakistan and was concerned about avoiding a Soviet domination the in the South Asian region due to the Cold war as the Soviet Union had expressed its support for an independent Bangladesh.[40] China and the United States were also among the last countries in the world to recognise Bangladesh as an independent state. The impact of this geopolitics was that the authority of Bangladesh had to choose whether to prosecute the perpetrators or to ensure government security and get recognition for the country. Bangladesh also needed to improve its infrastructure, military and economy which meant that it needed to work on building strong diplomatic ties with other economically stable countries such as the USA. The political turmoil in Bangladesh subsequently buried the demand for justice from 1975 until 1990. Nevertheless, following its establishment, the ICT-BD has so far delivered 38 judgments (as of July 2019) within 9 years from the initial establishment.[41] At present there are 21 cases pending before the ICT-BD and over 675 complaints are under investigation.[42]

[40] Bass (n 11) 148
[41] Judgments of ICT-BD (ICT-1), http://www.ict-bd.org/ict1/judgments.php & Judgments of ICT-BD (ICT-2) http://www.ict-bd.org/ict2/judgments.php Accessed 3 July 2019.
[42] Ibid.

2.1.1 Legal system in Bangladesh

Bangladesh has a dualist common law legal system and international law is not applicable directly without the help of an Act of Parliament.[43] The case of *Bangladesh and others v. Sombon Asavhan* states that if domestic law is linked to international law, then it is the duty of the domestic courts to apply domestic law complying with the Act of parliament.[44] However, for the application of 'customary international law', there is no need of any aiding domestic legislation because, by virtue of common practice principle, it is already part of national law, subject to the reservation that it does not contradict with an Act of Parliament.[45] There is no clear description in the Bangladeshi Constitution on how international laws are to be applied except for the vague concept of supplementary legislation.[46]

From an analytical perspective, the ICT Act 1973, as amended, is clearly an Act of Parliament to provide for the detention, prosecution and punishment of persons responsible for committing genocide, crimes against humanity, war crimes and other crimes under international law and there is no doubt that it is domestic law.[47] However, the Act also refers to crimes of international law which are developed by customary international law as a matter of source.[48] So, if we critically observe the functionality of the ICT Act 1973 as amended, it can be seen that the Act has ultimately created room to adopt international law by way of reference but there is no formal declaration of incorporating international law except in the Geneva Conventions of 1949.[49] There is no doubt that treaties such as the Genocide Convention and the Regulations annexed to Hague Convention IV are customary international law[50] and, if there is no conflict with Statute passed by Parliament, aspects of these

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43 *Rayner (Mincing Lane) Ltd v Department of Trade and Industry Ltd* [1990] 2 A.C. 418, 500 (H.L.) [hereinafter The International Tin Council case].
44 *Bangladesh and others v Sombon Asavhan* (1980) 32 DLR 198, 201.
45 *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 2 WLR 356.
46 *Bangladesh and others v Sombon Asavhan* (1980) 32 DLR 198, 201.
47 Linton (n 23) 225.
48 *Hussain Muhammad Ershad v Bangladesh and others* (2001) 21 B.L.D. (AD) 69.
49 Linton (n 23) 225.
50 Antonio Cassese, *International Law* (Oxford University Press 2003) 172

international treaties are applicable in Bangladesh.[51] However, Professor Shah Alam observed that Bangladeshi judges are unwilling to refer to foreign treaties without a formal declaration to be bound by that treaty.[52] The other option is that the judiciary of Bangladesh may accept to apply unincorporated treaty after ratification has been done, but did not explain how it could be possible to do so.[53] However, it is clear that Constitutional Supremacy is preserved in Bangladesh and international law will only apply if they are not contradictory with the legal authority of Bangladesh.[54]

2.1.2 Liberation War of 1971

To gain an understanding of the Liberation War of 1971 (alternatively Independence War of 1971), it is important to revisit the historical aspect behind the war. British India was partitioned in 1947 based on the 'two-nation' theory, which gave birth to India and Pakistan.[55] The justification put forward to implement this division was that India would be a country for the Hindu majority and Pakistan would be an Islamic country.[56] Pakistan was geographically comprised of East Pakistan and West Pakistan with India in between.[57] The native Bengali population along with a majority of Hindus and Bihari's[58] resided in East Pakistan and were governed by the Pakistani army. Bangla was the most common language spoken in East Pakistan. The people of East Pakistan were discriminated against politically, socially and economically and were worse off than the West Pakistanis, the Pakistani Government failed to respect the cultural and language differences between the two provinces.[59]

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51 Ibid.
52 *Bangladesh and others v. Sombon Asavhan* (1980) 32 DLR 198, 201.
53 Ridwanul Hoque and Mostafa Mahmu Naser, 'The Judicial Invocation of International Human Rights Law in Bangladesh: questing a Better Approach' 40 *INDIAN J INT'L L* 151(2006) 180.
54 Linton (n 23) 225.
55 *The Chief Prosecutor Vs Delowar Hossain Sayeedi,* ICT-BD Case No. 01 of 2011 [ICT-1 Judgment of 28 February 2013] para. 6.
56 *Sayeedi* (n 55) para. 6.
57 Ibid.
58 Ethnic minority (Stranded Pakistani in Bangladesh).
59 Muntassir Mamoon, *The Vanquished Generals and the Liberation War of Bangladesh (*Kushal Ibrahim tr, Somoy 2000) 14.

The East Pakistanis were treated as inferior citizens and their needs and demands were ignored by the Pakistani Government for a very long time. Major General (Rtd.) Tozammel Hossain Malik, wrote that an impartial observer would have noticed that the West Pakistanis, especially the Army, saw the Bengali as 'niggers'.[60] It was widely viewed that the Pakistani government had a purely monetary interest in East Pakistan and all the resources and money was being invested in building West Pakistan leaving the Eastern province financially weak. Dr. Mubashir Hasan, a former federal minister and a close ally of Bhutto had stated that East Pakistan was used as a colony.[61] It was reported that Sheikh Mujibur Rahman had visited Islamabad once and had reported that he could smell Jute, a product that was mainly cultivated in East Pakistan.[62]

The first movement against the discriminatory and undemocratic policies arose in 1952.[63] The authorities in Pakistan decided to impose Urdu as the official language of Pakistan, this went against the Bangla speaking majority of East Pakistan who felt that their language was considered unimportant and therefore ignored.[64] Protests erupted in East Pakistan, there was a widespread move to gain recognition for Bangla as a state language, this marked the inception of a movement that initially began in order to give equal importance to Bangla but developed into a demand for self-determination and eventually independence. The failure of East Pakistan to recognise Bangla lead to several lives lost and many causalities, this led to the East Pakistanis demanding provincial autonomy and emancipation. The Prime Minister of Pakistan, Benazir Bhutto, also acknowledged that 'Bengalis were in fact treated unfairly and they were not treated with respect'.[65] There was an incorrect assumption that the people of East Pakistan supported Hindus and therefore, they were supporters and sympathisers of India which made them disloyal to Pakistan as there were great tensions

[60] Ibid 12.
[61] Ibid.
[62] Ibid.
[63] Ibid.
[64] Ibid 14.
[65] Ibid 12.

between the two countries.[66] It was widely believed that, Hindus were the agents of India, and were responsible for creating anti-Islamic ideologies, for this reason they were considered as the main culprits.[67]

The Pakistani government also failed to follow the principles of democracy and accept the results of the general election of 1970, refusing to hand over the power to form a Government to Bangabandhu Sheikh Mujibur Rahman, leader of the AL party who won the majority seats of the National assembly of Pakistan.[68] The AL party won 167 of the 169 seats allocated to East Pakistan out of 300 seats in the parliament.[69] On 7 March 1971, Bangabandhu Sheikh Mujibur Rahman delivered a historic speech which called on the people of East Pakistan to strive for independence if the people's verdict was not respected and power was not handed over to the leader of the majority party.[70] The people of East Pakistan mobilized and took to the streets inspired by the speech of Sheikh Mujibur Rahman and on 17 April 1971, Bangabandhu was declared as the president of an independent Bangladesh by a provisional government-in-exile formed in Mujibnagar.[71] Syed Nazrul Islam was appointed as the Acting President and Tajuddin Ahmed was appointed as the Prime Minister.[72] They were in charge of overseeing the expulsion of the Pakistani forces in Bangladesh as Sheikh Mujibur Rahman was in Pakistani custody during the course of the liberation war.

The struggle in 1971 was not between centralists and secessionists or between integrationists and dis-integrationists, the fight was between democracy and militarism, between rights and repression, between human values and inhuman barbarities, between justice and tyranny, between human dignity and slavery.[73] In 1971, the UK Labour Party

66 Ibid 13.
67 Ibid 13.
68 *Sayeedi* (n 55) p. 5.
69 Ibid
70 Ibid
71 Ibid
72 Subimal Kumar Mukherjee, *Bangladesh And International Law* (Buddhadev Bhattacharyya & Nirmal Bose 1971) 1.
73 Ibid.

spokesman, Mr Denis Healey, stated that the situation in Bangladesh represented 'a human tragedy with few precedents in recent history'.[74] The situation in Bangladesh was actually a de facto war between the Yahiya regime (West Pakistan) and the rebels (East Pakistan). The rebels had announced the formation of a new sovereign People's Republic of Bangladesh on 17 April 1971 and formed a provisional government with a President, a Prime Minister and other ministers. The newly formed government sent official messages to various countries pleading for recognition and to pressure Yahiya Khan to stop the killings, but the world, including the United Nations, was unsurprisingly silent.[75]

The fight for an independent Bangladesh began on 25 March 1971 and concluded on 16 December 1971. At the end of the war, the Pakistani army surrendered before the Joint Indian and Bangladeshi forces in Dhaka.[76] The idea of a liberated and independent Bangladesh attracted a lot of support and encouragement from the people of East Pakistan throughout the war, however, there was also opposition, the Pakistani army received support from small number of the local population, mainly members of some political groups, Bihari's and a few Bengalis with pro-Pakistani ideologies, who collaborated with the local forces in supressing the people of Bangladesh.[77] The majority of people belonging to the Hindu faith were especially persecuted targeted for atrocities as they were viewed as Indian sympathisers and sided with an independent Bangladesh.[78]

74 Article published in Amrita Bazar Patrika in Calcutta (Kolkata, India) on 13 May 1971.
75 Mukherjee (n 72) 2.
76 *Sayeedi* (n 55) p. 5.
77 Ibid
78 Ibid

2.1.3 Atrocities committed during the liberation war of 1971






Photo Collection Gratitude: Liberation War e-Archive [Muktijuddho e-Archive]

The atrocities in Bangladesh started on 25 March 1971 after the inconclusive discussion in Dhaka between President Yahya Khan and Sheikh Mujibur Rahman.[79] Linton also reported that President Yahya and the West Pakistani politician Bhutto, secretly left East Pakistan and the army from the barracks came out to attack the people of Bangladesh.[80] After midnight, Sheikh Mujibur Rahman was arrested and the Pakistan army conducted a military operation named 'Operation Searchlight' on the night of 25 March 1971 targeting the students at the university dormitories, the police headquarters, various market places or shopping areas, some residential areas of the working class and the Hindu areas.[81] The shooting began at midnight and continued until 7.00 am in the morning killing hundreds of students, dead bodies were buried in mass graves using a bulldozer.[82] It is reported that Police headquarters of East Pakistan were attacked with tanks and almost all the people were killed indiscriminately.[83]

It is reported that there were no human rights during the nine-month long war and '…every soldier with a gun had supreme authority over life and death and property and could use that authority at will'.[84] There are three distinct phases to understand the massacres in Bangladesh by the Pakistani army along with the local Bangladeshi collaborators. It would not be possible for the Pakistani army to commit such atrocities without the help of communal political parties such as the Jamat-e-Islami, Muslim League and Nezame Islam.[85] The first phase of the atrocities started on 25 March 1971. Numerous eyewitnesses' accounts confirmed the week long horrendous killing of the Bengali people in Dhaka and the local intelligentsia were the target of the Pakistan army.[86] Along with many civilians, at least 50 prominent thinkers of Bangladesh including professors were brutally killed by the Pakistani

79 Macdermot (n 21) 476.
80 Linton (n 23) 286.
81 Macdermot (n 21) 5.
82 Ibid.
83 Ibid.
84 The Events in East Pakistan (n 7) 25.
85 Shahriar Kabir (ed), *On Recognition of Bangladesh Genocide* (Forum for Secular Bangladesh 2017) 5.
86 Ibid.

army and female students from the dormitory of Dhaka University were missing.[87] The Pakistani army was assisted by the local collaborators who formed paramilitaries and took part in the atrocities with the Pakistani army.[88] The main task of these local collaborators was to identify Bengali people who were sympathisers of the AL party. It is reported by B N Mehrish that, an eyewitness described the unchallenged atrocities in Dhaka city by the Pakistani army under the name of 'Operation Searchlight' where there was no resistance from the rebels.[89] According to the eyewitness's account, there was no prior warning before residential homes were raided and burnt down and every citizen the Pakistani army came across was shot and killed.[90] Due to the indiscriminate killing and destruction, Dhaka city turned into a graveyard, dead bodies were eaten by vultures and other animals.[91]

After the massacre in Dhaka on 25 March 1971, the second phase of the brutalities began. At this stage, the specific aim of the Pakistani army was to destroy entire sections of people who were supportive of the AL.[92] So, it appears that there was a specific government policy behind the atrocities and the nature of the killings was systematic and widespread. A US Senator, Adlai Stevenson stated in a press conference that the massacre by the Pakistani army and the local collaborators were 'a calculated policy to extinguish Bengali culture'.[93] It was further stated that the operation of the Pakistani army had the potential elements of genocide.[94] Another feature of the second phase of atrocities was that, hundreds of thousands of woman were raped and subjected to sexual violence.[95]

87 B N Mehrish, *War Crimes and Genocide: The Trial of Pakistan War Criminals* (Oriental Publishers 1972), p-2
88 Macdermot (n 21) 476.
89 Mehrish (n 87) 2.
90 Ibid.
91 Ibid.
92 Awami League was the East Pakistani Political Party now renamed as Bangladesh Awami League
93 Mehrish (n 87) 2.
94 Ibid.
95 Mehrish (n 87) 2.

The last phase of the atrocities started before the surrender of the Pakistani army to the joint forces of the Indian army and the rebels of Bangladesh.[96] It is reported that with the assistance of the local collaborators, the Pakistani army and members of the paramilitaries arrested over 200 Bangladeshi intellectuals including doctors, engineers, professors and journalists and all of them were tortured to death, their bodies were dismembered and mutilated.[97] The war came to an end when the Indian Army entered Bangladesh to assist the rebels of Bangladesh and forced the West Pakistani Army to sign the instrument of surrender on 16 December 1971.[98] After the Liberation War was over, at least two hundreds bodies of Bangladeshi intellectuals were found strewn across in many cities.[99]

2.1.4 Local collaborators, auxiliary forces

In order to assist the Pakistani Army, on 10 April 1971, leaders of Jamat-e Islami, Muslim League and Nezame Islam formed the Peace Committee with a group of people called the 'Razakars'.[100] The primary aim of creating this 'Peace Committee' was to take part in the hostility along with the Pakistani army and to eliminate the 'Muktijuddha', intellectuals and civilians of Bangladesh who were the sympathisers of the rebels.[101] After completing the initial training, the Razakars went into remote areas and looted recklessly, killed innocent villagers and tortured women.[102] They were used as guides by the Pakistani army who were unfamiliar with the geographical position of civilians and rebels and they praised their collaborators for their assistance.[103] In explaining the duties of the 'Razakars', General Niazi, stated that they were employed to detect and punish the people who were the supporters of an independent Bangladesh and AL.[104] A particular political party named the Jamat-e-Islami Party, also

96 Kabir (n 85) 5.
97 Kabir (n 85) 5.
98 Kabir (n 85) 5.
99 Mehrish (n 87) 2.
100 Kabir (n 85) 6.
101 Ibid.
102 Ibid.
103 Ibid.
104 The Dainik Pakistan, November 28, 1971.

designed two separate groups such as ‘Al-Badr' and 'Al-Shams Bahini' with the aim of targeting and killing the intellectuals of Bangladesh.[105] According to Shahrier Kabir, the ‘Al-Badr' and 'Al-Shams Bahini' imitated Hitler's style and blueprint for killing intellectuals.[106]

Hamoodur Rahman Commission 1972, reported that in response to the excessive force used by the Pakistani army, there was no meaningful resistance by the unarmed civilians.[107] It is also reported that junior army officers of the Pakistani army did not follow any norms of armed conflict and summarily executed many unarmed people.[108] Lt. Col. S. M. Naeem of the Pakistani army stated that, during the atrocities in Bangladesh, army abduction of the Bengalis took place on many occasions and summary executions by brush fire was very common and many innocent people were executed during the operation.[109] Another witness Mansoorul Haq, reported that a code word was being used to order the execution of Bengalis, rebels and AL supporters.[110] This particular witness further stated that there was an oral order to eliminate Hindus and at least 500 people were brutally executed near the Salda river.[111] Brigadier Iqbalur Rehman Shariff, in explaining the attitude of senior officers, stated that some generals used to ask the soldiers about how many Bengalis they had killed.[112] It was also common for senior officers to ask junior officers about the number of Hindus they had killed, as explained by Lt. Col. Aziz.[113] It is objectively reported that the army commanders of the Pakistani army had a policy of, ‘…You don’t go around counting the bodies of your enemies, you throw them in the rivers and be done with it’.*[114]*

105 Kabir (n 85) 6.
106 Ibid 7.
107 Hamoodur Rahman Commission Report (1972) para 12, p. 25.
108 Ibid.
109 Ibid.
110 Ibid.
111 Ibid.
112 Ibid.
113 Ibid.
114 The Events in East Pakistan (n 7) 36.

In conclusion, it can be said that the main target of the Pakistani army was to shoot and kill AL supporters, intellectuals, students and Hindus.[115] The Hindus were singled out as the enemies of West Pakistan on the grounds of religion and they were blamed to be the agents of India.[116] Secondly, if any areas showed signs of resistance by the Bengali people or the rebels, then the whole area or village was torn down by the Pakistani army and the civilians would have to flee or otherwise be killed.[117] Another policy was that if the rebels attempted to destroy bridges, then the Pakistani army would indiscriminately destroy all the residential buildings or homes.[118] Also, Hindu villages were destroyed and burnt to the ground and those who could not flee were killed.[119] Another aspect of the atrocities was the wide spread rape by the Pakistani army, and as a result, after the atrocities were over, the authorities of an independent Bangladesh had to open a new agency to deal with war babies and rape victims.[120] According to Anthony Mascarenhas, the Pakistani army had a horrendous official policy of 'kill and burn' the civilians.[121]

It is reported that the atrocities committed by the Pakistani army and local collaborators resulted in the killing of approximately 300,000 people and around 200,000 women were raped and 10 million people became refugees in India.[122] The US Embassy reported in a cable that the atrocities committed by the Pakistani army can be considered as a 'selective genocide'.[123] The report produced by the International Commission of Jurists also suggested that there were genocidal elements against people from the Hindu faith.[124]

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115 Macdermot (n 21) 477.
116 Ibid 478.
117 Ibid.
118 Ibid 478.
119 Ibid.
120 Ibid.
121 Ibid.
122 Bina D'costa, 'Frozen in Time?: War Crimes Tribunal in Bangladesh' Cover Story, Forum, The Daily Star Monthly Magazine, http://www.thedailystar.net/forum/2009/december/frozen.htm Last accessed 07/09/2016
123 Ibid.
124 Linton (n 23) 193.

2.1.5 Failed attempt at reconciliation and prosecution

As early as February 1972, just a month or so after Pakistan's surrender, the provisional government in Bangladesh was planning to establish an international tribunal in order to try the leading perpetrators of the liberation war.[125] According to a spokesperson from the Indian government, two categories of tribunals were to be created, the first one was to try high ranking army officials that planned the atrocities, the second was to try lower ranking officials that facilitated the will of the high ranking officials.[126] Most of the higher ranking officials, who were suspected for the atrocities, managed to return to Pakistan and were therefore out of the jurisdiction, however, the newly independent Bangladesh held around 600,000 prisoners of war, India had 92,000 prisoners of war out of which 195 were suspects.[127] Bangladesh wanted to take criminal proceedings against the all of the POW's with the exception of 260,000 prisoners which it wanted to expel to Pakistan.[128] Pakistan urged the nations not to take action against the 195 POW's and also stated that Pakistani civilians were also being held by India for purported genocide.[129] It was paramount to ascertain if Pakistan could assert jurisdiction for these POW's under Article VI of the Genocide Convention, which both States were party to.[130] An argument put forward by Levie has claimed that Bangladesh wanted official recognition from Pakistan as an independent state and the POW's were detained for a lengthy period of time in order to pressurise the Pakistani government to achieve recognition and 195 suspects were detained while the rest were released under agreement.[131] The politics of political recognition and population exchange would ultimately seal the fate of the accountability project in Bangladesh.[132]

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125 Kirsten Sellers, *Trials for International Crimes in Asia* (Cambridge University Press 2016) 19.
126 'Dhaka Will Try Yahya and Others for War Crimes' (23 February 1973*) HINDUSTAN TIMES.*
127 Ibid.
128 Ibid.
129 Linton (n 23) 225.
130 Ibid.
131 Howard Levie, 'Legal Aspects of the Continued Detention of the Pakistani Prisoners of War by India' (1973) 67 AM. J. INT'L L 512, 514
132 Linton (n 23) 225.

The Bangladeshi authority envisaged genocide charges despite not being a member of the Genocide Convention yet and 'in absentia trials', for former Pakistani President Yahya Khan and General Tikka Khan.[133] The following month, it approached among others, Niall MacDermot, the British Secretary-General of the International Commission of Jurists for further advice.[134] In a meeting with the Minister of Law Kamal Hossein, and in a memorandum produced by Commission MacDermot, urged the establishment of an international court based loosely on the Nuremberg Tribunal, which he thought would carry greater authority than a domestic one.[135] Yet, he cautioned against allowing Nuremberg too closely by allowing in absentia proceedings which he thought would deter foreign lawyers from taking part.[136] In reality, the formation of the court, which would have been established by Presidential decree, would have more closely resembled the Tokyo Tribunal (decreed by Douglas MacArthur) than Nuremberg (convened jointly by the four Allies).[137] But MacDermot's general advice appeared to have been heeded, and Dhaka proceeded towards an 'Asian Nuremberg' as described by a British official.[138]

The first step was to draw up the court's Charter, titled 'War Crimes Tribunal order, 1972'. This was designed to provide the legal framework for the trials of Pakistani civilian and military officials in the custody of Bangladesh, plus another 1500 or so Pakistani officers and men in the custody of India (including two leading figures: Major General Rao Farman Ali and Lieutenant-General Abdullah Khan Niazi). Draft Article 2 stated that the government would appoint five judges, it was intended, though not stated within, that two would be from Bangladesh, and three from elsewhere.[139] Thereafter, the order followed the template set

133 Sellers (n 125) 19.
134 Ibid.
135 Ibid mentioned Garvey (Delhi) (16 March 1972): FCO 37/1056.
136 Ibid mentioned Garvey (Delhi) (16 March 1972): FCO 37/1056.
137 Sellers (n 125).
138 Sellers (n 125) mentioned Sutherland, 'Bangladesh War Crimes' (1972) FCO 37/1056, TNA.
139 Sellers (n 125) mentioned 'Draft 'Order for constitution of war crimes tribunal' (1972) FCO 37/1056, TNA. The minor modifications include inserting the name of Bangladesh, simplifying the definition of crimes against peace

down at Nuremberg, denying state immunity and superior orders as defences, encompassing organizations as well as individuals, and allowing for trials in absentia and the death penalty.[140]

The charges set out in Article 6 of the Nuremberg Charter namely, crimes against peace, war crimes, crimes against humanity and common plan or conspiracy were transferred wholly into draft Article 10, with few minor modifications to bring them in line with the Bangladeshi situation.[141]

In May 1972, the Bangladeshi barrister M.S. Ali gave a copy of the draft Charter to Gerald Draper, a British specialist in humanitarian law, who had previously advised the independence movement on Mujibur Rahman's imprisonment in Pakistan.[142] While Draper was willing to comment on legal questions arising from the draft, he was prepared to offer strategic advice to Bangladesh only if it accorded with Foreign Office policy.[143] Because of its own role at Nuremberg, the United Kingdom could not publicly oppose a tribunal but was privately opposed to Bangladesh convening one because it would impose more strains on relations with Pakistan.[144] As a result, Mr Draper advised Ali that convening a tribunal would be unwise.[145] On legal questions, he cautioned that the cases must be watertight, and that, given that the war was not of an international character, charges of international crimes might not be sustained.[146] This approach of foreign policy taken by the UK demonstrates how a newly independent country struggled to make accountable those who committed crimes during the liberation war of Bangladesh. However, Bangladeshi officials did not stop taking steps to ensure that they serve justice by establishing tribunals and enacting legislation.

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e.g. removing the plan or conspiracy from the definition; for war crimes the modified definition inserted 'in the territory of Bangladesh' in place of 'in the occupied territory'.

140 Sellers (n 125) 20.

141 Sellers (n 125) 20.

142 Ibid.

143 Ibid 21.

144 Ibid.

145 Sellers (n 125) mentioned 'Draper to Ellison (29 May 1972), FCO 37/1056'.

146 Sellers (n 125) mentioned 'Draper to Ali, 'Bangladesh War Crimes Trial' (May 1972), pp. 2,3, FCO 37/1056'.

While Bangladeshi authorities were discussing the possibility of establishing a tribunal to prosecute Pakistani figures, another trial programme dealing with collaborators was being put into place.[147] These trials played an important role in establishing the credentials of the provisional government led by the AL, but they also attracted international criticism on legal grounds.[148] There were 73 Special Tribunals set up by the newly independent country to try those who had collaborated with the old regime or had, in support of it, perpetrated crimes such as murder, rape and arson.[149] Their operation was governed by the Bangladesh Collaborators (Special Tribunal) Order, 1972 (decreed by the President on 24 January 1972, but backdated to 26 March 1971).[150] The following year, the government passed the ICT Act 1973 covering crimes against peace, war crimes and crimes against humanity, as well as genocide and embracing any other international crimes.[151] However, no tribunal was ever established under the ICT Act 1973 until 2010.

Justice FKM Abdul Munim, stated that from 24 January to 13 December 1972, up to forty thousand people were investigated, twenty thousand were charged and taken into custody and less than a thousand people were convicted (with the right of appeal) under 1972 Collaborators Order.[152] Some trials involved very senior figures, for example, Abdul Motaleb Malik, the former civilian Governor of East Pakistan, and his Minister of Law, Jasmuddin Ahmed, were both sentenced to life imprisonment.[153] Malik was found guilty on all charges, but he was spared the death penalty on grounds of his age and his past service.[154] At the time, the AL provisional government was reluctant to allow the defendants to be represented by foreign counsel on the ostensible grounds that membership of the Bar in Bangladesh was

147 Sellers (n 125) 21.
148 Ibid.
149 Linton (n 23) 205.
150 Sellers (n 125) 21.
151 Ibid.
152 Ibid.
153 'Time of Trials' *Economist* (25 November 1972) 51.
154 Sellers (n 125) 51 mentioned 'Cumming to Millington (21 November 1972); FCO 37/1057, TNA'.

restricted to nationals.[155] On 17 November 1972, British MP Dingle Foot who was instructed by the Pakistani authority to defend Malik, arrived in Dhaka without a visa, and instead of being admitted (as he clearly expected), was refused entry into the country. Foot's junior, Robert Maclennan MP, was admitted but was not allowed to represent Malik.[156] Maclennan reported to the British Foreign Office that the tribunals under the Collaborators Act were systematically problematic as the 1972 Collaborators Act was retrospective; the burden of proof in many cases was on the accused; rules of evidence were very sketchy.[157]

Under the Collaborators Act, over 37,000 people were arrested, over 30,000 people were charged, out of which 2,848 were tried, 752 convicted and 2096 acquitted.[158] The people who were arrested, charged and convicted were only from the defeated party, that meant the people who aided and abetted the Pakistani Armed Forces, and who waged war or aided and abetted in waging war against Bangladesh.[159] However, there were no arrests among those who fought for Bangladesh. To this extent, it was a type of Nuremberg style 'victor's justice'. The majority of the local collaborators that were held or convicted were released by way of general amnesty declared by the government.[160] This declaration of amnesty was not extended to those who had committed crimes such as rape, murder and arson, yet a lot of suspects and collaborators accused of such crimes were released. One plausible reason was that the number of people to be tried was too high and some of them had only committed petty crimes.[161] A large number of people who the general amnesty did not apply to were subsequently released.[162]

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155 Sellers (n 125) 21.

156 Ibid.

157 Ibid.

158 Sara Hossain, 'A Long and Winding Road: Justice and Accountability for War Crimes in 1971', a paper presented at the International Conference on Genocide, Truth and Justice, Dhaka, Bangladesh, Mar. 1–2, 2008, CONFERENCE PROCEEDINGS, 52 (2008)

159 Linton (n 23) 202

160 Linton (n 23) 225.

161 Humayun Reza, 'War Crimes & Genocide in 1971: The Reality of the Trial' at the International Conference on Genocide, Truth and Justice, Dhaka, Bangladesh, Mar 1–2, 2008.

162 Ibid.

In return for Pakistan's recognition of Bangladesh on April 1974, the 195 Pakistani suspects of perpetrators of genocide and other international crimes were released under a Bangladesh–India–Pakistan Agreement on the Repatriation of War and Civilian Internees (the Simla Agreement), the then Foreign Minister of Bangladesh stated that Bangladesh was offering clemency to the Pakistani perpetrators and would not try them.[163] The agreement stated words such as ''reconciliation'' and ''forgetting the past'.[164] 'This was a purely political manoeuvre, post-war regional disaccords and international politics had become intertwined with ICL.[165]

The elected president, Sheikh Mujib, was assassinated in a military coup on 15 August 1975 and martial law was imposed.[166] Following this, General Ziaur Rahman assumed presidency and he repealed the 1972 Collaborator's Act.[167] Following that period, in 1981, Zia was assassinated by a military coup and was succeeded by Abdus Sattar.[168] The following year in 1982, all political parties and the constitution was suspended by General Ershad after he assumed power.[169] Due to the political turmoil that followed, there was no attempt to deal with the crimes of 1971. However, in 1990, Jahanara Imam[170] attempted to bring the issue of criminal prosecutions back into the foreground. She attempted to establish a people's court where exemplary trials were helping to create awareness about the perpetrators of 1971. Subsequently, the AL did not come into power until 1996 and in their first 5-year term, the party concentrated on party organisation rather than dealing with war crimes. However, before the general election in 2008, the AL party included a promise in their campaign manifesto that

163 Bangladesh-India-Pakistan Agreement on the Repatriation of Prisoners of War and Civilian Internees (1974) 68(1) AJIL 95-97.
164 Linton (n 23) 225.
165 Jordan Paust & Albert Blaustein,' 'War Crimes Jurisdiction and Due Process: The Bangladesh Experience' (1978) 11 VAND. J. TRANSNAT'L L 31.
166 BBC repot, 'Bangladesh profile – Timeline' (13 August 2017) < http://www.bbc.co.uk/news/world-south-asia-12651483> accessed 9 September 2017.
167 Ibid.
168 Ibid.
169 Ibid.
170 A Bangladeshi writer and a political activist, she was known as 'Shaheed Janani' (Mother of Martyrs).

if they win the election, they would establish tribunals to prosecute perpetrators of 1971.[171] Finally, on 25 March 2010, the ICT-BD was established on the basis of a slightly amended version of the ICT Act 1973.[172]

2.2 Conclusion

At the end of this chapter, it would be pertinent to make some brief observations concerning the proposed trials of the suspected Pakistani war criminals and local Bengali collaborators since 1972. There was no doubt about the gravity of the violations that had been committed in 1971 or the legal competence of Bangladesh to try the alleged perpetrators. In Bangladesh, the Pakistani Army indulged in a policy of repression, killings and hangings, the massacre of the innocent women and children. The Army violated and failed to protect civilians and violated aspects of IHL.

There were also strong indications that the Pakistani Army and the collaborators sought to commit the crime of genocide in Bangladesh. From the eyewitness accounts and press reports cited in this study, it appears that the regime wanted the destruction of the Bengalis in Bangladesh. However, from a legal perspective, for the genocidal intent, experts suggested that it was clearer that Pakistani army wanted to destroy the Bengali civilians and completely exterminate the Hindu population (please see more details in chapter 4.3.5).[173]

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171 Election Manifesto of Bangladesh Awami League, 9th Parliamentary Election, 2008 < https://albd.org/~parbonc/index.php/en/resources/articles/4070-election-manifesto-of-bangladesh-awami-league> accessed 9 October 2017.

172 About International Crimes Tribunal-1, Bangladesh < http://www.ict-bd.org/ict1/> accessed 7 September 2017.

173 Macdermot (n 21) 478.

CHAPTER 3

LITREATURE REVIEW AND THEOROTICAL FRAMEWORK

3.1 Introduction to literature Review on various Transitional Justice mechanisms

In order to conduct this research, the researcher has considered the ICT-BD as a transitional justice mechanism to deal with the past atrocities of 1971. As a result, the researcher has conducted a literature review on various forms of transitional justice mechanisms, in order to locate the ICT-BD as a possible mechanism in the context of countries in transition for the purpose of seeking justice. This chapter also discusses the academic debates around the theories of transitional justice.

Generally, the term 'Transitional Justice' refers to the various policies and measures applied by societies in transition in dealing with past abuses.[174] It may take various forms such as criminal prosecutions, truth and reconciliation, purges, lustration, compensation, restitution, or any other form.[175] Transitional justice aims to encourage the rule of law and make the violators accountable, provide justice to the victims and reinstate peace in society.[176] As part of the reconciliation process, both judicial and non-judicial techniques are applied to address the severe violations of human rights.[177]

According to Doak, the nature of conflicts in societies in transition significantly vary from each other based on the context; for this reason, the transitional justice mechanisms also differ from each other.[178] He further stated that victim-orientated justice such as truth, reparation and victims' participation are important factors to increase the victims satisfaction

[174] Ruti Teitel, *Transitional Justice* (Oxford University Press 2000) 3.
[175] Ibid 5.
[176] Olson L M, 'Provoking the Dragon on the Patio, Matters of Transitional Justice: Penal Repression Vs. Amnesties' (2006) 88(862*)* IRRC at 27
[177] Ibid.
[178] Jonathan Doak, 'Enriching trial justice for crime victims in common law systems: Lessons from transitional environments' (2015) 21(2) IRV 139, 154.

in relation to the sense of transitional justice.[179] To this extent, this study attempted to analyse how the ICT-BD is functioning in a Muslim majority country like Bangladesh as a form of transitional justice mechanism.

3.1.1 What is Transitional Justice?

The legal scholar Ruti Teitel popularised the term 'transitional justice' which refers to a set of mechanisms to address a particular society's past violence.[180] The concept of transition and transitional terms have been used to denote to the situation of when a particular society emerge from a period of abuse by the former regime.[181] One of the primary purposes of transitional justice is to start the reconciliation process thorough various types of responses such as prosecution, reparation, amnesty, or truth commission.[182] However, achieving reconciliation is not the only purpose of transitional justice. The Guidance note of the UN Secretary General suggests that:

> …transitional justice is the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, reparations, truth seeking, institutional reforms, vetting, and dismissals, or a combination thereof.[183]

According to Sarkin, transitional justice should consider three goals: truth, justice, and reconciliation.[184] According to Jon Elster, transitional justice can take both judicial and not-judicial forms for the purpose of establishing peace and reconciliation.[185] However, there are

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179 Ibid.
180 Teitel (n 174) 5.
181 Elizabeth S G, 'Reflections on the International Humanitarian Law and Transitional Justice: Lessons to be learnt from the Latin American Experience' (June 2006) International Review of the Red Cross 88 (862), at 328
182 *Guidance Note of the UN Secretary General*, United Nations Approach to Transitional Justice (March 2010) 2.
183 Ibid.
184 Jeremy Sarkin, 'Promoting Justice, Truth and Reconciliation in Transitional Societies: Evaluating Rwanda's approach in the New Millennium of Using Community-Based Gacaca Tribunals to Deal with the Past' (2000) 1(1) INT'L LF 115, 115.
185 Jon Elster, *Closing the books: Transitional justice in historical perspective* (Cambridge University Press 2004).

some general objectives that '…include punishing perpetrators, establishing the truth, repairing or addressing the damage caused, paying respect to the victims, preventing further abuses, promoting national reconciliation and reducing conflict over the past, highlighting new commitment to human rights, gaining support from the international community, establishing the rule of law and so on'.[186]

3.1.2 Developing phases of Transitional Justice

Jon Elster has analysed the transitional justice mechanisms from historical perspectives and drew a picture on trials and purges from more than 2,000 years ago, throughout political turmoil in early Athens.[187] On the other hand, Gary Bass has given an account of the past 200 years' history of war crimes tribunals.[188] Teitel analysed the history of transitional justice from World War I, and provided three specific phases of transitional justice such as '…the post-WWII phase (the international, ending with the beginning of the Cold War), the post-Cold War Phase (associated with a wave of democratic transitions and modernization), and the steady state phase (the normalized law of violence at the end of the 20th Century)'.[189]

The first phase was developed by the Nuremburg Military Tribunals which was '…set up by the victorious Allied powers in order to prosecute high-ranking Nazi officials for war crimes and crimes against humanity'.[190] This phase was short-lived due to the emergence of the Cold War which stopped the possibility of establishing any further international war crimes tribunals.[191] This phase of transitional justice attracted some criticisms among which included '…"victor's justice" and the retroactive application of human rights laws and norms to past

[186] Priscilla Hayner, *Unspeakable truths: Transitional justice and the challenge of truth commissions* (2nd edn, Routledge 2010) 10.
[187] Elster (n 185) 1.
[188] Gary Jonathan Bass, *Stay the hand of vengeance: The politics of war crimes tribunals* (3rd edn, Princeton University Press 2000) 3-4.
[189] Ruti Teitel, 'Transitional Justice Genealogy' 16(1) Harvard Human Rights Journal 70.
[190] Dustin N Sharp, 'Interrogating the peripheries: The preoccupations of fourth generation transitional justice' (2013) 26 Harvard Human Rights Journal 149, 150
[191] Teitel (n 189) 70.

conduct'.[192] In the first phase, the application of transitional justice can be observed soon after the war was over and the main characteristics were '…interstate cooperation, war crimes trials, and sanctions'.[193] The ICT Act 1973 was based on the legacy of Nuremburg and initially, it aimed to prosecute the high-ranking West Pakistani (now Pakistan) military officers. However, due to the effect of the second phase, Bangladesh could not establish any effective tribunals soon after the war.

The second phase of transitional justice encouraged domestic prosecution within the newly independent democratic countries which reduced the compliance with the rule of law standards due to political interference.[194] During this period, the peace versus justice debate arose and restorative justice mechanisms were introduced (e.g. granting amnesty to end hostility and establishing truth commissions).[195] Thus, this phase created a tension between global and local decision making when it came to coming up with the best way to address questions of justice in transition.[196] Phase two focuses on nation building and introduced a different understanding of the rule of law related to a particular political and social context.[197]

In the second phase, a contextual approach was adopted to define past human rights violations which differentiated the relationship between truth and justice. For this reason, truth commissions were popularised compared to criminal prosecutions.[198]

The competing notions of peace and justice in the second phase gave rise to questions as to the appropriateness of the justice in the first phase.[199] The criticisms of the first phase of transitional justice encouraged to develop justice beyond retribution in the second phase.[200] A critical analysis of the second phase of transitional justice demonstrates that here, the

[192] Sharp (n 190) 152.
[193] Teitel (n 189) 70.
[194] Sharp (n 190) 155.
[195] Teitel (n 189) 71.
[196] Sharp (n 190) 155.
[197] Teitel (n 189) 71.
[198] Ibid. 77.
[199] Ibid.
[200] Ibid.

transitional justice did not focus only on making the perpetrators accountable, but also on rebuilding society, establishing peace and serving justice through diverse rule-of-law values.[201] For this reason, the notion of transitional justice at this stage incorporated complex and diverse political culture with the aim of rebuilding society.[202]

The third phase of transitional justice is called the 'steady-state phase of transitional justice' linked with the most recent violations of human rights which formed a generalised law of violence.[203] Under this third phase, the nature of transitional justice is to include the universal rule of law.[204] In Teitel's third and final phase, it was not a question whether to conduct some form of transitional justice, but it was important to consider which method to use. At this phase, it has been established that peace and justice should go hand in hand. In this phase, a general legal framework of humanitarian justice has emerged to deal with the issue of transitional justice, and this created a pathway for the law of terrorism.[205] The trial of Slobodan Milosevic and Saddam Hussain are the examples of phase three transitional justice.[206]

The fourth generation of transitional justice is "externally driven", deliberate and executed in a "top-down" fashion with minimal engagement of "the locals".[207] It is suggested that the latest phase of transitional justice should make a correct equilibrium between local and international stakeholders.[208]

Based on specific contexts, the notion of transitional justice developed differently in the various parts of the world and these include, Western Europe, Japan, Southern Europe, Latin America, Eastern Europe, and Africa.[209] In Germany, soon after the war ended, both

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201 Ibid.
202 Ibid.
203 Ruti Teitel, 'The Law and Politics of Contemporary Transitional Justice' (2005) 38 Cornell Int'l LJ 837, 839.
204 Ibid.
205 Teitel (n 189) 72.
206 Teitel (n 202) 841.
207 Sharp (n 190) 156.
208 Sharp (n 190) 168.
209 Telford Taylor, *The anatomy of the Nuremberg trials: A personal memoir* (Alfred A. Knopf 1992).

national and international trials were conducted to prosecute the Nazi officials.[210] However, to complement the prosecution, a 'vast purge process (denazification)' along with other reparatory legislations were adopted to rehabilitate the victims of the holocaust.[211]

The development of human rights has changed the previous trend of transitional justice because modern states are under an obligation to address past human rights violations.[212] After the fall of the autocratic regime of Argentina, a Truth Commission was established in 1984 to address the past atrocities, and it became a role model for other Latin American nations.[213] Between 1982-1992, in Bolivia, Uruguay, and Paraguay human rights violations were investigated by their respective Parliamentary Commission which produced truth reports.[214] Non-Governmental Organisations also conducted their own investigations in Brazil, Paraguay, and Uruguay attempting to establish the truth.[215] These countries demonstrated an emphasis on establishing truth over criminal prosecution, and as a result, amnesty laws were introduced.[216]

3.1.3 Goals and objectives of Transitional Justice

There is no single set of goals of transitional justice because appropriate mechanisms for dealing with human rights violations depend on the particular goals, culture, and contexts of the society in transition.[217] Fenwick lists some of the many goals of transitional justice as including; establishing the truth regarding past atrocities, building a symbolic pause with the past, reinstating the rule of law and democracy, discouraging repeated violations of the past atrocities, sentencing the wrongdoers of offences, comforting victims and accomplishing

[210] Elster (n 185) 54-55.
[211] Elster (n 185) 54-55.
[212] Ibid.
[213] Ibid.
[214] Ibid.
[215] Ibid.
[216] Ibid.
[217] Lyn Graybill and Kimberly Lanegran, 'Truth Justice and Reconciliation in Africa: Issues and Cases' (2004) 8(1) ASQ, OJAS 1 cited Aukerman, Miriam, "Extraordinary Evil, Ordinary Crime: A Framework for understanding Transitional Justice" Harvard Human Rights Journal, (2002) 45.

collective reform and reconciliation.[218] According to Oduro, the history of the State prescribes a nation's choice on the form of transitional justice, the nature of transition, the particular needs of the state in transition, the political forum and the dissemination of administrative control throughout and afterward the transition.[219] He suggests that when transition to democracy is achieved by negotiation, truth commissions and amnesties are usually the preferred option and prosecution may not be suitable.[220] This is because the 'new' and 'old order', still share power as has been in the case of Chile, Argentina, Brazil, and South Africa.[221] Orentlicher, suggests that prosecution is impossible when the military hands over civil authority to the civilian regime, but still retains power by dictating the terms and conditions of the state.[222] In these circumstances, states may opt to offer de facto impunity, and amnesties which encourage forgetting the crimes and moving on.[223]

Orentlicher asserts that prosecution is possible where the transition was brought about by external conquest as was in the case of Germany and Japan.[224] Oduro is of the view that the choice is dependent on the relative strength of the demands of the outgoing regime and the general public. Trials are an obvious choice when the outgoing regime is weaker or has very little influence on the new regime.[225]

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218 Hayner (n 186) 252.
219 Samuel Huntington, *Third Wave: Democratisation in the late 20th Century* (Washington DC: USIP Press, 1995) 72.
220 Ibid.
221 Elin Skaar, 'Truth Commissions, Trials-or Nothing? Policy Options in Democratic Transitions'(1999) 20(6) TWQ 1109, 1110.
222 Diane Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100(8) Yale L.J. 2337, 2539.
223 Ibid.
224 Ibid.
225 Orentlicher (n 222) 2539.

3.1.4 Justice and Legitimacy of Transitional Justice Processes

A country in transition should make an avenue to serve justice to the affected communities. According to Joinet, justice is a right of the affected communities and the public which is also recognised under international law.[226] Under international human rights law, states are obliged to provide appropriate remedies for the violations of human rights. In order to establish rule of law and promote human rights, it is important to serve justice to the affected communities.[227]

According to Professor Villa-Vicencio, there are '…five different forms of justice in relation to transition, namely; deterrent, compensation, rehabilitation, recognition and exoneration'.[228] The aim of deterrent justice is to deter future crimes by providing exemplary punishment to the perpetrators.[229] The notion of compensatory justice encourages to provide compensation to the victims and make the perpetrators of former regimes liable to provide damage.[230] The main aim of rehabilitative justice is to rehabilitate the victims into the society.[231] Recognition as a form of justice can be understood from the affirmation of human dignity to heal the wounds of the victims where perpetrators acknowledged their wrongdoings and aimed to correct themselves.[232] Lastly, justice as exoneration can be understood when historic false accusation is corrected.[233]

It is important to note that emotion is often mixed with a transitional justice mechanism, which may create a revengeful desire rather than a real wish to carry out neutral justice. In certain circumstances, the prosecution can be used as a form of vengeance rather than to

226 Olson (n 176) 275.
227 Teitel (n 189) 70.
228 Asmal K, 'Truth, reconciliation, and justice: The south African experience in perspective' (2000) 63(1) MLR 1–24.
229 Ibid.
230 Ibid.
231 Ibid.
232 Ibid.
233 Ibid.

achieve justice.[234] However, it is argued that emotion and empathy are essential bases of justice.[235] The preparation of a transitional justice instrument may also be prejudiced by other wishes, including the wish for new regime to prove that 'We are not like them.'[236] Here, the new leaders are motivated by subjective interest that, if they can prove that they are not like the former regime then they will be able to stay in power. However, the new leaders refrain from expressing their subjective interest to justify their actions rather, they justify their actions stating that they are serving justice to the victims.[237]

One of the critical challenges with deterrent justice in countries in transition is the danger of political interference. For example, Bangladesh became independent following a violent war in 1971 and the newly formed judiciary of the country might have reflected the political will of the victorious party. According to According to Mobbek, 'an authoritarian regime is always reflected in its judicial system and by its judiciary'.[238] Also, Bangladesh could not prosecute the suspected war criminals of Pakistan because of the Agreement of 1974 (Delhi Agreement) but decided to prosecute the local collaborators who were still residing in the territory of Bangladesh. This sort of political justice lacks procedural fairness under the broad umbrella of selective justice. One of the main features of an authoritarian government is political justice.

234 Elster (n 185) 83.
235 Martin Hoffman ML, 'Empathy and justice motivation' (1990) 14(2) Motivation and Emotion 151–172.
236 Elster (n 185) 83
237 ibid
238 Eirin Mobekk, 'Transitional justice in post-conflict societies – approaches to reconciliation' in Ebnother A and Fluri P (eds), *After Intervention: Public Security Management in Post-Conflict Societies – From Intervention to Sustainable Local Ownership* (Geneva Centre for the Democratic Control of Armed Forces 2005).

3.1.4.1 Debates on Top-down v Bottom-up approaches

According to Gready and Robins, limitations of transitional justice exist in two forms: foundational limitations and secondary limitations.[239] Foundational limitations have two phases, liberal peace which is focused on democratic institutions in the context of a modern state and top-down state-based approaches. The liberal peace has limitations in the context of a nation in transition because of its lack of focus on the needs of local stakeholders and instead, placing more importance on the functioning of the state rather than its citizens.[240] The international and elitist dominance over transitional justice and its resulting lack of recognition for local grassroots organisations, pose as a secondary foundational limitation.[241]

Community participation is required for the long-term sustainability of transitional justice.[242] Top down approach is sustainable for as long as its sponsors are actively engaged in the process, therefore it may be less legitimate and effective in the long run due to the lack of local ownership.[243] A Bottom up approach which is designed to work with the foundational elements of a society which usually are local communities and organisations, puts communities and victims of conflict at the heart of transitional justice, thereby ensuring sustainability.[244]

Bell opines that the contemporary state of the field argues against the conception of TJ as a praxis-based interdisciplinary field.[245] She also states that meaningful justice can be achieved once all actors are aware and appreciative of ambiguity and difficulties in setting clear definitions, goals, concept and designs of the framework of transitional justice but can

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[239] Paul Gready & Simon Robins, 'From transitional to transformative justice: A new agenda for practice' (2014), 8(3) International Journal of Transitional Justice 339, 340.
[240] Ibid. 340.
[241] Ibid. 342.
[242] Jaya Ramji-Nogales, 'Designing Bespoke Transitional Justice: A Pluralist Process Approach' (2010) 32(1) Michigan Journal of International Law 1.
[243] Patricia Lundy & Mark McGovern, 'Whose justice? Rethinking transitional justice from the bottom up' (2008), 35(2) Journal of Law and Society 265, 291.
[244] Ibid.
[245] Christine Bell, 'Transitional justice, interdisciplinarity and the state of the 'field' or 'non-field' (2009) 3(1) *International Journal of Transitional Justice* 5, 17

still work towards shifting the focus from procedural to the core of TJ and contend with the past.[246]

According to the researcher's analysis, Bangladesh has adopted the bottom up approach, local communities on a major scale, participated in their transitional justice process and steered away from the 'one size fits all' approach. This could be an important development in the current state of the field.

3.1.4.2 Debates on Universalism vs Cultural relativism

There are debates around whether culture is the sole source of the validity of a Transitional Justice mechanism or whether only universally valid norms should be applied in the application of TJ. The Arab uprising in countries such as Libya, Syria, Tunisia and Egypt have bought the age-old debate between cultural relativism and universality back into focus in the context of transitional justice.[247]

Cultural relativists are of the opinion that rights come into existence in a society by considering the norms, traditions and socio-economic factors within a society and rights are only valid when a society acknowledges these rights.[248] A strong argument in favour of cultural relativism from a philosophical standpoint is that, morality can also be interpreted differently in each society based on differing cultural views.[249]

In favour of cultural relativism, Panepinto in her analysis argued that the inclusion of social, economic and cultural rights (ESCR) is integral to transitional justice and generate a better response from communities in a post conflict setting.[250] In the context of Islamic law,

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[246] Cristine Bell, 'Transitional Justice' (eds) *The fabric of Transitional Justice: Binding Local and global Political Settlements (*Routledge, 2016)

[247] Corri Zoli, M. Cherif Bassiouni and Hamid Khan, 'Justice in Post Conflict Setting: Islamic Law and Muslim Communities as Stakeholders in Transition' (2017) 33(85) Utrecht Journal of International and European Law 38, 43.

[248] Jack Donelly, 'Cultural Relativism and Universal Human Rights' (1984) 6(4) Hum Rights Qtly 400, 401.

[249] Rosalind Shaw and Lars Waldorf (eds), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford University Press 2010) 3.

[250] Alice Panepinto, 'Transitional Justice: International Criminal Law and 1 Beyond' (2014) 3 Archivio Penale 1.

she stated that core values of laws based on local cultures can find its place in the international setting and become a natural and neutral part of the system.[251] However, there are some limitations on the approach of cultural relativism to TJ, mainly that, cultural norms can be manipulated by elites to represent a political agenda, marginalise minority communities and overshadow minority rights within a society using this as a means to assert social control.[252]

On the other hand, universalists such as Donelly in the context of Human Rights, provided different senses of universality and promoted that all states must adhere to the Universal Declaration of Human Rights.[253] However, the universality approach is often alleged to be a western concept derived from western practices which conflict with local norms.[254]

According to Viaene and Brems, transitional process should explore the process of cultural relativism meeting universality and vice versa.[255] They have also stated that the universality approach can be inclusive and flexible to incorporate diversity and cultural influences.[256]

The researcher's analysis suggests that Bangladesh has attempted to strike a balance between universality and cultural relativity. In terms of due process, it attempted to adopt universally recognised norms (see Chapter 6). However, in terms of sentencing and admissibility of evidence (see Chapters 7 and 9), it has considered local norms and customs. International TJ is presented as a neoliberal conception of western rights that rejects traditional practices.[257] Panepinto, in the context of a Muslim majority country has provided that, core values of Islamic law are viewed as compatible with IHRL, IHL and ICL with the opportunity to address potential areas for development.[258] Moreover, Bassiouni has

[251] Ibid.
[252] Ibid.
[253] Donnelly Jack, '*The relative Universality of Human Rights',* (2007) 29(2) Hum Rights Qtly 284
[254] Lieselotte Viaene and Eva Brems, 'Transitional Justice and Cultural Contexts: Learning from the Universality Debate' (2010) 28 Neth Q Hum Rts 199.
[255] Ibid. 224.
[256] Ibid. 206.
[257] Panepinto (n 250).
[258] Ibid.

emphasised that there is a need to bridge the gap between international law and Islamic law paradigms in a conflict setting and contributions from the development and application of Islamic Law in a post-conflict setting is vital.[259]

The researcher is of the opinion that this area should be given the opportunity to develop further and Bangladesh can contribute towards the understanding of how a mixed structure incorporating local customs alongside international norms can contribute towards development of transitional justice in post conflict situations.

3.2 Various forms of Transitional Justice, their Strengths and weaknesses

There are various forms of transitional justice mechanisms, and each of them have their strengths and weaknesses. This subsection aims to deal with various transitional justice mechanisms, their strengths and weaknesses, challenges of making transitional justice decisions, and the legitimacy of the transitional process. Based on this context, Bangladesh has adopted criminal prosecution. However, in some circumstances, a combination of two or more mechanisms may be adopted to complement prosecution and provide justice to the victims.

3.2.1 Criminal Prosecution

States are under a legal obligation to prosecute or at least investigate repeated human rights violations. It is considered to be a violation of the international norm if States fail to investigate a gross violation of human rights.[260] Such prosecutions may occur at different levels: through an international tribunal, through an internationalized mechanism or through domestic courts. A key argument in favour of international prosecutions is that they can more effectively prosecute international crimes in circumstances where the State may be unable or unwilling to do so.[261] Moreover, international courts are more technically skilled, have the

259 Zoli & Bassiouni (n 247) 43.
260 Article 2 of the International Covenant on Civil and Political Rights.
261 Orentlicher (n 222) 2537.

finances, may be more impartial and are more visible to the media than would be national courts, making them better placed to prosecute crimes of such magnitude.[262]

According to Teitel, criminal prosecutions as a transitional justice mechanism are helpful to address the perpetration of human rights violations, and these also help to establish the rule of law and order in a post-conflict chaotic society.[263] According to Malamud-Goti, prosecutions assert democratic values by establishing judicial truth, confidence in the new regime, the right of the citizens, and transforming the relationship to achieve reconciliation.[264]

Whether international or domestic, prosecutions may provide the victims with a sense that their suffering has been recognized and that justice has been done.[265] When prosecutions are carried out by international tribunals, they serve as means to acknowledge the global importance of the crimes committed and provide a forum of international recognition of the pain suffered by the victims. At the same time, prosecutions break the cycle of impunity and serve to prevent the commission of future crimes.[266] Prosecutions serve to provide clear evidence to the community that those who attempt to commit human right abuses will be held accountable.[267] As a result, prosecutions can serve as a powerful deterrent to future human rights abuses. Orentlicher asserted that criminal punishment was an effective mechanism in preventing future repression.[268] However, criminal prosecution may not deter future crimes in all the circumstances. In situations where both parties committed similar crimes, victims may prioritise other forms of transitional justice (e.g. reparations, reconciliation or truth commissions) over criminal prosecution. However, the gravity of the crime is an important

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262 Danilo Zolo, 'Peace through criminal law?' (2004) 2(3) JICJ 727.
263 Teitel (n 174) 27-28.
264 Malamud-Goti, 'Trying violators of human rights: The dilemma of transitional democratic governments' in Aspen Institute, *State Crimes: in Punishment or Pardon* (Aspen Institute 1989) 81.
265 Jo-Anne M Wemmers, 'The healing role of reparation' in Jo-Anne M Wemmers (eds), *Reparations for Victims of Crimes Against Humanity* (Routledge 2014) 230
266 Orentlicher (n 222) 2542.
267 Neil Kritz, 'Coming to terms with atrocities: A review of accountability mechanisms for mass violations of human rights' (1996) 59(4) Law & Contemp. Probs 127.
268 Orentlicher (n 222) 2537.

factor which may influence the victims to choose other forms of transitional justice over criminal prosecution.[269]

There are various international legal mechanisms under which the states are under an obligation to investigate violations of human rights and serve justice; such obligation is termed in Latin as '*aut dedere aut judicare'.*[270] If we consider the international humanitarian law, then we can see that a state's obligation to serve justice exists in various treaties as well as in customary international humanitarian law.[271] According to Cassesse, states have treaty obligations under the 1949 Geneva convention to prosecute suspects of serious violations of IHL according to their national jurisdictions.[272]

If or when a society decides to undertake prosecution as a means of transitional justice, subsequent trials must meet acceptable standards of fair trials. In order to avoid the notion that trials are politically motivated or 'victor's justice', it must not fail to apply laws equally and must adhere to strict standards of a fair trial.[273] Ensuring that due process is followed is both tedious and expensive.[274] Also, internationalised prosecutions are said to be a slow process. Tribunals are sometimes based in a place different from that of the place of occurrence of the crimes, which makes it challenging to gather evidence and makes the process of transporting relevant evidence and witnesses to the relevant tribunals very expensive.

The expenses of international trials are quite high, as a result, selective prosecutions have become the norm in most transitional justice prosecutions.[275] The goal of limited prosecutions, therefore, is to use limited resources on the offenders that bear greatest

[269] Jo-Anne M Wemmers, 'The healing role of reparation' in Jo-Anne M Wemmers (eds), *Reparations for Victims of Crimes Against Humanity* (Routledge 2014) 230.
[270] van Steenberghe R, 'The obligation to extradite or prosecute: Clarifying its nature' (2011) 9(5) JICJ 1089–1116.
[271] Orentlicher (n 222) 2542.
[272] Antonio Cassese, 'On the current trends towards criminal prosecution and punishment of breaches of international humanitarian law' (1998) 9(1) EJIL 2–17, 5.
[273] Cassese (n 50) 103.
[274] Orentlicher (n 222) 2542.
[275] Orentlicher (n 222) 2537 & 2548.

responsibility. At the international level, there are various types of criminal justice mechanisms such as International Military Tribunals (IMT), Permanent ICC's, ad hoc tribunals, hybrid tribunals, and domestic tribunals with international elements. Some of these will be discussed in the sections below.

3.2.2 Historic Tribunals: Nuremberg & Tokyo

After the Second World War, the Allies sought to punish the individual perpetrators of the axis for the war crimes, crimes against humanity, crimes against peace, genocide, and other crimes against civilians.[276] The four Allies, France, USSR, UK, and the US, signed an agreement on 8 August 1945 to create an IMT which is also known as the Nuremberg Tribunal.[277] There were eight judges, four principle judges and four substitutes from the major Allies.[278] The prosecutors were also from the allied states, but the defence was formed of German lawyers.[279] Based on a similar charter, the International Military Tribunal for the Far East (Tokyo IMT) was established in January 1946. Both these tribunals contributed to developing basic principles of ICL. However, these tribunals were highly criticized as being victor's justice, and the judges' impartiality was questioned in terms of due process.[280]

3.2.3 Ad hoc international tribunals

The ad hoc international tribunals were established to deal with crimes committed over a certain period of time. They have now closed their doors and are been taken over by the residual mechanism. The ICTY and ICTR were established by way of UN resolutions to deal with the crimes committed in Yugoslavia and Rwanda, and their functions came to an end in 2017 and 2015, respectively.[281]

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276 Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights* (Sweet and Maxwell 2003) 273.
277 Cryer (n 340) 111.
278 Ibid.
279 Ibid.
280 Ibid.
281 Ibid.

As an institution, the ICTY and ICTR are similar in nature because, both tribunals originated from the UN Security Council's resolution, acting under Chapter 7 of the UN Charter.[282] From the beginning, these ad hoc tribunals had been highly costly and time-consuming. Also, these tribunals were located far away from the countries where the atrocities took place.

3.2.4 International Criminal Court

The only permanent international judicial institution to deal with crimes under ICL is the ICC. This is a treaty-based judicial institution having complementary jurisdiction over genocide, crimes against humanity, war crimes, and crimes of aggression. The ICC was established based on the Rome Statute on 17 July 1998 by the UN Diplomatic Conference on the establishment of an ICC.[283] One of the main limitations of the ICC is that it can only trigger its jurisdiction if the individual state is unable or unwilling to prosecute the crimes.[284]

The ICC is distinct from the ad hoc tribunals because it was not derived from the Security Council Chapter 7 Resolution which makes it a commitment for an individual state to assist the prosecution of crimes under ICL.[285] Unlike the ICTY and ICTR, the ICC is based on prospective legislation rather than retrospective legislation. This means that, ICC cannot trigger its jurisdiction if atrocities are committed before the establishment of the Rome Statute.

3.2.5 Hybrid tribunals

Hybrid tribunals or mixed tribunals are formed with both, international judges and the judges of the nation where the trials will be held. Also, both national and international laws are involved, and both the domestic and international prosecutors are available in these types of tribunals. When states prefer neither domestic nor international tribunals, they opt to establish

[282] Ibid.
[283] Ibid.
[284] Ibid.
[285] Geert-Jan Alexander Knoops, *An Introduction to the Law of International Criminal Tribunals A Comparative Study Second Revised Edition* (Martinus Nijhoff 2014) 10.

a mixed tribunal with both national and international elements. There are two versions of hybrid tribunals such as the ECCC, courts in Kosovo and Special Panels for Serious Crimes in East Timor which are the judicial organs of the relevant countries.[286]

Another version is that, the body may be international in nature and not part of the national judicial system such as the SCSL. In January 2003, the Sierra Leone Government maintaining its sovereignty, entered into an agreement with the UN to establish a Special Court to try and assess crimes under international law.[287] In the situation of Sierra Leone, due to the conflict, the judicial system had broken down and the national judicial system was not able to prosecute the crimes under international law.[288] As a result, the government of Sierra Leone decided to establish an international criminal tribunal in their own land with the assistance of the UN. Another reason for establishing hybrid tribunals is that the international judges would be viewed as neutral, whereas national judges may be influenced by their sentiments.[289]

The Special Tribunal for Lebanon (STL) was established by UN resolution at the request of the Lebanese Government. The nature of this tribunal is international, but the main objective is to try and assess crimes under national law.[290] As a result, this particular tribunal is trying terrorism as a distinct crime for the first time.[291]

The latest hybrid tribunal is the Extraordinary African Chambers for the trial of *Hissene Habre* in Senegal, established by an agreement with the African Union and the authority in

286 Antonio Cassese, *International Criminal Law* (University of Oxford 2003) 343.
287 Knoop (n 285) 4.
288 Ibid.
289 Ibid 10.
290 Ibid 16.
291 Ibid.

Senegal. The unique feature of this tribunal is that it has triggered the application of universal jurisdiction to try an assess the gross violation of human rights.[292]

3.2.6 Domestic tribunals

When international crimes are tried and assessed under the domestic judicial system, it is called domestic prosecution of international crimes or domestic tribunals.

According to Cryer, the common expectation is that crimes, including international crimes, will be prosecuted at a domestic level.[293] This expectation is also reflected in the Rome Statute of the International Criminal court (ICC) and its principle of complementarity justice, which provides that national courts are the starting point for prosecuting international crimes.[294] According to Bassiouni, 'when treaty is based on the obligation of a state, under international criminal law, it is reflected in the domestic legislation, this can be defined as the 'indirect enforcement system'.[295] In this respect, the Government of Bangladesh enacted the ICT Act 1973 to establish an indirect enforcement system of ICL derived mainly from the Genocide Convention through a domestic tribunal.

Historically, the domestic prosecution of international crimes can be traced back to the American Civil War in the 1860's and Anglo-Boer Wars of the late nineteenth century.[296] The other notable domestic prosecutions had emerged after the First World War such as the *Leipzig* trials and the *Istanbul* trials of 1920's to address war crimes.[297] European countries like France, Austria and the Netherlands have also conducted domestic prosecution of crimes against humanity addressing the Second World War atrocities.

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292 Human Rights Watch, 'Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal' (3 May 2016) available from <https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal> accessed 10 January 2019.
293 Cryer (n 340) 64.
294 Ibid.
295 M Cherif Bassiouni, *Introduction to International Criminal Law: Second Revised Edition* (2nd Edn, Martinus Nijhoff Publishers 2013) 488.
296 Cryer (n 340) 64.
297 Bassiouni (n 295) 547.

Another notable domestic prosecution of international crimes is the *Eichmann* trial which had addressed the issue of jurisdiction, criminal defence of a superior order and the principle of non-retroactivity of criminal law.[298] The important examples of domestic prosecution of international crimes are the Canadian *Finta* case and Australian *Polyukhovic* case which have developed the concept of mental elements for crimes against humanity and the constitutional validity of ICL legislation.[299] After the 1990's, ad hoc tribunals were established to address the issue of Yugoslavia and Rwanda. However, in order to deal with the large volume of detainees, Rwanda introduced a new form of '*Gacaca'* courts in 2001.[300]

The domestic prosecution of international crimes in Bangladesh is one of the latest domestic mechanisms dealing with the atrocities committed in 1971.[301] The Bangladesh Government opted for the domestic prosecution of international crimes. The ICT-BD is a purely domestic tribunal prosecuting crimes under ICL. The substantive laws of the ICT-BD include Crimes against humanity, Crimes against peace, Genocide, War Crimes, and other crimes under international law.[302]

As noted above, the ICT-BD is a domestic tribunal trying crimes under ICL. Domestic prosecutions were chosen because of the specific history and circumstances of Bangladesh. As also discussed in the theoretical framework above, there is no one-size-fits-all mechanism for transitional justice. The ICT Act 1973, which established the ICT-BD, was the first domestic Act criminalizing international crimes at the time (in 1973). The Act was unanimously passed by the parliament of Bangladesh.[303] The ICT-BD has no formal agreement with the UN and is composed of local personnel including judges, prosecutors, and defence lawyers. At present, all the perpetrators are Bangladeshi nationals. Under the Act, the ICT-BD is entitled to

298 Cryer (n 340) 64.
299 Cryer (n 340) 66.
300 Cryer (n 340) 67.
301 M Rafiqul Islam, *National Trials of International Crimes in Bangladesh: Transitional Justice as Reflected in Judgements* (Dhaka: University Press Limited 2019) 40.
302 The International Crimes (Tribunals) Act 1973 , Section 3(2) [Bangladesh].
303 The debate of Bangladesh National Parliament (7-17 July 1973), Session 2, Part 2 (Translated from Bengali).

formulate its own RoP, and thus, it has developed rules that are distinct from domestic criminal courts.

3.3 Alternatives and complements to criminal prosecution

Criminal prosecution alone may not achieve most of the goals of transitional justice. Because many perpetrators may have died naturally due to the long period of impunity or due to large number of perpetrators it may not be possible to prosecute every individual. As a result, it is important to consider other mechanisms to supplement the criminal prosecution.

3.3.1 Truth and Reconciliation commissions

Truth commissions, as defined by Priscilla Hayner, are temporary bodies, empowered by and authorized by the state to submit an investigative report on patterns of abuses over a period of time.[304] Around thirty official truth commissions under various names have been established since 1974, popularised by the 1995 South African Truth and Reconciliation Commission (TRC).[305] There was a considerable difference in authority and investigatory mandates structured according to the diverse needs and political situation in each country even though there were a lot in common between these bodies.[306]

Alice H Henkin clearly stated the importance of truth in her book; she wrote that truth should be made a part of a nation's history and that governments were obliged to investigate and provide facts.[307] Yasmin Naqvi, in her book, had written that telling the truth would provide an opportunity for national reconciliation and would also act as a response to the victims demanding justice.[308] She further noted that the broader objectives of ICL would intertwine

304 Hayner (n 186) 33.
305 Ibid.
306 Ibid.
307 Ibid.
308 Yasmin Naqvi, 'The right to the truth in international law: Fact or fiction?' (2006) 88(862) International Review of the Red Cross 245, 247.

strategically with the right to truth.[309] Firstly, the truth would be helpful to establish peace in the society because the publication of the truth would discourage the repetition of the same atrocities in the same context.[310] Secondly, the truth is helpful to initiate the process of reconciliation as divided societies can re-establish their connection if they know the truth.[311] Yet, the connection between truth and peace, or truth and reconciliation, remains debateable because, some argue that investigating the truth may expose past wounds and lead to further conflict rather than to peace and reconciliation.[312] Thirdly, the truth can play an important role in ending impunity because liability can be ensured only if the truth about who committed past crimes is known.[313] However, the relationship between truth and accountability is not always certain, particularly, in process of criminal prosecution. Some authors, favouring truth over justice and drawing from Chilean and South African experiences have argued that trials should be replaced by truth reports because it may restore and maintain peace by way of reconciliation process.[314] Also, knowing the truth heal rifts in communities and creates a path to accountability.[315] Fourthly, it can unify countries and therefore rebuild national identities through dialogues between nations about shared history.[316] It is said that the establishment of the truth had contributed to the renewal of German Unity.[317] Finally, the right to truth can create an avenue for the victims to know the underlying reality by accessing public documents which were previously inaccessible.[318]

The limitation of Truth Commissions is that, they do not have any judicial powers like courts although some Truth Commissions have powers to access documentary evidence and

309 Ibid 248.
310 Ibid 247.
311 Ibid.
312 Olson (n 186) 275.
313 Naqvi (n 308) 247.
314 Ibid.
315 Ibid
316 Ibid.
317 Ibid.
318 Ibid.

the South African TRC had the power to grant amnesties which is highlighted below. Truth Commissions are effective channels to understand the nature of atrocities, the triggers of violence, and the effects. Truth Commissions may also be helpful to depict the overall picture of any particular post-conflict atrocities. According to Hayner, truth commissions have at least five aims: discovering and acknowledging past atrocities; answering the queries of victims; contributing to end impunity and increasing accountability; sketching official responsibility and endorsing reforms, promoting reconciliation and establishing social harmony.[319]

The South African model of TRC is a unique example of transitional justice mechanism which aimed to establish truth and initiate the process of reconciliation. To encourage uncovering the truth, the TRC offered a form of incentives to the victims that if they provide full disclosure about the atrocities and their involvement, they will then be given amnesty. According to Hayner, '…only in South Africa has a truth commission been given amnesty granting powers'.[320] However, the amnesty power of the South African TRC was conditional that perpetrators actions had been '…(i) motivated by political goals rather than malice or desire for gain, and (ii) proportional to the occasion that triggered them'.[321] The applicants of the South African TRC were required to give full disclosure about the offences and the chain of command.

In the post-conflict situation of Bangladesh, the option for truth commissions was not considered due to the nature of the atrocities committed, as explained in Chapter 2. However, the West Pakistani authority formed a judicial inquiry commission to investigate the atrocities committed during the Liberation War of Bangladesh in 1971. Also, the International Commission of Jurists, conducted a legal study of the atrocities in Bangladesh soon after the Liberation War discovering the nature of crimes committed. The International Commission of Jurists set up a Commission of Enquiry into the events in East Pakistan (now Bangladesh) in

319 Hayner (n 186) 33.
320 Ibid.
321 Ibid.

November 1971 where a commission of three prominent international lawyers were appointed to enquire into the reported violations of human rights and the rule of law in East Pakistan.[322] It was agreed by India and Bangladesh that there would be a full cooperation for the Commission's enquiry but Pakistan refused to cooperate stating that it was their internal matter.[323] The legal study conducted by the Commission contains a factual account of the atrocities committed in East Pakistan from March 1971 until December 1971 based on published books, newspaper reports, sworn dispositions of refugees in India and oral and written statement given to the Commission.[324]

There is no 'one size fits all' type of mechanism to deal with transitional justice. Each of the mechanisms has its own pros and cons. If a society decides to initiate transitional justice mechanisms to deal with historic crimes, it has to consider various factors. The very first issue is to determine what needs to be achieved by investigating past atrocities and how this is to be accomplished. The goals of investigation may include justice, truth, reparation, reconciliation, or a mixture of these. These goals are paramount to dictate the form of transitional justice mechanism in a particular context (e.g. criminal prosecution, truth commissions or both). Bangladesh did not establish any Truth Commission alongside criminal prosecution because of the specific context that the people demanded criminal prosecution. Also, the legal study of the International Commission of Jurists partially served the purpose of the truth commission. Nevertheless, an effective truth commission in Bangladesh could complement the criminal prosecution and the accountability process given that criminal prosecution alone cannot achieve complete justice.

[322] International Commission of Jurists, 'A Legal Study: The Events in East Pakistan, 1971' (Geneva 1972) 4.
[323] Ibid
[324] Ibid

3.3.2 Reparations

The meaning of reparation is limited to compensation, restitution and rehabilitation. Restitution should, as far as possible, restore the victim to his or her circumstances before the crime was committed.[325] Compensation would be provided if the harm suffered can be easily quantified in the form of monetary value.[326]

According to Teitel, reparatory justice refers to the open acknowledgment of responsibility for past atrocities.[327] In her opinion, reparations can contribute to the process of rehabilitation at an individual level and may assist in rebuilding law and order and democracy.[328] However, reparation is not a claim laid against individual perpetrators; it is instead a claim against the authority for wrongs done by the former regime.[329]

In societies in conflicts, the notion of reparation is used in a generalized manner to represent various forms of remedying past violations. Tietel notes that the term 'reparatory justice', '…illustrates its multiple dimensions, comprehending numerous diverse forms: reparations, damages, remedies, redress, restitution, compensation, rehabilitation, tribute'.[330] Hence, reparation may take different forms and is broader than simply the payment of monetary reward. Reparation generally may take either material or symbolic forms.[331]

The ICC has developed the concept of reparations in other forms, such as symbolic reparation, preventative or transformative value.[332] In the case of *Katanga,* the ICC awarded symbolic compensation of USD 250 per victim and stated that, '…this symbolic amount, while not intended to compensate for the entirety of the harm, does provide meaningful relief to the

325 *The Prosecutor Vs Thomas Lubanga Dyilo* Case No. ICC-01/04-01/06 [Decision on reparation of 7 August 2012] p 223.
326 Ibid.
327 Teitel (n 174) 127.
328 Ibid 124.
329 Ibid 119.
330 Ibid.
331 Ibid.
332 Ibid.

victims for the harm they have suffered'.[333] In *Katanga*, the judges assessed compensation of USD 3,752,620 for the physical, material and psychological harm suffered by the victims.[334] The Chamber also awarded specific collective reparations in the form of support for housing, support for income-generating activities, education aid and psychological support.[335]

In the Bangladeshi context, there is no provision for the reparation of the victims, which is one of the main weaknesses of the transitional justice mechanism. Given that in the Bangladeshi situation, the ICT-BD was established a long time after the atrocities were committed and many perpetrators have died, reparation (both for the victims, who have had to wait for justice for a long time, and their families) could be an effective supplement to the criminal prosecution to improve the quality of lawfulness.

In the case of compensation, one of the key challenges is to recognise the damage or pain that is 'compensable'. So, there is a need to agree first on what forms of grief create victimhood.[336] There are other challenges incoming regarding '…whom to try, sanction, and compensate; and how to try, sanction, and compensate'.[337]

3.3.3 Amnesty

Amnesty is usually offered to protect national and general interests. It may be conditional or absolute. In the case of absolute amnesty, a State grants itself amnesty to protect itself from any form of accountability.[338] Conversely, the amnesty that took place in

333 Katanga case: ICC Trial Chamber II awards victims individual and collective reparations (24 March 2017) available from <https://www.icc-cpi.int/Pages/item.aspx?name=pr1288> accessed 15 November 2018
334 Ibid.
335 Ibid.
336 Elster (n 185) 127.
337 Ibid 129.
338 Orentlicher (n 222) 2543.

South Africa was a discretionary form of amnesty, granted only when an applicant had fulfilled conditions set up by the State courts.[339]

The argument in favour of amnesty is that, following a period of violence or civil unrest, it is important to heal collective wounds by disregarding historical wrongs. Amnesties do allow the law to block criminal prosecution against people of the former regime.[340] It is believed that by granting amnesties, it is possible to end hatred and hostilities which creates a path for reconciliation.[341] However, there are conflicting norms regarding amnesties because ICL requires violations to be prosecuted, but norms within general public international law allow amnesties if they serve to prevent further causalities.[342] Many authors think that granting amnesty ultimately undermines the deterrent effect of law because the decision to grant amnesty is often politically compromised which bargains away the rights of the victims and perpetrators enjoy impunity.[343] According to Orientlicher, amnesties for international law are unlawful because this is contrary to prosecute international crimes.[344] The UN policy is also against amnesties in international criminal law and the legal position of amnesties was clarified by the SCSL in the *Kallon* and *Kamara* decisions that amnesties in international law is not absolutely prohibited and it is a developing norm in international law.[345] Sometimes in order to save lives and end hostilities, amnesties may play an important role and for an amnesty to be lawful the scope is very narrow.[346]

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339 Mark Freeman and Priscilla Hayner P, 'The Truth Commissions of South Africa and Guatemala, International Centre for Transitional Justice' , available at < http://www.idea.int/publications/reconciliation/upload/reconciliation_chap08cs-safrica.pdf> accessed 28 Sept 2016.

340 Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (2nd Edn, Cambridge University Press 2010) 563.

341 Orentlicher (n 222) 2543.

342 Cryer (n 340) 566-568.

343 Ibid 569 mentioned Milliander.

344 Ibid mentioned Orientlitcher

345 Cryer (n 340) 566-568. mentioned *Prosecutor v. Kallon and Kamara* SCSL A. Ch. 13.3.2004 para 82 and *Kondewa* A. Ch. 25.5.2004 para.48.

346 Ibid

The Spanish transition had an uncommon feature 'involving a deliberate and consensual decision to abstain from transitional justice' and the Spanish government released over four hundred political prisoners.[347] The nature of the Spanish amnesty law is distinct from the Chilean amnesty law of 1978 because the Chilean amnesty was 'self-amnesty' by the outgoing regime whereas the Spanish amnesty was enacted by the incoming regime.[348] The Chilean amnesty was challenged and finally reversed due to its 'self-amnesty' nature.[349]

Nevertheless, because amnesties encourage impunity, it is measured to be an impediment to justice, and only a limited number of academics support it as feasible in minimal circumstances.[350] Also, the Spanish amnesty has not remained unchallenged as there has been an increasing social movement that challenges the Spanish amnesty law of 1977.[351] More recently, in 2010, a Spanish judge was suspended by Spain's General Judicial Committee on the grounds of ultra vires for by-passing the Amnesty law of 1977.[352] These recent developments demonstrate the controversy surrounding the amnesty law and that past atrocities are not forgotten. In the particular situation of Bangladesh, a general amnesty was granted soon after the Liberation War to a limited extent, only for petty crimes such as theft, looting, criminal damage etc. but not for serious crimes such as murder, rape, arson and other serious crimes. Initially in 1972, Bangladesh attempted to prosecute the local collaborators under the Bangladesh Collaborators (Special Tribunals) Order 1972 (theÔ1972 Collaborators Act') came into force through Presidential Order No. 8 of 1972 and over 30,000 people were arrested but due to systematic flaws, the trials could not be completed, and as a result, a general amnesty was granted for all small crimes except murder, rape, arson and other serious

347 Elster (n 185) 54-55.
348 Ibid.
349 Ibid.
350 James Ron and others, 'The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners' [2008] <http://aix1.uottawa.ca/~rparis/CIPS_Transitional_Justice_April2008.pdf> accessed 25 September 2016.
351 Vicente Navarro, 'The case of Spain: A forgotten genocide' (16 December 2008) <http://www.vnavarro.org/?p=606> accessed 25 September 2016.
352 Ibid.

crimes. However, whether this selective approach was correct is questionable because it was not defined which crimes are petty crimes and which crimes are serious crimes. This vagueness created confusion and all the people that were arrested were released irrespective of petty crimes and serious crimes. Subsequently, the government decided to legislate new law to try only the serious crimes under the ICT Act 1973 (see 1.1.1).

3.3.4 Lustration

The term lustration refers to the government policies which restrict certain individuals from taking certain governmental positions due to their association with the past regime.[353] This policy has been implemented predominantly in countries that were once part of the Soviet bloc, including Czechoslovakia, Hungary, Poland, and former East Germany. It was perceived that former members of the Communist Party could not be trustworthy to conduct democratic reforming; therefore, the new governments reacted by not only outlawing the party and prosecuting anyone deemed to have connections with the party, but also restricting those individuals from certain government and non-governmental posts.[354] Although lustration laws are controversial, they remain the main method used by these countries to screen former communist members for public office. Such information is generally obtained from secret police files to determine whether suspected individuals collaborated with the former State security service.[355] In the situation of Bangladesh, there is no formal policy of lustration due to its context and social settings. The numbers of local collaborators in 1971 was very low and all the West Pakistani officers returned to West Pakistan. Also, most of the local collaborators were socially identifiable and informally, they were precluded to take up any important government position. Further, any formal policy of lustration might not be appropriate in the

353 T D Olsen, L A Payne and A G Reiter, *The Transitional Justice in balance: Comparing Processes, Weighing Efficacy* (United States Institute of Peace 2010) 38.
354 Mark Ellis, 'Purging the past: The current state of Lustration laws in the former communist bloc' (1996) 59(4) Law & Contemp. Probs 181.
355 Ibid.

particular context of Bangladesh because of the constitutional protection not to discriminate between the citizens of Bangladesh.

3.3.5 Local justice mechanisms

Due to the growing trend of cultural diversity in relation to the application of ICL, local justice mechanism is becoming more and more popular over time.[356] Local justice mechanisms have three key characteristics, they focus on the group rather than individual, they seek compromise and community harmony and emphasise on restitution rather than punishment.[357] The Gacaca court of Rwanda is one of the finest examples of local justice mechanism where village elders convened all parties to a crime with a view to reconcile.[358] The Rwandan Government formed 'Gacaca' jurisdiction to speed up the pace of genocide trials.[359] A similar approach was seen in Northern Uganda where local traditional justice mechanism was adopted.[360] The South African Truth and Reconciliation Commission was also partly inspired by local justice mechanisms.[361] However, these trials have also attracted significant criticisms from the perspective of due process.[362]

In the particular context of Bangladesh, no informal or semi-formal local justice mechanisms was ever adopted to deal with the atrocities committed in 1971. In the researcher's opinion, local justice mechanisms could be adopted in Bangladesh to deal with the less serious crimes for which general amnesty was granted (see 3.3.3).

356 Cryer (n 340) 576.
357 Ibid.
358 Petter Harrell, *Rwanda's Gamble* (Writers Club Press, USA 2003) 67.
359 Ibid, 66.
360 Cryer (n247) 577.
361 Ibid.
362 Mark Drumble, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity'(2005) 99 Northwestern University Law Review 539, 459.

3.4 Nature of transitional justice around the world

To understand various form of transitional justice mechanisms, it is important to analyse transitional justice in different parts of the world. While the opposition in Portugal and Greece imposed the transitional processes, the one in Spain was led by the elites of the old regime (particularly by King Juan Carlos) following the death of General Franco.[363] In Portugal after the post-1974 coup, a mix of purges and counter-purges, jail, exile, nationalization and compensation took place.[364] After the collapse of the army administration in Greece in 1974, the new regime had taken 'dejuntafication' measures; purged people associated with the military regime, and introduced criminal proceedings.[365]

The Argentinian military leaders were prosecuted, convicted, and punished for the offences they had committed throughout the 'dirty wars' in the 1970's and 1980's.[366] The granting of pardon or amnesty was introduced at a later stage due to persistent opposition to the process from the army and other groups.[367]

The nature of transitional justice in Chile was that the amnesty law was introduced by the outgoing regime to hinder criminal prosecution. In 1978, the then president of Chile, General Pinochet, introduced an amnesty law which created a barrier for criminal trials for all human rights violations since September 1973.[368] In 1992, the law established a compensation policy.[369] In contrast to the Argentinian case, Chile had decided to establish criminal prosecution and overturned the amnesty law by the Chilean Supreme Court in 1999.[370] However, in the particular context of Uruguay, they deliberately decided to exclude transitional

363 Erick Posner and Adrian Vermeule, 'Transitional justice as ordinary justice' (2004) 117(3) Harv L Rev 761, 777.
364 Elster (n 185) 54-55.
365 Ibid.
366 Richard Segal, 'Transitional Justice: A Decade of Debate and Experience' (1998) 20(1) HRQ 432.
367 Ibid.
368 Hayner (n 186) 33.
369 Elster (n 185) 65.
370 Hayner (n 186) 33.

justice.[371] As noted by Lewis, 'the people of Uruguay voted in a referendum to maintain an amnesty law designed to protect their armed forces from prosecution'.[372] So, the voice of the people is an important factor in deciding the form of transitional justice in a particular society.

Following the fall of communism in Eastern Europe which begun in the late 1980's, transition took place in Poland, Hungary, East Germany (GDR), Czechoslovakia, Romania, and Bulgaria.[373] These transitional justice developments are branded as post-Cold War transitional justice.[374] The common feature of these post-communist transitional justice is that they adopted criminal prosecution to deal with the past atrocities. Timothy Garton Ash observed that '…Germany has had trials and purges and truth commissions and has systematically opened the secret police files to each and every individual who wants to know what was done to him or her-or what he or she did to others'.[375] In general, the nature of transitional justice in the Eastern Europe was that they primarily focused on reparations and purges, with increasing amnesties and fewer prosecutions.

In the African countries, the notable examples of transitional justice are Rhodesia (1979), South Africa (1994), and Ethiopia (1991). According to Jon Elster, in both Rhodesia and South Africa, '…white economic elite remained after the transition, which was largely shaped to safeguard their interests'.[376] Similar to Spain and Uruguay, Rhodesia had decided not to initiate any transitional justice process.[377] Truth commissions were established in Nigeria and Sierra Leone.[378] In Rwanda, we clearly see both supranational and national transitional

371 Elster (n 185) 65.
372 Segal (n 366) 432.
373 Elster (n 185) 66.
374 Teitel (n 168) 75.
375 Thompson WC and Tomothy Ash, 'The file: A personal history' (1999) 22(1) GSR 162, 220.
376 Elster (n 185) 70.
377 Ibid.
378 Hayner (n 186) 33.

processes as well as traditional 'Gacaca' courts.[379] Sierra Leone combines criminal prosecutions and truth commissions to serve justice to the affected communities.[380]

In some situations of transitional justice, both the incoming and outgoing regime might have been involved with the atrocities. In this respect, it is noted that the '…delicate question is whether retribution shall be one-sided or even-sided - whether acts of wrongdoing shall include only crimes committed by agents of or collaborators with the former regime, or whether crimes committed by the opposition and its supporters to the regime should also be covered'.[381] In South Africa, both the former regime and the opposition were subject to the same method of transitional justice.[382]

3.5 Conclusion: Choosing Transitional Justice Mechanisms

In choosing a form of transitional justice, a society has to determine whether it is necessary and feasible to penalize the wrongdoers of mass crimes and whether this will establish sustainable peace.[383] There are various factors such as international community, political and economic settings, social and religious norms which may influence the nature of transitional justice mechanisms adopted by a particular society. The TRC in South Africa, the ICTR and the Gacaca courts in Rwanda, aimed at reconciliation.[384]

The Bangladeshi Government opted for criminal prosecution due to the gravity of the offences perpetrated during the 1971 conflict and also because there was a strong determination among the Bangladeshi society to ensure that such crimes should not go unpunished, even after such a long lapse of time.[385] In the particular context of Bangladesh, national culture and public opinion contributed towards the selection of criminal prosecution

379 Mobekk (n 238).
380 Ibid 278.
381 Elster (n 185) 118.
382 Elster (n 185) 118.
383 Kai Ambos, 'Assessing the Efficiency of Transitional Justice' (2015) 6 Yonsei LJ 45, 50.
384 Elster (n 185) 118.
385 Teitel (n 174) 27.

to deal with transitional justice. Bangladesh as a Muslim majority country has defined its domestic criminal tribunal according to its local culture and norms. Before establishing the criminal tribunal, the Awami League party had to incorporate in their election manifesto that if they came to power, they would establish a criminal tribunal to prosecute the perpetrators of 1971. Subsequently, they received overwhelming majority in the election, thus, the public gave the mandate for establishing a criminal Tribunal. The appellate division of the Supreme court of Bangladesh also considered the public sentiments in deciding appropriate punishment. The violent nature of the atrocities, long term delay, and a significant period of a culture of impunity were all factors in the decision to establish criminal prosecution as an appropriate transitional justice mechanism in Bangladesh. It is argued that, on account of the specific situation of Bangladesh, a truth commission on its own would not have been an effective remedy in Bangladesh because of the long period of the culture of impunity. However, the truth commission as a supplement of prosecution would be an effective viable option. However, it is not known why this was not considered in the particular context of Bangladesh. Similarly, amnesty could not achieve justice in Bangladesh. The parliamentary debate of 1973 indicated that criminal prosecutions were heavily supported by the citizens of Bangladesh at the time. Moreover, the AL government came to power in 2008 with the mandate from the people that the perpetrators of 1971 would be prosecuted under a domestic tribunal.

According to Aukerman, '…those who have not suffered cannot presume to determine for those who have, what should be attempted through transitional justice'[386] Transitional justice should address the wishes, pleas, and political realities of the mistreated society, while at the same time acknowledging the global community's right and responsibility to intervene.[387] Accordingly, in Bangladesh, the prosecution preferred to reflect the political realities of the society and the national desire. The Bangladeshi approach is distinctive because they have

386 Miriam Aukerman 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice' (2002) 15(1) HARV HUM RTS J 39, 43.
387 Ibid.

established a domestic tribunal without international funding. This domestic tribunal adopted universally recognised norms (e.g. due process) of transitional justice as well as retained their local cultural norms (e.g. capital punishment). Thus, the ICT-BD became a fourth-generation domestic tribunal dealing with international crimes which attempted to create a balance between universalism and cultural relativism. However, the direct applicability of international law thorough the ICT-BD depends on the status of international law in the domestic legal system.[388] Although, the ICT-BD is a purely domestic tribunal, it is mostly independent and comes with an infrastructure that is completely separate from the national judiciary. However, the judgments of this Tribunal can be challenged through to the highest court of the land.

In terms of delayed prosecution, the ICT-BD can be compared to the ECCC. Although, the ECCC was established in Cambodia, it had recruited both foreign and domestic judges and prosecutors. Also, UN funding was available for the operation of the ECCC and it was a mixed tribunal and not a pure domestic tribunal like ICT-BD. However, being a pure domestic tribunal, ICT-BD bears a higher risk of impartiality because judges are selected from national judiciary and they might be influenced by public sentiment. The ICT-BD can also be compared with the Iraqi High Tribunal which recruited national judges, but they were assisted by international advisers.[389] However, both Iraq and Bangladesh being Muslim majority countries retained capital punishment as the highest punishment.

The dominant understanding of transitional justice relates to the investigation, prosecution, and punishment of perpetrators of past abuses.[390] Hayner asserts that, the rule of law shall be at the heart of transitional processes, and hence that accountability shall be ensured according to the law.[391] Although, prosecution was the most feasible option for Bangladesh, this mechanism alone cannot achieve the wide range of goals of transitional

388 Miriam Beringmeir, *The International Crimes Tribunal in Bangladesh* (Berliner Wissenschafts-Verlag 2018) 75.
389 Jonh Laughland, *A History of Political Trials* (Peter Lang Limited 2008) 244.
390 Teitel (n 174) 27.
391 Ibid.

justice. It would wise to adopt supplementary mechanisms such as Truth Commission and Reparation programme to complement the criminal prosecution. Bangladesh has adopted the South African style truth commission which has become a contemporary standard example of truth commissions, based on the TRC established in 1995.[392] In the course of truth commissions, the victims may be compensated by the state in the form of free education, free medical and psychological treatment, and even monetary compensation.[393] Commissions often establish permanent reminders of the legacy of such abuses, such as monuments and ceremonies, with the aim of acknowledging the pain of the victims.[394] Given that the prosecution is taking place more than 40 years later, this mechanism alone may not bring the bulk of the perpetrators to justice. Also, many perpetrators have died due to the time lapse and in this regard, criminal prosecution may not serve any effective form of justice to the victims. However, if we also consider the economic factors related to reparation in Bangladesh, then it does clarify why Bangladesh could not develop any effective reparation programme. On the other hand, truth commission was not considered due to the specific wishes of the local population.

392 Hayner (n 186) 33.
393 Freeman and Hayner (n 339).
394 Harrell (n 358) 37.

CHAPTER 4

FEATURES OF THE ICT- BD

4.1 Introduction

This chapter analyses the features of the ICT-BD, including substantive and procedural law. It also discusses the formation and functions of the ICT-BD. The International Crimes (Tribunal) Act 1973 (hereinafter ICT Act 1973), is the governing Act of the ICT-BD. This particular Act was enacted with the aim of prosecuting the perpetrators of 1971 who had committed genocide, crimes against humanity, war crimes, and other crimes under international law. The RoP's of the Tribunal 1 and Tribunal 2 were formulated in 2010 and 2012, respectively. Both the RoP's are identical. According to Hossain, the ICT Act 1973 has borrowed the legal principles of the Nuremberg trials and made, '…a significant contribution to the development of ICL at the time'.[395] According to Robertson, the ICT Act 1973 was the first legislation based on the legacy of Nuremberg, and historically, it was a significant development for the national prosecution of international crimes.[396] Before discussing the formation and jurisdiction of the ICT-BD, the following para will provide a brief overview of some of the international and domestic criminal tribunals that have preceded it.

The ICT Act 1973 is based on the legacy of the Nuremberg tribunal. Also, the grave nature of atrocities committed in Bangladesh is similar to that of Rwanda, Yugoslavia, Sierra Leon and Cambodia. For these reasons, this study made frequent references to the Nuremberg and Tokyo tribunals, ICTY, ICTR, ICC, ECCC, SCSL and other internationalised tribunals. This is helpful in clarifying how the ICT-BD being a domestic tribunal, is transposing universally recognised norms within a Muslim majority country like Bangladesh. It would be

[395] Abeed Hossain, 'War Crimes & The Rule of Law' (22 Sept 2011) available <http://southasiajournal.net/war-crimes-the-rule-of-law-abeed-hossain/> last accessed 6 June 2018.
[396] Geoffrey Robertson, 'Report on the International Crimes Tribunal of Bangladesh' (2015) International Forum for Democracy and Human Rights, 54.

worth mentioning that the nature of transitional justice in Bangladesh is distinct from other Muslim majority countries like Egypt, Tunisia, Libya and Iraq due to the delayed prosecution and the grave nature of atrocities committed in Bangladesh, including genocide. In Tunisia, a Military Tribunal was established to prosecute the former president Ben Ali and he was sentenced to life in prison.[397] However, the tribunal was criticised for being a military tribunal trying civilians in an unorganized manner and lacking a clear strategy.[398] The Trial of Hosni Mubarak is important to consider because it has established an important example of the contextual understanding of accountability complying with universally recognised due process standards.[399]

4.2 Parliamentary Debates relating to ICT Act 1973

Before enacting the ICT Act 1973, there was a parliamentary debate scrutinizing various aspects of the Act. This Act is a constitutionally protected legislation.

4.2.1 Constitution (First Amendment) Bill 1973

It appears from the records that there was a parliamentary debate to amend the constitution of Bangladesh for the first time in order to provide special protection to the governing Act of the ICT-BD. A parliamentarian, Sri Monoranjan Dhar stated that the perpetrators of 1971 wanted to extinguish the Bengali nation from the world and disrespected their legitimate demand for self-determination.[400] As a result, in order to make the perpetrators of 1971 accountable for their heinous crimes, a decision was made to amend the constitution of Bangladesh.

Mr Dhar stated that, '…honourable speaker, you might have known that prosecuting war criminals is not new and the name of Nuremberg Trial, Tokyo Trial and Yamashita Trial

397 Christi L Thornton and Clarinsa V Grives, 'Transitional Justice and Amnesty Laws in Arab Spring Countries' (2012) 21 ILSA Quart 24, 26
398 Ibid.
399 Human Rights Watch, 'Egypt: The Trial of Hosni Mubarak' (2012) <https://www.hrw.org/sites/default/files/related_material/MubarakTrialQ%26A.pdf> accessed 6 August 2020
400 Ibid.

are the recent examples and for this reason, it is important to amend our constitution so that we can make the perpetrators accountable'.[401] He further explained that if the Constitution is not amended, then the perpetrators may rely on the fundamental rights given under the constitution and it would not be possible to make them accountable for their heinous crimes.[402] For this reason, he proposed to amend the constitution so that there can be no barrier to prosecute the perpetrators of 1971. However, he proposed to ensure due process and justice for the perpetrators of 1971.

Another Parliamentarian, Sri Manbendra Narayan Larma stated that the inclusion of clause 3 of Article 47 of the Constitution of Bangladesh interplays with Article 31, 35 and 44 and for this reason, the accused persons under the proposed International Crimes Act would not receive proper fundamental rights.[403] He further explained that the proposed bill would not give the accused persons the right to go to the highest court of the country against the decision of the proposed tribunal, and this aspect of the amendment is contradictory with the Universal Declaration of Human Rights and with the Charter of the United Nations.[404] So, it seems that Mr Larma was not against the Constitution (First Amendment) Bill 1973; instead he wanted to make sure the proposed Act had proper due process to ensure the rule of law.

Another Parliamentarian Mr Amirul Islam stated that the Bill had been brought to solve future disputes between the Constitutional rights and the proposed Act.[405] He further opined that, 'it does not matter what is in the international law, our Act will be domestic law and we will prosecute the perpetrators of 1971 and right to go to the supreme court is not necessary since it can unnecessarily delay the process'.[406] After the debate, the Speaker asked the parliamentarians to vote whether the Bill should seek public opinion or not, but the majority

401 Ibid.
402 Ibid.
403 Ibid.
404 Ibid.
405 Ibid.
406 Ibid.

said ‘No’ and then the Speaker asked whether the Bill should be passed without any delay and the majority said ‘Yes’.[407]

Following the vote, the Law Minister, Sree Monoranjan, Dhar explained the proposed amendments to the members of the Parliament. After the discussion, the Speaker asked the members of the parliament who were in favour of the Bill to stand up, and they all stood up. Then, Bangabandhu Sheikh Mujibur Rahman proposed that, ‘this bill relates to the amendment of the constitution so, although we voted, it is important that those votes are in the record’.[408] For this reason, the speaker put the bill on division for voting and finally the Constitution (First Amendment) Bill 1973 was passed unanimously by 254 votes out of 254.[409]

4.2.2 International Crimes (Tribunal) Bill 1973

The main aim of the International Crimes (Tribunal) Bill 1973 was to prosecute the people who had committed genocide, crimes against humanity, war crimes, crimes against peace and any other crimes under international law. A parliamentarian, Mr Moinuddin Ahmed Manik was of the opinion that only 195 war criminals would be primarily accused under the Act and according to him, this figure was very low because, under the command of General Tikka Khan and General Niazi, some 93,000 armed forces had committed atrocities including genocide and crimes against humanity, there were also local collaborators who may have joined the ‘Peace Committee' or the ‘Rajakar Bahini' for various reasons and it was not proportionate to try only 195 war criminals leaving the other perpetrators at large.[410] He attempted to explain that all the people who were part of the auxiliary forces may not have committed crimes and many might have been involved with the auxiliary forces simply to save themselves from the atrocities, and there should be a process to identify those innocent civilians. Mr Manik stated that the proposed Act should not be used as an instrument to punish

407 Ibid.
408 Ibid.
409 Ibid.
410 Ibid.

the political members of minor political parties.[411] It seems that during the Bill stage, Mr Manik anticipated that the proposed Act may be misused to oppress the members of political parties to express a different opinion.

A parliamentarian, Mr Serajul, opined that, 'this Bill is introduced not because we want to take revenge on them or that we are in the mood of anger' instead 'it is a law for clearing the conscience of humanity at large'.[412] He said, if one considers that the 1973 Act as vengeful, it may be wrong given that, out of 70,000 people, Bangladesh initially identified 195 POW's to vindicate their sense of justice.[413] Mr Sirajul Haque also stated that, 'we are going to bring these people to punishment not because they devastated our land but because we have a responsibility towards suffering humanity and the entire population of the world is looking up to us'.[414] During the parliamentary debate, it was explained that the ICT Act 1973 had incorporated all the known norms of justice. It appeared from the above that during the Bill stage, the ICT Act 1973 had incorporated the then international criminal jurisprudence. Further to that, the Act has contributed to the development of ICL because being domestic legislation; it has made provisions for providing the accused the right to appeal.

4.3 Analysis of the Substantive Laws of the ICT-BD

The governing Act of the ICT-BD was drafted into the first phase of Transitional Justice in 1973. According to Cassese, 'international criminal law is a 'rudimentary branch' of law, and the meaning of substantive laws are gradually broadening.[415] At present, there are four categories of crimes, definitions of which are broadly accepted by ICTY, ICTR and ICC and these crimes are the crime of genocide, crimes against humanity, war crimes and, in the case of the ICC, the crime of aggression (also known as crimes against peace)'.[416] The crime of

411 Ibid.
412 Ibid.
413 Ibid.
414 Ibid.
415 Cassese (n 286).
416 Knoops (n 285) 27.

aggression was not within the jurisdiction of the ICTY and ICTR. As mentioned earlier, the definition of the above-mentioned crimes is broadening by the practices of ICT's, the ICT-BD in its judgments also clarified the definition of some crimes and their elements.

4.3.1 Jurisdiction of the ICT-BD

Section 3(1) deals with the ICT-BD's adjudicative jurisdiction which states that the Tribunal will have jurisdiction to try and punish any individual or group of individuals, or organisations, or any members of armed, defence or auxiliary forces, irrespective of his nationality, who commits or has committed, in the territory of Bangladesh, whether before or after the commencement of this Act, any of the crimes mentioned in sub-section (2).[417] So, it appears that the jurisdiction of the ICT-BD is not only restricted to try and assess the crimes committed in 1971; it also covers crimes committed at any time either in peace or war.[418] Also, the jurisdiction was carefully designed, keeping in mind the specific circumstances of Bangladesh and as a result, crimes committed during international or non-international armed conflicts were within the jurisdiction of the ICT-BD. However, a restriction of the jurisdiction is that, to make an individual responsible for the crimes defined under the Act they, '…must have been a member of an armed, defence or auxiliary force at the time of the offence and the offence must have been committed in the territory of Bangladesh'.[419] One of the special characteristics of the ICT Act 1973 is that it has been designed to prosecute not only the armed forces but also the 'auxiliary forces', individual or a group of individuals.[420]

4.3.2 Crimes against humanity

In the absence of any specific treaty in relation to crimes against humanity, individual States previously adopted their own approach in formulating the definition.[421] The elements of

417 The International Crimes (Tribunals) Act 1973, Section 3(2) [Bangladesh].
418 Unknown (Commentary) 'International Crimes Tribunals in Bangladesh' (1973) 11 ICJ REV 29.
419 Ibid.
420 *The Chief Prosecutor v Abul Kalam Azad,* ICT-BD Case No. 05 of 2012 [ICT-2 Judgment of 21 January 2013] para. 17.
421 Than and Shorts (n 276) 89.

crimes against humanity entails that: they constitute a serious attack on human dignity including 'grave humiliation' or 'degradation'; they are part of a governmental policy or of a widespread or systematic practice of de facto authority; they are prohibited and punishable regardless of whether they are perpetrated during war or peace; and the victims of the crimes may include civilians or persons that do not take part in armed hostilities.[422] The concept of crimes against humanity originates from customary international law, and these offenses can be committed either during armed conflict or in times of peace.[423] The crimes against humanity can also overlap with war crimes such as the mass killing of civilians which can be defined as war crimes as well as crimes against humanity.[424] However, the difference between war crimes and crimes against humanity can be seen from the context that crimes against humanity can occur during peaceful times and in the absence of any armed conflict.[425] Some have argued that genocide is a particular type of crime against humanity, but others have argued that genocide is a separate category of crime due to the specific intent requirement.[426]

There are differences in the definition of crimes against humanity stated in the Nuremberg Charter, ICTY, ICC, and the ECCC. Generally, the definition of crimes against humanity should consist of at least five elements: firstly, there must be an attack[427]; secondly, the nature of the attack should be widespread or systematic[428]; thirdly, the attacks are aimed at civilians[429]; fourthly, the attacks are inhumane and cruel, infringing recognized values of mankind and humanity[430]; and finally, the perpetrators should have knowledge about the attack (the link between the accused and the attack).[431] The ICC statute going beyond the customary

422 Cassese (n 286) 64.
423 Bassiouni (n 295) 146.
424 Cryer (n 340) 233.
425 Ibid.
426 Knoops (n 285) 37-38.
427 *Prosecutor v Kunarać, Kovać and Vuković*, ICTY Case No. IT-96-23-T & IT-96-23/1-T, [Trial Chamber Judgment, 22 February 2001] para. 410.
428 *Prosecutor v Bagilishema*, Case No. ICTR-95-1A-T [Trial Chamber Judgment, 7 June 2001] para. 77
429 Knoops (n 285) 47.
430 Bing Jia, 'The Differing Concepts of War Crimes and Crimes against Humanity in International Criminal Law', in Guy S. Goodwin-Gill and Stefan Talmon (eds.), *The Reality of International Law* (Oxford: Oxford University Press, 1999) 270.
431 Article 7 of the Rome Statute.

international law, added another element which was, the listed crimes must be committed '…pursuant to or in furtherance of a State or organizational policy to commit such attack'.[432]

The elements of crimes against humanity applied by the ICT-BD differ greatly from the internationally recognised elements.

4.3.3 Crimes against humanity under the ICT Act 1973

Section 3(2)(a) of the ICT Act 1973 deals with the crimes against humanity. According to this particular section, crimes against humanity are certain acts (murder, extermination, enslavement, deportation, imprisonment, abduction, confinement, torture, rape or other inhumane acts), '…committed against any civilian population or persecutions on political, racial, ethnic or religious grounds, whether or not in violation of the domestic law of the country where perpetrated'.[433]

At the surface, it appears that the definition of crimes against humanity excluded certain acts which are included in the Rome Statute such as sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other forms of sexual violence. This has restricted the scope of the definition of crimes against humanity and left it to the imagination to consider what other inhumane acts could be. The definition of crimes against humanity is similar to the approach adopted by the Nuremberg Charter, but the only difference is that ICT Act 1973 did not confine the crimes within a certain period of time.

The technical problem with the definition is that, like the Nuremberg Charter and ICTY Statute; it did not include certain important elements of the crimes such as a widespread or systematic attack. However, the ICTY and ICTR jurisprudence established that crimes against humanity must be 'widespread' or 'systematic'[434] and it has been reflected in the Statute of the ICC and ECCC as mentioned earlier. Also, the definition of the ICT Act 1973 did not make

[432] Article 7(2) (a) of the ICTY.
[433] The ICT Act 1973, Section 3(2)(a).
[434] *Prosecutor v Tadić*, ICTY Case No. IT-94-1-A [Appeal Judgment of 15 July 1999] para. 168.

any reference to the fact that, in order to make an individual liable for crimes against humanity, he/she should have knowledge of the nature of the acts. The link between the accused and the attack does require the accused to have committed a prohibited act that falls within the list of attack and that they had knowledge about the nature of the attack.[435] A single act of an accused may be considered as a crime against humanity if it forms part of the attack.[436]

Given that the ICT Act 1973 was originally drafted in the early seventies, it has left some issues for the judges to decide based on interpretation and assumption. However, the definition under ICT Act 1973, rightly omitted the 'armed conflict requirement' which is no longer a requirement for crimes against humanity as confirmed by the *Tadić* case and the report of the International Commission of Jurists.[437] Even if the armed conflict had been an element under the ICT-BD's Act, it would not add any difficulties defining crimes given that there were evidently armed conflicts in 1971.[438]

It appears from a judgment of the ICT-BD that, a defence counsel has made reference to the fact that definition of crimes against humanity of the ICT-BD does not explicitly contain the 'widespread or systematic' element for constituting the crimes against humanity.[439] However, in the case of *Abul Kalam Azad,* it is reflected that there is a lack of 'consistency' in defining crimes against humanity by various ICT's.[440] It is further stated that, 'the definition of 'Crimes against humanity' as contemplated in Article 5 of the ICTY Statute 1993, neither requires the presence of 'Widespread and Systematic Attack' nor the presence of 'knowledge' as conditions for establishing the liability for 'Crimes against Humanity'.[441] However, from a

435 Ibid para. 271.
436 *Prosecutor v Kunarac*, ICTY Case No. IT-96-23 & IT-96-23/1-A [Appeal Judgment 12 June 2002] para. 96.
437 Events in East Pakistan (n 7) 61.
438 Linton (n 23) 236.
439 *The Chief Prosecutor v Abul Kalam Azad,* ICT-BD Case No 05 of 2012 [ICT-2 Judgment of 21 January 2013] para. 72.
440 Ibid para. 74.
441 Ibid.

human rights approach, if the definition of a crime is not clear enough then it would be against an accused's rights to know the allegation against him or her.

It appears from the case of *Azad* that he was found guilty of the offence of abduction, confinement, and torture as 'crimes against humanity' on charges no 1 & 2.[442] The facts of the charges were that, the accused along with seven to eight armed men had gone to the victim Anjali Das's house told her father to hand over his daughter Anjali Das to the accused, but when denied, the accused and his cohorts took away Anjali Das forcibly. Later on, Anjali Das committed suicide fearing any further violence, presumably sexual in nature.[443] So it seems that the accused forcefully abducted, tortured and confined a young girl from a Hindu family and considering the background of the atrocities of 1971, it is suggested that the motive behind the abduction might have been to sexually abuse the girl which meets the threshold of 'other inhumane acts'. On the other hand, the term abduction and confinement can be compared to the ICC's list of enforced disappearance, but the problem is that during 1971, enforced disappearance was not recognized as a crime under customary international law. The definition of crimes against humanity as developed by the ICT-BD lack clarity. The absence of clear definitions and the inconsistent application of the definitions in the cases before ICT-BD created a high risk of arbitrary application of the law.

4.3.4 Crimes against peace

Section 3(2)(b) of the ICT Act 1973 provides that crimes against peace include, '…planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements, or assurances.[444] This provision is the identical reflection of the Nuremberg Charter. Crimes against peace mean waging a war of aggression, in violation of international treaties.[445] The General Assembly of the UN adopted the definition of

442 *Abul Kalam Azad* (n 439) para. 332.
443 Ibid.
444 The ICT Act 1973, Section 3(2)(b) [Bangladesh].
445 *The Chief Prosecutor v Abdul Quader Molla*, CRIMINAL APPEAL NOS.24-25 OF 2013 (Appeal Judgment of 17 September 2013) p. 49.

aggression as the crimes against peace in 1974.[446] To make an individual accountable for crimes against peace, it is important to prove that the individual was in a position of leadership, and 'act of aggression' by must be established by the state and a 'manifest violation of the UN Charter' must be stipulated.[447]

The analysis of the wording of Section 3(2)(b) of the ICT Act 1973, suggests that, although it has adopted the definition of the Nuremberg Charter, it did not include other parts such as, '…or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing'. According to Linton, 'This omission may perhaps reflect the continental lawyer's traditional distaste for this notion of criminality that is prevalent in the common law system, and the notion of common plan' which was very controversial at Nuremberg'.[448] As of 26 June 2019, the ICT-BD (Tribunal 1 & Tribunal 2) has delivered 38 judgments and the crimes against peace have not been used so far. In the particular context of Bangladesh, the applicability of crimes against peace would be restricted to the time from when the war became international. As there was no war of aggression in the context of Bangladesh, the crimes against peace has little scope of application. However, this particular provision has a symbolic and psychological value that the atrocities committed by the Pakistani authorities can be theoretically defined under this provision.[449]

4.3.5 Genocide

Mr Macdermot, who contributed in drafting the ICT Act, reported in 1973 that there was a broad allegation by the Bangladeshi people that the Pakistani army was guilty of genocide.[450] He said, in Bangladesh,' genocide' is perceived to be large-scale killings, and it is a highly emotive term.[451] He further stated that, 'there would be great difficulty in establishing

446 Cassese (n 286) 112.
447 Knoops (n 285) 64.
448 Linton (n 23) 240.
449 Ibid.
450 Macdermot (n 21) 481.
451 Ibid.

the intent to destroy the Bengali people,' but there is a strong case to establish specific intent for the purpose of genocide in relation to the attack on the Hindu people.[452] Since the ICT-BD is only prosecuting the local collaborators, the genocidal charges are mostly related to conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and conspiracy in genocide.

According to UN General Assembly Resolution 96(1), genocide 'is a denial of the right of existence of entire human groups, as homicide is the denial of the right to life of individual human beings'.[453] According to Article 2 of the 1948 United Nations Convention, the prevention and punishment of the crime of genocide can be defined as certain acts, '…committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group'.[454] There are at least three important jurisprudential elements of the crime of genocide such as; the development of the concept of genocide and the requirements to prove genocide before an international criminal tribunal; evidentiary obstacles; and legal defences against genocide charges.[455]

The exhaustive list of acts is '…killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group'.[456] Article 3 of the genocide convention added that conspiracy, incitement, attempts, and complicity to commit genocide are punishable as genocide. According to Cassese, the above definition of genocide has some flaws because it has ignored cultural genocide, it did not include 'political groups' and the four classes of groups are not defined.[457]

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452 Ibid.
453 UN General Assembly resolution 96(1) (11 December 1946).
454 Article 2 of the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide.
455 Knoops (n 285) 30.
456 Article 2 of the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide.
457 Cassese (n 286) 96-97.

Section 3(2)(c) of the ICT Act 1973 provided that:

Genocide: meaning and including any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, such as:

(i) killing members of the group.

(ii) causing serious bodily or mental harm to members of the group.

(iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

(iv) imposing measures intended to prevent births within the group.

(v) forcibly transferring children of the group to another group.[458]

In the above definition, Linton identifies some differences from the definition of UN Convention and states in her own words, 'Political groups are added, and the phrase ''as such'' has become 'such as'.[459] She explained that 'the turn to ''such as'' not just shifts the emphasis away from the targeting of the protected groups to the core crimes, but it also turns the Genocide Convention's closed list of core crimes into a merely illustrative list.[460] The inclusion of political group as a protected group is not recognised by the internationally recognised definition of genocide. There are at least two problems with including political groups within the definition of genocide. Firstly, the attributes of political groups are not stable. Secondly, members of certain political groups join the party voluntarily rather than inherit it at birth and this differentiates them from other protected groups.[461] However, being a pure domestic tribunal, the ICT-BD deviated from the definition of genocide under customary international law. Thus, the relationship with cultural relativism can be observed from the ICT-BD's definition of genocide.

458 The ICT Act 1973, Section 3(2)(C).
459 Linton (n 23) 244.
460 Ibid.
461 William Schabas, *Genocide in International Law* (2nd Edn, Cambridge University Press 2009) 164

In the case of *Md. Mahbubur Rahman,* the ICT-BD stated that 'genocide' is the deliberate and systematic attack intending to cause destruction of a national, ethnic, racial, religious or political groups which includes causing serious bodily or mental harm to members of the group.[462] So, under the ICT Act 1973, the definition of genocide is extended to 'political groups' which also reflects the contemporary understanding of genocide. It appears from the ICT-BD judgments that many accused were charged and found guilty of genocide and this has been discussed below.

4.3.6 Notion of genocide reflected in the ICT-BD judgments

In the case of *Salauddin Quader Chowdhury*, the ICT-BD found him guilty on the offence of the killing of a religious group as genocide as specified in section 3(2)(c) (i) of the 1973 Act under four separate charges (Charge numbers 2, 4, 5 and 6).[463] One of the four charges is that in 1971, in order to destroy in whole or in part the Hindu community, the accused along with a group of Pakistani army abducted seven un-armed civilians, out of which six persons were inhumanly tortured to death in the presence of the accused. As a result, the accused was charged for the physical participation and also for substantially contributing to the actual commission of the offence of genocide under 3(2)(c)(i).[464] Another charge read that, on 13 April 1971, accused Salauddin Quader Chowdhury, along with his accomplices and the Pakistani Army opened fire on the unarmed Hindu civilian population killing 30/35 Hindu persons. [465]

The most recent judgment by the ICT-BD was delivered during the revision period of this thesis; it was the case of *Md. Mahbubur Rahman*[466], this particular accused was charged

[462] *The Chief Prosecutor Vs. Md. Mahbubur Rahman @ Mahbub @ Mahebul,* ICT-BD Case No. 01 of 2018 [ICT-1 Judgment of 27 June 2019) para. 312.
[463] *The Chief Prosecutor Vs Salauddin Quader Chowdhury*, ICT-BD Case No. 02 OF 2011 [ICT-1 Judgment of 1 October 2013] para. 288.

[464] Ibid para. 75.
[465] Ibid para. 125.
[466] *Md. Mahbubur Rahman* (n 462) .

with and convicted of genocide. This particular accused was found 'guilty of participating, abetting, assisting, substantially contributing and facilitating, by his act and conduct, forming part of a systematic attack and the killing of 33 Hindu civilians constituting the offence of 'genocide' under the Act of 1973.[467] The critical analysis of this case suggests that although the ICT Act 1973 does not include the modes of liability and inchoate crimes, it does criminalise individuals for attempt, complicity and conspiracy. Another important observation is that most of the genocide charges are based on complicity, this is because the tribunal is only prosecuting the local collaborators. Thus, an argument on the extent of justifiability in prosecuting the secondary offenders leaving at large the principal offenders can be produced. It should be noted that due to jurisdictional limitation, the ICT-BD at this moment is unable to prosecute the Pakistani army officers who were directly involved with the atrocities committed during the liberation war of Bangladesh because those army officers were repatriated after the liberation war had ended.

In relation to the specific intention requirement, it appears from the latest judgment of 27 June 2019, that the 'specific intent' of the enterprise was to destroy the substantial part of the Hindu community of the locality under the Mirzapur District of Tangail.[468] It is stated that the destruction of a group does not mean its total destruction and substantial destruction would be sufficient to infer the intent of the accused.[469] The judges of the ICT-BD stated that specific intent requirement for genocide, 'cannot be tangible, and it cannot be proved by direct evidence'.[470] Further, it is stated that 'Intent[ion] is a mental factor which is hard, even impracticable, to determine and as such, it may be proven through inference from a certain number of facts unveiled and the pattern and magnitude of attack'.[471] However, considering justice value e.g. due process, the researcher argues that if judges are empowered to

467 Ibid para. 549.
468 Ibid para. 277.
469 Ibid para. 279.
470 Ibid para. 279.
471 Ibid para. 287.

construct the mental element of genocidal crime through inference, then their subjective notion may undermine the credibility of the process. Also, given that the ICT-BD is conducting delayed prosecutions, it would be challenging to make the right inference from the decades old facts.

In the judgment, it is stated that although targeting part of the community qualifies as 'substantial', for the propose of inferring the 'genocidal intent', merely the number of individuals belonging to Hindu religious group killed cannot be the only precondition for the inference of 'genocidal intent'.[472] The judges also made reference to the ICTY's case of *Jelisic* which states that there are two forms of genocidal intent, such as; intention to destroy a large group, and intention to destroy a selected number of people.[473] In this regard, it said in the ICT-BD's judgment that genocide, '…is a coordinated attack against the human multiplicity of a targeted group aiming to cause a grave destructive effect on the group'.[474] So, the killing of a limited number of people can add the destructive effect of the protected group, which can give rise to genocidal intention.

Almost all the charges relating to genocide indicate that, '…the accused encouraged, assisted and provided moral support' for the commission of genocide.[475] This aspect reflects the ICTR's case of *Nahimana* where it was stated that encouragement and moral support either expressed or implied, including presence near the scene of the crimes may give rise to individual criminal responsibility.[476] As a result, the accused were found to be liable for the offense of genocide before the ICT-BD due to conscious presence at the crime scene. It can be observed that the judges of the ICT-BD repeatedly stated that, 'It has been jurisprudentially settled that those who make their contribution with the shared intent to commit the offence can

472 Ibid para. 295.
473 Ibid para. 82.
474 Ibid para. 297.
475 Ibid para. 301.
476 Ibid para. 826.

be held ‘equally liable’, regardless of the level of their contribution to its commission’.[477] The researcher is of the opinion that there should be a clear threshold as to the level of contribution to the crime. It would be procedurally unfair to impose liability for mere presence at the crime scene. Also, the meaning of ‘shared intent’ is unclear. If we consider the particular context of Bangladesh, for the commission of a particular genocidal crime, there may be a diverse range of motives. Whilst the Pakistani army may have had the genocidal intention, the local collaborators may have participated in the crime for personal gain as opposed to genocidal intention and this aspect has not been clarified within the judgments of the ICT-BD.

4.3.7 Interim findings

It appears from the above, that although the ICT Act 1973 included ‘political groups' as a further group within the ambit of the genocidal target group, to date, the ICT-BD has not found anyone guilty of genocide for attacking a political group. It is reported by various outlets that people in Bangladesh assumed that the Pakistani military actions and auxiliary forces constituted genocide by destroying in whole or part the Bengali nation as an ethnic or racial group.[478] Although this argument may be plausible for the Pakistani army, it is not plausible as to why the local collaborators, who are predominantly Bengali, would want to destroy part of their own nation. For this reason, a forum of jurists opined that it would be difficult to prove genocide in a court of law for destroying the Bengali nation due to lack of specific intent.[479] Alternatively, it is suggested that the Pakistani authority targeted members of four identifiable groups such as the AL (political group), Intellectuals, students, and Hindus (religious).[480] It is reported that ‘…anyone identifiable as belonging to one of these groups was liable to be shot at sight, or to be arrested and in many cases, severely ill-treated…'.[481] While such an approach would invoke ‘political’ groups, the judgments delivered by the ICT-BD so far indicate that most

477 Ibid para. 305.
478 Events in East Pakistan (n 7) 56.
479 Ibid.
480 Ibid.
481 Ibid.

of the genocide charges are related to the religious group of Hindus as the shared intention of destroying the Hindu community was common to both, the Pakistani army and the local collaborators.

The definition of genocide by the ICT Act 1973, can be criticized stating that it has departed from the Customary International law. However, in the particular context of the atrocities in Bangladesh, the inclusion of political group as a protected group within the ambit of genocide by the ICT Act 1973 is a forward-thinking approach providing protection to the political groups which is also supported by many academics including Cassese.[482] Also, the ICT-BD is a domestic tribunal and there are no barriers preventing the inclusion of political groups within its domestic law. In the context of Bangladesh, the war was based on political grounds and the Pakistani army conducted military operations to punish the Bengali people who were the sympathisers of the Awami League party. So, in a broader perspective, there were elements of destroying wholly or partly the people belonging to a particular political group. But the danger of such an inclusion should also be considered because political groups are not permanent, and members of this group can voluntarily join. It appears from the judgments delivered by the ICT-BD that, due to the complexity around the inclusion of political groups, no one was convicted for genocide on this ground.

4.3.8 War Crimes

A war crime is a serious violation of fundamental rules and customs of war in armed conflict, which is also known as International Humanitarian Law (IHL).[483] War crimes have no requirement of widespread or systematic commission, and a single act may give rise to individual responsibility.[484] The first precise source of warfare rules is included in 'The Hague Regulations' prohibiting unlimited and unnecessary injury to enemies at warfare.[485]

[482] Cassese (n 286) 96-97.
[483] Cryer (n 340) 267.
[484] Ibid.
[485] Ibid.

Section 3(2)(d) of the ICT Act 1973 defined war crimes as,

> War Crimes: namely, violation of laws or customs of war which include but are not limited to murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population in the territory of Bangladesh; murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages and detainees, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

The above definition has been borrowed from the Nuremberg Charter, and there is a minor modification which is the addition of killing 'detainees' and restricting the territory of the crimes within Bangladesh.[486] Thus, the definition adapted within the context of Bangladesh.

According to Cassese, 'war crimes may be perpetrated in the course of either international or internal armed conflicts, that is, civil wars or large scale and protracted armed clashes breaking out within a sovereign state'.[487] War crimes do not apply during times of peace; its commission is restricted to armed conflict only.[488] It appears from the ICT-BD's judgments that no one has been charged under this particular section. It appears that this section was an application for the POW's of Pakistan who were able to return to Pakistan through an agreement. The researcher concludes that for the specific circumstances of Bangladesh, this particular section has little role to play in practice although it does have great symbolic value demonstrating that the acts committed by the Pakistani army were triable as war crimes.

4.3.9 Attempt, Abetment or Conspiracy: Section 3(2)(g)

This section refers to inchoate crimes under international law. Under the Geneva Convention, conspiracy to commit genocide is a crime, but section 3(2)(g) of the ICT Act 1973

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[486] Linton (n 23) 249.
[487] Cassese (n 286) 47.
[488] Knoops (n 285) 54.

extended the crimes to any crimes under the Act. However, the inchoate offence of conspiracy was used at the Nuremberg and Tokyo Tribunals but only for crimes against peace.[489] In contemporary international law, conspiracy does not give rise to individual criminal responsibility except in the case of genocide.[490] In practice, both conspiracy and attempt have very modest roles to play in ICT-BD.

In the case of *Jabbar Engineer*, the accused was, 'charged for conspiracy, abetting and facilitating the commission of offenses of abduction, murder, torture, plundering [other in humane act] and persecutions on religious ground as crimes against humanity as specified in section 3(2)(a)(g) (h)'.[491] Since the definition of conspiracy is not defined under the ICT Act 1973, the tribunal borrowed the concept from the domestic penal code such as section 120A of the dispensation of justice as confirmed in the appeal judgment of *Chief Prosecutor Vs. Abdul Quader Mollah*.[492] The tribunal defined conspiracy as, '…an inchoate offense refers to an act of agreeing to commit a substantive crime to further plan and policy' between two or more persons.[493] In explaining the meaning of abatement, the Court of Appeal of Bangladesh in the case of *Abdula Quader Molla* made reference to section 109 of the domestic penal code. The explanatory note of abatement states that, 'an act or offence is said to be committed in consequence of the abetment when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment'.[494]

So, the ICT Act 1973 defined attempt, abatement and conspiracy within their domestic criminal law because references were made to the domestic penal code. This is how the ICT-BD attempted to strike a balance between universally recognised norms within the domestic criminal law norms.

489 'Nuremberg IMT: Judgment (1947) 41 AJIL 172, 224 .
490 Cryer (n 340) 384.
491 *The Chief Prosecutor Versus Md. Abdul Jabbar Engineer,* ICT-BD Case No.01 OF 2014 [ICT-1 Judgment of 24 February 2015] para. 221.
492 Ibid para. 244.
493 Ibid.
494 The Penal Code of 1860, Section 109 [explanation] [Bangladesh].

4.3.10 Complicity in or failure to prevent crimes: Section 3(2)(h)

The crimes under section 3(2)(h) give rise to omission liability under ICL, that means if someone is under a duty to prevent the commission of certain acts, then that particular individual would attract liability under this section. This is an important element of international criminal law, but it remained challenging to define complicity because it is listed only in the definition of genocide under international law. The ICT-BD did not confine it within genocide but considered it as a mode of liability for all crimes under the ICT-BD's jurisdiction.

A hypothetical example of complicity can be given to illustrate this aspect, if a commander fails to prevent people under his command from committing atrocities, then he may attract liability for failing to prevent people under his duty, and this is analogous to the superior's command responsibility. The term 'complicity' has been defined by reference to the case of *Akayesu* where it was stated that 'A person may be tried for complicity in genocide 'even where the principal perpetrator of the crime has not been identified, or where, for any other reasons, guilt could not be proven'.[495] In the case of *Azam,* the ICT-BD applied the term of complicity to make the accused liable because the accused participated in a meeting with the Chief Martial Law Administrator of Pakistan where the accused expressed his full cooperation with the aim of establishing peace in the region.[496] Thus, he attracted liability under the head of complicity for all crimes committed. However, the approach adopted by the ICT-BD in this regard can be criticised for not clarifying the mental elements of the crimes or for the poor definition of the mental element.

4.3.11 Accessors, abettors and auxiliary forces

Section 3(2) (g) (h) of the ICT Act 1973 have broadened the jurisdiction of the tribunal to try and assess the accessors, abettors, and auxiliary forces of the Pakistani Army. It should

[495] *The Chief Prosecutor Vs Md. Abdul Alim @ M.A Alim*, ICT-BD Case No. 01 of 2012 [ICT-2 Judgment of 9 October 2013] para 132, Mentioned [ICTR Trial Chamber, September 2, 1998, para. 531].
[496] *Ghulam Azam*, (n 6) para 225

be noted that this particular feature was borrowed from Article 6 of the Nuremberg Charter which states as follows: 'Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan'.[497]

4.3.12 Modes of liability: Joint enterprise & Superior responsibility

Section 4(1) provides that, if any crime as specified in section 3 is committed by several persons, each of such person is liable for that crime in the same manner as if it were done by him alone. It appears from the judgments delivered by the ICT-BD that this section has been widely used to cover the auxiliary forces of the Pakistani army.

Section 4(2) of the ICT Act 1973 deals with superior command responsibility. Command responsibility is an inculpatory doctrine which can give rise to individual criminal responsibility for the crimes committed by the subordinates of the commander.[498] In the case of *Yamashita*, US authorities accused him of failing to control the troops under his command from committing widespread atrocities.[499] In the case of *Ghulam Azam*, it is stated that, 'For a person to be regarded as a superior, he must have a position of command or authority (in a military context), a more general term, applicable in both military and civilian settings'.[500] It is also stated that a civilian superior is not required to be officially recognized as superior rather, a de facto position would suffice.[501]

In relation to the 'knowledge requirement' of the superior, the ICT-BD stated that the mental element is an abstract phenomenon which needs to be identified, '…from the facts, circumstances, and from the context of the case'.[502] Interestingly, the ICT-BD took the burden of constructing the mental element of the superior and discharged the prosecution from

497 Article 6 of the Nuremberg Charter.
498 Cryer (247) 387.
499 Cassese (n 286).
500 *Ghulam Azam* (n 6) para. 332.
501 *Ghulam Azam* (n 6) page 207 (para XXI).
502 Ibid para. 336.

producing any evidence in this regard. The words of the judgment read that, 'The burden is more upon the tribunal to infer than on the prosecution to produce evidence specifically, as the knowledge requirement was primarily not mentioned in section 4(2) of the ICT Act, 1973 explicitly'.[503] Thus, section 4(2) of the ICT Act 1973 is technically suggesting a form of strict liability in ICL.[504]

4.4 Analysis of Procedural Rules of the ICT-BD

Under section 22 of the ICT Act 1973, the ICT-BD has formulated its own RoP. However, there is no separate body of rules, similar to the ECCC and the SCSL, in order to govern the procedure of the ICT-BD due to its domestic nature.[505] Since there is no separate supervisory body to oversee the performance of the ICT-BD, it raises concerns in relation to its transparency and judicial independence.

4.4.1 Applicable laws

The RoP of the ICT-BD made the tribunal distinct from the domestic courts, in terms of the flexible approach of evidential rules.

Section 23 of the ICT Act 1973 stated that the domestic Criminal Procedure Code and the Evidence Act 1872 are not applicable in the proceedings of the ICT-BD.[506] Also, Section 19 of the ICT Act 1973 stated that the tribunal is not bound to follow technical rules of evidence.[507]

Although, the ICT-BD has no distinct rules of evidence, the RoP ensures that universally recognised norms of evidence would be applicable. Thus, we can see an element of universalism in the operation of the ICT-BD. Under Section 19(1) of the ICT Act 1973, the

503 Ibid para. 339.
504 Linton (n 23) 276.
505 Menon (n 24) 11.
506 The ICT Act 1973, Section 23 [Bangladesh].
507 The ICT Act 1973, Section 19 [Bangladesh].

Tribunal may admit any evidence which it deems to have probative value. Rule 56(2) of the RoP further stated that, the Tribunal shall have the discretion to consider hearsay evidence. The case laws of the Tribunal further developed the applicable evidential rules of the ICT-BD.

4.4.2 Investigation agency and the prosecution team

Under Section 7(1) of the ICT Act 1973, the government of Bangladesh established a prosecution team. Rule 17-20 of the RoP of the ICT-BD, deal with powers and functions of the prosecutors. Under Section 8(2) of the ICT Act 1973, appointed prosecutors have investigatory power and provisions relating to the investigation are applicable to them.[508]

Under Section 8(1) of the ICT Act 1973, the government of Bangladesh established an Investigation agency. Rule 3-16 of the RoP of the ICT-BD, deal with powers and functions of the Investigation Agency. After receiving a complaint, investigators are required to proceed in person to the spot, investigate the facts and circumstances of the case and if necessary, take steps for the discovery and arrest of the accused.[509] After completing the initial investigation, the investigation officer is required to submit a detailed report along with the necessary documentation.[510]

It appears to the researcher that the prosecutors and Investigation agencies are appointed by the government and the process of selecting cases for trial is not clear. It raises questions regarding the objectivity of the selection process for cases and judicial independence. It was not possible for the researcher to obtain information on how many cases were closed following the initial investigation and it is assumed that following initial investigation, almost all the cases went to the trial stage. Also, there is no clear legal provision regarding right to legal representation at the time of investigation and this aspect can be criticised in terms of due process.

508 The ICT Act 1973, Section 8(2) [Bangladesh].
509 Rule 6 of the Rule of Procedure (RoP) of the ICT-BD.
510 Rule 11 of the RoP of the ICT-BD.

4.4.3 Warrant of arrest and right to bail

After an initial investigation, if *prima facie* case is found against a suspect, then the investigation officer may seek the arrest of the suspect though the prosecutor from the tribunal and local law enforcement agencies are empowered to execute the warrant of arrest.[511] A unique feature of the RoP is that if a suspect is already in custody, then the investigation must be completed within 12 months; otherwise, bail will be granted.[512] Although other tribunals emphasized that investigation should be completed without any delays, the ICT-BD's RoP states the exact time frame so that the accused are not detained long-time arbitrarily.[513]

4.4.4 Forming charges against the accused

Under Rule 18(1), the Chief Prosecutor or any other prosecutor authorized, will take into account the investigation report and prepare a formal charge in the form of a petition and submit it before the tribunal.[514] Section 16(1) of the ICT Act 1973, stated the requirements for a formal charge against an accused and section 16(2) required that a copy of the formal charge and any accompanying documents must be given to the accused at a reasonable time before the trial.[515]

Under Rule 50 of the RoP of the ICT-BD, the threshold to prove the charge is 'beyond reasonable doubt' and burden of proof is on the prosecution.[516] The threshold of 'beyond reasonable doubt' was inserted by an amendment in 2011 to comply with the due process standards.

511 Rule 9(1) of the RoP of the ICT-BD.
512 Rule 9(5) of the RoP of the ICT-BD.
513 Menon (n 24) 11.
514 Rule 18(1) of the RoP of the ICT-BD.
515 Section 16 of the ICT Act 1973.
516 Rule 50 of the RoP of the ICT-BD.

4.4.5 Trial

According to Rule 35, once a case is ready for trial, the tribunal shall proceed to hear the case in accordance with the procedure of trial under section 10 of the Act and firstly, the decision is to be made on the charge framing matter. Section 10 of the ICT Act 1973 deals with the procedure of trial; the charge shall be read out; the accused person shall be asked whether he pleads guilty or not guilty. After recording a plea of guilty or not guilty, the witnesses from both sides will be examined before the verdict is delivered.

4.4.6 Right to Interpreter and Counsel

The section 10(2) of the ICT Act 1973 states that, the proceedings of the tribunal shall be either in Bengali or in English and section 10(3) provided a provision for an interpreter to be available to the accused and witnesses.[517]

Section 12 of the ICT Act 1973 empowered the tribunal to direct the authority to provide counsel at the expense of the government if the accused is not represented by any counsel.[518] This legal representation assistance for the accused is available at any stage of the case.

4.4.7 Trial in Absentia

Section 10A of the ICT Act 1973 permits trial in abstention if the Tribunal finds a reason to believe that the accused person has absconded or concealed himself so that he cannot be produced for trial.[519] Rule 32 of the RoP of the ICT-BD states that, after the publication of a notice in daily newspapers, if the accused still fails to appear before the tribunal on the specified date and time, the tribunal will consider the accused as an absconder and the trial of the accused shall commence and be held in absentia.[520]

517 The ICT Act 1973, Sections 10(2) & 10(3) [Bangladesh].
518 The ICT Act 1973, Section 12 [Bangladesh].
519 The ICT Act 1973, Section 10A [Bangladesh].
520 Rule 32 of the RoP of the ICT-BD.

Trial in absentia is clearly contrary to due process and universally recognised norms of human rights. However if we consider the trend of 'Arab Spring' in countries like Tunisia and Egypt, it appears that in Muslim majority countries, trial in absentia is acceptable as it was in the case of *Ayyash* in Lebanon under the Special Tribunal for Lebanon (SLT).[521] Similarly, the ICT-BD has retained the provision of trial in absentia considering local norms and customs.

4.4.8 Rules of Evidence

As mentioned above, the tribunal is not bound to follow the domestic criminal law and the Evidence Act of 1872. Section 19(1) of the ICT Act 1973, provides that the tribunal shall not be bound by technical rules of evidence and is encouraged to adopt flexible rules of evidence.[522] This particular section also stated that the tribunal might admit any evidence having probative value.[523] Section 19(4) authorized the tribunal to take into its judicial notice of the fact, common knowledge which is not needed to be proved by adducing evidence.[524] Under section 56(2) the tribunal has the discretion to consider hearsay evidence by weighing its probative value.[525] The accused has the right to cross-examine the witnesses against him to determine the credibility of oral evidence.[526] In relation to the alibi defence, Rule 51 of the RoP of the ICT-BD provides that, it is the defence who has to prove the defence of alibi.

4.4.9 Judgment and Sentencing

Section 20 of the ICT Act 1973 deals with judgment and sentencing matters. It is required that judges should give the reasoning for guilt or innocence. In relation to sentencing, section 20(2) provides that, 'Upon conviction of an accused person, the tribunal shall award sentence of death or such other punishment proportionate to the gravity of the

521 'The Ayyash case (STL 18-10) to proceed in absentia' (Special tribunal for Lebanon 6 February 2020) < https://www.stl-tsl.org/en/media/press-releases/the-ayyash-case-stl-18-10-to-proceed-in-absentia> accessed 9 August 2020.
522 The ICT Act 1973, Section 19(1) [Bangladesh]
523 The ICT Act 1973, Section 19(1)
524 *Abul Kalam Azad* (n 439) para 22 [Bangladesh]
525 Ibid.
526 Ibid.

crime as appears to the tribunal to be just and proper'.[527] The wording of this particular section indicates that after finding an accused guilty, the first task of the tribunal is to consider the death penalty unless there are any other reasons why the death penalty should not be applied. This aspect has been elaborately discussed later in this thesis (see Chapter 9).

The ICT-BD has no separate body to carry out sentencing, it is the responsibility of the national prison authority to execute the sentencing. Section 368. (1) of The Code of Criminal Procedure (CrPc) 1898 states that, the method of execution for a person sentenced to death is hanging.[528] This is the only form of execution for capital punishment in Bangladesh.

The ICT-BD follows the principle of retribution and deterrence to determine sentences, namely that punishment must be proportionate to the crime committed. As it stands, the ICT-BD does not have any official sentencing guidelines and trial judges usually apply their discretion depending on the case.[529] Islam, on his research paper proposed certain mitigating or aggravating factors that can be taken into account while determining sentences such as the gravity of the crime, age of the offender, economic conditions, custody period, uncertainty, effect of the offence on the victim and plea bargaining.[530] The researcher is of the opinion that in the context of Bangladesh, although there are no official guidelines, mitigating and aggravating factors considered by the courts have placed importance on public sentiments, gravity of crime and not only the suffering of the victims as some victims had passed away before the trial or sentencing but the suffering of the society as a whole. Mitigating factors such as age have also been considered while determining sentence as in the case of *Ghulam Azam.*[531] The ICT-BD's judgments provided some observations in regards to the consideration of aggravating circumstances in determining sentence which has been elaborately discussed

[527] The ICT Act 1973, Section 20(2).
[528] The Code of Criminal Procedure 1898, s 368 (1).
[529] Md. Mohidul Islam, 'Sentencing in criminal cases in Bangladesh: Pronouncements as guideline' (2020) 19(1) Journal of Judicial Administration Training Institute 207-225.
[530] Ibid.
[531] *Ghulam Azam* (n 6).

in Chapter 9.[532] Although it has been difficult to establish clear rules of sentencing precedent in the ICT-BD, some guidelines set in the judgement of *Ali Ahsan Mujahid*,[533] in relation to the gravity and nature of participation, level of influence and culpable affiliation with the armed forces, have later been reiterated in the case of *Mir Quasem Ali* to determine sentence.[534]

The ICT-BD has strived to provide clear rationales behind sentencing in the judgments. The researcher is of the opinion that the rationales and judgments provided by the ICT-BD has value to set in place a precedential mechanism for other Muslim majority countries who can reflect back to the judgments of the ICT-BD for rationale and retributory objectives in sentencing, thus contributing to International law.

4.4.10 Right of appeal

Section 21 of the ICT Act 1973 deals with the right of appeal for the accused and the prosecution challenging conviction and sentence to the Appellate Division (AD) of the Supreme Court of Bangladesh.[535] This feature of the ICT-BD is significant because the accused are able to challenge the judgments of the ICT-BD to the highest court of Bangladesh. Also, the decisions of the Court of Appeal are subject to review. In order to comply with the overriding objectives of speedy trial, section 21(3) & (4) provided a time limit of 30 days to lodge an appeal by either party or 60 days to dispose of the appeal respectively. Rule 26(3) of the RoP of the ICT-BD permits either party to apply for a review of any of the tribunal's orders, including the charge framing order.[536]

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[532] *The Chief Prosecutor v Ali Ahsan Muhammad Mujahid,* ICT-BD Case No. 04 of 2012, [ICT-2 Judgment of 17 July 2013]
[533] Ibid.
[534] *The Chief Prosecutor Vs Mir Quasem Ali,* ICT-BD Case No. 03 of 2013, [ICT-2 Judgment of 2 November 2014]
[535] The ICT Act 1973, Section 21.
[536] Rule 26 (1) of the RoP of the ICT-BD.

4.4.11 Protection of witnesses and victims

Under Rule 58A, the ICT-BD is empowered to direct the government to ensure the protection, privacy, and well-being of the witnesses and or victims. Rule 53A (3) of the RoP of the ICT-BD provides that video trials may be held for the protection of witnesses and both the prosecution and the defence counsel are required to maintain confidentially of the proceedings and the identity of the witnesses. If either the prosecution or the defence fails to maintain the confidentiality requirement, they shall then be prosecuted under section 11 (4) of the ICT Act 1973 (please see Chapter 8 for more details on witness protection).

4.4.12 Fair trial attributes

A critical aspect of the ICT-BD is that the governing Act was legislated in 1973 considering the then customary international law and conception of due process. It should be noted that the concept of due process in the area of ICL has gone through a substantial amount of change. As a result, the ICT Act 1973 had to be amended to comply with the contemporary due process standard. The RoP of the ICT-BD had to go through an amendment to address the due process issues. In addition to the above-mentioned provision, other notable fair trail attributes include protection against self-incrimination under Rule 43(7); safeguards related to confessional statements under Rule 25(2) & Section 14(2), safeguards against possibilities of torture or coercion, duress or threat of any kind under Rule 16(2); adequate time for preparing defence under Rule 38(2); presumption of innocence under Rule 43(2), etc.[537] Rule 42 also permits the ICT-BD to allow foreign lawyers subject to the approval of the Bangladesh Bar Council.[538]

Despite having the above fair trial attributes, the due process aspect of the ICT-BD has been criticized from various quarters. According to Robertson, although it is common that

[537] 'Legal Framework of the ICT and Due Process standards' (15 December 2012) International Crimes Strategy Forum available from http://icsforum.org/141 accessed 7 August 2019.
[538] Ibid.

newly established tribunals do attract criticisms for the procedural difficulties, the criticisms for ICT-BD are comparatively more.[539] According to him, one of the main procedural faults of the ICT-BD is that the governing Act has excluded the accused to seek fundamental rights ensured under the constitution.[540] In relation to *alibi,* he stated that the ICT-BD followed an incorrect approach in shifting the burden on the defence and deviated from the principle of ICTR established in the case of *Protais Zigiranyirazo.*[541] The procedural aspect of the ICT-BD has also been criticized for following the trend of Nuremberg Trials in many aspects, including retaining the death sentence. However, according to Menon, the trial in absentia and death penalty aspect of the Nuremberg trials '…were unanimously affirmed by the first General Assembly of the United Nations'.[542] Menon further stated that despite several shortcomings, the Nuremberg trials were widely accepted and taking a different approach towards ICT-BD would be a double standard approach.

4.5 Composition of the ICT-BD

The ICT-BD has four major bodies: The Office of the Prosecutor, investigation Agency, Registry, and Judicial Organs. The prosecutors, investigators and judges all are from Bangladesh.

4.5.1 Structure of the Tribunal

Section 6 (1) of the ICT Act 1973 permits the government to set up one or more tribunals by way of notice in the official Gazette consisting of a Chairman and not less than two and not more than four other members.[543] The standard practise is that the tribunal judges in Bangladesh are appointed from the district judges. However, pursuant to section 6(2) any

539 Robertson (n 386) 110.
540 Ibid.
541 Ibid.
542 Menon (n 24) 14.
543 The ICT) Act 1973, Section 6(1) [Bangladesh].

sitting judge or qualified judge of the Supreme Court of Bangladesh, may be appointed as a Chairman or member of a Tribunal.

The first tribunal was established on 25 March 2010 by notification to the official gazette which is known as ICT-BD-1 and for the purpose of speedy trial, a second tribunal was established on 22 March 2012 which is known as ICT-BD-2. The Second Tribunal remains non-functioning since 15 September 2015. The ICT-BD is currently based in Dhaka, Bangladesh.

4.5.2 Appointment process of judges

In relation to the appointment of judges of the Supreme Court of Bangladesh, Article 95 (1) of the Constitution of Bangladesh provides that, 'The Chief Justice shall be appointed by the President, and the other Judges shall be appointed by the President after consultation with the Chief Justice'.[544] Article 95(2) provides that to be qualified as a judge, a person must be a citizen of Bangladesh and have at least 10 years of experience as an advocate of the Supreme Court or at least 10 years of experience holding judicial office in Bangladesh or having special qualifications prescribed by law.[545]

Under Section 6(1) of the ICT Act 1973, the government of Bangladesh is empowered to appoint the Judges of the ICT-BD. The judges are from civilian backgrounds and not from military backgrounds. The judges are required to be Bangladeshi citizens and qualified to be a judge in the Bangladesh judiciary as required under the Constitution of Bangladesh. The judges are required to be independent when making decisions on any matters. The panel of judges is composed of at least three judges, and one of them acts as a chairman.

The appointment process of the judges of the ICT-BD has been criticized in terms of the independence of the judges. According to Menon, the exclusive authority for the

[544] Article 95(1) of the Constitution of Bangladesh.
[545] Article 95(2) of the Constitution of Bangladesh.

appointment of the judges is in the hands of the government, and this is alarming in relation to maintaining the principle of independence of the tribunal.[546] This appointment process of the ICT-BD is one of the main limitation of a domestic tribunal dealing with international crimes. Since local judges only are recruited by the government, there is a lack transparency regarding their appointment, it can undermine overall credibility of the ICT-BD. Furthermore, the country is standing on such volatile political grounds and selectivity of the judges' appointment would give rise to questions as to whether the government appointed the judges to serve the purpose of the government. It would be appropriate to form an independent body to appoint judges and prosecution teams in order to maintain transparency and judicial independence. On the other hand, if we consider the fact that judges of the tribunal are already qualified to be a part of the Bangladesh judiciary and that they would be oath bound to perform their duty independently, then the risk of being impartial may be mitigated. Another issue regarding the appointment of judges is that, gender diversity was not considered and as a result, there is no female judge in the ICT-BD. However, if we consider the social setting of the country and the fact that women are underrepresented in the elite professions then it is understandable as to why there are no female judges at the ICT-BD. The criticisms attracted by the ICT-BD in terms of appointment of the judges may provide important lessons for any future tribunals in the South Asian Countries or Muslim majority countries.

In relation to decision making, Section 6(6) of the ICT Act 1973 states that if there is a difference of opinion among its members, the opinion of the majority shall prevail, and the decision of the tribunal shall be expressed in terms of the views of the majority.[547] So, it can be seen that, dissenting opinions are permitted under the ICT Act 1973 providing final verdict. This has provided an area of development because the judges have the option to provide their subjective analysis of the case.

[546] Menon (n 24) 7-9.
[547] The ICT Act 1973, Section 6(6) [Bangladesh].

4.5.3 Office of the Tribunal

Rule 60 of the RoP of the ICT-BD provides the Powers and Functions of Registrar and Deputy Registrar. The Registrar is the Chief Administrative Officer of the Office of the Tribunal and prosecutors submit the cases to him or her for the purpose of presenting before the tribunal. The main task of the registrar is to assist the tribunal in the performance of its functions under the authority of the Chairman and play the role as the spokesperson of the tribunal.[548] The registrar is assisted by deputy registrar and delegates certain powers to him or her.

4.5.4 Budget of the ICT-BD

Maintaining an ICT is costly business. The ICT-BD is wholly financed by the Bangladeshi government and did not seek any financial assistance from the UN, unlike ad hoc tribunals and hybrid tribunals. The ad hoc and hybrid tribunals such as the ICTY, ICTR, ECCC are financed by the UN. The ICT-BD is still an ongoing process, and at this stage, it is not possible to give a complete picture of the costs of the tribunal. Moreover, the ICT-BD did not publish any formal report on budget and funding issues. However, it has been reported that initially, the tribunal budget was $1.44 million.[549] This number of the initial budget is deficient compared to other ICT's. Robertson said that the government had provided inadequate funding for the tribunal and that would have an impact on the standard of justice delivered by the tribunal.[550] The ICT-BD has the option to provide government sponsored defence counsel and legal representation to the defendants if they are unable to afford their counsel. Since the Tribunal is financed by the government and there is no official public information on the budget, it may raise questions about the transparency of the ICT-BD. This aspect again undermines the overall credibility of the Tribunal. However, a separate research can be conducted on the

[548] Rule 60(2) of the RoP of the ICT-BD.
[549] Nijhoom Majumder, 'A comparative analysis of the ICT-BD's budget and spending' (2018) in Arif Rahman (Eds), Liberation War and War Crimes: The answer to some confusion' (Translated from Bengali to English, Shobdoshoily, Dhaka 2018) 96.
[550] Robertson (n 386) 54.

budget issue and considering the main focus of this current research, it was not possible to elaborate on the budget issue any further due to lack of data. It is reported that from 2009 until 2017, the ICT-BD's average allocated budget was $216 million (approximately $2.8 million per year), and the actual costs of the ICT-BD were $190 million (approx. $2.15 million per year).[551] From 2009 until 2017, the ICT-BD was able to deliver 27 judgments and 10 cases at the trial stage.[552] Comparing to ICTR, ICTY, ICC, and ECCC, the costs of the ICT-BD is very low. This is because the Tribunal employed domestic personnel and resources. Within a decade, the ICTY and ICTR have received $4.5 billion to cover the expense of the tribunals.[553] It is reported that the ECCC in a decade's time spent $300 million but delivered only three judgments which attracted criticisms on the effectiveness of ECCC.[554]

If we consider the cost benefit analysis, it will give us a lucrative picture that comparatively, the ICT-BD spent less amount of resources and delivered a significant number of judgments since its establishment. However, the ICT-BD has already attracted criticisms for being underfunded and raised questions as to whether international standard justice can be served with the underfunded budget of the ICT-BD. On the other hand, the ICT-BD can provide us a lesson that cost-effective domestic tribunal can be an effective way to deal with past human rights violations in any country. The ICT-BD has provided an indication that the prosecution of international crimes is no longer a multibillion-dollar business. Despite its limitations and criticisms, the attempt of the ICT-BD in providing delayed justice may encourage other south Asian countries to deal with their past violence thorough a domestic mechanism.

551 Majumder (n 549).
552 Ibid.
553 D Roper and Lilian A Barria, *Designing Criminal Tribunals* (Ashgate Publishing 2006) 61.
554 Seth Mydans, '11 Years, $300 Million, and 3 Convictions. Was the Khmer Rouge Tribunal Worth It?' *The New York Times* (10 October 2017).

4.6 Conclusion

The primary intention of the ICL is to enforce the international obligation of criminal prosecution through an indirect enforcement mechanism. As a result, the establishment of domestic tribunals is strengthening the enforceability of the rules of international criminal conventions. The ICT-BD is a purely domestic mechanism with international elements. Due to its domestic nature, it has attracted several criticisms in terms of definition of its substantive laws, appointment procedure of judges and prosecutors and a low budget to run the tribunal.

The substantive law and principles of the ICT-BD are borrowed from the Nuremberg trials. The governing Act of the ICT-BD was enacted by the parliament of Bangladesh after a thorough parliamentary debate. As part of the substantive law, the ICT Act 1973 has given a potentially vague definition of crimes against humanity and has broadened the definition of genocide. The application of the substantive laws of the ICT-BD has also heavily relied on the inchoate offense and joint enterprise in ICL. This has raised issues of legitimacy as the ICT-BD is subject to serious levels of selectivity due to historic reasons as the tribunal is only prosecuting the local collaborators whereas, the principle offenders were able to escape prosecution. Due to jurisdictional limitations, the ICT-BD is unable to make principal offenders accountable for their criminal acts. This has created a dilemma in defining crimes and establishing the mental element of the crimes under the ICT-BD's governing Act. However, the ICT-BD can be considered as an example that even though justice was delayed, it had not been totally denied.

The ICT-BD's credibility has been called into question in relation to the appointment procedure of the judges of the tribunal since there is no independent body to recruit the judges of the tribunal. However, the verdict of the tribunal is not the ultimate say and all verdicts of the Tribunal can be challenged through to the Appellate Division of the Supreme Court and the Appellate Division's judgment is also subject to review. Thus, if there is any concern

regarding the impartiality of the judges, then that judgment can be challenged to highest court of Bangladesh on grounds of procedural unfairness.

The ICT-BD's sentencing practices are determined by social and cultural aspects as well as long denial of justice and national wishes. From the very beginning, the procedural laws of the ICT-BD have been criticized from various quarters. As a result, both the governing Act and the RoP had to be amended to incorporate the accepted standards of due process and presumption of innocence, beyond a reasonable doubt, and interlocutory appeal was included as part of procedural laws. Thus, the analysis of the ICT-BD's substantive laws provides us important lessons on how a domestic tribunal can attempt to make a balance between internationally recognised standards as well as respective local norms. Despite having some inherent limitations, the ICT-BD is a cost-effective domestic measure which has already been proven to be working.

CHAPTER 5

CULTURE OF IMPUNITY, DELAYED JUSTICE AND REPARATION

5.1 Introduction

Chapters 5 to 9 present the perspectives of the stakeholders (judges, lawyers, and politicians) involved in the establishment or operation of the ICT-BD, which the researcher collected by way of semi-structured interviews. This chapter deals with three key themes that have emerged from the data: (a) the ICT-BD's role in fighting a culture of impunity; (b) the implications of delayed justice and (c) the issue of reparations. Concerning the culture of impunity, this sub-section also investigates why Bangladesh could not establish a functioning tribunal investigating the crimes soon after the liberation war in 1971. Also, the extent to which delay may affect the prosecution of international crimes and in case of delayed justice, if reparation can supplement the prosecution to serve justice to the victims.

To maintain a consistent fashion, Chapters 5-9 have been structured under 5 sections (e.g. Introduction, international legal position, legal position of the ICT-BD, analysis of data and conclusion). In writing the international legal positions, frequent reference has been made to ICTY, ICTR, ICC, SCSL, ECCC and other relevant tribunals. This comparative analysis is valuable in this study because this would help us understand how the ICT-BD has made a balance between internationally recognised norms and local cultural norms.

5.1.1 Definition of impunity

It is challenging to offer a comprehensive definition for impunity, which encompasses all the different aspects implied in the term; this may be due to the nature of impunity, which has become so ‘ubiquitous'.[555] In simple terms, impunity means the lack of effective remedies

[555] Meg Penrose ‘Impunity Inertia, Inaction, And Invalidity’ (1999) 17| (1) B.U. Int’l L.J 269, 273.

for victims.[556] A victim centred approach shows the very personal and subjective side of impunity: '…sitting next to the torturer [of the victims] and feeling powerless'.[557] However, the meaning of impunity includes more than the above. It describes a social phenomenon characterizing and affecting a whole society.[558] By denying survivor's access to truth or access to justice, impunity continues the historical interpretation of the oppressors and denies the necessary acknowledgment and reparation for victims and survivors.[559]

As a starting point, it may be helpful to consider the definition of Opotow, who describes impunity as '…the exemption from accountability, penalty, punishment, or legal sanction for perpetrators of illegal acts'.[560] This particular author adds that impunity '…can occur before, during, or after judicial processes'.[561] There are three main aspects to this definition that are worth highlighting. First, is the emphasis placed here upon the lack of 'accountability'[562] as opposed to the absence of an effective remedy for victims.[563] According to Blumenson, international serious crimes such as genocide, crimes against humanity, and others (*jus cogens* crimes) must be prosecuted, and that justice is not achieved without formal trial or punishment.[564] The second aspect of Opotow's definition concerns the various moments in which impunity may arise. This is mirrored in Amnesty International's account of impunity that impunity may arise before, during or after the judicial process such as not investigating the crimes, not bringing the perpetrators to trial and not providing verdict or not

556 Kai Ambos, 'Impunity and International Criminal Law: A Case Study on Colombia, Peru, Bolivia, Chile and Argentina' (1997) 18(1) HRLJ 1-15.
557 Ibid.
558 Center for Peace and Development Initiatives, 'What is Impunity' http://www.cpdi-pakistan.org/wp-content/uploads/2017/06/What-is-impunity.pdf last accessed 5 December 2018.
559 Ibid.
560 Susan Opotow, 'Reconciliation in Times of Impunity: Challenges for Social Justice', 14 Social Justice Research (2001) 149 and 'Psychology of Impunity and Justice: Implications for Social Reconciliation' in Cherif Bassiouni (eds), *Post-conflict Justice* (Transnational Publishers 2002) 201-202.
561 Ibid.
562 Mark Ellis 'Combating Impunity and Enforcing Accountability as a Way to Promote Peace and Stability- The Role of International War Crimes Tribunals' (2006) 2(1) JNSLP 111, 111.
563 Christopher C 'Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability' (1998) 26(1) DJILP 591.
564 Eric Blumenson, 'The Challenge of the Global Standard of Justice: Peace Pluralism, and Punishment in the International Criminal Court' (2006) 44(1) Colum. J. Transnat'l L 801, 869.

enforcing the verdict.[565] The third aspect of Opotow's definition refers to the causes of impunity that impunity is the result of political considerations and compromise or '*realpolitik'*.[566] The fight against impunity includes political measures to establish the truth, to construct a collective memory, to bring the perpetrators to court, and organizational reforms to prevent society from suffering the same kind of atrocities again.[567]

The concept of impunity must be kept separate from the concept of immunity.[568] Immunity from prosecution is a doctrine of international law that allows an accused to avoid prosecution for criminal offences.[569] Immunity comes in two forms, the first is functional immunity or immunity *ratione materiae*.[570] This is immunity granted to people who perform certain functions of a state.[571] The second is personal immunity or immunity *ratione personae*.[572] This is immunity granted to certain officials because of the office they hold, rather than in relation to the actions they have committed.[573]

5.1.2 Culture of Impunity

A culture of impunity is seen as one of the main challenges of ICL, and in many countries, it has not been possible to serve justice for the past atrocities they have suffered.[574] Such impunity has emboldened perpetrators and has encouraged repeated violations of ICL.[575] The investigation and prosecution of international crimes, including genocide, crimes

565 Amnesty International, 'Disappearances and Political Killings; Human Rights Crisis of the 1990s Bringing the Perpetrators to Justice' (1993) Doc. AI Index No. ACT 33/005/1993, p. 2.
566 Charles Harper, 'From Impunity to Reconciliation' in Charles Harper (eds), *Impunity an Ethical Perspective* (1996), p. ix.
567 Centre for Peace and Development Initiatives (n 485).
568 Cassese (n 286) Chapter 14.
569 Ibid.
570 Collin Warbrick, "Immunity and International Crimes in English Law", (2004) 53 ICLQ 769, 772-774.
571 Ibid.
572 Ibid.
573 Ibid.
574 Rene Lemarchand, *Forgotten Genocides* (University of Pennsylvania Press 2011) 4-6.
575 Ibid.

against humanity, and war crimes is a fundamental component of transitional justice.[576] The primary goal of the Rome Statute of the International Criminal Court (ICC) is 'to put an end to impunity for the perpetrators' [...] 'of the most serious crimes of concern to the international community as a whole'.[577] This is an indication that the area of ICL has seen a long period of a culture of impunity for various reasons.

According to Bassiouni, impunity arises due to the conflicting goals of *realpolitik* and justice at both, the international and national levels.[578] One of the primary purposes of criminal law is deterrence so, if there is impunity, this purpose of deterrence will fail, and it is necessary to make those who have committed crimes under international law accountable.

5.2 International position of the culture of Impunity

All over the world, around 75 to 170 million people were killed during the twentieth century in more than 250 different types of conflicts.[579] Yet, most of the perpetrators of these crimes escaped justice due to political considerations.[580] In Turkey, justice for the victims of the Armenian killings was abandoned for political reasons.[581]

Impunity was an underlying cause of the genocide in the former Yugoslavia (ICITY) and in Rwanda (ICTR).[582] The concept of impunity in the Rwandan context developed a sense of frustration and hopelessness among the victims.[583] The ICC was established following the

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576 ICTJ, 'Criminal Justice' https://www.ictj.org/our-work/transitional-justice-issues/criminal-justice Accessed 17 November 2018.

577 Preamble, Rome Statute of the International Criminal Court < http://legal.un.org/icc/statute/romefra.htm> Last accessed 17 November 2018.

578 M. Cherif Bassiouni, 'Combating Impunity for International crimes' (2000) 71 U. Colo. L. Rev. 409, 409.

579 Ibid.

580 Ibid.

581 Ibid 414.

582 Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities' (2001) 95 Am J Int'l L 7.

583 Parker Patterson, 'Partial Justice: Successes and Failures of the International Criminal Tribunal for Rwanda in Ending Impunity for Violations of International Criminal Law' (2010) 19 Tul J Int'l & Comp L 369, 370.

success of the ad hoc tribunals, the ICTY and the ICTR.[584] Thus, a trend of political legitimacy developed to end culture of impunity despite several limitations.[585]

The situation in Cambodia suggests that the cultural interpretation of Impunity is vital to deterrence.[586] The trials of former Khmer Rouge leaders in the ECCC has opened a flood gate to violence which has been a challenge for the country to control.[587] Human rights violations are very common in many political and cultural environments where corruption exists due to impunity.[588] The ECCC has interpreted impunity based on the cultural and religious traditions in Cambodia. However, familiarity and perspective on impunity based on local norms can be very complicated and can often either support or clash with each other.[589]

The differences in objectives of realpolitik and justice is the cause of impunity nationally and internationally.[590] In a nation trying to achieve stability, political practicality is often parallel to the objective of pursuing retributive and restorative justice through accountability.[591] The pragmatic approach of realpolitik is not burdened with moral obligations.[592] It is evident from history that side-lining long-term objectives such as harmony and restoration in order to appease temporary goals, is disadvantageous for the society in the long run. This unequivocally leads to the failure in addressing the needs of the society to bring perpetrators of serious crimes to justice and remedy victims by combating differences of opinions even after the truth has been accepted.[593]

Member states of the U.N are obligated to work together with the organisation to attain the ‘standard of achievement’ goals of the charter established in 1948 which are, universal

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584 Akhayan (n 582) 9.
585 Ibid.
586 Maurice Eisenbruch, ‘The cloak of impunity in Cambodia I: cultural foundations’ (2018) 22(6) THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 757.
587 Ibid.
588 Ibid.
589 Ibid.
590 M Cherif Bassiouni, 'Combating Impunity for International Crimes' (2000) 71 U Colo L Rev 409.
591 Ibid.
592 Ibid.
593 Ibid.

respect and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. However, the commitment excluded execution or prosecutions for violations.[594] On the other hand, there was a requirement for signatory commitment on the International Convention on the prevention and punishment of the Crime of Genocide which attached liability for violations by the General Assembly that also upheld the five principles of the Nuremberg charter which attached individual responsibility for war crimes, crimes against peace and crimes against humanity.[595]

It is internationally recognised that individuals and states have duties and responsibilities to prevent crimes against International law, failure to do so would result in being held accountable and responsible as provided in the provisions of International law.[596] There are various provisions under international law such as the Article IX of the Genocide convention and Article 6 of the charter of International Military Tribunal that states can rely on to steer away from Impunity under international criminal law by imposing individual responsibility.[597] Advisory opinions on the legal responsibility of successor states in prosecuting violations against International law by former regimes can be sought from organisations such as the Security Council, General Assembly, ECOSOC or any other specialised agencies.

The international community has had an opportunity to learn from the *Pinochet* case as its distinctive facts of a domestic court in a separate state bringing forth a former head of state to stand trial for human rights violations is unprecedented.[598] It may seem that there is a

[594] Stephen P Marks, 'Forgetting the Policies and Practices of the Past: Impunity in Cambodia' (1994) 18 Fletcher F World Aff 17.

[595] Ibid.

[596] Final Judgment of the Nuremberg Tribunal (hereinafter Nuremberg Judgment), 1 October 1946, reprinted in: American Journal of International Law (AJIL), vol. 41, 1947, 172, 220-221.

[597] M Cherif Bassiouni, 'Combating Impunity for International Crimes' (2000) 71 U Colo L Rev 409, 414.

[598] Jill M Sears, 'Confronting the Culture of Impunity: Immunity of Heads of State from Nuremberg to ex parte Pinochet' (1999) 42 German YB Int'l L 125.

responsibility for successor states to prosecute individuals belonging former regimes for human violations as a duty imposed by international law.[599] There exists great legal difficulties and political barriers in securing fugitives and some seem to have escaped the reach of justice.[600]

5.3 The position of culture of impunity in Bangladesh

The nature of the Bangladeshi culture of impunity should be understood with reference to its political culture. The country has gone through a large of period of political violence and military rule. The analysis of the causes and results of impunity for mass atrocities in Bangladesh can give us valuable insight as to how the country confronted the problem of international justice. Bangladesh stands as one of the most important cases where the pursuit of war criminals was foiled, resulting in a disturbing impunity for one of the ugliest episodes of the Cold War.[601]

The declassified government papers released by the Indian government provide us an understanding of some real reasons of the culture of impunity in the context of Bangladeshi transitional justice.[602] This would be helpful to validate the empirical data collected through semi structured interviews. The Pakistani government was able to pursue the government of Bangladesh and India not to prosecute the soldiers as war criminals. Both Bangladesh and India had chosen international security over justice with a view to make peace with Pakistan.[603]

Due to lack of substantial military and political power, Bangladesh could not prosecute the Pakistani soldiers.[604] When the Pakistani prisoners were repatriated, Bangladesh was left with the only option to prosecute the local collaborators. Despite having a significant military

[599] Marks (n 594) 22.
[600] Parker Patterson, 'Partial Justice: Successes and Failures of the International Criminal Tribunal for Rwanda in Ending Impunity for Violations of International Criminal Law' (2010) 19 Tul J Int'l & Comp L 369, 387
[601] Gary Bass, 'Bargaining away justice: India, Pakistan, and the International Politics of Impunity for the Bangladesh Genocide' (2016) 41(2) International Security 140.
[602] Ibid.
[603] Ibid.
[604] Ibid 147.

victory and a strong moral drive for prosecuting the perpetrators of 1971, international criminal law could not be applied in Bangladesh. Similar to the situation in Cambodia, Bangladesh had obstructions such as poverty, corruption, mismanagement and bloody military coups in its early attempts at justice. However, there was always a societal demand to prosecute the remaining local collaborators in Bangladesh to end impunity. Even so, there was no stable democracy until 1991 to reflect the societal demand. Further to that, the development of politics of Islamist parties assisted the culture of impunity.

5.4 Analysis of interview data: Culture of Impunity

The interview data concerning the culture of impunity in Bangladesh provided a contextual picture. In explaining the nature of impunity in the Bangladeshi situation, the participants confirmed that genocide, crimes against humanity, war crimes and gross violation of human rights were committed during the liberation war of 1971 but no effective tribunals were established until 2010.[605] In the case of *Mujahid*, the ICT-BD addressed the issue of impunity in the following way:

> The perpetrators of the crimes could not be brought to book, and this left a deep scratch on the country's political awareness and the whole nation. The impunity they enjoyed held back political stability, saw the rise of militancy, and destroyed the nation's Constitution.[606]

One of the ICT-BD judges interviewed opined that, the extent and magnitude of the atrocities committed by Pakistani soldiers were so grave that Dhaka based US diplomats sent a telegram signed by 20 of them led by the head of the Mission Mr. Archer Blood, informing the US government of the grave nature of atrocities committed by the Pakistani army and their

[605] Analysis of the interview data of judges, politicians, and lawyers in general.
[606] *The Chief Prosecutor Vs Ali Ahsan Muhammad Mujahid,* ICT-BD Case No. 04 of 2012 [ICT-2 Judgment of 17 July 2013] para. 5.

local collaborators.[607] In explaining the reason behind the atrocities in Bangladesh, a particular interviewee stated that in 1971, the people of Bangladesh wanted freedom from West Pakistan but the pro-Pakistan supporters in Bangladesh, mostly the supporters of Jamaat-e-Islami did not agree with them and they committed mass crimes for ideological reasons.[608] This particular politician further commented that the murder, arson, looting and rape were committed during 1971 not for personal interest but for ideological interest.[609] He explained that it is the obligation of the Bangladeshi government to serve justice to the victims of 1971.[610]

In explaining the reasons for impunity, a senior BNP politician stated that, 'political instability is the main reason and some government wanted to establish a tribunal and some government did not want'.[611] A particular judge who took part in the interview stated that, 'Well, it took a very long time, for the trial to begin, my personal view is the trial should have been started earlier'.[612] He reaffirmed that 'the father of the nation, Bangabandhu Sheikh Mujib, wished to see the trial started as early as 1975 and that is why he initiated and introduced his bill which became the Act of 1973 in the year 1973, and it was unanimously passed by the parliament'.[613] This particular interviewee stated that after the assassination of Sheikh Mujibur Rahman in 1975, people who came to power were pro-Pakistani and they abstained from the idea of trying the perpetrators of the offences during the Liberation War.[614] Thus, the culture of impunity had begun in the situation of Bangladesh.

A judge, who took part in the interview, stated that, 'the perpetrators of the 1971 have ruled the country for many years and that is the main reason, I would say only reason why the

607 J3-Q-B3.
608 P6-ALP-Q-B3.
609 P6-ALP-Q-B3.
610 P6-ALP-Q-B3.
611 P1-BNP-Q-A.
612 J1-Q-B1.
613 J1-Q-B1.
614 J1-Q-B1.

trial could not take place earlier'.[615] He also explained that, 'Awami League which is in power now was in power during the intervening period from 1996-2001 but for a very short period of 5 years, they could not organize the thing, they lost again and after that they came to power in 2009'.[616] He said it was one of AL parties election manifestos that they would try the perpetrators of 1971 for humanitarian crimes.[617] The trial of war criminals was a major commitment that AL made in its 2008 election manifesto and the overwhelming victory that they received mandated them to proceed with the commitment.[618]

Most of the interviewees mentioned that the 'Tri-Partite Agreement' (also known as Delhi Agreement, 1974) between India, Pakistan and Bangladesh in 1974 contributed to the culture of impunity in the Bangladeshi situation.[619] Under this agreement, 195 Pakistanis listed as war criminals were released to Pakistan.[620] It had a great impact on the overall prosecution of the perpetrators of 1971.[621] Although Pakistan promised to prosecute 195 alleged war criminals, they failed to maintain that promise.[622] It appeared from a particular judgment that the Bangladeshi government was under diplomatic pressure to release the 195 war criminals.[623]

N. Jayapalan, in his book, sums up the issue in the following way:

> ……India left no stone unturned for helping Bangladesh to get recognition from other countries and its due place in the United Nations. India gave full support to the August 9, 1972 application made by Bangladesh for getting the membership of the United Nations. However, the Chinese veto against Bangladesh prevented success in this

615 J1-Q-B1.
616 J1-Q-B1.
617 J1-Q-B1.

618 J1-Q-B1.
619 Howard Levie, 'The Indo-Pakistani Agreement of August 28, 1973', (1974) 68(1) Am. J. Int'l L 95-97.
620 Ibid.
621 Syeed Ahamed, 'The Curious Case of the 195 War Criminals' (2010) 3(5) The Daily Star Forum < http://archive.thedailystar.net/forum/2010/may/curious.htm> last accessed 21 October 2018.
622 Ibid.

623 *Mujahid* (n 606) para.102.

direction. In February 1974, Pakistan gave recognition to Bangladesh and it was followed by the accord of recognition by China. This development cleared the way for Bangladesh's entry into the United Nations. In the context of Indo-Pak-Bangladesh relations, the April 1974 tripartite talks between India, Pakistan and Bangladesh produced an important agreement leading to the repatriation of 195 Pakistani POWs who were still being detained in India because of Bangladesh's earlier decision to try them on charges of genocide and war crimes.[624]

Article 13 of the Tripartite Agreement states that, 'there was universal consensus that persons charged with such crimes as the 195 Pakistani prisoners of war should be held to account and subjected to the due process of law'.[625] On the other hand, Article 15 of the agreement states that, 'having regard to the appeal of the Prime Minister of Pakistan to the people of Bangladesh to forgive and forget the mistakes of the past Government of Bangladesh had decided not to proceed with the trials as an act of clemency'.[626] Here two things are important to note; firstly, Bangladesh agreed not to try the listed war criminals within their territory but Pakistan gave undertaking that those war criminals suspects will be prosecuted in Pakistan; secondly, 'forgiveness or immunity to the persons committing offenses in breach of customary international law was disparaging to the existing law, i.e. the Act of 1973 enacted to prosecute those offences'.[627]

In explaining the reasons for developing a culture of impunity, a particular participant mentioned that the prosecution attempt was stopped by the assassination of Bangabandhu Sheikh Mujibur Rahman on 15 August 1975 and later, his colleagues were killed on 3rd of November 1975.[628] He further stated that following the assassination, a completely different government took over and they ceased to administer the law of 1973.[629] This particular

624 Ibid cited [India and Her Neighbours: N. Jayapalan: Atlantic Publishers & Distributors, Jan 1, 2000: B-2, Vishal Encalve, Opp. Rajouri Garden, New Delhi-27]: ISBN 81-7156-921-9].
625 *Mujahid* (n 606) para.102.
626 Ibid.
627 Ibid.
628 P4-GF-Q-B2
629 P4-GF-Q-B2

interviewee also mentioned that a new government allowed the Pro-Pakistani politicians to form a party and take part in politics.[630] According to this interviewee, Army General Ziaur Rahman rehabilitated many people who were anti-liberation and his attitude was indifferent with regards to prosecuting the perpetrators of 1971.[631] The interviewee also stated that, Ziaur Rahman had repealed the Collaborators Act, struck out secularism from the constitution and replaced it with religious provisions.[632] He said that despite the political unwillingness, there was always a very high demand for justice from the victims of 1971 and their family members.[633] However, due to the lack of free and fair elections held by the military rulers after 1975, the true desire of the majority people of Bangladesh could not be reflected in the parliaments and also in the governments.[634] A particular interviewee stated that the military governments were mostly busy with their vested priorities rather than the wishes of the people.[635]

One of the Jamaat-e-Islami politicians stated that the Bangladesh government attempted to establish a tribunal soon after the liberation war based on domestic criminal law, but due to lack of evidence during that time it was not possible to conduct trial.[636] He said that the government offered a general amnesty to the perpetrators of 1971.[637] However, the general amnesty was not applicable for the perpetrators who had committed crimes such as murder, rape and arson. He opined that a reconciliation process was conducted to establish peace rather that hatred and after 1975, the Collaborators Act was expressly repealed by the parliament and thus, the prosecution process had stopped.[638]

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630 P4-GF-Q-B2
631 P4-GF-Q-B2
632 P4-GF-Q-B2
633 P4-GF-Q-B2

634 P6-ALP-Q-B1
635 P4-GF-Q-B2
636 P2-BJI-Q-B2
637 P2-BJI-Q-B2
638 P2-BJI-Q-B2

A politician from AL party opined that Salauddin Quader Chowdhury, a BNP politician, was in power in Bangladesh and destroyed a lot of documents relating to the cases which were filed against him in 1972.[639] This AL politician further stated about Mr Salauddin that, 'he became the minister in Bangladesh and shared power with other convicted war criminals such as Mujahid, Nizami and others'.[640] A prosecution lawyer stated that, 'much evidence was officially destroyed by a government of anti-liberation war'.[641] He reaffirmed that, 'the assassination of Bangabandhu Sheikh Mujibur Rahman made the trial process difficult as there was political turmoil which made it less important to establish tribunal'.[642]

A particular interviewee stated that being very weak in international politics, Bangladesh could not establish any competent tribunal to try Pakistani war criminals soon after the liberation war, but Bangladesh did start prosecuting local collaborators.[643] However, as mentioned earlier, after the assassination of Sheikh Mujibur Rahman, the process of the prosecution was stopped and Ziaur Rahman freed all the detained people under the Collaborators order and in 1977 the law was repealed.[644]

A participant reaffirmed that, 'in 1975 Sheikh Mujibur Rahman was assassinated and Jamaat-e-Islami was restored in politics by Ziaur Rahman, and many detained accused were released by Ziaur Rahman'.[645] He said under section 293 of the Bangladesh penal code, the prosecution could withdraw charges at any time and war crimes related cases were withdrawn under this section after the assassination of Bangabandhu Sheikh Mujibur Rahman and as a result, there was no scope for revised tribunal or trial.[646] He explained that, 'before 2009, no other government got an overwhelming majority to take a step towards establishing a tribunal,

639 P6-ALP-Q-B1
640 P6-ALP-Q-B1
641 PL1-Q-B2
642 PL1-Q-B2
643 P6-ALP-Q-B2
644 P6-ALP-Q-B2
645 P3-JAPA-Q-B2
646 P3-JAPA-Q-B2

and except for AL, political will was not strong enough to prosecute war criminals of 1971 for another government in power*'*.[647] This particular interviewee further stated that that 'countries like Turkey, Pakistan, and Middle Eastern countries reacted badly when the tribunal delivered judgments against the leaders of Bangladesh Jamaat-e-Islami'.[648] This was because, Jamaat-e-Islami is an Islam based political party and they had good political connections with some of the Muslim countries like Turkey, Pakistan and other Middle Eastern countries.

5.4.1 Reasons for establishing the ICT-BD

In relation to the question, 'Why was ICT-BD only established recently?' the participants have provided mixed answers. An AL politician stated that, 'in one-word tribunal has been established to end the culture of impunity and to serve justice to the victims of 1971*'*. This politician reiterated that, their party led the liberation war of 1971 and for this reason, it is their political, social, and ideological responsibility to prosecute the perpetrators of 1971.[649]

However, the politician of Bangladesh Jamaat-e-Islami reacted differently. According to this particular politician, the ICT-BD was established solely for political gain by the AL party.[650] This particular politician stated that most of the people prosecuted by the tribunal were influential opposition leaders who had significant influence over the general public.[651] He also added that the AL party is a secular party and they are trying to divide the Islamic party in Bangladesh.[652] For this reason, widespread protests were seen when the verdict of Delowar Hussain Sayeedi was delivered. According to him, the Tribunal is very selective when prosecuting the opposition leaders.[653] The Tribunal was selective in a sense that it only tried local collaborators and precluded the Pakistani army due to jurisdictional limitation as they

647 P3-JAPA-Q-B2
648 P3-JAPA-Q-B2
649 P6-ALP-Q-B3
650 P2-BJI-Q-C3
651 P2-BJI-Q-C3
652 P2-BJI-Q-C3
653 P2-BJI-Q-C3

were able to return to West Pakistan. The claim made by this particular interviewee that only opposition leaders were tried was not founded because people from various political and non-political background were charged and tried.

5.4.2 Problems due to the culture of Impunity

In explaining the problems of the culture of impunity, a judge stated that due to significant time lapse, a lot of issues were raised by the defence.[654] Firstly, it was argued by the defence that the unexplained delay of 40 years created doubt in the fairness of the trial.[655] However, the prosecution has put forward the counter-argument that, 'there is no limitation in bringing a criminal prosecution, particularly when it relates to 'international crimes' committed in violation of customary international law'.[656] Secondly, it was argued that the 1973 Act was purposefully amended to include 'individual' and 'group of individuals' and for this reason, the accused cannot be subject to the jurisdiction of the Act.[657] Thirdly, it was argued that the 1973 Act was enacted to prosecute the recognized 195 listed war criminals of Pakistan who were pardoned by 'Tripartite Agreement of 1974' and without prosecuting them, the auxiliary forces cannot be tried under the Act.[658] However, the prosecution stated, '...that the "tripartite agreement" which was a mere "executive act" cannot hinder in bringing a prosecution under the Act of 1973 against "auxiliary force", an "individual" or "group of individuals"…'.[659] Further, it has raised issues linked to the intention of the parliament to enact the law. It appears from the judgment that the intention of the framers of the legislation was not only to prosecute the 195 listed war criminals of the Pakistan armed force but also 'any person' belonging to armed force or auxiliary force.[660] Fourthly, it was argued that offences are not well defined compared

654 J4-Q-B
655 *Mujahid* (n 606) para. 87.
656 Ibid.
657 Ibid.
658 Ibid.
659 Ibid.
660 Ibid para. 93.

to the Rome Statute and jurisprudence of ad hoc Tribunals are not adopted.[661] These issues would not have emerged if the tribunal had been established soon after the atrocities were committed.

In explaining the problem of the culture of impunity, one of the prosecution lawyers stated that the victims had suffered an extended period of injustice.[662] He also stated that due to impunity, *'…*so much fear was injected into the mind of these victims and witnesses'.[663] Another prosecution lawyer stated that due to impunity, they had to face a lot of obstacles such as systematic propaganda against the tribunal.[664] He mentioned that a British-based lawyer was appointed to criticise the tribunal and also, a lobbying firm was appointed for the same purpose.[665]

A particular participant stated that, 'my subjective opinion would be that because of time-lapse, there is a growing perception that they did not commit any offence and they claimed to not having guilty mind when they committed crimes'.[666] Another participant stated that it would have been easier to prosecute actual perpetrators soon after the liberation war in 1971 because the nation was united at that time, and no questions would have arose regarding the tribunal.[667] A particular interviewee opined that, most of those who have been convicted and executed by the ICT-BD became the wealthiest people in the republic at the cost of who suffered during 1971.[668] He narrated that, 'people like Mir Qasim Ali[669] and Salauddin Quadwer Chowdhury became the richest people in the country' and if they were tried in 1971, then they would not have had this opportunity.[670]

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661 Ibid para. 87.
662 PL3-Q-B
663 PL3-Q-B
664 PL2- Q-B
665 PL2-Q-B
666 J3-Q-B1
667 DL1- Q-B
668 J1-Q-B1
669 A perpetrator of 1971
670 J1-Q-B1

Another interviewee stated that due to the culture of impunity, the accused have integrated into the society and people have started accepting them, they became well known political figures and they did some good for people of Bangladesh to reposition themselves in the society.[671] This particular participant further stated that, had the tribunal had been established under the ICT Act 1973 soon after the liberation war, then the problems of evidence could have been avoided and it would have been more comfortable for the people involved with the tribunal to do their job efficiently.[672]

5.4.3 Role of ICT-BD ending the culture of Impunity

In relation to the role of the ICT-BD in ICL, J4 stated that, 'although it was very much delayed, the ICT-BD has taken a great step to end the culture of impunity'.[673] He is of the opinion that the ICT-BD has put an end to the long-term culture of impunity, and it will definitely bring peace to the society in the long run.[674] According to him, the judgments delivered by the tribunal will be considered as authentic documents to establish the truth.[675] Another participant, J1 stated that the ICT-BD is attempting to end the culture of impunity, serve justice and achieve peace.[676] Furthermore, the establishment of the ICT-BD is remarkable at least to some extent, people will feel that there is no scope for impunity. As an institution, the ICT-BD is establishing the precedent that, 'an offender will be punished today or tomorrow'.[677]

According to J2, ICT-BD is an example that will deter future crimes of a similar nature, and it will heal the pain of the victims for not getting justice for a long time.[678] P6- ALP stated that, the ICT-BD has an important role in ICL in terms of enforcement ability by breaking

671 DL1- Q-B
672 DL1- Q-B
673 J4-Q-A
674 J4-Q-A
675 J4-Q-A
676 J1-Q-C
677 J1-Q-C
678 J2-Q-A1

the culture of impunity and this will assist in developing a law-abiding society in Bangladesh.[679] The interviewee P3-JAPA is of the opinion that the ICT-BD has symbolic value in deterring crimes and stated that the principal purpose of establishing the Tribunal was to serve justice.[680] He further stated that along with prosecuting the perpetrators of 1971, the ICT-BD would provide psychological comfort to the victims and their family members at the same time.[681]

However, there are opposing views such as that of DL2 who opined that, prosecution in the ICT-BD is creating divisions in the Bangladeshi society by accusing people after more than three decades since the crimes were committed.[682] He also stated that the delivery of the judgment of Maulana Sayeedi is an example that the ICT-BD has created social chaos where more than 100 people have died.[683] Another defence lawyer DL1 opined that, 'if the tribunals were established soon after the liberation war, there might not be outrage or dispute'.[684] He said 'after 45 years, it is really strange to bring accusation'.[685] He thinks for the sake of the country's development, amnesty could be appropriate in the best interest of the country.[686] On the other hand, PL1 stated that, 'to serve justice and to achieve the goals of transitional justice, prosecution is more appropriate at this moment'.[687] However, he suggested other complementary mechanisms and in his own words, 'there could be other mechanisms like the holocaust denial law'.[688] The interviewee P3-JAPA opined that if justice is served through a flawed system, then the persons under the trial will have suffered a lot and those who are observing will have lost confidence in the justice process.[689] According to him, like impunity

679 P6- ALP-Q-C
680 P3-JAPA-Q-C
681 P3-JAPA-Q-C
682 DL2-Q-A1
683 DL2-Q-A1

684 DL1-Q-A1
685 DL1-Q-A1
686 DL1-Q-A1

687 PL1-Q-A1
688 PL1-Q-A1
689 DL1-Q-B3

itself, if the judge's neutrality is in question then, 'it is a very dangerous sign for judicial culture'.[690] So, along with the culture of impunity, it is equally important to uphold the rule of law and a proper system of due process. Despite having some limitations, the ICT-BD is at least breaking the culture of impunity for the atrocities committed during the country's liberation war.

5.4.4 Systematic criticisms of the ICT-BD

The interviewee PL2 stated that along with their continuous development, they had to face many obstacles such as systematic propaganda against the tribunal, which contributed to the culture of Impunity.[691] He also stated that, a London based barrister had been appointed to criticise the tribunal and a lobbying firm was also appointed solely to criticize the tribunal.[692] The entire defence team was trained in London at the firm of this London-based barrister.[693] They had the opportunity to observe War Crimes Tribunals from around the world.[694] It is said that many applications made in connection to the ICT-BD were carefully drafted by the London based law firm and sent over to Bangladesh to support the defence team.[695] A prosecution lawyer stated that, as a result of the work of this lobbying firm, a number of the Human Rights organizations were misguided by the appointed lobby firm which supported the defence.[696] According to him, those human rights organizations were used in order to support the people who had committed genocide in Bangladesh.[697] Thus, it can be observed that the general criticisms of TJ as discussed in Chapter 3 are reflective here because, Human Rights organisations assessed the credibility of the ICT-BD's due process aspect from a western point of view and failed to consider the local values and norms.

690 DL1-Q-B3

691 PL2-Q-B
692 PL2-Q-B
693 PL2-Q-B
694 PL2-Q-B
695 PL2-Q-B
696 PL4-Q-B
697 PL4-Q-B

According to a prosecution lawyer, one of the accused who was the treasurer of the Jamaat-e-Islami party, officially hired a lobbying firm and spent 25 million US dollars to criticize the ICT-BD at various international governmental and non-governmental organizations.[698]

Most of the perpetrators were rich, which made it difficult but not impossible to prove their guilt.[699] They tried to misguide justice in many ways with their money; they even appointed a lobbying firm to assist them internationally, which was well documented.[700] In brief, the perpetrators used all the ways possible to misguide the justice system.[701]

To summarise the above, it can be said based on the interview data that, political instability was the main reason for the impunity in the Bangladeshi context of transitional justice. In particular, the assassination of Prime Minister Shiekh Mujibur Rahman stopped the trial process, and a subsequent undemocratic military government was not willing to prosecute the perpetrators of 1971. Due to the long period of impunity, the perpetrators had enjoyed a free life. The majority of interviewees think that the ICT-BD was established to end the long period of impunity. In the Bangladeshi context, due to the long period of impunity, the ICT-BD had to face systematic criticism. Some interviewees believe that the accused people, who were very financially solvent, hired lobbyist firms to criticise the tribunal. Due to a substantial period of delay, the victims of atrocities suffered a lot due to not getting justice. The section below discusses the nature of delayed justice in Bangladesh.

5.5 An analysis of interview data: ICT-BD and Delayed Justice

The ICT-BD has been prosecuting crimes from more than 40 years ago since 2010, it is essential to assess whether justice can be delivered even if justice is delayed. Over the

698 PL4-Q-B
699 PL1-Q-B
700 PL1-Q-B
701 PL1-Q-B

past three decades, the perpetrators have enjoyed impunity and integrated into the society and politics of Bangladesh.

For the victims of the mass atrocities who are seeking justice, the time taken for investigating the crimes is an essential factor in evaluating how victims experience justice. If victims have to wait for a long time to seek justice, they become frustrated, this lowers their expectation of justice and renders the delayed prosecution unworthy. Former British Prime Minister, William Gladstone, stated that 'justice delayed is justice denied'.[702] Delay is one of the key challenges with prosecuting international crimes and in many situations like Bangladesh, the prosecution and the investigation of mass atrocities take place decades after the commission of the crimes.[703] According to Whiting, delayed prosecution, '…can diminish the deterrent value of such prosecutions, undermine the quality of the evidence in the case, allow perpetrators to continue living in impunity (and continue committing crimes)'.[704] According to him, due to the delayed prosecution, victims become 'discouraged and marginalized' and they lose confidence in the judicial system.[705] However, in some cases, delayed prosecution of international crimes may give rise to fresh evidence, and truth. In the case of *Radovan Karažić*, the delay was beneficial and detrimental; beneficial in the sense that better evidence became crystallized and detrimental in the sense that victims had become demotivated due to the long delay.[706] According to Bergsmo, in a post-conflict situation, delays occur due to the lack of capacity to investigate crime as the society is still recovering from traumatic memories. Authorities have to prioritize reconstructing the fragile society, law and order, and political environment.[707]

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[702] Tania Sourdin and Naomi Burstyner, 'Justice Delayed is Justice Denied' (2014) 4(1) VICTORIA U L & JUST J 46, 46.
[703] Bergsmo and Ling (n 27) 1.
[704] Alex Whiting, 'In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered' (2009) 50 HARV INT'L LJ 323, 326.
[705] Ibid.
[706] Dan Bilefsky, Serb Leader's Capture Brings Little Solace at Site of Killings in Bosnia, New York Times (25 July 2008) available from https://www.nytimes.com/2008/07/25/world/europe/25srebrenica.html Last accessed 27 September 2018.
[707] Bergsmo and Ling (n 27) 1.

If there is a long delay in prosecuting the perpetrators of mass atrocities, it can increase the pain and suffering of the victims and their family members.[708] The victims and their family members feel betrayed by the justice system when they see the perpetrators are walking freely. As part of the healing process, it is important that victims and survivors can feel that justice been done; otherwise, it will be difficult to move on.[709]

There are various factors behind the delay in investigating crimes in the transitional justice situation. The notable factors are the volatile political environment, lack of judicial capacity, diplomatic pressure etc. Post-war societies are keen to focus on establishing peace, rebuilding infrastructure and economy, law and order rather than focusing on the prosecution of atrocities during a society's transition. Below, the researcher discusses the factors behind the delays in investigating the crimes committed in Bangladesh in 1971.

A stable political environment is necessary for investigating a post-war society. In the particular situation of Bangladesh, the entire country's infrastructure was broken down, and there was no functioning law and order. It was the first task of the new authority to end the hostilities. Along with other duties, the new government in January 1972 declared that judicial action would be taken against the perpetrators of 1971 and invited the citizens of Bangladesh to end hostilities. Thus, in the Bangladeshi situation, the first step was to end the hostility and violence so that law and order can take shape. Also, the authority promised to investigate the crimes.

As a newly independent country, it was crucial for Bangladesh to get recognition from other countries and build diplomatic relationships with them. One of the politicians that was interviewed stated that Bangladesh was able to get the membership of the United Nations on a condition that Bangladesh will not prosecute the suspected war criminals of the Pakistani

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708 Massimo Calabresi, *Karadzic's Arrest Comes Too Late*, TIME (22 July 2008) available from http://content.time.com/time/world/article/0,8599,1825366,00.html Last accessed 15 June 2018

709 Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Beacon Press 1998) 12.

army.[710] Initially, Bangladesh was denied UN membership on two occasions, in 1972 and 1973 due to objection from China who provided veto on behalf of Pakistan.[711] It appeared from the Recommendation to the General Assembly regarding membership that, 'During the period under review all applications for admission have obtained the Council's recommendation with the only exception of the application of Bangladesh' which failed to obtain it upon its initial consideration but was recommended upon reconsideration'.[712] Finally, Bangladesh was able to get the membership of the UN on 17 September 1974 after a controversial agreement was made among India, Pakistan and Bangladesh that the suspected war criminals from Pakistan will be released to Pakistan.

A particular politician the researcher interviewed stated that, in 2010, the ICT-BD was established primarily to prosecute the auxiliary forces of the West Pakistani Army that committed crimes in the Bangladeshi territory during the liberation war of Bangladesh in 1971.[713] He said that the West Pakistani war criminals were repatriated by the government with the condition that they will prosecute the war criminals in West Pakistan, and, the Hamdoor Rahman Commission set up by West Pakistan also recognized that the accused were indeed war criminal suspects.[714] He added that Pakistan never fulfilled their promise to prosecute those war criminals, which was publicly made to take back the prisoners of war (POW).[715] According to this particular politician, in the situation of Bangladesh, the main reason of delay is political turmoil and the assassination of President Shiekh Mujibur Rahman (who declared the independence of Bangladesh and was the then supreme leader) in 1975.[716]

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710 PL4-Q-B3
711 Robert Alden, 'China's First U. N. Veto Bars Bangladesh' The New York Times archive (26 August 1972) available from https://www.nytimes.com/1972/08/26/archives/chinas-first-un-veto-bars-bangladesh-soviet-union-and-india-are.html Last accessed 15 June 2018.
712 The UN, 'Practice Relative To Recommendations to the General Assembly Regarding Membership in the United Nations' available from https://www.un.org/en/sc/repertoire/72-74/72-74_07.pdf Last accessed 15 May 2018.
713 PL4-Q-B3
714 PL4-Q-B3
715 PL4-Q-B3
716 P4-Q-B3

Another politician stated that, due to delay and political turmoil in Bangladesh, the War Criminals or their associates assumed power in the government and over the course of time, they had destroyed a lot of significant evidence and documents relating to genocide or gross violation of human rights.[717] He mentioned the case of *Salauddin Quader Chowdhury*[718] and stated that while he was in power, he destroyed a lot of documents relating to the cases which were filed against him in 1972.[719] He further mentioned that *Salauddin Quader Chowdhury* became a minister in Bangladesh and shared power with other convicted war criminals such as *Mujahid, Nizami* and others.[720] So, it appears from the interview data that there are allegations of destroying many official evidence which might have contributed to the delayed prosecution. It is important to note that these allegations have neither been proven nor disproved by any independent body. This particular politician further stated that due to significant delays, the Jamaat-e-Islami had become a rich political party in Bangladesh.[721] He also said that, '…they got funding from {the} Middle East and also they have conducted business in Bangladesh with the money they looted in 1971'.[722] According to him, they accumulated billions of dollars over time being in an advantageous position as they shared government power in Bangladesh.[723]

Another politician stated that there were no similar tribunals like ICT-BD soon after the liberation war, but there were laws under which many people were accused and tried at that time.[724] According to him, a man called *Chikon Ali* had been given the death penalty under the Bangladesh Collaborators (Special Tribunal) Order 1972.[725] He further stated that around twenty thousand people were in jail under the Collaborators Order of 1972.[726] According to

717 P5-GDNC-Q-B1
718 *Salauddin Quader Chowdhury* (n 463).

719 P5-GDNC-Q-B1
720 P5-GDNC-Q-B1
721 P5-GDNC-Q-B1
722 P5-GDNC-Q-B1
723 P5-GDNC-Q-B1
724 P6-ALP-Q-B2
725 P6-ALP-Q-B2
726 P6-ALP-Q-B2

this particular politician, most importantly, the assassination of Bangabandhu Sheikh Mujibur Rahman made the trial process difficult as there was a lot of political turmoil which made it less important to establish a tribunal.[727]

A particular Judge stated that, 'after the assassination of B B Sheikh Mujibur Rahman, process of the prosecution was stopped and Ziaur Rahman[728] freed all the detained people under the Collaborators order and in 1977 the law was repealed'.[729] Thus, the willingness of the authorities is an important factor, in the absence of which delay may occur in the prosecution of crimes in a post-conflict situation. Sheikh Hasina, the daughter of the assassinated president and the leader of the AL party, stated in the election manifesto of 2008 that if they win the election, they will investigate the crimes of 1971.[730] Subsequently, her party won the election and formed the government. Thus, having a mandate from the people of Bangladesh, the ICT-BD was established in March 2010.

In explaining the post-war situation of Bangladesh, a particular politician said that the entire country was destroyed by the war, the infrastructure was broken and it was a priority for the government to rehabilitate rape victims, war children, establish police and military service and rebuild the infrastructure.[731] According to him, 'some hostile countries created a man-made famine in Bangladesh after the liberation war, and [the] newly born Bangladesh had to face all the challenges'.[732] He also said, 'many accused were working in Egypt, Saudi Arabia and London to regain a united Pakistan and their legacies are manipulating the media like BBC and Al-Jazeera'. A judge of the tribunal stated that '…being very weak in international politics, Bangladesh could not establish any competent tribunal to try Pakistani war criminals soon after the liberation war, but Bangladesh did start prosecuting local collaborators'.[733] Some

727 PL1-Q-B
728 Founder of Bangladesh Nationalist Party (BNP).
729 J4-Q-B
730 Election Manifesto of Awami League (General Election 2008).
731 P6-ALP-Q-B2
732 P6-ALP-Q-B2
733 J4-Q-B

of the participants stated that there were some practical difficulties for the Bangladeshi authority to carry out a thorough investigation of the crimes committed during the country's liberation war because the authorities had to prioritize rebuilding the society, economy, infrastructure, law and order.

5.5.1 Effects of delayed prosecution

Cohen explained, 'three inter-related problems as to the way the passage of time affects evidence and the ability to prove a case beyond a reasonable doubt'.[734] Firstly, Cohen considers establishing and documenting the identity of the accused; secondly, he considers the, '…problems of collective memory, as opposed to individuals' personal experience, that may taint the way witnesses describe what they saw and experienced'[735]; thirdly, he considers '…the inter-relation of trauma and the passage of time on memory'.[736]

A politician the researcher interviewed stated that, some convicts before the ICT-BD were in government power in Bangladesh after the assassination of Sheikh Mujibur Rahman, they even became ministers and for this reason, a lot of official documents were destroyed by them.[737] The properties they looted during the atrocities in 1971 were illegally earned property.[738] A few people left the country, a few people were rehabilitated into politics and over time, their statutes rose in the Bangladeshi society and they became economically strong, these issues created some problems due to time lapses.[739]

A defence lawyer while sharing his experience, stated that transitional justice normally applied immediately after an event, he witnessed summary executions of a lot of anti-liberation

734 David Cohen, 'The Passage of Time, the Vagaries of Memory, and Reaching Judgment in Mass Atrocity Cases' in Morten Bergsmo and CHEAH Wui Ling (Eds) *Old Evidence and Core International Crimes* (Torkel 2012) 9
735 Ibid.
736 Ibid.
737 PL4-Q-B
738 PL4-Q-B
739 P4-GF-Q-B

activists by the rebels, and as they were against the independence of Bangladesh, their relatives did not disagree with the execution.[740]

A prosecution lawyer that was interviewed, stated that due to time lapses, collecting fresh evidence, investigation and admitting evidence becomes difficult and in the Bangladeshi situation, the ICT-BD had to deal with the time lapse issues in relation to admissibility of evidence and collecting witnesses.[741] The ICT-BD is a pioneer of serving delayed justice and Bergsmo said, 'there may in fact be an increase in such prosecutions in the future as the pursuit of individual accountability for such crimes becomes a norm, rather than an exception, with societies increasingly willing and able to investigate atrocities perpetrated in their past'.[742]

In explaining the problem of delay, a particular politician of Jamaat-e-Islami stated that, 'because of time lapse, wrong perception was developed by the AL party and witnesses are being manipulated by the perception that developed over time and could not provide an accurate description of the events'.[743] He also stated that, 'the victims of the crimes were also living with misleading perception for a long-time'.[744] He further mentioned that, 'the accused have been living peacefully for a long time and they became normal citizens of the country, contributing towards the country's economy'.[745]

According to Cohen, these problems are not uncommon to long-delayed prosecutions and they may arise as normal evidentiary issues in many trials.[746] This author further mentioned that in a delayed prosecution, a defence lawyer's position would be that, since there is a long delay between the actual time of the commission of the crimes and the trial time, there must be a reasonable doubt in the absence of concrete forensic evidence.[747]

740 DL1-Q-B
741 PL1-Q-B3.
742 Bergsmo and Ling (n 27) 1.
743 P2-BJI-Q-B1
744 P2-BJI-Q-B1
745 P2-BJI-Q-B1
746 Cohen (n 734) 9.
747 Ibid.

A particular prosecution lawyer stated that, due to significant time lapses, many victims were unwilling to describe crimes such as rape, due to the social stigma associated with the crime.[748] Cohen observed that due to the delay, perpetrators often used falsification or substitution of identity documents which make it difficult for the witnesses to identify the perpetrators.[749] He mentioned the case of *John Demjanjuk* [aka Ivan][750] and explained that whereas Israel identified him as 'Ivan the terrible', Demjanjuk's defence argued that he was inaccurately identified as Ivan and his conviction of death sentence was overturned based on new evidence.[751]

In the case of *Quader Molla*,[752] the defence raised similar arguments as that of Dejanjuk that, Abdul Quader Molla is not the 'butcher of Mirpur' and there were many issues in the identification of the accused by the witnesses.[753] It is observed in the judgment that, '…therefore, identification of accused on dock 40/41 years after she had seen the said 'Bangalee person' at the crime site cannot be relied upon at all as it is not even possible to keep one's face memorized particularly for a traumatized wife of victim'.[754] It is also mentioned in the judgment that:

> Like all elements of a crime, the identification of the accused must be proved by the Prosecution beyond a reasonable doubt. In assessing identification evidence, it is to be taken into account a number of relevant factors, including the circumstances in which each witness claimed to have observed the accused; the length of the observation; the familiarity of the witness with the accused prior to the identification; and the description given by the witness of his or her identification of the accused. But as we see, the evidence does not inspire us to believe that the P.W.7 and P.W.8 were

748 PL1-Q-B
749 Cohen (n 734) 9.
750 Who served as a guard in various concentration camp during WWII.
751 Cohen (n 734) 9.
752 *The Chief Prosecutor v Abdul Quader Molla,* Case No. ICT-BD Case No. 02 of 2012 [ICT-2 Judgment of 5 February 2013].
753 *Abdul Quader Molla* (n 13) para 303.

754 Ibid para. 301.

familiar as to the identity of the accused even since prior to the alleged event. None of these two witnesses claim so.[755]

In explaining the effect of delay in defining crimes, a Judge that was interviewed stated that due to time lapses, prescribing crimes were difficult and document-related issues were raised.[756] He further stated that, 'it was difficult to establish the mental elements of crimes because of significant time lapse'.[757] He said the definition of genocide has been broadened to cover the political group.[758] According to him, because of time lapse, witnesses could not explain appropriately and they had to rely on additional corroborative documents to give weight.[759] He said that, they had to rely on newspaper articles, authoritative books and articles before giving weight.[760] He further observed that victims of the crimes suffered mentally for a long time due to not getting justice and they became emotional during the trial.[761] He explained that because of the time lapse, there was a growing perception that the accused persons did not commit any of the offenses and the accused persons during trial claimed not having a guilty mind when they committed crimes.[762] This particular judge, however said that, based on available evidence, they were found guilty and punishment was given.[763] According to him, the verdicts of the ICT-BDT are important because, they show that the length of delay does not matter and that justice had been served.[764]

A defence lawyer the researcher interviewed stated that delay was not a problem for him as a defence lawyer, but it might have been a problem for the prosecution team.[765] According to him, primarily, the delay was beneficial to the defence team.[766] He said that they

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755 *Abdul Quader Molla* (n 13) para 303.

756 J3-Q-B
757 J3-Q-B
758 J3-Q-B
759 J3-Q-B
760 J3-Q-B
761 J3-Q-B
762 J3-Q-B
763 J3-Q-B
764 J3-Q-B
765 J3-Q-B
766 DL1-Q-B

mainly cross-examined the witnesses and observed from his subjective point of view that allegations were not proved due to delay.[767]

According to a prosecution lawyer, it would be less challenging to establish crimes by way of evidence if there was no significant delay like 45/56 years.[768] He also explained that the amount of time and labour they invested could be much lesser than that which they invested for the ICT-BD.[769] He also added that, '…after the liberation war, witnesses' memories were fresh but due to delay many witnesses have died, many witnesses' memories faded and prosecution had to deal with these issues'.[770]

A defence lawyer stated that the accused had established their position in the country due to significant time lapse and people had started accepting them, they had become well known political figures and they did few good things for the people of Bangladesh.[771] According to him, due to the delay people had started seeing the accused persons in a different light as the years passed, it would have been logical to prosecute them in 1971 and no questions would have been asked. The subsection below analysed how delay may contribute to the prolonged suffering of the victims of 1971.

5.5.2 Suffering of victim and witnesses

In addition to the above analysis of the effects of delay, the significant time lapse also contributed to the prolonged suffering of the victims and the affected community. A judge that the researcher interviewed opined that due to delay, '…definitely the victims suffered mentally as they were denied justice for a long time'.[772] He further stated that, 'perpetrators got free life for [because of] the delay and some of them even became minister[s] in this country, and they

767 DL1-Q-B
768 PL1-Q-B
769 PL1-Q-B
770 PL1-Q-B
771 DL1-Q-B
772 J2-Q-B

put Bangladeshi flag[s] in their cars.[773] According to him, due to significant delays, 'some people left the country, some people were rehabilitated into politics and over time, they became strong in the Bangladeshi society, they became economically strong and these issues created some problems during trial'.[774] This particular Judge also said that, 'the victims waited too long for justice and many victims have died too, and their successors are not even aware of the historic injustice suffered by their predecessors'.[775]

A prosecution lawyer stated that, 'due to time lapses so much fear was injected into the mind of these victims and witnesses'.[776] He added that, '…the first thing they had to fight was fear; they had to ensure them, make them believe into the tribunal that it will work and only then they came and gave their testimonies'.[777] He explained that, after five or six executions of the sentences, the witnesses and the victims started to believe tribunal's capacity.[778] According to him, the accused persons before the ICT-BD became so much embedded into the society of the rural villages that the victims are still afraid.[779]

The ICT-BD is seeking delayed justice for the victims of 1971. The delayed prosecution has a particular feature because victims have already suffered injustice seeing the perpetrators at large. As a result, long denial of justice may be a factor in assessing the atrocities adopting a flexible approach in terms of procedural rules. However, a delay cannot compromise the rights of the accused to have a fair and impartial hearing. Also, in cases of delayed justice like Bangladesh, prosecution alone may not serve proper justice to the victims. As a result, other forms of transitional justice mechanism may supplement the criminal prosecution. The majority of the interviewees opined that in the particular context of Bangladesh, reparation could be a useful supplement to enhance the justice for the victims.

773 J2-Q-B
774 P4-GF-Q-B
775 DL2-Q-B
776 PL3-Q-B1
777 PL3-Q-B1
778 PL3-Q-B1
779 PL3-Q-B1

The section below has discussed the necessity of reparation in the particular context of Bangladesh, where the ICT-BD is seeking delayed justice.

5.6 Reparation as a supplement to criminal prosecution

Reparation is an essential aspect of the transitional justice mechanism and in limited circumstances, providing reparation to the victims can rehabilitate them and allow them to recover from historical trauma (see more details at 3.3.2). According to Gillard, '…reparation is an important part of enforcement and can play a significant role in deterring future violations.[780] It may not be possible to serve complete justice in the area of transitional justice; instead; it is possible to serve some form of justice. In a particular situation like Bangladesh, where crimes were committed decades ago, prosecution alone may not serve justice. The victim's right to prosecution includes the right to reparation in some circumstances.

Victims are identified as those who have directly or indirectly suffered from the gross violation of human rights or war crimes; their family members are included too. For example, if a father from a family perishes due to the mass atrocities committed by the convicted individual, then his immediate family members and dependents will be considered as victims. The governing Act of the ICT-BD defined a victim as, '…a person who has suffered harm as a result of the commission of the crimes under section 3 (2) of the International Crimes (Tribunal) Act, 1973'.[781] This definition, however, did not include any organisations as victims.

In the current regime of ICL, some form of reparatory justice became crucial to complement the criminal prosecution. According to Teitel, transitional reparatory justice negotiates individual and collective liability and assists to shape the political identity of the liberalizing state.[782]

780 Emanuela-Chiara Gillard, 'Reparation for violations of international humanitarian law' (2003) 85 INT'L REV RED CROSS 529, 530.
781 Rule 2(26) of the RoP of the ICT-BD [as amended].
782 Teitel (n 174) 119.

5.7 International Legal position on Reparation

The ICC in 1998, created a comprehensive legal provision to provide reparation to the victims of International Crimes. Under Article 75(1) of the Rome Statute, the court has been given the power to determine the extent of damage and loss for reparation, compensation and rehabilitation.[783] Article 75(2) is significant because it has made it possible for the court to make an order against the convicted person and made reference to the trust fund under Article 79 of the Rome Statute.[784] Thus, the Rome Statute encouraged the establishment of a trust fund under Article 79 out of which reparations should be provided to the victims.[785] However, the reparation mechanism of the ICC is a, '…contentious matter in politics and legal terms'.[786] According to the Trust Fund for Victims (TFV) of ICC, principles of reparation should address relevant, '…philosophical questions related to the right of victims of international crimes to reparations, such as addressing the relationship between reparations and reconciliation'.[787]

The representation made the ICTJ mention three recommendations for the ICC in relation to the decision on reparations to victims. Firstly, it is submitted that the ICC should determine the class of victims who would be able to qualify for reparation.[788] Secondly, the ICC should make it accessible for the victims to claim reparation following an effective procedure.[789] Thirdly, the decision should support the right of victims through appropriate transitional justice mechanisms.[790] In relation to reparation on an individual basis, ICTJ submits that the direct victims of the crimes, including that victims of sexual violence should be considered first.[791]

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783 Article 75 of the Rome Statute.
784 Article 75 of the Rome Statute.
785 Article 79 of the Rome Statute.
786 Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (2nd Edn, Cambridge University Press 2010) 490.
787 *Lubanga Dyilo* (n 688) p. 5.
788 Ibid 27.
789 Ibid.
789 Ibid.
790 Ibid.
791 Ibid.

Since there is a similarity between ICT-BD and ECCC in terms of significant delay, this section analysed how the ECCC dealt with a reparation programme to complement criminal prosecutions. The original version of the ECCC's Internal Rules had ambiguous provisions of reparation and if the accused person had no assets, the ECCC Chamber could not provide any alternative remedy.[792] Accordingly, the first case before the ECCC (Case 001) stated that, apologies or expressions of remorse from the accused were, 'the only tangible means by which [the accused] could acknowledge his responsibility and the collective suffering of victims'.[793]

Rule 23(1) of the Internal Rules of the ECCC, was introduced by an amendment to assist the Civil Party participation at trial. The aim was to focus on the needs of the victims and their participation at trials. Due to the amendment in the Internal rules, civil parties are now able to participate in the cases individually and from the pre-trial to the trial and further stages, '…they comprise a single, consolidated group, whose interests are represented by one Cambodian and one international Civil Party Lead Co-Lawyer supported by the Civil Party Lawyers'.[794]

A notable aspect of the Cambodian tribunal is that in some cases, the surviving victims were able to become parties in the cases concerned against the former Khmer Rouge officials.[795] The surviving victims who were able to become parties in the criminal trials are considered as civil parties in criminal prosecution. The role of these civil parties in criminal cases is to assist the prosecution and instigate reparation claim.[796] These participating victims are known as civil parties, and they assist the prosecution and may claim for reparations.

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792 Cheryl White, 'Making reparation for Khmer Rouge crimes at the Extraordinary Chambers in the Courts of Cambodia' (2014), RegNet Working Paper, No. 47, Regulatory Institutions Network.
793 *Co-Prosecutors v Kaing Guek Eav alias Duch* (Judgment) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No.001/18-07-2007, 26 July 2010), para 668.
794 *Co-Prosecutors v Nuon Chea and Khieu Samphan* (Judgment) (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case File No 002/19-09-2007/ECCC/TC, (7 August 2014) para. 1109.
795 Rachel Hughes 'Reparations of the Extraordinary Chambers in the Courts of Cambodia: a brief update' available from <https://www.iias.asia/sites/default/files/nwl_article/2019-05/IIAS_NL80_20.pdf> accessed 20 November 2018.
796 Ibid.

However, the ECCC's order of reparation is limited to 'collective and moral' reparations only, and there is no scope for individual financial compensation.[797]

5.8 Legal position of ICT-BD on Reparation

The ICT-BD has no clear legal provisions recognising reparation or compensation for the victims or the affected community. Section 20(2) of the ICT Act 1973 is clear in expressing the retributive nature of justice. A judge the researcher interviewed stated that, one of the limitations of the ICT-BD is that there is no provision for providing reparation to the victims.[798] However, subsequent legislation may be implemented to deal with this issue.[799] Section 53 of the Penal Code 1860 of Bangladesh provides that, as a least punishment, an offender may be fined and his property may be forfeited.[800] However, there is very little application of this provision even under the ordinary criminal justice system of Bangladesh.

There are other international legal provisions which are applicable in Bangladesh, relying on which reparation may be considered as an effective remedy for the victims. Firstly, under Article 8 of the Universal Declaration of Human Rights, everyone has the right to have an effective remedy. Secondly, Article 2(3)(a) of the ICCPR 1966 provides that any person whose rights are violated shall have an effective remedy.[801] However, in the case of *Syed Md. Qaiser,* the prosecutor claimed reparation for the victims of sexual violence, but the Tribunal rejected the prosecution's argument on three specific grounds. Firstly, the Tribunal stated that RoP of the Tribunal is a mere procedural law and not substantive law.[802] Secondly, the Tribunal stated that the RoP cannot override the substantive law of the ICT-BD. Thirdly, the

797 'Are victims be entitled to compensation?' (20 July 2017) available from <https://www.eccc.gov.kh/en/faq/are-victims-be-entitled-compensation> accessed 15 May 2018.
798 J3-Q-A1-B3
799 J3-Q-A1-B3
800 Section 53 of Penal Code 1860
801 Article 2(3)(a) of the ICCPR 1966
802 *The Chief Prosecutor v Syed Md. Qaiser*, ICT-BD [ICT-2] Case No. 04 of 2013 [23 December 2014] para 967-979

ICT Act 1973 did not make any reference to reparation.[803] Also, the Court of Appeal of Bangladesh in the case of *Quader Molla* made reference to Article 8 of the UDHR and Article 2(3) of the ICCPR and provided an indication to provide effective remedies to the victims.[804]

The researcher is of the opinion that due the local judicial culture of Bangladesh, reparation has not developed as a common remedy for the victims of crime. Bangladesh does not have sufficient resources, and this may be a factor for not considering reparation as an effective remedy, at least for the victims of rape. The section below attempted to analyse the empirical data in relation to a reparation mechanism to complement the criminal prosecution.

5.9 An analysis of interview data: Reparation

During the interview, a question was asked to a particular judge whether prosecution is enough to serve justice for the atrocities committed in 1971. The judge opined that, prosecution is not enough to serve optimum justice.[805] According to him, there should be other supplementary measures to complement the trial process.[806] This particular judge further stated that, '…reparation from the property of the [convicted] accused could be an effective way to rehabilitate the victims of the crimes or relatives/family members of the victim'. [807] He also suggested that, '…government should legislate law for acquiring the property of the perpetrators as they looted property during the 1971 war and these properties can form the foundation of providing reparation to the victims or their family members'.[808] This aspect of the judge's observation is important to analyze that some of the accused before the ICT-BD accumulated properties during the liberation war in 1971. The accused had looted the unattended properties of the civilians who had to flee the country and seek refuge in India.

803 *The Chief Prosecutor v Syed Md. Qaiser*, ICT-BD [ICT-2] Case No. 04 of 2013 [23 December 2014] para 967-979
804 *Bangladesh v Abdul Quader Molla* [17 September 2013], Criminal Appeal Nos. 24-25 of 2013
805 J3-Q-A1-B3
806 J3-Q-A1-A3
807 J3-Q-A1-A3
808 J3-Q-C3

Evidence suggests that the Hindu[809] civilian population, were the prime targets of the perpetrators in 1971. Due to their religious identity, they were categorically labeled as pro-liberation and pro-Indian. Their lands, shops, houses and other properties belonging to them were declared as '*Gonimoter Mal'*, a term used to express the acquisition of property during the war under Islamic law. So, it would be unjust to allow the accused persons and their successors to possess the properties gained by the accused during the 1971 liberation war.

The ICC has formed a Trust Fund for Victims (TFV) for the purpose of providing reparations to the victims. Similarly, some interviewees are of the opinion that the ICT-BD could amend its Rule of Procedure for the purpose of enabling the judges to pass appropriate order collecting resources from the convicted individuals and redistributing the resources through the trust fund. However, the problem that arises here would be to evaluate the properties going back to 45 years from present time. For this reason, the politicians who took part in the interview did not show an adequate interest in developing any reparation programme.

A particular defense lawyer opined that, instead of criminal prosecutions, there could be restorative forms of justice including providing reparation to the victims.[810] He said, '…there could be a different way to identify the perpetrators and serve justice to the actual victims by way of reparation and amnesty'. [811]

A particular prosecution lawyer stated that it is not possible for the ICT-BD to achieve all of the goals of transitional justice.[812] In his opinion, the ICT-BD is mainly focusing on prosecution and making people accountable for their crimes to end the culture of impunity. [813]

809 Hinduism is an Indian religion widely practised in the Indian subcontinent and parts of South East Asia.
810 DL1-Q-C3
811 DL1-Q-C3
812 PL1-Q-A-A1
813 PL1-Q-A-A1

According to him, '…the only thing missing currently is providing reparation to the victims.[814] Another judge on the same issue stated that, this was one of the areas where the ICT-BD could not be successful in relation to the reparation of the victims because the Act is not comprehensive on this question.[815] This particular judge further stated that:

> …we believe that like the victim of any other offence, the victims of the offences of the 1971 and those victims who were killed, their dependents should be compensated and that compensation should not be only symbolic it should be real it should be financial and it should [be] sufficient to repair the loss they have suffered. There are several reasons, most of the people that have been punished under this Act have really built billions, millions they are very rich and the money they accumulated are all ill-gotten. They became rich in 1971 because they looted.[816]

It appears from the above quotation that the judge thought that it is necessary to provide reparation to the victims so that prosecution can be complemented. In particular, the judge referred to the fact that some of the accused have acquired properties from their involvement with the atrocities in 1971. However, due to lack of legal mechanisms, the judges of the ICT-BD were not able to give any orders to provide reparations to the victims of 1971 or their family members.

5.9.1 Reason for not providing reparation to the victims of ICT-BD

Why the ICT-BD judges could not come up successful plan to develop the area of reparation is an important question. One obvious answer to this question is that in Bangladesh, there is no legal mechanism to deal with this issue. Secondly, there was no clear policy about assessing reparations for the victims. Thirdly, it was the priority of the Tribunal to deliver judgment due to the significant amount of delay in making the perpetrators accountable.

814 PL1-Q-A-A1
815 J1-Q-A-A3-A1
816 J1-Q-A-A3-A1

The policymakers of Bangladesh were also unwilling to proceed with implementing any legislation fearing a floodgate of potential claims.

There is a growing trend that victims of violations of human rights are entitled to seek compensation. However, there are many other factors to consider before attempting to instigate any reparation mechanism. A particular politician that was interviewed stated that, there was speculation in the policymaking level that introducing any reparation would give rise to criticism.[817] Further, he mentioned that the particular social structure in Bangladesh is such that allegations of corruption would be made against the government in regards to the Trust funds of victims.[818] He further stated that in a situation like in Bangladesh, the actual trial process of the ICT-BD would be affected if focus is given to the reparation issue.[819]

The need for reparation is a significant issue to be considered as some the alleged perpetrators or the accused have died during the trial. If there is no system of providing reparation, there will be a gap of justice and in this way, impunity will infinitely exist in some circumstances.

5.9.2 Lack of legal provision to deal with reparation

A judge in replying to the question relating to reparation stated that, some of the accused before the ICT-BD were financially resourceful and it would be appropriate to enable the tribunal to order seizing their properties and build up a reparation fund.[820] During the interview, the judge opined that, '…there is a demand and I think the demand is quite justifiable that their ill gotten money should be confiscated by the government under the law, by making law and then distribute it to the victims of 1971'. [821] He also stated that legislating any such law to confiscate the properties of the convicted war criminals would not be contradictory with the

817 P6-ALP-Q-A3-A-A1
818 P6-ALP-Q-A3-A-A1
819 P6-ALP-Q-A3-A-A1
820 J1-Q-A-A3-A1
821 J1-Q-A-A3-A1

constitution because there is a special provision in the constitution of Bangladesh giving protection to the ICT Act 1973.[822] According to him, legislation to allow the government to enable them to confiscate the wealth of the convicted individual may not be declared ultra vires to the constitution and that as a democratic country, the demand of the people should be reflected thought the Act of the parliament.

Another judge of the ICT-BD stated that during his time at the ICT-BD, the judges discussed about the provision of reparation because there is no provision in the governing Act of the ICT-BD.[823] This particular judge opined that they could not develop any provisions to provide reparation to the victims due to legal technicality issues.[824] This particular judge opined that, reparation could be a supplementary form of justice which could extend the aim of prosecution.[825]

Another prosecution lawyer stated that due to the lack of adequate legal provision, it was not possible to provide reparations to the victims of 1971.[826] He further stated that the RoP included a provision of victim protection, and the government is responsible for ensuring victim protection.[827] However, this particular provision did not say anything about providing reparations to the victims. For this reason, although the Prosecution raised the issue of providing reparations in several cases, the ICT-BD did not directly mention about providing reparation. [828]

Another politician stated that a lot of the accused are now elderly, and many of the accused have died already, and prosecution would not serve justice in their case.[829] According

822 J1-Q-A-A3-A1
823 J2-Q-A2
824 J2-Q-A2
825 J2-Q-A2
826 PL4-Q-C3-A1
827 PL4-Q-C3-A1
828 PL4-Q-C3-A1
829 P1-BNP-A3-A-A1

to this particular politician, reparation could be useful to complement justice in limited circumstances where the perpetrators have died during the trial process.[830]

5.9.3 Economic and Political consideration

The establishment of a reparation programme may not be an issue for the more resourceful and developed countries, but it may be an issue for a developing country like Bangladesh. It could be one of the policy reasons that due to financial aspects involved with the reparation mechanism, there is no adequate legal provision to provide compensation to the victims of 1971. Many states are reluctant to introduce reparation for the victims fearing that there may be a floodgate of claims for the historic violations.[831]

A particular prosecution lawyer stated that, '…providing reparations are not at the hand of the Tribunal, rather, it is up to the Parliament to legislate new law in this regard'. [832] So, it appears that lawmakers in Bangladesh have a duty to implement the law in relation to providing reparation to the victims of 1971.

A particular politician of the Bangladeshi Jamaat-e-Islami party, stated that providing reparations to the victims is the matter of the policymaker.[833] He said reparation is important to deal with transitional justice mechanism especially when trials are conducted after so many years have passed and many perpetrators had already passed away, but for this mechanism, a huge resource is necessary which cannot be afforded personally.[834] According to him, this reparation liability ultimately lies with Pakistan, the actual cause of the suffering and loss and in a position to provide reparation.[835] He further elaborated that in relation to providing reparations, the first thing to do is to determine who is in a resourceful position.[836]

830 P1-BNP-A3-A-A1
831 Bassiouni (n 295) 125.
832 PL1-Q-A-A1
833 P2-BJI-Q-A3-A
834 P2-BJI-Q-A3-A
835 P2-BJI-Q-A3-A
836 P2-BJI-Q-A3-A

He said historically, West Pakistan (now Pakistan) is responsible for the sufferings of the 1971 victims in Bangladesh.[837] According to him, an individual accused should not bear the burden of providing reparation.[838]

Although the international criminal responsibility of individuals for international crimes is now well-established, reparation to victims has not been fully developed yet.[839] The main problem of the reparation programme in the Bangladeshi situation is bearing the costs of the reparation mechanism. Since the ICT-BD is trying local collaborators that of Bangladeshi origin, the majority of the interviewees recommended the creation of appropriate legislation so that the properties of the convicted perpetrators can form a trust fund out of which in exceptional circumstances, reparation can be provided.

A politician of AL stated that the ICT-BD has limitations in regard to giving reparations to the victims and there should be a supplementary legal mechanism to deal with this issue.[840] He stated that the primary purpose of transitional justice is to bring back peace in society through justice. He also opined that without justice, peace could never be achieved.[841] According to him, if the prosecution cannot serve justice due to the natural death of the perpetrators, then reparation could be an essential element for the victims of the atrocities of 1971.[842] He further stated that the victims, '…may forgive but may never forget'. [843] This particular politician further stated that the ICT-BD should continue delivering judgments, and victims should be given reparation as quick as possible in order to provide honor to the victims and their families. [844] He opined that it is important to let the future generations know that the people who sacrificed their lives for the country were rewarded.[845]

837 P2-BJI-Q-A3-A
838 P2-BJI-Q-A3-A
839 Bassiouni (308) 133.
840 P6-ALP-Q-A3-A-A1
841 P6-ALP-Q-A3-A-A1
842 P6-ALP-Q-A3-A-A1
843 P6-ALP-Q-A3-A-A1
844 P6-ALP-Q-C1
845 P6-ALP-Q-C1

Reparation is an essential transitional justice mechanism which may complement criminal prosecution in the particular context of delayed justice in Bangladesh. However, the ICT-BD could not develop any reparation mechanism to complement delayed criminal prosecution. The majority of the interviewees think that, a lack of legal provision and financial resources were the main reasons why the ICT-BD could not come up with any reparation mechanism for the victims.

5.10 Conclusion and interim findings

From the above, we can conclude that the culture of impunity, delay in the justice process and reparation are interlinked with one another, the culture of impunity has been partly built due to the delay in the justice process. This delay further causes the victims and witnesses to lose faith in the justice process; therefore, a majority of interviewees stated that in a situation like Bangladesh, reparation could supplement the prosecution. Others held a view that reparations could delay the justice process even further.

According to the definition of Opotow, it seems that the nature of the impunity in the situation of Bangladesh can be understood primarily as the lack of accountability. Since accountability is the antithesis of Impunity, we can see in the situation of Bangladesh that lack of accountability is the main reason for the development of the culture of Impunity.

The second dimension of the Opotow's definition made reference to the different situations under which impunity may arise such as not investigating the crime, not bringing suspects before the tribunal, not reaching verdicts, not sentencing or not enforcing the sentencing.[846] In the particular context of Bangladesh, there was always a moral drive and societal demand for justice and for these reasons even though late, a tribunal has been established to investigate the crimes. The important lessons which may be learnt in this

[846] Susan Opotow, 'Reconciliation in Times of Impunity: Challenges for Social Justice', 14(1) Social Justice Research (2001) 149, 149.

respect is that, societal demand is an important factor which can give mandate to an authority to investigate past atrocities.

Also, the Bangladeshi situation provided valuable insights into how impunity may develop based on ineffective early legal attempts under the domestic criminal justice system. So, it may be said that the ICT-BD provided an indication that in addition to Opotow's definition, impunity may arise due to national priority and ineffective legal attempts (this is also related to realpolitik further explained below). Here, national priority indicates how a newly independent country prioritizes the task of rebuilding a nation and it may take decades to instigate the process of accountability by way of establishing a special tribunal.

The third dimension of Opotow's definition refers to the main root of the impunity as the political consideration and compromise or 'realpolitik'.[847] In this respect, the majority of the interviewees are of the opinion that the main source of the impunity in the situation of Bangladesh is related to the political consideration and the prevailing political context at the time.

The ICT-BD has demonstrated the nature of impunity which can be understood from different points of view. Firstly, the establishment of the ICT-BD is an attempt to decrease the culture of impunity and increase accountability by way of a domestic legal mechanism dealing with international crimes. Secondly, the ICT-BD is addressing the issue of historic trauma which has been built through the development of the culture of impunity and contributing to healing the psychological damage of the victims and their family members for the denial of justice for a prolonged period of time. Thirdly, it may not be possible to achieve complete justice for a situation such as that of Bangladesh after a substantial period of delay, but some form of justice may be achieved through criminal prosecution. Fourthly, the early restorative

847 Susan Opotow, 'Reconciliation in Times of Impunity: Challenges for Social Justice', 14(1) SJR (2001) 149, 149.

means of justice, such as general amnesty, did not play any meaningful role in addressing the issue of impunity and accountability in the Bangladeshi situation. The majority of the interviewees were of the opinion that the ICT-BD has been more impactful in ending the culture of impunity in the field of ICL. Although this study focuses on the situation of Bangladesh, the findings may well have a bearing on similar situations around the world, particularly in South Asian and Muslim majority countries. With regards to delay, the establishment of the ICT-BD may provide us an important lesson that 'Justice delayed is no longer justice denied'. When it comes to prosecuting crimes of the utmost gravity, 'considerations of material justice for the victims now prevail over formalistic notions of legal certainty'.[848]

Germany convicted a 91-year old Nazi war criminal, John Demjanjuk on 12 May 2011 for his involvement in a concentration camp 70 years ago where he acted as a guard; this suggests that in some cases, justice may be delayed but justice was served.[849] Similarly, the contribution made by the ICT-BD in relation to delayed justice is quite significant, it assists in reviving many forgotten atrocities around the world because there is no time bar for prosecuting crimes under ICL. Furthermore, the ICCPR enabled States to abolish any legal provisions which may potentially hinder prosecution and gross violation of human rights.

Concerning reparation, most of the interviewees stated that in a situation like Bangladesh, reparation could supplement the prosecution. Other's took a different view that reparation related provisions would make the prosecution process slower. The substantive law of the ICT-BD (e.g. the ICT Act 1973) has no express provision for reparation. As a result, the ICT-BD rejected the prosecution's argument to provide reparation to the victims of rape. We can learn an important lesson by considering the effects of the delayed prosecution, that prosecution alone may not serve complete justice and other supplementary mechanisms may complement the prosecution. Similar to the mechanism of ECCC as mentioned above, the

848 Jn Aro Hessbruegge, 'Justice Delayed, Not Denied: Statutory Limitations and Human Rights Crimes' (2011-2012) 43 Geo. J. Int'l L. 335, 384.
849 Ibid.

ICT-BD could also amend its RoP's to include legal provision for reparation. A majority of the interviewees have acknowledged that the ICT-BD could not develop a comprehensive reparation mechanism for the victims of 1971. It is still open for the judges of the ICT-BD to amend its RoP's to include reparation and compensation provisions for the victims. Some participants are of the opinion that the legislators of Bangladesh should introduce reparation related national laws. However, according to Bassiouni, only legal mechanisms giving the victims the right to reparation would not serve any meaningful purpose if there is no separate mechanism giving compensation to the victims.[850] Accordingly, similar to Article 79 of the ICC, the ICT-BD can form a trust fund for the eligible victims, and at the same time, there should be appropriate law in place so that those who are convicted by the tribunal can have their properties confiscated. However, there are at least two challenges in developing any reparation program in the particular context of Bangladesh. Firstly, many perpetrators might have already died or may be difficult to locate. Secondly, if the located perpetrators have no resources, then any reparation program would not be feasible.

The lesson that can be learned from the ICT-BD in this respect is that, in case of delayed justice, reparation can supplement the prosecution to serve justice to the victims. It is not too late for the authorities in Bangladesh to look into the issue of making appropriate legislation which would enable the victims to seek compensation from the convicted war criminals. The willingness of the policymakers in Bangladesh could make it possible to provide reparation to the victims of 1971.

850 Bassiouni (n 295) 125.

CHAPTER 6

DUE PROCESS

6.1 Introduction

The aim of this Chapter is to analyse the interview data that was collected through semi-structured interviews and in particular, the perceptions of participants with respect to the due process followed by the ICT-BD in the course of the initial investigations and delivering judgments. This Chapter has also analysed the nature of due process followed by the ICT-BD from an analysis of its judgments and decisions, and to what extent the due process complied with the existing international practices. Due process is a broad concept, and there are various approaches on how it should be applied in ICL tribunals and in domestic tribunals. The previous chapters have discussed the domestic nature of the ICT-BD. This Chapter has attempted to analyse how a domestic tribunal dealing with international crimes has applied the principles of due process, and to what extent lessons drawn from the ICT-BD could contribute to ICL and transitional justice.

According to Bassiouni, the goals of ICL are, '...to include the prevention and suppression of international criminality, enhancement of accountability and reduction of impunity, and the establishment of international criminal justice'.[851] On the other hand, the goals of international criminal procedure refer to respect for human rights and due process principles and that the perpetrators are given fair trial rights before an independent and impartial judicial body.[852]

851 Bassiouni (n 295) 1.
852 Knoops (n 285) 1.

6.1.1 Meaning of due process

Due process is a fundamental element in democratic countries which maintains a fair and effective judicial system.[853] According to Knoops, due process can be understood as an assurance or guarantee based on which institutional actions can be authoritative and it has a bearing on public confidence in the judicial process.[854] In a criminal trial, the concept of due process can be explained as the minimum rights that are given to an accused.[855]

The meaning of due process can also be understood by scrutinising US based academic resources as they carry international significance. The history of due process can be traced back to Article 39 of the Charter of Liberty (Magna Carter) and it means that, everyone is entitled to the safeguards provided by the law of the land and that law should be applied properly by institutions before depriving an individual of their freedom.[856] Sir Edward coke stated that, due process protected all personal liberties and was identical to common law.[857] However, in the American constitutional system, due process is guaranteed under the fifth and fourteenth amendment of the constitution as opposed to the English constitutional system which relies on a mix statues and common law.[858] The US judicial system considers the fairness of the judicial systems in other states before enforcing foreign judgments.[859] This shows us that the umbrella of international due process norms and the context of due process in domestic settings based on cultural applications can vary greatly.[860]

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853 Simona Grossi, 'Procedural Due Process' (2017) 13 Seton Hall Cir Rev 155, 157.
854 Knoops (n 285) 276, mentioned the dissenting opinion of Justice Murphy of the US Supreme Court in the famous criminal trial against General Yamashita.
855 Masha Fedorova and Goran Sluiter, 'Human Rights as Minimum Standards in international criminal proceedings' (2009) 3(1) HR&ILD 9, 11-12.
856 Edward D. Re, 'Due process, Judicial Review and the Rights of an individual' (1991) Vol 39, Cleveland law state review, 1
857 Cengage, 'Due process of Law' (Encyclopedia.com, 28 July 2020) < https://www.encyclopedia.com/social-sciences-and-law/law/law/due-process-law> Accessed 8 August 2020
858 E Thomas Sullivan and Toni M Massaro, 'Due Process Exceptionalism' 46 Irish Jurist (NS) 117
859 Montre D Carodine, 'Political Judging: When Due Process Goes International' (2007) 48 Wm & Mary L Rev 1159
860 Cristian DeFrancia, 'Due Process in International Criminal Courts: Why Procedure Matters' (2001) 87 Va L Rev 1381, 1384

There are contradictory opinions regarding what qualifies as due process and its relationship with a fair trial.[861] At an international level, the generalised concept of due process was codified in the International Covenants on Civil and Political Rights (ICCPR) and regionally in the European Convention on Human Rights (ECHR).[862] Further to that, the general principle of criminal law and binding authority of international law may give rise to the issue of due process.[863] It can be compared to a form of standard which assists in gaining public confidence and a fair balance between the rights of an accused and victims.[864]

There are various stages of due process, such as drafting the substantive laws, the investigation stage, and trial stage.

6.1.2 Substantive and Procedural due process

In order to administer ICL and transitional justice, there are a set of rules regulating international criminal proceedings called procedural criminal law that governs the various stages of international criminal trials.[865] Also, there is another set of rules defining what acts amount to international crimes, which is called substantive law.[866]

The concept of substantive due process refers to the situation where lawmakers are required to make law in such as a way that does not treat people unfairly.[867] On the other hand, procedural due process refers to the situation where officials are required to apply law using a fair procedure equally applicable for all.[868]

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861 Salvatore Zappala, *Human Rights in International Criminal Proceedings* (Oxford University Press 2005), 3.
862 Jens David Ohlin, 'Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law' (2009) 4 (1) UCLA J. Int'l L. Foreign Aff. 77, 92.
863 Zappala (n 861) 3.
864 Ohlin (n 862) 92.
865 Cassese (n 286) 15.
866 Ibid.
867 Thomas O Main, 'The Procedural Foundation of Substantive Law' (2010) 87 Wash U L Rev 801, 802, also in Gabrielle Kirk-MacDonald & Olivia Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law* (Brill Publisher 2000)
868 Ibid.

6.1.3 Development of due process concept

The development of due process in international criminal adjudication can be traced back to the Nuremberg Charter and the RPE of the IMT where certain rights were guaranteed to the defendants through the due process principle.[869] Article 16 of the Nuremberg Charter guaranteed five rights to the defendants which were, the right to know full information regarding the allegation against an individual, right to give any explanation relevant to the charges during preliminary examination, right to understand the trial in a language he or she understands, right to conduct his or her own defence or getting assistance from counsel, right to present evidence and cross-examine the witnesses against him or her.[870] However, Professor Bassiouni criticised the nature of due process rights in the Nuremberg Charter, saying that, '…the procedural rights afforded the defendants were quite limited' compared to the contemporary standards.[871] According to Zappalà, there were no due process safeguards during the investigation phase before the Nuremberg trials and presumption of innocence was not expressly stated.[872] Also, defendants were not given any right to remain silent and right to be released on bail.[873] Additionally, there was no right of appeal for the defendants.[874] However, Gordon argued that before the Nuremberg trial, human rights law was not developed in a contemporary fashion, and for this reason, the tribunal could not adopt the due process in today's fashion.[875] As a result, Safferling and Bassiouni suggested that the Nuremberg

869 Gregory S Gordon, 'Toward an International Criminal Procedure: Due Process Aspirations and Limitations' (2007) 45 COLUM J TRANSNAT'L L 635, 637-38.
870 Article 16 of the Nuremberg Charter available at< https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf> accessed 12 December 2018
871 Bassiouni (n 295) 553.
872 Zappala (n 861) 7.
873 Ibid.
874 Louise Arbour, 'Progress and Challenges in International Criminal Justice' (1997) 21 (2) FILJ 531, 539.
875 Gordon (n 869) 637-38.

tribunal paid some respect to the rights of an accused both in the Charter and the Rules of Procedure.[876]

6.2. International application of Due Process

The due process of ICL was revisited in the ICTY, ICTR and later by the ICC. According to Arbour, the ICTY and ICTR have brought significant changes in the due process principles of ICL.[877] There were six procedural steps during the investigation phase to ensure due process to the accused, and the ICTY reflected the due process guarantee enshrined in Article 14 the ICCPR.[878]

The primary basis of the due process rights is the Article 14 of the ICCPR which contains a list of due process rights and notable rights which are: fair and impartial tribunal, public trial, adequate time for preparation of defence, not to be compelled to testify against himself or to confess guilt, right to know charges against an individual, right of an accused to be presumed innocent until proven guilty, right to legal representation, right of appeal, right of bail, right to cross-examine the witnesses against an accused, adequate prosecutorial discloser, avoiding delays, right to review conviction at a higher court, etc.

In order to ensure due process principles, the ICTY and ICTR have amended their RPE 45 times and 27 times, respectively. Gordon in his article suggested that the due process in ICL has developed primarily to protect the fundamental human rights of an accused and there is a fundamental difference between the nature of due process in the national and international models namely that, national models rely on their own agencies for investigation,

876 Christoph Safferling, *Towards an International Criminal Procedure* (Oxford University Press 2001), pp-1-2 & M Cherif Bassiouni, *Introduction to International Criminal Law* (Oxford University Press 2003), pp- 586-87.
877 Louise Arbour, 'Progress and Challenges in International Criminal Justice' (1997) 21 (2) FILJ 531, 534
878 Masha Fedorova and Goran Sluiter, 'Human Rights as Minimum Standards in international criminal proceedings' (2009) 3(1) HR&ILD 9, 11-12.

compliance and enforcement, whereas international models rely on external bodies and the cooperation of states to procure evidence and suspects.[879]

6.3 Legal position of Due Process in the ICT - BD

One of the main criticisms against the ICT-BD is that it fails to follow International standards of due process.[880] It seems that the title of the act itself seems to generate the opinion that the act must adhere to International standards and the government of Bangladesh has shown commitment to follow certain International obligations by ratifying the Rome statue. The ICT Act through amendments, has provided provisions to ensure fair trial and guarantee certain fundamental rights of the accused. These different provisions such as the RoP's of the ICT act have been discussed more elaborately in Chapter 4. However, its decision not to amend Article 47(A) and 47(3) which does not provide accused persons same constitutional rights as other citizens has gathered criticisms. Article 31 protects accused from retrospective laws, Article 33 guarantees a fair trial and Article 44 allows the enforcement of those guaranteed rights. Before the 2009 amendment which allowed appeals to the tribunals, the accused were denied interlocutory appeals. There are calls for the act to follow the legislative origin of the ICT Act and to investigate political bias.[881] The below sections go through the analysis of the information received from the semi structured interviews in order to understand how due process is exercised in the ICT-BD though its investigative practical procedures and criticisms.

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879 Gregory S Gordon, 'Toward an International Criminal Procedure: Due Process Aspirations and Limitations' (2007) 45 COLUM J TRANSNAT'L L 635, 637-38.

880 'Bangladesh: Guarantee Fair Trials for Independence-Era Crimes' (Human Rights watch 11 July 2011) < https://www.hrw.org/news/2011/07/11/bangladesh-guarantee-fair-trials-independence-era-crimes> accessed 8 August 2020.

881 'War crimes and the rule of law' (South Asia Journal 22 September 2011) < http://southasiajournal.net/war-crimes-the-rule-of-law-abeed-hossain/> accessed 10 August 2020.

6.4 Analysis of Interview Data

After providing a basic understanding of due process, the researcher has discussed below the interview data, which have been divided into four sections; Standard, procedure, comments and criticisms under separate headings for the purpose of clarity.[882]

6.4.1 Standard: Due process in practice

One of the judges during the interview stated that under the ICT Act 1973, the crimes are clearly defined and they followed the law accordingly when they conducted the trial.[883] He said, 'we followed the trial process of the Nuremberg Tribunal to some extent and adapted to present time legal application'.[884]

Another ICT-BD judge who was also the chairman of the tribunal stated that each of the stages of the ICT-BD had followed proper due process.[885] He stated that, although there was no review in the legal framework of the ICT-BD, there is a review system against every judgment of the Supreme Court of Bangladesh and that review right has been given to the accused under ICT Act 1973.[886] He further explained that in the ICT-BD case of *Quader Molla,* it was an issue of whether the review was applicable in cases under ICT 1973 Act, and later it was decided that review would be given.[887] He also asserted that, 'so I think sufficient scopes were given to the accused to defend themselves'.[888] He further stated, 'when I was a lawyer, I used to deal with Human Rights issues and also in our jail code there were some provisions to take accused friendly decisions to allow them wider rights'.[889] He also said that, 'as a judge I did allow the accused Golam Azam to bring home-cooked food after reviewing their petition

882 Article 14 of the ICCPR, available at < https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf> accessed 15 December 2018.
883 J1-Q-C
884 J1-Q-C
885 J2-Q-C2
886 J2-Q-C2
887 J2-Q-C2
888 J2-Q-C2
889 J2-Q-C2

and with the condition that food will not be harmful to the accused'.[890] He said this type of rights given to an accused is a rare case in Bangladesh.[891] He said that, an accused named Delwar Hussain Sayeedi became ill during trial and, 'I ordered to ensure best available treatment for him'.[892] In the case of *Sayeedi*, the prison authority was directed to provide treatment at the choice of the accused, a special diet was requested by the accused and a health-friendly vehicle for his transport was also provided.[893]

A particular judge stated that, '…we allowed remand for questioning, I made a system that accused will remain in a house during questioning'. He stated that he usually allowed remand during daytime not at night, and a doctor and lawyer could be in the next room to observe that the rights of the accused are protected during questioning.[894] He said, 'this type of rights has [had] never been seen in our country'.[895] The judge further narrated that an accused could have his lunch during questioning, and in the evening, they could return to jail.[896] These were a few things which have been allowed by the tribunal when he was the chairman of the tribunal.[897] He believes these practices have been developed since he left the tribunal.[898]

However, a particular defence lawyer stated from his practical experience that, he had dealt with many criminal trials as a defence lawyer, sometimes judges delivered judgment against his client's favour, but he always had the satisfaction that whatever a judge decided was right.[899] However, based on the way that the ICT-BD delivered judgment; he did not have the same feeling of satisfaction that the judge decided rightly or that judges were neutral.[900]

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890 J2-Q-C2
891 J2-Q-C1
892 J2-Q-C1
893 *Sayeedi* (n 55) para. 33.
894 J2-Q-C1
895' J2-Q-C1
896 J2-Q-C1
897 J2-Q-C1
898 J2-Q-C1
899 DL1-Q-C3
900 DL1-Q-C3

He said that, ‘if this satisfaction is not present, then the purpose of establishing a tribunal would fail because there would be no peace or reconciliation through the tribunal.'[901] Another defence lawyer stated that the tribunal could not achieve the aim of transitional justice, and he believed that most of the people in Bangladesh assumed that the tribunal was not neutral.[902]

The defence lawyer further opined that, ‘from my personal point of view, it may be wrong to say due to my limitations of knowledge on this subject matter that investigation, prosecution, judges, and witnesses were all set and they were under central command’.[903] He further stated that, ‘the way ICT-BD was designed, they simply followed that plan, the trial did not follow the typical judicial culture of Bangladesh’.[904] He further stated that the prosecution could use all the state power and agents to prepare their case; on the other hand, the defence team was oppressed by the state missionary.[905] He mentioned that the premises that they used to conduct their office work was under pressure as the police used to visit the premises on a regular basis.[906]

6.4.2 Standard: Substantive Due process and International Crimes (Tribunal) Act 1973

As discussed in the introduction, the concept of substantive due process requires that lawmakers draft law in a way that is equally applicable to all and for this reason, it is important to analyse how the governing Act of the ICT-BD was drafted. One of the politicians that the researcher interviewed, stated that after the 1971 Liberation War, the Prime Minister ‘Bangabandhu Sheikh Mujibur Rahman’,[907] in his first speech on 10 January 1972 invited the citizens of Bangladesh not to take the law into their own hands as a lot of atrocities had already been committed. He assured everyone that those who were responsible for the atrocities

[901] DL1-Q-C3
[902] DL1-Q-C3
[903] DL1-Q-C3
[904] DL1-Q-C3
[905] DL1-Q-A2
[906] DL1-Q-A2
[907] Father of the nation of Bangladesh who declared the independence of Bangladesh in 1971 and the supreme leader during 1971.

would be prosecuted for crimes under ICL following due process principles.[908] Also, when the interviewee became the law minister on 12th January 1972, it was ordered that there would be no summary executions.[909] One of the first tasks he took upon was drafting the constitution of Bangladesh and making a special law for war crimes prosecution which is known as the ICT Act 1973, and it was given special protection under the constitution in the first amendment stating that, any law would not challenge prosecution under this Act.[910]

It appears from the initial stages of drafting the governing Act of the ICT-BD that, due process was considered at least to the extent that the perpetrators were saved from summary executions with a view to give them legal rights by trial. This particular interviewee further stated that they had the task of systematically collecting evidence and appointed some of the most senior lawyers as prosecutors, they are named as follows, Subita Ranjan Paul, Serajul Hoque, and Aminul Hoque.[911] This suggests that straight after the liberation war, Bangladesh attempted to prosecute the perpetrators of 1971 in a systematic way through the judicial system and Sheikh Mujibur Rahman himself promised to provide justice through due process.

The interviewee further stated that they produced a draft law and presented the draft at the International Conference held in Dhaka in 1973 where distinguished international criminal lawyers including the vice president of the International Court of Justice (ICJ) and other experienced lawyers and academics were present at the conference.[912] He also mentioned that before finalising the draft, they received suggestions from the participants of the conference and approved the draft.[913] They were then invited to another ICL conference in Italy in 1973, and the interviewee went there along with two prosecutors (Subita Ranjan Paul and Serajul Hoque).[914] He said that they had the opportunity to circulate the draft in a

908 P4-GF-Q-B3
909 P4-GF-Q-B3
910 P4-GF-Q-B3
911 P4-GF-Q-B3
912 P4-GF-Q-C2
913 P4-GF-Q-C2
914 P4-GF-Q-C2

whole session and received comments from the top international criminal lawyers and eminent people who were prosecutors at Nuremberg and so, all the people present discussed this draft and showed positivity in relation to the provisions for fair trial, giving proper opportunity to the accused persons to defend themselves and proceedings were seen to be neutral, impartial and open to public trials.[915]

Another participant stated that, '…I think the governing Act of the ICT-BD is an excellent piece of legislation despite having few minor issues which were amended subsequently'.[916] A particular judge who took part in the interview stated that the ICT Act 1973, '...contained all the provisions of the due process and international standards and there should not be any question about the accuracy of the law because it was updated legislation in its time'.[917] A particular politician stated that, '…there are sufficient legal provisions to ensure fairness and defence has the option to appeal and review the decision of the tribunal before Supreme Court'.[918] It is further stated by another participant that the defence team exercised appeal rights before the court of appeal; decisions of the tribunal were reviewed before final judgment was delivered therefore, there should not be an issue of due process under the ICT-BD's legal mechanism.[919]

One of the prosecution lawyers stated that, '…I have observed Cambodian Tribunal, ICTR, ICTY, ICC, and Latin American Tribunal; comparatively the ICT Act 1973 is more accused friendly and the ICT-BD's RoP gave absolute rights to the accused'.[920] He further stated that the RoP gave more rights to the accused rather than the victim.[921] He also confirmed that, '…initially the prosecution had no right to appeal against the inadequacy of

915 P4-GF-Q-C2
916 P5-GDNC-Q-C1
917 J4-Q-A
918 P4-GF-Q-C2
919 P4-GF-Q-C2
920 PL4-Q-C2
921 PL4-Q-C2

punishment, but subsequently it was given to the prosecution after amending the 1973 Act'.[922] He further narrated that '…under the RoP, the defence team got more rights than the prosecution team despite applying several equality principles'.[923]

Another judge of the tribunal reaffirmed that '…in all the stages of the tribunal due process are[is] in place'.[924] He restated that before establishing tribunals, judicial forums were formed to consult the adequacy of due process.[925]

So, it appears that the ICT Act 1973 was legislated to ensure a fair trial and stop summary executions. The purpose of drafting the ICT Act 1973 was to install the rule of law. At the drafting stage, the Act was thoroughly scrutinised to adopt recognised principles of law.

6.4.3 Standard: Procedural due process and the ICT-BD

The governing Act of the ICT-BD made it clear that the principles of national criminal code and Evidence Act have no significance to the procedural aspect of the ICT-BD.[926] The ICT-BD has its own RoP in terms of procedural issues. It is noted in the judgment of the *Chief Prosecutor v Abdul Quader Molla*[927] that, the ICT Act 1973 and the RoP have incorporated the procedural rights of the Article 14 of the ICCPR.[928]

A judge of the tribunal, who took part in the interview, stated that, '...I think comparing to other similar tribunals around the world, our ICT-BD has no shortage of standard and we can even claim that in terms of international standards, the legal framework of the ICT-BD is more advanced'.[929] The judge further narrated that he had the opportunity to observe the Cambodian Tribunal, the process of ICC and three tribunals in Hague where he was present

922 PL4-Q-C2
923 PL4-Q-C2
924 J3-Q-C2
925 J3-Q-C2
926 The ICT Act 1973, Section 23 [Bangladesh].
927 *Abdul Quader Molla* (n 13).
928 *Abdul Quader Molla* (n 13) para 4.
929 J2-Q-A

as an observer, he exchanged information and shared ideas and discussed various aspects of international criminal tribunals before being a judge for the ICT-BD.[930] Another participant stated that, '…in all the stages of the process fair process was ensured, judges were independent, after proper investigation charges were constituted against each accused'.[931] This particular participant also stated that after the preliminary hearing, each case went to trial for a full hearing and during the preliminary hearing, the defence team used interlocutory appeals frequently to ensure due process.[932] When a question was asked on whether the accused or their lawyers were given adequate time, the judge stated that, '…they were given sufficient time to gather evidence and witnesses'.[933] The judge also confirmed that '…interlocutory appeal rights were given to the defence team and they have used interlocutory appeal several times'.[934]

However, both substantive and procedural provisions have caused concern among human rights groups.[935] Human rights advocates and legal observers have said that offence under the ICT Act 1973 must be clearly defined and due process rights for the accused must be enhanced.[936] It is alleged that the amended ICT Act 1973, did not provide suspects a right against self-incrimination or a right to legal counsel when being questioned by the police, nor did it give them adequate time to prepare a defence.[937] However, it appears from the analysis of Rule 24(1) of the RoP of the ICT-BD that any statement made by the accused during interrogation or investigation cannot be adduced as evidence against the accused and effectively, this has provided a protection against self-incrimination. Also, Section 16(2) of the

930 J2-Q-A
931 J3-Q-C2
932 J3-Q-C2
933 J3-Q-C2
934 J3-Q-C2
935 Surabhi Chopra, "The International Crimes Tribunal in Bangladesh: Silencing Fair Comment (March 1, 2015). Journal of Genocide Research Vol. 17 Issue (2) 4.
936 Ibid.
937 Ibid.

ICT Act 1973 ensures that reasonable time is to be given to the accused to understand the charge against an accused and prepare defence.

One of the politicians (Bangladesh Jamaat-e-Islami)[938] stated that, due process is being used very technically in the ICT-BD's legal mechanism.[939] He further stated that, '…in theory there are sufficient provisions in place to ensure a fair trial and due process'.[940] But he mentioned that in practice, this tribunal [ICT-BD] was largely biased.[941] He alleged that '…almost all the judges are appointed by the ALP and they are the supporters of the government'.[942] Further, Menon stated that the lack of transparency in the appointment process of the judges and prosecutors raises questions concerning the norm of neutrality of the tribunal.[943]

It is further observed that under Section 6(2) of the ICT Act 1973, to be appointed as the tribunal chairman or member, an individual has '…to be a judge at the Supreme Court of Bangladesh' and they must be Bangladeshi nationals.[944] If we compare the appointment process of the ICT-BD with SCSL, ECCC it appears that the latter had provision to appoint foreign judges along with domestic judges, but the former had no such provision to ensure judge's neutrality and objectivity.[945] The judges of the ICT-BD are appointed by the Government of Bangladesh at their discretion. As such, there is a potential for bias as judges may be selected based on their political views or social standing. Also, under Section 6(8) of the ICT Act 1973, both prosecution and defence have no right to challenge the appointment of the judges.[946] But the appointment of the Supreme Court bench judge could be challenged

938 They were against the liberation war of Bangladesh and their senior party leaders were accused under the ICT-BD (See more details in Chapter 2).
939 P2-BJI-Q-C2
940 P2-BJI-Q-C2
941 P2-BJI-Q-C2
942 P2-BJI-Q-C2
943 Menon (n 297) 9.
944 Ibid 8.
945 Ibid.
946 Ibid.

and in the case of *Chief Prosecutor v Abdul Quader Mollah,*[947] defence made an application challenging the appointment of a particular judge '… on grounds of violation of the Code of Conduct of Judges under the Constitution of Bangladesh'.[948]

Robertson stated that, the 1973 Act '…was something of a wonder of its time – the first legislation devised to deliver on the legacy of Nuremberg...' and the Act is partly the work of Niall MacDermott Q.C.[949] He further opined that the 1973 Act is a well-meaning piece '…but now an out-dated prototype for post-Nuremberg war crimes court…' and by 2009, the Act had been superseded by the modern international tribunals such as ICTY, ICTR, SCSL and ICC which have incorporated an up to date concept of human rights standards.[950] The main concern raised by Robertson was that the ICT Act 1973 does not allow to question the appointment of the Judges of the ICT-BD.[951] Although the appointment of the judges of the tribunal could not be challenged, the verdict of the tribunal could be challenged to the highest court of the land. Also, the appointment of judges of the highest court of the land can be challenged, and the defence team had exercised their right to challenge the appointment of a judge of the highest court of the land.[952]

6.4.4 Procedure: Due process of ICT-BD at the investigation stage

In the case of *Quader Molla*, it was stated that the ICT-BD has guaranteed the required procedural protections of the defendant's right to fair trial both in the pre-trial phase and during the trial.[953] A prosecution lawyer confirmed that an investigation agency had been formed to assist the tribunal with the most skilful and professional investigators of the country.[954] A judge,

947 Quader Mollah (n 13).
948 Menon (n 297) 8.
949 Robertson (305) 54.
950 Ibid.
951 Ibid.
952 In the case of Abdul Quader Molla, ICT.BD. CASE NO. 07 OF 2011, the Defence team made an application challenging the appointment of Justice Samsuddin Chowdhury Manik on the ground of violation of the Code of Conduct of Judges, also see Menon (n297) 10.
953 *Abdul Quader Molla* (n 13) para.40.
954 PL1-Q-C2

who took part in the interview stated that, the investigation stage is very important and the investigators do not take part in the judicial process but, during their investigation, they try to find out *prima facie* case and they examine potential witnesses.[955] He also narrated those investigations are conducted for the tribunal by very senior officers in their capacity who are also highly trained.[956]

However, Menon alleged that neither the ICT Act 1973 nor the ICT-BD RoP, provide any rights to the suspects during the investigation stage.[957] Nevertheless, it appears from the case of *Quader Molla* that the Tribunal had developed a practice that:

> '…at the time of interrogation defence counsel, a doctor shall be present in a room adjacent to that where the accused is interrogated' and during break time they are allowed to consult the accused, despite the fact that statement made to investigation officer shall not be admissible in evidence.[958]

It is alleged that the suspects are not entitled to the assistance of a counsel of their own choice or to free legal assistance if they are unable to afford it.[959] However, in practice, the accused are allowed to select their counsel within the jurisdiction, and if unable to afford counsel, then the State sponsored defence lawyers are available for them, including an interpreter.[960] Under Section 12 of the ICT Act 1973, the accused are entitled to get defence counsel provided by the government fund in all the stages of the case if the accused are unrepresented.[961] However, it is not clear whether free legal assistance is available at the investigation stage.

955 J1-Q-C2
956 J1-Q-C2
957 Menon (n 297) 9.
958 *Abdul Quader Molla* (n 13) para. 40.
959 Parvathi Menon (n 297) 9.
960 The ICT Act 1973, Section 10, 12 and 17(2) [Bangladesh]
961 The ICT Act 1973, Section 12 [Bangladesh].

Menon alleges that during the investigation stage under the ICT-BD, it is possible to examine a suspect orally and there is no privilege against self-incrimination.[962] However, it appears from the case of *Quader Molla* that during the investigation stage, 'statement made to the investigation officer shall not be admissible as evidence'.[963] Also, under Section 14 of the ICT Act 1973, any statement or confession a suspect makes must be done in front of a Magistrate as part of the investigation process and such evidence may be used against the accused.[964]

Once a suspect is arrested, there is a time-limit of one year and by this time, investigation in a particular case must be completed; otherwise, suspects should be released on bail. This stipulation of the time limit is unique to the Act because other tribunals merely gave direction for the investigation to be concluded without undue delays, but the ICT Act 1973 has provided a clear timeline.[965]

Also, in relation to the warrant of arrest, the Rule 9(3) of RoP of the ICT-BD provides that, at the time of executing the warrant of arrest, a copy of allegations is to be served to the suspect.[966] Further, Rule 18 (4) provides that, 'The Chief prosecutor shall file extra copies of formal charge and copies of other documents for supplying the same to the accused(s) which the prosecution intends to rely upon in support of such charges so that the accused can prepare his defence'.[967] In the case of *Mujahid,* it was stated that '…right to disclosure has been adequately ensured so that the suspect person can have a fair opportunity to defend his own interest'.[968] The tribunal has given the opportunity to the accused to have privileged

962 Menon (n 297) 9.
963 *Abdul Quader Molla* (n 13) para. 40.
964 Menon (n 297) 9.
965 Ibid.
966 Rule 9(3) of Rules of Procedure of the ICT-BD.
967 Rule 18 (4) of Rules of Procedure of the ICT-BD.
968 *Mujahid* (n 502) para. 36.

communications with their counsels, in prison as and when prayed for and this right was exercised by *Ali Ahsan Muhammad Mujahid* .[969]

The ICT-BD, since Ali Ahsan Mujahid's detention, had received several applications seeking his release on bail and the issue was dismissed by way of fair hearing after giving sufficient opportunity to both sides.[970] It appears the tribunal had taken maximum caution to ensure that an accused is free from 'coercion and torture of any kind and ordered the presence of an engaged counsel and a doctor at a room adjacent to the room of the 'safe home' where the Investigation Agency was allowed to interrogate the accused'.[971] The judgment of *Mujahid* mentioned that the Tribunal under its discretionary power given by Rule 46A of the RoP, has adopted numerous practices for ensuring a fair trial by providing all possible rights to the accused.[972] For instance, one of the accused was allowed to bring home-cooked food and maintain specials diets.

6.4.5 Procedure: Due process and evidential flexibility

A particular judge stated that every legal system must be fair, not only fair but visibly fair and referred the case of *ex parte Sussex Justices,* that justice not only is done but must be seen to be manifestly and undoubtedly done.[973] So, justice must be seen to be fair and flawless and must be free from all kinds of imperfections.[974] He is of the opinion that as far as justice is concerned, the ICT-BD has delivered fair judgments based on the evidence before the tribunal.[975]

969 Ibid para. 18.
970 Ibid.
971 Ibid.
972 Ibid.
973 J1-Q-A2
974 J1-Q-A2
975 J1-Q-A2

A defence lawyer stated that the judges were lenient towards documentary evidence; otherwise, it would not have been possible to prove a single fact.[976] He said that it would be the right approach to establish the tribunal under the international body; the tribunals could have more support from the international body, and it would attract fewer criticisms and public faith in the tribunals would increase.[977] He also said that if the tribunal could be established under the guidance of the United Nations, then the admissibility of evidence could be applied differently and the accused would feel more secure.[978] Another defence lawyer stated that, 'the judges have adopted a favourable approach accepting evidence which has raised the issue of bias and the judges accepted a lot of hearsay evidence in a 'dangerous way'.[979] However, it appears from the case of *Sayeedi*, that the number of oral evidence was coupled with documentary evidence, and it was proved beyond a reasonable doubt that the Mr Sayeedi was a prominent member of the auxiliary force and he had actively participated in different atrocious activities in association with the Pakistani occupation forces.[980]

Another participant stated that 'in the case of *Quader Molla*, an issue arose when a prosecution witness was asked about the accused shirt's colour during the trial and the witness provided two different versions of the colour'.[981] He explained that, 'this is a serious inconsistency in the domestic criminal law, but it is not an issue in international criminal law'.[982] He explained that, 'here the question is, did the person know that he has to give evidence after 40/45 years and he had to memorise the colour of the shirt? If the answer is no, then this type of inconsistency is not a problem for international criminal law evidence'.[983] He further stated that, 'it is clearly mentioned similar to the Nuremberg Tribunal that this law [evidential

976 DL2-Q-C2
977 DL3-Q-C2
978 DL3-Q-C2
979 DL3-Q-C2
980 *Sayeedi* (n 55) para. 84.
981 P5-GDNC-Q-B
982 P5-GDNC-Q-B
983 P5-GDNC-Q-B

law of ICT-BD] will not be guided by conventional evidence Act'. He said the defence team in the case of Quader Molla raised the conventional evidence Act issue and for this reason, the tribunal did not give him the severest punishment.[984] He further explained that the prosecution raised the argument in their favour that, the tribunal was leaning towards the conventional evidence Act (e.g. domestic criminal law evidence Act) and Mr Molla was not only a member of the Al- Badar but also a leader and he has to take the superior responsibility for being a leader.[985]

A particular defence lawyer stated that, 'the evidence law was relaxed and it did give extra benefit to the prosecution team to prove allegation'.[986] He added that if a normal standard would be followed, there could be very little chance to prove the allegation against the accused.[987] However, a judge of the tribunal stated that, 'during this trial, we had to consider witnesses and evidence very cautiously because of significant time-lapse, we had to rely on corroborative evidence'.[988] He acknowledged that they had to adopt a flexible approach for admitting written witness statement for both the defence and prosecution for clarity.[989] In chapter 7 of this thesis, a detailed analysis of the evidential matters of the ICT-BD has been discussed.

6.4.6 Procedure: Right of Appeal

Majority of the interviewees stated that the accused before the ICT-BD have the right to challenge the verdicts of the tribunal to the Supreme Court of Bangladesh. Further, a particular participant also confirmed that the decision of the AD was easily reviewable.[990] He explained that there could be two hearings before the AD and there was no such thing in the

984 P5-GDNC-Q-B
985 P5-GDNC-Q-B
986 DL3-Q-B1
987 DL3-Q-B1
988 J3-Q-C1
989 J3-Q-C1
990 J1-Q-C

Nuremberg trials, and finally, the convicts have a right to apply for clemency to the head of state under the constitution of Bangladesh.[991] This particular participant is of the opinion that the accused persons have a much higher right in the ICT-BD than those accused under the Nuremberg Charter.[992]

Concerning the right of appeal of the prosecution, a participant stated that, initially there was no right of appeal before the ICT-BD for the prosecution against the conviction, they had limited right in case of acquittal, but the convict had a certain appeal right.[993] So, the law had to be changed to make it equal in a sense that, since the defence or the convict has a right of appeal, there should always be a right of appeal for the prosecution.[994] He said that, 'the right of appeal should not be unbalanced, it should be balanced and it should be reciprocatory'.[995] As a result, the parliament amended the law giving the prosecution right of appeal against conviction and against the sentencing.[996] The judge further narrated that, opinion was sought from *amicus curiae* regarding amendment of the law.[997]

Equality of arms of due process is that, both the prosecution and defence should have the same level of rights. This issue was addressed by the ICT-BD in the case of *Chief Prosecutor v Abdul Quader Molla.* The majority of the interviewees are of the opinion that the ICT-BD made an important development in relation to the equality of arms in the due process by enabling the prosecution a right of appeal against the conviction. This aspect of development had not been seen in any previous ICT's. However, this amendment had attracted criticisms from around the world because the 2013 amendment of the ICT Act 1973, enabled the prosecution to secure capital punishment for the accused.

991 J1-Q-C
992 J1-Q-C
993 J1-Q-C2
994 J1-Q-C2
995 J1-Q-C2
996 J1-Q-C2
997 J1-Q-C2

6.4.7 Procedure: Rights of the defence lawyer

One of the defence lawyers stated that he felt the typical situation of ordinary court proceedings which he previously observed was not seen at the tribunal.[998] He said that there was a bit of an 'anxious situation' at the ICT-BD. He added that entry to the tribunal was subject to strict check-up.[999] He alleged that, 'the way normal courts are open; this openness could not be seen at the tribunal'.[1000] There was a lot of security which created fear in the minds of the defence lawyers. This particular participant stated that their 'bodies were searched, mobiles were taken away, and they felt difference [discrimination] between [the] prosecution and defence lawyer'.[1001]

Another defence lawyer quoted, 'I felt [an] informal discriminatory policy towards defence lawyers compared to the prosecution lawyers.[1002] He said, '...the way we were checked, searched and mobiles taken; those were not seen for the prosecution lawyers'. He further narrated that '...although, both we and the prosecution are lawyers but they [prosecution lawyers] were treated specially'.[1003] He added that the environment of the ICT-BD was not equal for prosecution and defence lawyers as it was prosecution friendly.[1004] On another point, a defence lawyer stated that '..of course I think it is important to establish a tribunal to try and assess the mass crimes which were committed during the country's liberation war in 1971 but at the same time, I think it is important to see proper legal application to serve justice'.[1005] Another defence lawyer stated that, '...there were [was] a lot of security which created fear in our minds [defence lawyers]'.[1006]

998 DL-1-Q-C2
999 DL-1-Q-C2
1000 DL 1-Q-C2
1001 DL 1-Q-C2
1002 DL 2-Q-A2
1003 DL 1-Q-C2
1004 DL 1-Q-C2
1005 DL2-Q-B3
1006 DL-1-Q-A

A particular defence lawyer stated that in the course of collecting evidence for the case of Mr Sayeedi,[1007] defence teams went to *Pirujpur* where they were harassed by the Chatra League [student wing of the AL party].[1008] He said they went to a police station to seek help, but the police officer was not available at the office, and they had no help from the state agency.[1009] He further stated that except for the trial period in the court, they were always afraid of the authority.[1010]

However, a particular judge stated that the interests of the defence team had been fully protected and they have been given all the opportunities to put up their case based on evidence and submission.[1011] He further observed during the trial that the defence lawyers were very competent.[1012]

Rights of the defence lawyers are essential to ensure a fair trial and lack of this element may undermine the credibility of a tribunal. Two defence lawyers, who have participated in the interview, stated that they did not receive equal treatment compared to the prosecution lawyers. The Human Rights Watch reported that they had received complaints from defence lawyers stating that the authorities were harassing them and that they were under surveillance.[1013] However, it is not clear why they were under surveillance. Whether the defence lawyers were under surveillance for their own security or any potential conspiracy is not clear. However, for the sake of fair trial, it is important that the defence lawyers can work independently and are not being intimidated or harassed by the authorities.

1007 *Sayeedi* (n 55).
1008 DL-1-Q-A2
1009 DL-1-Q-A2
1010 DL-1-Q-A2
1011 J1-Q-A2
1012 J1-Q-A2
1013 Human Rights Watch, 'Bangladesh: End Harassment of War Crimes Defence Counsel' (17 October 2012) available from https://www.hrw.org/news/2012/10/17/bangladesh-end-harassment-war-crimes-defence-counsel accessed 17 November 2018.

6.4.8 Comments: Experience of judges and lawyers

One of the prosecution lawyers stated that the prosecution team was formed with the most senior criminal law lawyers. Mr Golam Arif Tipu was initially appointed as the chief prosecutor, and the interviewer was appointed as the prosecutor at the same time. He described that, previously, there was no example of such a tribunal in Indian- sub-continent, and for this reason, the application of ICL at the domestic tribunal was a totally new judicial concept in Bangladesh.[1014] He also clarified that the ICT Act 1973 has no relation with Bangladesh's domestic criminal evidence related law.[1015]

One of the ICT-BD judges stated, 'the definition, evidential aspect and punishment guidelines were all new to them.'[1016] He further added that over time, the tribunal gained competency to deal with the crimes under international law.[1017]

A particular prosecution lawyer stated that, '…initially the people associated with the tribunal had no prior experience in the field of international criminal law'.[1018] However, they were experienced in the domestic criminal law sector.[1019] Although, they did not have any practical experience, they had observational experience of how other international crimes tribunals operate. He further stated that, prosecution developed their skills in relation to the principles and practices of international crimes as the ICT-BD moved forward.[1020] He also stated that the prosecution team had been given sufficient opportunity to develop their skills to deal with the crimes and trial process.[1021] When a question was put forward to him on whether the legal framework of the ICT-BD enabled the prosecution team to perform their

1014 PL4-Q-C2
1015 PL4-Q-C2
1016 J4-Q-C1
1017 J4-Q-C1
1018 PL3-Q-C3
1019 PL3-Q-C3
1020 PL3-Q-C3
1021 PL3-Q-C3

duties effectively, he stated that, '…the legal framework of the tribunal was sufficiently precise which made it possible for the prosecution to deal with the crimes'.[1022]

In relation to the efficiency of the prosecution, a particular interviewee is of the opinion that although the prosecution team built up some experience and skills, there is still further scope for development.[1023] He said that he is aware that the prosecution team has a link with other international tribunal prosecutors, but a more formal link was necessary.[1024] Another politician stated that, '…as far as I know, initially there was a problem for the lawyers and judges to understand the law because previously no tribunal was ever established in similar nature'.[1025] He, however reaffirmed that, '…our lawyers and judges were experienced with the traditional criminal justice system, which included Code of Criminal Procedure (CrPC) and this traditional law did not define what genocide or war crimes was'.[1026]

The majority of the interviewees were of the opinion that, the prosecution team took a bit of time to understand the law and definitions of the crimes.[1027] The ICT Act 1973 was in English, and it was later translated into Bengali for a better understanding of the governing Act.[1028] One of the politicians stated that, '…an easy reading book was prepared by Justice Mohammad Golam Rabbani where every single section of the 1973 Act was explained in Bengali, and the Nuremberg Tribunal was our role model'.[1029]

Muhammad Rafiqul Islam, a professor of Bangladeshi origin in Australia's Macquarie University Law School, stated in an interview that, '…from [the] government's perspective, I would say that certainly, the government was not well prepared for the tribunal because if you consider the current Cambodian Tribunal you would see that no Tribunal started functioning

[1022] PL3-Q-C3
[1023] P3-JAPA-Q-C2
[1024] P3-JAPA-Q-C2
[1025] P5-GDNC-Q-C1
[1026] P5-GDNC-Q-C1
[1027] P5-GDNC-Q-C1
[1028] P5-GDNC-Q-C1
[1029] P5-GDNC-Q-C1

without proper research.'[1030] He further stated that the Cambodian government did not carry out their own research, but they hired Yale Law School to conduct research on their behalf, but in Bangladesh, no official or institutional research was carried out before establishing the Tribunal.[1031] He opined that initially in the process of establishing the ICT-BD, there was a lack of intellectual issue.[1032] He said, 'when we talk about justice it is not only political or socio-economic, it is also an intellectual issue'.[1033] He further stated that, '… the judges, prosecutors or defence lawyers of the ICT-BD never formally studied international criminal law; however, they are developing their skill gradually in English, which we called learning by doing'.[1034] So he claimed that judges, investigators, and lawyers did not have the necessary knowledge before starting the tribunal; instead, they are learning through the working process of the tribunal.

One of the prosecution lawyers stated that, '…the judges of the tribunal are very experienced, and to my knowledge, no other tribunals appointed such experienced judges from the highest court of a country'.[1035] He further stated that any party might appeal to the AD of the supreme court of Bangladesh which is the highest judicial forum of Bangladesh.[1036] It is important that the tribunal decisions are subject to review by the highest court of Bangladesh. This is the reflection of safeguards to ensure due process. One of the tribunal judges confirmed that, '…the prosecution team was given practical observational training similar to [the] international criminal tribunal'.[1037] He further asserted that, '…the defence team got direct assistance from London based barristers who prepared their submission and legal

1030 Muhammad Rafiqul Islam's interview on International Crimes Tribunal Bangladesh (December 2015) < https://www.youtube.com/watch?v=qR2_RfsSTlg> accessed 2 June 2018.
1031 Ibid.
1032 Ibid.
1033 Ibid.
1034 Ibid.
1035 PL1-Q-C2
1036 PL1-Q-C2
1037 J4-Q-C1

arguments'.[1038] However, no formal training like Continuous Professional Development (CPD) is available either for lawyers or for the judges of the ICT-BD. Another judge of the tribunal stated that initially at the pre-trial stage, alleged perpetrators were brought to the tribunal through proper investigation and they were self-recognised criminals and most of them were found guilty.[1039] A particular politician added that all the prosecutors are senior lawyers with good standing and the prosecution sought the international legal opinion which enhanced the experience of the lawyers.[1040]

In explaining the experience of the defence lawyers, a particular judge stated that some of the lawyers from the defence before both; the tribunal and the AD of the Supreme Court of Bangladesh were highly equipped with all the decisions delivered by the Nuremberg Tribunal and other tribunals.[1041] In his opinion, defence lawyers were more competent than the prosecution lawyers.[1042]

The majority of the interviewees stated that the lawyers and judges of the ICT-BD had no practical experience of dealing with international crimes. Although the judges and prosecution team were given training, nothing as such is suggested in relation to the defence team except the fact that defence team received direct support from a London based firm of barristers. Most of the participants are of the opinion that initially, the people associated with the ICT-BD were inexperienced but gradually, they have developed their capacity. However, it appears from the early judgments that the lack of initial experience did not affect the final judgment and the observations made by the Court of Appeal broadly confirmed the same.[1043] However, there were some inconsistent practices of sentencing, which went to the Court of

[1038] J4-Q-C1
[1039] J3-Q-C1
[1040] P4-GF-Q-C2
[1041] J1-Q-A2
[1042] J1-Q-A2
[1043] *The Chief Prosecutor v Abdul Quader Molla,* Criminal Appeal No.24-25 OF 2013 [17 September 2013].

Appeal for further scrutiny, and the researcher has covered this particular issue in chapter 9 later in this thesis.

6.4.9 Criticisms: Victors' Justice

A defence lawyer stated that the ICT-BD is attempting to serve victor's justice or revengeful justice, and to this extent, the goals of transitional justice are not being achieved by this tribunal.[1044]

A politician of Bangladesh Jamaat-e-Islami party said that, 'there should be some clarification that crimes were committed not only by pro-Pakistani but also by the pro-independent party'.[1045] He claimed that, 'prosecution is only dealing with the pro-Pakistanis, not any rebels who might have committed similar crimes'.[1046] However, another participant stated that, 'this is natural that the State, which succeeded in defeating the violator, will prosecute the perpetrators'.[1047] He further elaborated that the state will include their norms in their legal framework.[1048] He explained that before enacting the ICT Act 1973, the authority of Bangladesh passed 'the Bangladesh National Liberation Struggle (Indemnity) Order, 1973' protecting the rebels from prosecution.[1049] He explained that there is no single tribunal of international crimes, including the Nuremberg and Tokyo tribunals that are free from criticisms.[1050] Nonetheless, it is an obligation for a state to prosecute people who committed crimes under ICL.[1051] He narrated that, 'this may have two different views, one from victorious people and another from defeated persons and I do not want to put any abrupt comment on this point'.[1052] He said that the victor's justice debate was also an issue in the Nuremberg

1044 DL2-Q-C2
1045 P2-BJI-Q-B3
1046 P2-BJI-Q-B3
1047 P4-GF-Q-C2
1048 P4-GF-Q-C2
1049 P4-GF-Q-C2
1050 P4-GF-Q-C2
1051 P4-GF-Q-C2
1052 P4-GF-Q-C

tribunal and there are different views on this point where there may be some controversy too.[1053] He said the accused persons normally claimed that they are innocent from their point of view, but legal analysis, producing evidence, examining witnesses, and reviewing decisions ultimately decide guilt.[1054] So, comparing to other international tribunals, the ICT-BD has followed all the aspect of transitional justice.[1055] The aforementioned politician stated that, 'foreign observers were satisfied with the procedural aspect of the ICT-BD'.[1056]

A small number of participants stated that establishing the ICT-BD was not necessary considering the goals of transitional justice. They supported that an alternative step could have been taken such as truth commissions or reparation. They said that due to the significant time lapse, producing evidence would not be possible if evidential law was relaxed and there may be future judicial debate regarding the trial process.[1057] One of the defence lawyers said, 'as a defence lawyer, I have a limitation, and I cannot tell you many of my observations regarding the tribunal'.[1058] However, the majority of the interviewees stated that the tribunal had taken a good step towards justice and identified principal offenders who were still alive.[1059]

6.4.10 Criticisms: Constitutional issue and Due process

ICT-BD applies domestic law, and the tribunal is not involved with international judges or lawyers.[1060] However, it has also been argued that the ICT-BD is not a 'pure' Bangladeshi tribunal because a 2010 amendment removed some basic constitutional protections given to defendants before other domestic courts in Bangladesh.[1061] So, it seems that Robertson considered the ICT-BD as neither an international nor a purely domestic tribunal. The effects

1053 P4-GF-Q-C
1054 P4-GF-Q-C
1055 PL4-Q-C2
1056 PL4-Q-C2
1057 DL2-Q-C2
1058 DL2-Q-C2
1059 P3-JAPA-C1
1060 Ibid.
1061 Ibid.

of this status of the ICT-BD on due process and fair trial are that: firstly, judges' objectivity may be questioned because there is no international judge; secondly, the ICT Act 1973, as amended in 2010, creates a distinction between the accused before the ICT-BD and the accused before other domestic tribunals in Bangladesh, offering less constitutional rights to the former, giving rise to issues of due process.

Article 47A[1062] of the Bangladeshi Constitution, stated that an accused under the ICT Act 1973 could not go to the higher court for judicial review.[1063] In 2010, a prominent defence counsel of the ICT-BD stated that an accused under the ICT Act 1973 could not invoke Article 26 (Laws inconsistent with fundamental rights to be void); Article 27 (that everyone is equal under the law); and Article 44 (Enforcement of fundamental rights).[1064] He also made reference to Article 35(1) of the Bangladeshi Constitution, which provided a safeguard against retrospective legislation.[1065] He claimed that the ICT Act 1973 is against the rule of law. Moreover, Article 47(1) stated that the rights guaranteed under Article 31 (Right to protection of law), clause 1 of article 35 (protection against retrospective legislation) and 44 (Enforcement of fundamental rights to High Court Division) shall not apply to any person to whom a law specified in clause 3 of Art 47 applied, this means that, if there is a case filed against anybody under the ICT Act 1973, then he cannot bring those rights once accused. This provision is contradictory with the general concept that an accused is presumed to be innocent until proven guilty because if we presume an accused to be innocent, then he should have all the rights granted to any other individual until proven guilty. Furthermore, Clause 3 of Article 47 of the Constitution of Bangladesh provided a barrier for those who are alleged under the ICT Act 1973 to seek remedies from the Supreme Court under the constitution.[1066]

1062 Article 47Aof The Constitution of Bangladesh.
1063 Article 47Aof The Constitution of Bangladesh.
1064 The Legality of the International war crimes (Tribunals) Act 1973, Venue-Hotel Sheraton, Date: 16th April 2010 < https://www.youtube.com/watch?v=Cb7oxkEOvPU> Last accessed 31 May 2018.
1065 Ibid.
1066 Ibid.

One of the main criticisms of the ICT-BD is that, the accused are not allowed to challenge the jurisdiction of the tribunal or bring any constitutional challenges.[1067] Also, the accused are not allowed to rely on the constitutionally protected right of not to be charged on any retrospective legislation. This created an anomaly given that the accused are the citizens of Bangladesh; they should be able to rely on constitutional rights.

In relation to Article 35 of the Constitution, although in principle the application of retroactive law is not allowed in criminal law, retroactive statutes are allowed in certain circumstances. The ICT Act 1973 is a constitutionally protected legislation; anything under the Act cannot be unconstitutional. Also, the Australian High Court allowed the retrospective application of a national war crimes law in the *Polyukhovich* case[1068] stating that, 'the retrospective operation of the Australian War Crimes Act was authorized by the constitution since the operation was a matter incidental to the execution of a power vested by the constitution in the parliament'.[1069] Also, the ICTY, ICTR, SCSL, and other ad hoc Tribunals backed by the UN have been constituted under their respective retrospective statutes, and only the ICC is founded on prospective Statute [Rome Statute].[1070]

Although, there are some anomalies in relation to the constitutional rights of an accused before the ICT-BD, in the case of *Quader Molla,* it was stated that provisions of the ICT Act 1973 and the rules offer adequate compatibility with the rights of the accused enshrined under Article 14 of the ICCPR.[1071] The amendments of the ICT-BD's RoP included right to the presumption of innocence, right to a fair and public hearing with counsel of their choice, right to bail, the prohibition against double jeopardy, protection against self-incrimination, burden of proof beyond reasonable doubt and provision for a victim and witness

1067 Knoops (n 285) 24.
1068 Rahman & Billah (n 26) 5.
1069 *Polyukhovich v Commonwealth*, High Court of Australia (14 August 1991).
1070 *Mujahid,* (n 502) para. 3.
1071 *Abdul Quader Molla* (n 13) para. 40,

protection scheme.[1072] It is further stated that, the ICT-BD not only considered its own due process principles but also followed settled jurisprudence from other similar tribunals.[1073]

6.4.11 Criticisms: Openness and Fairness

A particular participant stated that, '…in terms of fairness, the tribunal could be more open, it is not easily accessible, although there is a serious security concern'.[1074] He said there was a confusion regarding the review and the Attorney General opined that there is no scope of review for the ICT-BD verdict; however, the right of review was subsequently given to the accused.[1075] He further stated that, '…a person associated with the tribunal said that jail code would not be followed for the war criminals, but 'these were just saying[s], not applied'.[1076] But according to him, 'these comments shape public perception of the tribunal and created doubt for few people but not many'.[1077] He opined that there could be a consented mechanism to work together.[1078]

Another politician stated that, 'one or two foreign lawyers could be allowed by way of gaining permission from Bar Council for the sake of fairness'.[1079] He said in the case of the '*Agartala Conspiracy case'*,[1080] a foreign lawyer was allowed by the Bar Council of East Pakistan.[1081] However, another participant stated that 'right to appoint foreign lawyers was also given to the defence team and the accused, subject to the long-standing practice that only Bangladesh Bar Council authorised persons can practice law in the territory of Bangladesh'.[1082]

1072 Human Rights Watch, 'Bangladesh: Guarantee Fair Trials for Independence-Era Crimes' (11 July 2011) available from https://www.hrw.org/news/2011/07/11/bangladesh-guarantee-fair-trials-independence-era-crimes Last accessed 15 November 2018.
1073 *Abdul Quader Molla,* (n 13) p.40.
1074 P3-JAPA-Q-C2
1075 P3-JAPA-Q-C2
1076 P3-JAPA-Q-C2
1077 P3-JAPA-Q-C2
1078 P3-JAPA-Q-C2
1079 P3-JAPA-Q-C2
1080 The Agartala Conspiracy Case was a sedition case in Pakistan during the Ayub Regime against Awami League, brought by the government of Pakistan in 1968 against Sheikh Mujibur Rahman, a political leader of East Pakistan.
1081 P3-JAPA-Q-C2
1082 PL4-Q-C2

He said, ‘it is similar to other common law jurisdiction[s] such as England, if I go to England, I will not be allowed to practice law in their country'.[1083] He further added that the ICT-BD is conducting trials publicly and international media are reporting its activities, and there should not be any issue regarding the openness.[1084]

6.4.12 Criticisms: Due process and political interference

In relation to political interference, most of the interviewees seem to be supportive of the tribunal and deny any political interference. However, it should be noted that these interviewees are the supporters of the tribunal, and their views may be influenced by their support of the tribunal.

A particular participant stated that, ‘I agree that trial is necessary to prosecute criminals, but it also needs to be fair and free from political influence’.[1085] Concerning political interference, a participant judge stated that, ‘personally I never got any request or recommendation from any political person, not even opposition parties’.[1086] He believes there is no influence by any political party.[1087] All the judges, who took part in the interview, are of the opinion that they performed their duties independently and impartially, and they were not politically motivated or influenced.

A particular participant stated that there is a general perception that the tribunal is politically motivated because over time, the accused rehabilitated into Bangladeshi politics.[1088] Another interviewee stated that the establishment of the tribunal was largely supported by the AL and other leftist parties in Bangladesh.[1089] He said, ‘we wanted a neutral tribunal by

1083 PL4-Q-C2
1084 PL4-Q-C2
1085 P2-BJI-Q-B3
1086 J2-Q-C2
1087 J2-Q-C2
1088 P1-BNP-Q-B
1089 P2-BJI-Q-B3

international bodies'.[1090] A defence lawyer stated that the AL government established the tribunal to punish their opponent political party leaders rather than to serve justice.[1091] He further added that, 'it is apparent that they did not establish any tribunal in 1996 when they came into power because during that time Jamaat was not very popular and powerful'.[1092] He opined that Jamaat came into power jointly with the BNP in 2001 and the AL party feared that they would not be able to come to power if BNP and Jamaat were together, so they established the tribunal for political gain.[1093]

However, another participant stated that the establishment of the tribunal is basically the repetition of Bangabandhu's[1094] words that war criminals will be tried on the soil of Bangladesh and, 'that was translated into law later and that commitment was reflected in recent times'.[1095] However, a BNP backed politician stated that, 'the AL party established the tribunal and most of the accused are members of a particular political party like Jamaat-e-Islami and a couple of BNP leaders'.[1096] He further explained that, 'since those people are the opposition of the current ruling party, so there is a possibility of political motive conducting the tribunal'.[1097] A defence lawyer corroborated that the AL government established the tribunal to punish their opponent political party leaders.[1098]

A prosecution lawyer stated that, 'I do not know in what respect the tribunal is politically motivated'.[1099] He said that the governing Act of the tribunal was enacted in 1973 and it was the long term promise to prosecute the perpetrators of the 1971 and allegation of political

1090 P2-BJI-Q-B3
1091 DL-3-Q-A
1092 DL-3-Q-A
1093 DL-3-Q-A
1094 Bangabandhu Sheikh Mujibur Rahman, leader of Bangladesh Liberation War
1095 P4-GF-Q-A
1096 P1-BNP-Q-B
1097 P1-BNP-Q-B
1098 DL3-Q-B3
1099 PL3-Q-C3

manipulation is nothing but a generic comment.[1100] A BNP politician stated that, 'from our party, we say that we want justice for the crimes committed during 1971 by collaborators but it should be free from political gain'.[1101] He further stated that since the tribunal has started functioning, they have some reservations in relation to the investigation process that there may be a political motive behind the tribunal.[1102]

A judge of the tribunal opined that the crimes committed were in a context of political turmoil and the killings were politically motivated.[1103] However, there is no relationship with the judicial process and politics.[1104] The judge further confirmed that, 'the tribunal is independent of the government or the authority and the judges are independent'.[1105] The judge further clarified that, 'there may be some benefit enjoyed by particular political party/parties, but this must be separate from political interference'.[1106] A prosecution lawyer stated that the ICT-BD is a domestic tribunal for international crimes, and it was established to serve justice primarily to address the atrocities committed in 1971.[1107] He further explained various reasons for establishing the tribunal that:

> Firstly, the ICTA 1973 was enacted to serve justice to the victims of 1971 and to prosecute the perpetrators of war crimes, crimes against humanity, genocide, and other gross violation of human rights. However, due to political instability, no tribunal could be established until 2010. Secondly, the ICT-BD was established to end the culture of impunity, to serve justice to the victims and their families. Thirdly, the

1100 PL3-Q-C3
1101 P1-BNP-Q-A2
1102 P1-BNP-Q-B
1103 J3-Q-C3
1104 J3-Q-C3
1105 J3-Q-C3
1106 J3-Q-C3
1107 PL4-Q-B3

government of Bangladesh is under an obligation to prosecute perpetrators under international criminal law.[1108]

A politician stated that, 'critiques are simply repeating that the ICT-BD is a politically motivated court, it has no standard, it is not following due process; it is a Kangaroo court etc'.[1109] He also stated that, 'our continuous effort made it possible to make the trustworthy person understand that ICT-BD is functioning following recognised international standard'.[1110] He said even the US Ambassador Mr Stephen Rapp, expressed that the ICT-BD was functioning well.[1111] He added that the British lawmakers and Swedish parliamentarians have acknowledged that the tribunal of Bangladesh is a role model for other countries seeking delayed justice.[1112]

6.4.13 Criticisms: Role of media and perception of due process

The media has played an essential role in influencing public perceptions of the operations of the ICT-BD. The majority of the interviewees are of the opinion that in some high-profile cases, the accused appointed international lobby firms to criticise the ICT-BD. Also, some interviewees suggested that the international media had played a significant role in forming a negative perception that the ICT-BD was not following due process. A politician from AL stated that the AL party had to face a large volume of negative propaganda since the ICT-BD began operating.[1113] He said that media sources like BBC and Al-Jazeera were misguided by the propaganda and created a hostile image for the AL party.[1114] He also stated that politically affiliated people who are involved with many organisations and who have contact with many organisations have passed an incorrect message to the world that the ICT-

[1108] PL4-Q-B3
[1109] P5-GDNC-C3
[1110] P5-GDNC-C3
[1111] P5-GDNC-C3
[1112] P5-GDNC-C3
[1113] P6-ALP-Q-C3
[1114] P6-ALP-Q-C3

BD is punishing Islamist politicians or clerics.[1115] In fact, many people from Bangladesh Jamaat-e-Islam were initially accused of crimes under the ICT Act 1973 for their involvement with the atrocities in 1971. After the liberation war, those people became leaders of the religion-based political party.

A particular participant stated that, 'it has been acclaimed worldwide that there has been criticism, there is no doubt about it, you cannot shout at the mouth of the critiques'.[1116] He said critiques will always criticise anyway but, 'it is generally accepted that the standard of trial and standard of AD's decisions in Bangladesh have been world-class'.[1117] He also explained that, '…sometimes, it is even stated that the standard maintained by the Bangladesh Tribunal and the AD have been better and superior in some aspect to the judgments passed by other tribunals'.[1118] So, the decisions of the ICT-BD and AD of the Supreme Court in Bangladesh can enrich the applicability of international law domestically.[1119]

A prosecution lawyer stated that, 'the Human Rights organisations were misguided by the appointed lobbyists which supported the perpetrators'.[1120] A particular interviewee stated that, 'from previous experience, it can be seen that media like BBC, Al-Jazeera and other international media have their own policy or criteria to assess regional or national problems and most of the time they perform wrong assessment'.[1121] He gave the example of the Vietnam war and the Liberation War of 1971 and said that, 'media did wrong assessment'.[1122] He said that the media failed to understand or report that in the Bangladeshi situation, perpetrators or their associates were in power for a long time, and they have destroyed most of the

[1115] P6-ALP-Q-C3
[1116] J1-Q-C1
[1117] J1-Q-C1
[1118] J1-Q-C1
[1119] J1-Q-C1
[1120] PL4-Q-B1
[1121] P6-ALP-Q-B1
[1122] P6-ALP-Q-B1

evidence.[1123] Another politician from Jatiya Party said that a few Muslim majority countries (e.g. Turkey, Pakistan and some middle eastern countries) were critical when the tribunal delivered judgments against the leaders of the Bangladesh Jamaat-e-Islami party.[1124] He said this was mainly because of Pakistan's sympathetic view towards the accused under the ICT Act 1973 fearing that in future, Bangladesh may attempt to prosecute their army officers who took part in the atrocities of 1971.[1125]

6.5 Conclusion and Interim findings

The generalised concept of due process was articulated in Article 14 of the ICCPR, and it seems from the interview data that the majority of the interviewees are of the view that the ICT-BD has provided appropriate due process safeguards to the accused.[1126] A particular interviewee stated that after detailed deliberation and following expert advice, the parliament unanimously adopted the ICT Act 1973 to, '…provide for detention, prosecution, and punishment of persons of genocide, crimes against humanity, war crimes and other crimes under international law, and for matters connected therewith'.[1127]

The interim findings show that, majority of the respondents interviewed were of the view that the ICT Act 1973 and its RoP afford all the standard fair trial safeguards to the accused. However, there are conflicting opinions provided by some politicians and defence lawyers that in practice, due process principles have not been followed appropriately.[1128] It is important to note that this data provided by the politicians and defence lawyers may be subject to political bias.

[1123] P6-ALP-Q-B1
[1124] P3-JAPA-Q-B2
[1125] P3-JAPA-Q-B2
[1126] PL4-Q-B1
[1127] Preamble of the ICT Act 1973, available at < https://www.ict-bd.org/ict1/pdf/The%20Act%20of%201973.pdf> last accessed 15 June 2016.
[1128] DL2-Q-C2.

The majority of the interviewees opined that the ICT-BD's foundation was based on the Nuremberg Charter and for this reason, the governing Act of the tribunal had to be amended to ensure it reflected contemporary due process principles. Whereas the Nuremberg tribunal had no right of appeal to a higher court or a provisional release option, the ICT-BD made these due process safeguards available to the accused persons before it. This distinguishes the tribunal from other international tribunals and in the researcher's opinion, can set a contextual precedent for other South Asian and Muslim majority countries to follow in order to provide a fair justice mechanism not only to the victim but also to the accused.

In relation to substantive due process, a particular interviewee stated that the main objective of enacting the governing Act of the ICT-BD was to ensure due process. Even Robertson opined that the ICT Act 1973 was a masterpiece in its time. However, the concept of due process has evolved significantly due to the development of human rights and the contemporary ad hoc and hybrid tribunals such as ICTY, ICTR and SCSL. For this reason, the government of Bangladesh appointed the Bangladesh Law Commission to review the 1973 Act, and the scope of the Act was broadened so that anyone within the territory of Bangladesh who has committed crimes under ICL can be prosecuted under the Act. Also, several fair trial rights from Article 14 of the ICCPR were included after amending the ICT Act 1973 and the RoP of the ICT-BD. Also, the judges have used their discretion and allowed interlocutory appeals, bringing home-cooked food and treatment at the choice of the accused.

In relation to procedural due process of the ICT-BD, there are divided opinions; the judges of the tribunal stated that procedurally, there was no short of the quality of the due process. The majority of the interviewees confirmed that sufficient time was given to the defence team to prepare their case, and interlocutory appeal rights were available. It is also confirmed that the defence team has used interlocutory appeals on numerous occasions. On the other hand, the politician of Jamaat-e-Islami and defence lawyers provided a contradictory opinion that in practice, there was no proper procedural due process for the accused.

The judgments of the ICT-BD suggest that there is no 'one size fits all' concept of due process rather this concept is relative, and the ICT-BD has defined the due process in line with the national wishes, long denial of justice and recognised international norms and jurisprudence. A critical analysis suggest that minimum standard of due process has been provided to the accused under the ICT Act 1973 because RoP was amended in 2011 to include right to the presumption of innocence, right to a fair and public hearing with counsel of their choice, right to apply for and be granted bail, prohibition on convicting a person twice for the same crime, prohibition on requiring the accused to confess guilt, prosecution bears the burden of proving guilt beyond reasonable doubt, creation of a victim and witness protection system.[1129] The Human Rights Watch commented on the amendments stating that, the ICT-BD's RoP addresses the key problems of the due process issues but not all the aspects such as clarifying the definition of crimes, and victim and witness protection.[1130]

The ICT Act 1973 was given special protection under Article 47A of the Bangladesh Constitution, that means provisions of this particular Act cannot be challenged on constitutional grounds. Many critics, including Robertson, Menon, and Chopra argued that since the subsequent amendment of the Act excluded the accused from safe constitutional guards, it has an impact on the quality of the due process. However, Professor M Rahman argued that, the validity of Constitution derives from its people itself and Bangladesh is a democratic country so it is entirely a domestic judicial matter of Bangladesh on how they define due process applicability to the accused under national criminal code and the accused under the 1973 Act.[1131] Bangladesh has secured independence through a liberation war (the war was

1129 Jon Lunn and Arabella Thorp, 'Bangladesh: The International Crimes Tribunal' (3 May 2012) House of Commons: International Affairs and Defence Section 3.
1130 Bangladesh: Guarantee Fair Trials for Independence-Era Crimes, *Human Rights Watch*, 11 July 2011 available from https://www.hrw.org/news/2011/07/11/bangladesh-guarantee-fair-trials-independence-era-crimes Last accessed 15 March 2019
1131 Rahman & Masum Billah (n 26) 18.

unjustly imposed) and the proclamation of Bangladesh independence forms the genesis of the Bangladeshi Constitution.[1132]

The safeguard against retrospective legislation is not applicable for law which is designed to prosecute and punish the international crimes which existed as crimes at the time of their commission. Similarly, the crimes committed in 1971 in the territory of Bangladesh were recognised as crimes under international law. The ICT Act 1973 criminalises acts, which were crimes under customary international law. Also, Bangladesh is a party to the ICCPR, and Article 15(1) permits post-facto legislation to try and assess crimes under ICL.

In relation to the rights of an accused during the investigation stage, it appears that although the suspects have the right to bail if an investigation cannot be completed within one year, in practice, no one has been granted bail by the tribunal due to lack of progress during investigation stage. It appears that the investigation agency was able to complete investigation within the stipulated timeframe. This stipulation of time is significant because other international criminal tribunals mentioned a reasonable time without giving a time frame. In terms of clarity and arbitrary detention, this aspect of the ICT-BD may be considered as a small contribution to the development of ICL and transitional justice.

The ICT-BD has granted bail to the accused on a few occasions on health grounds. The defence team attempted to take the benefit of health grounds in the case of the *Chief Prosecutor -Vs-Muhammad Shahidullah* where the accused was on bail due to health issues. In this case, it was argued that the accused was physically incapable due to illness and also mentally impaired, defending his case if a charge is framed.[1133] Subsequently, the prosecution submitted that it was important for the accused to understand the charge against him when the charge is framed and if the suspect is mentally impaired then proceedings should not

1132 Ibid.
1133 *The Chief Prosecutor Vs Muhammad Shahidullah,* ICT- BD Case No.07 of 2017 [Order No.06 of 25.02.2018].

progress unless the suspect's mental soundness is confirmed.[1134] The tribunal directed to refer him to the Civil Surgeon of Dhaka to ascertain his mental soundness. Very recently, in April 2019, an accused of ICT-BD has been granted bail on health grounds. The accused Gulzar Hossain Khan, has been granted bail on three conditions; firstly, he should respond whenever the court summons; secondly, he must maintain contact with his Dhaka based relatives and thirdly he cannot contact the witnesses of the case.[1135]

In relation to the experience of the lawyers, the majority of the interviewees stated that the people involved with the tribunal developed experience over time. The prosecution lawyers that were interviewed stated that they were experienced lawyers dealing with national criminal law, but they had no prior experience dealing with the issue of ICL and a new set of evidential law.

One of the most important findings is that tribunals dealing with international crimes often attract the attention of the international community for apparent reasons. There are various factors such as international lobbying, diplomatic pressure, and the negative role of media, which might have been affected the credibility of the ICT-BD. The authority should have an active intellectual, strategic policy combatting these issues. However, in the situation of Bangladesh, initially, there seemed to be an intellectual gap prior to establishing the ICT-BD. No formal research was conducted before establishing the tribunal.

Even if we consider the Cambodian Tribunal, it appears that their tribunal did not start functioning without appropriate prior research. However, in Bangladesh, no official or institutional research was carried out before establishing the tribunal. Majority of the interviewees referred to the fact that they never formally studied ICL as a discipline. They did

1134 Ibid.

1135 Mizanur Rahman, 'War crimes: Accused gets bail on health grounds' *Dhaka Tribune* (Dhaka, 3 April 2019), available from < https://www.dhakatribune.com/bangladesh/court/2019/04/03/war-crimes-accused-gets-bail-on-health-grounds> Last accessed 10 April 2019.

not learn before starting the tribunal; instead, they are learning through the working process of the tribunal. However, a particular judge stated that the initial lack of experience did not affect the judgments or justice, which has been reflected by the comments made by the AD of the Supreme Court of Bangladesh. The defence lawyers or the opposing politicians did not raise any concerns regarding the lack of experience and whether it had affected the initial judgments because there is a three-stage process before the excluded decision is delivered.

Generally, it is believed that the defence lawyers are in a disadvantageous position in the criminal tribunals compared to the prosecution lawyers. This is because the prosecution lawyers have the advantage of using government agencies (e.g. Police, magistrate and local administrators) in investigating matters and collecting evidence. In terms of equality of arms, this disadvantageous position of defence lawyers is a notable criticism of the due process notion. The defence lawyers of the ICT-BD also raised their concern in this regard. One of the defence lawyers even stated that the lawyers of the defence team had faced discrimination such as extra security checks compared to the prosecution lawyers when entering the tribunal. The limited number of defence lawyers that were interviewed also raised concern that they could not work freely as they felt they were perhaps, under surveillance. However, the prosecution lawyers expressed an opposite view that security of the prosecution lawyers was an important issue. A particular prosecution lawyer stated that even he himself was under threat.

The due process aspect of the ICT-BD is, however, criticised from various quarters. The critics in relation to due process principles alleged that the ICT-BD falls short of internationally recognized standards of due process.[1136] There are allegations that the governing statute is vague, RoP's are unclear in terms of due process. It is also alleged that the accused have not been given sufficient due process rights as they had been interrogated

[1136] War Crimes & The Rule of Law (22 September 2011) *South Asia Journal* available from < http://southasiajournal.net/war-crimes-the-rule-of-law-abeed-hossain/> Accessed 11 September 2017.

without the presence of legal representatives. A particular judge that was interviewed indicated that the allegations were unfounded. Many of the allegations are based on the legal position before amending the RoP in 2011. After the amendments of the RoP, the criticisms were narrowed down.

During the researcher's short stay in Bangladesh in May 2017, the researcher observed that police protection had been given to the prosecution lawyers due to serious concerns regarding security. However, when the researcher had interviewed the defence lawyers, there was no such police protection for them, and when asked if they had sought any police protection from the tribunal, a particular defence lawyer did not provide an affirmative answer. The majority of the interviewees are of the opinion that the defence team being in a financially advantageous position were able to hire international legal experts to assist them in the preparation of their arguments and submission. One prosecution lawyer stated that the defence team had not only hired international legal experts but also hired an international lobby firm to pressure the government and to criticise the tribunal.

Returning to our key question as to the nature of due process in the context of transitional justice in Bangladesh, the ICT-BD offers three important lessons. Firstly, the concept of due process may be defined by referring to the long delay, established historical facts, national wishes and the judicial culture of a particular jurisdiction. The ICT-BD has strived to meet one of the main aims of a transitional justice which is to hear the voices of the people. The due process system in Bangladesh has not only listened to the voices of its own people by protecting the ICT Act under Article 47 of the constitution, but it has also considered international opinions and criticisms and amended the act accordingly. The amendment of the ICT Act shortly before and during the process of ongoing trials have been met with criticisms, but the latter amendments guaranteeing more rights of the accused have been appreciated globally. This could serve as an example to other post conflict countries.

The second lesson that can be learnt from the ICT-BD is that, the ICT-BD has created an opportunity to scrutinize the decision of the tribunal to the highest court of land via right of appeal and review. This is a critically necessary process in countries awarding the death penalty as the highest form of punishment.

The third lesson from the ICT-BD is that, the ICT-BD has not developed an independent appointment body to appoint judges and prosecutors for which it has attracted criticisms. Nevertheless, the reflection of the judgments suggests that there is no evidence of bias and all decisions are taken based on the evidence before the ICT-BD and sufficient reasoning is provided. Even though the appointment of the ICT-BD judges could not be challenged, the decision of the ICT-BD could always be reviewed by the highest court of the land, and the appointment of the highest court judges can be challenged. So, there is a check and balance system at least to ensure that the judgments of the ICT-BD are not legally flawed or erroneous. Overall, considering the judgments, interview data, and opinions of the critiques, it seems that the ICT-BD has blended the notion of due process applied by international criminal tribunals and due process applied by Bangladesh in general.

CHAPTER 7

EVIDENTIAL MATTERS OF THE ICT-BD

7.1 Introduction

This Chapter attempted to analyse the lessons that can be learnt from the operation of the ICT-BD's handling of old evidence and hearsay evidence. In order to answer the main research question, this Chapter analyses interview data collected through semi-structured interviews and various evidential aspects of the ICT-BD with particular reference to the established principles of the historic international criminal tribunals such as Nuremberg trials, ICTY and ICTR and ICC. The historical development of the evidential rules has been given particular attention in assessing whether the ICT-BD has provided any valuable insight into the further development of the evidence rules of ICL and transitional justice. The approach taken by the ICT-BD has also been considered along with the quality of evidence before the ICT-BD. Also, it has been assessed whether the judges gave sufficient reasoning in assessing evidence and to what extent the ICT-BD reflected accepted evidential rules in its practices. Specific focus has been given to the issue of how the ICT-BD dealt with the hearsay evidence and how evidential weight has been assessed considering the cultural context of Bangladesh. The ICT-BD has adopted a cautious approach towards admitting hearsay evidence, without further corroborating evidence the tribunal did not admit hearsay evidence.

7.1.1 Types of evidence

There are two elements in evidence which are, the fact in issue (*factum probandum*) and the evidentiary fact (*factum probans)*.[1137] The fact in issue requires a particular fact to be established and the evidentiary fact is to support the fact in issue establishing the fact to be true.[1138] Primarily, there are two types of evidence; establishing fact such as 'direct evidence'

[1137] Mark Klamberg, *Evidence in International Criminal Trials* (Martinus Nijhoff 2013) 115.
[1138] Ibid 115.

and ‘indirect evidence’ (circumstantial evidence).[1139] In the ICT-BD, both direct and indirect evidence have been used. In both types of evidence, there may be evidentiary facts establishing a particular fact, and collateral facts influencing the probative value of the evidence.[1140]

The Nuremberg Tribunal admitted the evidence which was relevant to establish the true facts including official government documents, the report by the International Red Cross, affidavit, deposition, signed statements, diary, sworn or un-sworn letter and statement, copy of any relevant document and hearsay evidence.[1141] As per section 19(1) of the International Crimes (Tribunal) Act 1973, the ICT-BD is also empowered to admit evidence ‘…without observing formality, such as reports, photographs newspapers, books, films, tape recordings and other materials which appear to have the probative value'.[1142]

7.1.2 Objectives of the Rules of Evidence

It is not the objective of the Rules of Evidence to establish historical truth; instead, it is the main objective of the rules of evidence to establish ‘trial truth' or ‘judicial truth'.[1143] A flexible approach to admissibility of evidence in ICL has been developed since the Nuremberg trial, and weight has been placed on the totality of the evidence. The judges have been given considerable discretion to admit the evidence. There are competing issues such as crime control, fair trial, truth, and expeditious proceedings, which are all interrelated. The complexity of the mass atrocity cases and the absence of juries in such trials may be the reasons for the flexible approach in admitting evidence in international criminal trials.[1144] Article 15 of the ICTY stated that, the judges are empowered to formulate the RPE’s necessary for the proper

[1139] Ibid 117.
[1140] Ibid 117.
[1141] Ibid 342.
[1142] *Sayeedi* (n 55) para. 65.
[1143] Robert Cryer, 'Witness Evidence before the International Criminal Tribunals' (2003) 2 LAW & PRAC INT'L CTS & TRIBUNALS 411, mentioned B V A Röling and A. Cassese, *The Tokyo Trial and Beyond* (Cambridge, Polity, 1992), p. 50.
[1144] Klamberg (n 1137) 416.

administration of justice.[1145] The ICT-BD has also followed a flexible approach on the admissibility of evidence with some safeguards.

7.2 International legal position on Rules of Evidence

The historic Nuremberg tribunal heavily relied on documentary evidence and comparatively, gave lesser rights to the accused persons, and for this reason, the same practice would not be acceptable today due to the subsequent development of the human rights.[1146] The judges of the Nuremberg tribunal however were very flexible. The Nuremberg Charter empowered the judges to produce the necessary rules of evidence and procedure.[1147] Also, judges were from diverse legal systems, and their mixed perspectives on evidence started the development of the evidential aspect of the ICL.[1148]

The Nuremberg Tribunal was not bound to follow the technical rules of evidence because of the large number of accused, the complexity of the cases, and to ensure expeditious procedure.[1149] Article 19 of the Nuremberg Charter provided that, in order to ensure expeditious and non-technical procedure, the tribunal shall admit any evidence if it has probative value.[1150] A critical analysis suggests that the witnesses of the atrocities during WWII were scattered around the world, many official documents were destroyed by the Japanese and for this reason, it was necessary to adopt a flexible approach for admissibility of evidence.[1151] A resemblance of this aspect of the historic international criminal tribunal can also be observed in the Bangladeshi situation where official documents were destroyed over time, and many eyewitnesses have died due to the long denial of justice.

[1145] Article 15 of the ICTY.
[1146] W J Fenrick, 'In the Field with UNCOE: Investigating Atrocities in the Territory of Former Yugoslavia' (1995) 34 MIL. L. & L. WAR REV. 33, 36.
[1147] Article 13 of the Nuremberg Charter.
[1148] Peter Murphy, 'Excluding Justice or Facilitating Justice - International Criminal Law Would Benefit from Rules of Evidence ' (2008) 12 INT'L J EVIDENCE & PROOF 1.
[1149] Nuremberg Trial Final Report Appendix L: Ordinance 7, available from https://avalon.law.yale.edu/imt/imt07.asp accessed 20 November 2018.
[1150] Article 19 of the Nuremberg Charter.
[1151] Klamberg (n 1137) 342.

The judges of the ICTY made their own RPE and amended it twenty-two times to adapt with due process.[1152] Further, the ICTY judges interpreted the RPE inconsistently at different times.[1153] This is an indication of the complexity of the rules of evidence surrounding the application of ICL. The critical issue of formulating evidential rules is to make an adequate balance ensuring expeditious administration of justice and giving sufficient rights to the accused to defend their case.[1154] The judges of the ICTY actually followed the limited guidelines of the Nuremberg and Tokyo Trials and created its own adversarial approach to the evidential rules.[1155]

The general rule on the standard for admissibility defined in ICTY and ICTR Rule 89 is as follows:

> **(A)** A Chamber shall apply the rules of evidence set forth in this Section and shall not be bound by national rules of evidence. (Amended 1 Dec 2000 and 13 Dec 2000)
>
> **(B)** In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.
>
> **(C)** A Chamber may admit any relevant evidence which it deems to have probative value.
>
> **(D)** A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.
>
> **(E)** A Chamber may request verification of the authenticity of evidence obtained out of court.

[1152] Gideon Boas, A Code of Evidence and Procedure for International Criminal Law? The Rules of the ICTY in Gideon Boas & William A. Schabas (Eds) *International Criminal Law Developments in the Case Law of the ICTY* (Brill Academic Publishers 2003) 1.
[1153] Ibid.
[1154] Ibid.
[1155] Ibid 2.

(F) A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.[1156]

It seems that under the above-mentioned Rule, the trial chamber is not bound to follow the national Rules of evidence. Also, it is imperative that the tribunal should apply the rules of evidence for a fair determination following the general principles of law. The vital aspect of Rule 89 is that tribunal may admit any evidence which has probative value and exclude any evidence which has no probative value. The SCSL in determining the method of admitting evidence did not, however, consider probative value as paramount and stated that evidential weight is a separate issue, and judges should determine it at the trial stage.[1157] Last but not least, Rule 89 permitted to admit evidence both in the oral form or written form.

7.3 Legal position of the evidential rules of the ICT-BD

Under Section 23 of the ICT 1973 Act, the Criminal Procedure Code (CrPC) 1898 and the Evidence Act 1872 are inapplicable for the trial under ICT-BD.[1158] This echoes Rule 89 of the ICTY and ICTR.

Rule 54 allowed the prosecution to admit documentary evidence in the absence of the maker of the statement and its photocopies are also said to be admissible provided the evidence has probative value.[1159]

Rule 56 (2) permitted hearsay evidence to be admissible by its discretion, considering the reliability and probative value of the evidence. Rule 56 (3) clarified that, 'Any statement made to the investigation officer or to the Prosecutor in the course of investigation by the

[1156] Rule 89 of the Rules of Procedure of the ICTY.
[1157] *Prosecutor v Moinina Fofana & Allieu Kodewa* (Case No. SCSL-04-14-T) 9 October 2007.
[1158] Sayeedi (n 55) para. 35.
[1159] Rule 54 of the RoP of the ICT-BD.

accused is not admissible'.[1160] Rule 57 of the RoP of the ICT-BD reflected Rule 89 (B) of the ICTY that, all the rules should be applied for a fair determination of the matter within the Act.[1161]

7.3.1 Method of evaluating evidence: Standard of proof

The method of evaluating evidence is determined by the required level of standard of proof. In common law systems, there are two standards of proof such as *'beyond a reasonable doubt*', and '*on the balance of probabilities*' and in criminal proceedings, it usually is 'beyond reasonable doubt'.[1162] The 'beyond reasonable doubt' is sufficiently a high standard where more than one reasonable person would come to the same conclusion based on evidence.[1163] According to Blakesley, the 'beyond a reasonable doubt' standard means if there is any reasonable doubt on the evidence, then the conviction cannot be given.[1164] The historic Nuremberg tribunal had acquitted Mr Schacht and Von Papen, because the allegations against them could not be proven 'beyond a reasonable doubt'.[1165]

It is important to consider that lower than 'beyond reasonable doubt' is used for charge framing and issuing warrant of arrest. The standard of 'substantial grounds' is used at the pre-trial stage to take into consideration a particular case. Also, in issuing a warrant of arrest a 'reasonable ground to believe' standard is used.[1166] As discussed earlier, one special feature of the ICT-BD is that the burden of proof shifted to the defence in relation to a suspects alibi defence to prove that the accused was not present at the crime scene.

[1160] Rule 56 of the RoP of the ICT-BD.
[1161] Rule 57 of the RoP of the ICT-BD.

[1162] Klamberg (n 1137) 128.
[1163] Klamberg (n 1137) 128.
[1164] L Blakesley, 'Commentary on Parts 5 and 6 of the Zuphen Inter-Sessional Draft: Investigation, Prosecution & Trial', Nouvelles Etudes Pénales , vol. 13 BIS , (1998), 87.
[1165] The Avon Project: Judgment : Von Papen and Schacht, Available from https://avalon.law.yale.edu/imt/judschac.asp accessed 4 December 2018.
[1166] Klamberg (n 1137) 143.

7.3.2 Admissibility of Evidence

According to Cassese, it is the established principle of the common law that, '…all relevant evidence is admissible unless it is inadmissible'.[1167] The justification behind this assertion is that, judges are professional and they are capable of determining the proper weight to give to the evidence, and they evaluate the evidence fairly and objectively.[1168]

According to Friman, in terms of admissibility of evidence in international criminal tribunals, the main focus should be given on the fair determination of the cases following the principles of its own Statute and the general principles of law.[1169] The judges have essential roles to play in adopting and amending the rules if necessary, and their function is a 'fluid process'.[1170]

The main feature of the admissibility rule under ICL, is the 'totality of the evidence' approach, which allows the judges to make a rounded assessment of the all available evidence.[1171] The issue which is left to the individual judge is the amount of weight to be given on particular evidence - based on credibility and reliability of that evidence.[1172]

7.3.3 Probative value and weight of Evidence

In assessing the evidence, the task of the judges is to evaluate 'the probative value' or 'weight of the evidence'.[1173] The term 'probative value' can be defined as the aspect of any evidence which can prove or disprove a point in issue.[1174] The ICL has developed an approach

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[1167] Peter Murphy, 'Excluding Justice or Facilitating Justice - International Criminal Law Would Benefit from Rules of Evidence ' (2008) 12 INT'L J EVIDENCE & PROOF 1 mentioned Judge Cassese's statement on 11 February 1994.
[1168] Ibid.
[1169] Hakan Friman, 'Inspiration from the International Criminal Tribunals When Developing Law on Evidence for the International Criminal Court' (2003) 2 LAW & PRAC INT'L CTS & TRIBUNALS 373, 385.
[1170] Daryl A Mundis, 'The Legal Character and Status of the Rules of Procedure and Evidence of the ad hoc International Criminal Tribunals' (2001) 1 INT'L CRIM L REV 191, 226.
[1171] Yvonne Mcdermott, 'The Admissibility and Weight of Written Witness Testimony in International Criminal Law: A Socio-Legal Analysis' (2013) 26 LJIL 971, 985.
[1172] Ibid.
[1173] Klamberg (n 1137) 143.
[1174] Ibid 342.

that has given importance to the totality of the evidence in determining the relative weight for the evidence.

The exciting issue is that there is no specific law that states how judges should evaluate evidence in terms of giving weight. As a result, Klamberg has supported the argument of legal realists that to some extent, evaluation of evidence by the judges may be guided by their subjective preferences.[1175]

7.3.4 Corroborating Evidence

Corroborating evidence is not directly related to confirm the allegation, but to reaffirm the reliability of the related evidence which requires support.[1176] It may be relevant to issues concerning admissibility as well as evaluation of evidence. The ICTY and SCSL reaffirm that, '…corroboration of evidence is not a legal requirement, but rather concerns the weight to be attached to the evidence'.[1177]

7.4 Analysis of the interview data

Kelsall has compared the ICTY with 'a Mercedes Benz, crawling at a pitiful pace along Sierra Leone's potholed roads: prestigious, maybe, but ill-adapted to the local terrain'.[1178] According to him, international criminal tribunals should be tailored to deal with the particular cultural context.[1179] In this regard, the ICT-BD is a customised domestic tribunal dealing with international crimes. The judges and lawyers and investigators have relevant cultural knowledge which is important to consider in assessing the evidence and witnesses.

[1175] Mark Klamberg, 'Fragmentation and Criminal Procedure' in Larissa van den Herik and Carsten Stahn (eds) *The Diversification and Fragmentation of International Criminal Law* (Martinus Nijhoff 2012) 618

[1176] Black's Law Dictionary, 2004, 596.

[1177] *Prosecutor v Kordić and Čerkez*, ICTY Case No. IT 95-14/2) [Appeal Chamber Judgment 17 December 2004] para. 274; *Fofana and Kodewa* , [SCSL Appeal Chamber Judgment of 28 May 2008] para. 199.

[1178] Tim Kelsall, *Culture Under Cross-Examination: International Justice and Special Court for Sierra Leone* (Cambridge University Press 2009) 256.

[1179] Ibid.

7.4.1 Availability of evidence before ICT-BD

In explaining the availability of evidence, a particular politician stated that there were already a lot of documents, reports, films, footage, newspaper articles available depicting what had happened during 1971.[1180] According to this politician, through the trials, the evidence had been re-examined and provided evidential value in criminal proceedings.[1181] This particular politician further narrated that he does not think there are any disputes about the perpetrators and scale of atrocities because various independent media have reported these since 1971.[1182] He also added that academic research had been conducted on the events of 1971, and many facts and crimes are well established.[1183] The politician also opined that, '…if you go to the villages in Bangladesh in almost every village, you will find mass graves where innocent people were buried'.[1184] This is important to consider that the nature of evidence under ICL is different from domestic criminal law and for this reason, evidence such as mass graves demonstrates the level of crimes committed in a particular area. On another point, a prosecution lawyer mentioned that, '…literally it is impossible to get direct evidence proving guilt' for the crimes under ICL and that was the idea when the Nuremberg statute was framed.[1185]

7.4.2 Statements of the witnesses

Witnesses are essential in the international criminal proceedings in establishing accurate fact-finding. Combs, in her article, has given a detailed account of the testimonial deficiency and the judge's treatment of witness testimony in international criminal trials.[1186] She has conducted an empirical analysis of 342 prosecution witnesses who testified before

[1180] P4GF- Q-C1
[1181] P4GF- Q-C1
[1182] P4GF- Q-C1
[1183] P4GF- Q-C1
[1184] P4GF- Q-C1
[1185] P4GF- Q-C1
[1186] Nancy Amoury Combs, 'Grave Crimes and Weak Evidence: A Fact-Finding Evolution in International Criminal Law' (2017) 58 HARV INT'L LJ 47, 49.

the ICTR and found deficiencies in the evidence.[1187] According to her research, some witnesses before the international criminal tribunals explained the same set of facts multiple times on different occasions and thus discrepancies arose from the same person's statement.[1188] Combs also claimed the following:

> My previous research found such inconsistencies to be a prevalent feature of witness testimony in all of the international criminal tribunals I studied, and they pertain to a whole range of topics relevant to the disposition of the trial. Some inconsistencies centre on such details as dates, distances, duration, and numbers[sic], whereas others concern central aspects of the crime and/or the defendant's involvement in the crime.[1189]

However, Combs maintains that whatever the quality of the evidence before a tribunal, it will not affect the accuracy of its findings provided that judges made an accurate assessment of '…the quality of the evidence and finds facts in accordance with that assessment'.[1190]

A judge of the tribunal reaffirmed that 'during the trials, we had to consider witnesses and evidence very cautiously because of significant time-lapse, we had to rely on corroborative evidence'.[1191] This particular judge also acknowledged that they had to adopt flexible approaches for admitting written witness statements for both the defence and prosecution for clarification and for the sake of justice.[1192]

[1187] Ibid.
[1188] Ibid.
[1189] Ibid.
[1190] Ibid.
[1191] J3-Q-B1
[1192] J3-Q-B1

7.4.3 Cultural factors assessing witnesses

It is important to note that cultural factors are relevant when assessing any written statement or oral evidence before international criminal tribunals where judges are from a different culture. However, there is no such tension in the ICT-BD because judges are from the same cultural background. On the other hand, it should be noted that there is also danger if judges are from the same cultural background because historical truth may guide the sense of judgment of the judges when assessing the evidence. According to Zenebe, judges should not be from the same nationality as the accused because the witness may not come to give evidence before a judge of their own nationality.[1193] However, Cryer has provided a different opinion that local judges are capable of considering the cultural and social norms when assessing evidence to give the evidence a real meaning.[1194] Cryer has given an example from the case of ICTR, that in the Rwandan culture, people do not give direct answers, and the answers have to be decoded to be given true meaning.[1195] Also, in some cases, the witnesses may not be familiar with maps, film and graphic representations of localities and judges should not find adverse credibility in this regard.[1196] In some cases, the witnesses seem to be evasive, giving oral evidence.[1197]

According to Cryer, judges on international courts should take into account the cultural and linguistic differences because it would show respect to the victims of international crimes.[1198] This is an indication of how the evidential aspect is affected if the tribunal is established far away from the country where the crimes had been committed. This problem can be avoided by establishing a domestic tribunal, which can be observed from the experience of ICT-BD. Kelsall in assessing the efficacy of the ICTY, in the particular context

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1193 Robert Cryer, 'A Long Way from Home: Witnesses before International Criminal Tribunals' (2006) 4 INT'L COMMENT ON EVIDENCE [i].
1194 Ibid.
1195 Ibid.
1196 *Prosecutor v. Akayesu*,Case No.] ICTR-94-6-T [Trial Chamber Judgment of 2 September 1998] para. 156
1197 Ibid.
1198 Cryer (n 1193).

of Sierra Leone, argued that, '…Western legal precepts and procedures were unsuited to judging adequately' the facts, nature of crimes, and credibility of witnesses in the cultural context of Sierra Leone.[1199] He stated that due to lack of requisite cultural knowledge, the judges could not assess the credibility of the witnesses appropriately. According to him, local culture is an essential factor to take into account, for administering proper justice.[1200]

7.4.4 Quality of Evidence

A particular defence lawyer stated that the prosecution produced weak evidence and many witnesses in support of the prosecution could not give reliable evidence; nevertheless, the judges accepted their evidence very liberally.[1201] According to him, 'the evidence law was relaxed, and it did give extra benefit to the prosecution team to prove allegation'.[1202] He further stated that 'if normal standards would have been followed there could be very little chance to prove the allegation against the accused'.[1203]

In the case of *Delowar Hossain Sayeedi*, the prosecution has successfully proved 19 charges by oral testimony and documentary evidence and 5 charges have been proven by the statements of witnesses.[1204] In this case, the prosecution produced a list of 138 witnesses and defence submitted a list of 48 witnesses defending the case against the accused.[1205] During the trial, both the prosecution and defence had examined 20 witnesses who were witnesses of the occurrence.[1206] In passing the verdict judges stated the following:

> The incidents took place [a]bout 40/41 years back in 1971 and as such memory of live witnesses might have been faded and as a result discrepancy may have occurred in their versions made in the tribunal. The case before us depends mostly on narratives of live witnesses who claim to have witnessed the occurrences and sustained trauma

[1199] Kelsall (n 1178) 256.
[1200] Ibid 267.
[1201] DL2- Q-B1
[1202] DL2- Q-B1
[1203] DL2- Q-B1
[1204] *Sayeedi* (n 55) para. 43.
[1205] Ibid para. 37.
[1206] Ibid.

> as well. Their testimonies are based on their explicit memories. Despite the indisputable atrocities of the crimes committed during the War of Liberation in 1971 by the Pakistani Soldiers in collaboration with the local perpetrators like accused Delower Hossain Sayeedi we require to examine the facts constituting offences dispassionately, keeping in mind that the accused is presumed to be innocent.[1207]

Now, if we analyse the approach taken by the judges of ICT-BD in assessing evidence, it appears that the judges have taken into account the significant time-lapse and how it might have affected the memory of the witnesses. The judgment acknowledged that some of the witnesses sustained trauma, and their memories were unambiguous.[1208] Also, the judges predominantly reminded themselves that the accused is presumed to be innocent.

In assessing the individual liability of Delowar Hossain Sayeedi, the tribunal judges considered facts of common knowledge, the context of the attack, documentary and circumstantial evidence, political status of the accused at the time of occurrences, relationship, '…of the accused with the local Pakistani armed forces and his participation in the commission of offences charged'.[1209]

Based on the above interview data and information from the judgments, it can be said that, on one hand, given the gravity of the crimes and delayed prosecutions, the ICT-BD has to adopt more flexible rules of evidence. However, from the perspective of the defence, at least, judges were being very flexible with the admission of evidence and adopting inclusive approaches to assessing probative value.

7.4.5 Hearsay Evidence

The general rule in common law is that hearsay is inadmissible with some exceptions under which hearsay evidence may be admissible. A particular defence lawyer

[1207] Ibid para. 38.

[1208] Ibid.

[1209] Ibid.

that was interviewed opined that judges were lenient to admit evidence in favour of the prosecution.[1210] A particular defence lawyer stated that, '…if judges would not take a flexible approach in admitting evidence not a single allegation could be proved'.[1211] A particular judge narrated, however, that, '…it is true that the ICT-BD relied on hearsay evidence; however, cautions were taken, and corroborative evidence was relied upon to give any weight to the relevant hearsay evidence'.[1212] This particular judge further explained that direct evidential problems arose because many eyewitnesses had passed away, and a lot of fresh evidence had been destroyed when the alleged perpetrators assumed power in the government of Bangladesh.[1213]

According to a particular participant, evidential flexibility is apparent in the trials of the ICL in particular, where crimes were committed many decades ago.[1214] He further opined that the judgments of the ICT-BD would add legal value for the available evidence, and it will contribute to some form of justice.[1215]

A judge that was interviewed stated that the ICT-BD had followed a cautious approach when it admitted hearsay evidence.[1216] He reaffirmed that at the appeal stage, before the AD of the Supreme Court, he had the chance to scan all the evidence before him and said that all the convictions were based on evidence and judges have given sufficient reasoning for evidential weight.[1217] According to him, although hearsay evidence is admissible, most of the evidence was actual evidence, and there were lots of other corroborative evidence.[1218]

[1210] DL-1-Q-A
[1211] DL-1-Q-A
[1212] J4-Q-B
[1213] J4-Q-B
[1214] P4-GF-Q-C1
[1215] P4-GF-Q-C1
[1216] J1-Q-C3
[1217] J1-Q-C3
[1218] J1-Q-C3

In the case of *Tadić,* the ICTY stated that, in assessing the probative value of hearsay evidence, special attention should to be given to the reliability of the evidence.[1219] It was emphasised that in admitting any hearsay evidence, the tribunal should consider whether the statement was 'voluntary, truthful and trustworthy'.[1220] Also, the ICTR in the case of *Akayesu,* has reiterated that hearsay evidence is admissible, but caution has to be followed as required by Rule 89.[1221]

Defence lawyers of the ICT-BD in Bangladesh alleged that the prosecution produced weak hearsay evidence and the judges accepted their evidence and that the accused had been denied the opportunity to cross-examine the witnesses in some cases especially when the prosecution presented hearsay evidence.[1222] However, an AD Justice stated that hearsay evidence is acceptable in most of the international tribunals such as Nuremberg tribunal, Tokyo tribunal, ICC and other ad hoc tribunals created by the UN and similarly the ICT-BD also admitted hearsay evidence.[1223] He said that, in drafting the ICT 1973 Act, many aspects of the Nuremberg charter were borrowed, and admissibility of hearsay evidence is one such aspect.[1224] According to this judge, the Rome Statue followed the ICT Act 1973 to some extent.[1225]

The Appeals Chamber of the ICTY provided guidelines when admitting hearsay evidence and provided that the relevant factors include whether the statement was given under oath, subject to cross-examination, first-hand, made through translation; made contemporaneously to the events; given under formal environment i.e. before a judge. [1226]

[1219] *Prosecutor v Dusko Tadić*, ICTY Case No. IT-94-1), ICTY [Trial Chamber Decision on defence Motion on hearsay dated 5 August 1996] para. 16.
[1220] Ibid.
[1221] *The Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4 [Appeal Chamber Judgment of 1 June 2001].
[1222] DL1-Q-B
[1223] J1-Q-A
[1224] J1-Q-A
[1225] J1-Q-A
[1226] *Prosecutor Vs Kordić and Čerkez*, ICTY Case No. IT 95-14/2) [Decision on Appeal regarding Statement of a deceased Witness 21 July 2000] paras. 23–28.

Under the ICC's legal framework hearsay evidence is also admissible, and in the case of *Lubanga,* four documents were presented which were admitted as hearsay evidence.[1227]

There are at least four criteria for admitting hearsay evidence. Firstly, hearsay evidence should bear a sufficient level of reliability.[1228] Secondly, there should be an explanation for admitting hearsay evidence in terms of necessity.[1229] Thirdly, hearsay evidence is available without any difficulties along with other corroborative evidence this type of evidence is helpful for the administration of justice.[1230] Fourthly and most importantly, hearsay evidence should be relevant to the case.[1231]

On the other hand, hearsay evidence is against the right of an accused to cross-examine the witnesses against him.[1232] Also, the maker of the statement may rely on deception and later may reveal the information to be incorrect.[1233] Further, later evidence may suggest that the statement maker was under duress to give a statement or the statement can be fabricated.[1234]

An AD justice held that, the hearsay evidence admitted by the ICT-BD have basis and they have reliability and they appropriately passed the test.[1235] This particular judge mentioned that they have seen whether the hearsay evidence can be relied on before giving any weight.[1236] He also emphasised that they did not wholly rely on hearsay evidence; the hearsay evidence was supported by other corroborative evidence.[1237] It appears from the case of

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1227 *The Prosecutor v Thomas Lubanga Dyilo,* Case No. ICC-01/04-01/06 [14 March 2012].
1228 The Theoretical Foundation of the Hearsay Rules, HARVARD LAW REVIEW, Vol. 93, No. 8 (June 1980).
1229 Ibid.
1230 Gashaw Sisay Zenebe, 'Admissibility of Hearsay Evidence in Criminal Trials: An Appraisal of the Ethiopian Legal Framework' (2016) 5 HARAMAYA L REV 115, 124.
1231 Ibid.
1232 Ho HOCK LAI, *A Philosophy of Evidence Law: Justice in the search for truth* (Oxford University Press, Oxford, 2008) Chapter 5.
1233 The Theoretical Foundation of the Hearsay Rules, HARVARD LAW REVIEW, Vol. 93, No. 8 (June 1980)
1234 Gashaw Sisay Zenebe, 'Admissibility of Hearsay Evidence in Criminal Trials: An Appraisal of the Ethiopian Legal Framework' (2016) 5 HARAMAYA L REV 115, 125.
1235 J1-Q-B
1236 J1-Q-B
1237 J1-Q-B

Sayeedi that, if hearsay evidence is not corroborated by other evidence, then that evidence may be disregarded.[1238]

In the ICT-BD cases, the prosecution relied on a number of newspaper articles which are normally not admissible under domestic criminal law. However, a newspaper article would only be admissible if, '…it is necessary and trustworthy, relevant and material, and its admission is within the trial judge's exercise of discretion'.[1239]

A judge who was interviewed referred to the newspapers of 1971 produced by the prosecutors and the investigators, most of those newspaper was from a political party called Jaamat-e-Islami which in fact was the political party that participated in the crimes against humanity.[1240] He reaffirmed that hearsay evidence was corroborated by this evidence as well as other documentary evidence and also by direct evidence.[1241]

The participant also gave an example by referring to the case of *Salauddin Quader Chowdhury*[1242] that, 'the man Nuton Kundu was killed in 1971, his son gave evidence, in the case of *Qader Molla*, lots of villagers gave evidence, and those who were direct victims gave evidence'.[1243] Another example that was provided by this particular judge mentioned that, *'*a lady whose husband was killed, who was raped, gave evidence although she had become old but she remembered things because people do not normally forget, easily these sort of dramatic events'.[1244] So, in terms of quality of evidence, the ICT-BD had the opportunity to hear from direct witnesses of the crimes and other corroborative evidence assisted the tribunal to establish judicial truth.

[1238] *Sayeedi* (n 55) para. 101.
[1239] 'Evidence: Admissibility of Newspapers under the Hearsay Rule' (1961) 1961 DUKE LJ 460, 462
[1240] J1-Q-B
[1241] J1-Q-B
[1242] *The Chief Prosecutor Vs Salauddin Quader Chowdhury, ICT-BD Case No. 02 OF 2011 (ICT-1 Judgment of 1 October 2013)*
[1243] J1-Q-B
[1244] J1-Q-B

It appears that the judges of the ICT-BD have refused to admit hearsay evidence on multiple occasions if the required test had not been passed.[1245] In the case of *Salauddin Quader Chowdhury*, it was stated that uncorroborated hearsay evidence might not have probative value.[1246] The following information is notable:

> The evidence adduced by P.W.18 is found to be purely hearsay and uncorroborated testimony, and as such, no person can be held guilty based on such hearsay and uncorroborated evidence as it has no probative value. Therefore, it is evident that prosecution has failed to produce any reliable evidence to connect the accused with the commission of offences of crimes against humanity and genocide as specified in the above charge. Ms. Tureen Afroz, the learned Prosecutor by referring to decisions of the ICTY Chamber in Simic, Tadic and Zaric (2003) has submitted that there is no need to corroborate hearsay evidence and as such hearsay evidence can be accepted as reliable evidence.[1247] In consideration of our social value and human behaviour, we failed to accept the above submission of the learned Prosecutor. In the above context, it is our considered opinion that it is very much unsafe to convict a person based on uncorroborated single hearsay evidence. Thus, we hold that the prosecution has failed to prove charge no. 1 beyond a reasonable doubt.[1248]

Although it is not a requirement that hearsay evidence should be supported by corroborative evidence as per the case of *Tadić,* the ICT-BD has taken a very cautious approach. The most important aspect of the above quotation is that in determining the probative value of hearsay evidence, the judges of the ICT-BD considered the social value and human behaviour. Cryer's work partially supports this aspect of the judge's findings that cultural factors are relevant in assessing the evidence before the international criminal tribunal.

A judge interviewed said that he, '…was one of the judges in the panel of appeal which heard Quader Molla's appeal and there were some direct eyewitnesses, it was the same with

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[1245] *Sayeedi (n 55) para.101*
[1246] *Salauddin Qader Chowdhury* (n 1242) para.78
[1247] Ibid
[1248] Ibid

the case of the second one, Delowar Hossain Sayeedi, there were direct witnesses and it was the same with the third one which I heard Kamaruzzaman had direct eyewitnesses.[1249] So, although hearsay evidence is admissible, they were supported by other evidence in the ICT-BD.[1250]

7.4.6 Effect of time and old Evidence

If the evidence before an international criminal tribunal is old, that does not mean the evidence is weak. In assessing old evidence, the ICTY judge Alphons M M Orie suggested that drawing inference from evidence presented, it is more important to take into account the psychological factors affecting the evidence than a legal approach.[1251] Also, the collective memory of a society may influence the testimony of witnesses.[1252] There is a chance that effect of time on evidence of international crimes could be positive and negative, and in a book review, Kristin did sum up the position well that:

> …effect of time on the trials of core international crimes: on the one hand, access to archives may improve over time, and so the passage of time could improve the amount and quality of documentary evidence'. On the other hand, crime scenes could erode over time, and memories of specific events could fade. Time is an especially critical matter in both international criminal trials and domestic trials that address core international crimes because both typically start only after a considerable amount of time has elapsed since the commission of the crimes.[1253]

The collective memory is an issue for international criminal evidence in particular when dealing with old evidence. In many cases, the evidentiary testimony is influenced by community understanding. This is a very critical aspect of assessing witness testimony to try

[1249] J1-Q-B
[1250] J1-Q-B
[1251] Morten Bersgmo, 'Using Old Evidence in Core International Crimes' (2011), 6 (1) FICHL Policy Series, 4
[1252] Ibid.
[1253] Wu Xueqin Kristin, 'Old Evidence and Core International Crimes' (2014) 4 ASIANJIL 426.

and assess crimes committed many decades ago. As a result, sometimes witnesses testify in a way as if they had actually observed the event.[1254]

One of the important findings in the situation of Bangladesh is that the ICT-BD has demonstrated the effect of time on the evidential aspect and Kristin in his book review, mentioned the latest developments in Bangladesh as a timely case study.[1255] The memories of witnesses have a different phase of encoding, retention, and retrieving of information and traumatized victim's memory have special characteristics.[1256] The expert reports by historians may also play an important role in relation to the admissibility of old evidence.[1257]

A particular judge explained that due to time-lapses, witnesses could not explain events appropriately, and they had to rely on additional corroborative documents to give weight.[1258] He further stated that they had to rely on newspaper articles, authoritative books, and articles before giving weight.[1259] This particular judge observed that victims of the crimes, suffered mentally for a long time due to not obtaining justice, and they became emotional during the trial.[1260] This indicates that judges of the ICT-BD were cautious when considering the evidence before them.

A defence lawyer that was interviewed stated that they did not face any problems due to time-lapses and even that they were in a strong position.[1261] He asserted that the prosecution produced weak evidence, and many witnesses in support of the prosecution could not give reliable evidence.[1262] According to him, the judges of the ICT-BD accepted

[1254] Cohen (n 734).
[1255] Kristin (n 1253) 426.
[1256] Ibid
[1257] Ibid
[1258] J4-Q-B
[1259] J4-Q-B
[1260] J4-Q-B
[1261] DL1-Q-B
[1262] DL1-Q-B

prosecution's evidence very liberally.[1263] According to this particular defence lawyer, it is practically impossible to prove allegation 45 years after the crimes had been committed.[1264]

In explaining his experience, a prosecution lawyer stated that they had to face difficulties collecting evidence as there was a significant time gap, and a government of anti-liberation war officially destroyed much of the evidence.[1265] This particular prosecution lawyer further stated that many witnesses were unwilling to give evidence due to the fear of being attacked by the perpetrators and their associates.[1266] He also said that when the prosecution assured them safety and made them feel safe, they then came forward to give evidence.[1267] He said, 'it did take time, but finally we were able to obtain evidence and witnesses'.[1268]

In explaining the particular situation of Bangladesh, a judge of the ICT-BD stated that, '…due to significant time-lapse, the nature of acceptable evidence is quite different from national criminal law because the events of the war are recorded objectively in the various sources'.[1269]

7.5 Conclusion and interim findings

The Bangladeshi experience of dealing with old evidence is an important aspect and lessons drawn from the operation of the ICT-BD would bring valuable insight for the development of ICL and transitional justice. The majority of the interviewees are of the opinion that the ICT-BD has adopted a comprehensive rule of evidence and followed the principles established by the earlier tribunals. Some participants referred to the RoP and judgments and

[1263] DL1-Q-B
[1264] DL1-Q-B1
[1265] PL1-Q-B
[1266] PL1-Q-B
[1267] PL1-Q-B
[1268] PL1-Q-B
[1269] J3-Q-B

stated that the presumption of innocence had been maintained and the general burden of proof is on the prosecution.

According to Doherty, there is very little difference between the practice of domestic and international trials because in both the cases an accused is given a fair, just and expeditious trial finding of truth beyond a reasonable doubt.[1270] However, the main differences between the domestic criminal law and ICL are the flexibility of the rules of evidence, the complexity of the cases and jurisdiction.

Most of the participants are of the view that the judges of the ICT-BD had taken a holistic approach in assessing the relative weight of particular evidence. Majority of the interviewees also stated that although a flexible approach of admissibility of evidence has been followed by the ICT-BD, this flexibility has been assessed with making reference to the quality of evidence and reasoning given for giving weight to particular evidence. In the ICT-BD, we have seen that the judges have considered the totality of evidence rather than undermining the whole evidence-based on mere inconsistencies.

It appears from judgments of the ICT-BD that the judges have considered the cultural factors in assessing oral and written testimony of the witnesses. Majority of the interviewees stated that the judges of the ICT-BD, made reference to the social value and behaviour of the local people in assessing the evidence given by the witnesses.

One potential contribution of the ICT-BD's evidential rule to ICL and transitional justice is in relation to alibi defence, the burden of proof is shifted to the defence. This aspect is particularly important in the Bangladeshi context in terms of delayed prosecution. However, this is against the concept of presumption of innocence. For this reason, the RoP of the ICT-BD was amended in 2011 and the rules made it clear in this regard that, '...Mere failure to

[1270] T A Doherty, 'Evidence in International Criminal Tribunals: Contrast between Domestic and International Trials' (2013) 26 LJIL 937.

prove the plea of alibi and or the documents and materials by the defence shall not render the accused guilty'.[1271]

In relation to hearsay evidence, the contribution made by the ICT-BD is that due to lack of corroborative evidence, the judges refused to accept hearsay evidence. The ICT-BD has now developed guidelines for adopting hearsay evidence. For there to be probative value, hearsay evidence should be supported by other corroborative evidence.

In assessing the probative value of hearsay evidence, the judges of the ICT-BD considered the 'social value' and 'human behaviour of the Bangladeshi society.

Dealing with old evidence is another lesson which may be drawn from the operation of the ICT-BD. As per the results from the above interview data, the ICT-BD has adopted a particular approach on how to deal with old evidence. The particular context of the ICT-BD, the nature of the evidence, the approaches taken by the judges are considered to be valuable contribution in the diversity of ICL and transitional justice.

[1271] Rule 51(3) of the ICT-BD.

CHAPTER 8

WITNESS PROTECTION

8.1 Introduction

This Chapter discusses various aspects of the witness protection measures in ICL. It has also analysed the interview data collected through semi-structured interviews in assessing the witness protection aspect of the ICT-BD. However, before analysing the interview data, the existing practices and jurisprudence relating to witness protection developed by other international tribunals have also been considered. The interviewee judges and prosecution lawyers have expressed their views that the ICT-BD has limitations in relation to the protection of witnesses before the ICT-BD. Further to that, both prosecution and defence have also raised concerns about witness tampering and intimidation. The lessons learned from the ICT-BD concerning the witness protection would be helpful for the further development of ICL and transitional justice. As a domestic tribunal, the ICT-BD could not come up with any effective witness protection measures at an early stage. Attempts were made to form witness protection committees within local administrations but due to lack of adequate training, these did not perform well.

Before analysing the interview data, the next sections define the nature and scope of witness protection and its main elements. These sections have also analysed various aspects of witness tampering, witness intimidation, and how the earlier criminal tribunals have responded to these issues. Furthermore, to assess the nature of witness protection in the Bangladeshi situation, reference has been made to the recognized jurisprudence and experience developed by ICTY, ICTR, ICC and other similar ICT's. The issue of witness protection at the ICT-BD has been analysed from various different perspectives: Firstly, to consider the extent to which the witness protection issue has affected the trial process; Secondly, to consider to what extent the ICT-BD has adequate legal mechanisms, institutions, and personnel's to implement the provision of witness protection; Thirdly, how the ICT-BD has

responded towards the witness protection issues in Bangladesh; Fourthly, whether any lessons can be learned from the ICT-BD in relation to witness protection.

One of the crucial aspects of ICL is witness protection, so that, the victims and witnesses are not subject to further violence. It is said that, '…a failure to protect witnesses can allow organized criminals, terrorists and other criminals to intimidate witnesses and to act with impunity'.[1272] Witness protection is one of the pre-conditions of the success of a judicial process because witnesses are live evidence.[1273] Although there is adequate academic work on the functions of the ICT's, there are still some areas for improvement in the way such tribunals deal with the protective measures for the witness.[1274] For the purpose of a fair trial, an accused is entitled to know the witnesses against him and has the right to cross-examine the witnesses. Thus, witness's identity and whereabouts can be easily published, and this may create a severe security issue for the witnesses and victims. In practice, witness protection in criminal proceedings is given either by police or by witness protection programs permanently or temporarily. If the threat to witness security is very high, then appropriate protective measures and formal protection programs are also necessary, including relocation and change of identity.[1275]

8.1.1 Definition of Witness and its scope

A witness can be defined as a person who will or has provided a formal statement, either in the written form or orally or both, to be used in the proceedings of the Court.[1276] According to the European human rights framework a witness '…means any person

1272 K R, 'A Missed Opportunity to Reform Witness Protection' (2013) 59 CRIM LQ 441, 441.
1273 Chris Mahony, 'The Justice Sector Afterthought: Witness Protection in Africa' (*Institute of Security Studies Pretoria 2010*), 1.
1274 Markus Eikel, 'Witness Protection Measures at the International Criminal Court: Legal Framework and emerging practice' (2012) 23 CLF 97, 98.
1275 Chris Mahony, *The Justice Sector Afterthought: Witness Protection in Africa* (Institute of Security Studies Pretoria 2010), 1.
1276 Eikel (1274) 98.

irrespective of his/her status under national procedural law, who possesses information relevant to criminal proceedings'.[1277]

For this particular section, witness protection means to provide security and safety to the individual and their family members who have appeared before the tribunal and have given formal evidence. The family members will also come to the ambit of witness protection if they are likely to be attacked or threatened just because of the evidence given by the main witness. As a result, this section analysed the legal framework and policies in Bangladesh relating to, '… protect witnesses whose cooperation with law enforcement authorities or testimony in a court of law would endanger their lives or those of their families'.[1278]

8.1.2 Intimidation of Witnesses

Witness intimidation '…means any direct, indirect or potential threat to a witness, which may lead to interference with his/her duty to give testimony free from the influence of any kind whatsoever'.[1279] Intimidation may also occur because the witness belongs to a minority social or religious group and '…in a position of weakness therein'.[1280]

There are various strategies employed by the interested parties to intimidate the witnesses. Firstly, the accused may intimidate the witness by requiring them to face the accused at the court.[1281] Also, the family members, followers, or acquaintances may be present in the courtroom during the trial, which may also inject fear into the minds of the witnesses. Secondly, intimidation may also occur if the accused decides to represent himself/herself where the accused can directly ask a question to the witness.[1282] Thirdly, if the

1277 Appendix to Recommendation No. R (97)13 of the Committee of Ministers to member states concerning intimidation of witnesses and the rights of defence.
1278 United Nations Office on Drugs and Crime, Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime (2008) 1.
1279 Recom. No. R(97) (n 1277).
1280 Ibid .
1281 Mary D Fan, 'Adversarial Justice's Casualties: Defending Victim-Witness Protection' (2014) 55 BC L REV 775, 788.
1282 Ibid.

witnesses identities are disclosed, then interested parties can secretly contact them and manipulate or bribe them with rewards or scare them with harmful threats to the witness or family members.[1283] Intimidation of witnesses was an issue before the ICT-BD, and later in this chapter, the nature of intimidation has been discussed.

8.1.3 Witness Tampering

Witness tampering is another form of intimidation which might have occurred due to lack of witness protection measures. Witness tampering, '…means threats, both expressed and implicit, to witnesses and/or their families, as well as bribes or other inducements'.[1284] The very first case before the ICTY had to deal with witness tampering issues and this was elaborately considered in the other cases such as *Macedonia* and *Kosovo*.[1285] In the first case of the ICTY, the *Tadic* case, it was alleged that the witness Dragon Opacid, '…had been coached by the Bosnian government to invent claims of atrocities, in particular, the killing of his father by Bosnian Serbs'.[1286]

The severe form of witness tampering can be a situation where a witness is intimidated not to testify at all or testify that a particular incident did not happen or a particular defendant was not involved and this issue was observed in the ICTY case of *Haradinaj.*[1287] In this case, a witness called Kabashi, came to the court but did not answer any substantive questions to assist the trial.[1288] The trial chamber later arranged a video conference for him to testify from the United States, but Kabashi refused to testify although he was a key witness and a former member of the Kosovo Liberation Army.[1289] In the case of *Haradinaj,* the trial Chamber observed that many key witnesses, '…expressed a fear of appearing before the trial chamber

1283 Ibid .
1284 Robert Cryer, 'Witness Tampering and International Criminal Tribunals' (2014) 27 LJIL 191, 192.
1285 Ibid.
1286 Ibid 193.
1287 Ibid.
1288 *Prosecutor v Haradinaj, Balaj and Brahimaj*, Case No. IT-04-84-T, [Trail Chamber Judgment of 3 April 2008] para. 27
1289 Ibid para. 27.

to give evidence' and as a result protective measures were adopted to keep the identity of 34 witnesses anonymous from the public.[1290]

In the case of *Jelena Rasic*, the accused admitted that she bribed an important potential witness in the *Lukic and Lukic* case, and asked the witness, '…to confirm, sign, and verify a pre-prepared witness statement ('Tabakovic Statement') in exchange for 1,000 Euros and by offering him additional money to testify on behalf of *Milan Lukic'*.[1291] She further admitted that she provoked Tabakovic to find other witnesses who were in the Bosnian and Herzegovina army and who would give evidence in return for money.[1292] In another case, the defendant was convicted for contempt of court three times consecutively, due to the fact that sensitive information of the protected witnesses was released by the defendant endangering their protection.[1293]

In the cases of *Bizimingu and Simba,* the defence alleged that the government of Rwanda had intimidated and manipulated the defence witnesses not to give evidence in favour of the defendant.[1294] However, the trial chamber's findings in this respect suggested that for one witness, the allegation made by the defence was not proven and in respect of the other witness, although there was a threat, it had not materially affected the decision.[1295]

In the case of *Brima*, the SCSL had to deal with witness intimidation where wives of the accused came to know the personal details of the protected witnesses and the witnesses were intimidated after they had given evidence at the trial.[1296] In the same case, other

1290 Ibid para. 22.
1291 *Prosecutor v Jelena Rasic,* ICTY Case No. IT-98-32/1-R77.2-A [Appeal Chamber Judgment of 16 November 2012] para. 3.
1292 Ibid.
1293 *Prosecutor v Seielj,* ICTY Case No. IT-03-67-R77.4-A, [3rd judgment of 20 May 2013, public version issued on 30 May 2013].
1294 *Prosecutor v Bizimingu, Mugenzi, Bikamumpaka and Mugiraneza*, Case No. ICTR-99-50-T [Trial Judgment of 30 September 2011] paras. 108-110.
1295 Cryer (n 1284) 193.
1296 *Independent Counsel v Brima, Samura*, Case No: SCSL-200 5-01, [Judgment in Contempt Proceedings of 26 October 2005].

defendants Kanu and Kamara, were found guilty of contempt of court for offering a bribe to the witnesses even while they were in custody.[1297]

In the Special Tribunal of Lebanon (STL), the names of the possible prosecution witnesses were released which suggests that the witnesses were either influenced not to give any evidence or to fabricate the evidence.[1298] Also, in the case of *Lubanga,*[1299] *'…* there were also significant allegations of witness tampering, intended both to incriminate and to exculpate Lubanga'.[1300]

As discussed above, almost all of ICT's had to deal with the issue of witness tampering or witness intimidation, and the situation of Bangladesh is not free from these issues. The cases before the ICT-BD suggest that both prosecution and defence have made complaints regarding witness intimidation and tampering. Later in this chapter, the witness intimidation and witness tampering issues has been discussed more elaborately.

8.1.4 Various stages of Witness Protection

Participation in proceedings can carry a level of risk to victims and witnesses. This risk of security may exist at various stages, from investigation to post-trial. As a result, it is important to make an assessment of the real risk and perceptions of threats to the safety of the witnesses and take appropriate measures so that their participation can be ensured.[1301] The initial '…measures will need to take account of the current and local context, including the

1297 Ibid.
1298 Cryer (n 1284) 193 mentioned 'Tribunal Condemns Attempts to Interfere with Judicial Process', STL press release, 11 April 2013; 'STL Appoints Investigator to Probe Unauthorised Disclosures', STL press release, 2 July 2013.
1299 *Lubanga* (1138).
1300 Cryer (n 1284) 193 mentioned *Prosecutor v. Lubanga*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012.
1301 Commonwealth Secretariat, Best Practice Guide for the Protection of Victim/Witness in the Criminal Justice Process, Meeting of Commonwealth Law Ministers and Senior Officials, Provisional Agenda Item 4(d) (14 July 2011) 10.

environmental, social, and cultural situation, the security situation and the availability of security and policing, and the potential threat'.[1302]

8.1.5 Anonymity as a Witness Protection

As discussed earlier, witness intimidation and tampering are the main problems of achieving justice before the ICT. The cost-effective measure to provide witness protection in this particular aspect is the anonymity of the witnesses. However, it is often legally challenged on the grounds that the accused has the right to a fair trial and public hearing and the right to cross-examine the witnesses before the tribunal. Nevertheless, in the landmark case of *Tadic*, it was reasonably permitted to admit anonymous witnesses when necessary.[1303] Although generally international tribunals such as ICTY, ICTR, and ICC have achieved a reputation in terms of fairness, the decision in the *Tadic* case was criticized from various quarters for allowing anonymous witness.[1304] As the anonymity of that particular witness restricted Tadic's right to cross-examine all the witnesses before the court and on this particular ground, the defence did appeal the final judgment in the *Tadic* case.[1305] However, the Appeals Chamber held that the right to cross-examination is not absolute when witness protection is at stake.[1306]

8.1.6 Delayed Disclosure

Since anonymity of witnesses is questionable, the delayed disclosure of the personal details of the witnesses is an alternative protective measure. Delayed disclosure denotes that information regarding the witnesses will be disclosed to the defence when it is necessary for the defence to prepare an accused's case rather than keeping the witnesses anonymous.[1307]

1302 International Criminal Law & Practice Training Materials: Victims & Witnesses (Part of the OSCE-ODIHR/ICTY/UNICRI Project "Supporting the Transfer of Knowledge and Materials of War Crimes Cases from the ICTY to National Jurisdictions") 11.

1303 Natasha A Affolder, 'Tadic, the Anonymous Witness and the Sources of International Procedural Law' (1998) 19 MICH J INT'L L 445, 446.

1304 Ibid.

1305 Ibid.

1306 Ibid

1307 Sangkul Kim, 'The Witness Protection Mechanism of Delayed Disclosure at the Ad Hoc International Criminal Tribunals' (2016) 9 JEAIL 53, 55.

Under the delayed disclosure measure, the prosecutor is entitled to keep the personal details of the witnesses secret before the time determined by the court, generally before the commencement of trial.[1308] The practical aspect of delayed disclosure is that, certain information identifying the witnesses will be redacted before being disclosed to the defence.[1309]

8.1.7 Balancing the rights of an accused and witness protection

In terms of a fair trial, the accused has some basic rights such as examining the witnesses against the accused. On the other hand, providing witness protection is another aspect of achieving justice because witnesses are live evidence, and they often carry a risk of security due to their cooperation with the trial proceedings. As a result, it is important to create a careful balance between the protective measures for the witness and upholding the rights of an accused by giving him or her the opportunity of examining the witnesses against him or her and a fair, impartial public hearing.[1310]

In the case of *Tadić*, Judge McDonald stated that anonymity of witness in exceptional circumstances is in line with Rule 75 of the RPE because '…fair trial 'means not only fair treatment of the defendant but also of the prosecution and witnesses'.[1311] This particular judge identified five criteria for balancing the rights of an accused and the witness protection measures such as, a real fear of the witness in concern; the importance of the testimony; strong credibility of the witness; the non-existence of a long-term national witness protection program and the necessity.[1312] Besides, the security of the witnesses can be preserved by distorting the face and voice of the witness concerned, by way of Video-conferencing, safe conduct, and redaction. The safe conduct is a situation where certain witnesses will be given

1308 Ibid.
1309 Ibid 179.
1310 Maille Brady Bates, 'A Balancing Act: The Rights of the Accused and Witness Protection Measures' (2014) 17 TRINITY CL REV 143.
1311 Ibid mentioned Tadić.
1312 Ibid.

assurance that they will not be detained by the prosecution if they come forward to give evidence.[1313]

8.2 International Witness Protection measures

The witness protection measures should equally be applicable for both prosecution and defence witnesses.[1314] Before assessing the witness protection aspect of the ICT-BD, it would be helpful to make references to the practices before the ICTY, ICTR and ICC. In the case of *Šešelj,* it is stated that witnesses from both prosecution and defence may be given protection if it is legitimately needed.[1315]

The ICTY and ICTR have taken a similar approach in adopting witness protection measures. These two tribunals emphasized on keeping the identity of the witnesses confidential and adopted various measures in this respect such as using pseudonyms, non-disclosure of identity until necessary for adequate preparation of the defence, image and voice distortion, testifying behind a screen, via closed circuit television or in closed session.[1316]

The statute of the ICTR and ICTY specifically mentioned that the RPE should include witness protection measures and emphasized protecting the identity of the witnesses and victims.[1317] Rule 53 of the ICTY included a non-disclosure provision under which the tribunal is empowered to order the government and accused not to disclose certain documents or information until further order.[1318] Rule 75 of the RPE of the ICTR also mentioned non-disclosure provisions for the protection of witnesses and victims.[1319] Article 21(2) of the ICTY Statute expressly mentioned that the accused is entitled to a fair and public hearing subject to

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1313 Ibid.
1314 Ibid 10.
1315 *The Prosecutor v Vojislav Šešelj,* ICTY Case No. IT-03-67-T, [Decision on Vojislav Šešelj's Motion for Reconsideration of the Decision of 30 Aug. 2007 on Adopting Protective Measures 11 January 2008].
1316 Training materials (n 1214).
1317 Article 22 of the ICTY Statute and Article 21 of the ICTR Statute.
1318 Rule 53 of Rules of Procedure and Evidence of the ICTY.
1319 Rule 75 of Rules of Procedure and evidence of the ICTR.

Article 22 which provides protective measures to the witnesses and victims.[1320] This means that an accused persons right to cross-examine the witness(s) is the primary consideration and protecting the witnesses is the secondary consideration.[1321]

Under the Rome Statute, the ICC has established the Victims and Witnesses Unit ("VWU") which has been renamed as the Witnesses and Victims Section ("WVS") to ensure witness protection to the victims and witnesses. Under Articles 54(3)(f) and 68(1) of the ICC statute, the prosecution is also responsible for employing protective measures at the pre-trial and trial stages.[1322]

Along with judicial protective measures, the ICC has also developed non-judicial protective measures by following some good practices.[1323] These non-judicial measures include Initial Response System (IRS), Security Risk Assessment (SRA), and Individual Risk Assessment (IRA).[1324]

8.3 The Law relating to victim and witness protection in Bangladesh

The legal framework of Bangladesh dealing with witness protection is inadequate. Section 506 of the Penal Code of Bangladesh is the starting point of witness protection which provides that witness intimidation is a criminal offence and punishable.[1325] However, it did not provide any precautionary remedy; instead, it merely made it a crime if someone intimidated a witness at a criminal proceeding. Section 151 and 152 of the Evidence Act of 1972 provides cursory respect to the witnesses during questioning at trial.[1326]

1320 Article 21-22 of the ICTY.
1321 Sangkul Kim, 'The Witness Protection Mechanism of Delayed Disclosure at the Ad Hoc International Criminal Tribunals' (2016) 9 JEAIL 53, 54.
1322 Article 54 and 68 of the Rome Statute.
1323 Eikel (n 1274) 118.
1324 Ibid.
1325 The Penal Code of Bangladesh 1860, Section 506 [Bangladesh].
1326 Section 151 of the Evidence Act 1972 of Bangladesh, available from http://bdlaws.minlaw.gov.bd/print_sections_all.php?id=24 accessed 11 January 2019

There was a directive in Bangladesh from a writ petition of the High Court in 2010 namely *BNWLA v Government of Bangladesh,* where it was said that, '…Government shall take immediate steps to enact law for introduction of witness and victim protection system for effective protection of victims and witnesses of sexual harassment as well as the people who come forward to resist sexual harassment'.[1327] This High Court directive is only limited to the witnesses of sexual violence and to date there is no formal witness protection program in Bangladesh.

Article 35 of the Constitution says that those accused of a criminal offence shall be entitled to get a speedy and public trial by an independent and impartial court or tribunal.[1328] This means that the witnesses identity should be disclosed and accused should be able to cross-examine the witnesses against the accused. As discussed above, in the case of *Tadić,* in exceptional circumstances, it is more important to provide protection to the witnesses rather than maintaining the fair trial rights of an accused to know the witnesses against him and to cross-examine the witnesses.

After analysing the domestic legal framework of Bangladesh relating to witness protection, if we consider the International Crimes (Tribunal) Act 1973, it appears that it has no express provisions for witness protection. However, Chapter VI A of the RoP of the ICT-BD (as amended) deals with the issue of witness protection. Under Rule 58A (1), the tribunal is empowered to pass appropriate order (by its own initiative or by an application from either party) to the relevant bodies to provide protection, privacy and well-being of the witnesses and victims.[1329] Under this particular rule, the government is obliged to provide accommodation and if required and also provide security and surveillance during the stay of witnesses as

1327 Writ Petition No. 8769 of 2010 BNWLA v. Govt. of Bangladesh.
1328 Article 35 of the Constitution of Bangladesh.
1329 Rule 58A of the RoP of the ICT-BD.

directed by the tribunal.[1330] This particular rule, however, did not say anything about a permanent witness protection program.

8.3.1 Law Commission Reports

The Bangladesh Law Commission provided at least two detailed reports to the law ministry for the protection of witnesses and victims. The first report (hereinafter 'first report') published in 2006 observed that witnesses and victims in Bangladesh are '…vulnerable to threats, intimidation, coercion and harassment by the offenders or their associates and for these reasons, the victims and witnesses are unwilling to assist the investigation or testify before court at trial stage.[1331]

As early as 2006, the Law Commission reiterated that, '…there is an urgent need for making a new law providing for the rights, privileges and protection of the victims and witnesses and where necessary, their family members'.[1332] The Law Commission also mentioned that witnesses are reluctant to give evidence in the court or tribunal fearing the safety of their life, properties and family members.[1333] The Law Commission further observed that in Bangladesh, in most of the cases involving the powerful and influential suspects, '…witnesses turn hostile, making the whole process of justice infructuous'.[1334] The Law Commission in their report also observed that on many occasions, witnesses become untraceable due to the influence by the suspects or their associates where the suspects are rich or influential.[1335]

1330 Rule 58A of the RoP of the ICT-BD.

1331 Law Commission-Bangladesh, 'Final Report on a proposed law relating to the protection of victims and witnesses of crimes involving grave offences' (Report 74 of 17/10/2006) < http://www.lawcommissionbangladesh.org/reports/74.pdf> accessed 5 November 2018.

1332 Ibid.

1333 Ibid.

1334 Ibid.

1335 Ibid.

On 9 February 2011, the Law Commission of Bangladesh published its second report (hereinafter 'second report') where it is stated that except for Section 151 and 152 of the Evidence Act, there is no modern legal framework to provide protective measures to witnesses in criminal trials.[1336] It is also reported that judges have ordered the relevant authorities to provide appropriate protection to the witnesses who have raised concerns about their safety.[1337] However, since there is no specific legal framework for providing any protection, the authorities could not implement the order/directives from the court. The second report further stressed that although there is a social pressure on the government to make laws in relation to witness protection, no up to date steps have been taken in this regard.

The second report also suggested that the witness protection law has been developed over the last two decades by the establishment of some ad hoc tribunals, ICT's and the permanent ICC[1338] As discussed above, the earliest comprehensive legal mechanism relating to witness protection was addressed by the deputies of the ministers of EU states in a meeting in 1985 which is known as Recommendation Rec(85)11.[1339] The European standard of witness protection provided a series of recommendations which was later reflected in the witness protection measures in the ICTY followed by ICTR and ICC. Most of the common law countries have also developed their laws relating to witness protection. The present trend of the ICL is to encourage and influence the development of an effective and powerful witness protection measure. In this respect, reference can be made to the Model Witness Protection Bill developed by the United Nations Office on Drugs and Crime (UNODC); the manual of Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime

1336 Ibid.
1337 Ibid .
1338 Ibid.
1339 Nicolae George Stanica and Florin Coman, 'European Standards in Witness Protection' (2014) 3 PUB SEC STUD 276.

and the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985.[1340]

Most importantly, the Law Commission also made specific reference to the ongoing ICT and the ICC's rules relating to witness protection. The second report further sought an opinion from experts around the world and rectified the draft bill made by earlier reports in 2006 (first report) on the same point.[1341] The recommendation 14 of the second report is mainly designed to address the witness protection of the ICT-BD. It is opined that the number of witnesses before the ICT-BD is sufficiently large and threats towards the witnesses would come from organized groups.[1342] It is further stated that wherever international crimes are tried, such as domestic tribunal or international court; State's protection is the main source of protection for the witnesses.[1343] The second report recommended that in order to protect the witnesses, there should be a national policy, program, and implementing body.[1344] Further, it was also recommended that primarily, there should be witness protection offices in every major city, and gradually it should be expanded to the district level.[1345]

From the above two reports of the Law Commission of Bangladesh, it appears that the judiciary has identified the problems with witness protection measures in Bangladesh and how it has been affecting the justice process in Bangladesh. However, the amended version of the ICT Act 1973 did not include any provisions regarding witness protection. Although, the amended RoP of 2011 inserted the new Chapter VIA and the new Rule 58A (1) giving the tribunal some power to direct the authorities of the government to provide witnesses and victims appropriate protection. It seems that the ICT-BD has no direct power to provide protection to the victims rather, it had to rely on government bodies. One important observation

1340 Law Commission Final Report (n 1331).
1341 Ibid.
1342 Ibid.
1343 Ibid.
1344 Ibid.
1345 Ibid.

in this particular regard is that the government failed to understand the importance of witness protection. So, the legal status of the witness protection issue was broadly overlooked at the beginning of the Tribunal.

8.4 Analysis of interview data: Observation of the Appellate Division Judge

The ICT-BD has given very little attention to ensure an appropriate mechanism to deal with witness protection. The judges of the tribunal did not play an active role in providing appropriate protection to the witnesses. A particular judge, who took part in the interview, stated that many witnesses of the ICT-BD were actually threatened by the accomplices and relatives of the accused persons and even few of the witnesses were killed.[1346] According to him, over the course of time, some of the accused persons have gained power due to their involvement with politics in Bangladesh.[1347] This particular judge also opined that the issue of witness protection would not be a severe issue if trial could have established soon after the liberation war because the situation was different and the accused persons had no influence like they have at the present time.[1348] It seems the issue of witness protection became severe due to the significant time lapse since the crimes were committed. He also mentioned that some of the accused were able to establish themselves within the mainstream politics of Bangladesh under the pro-Pakistani government, and they accumulated not only wealth but also became powerful socially and politically.[1349] Some of the accused became ministers, some of them became members of the parliament, and as a result, they also developed their political muscle.[1350]

When a question was asked to a Judge on whether the ICT-BD has sufficient provisions to ensure witness protection, the Judge stated that, '…not sufficiently, there should

1346 J1-Q-B
1347 J1-Q-B
1348 J1-Q-B
1349 J1-Q-B
1350 J1-Q-B

be more rigorous Act for the protection of the witnesses, police protection for example'.[1351] So, it appears from the Judge's observation that there was a lack of police protection and physical protection of the witnesses who gave evidence before the ICT-BD. The Judge made reference to the investigatory agency's experience in gathering live witnesses that, '…many witnesses said when the investigatory team went there, please for god sake don't call me as a witness'.[1352] It is important to note why the witnesses were unwilling to give evidence before the tribunal; one possible answer would be lack of witness protection. The witnesses did not feel confident that they would be protected if their safety was threatened. At the pre-trial stage, the investigators did not employ any protective measures in terms of keeping the identity of the witnesses secret.

The Judge further stated that many witnesses avoided the investigators and their daughters and sons said, '…for god sake, spare my father he will not give evidence'.[1353] It appears that there was no adequate protection for those who gave evidence and who wanted to give evidence before the ICT-BD.[1354] It is reported that in some cases, the accused persons tried to bribe the witnesses not to give evidence against them, this would not have happened if the tribunal could have been established soon after the atrocities were over in 1971.[1355] It appears that one of the primary deficiency of the ICT-BD's protective measures was the insufficient mechanism to ensure witness protection. For this reason, some of the witnesses before the ICT-BD were allegedly murdered as reported by various news reports.[1356]

8.4.1 Intimidation of witnesses in Bangladesh

1351 J1-Q-C3
1352 J1-Q-C3
1353 J1-Q-C3
1354 J1-Q-C3
1355 J1-Q-C3
1356 Shah Ali Farhad, 'Protect witnesses and victims' *Dhaka Tribune* (Dhaka, 28 December 2013) available from < https://www.dhakatribune.com/uncategorized/2013/12/28/protect-witnesses-and-victims> accessed 17 November 2018.

It appears that in the Bangladeshi situation, that there is no unified system of witness protection and some witnesses initially declined to give evidence fearing persecution or harm by the followers or the family members of the accused. As discussed above, Bangladesh does not have a separate and distinct law for the protection of victims and witnesses of international or serious crimes. However, as for the victims and witnesses of cases at the ICT-BD, there are certain legal provisions (e.g. Section 506 of the Penal Code of Bangladesh & Chapter VI A of the RoP of the ICT-BD) relying on which reasonable safety and security can be given to the witnesses before the ICT-BD if judges make the best use of the provision.[1357]

The Economist reported that, '…the immediate effect of the latest verdict [of 28 February 2013] from the 'International Crimes Tribunal' was the worst single day of political violence in the history of modern Bangladesh'.[1358] The accused, Delowar Hossain Sayeedi[1359] who was an important leader of the Bangladesh Jamaat-e-Islami party, was convicted by the ICT-BD for murder, abduction, rape, torture, and persecution in 1971. The student wing of the Jamaat-e-Islami, Bangladeshi Islami Chaatra Shibir and their supporters had reacted violently causing the death of at least 35 people including four police officers.[1360] It was a serious indication of the safety and security of the witnesses who testified against Mr Sayeedi. However, the ICT-BD failed to take adequate measures to deal with the immediate threats towards the witnesses.

It is reported that due to lack of witness protection measures, in 2013 three prosecution witnesses were murdered.[1361] It is also reported that violence had escalated

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1357 Shah Ali Farhad, 'Protect witnesses and victims' *Dhaka Tribune* (Dhaka, 28 December 2013) available from < https://www.dhakatribune.com/uncategorized/2013/12/28/protect-witnesses-and-victims> accessed 17 November 2018.

1358 Banyan, 'Bangladesh's war-crimes trials: Bloodletting after the fact' *The Economist* (1 March 2013) available from <https://www.economist.com/banyan/2013/03/01/bloodletting-after-the-fact> accessed 18 November 2018.

1359 *Sayeedi* (n 55).

1360 Banyan (n 1358).

1361 Sayed Samiul Basher Anik, 'When will we get witness protection law?' (15 June 2018) available at < https://www.dhakatribune.com/bangladesh/2018/06/15/will-bangladesh-ever-get-a-witness-protection-law> accessed 15 November 2018.

against the people who were involved with the administration of justice process of the ICT-BD and witnesses, prosecutors and judges of the ICT-BD were the prime targets.[1362] It is further reported that to frighten the people, judges and prosecutors, a few unidentified people threw bombs and, 'attacks[ed] the residences of ICT-BD Chairman Justice ATM Fazle Kabir and Judge of the AD of the Honourable Supreme Court of Bangladesh, Justice SK Sinha' and the houses of some of the prominent prosecutors.[1363]

According to Adams, '…the killing of a prosecution witness will frighten past and future war crimes trial witnesses and some may choose not to testify'.[1364] He further opined that to ensure witness protection, law should be amended to safeguard protection to the witnesses presenting themselves before the ICT-BD including, '…safety, dignity, privacy, and physical and psychological well-being.'[1365]

A key prosecution witness, Wahidul Alam Junu against Salauddin Qader Chowdhury was found dead in Chittagong.[1366] The accused SQ Chowdhury was a powerful politician of Chittagong and, one of the Chittagong based prosecution lawyers, Rana Das Gupta opined that Mr Junu's murder was linked to him giving witness against the accused Mr Chowdhury. Mr Junu's family members stated that before giving evidence to the ICT-BD, he was threatened not to give evidence and later it seemed that he was murdered for testifying before the ICT-BD.[1367] It appeared from another report from the Daily Star (a prominent daily English newspaper in Bangladesh), that this particular witness's details were published, and reference

1362 Farhad (n 1357).
1363 Ibid.
1364 Human Rights Watch, 'Bangladesh: Investigate Killing of Witness' (23 December 2013) available from < https://www.hrw.org/news/2013/12/23/bangladesh-investigate-killing-witness> accessed 10 May 2018
1364 Ibid.
1365 Letter to the Bangladesh Prime Minister regarding the International Crimes (Tribunals) Act by Brad Adams available from < https://www.hrw.org/news/2011/05/18/letter-bangladesh-prime-minister-regarding-international-crimes-tribunals-act> accessed 15 December 2018.
1366 Anik (n 1361).
1367 The Daily Star 'WITNESS AGAINST SQ CHY: Left dead at Ctg hospital' (24 February 2013) available from < https://www.thedailystar.net/news-detail-270263> accessed 18 November 2018.

was made to his deposition.[1368] However, during this research, it was not possible to verify independently whether the murder was linked to him giving evidence before the ICT-BD.

Another prosecution witness Mostafa Hawlader, was murdered on 8 December 2013 at his home by an unidentified individual, and it was thought that he was killed because he gave evidence against Delwar Hossain Sayeedi.[1369] Before his death, Hawlader had received several death threats from unknown callers, and the local police provided him initial protection.[1370] But the family could not afford to provide free food to the police constable who would give him protection and according to his son, '…feeding the police would cost more than his father could earn in a day'.[1371] The availability of the police is limited in the rural areas of Bangladesh and for this reason, the police constable had to stay continuously at the house of the witness and they had to provide food for the police constable free of charge but the witness was very poor and could not afford to provide free food to the police constable who would give him continuous protection at his home and outside. On the other hand, the police had no additional funding to cover the food costs of the constable. Further, since the witness used to live in a rural area, it was not possible for the police constable to buy food from the market; instead, he had to rely on the witness's family for food. Eventually, the police constable was told by the witness that he does not require police protection. This issue indicates that the police protection given to Mr Hawlader was not given under any witness protection program, and it was an informal method of providing protection to an individual by a local police station. According to preliminary police investigations, the attackers of Mr Hawlader were the followers of the Delwar Hossain Sayeedi, but Jamaat-e-Islami denied any involvement with the attack.[1372]

1368 The Daily Star 'SQ CHY'S RESIDENCE IN '71: Witness testifies on abduction, torture' (13 February 2013) available from <https://www.thedailystar.net/news-detail-268925> accessed 17 November 2018.
1369 Anik (n 1361)
1370 Human Rights Watch (n 1364).
1371 Ibid.
1372 Human Rights Watch (n 1364).

So, although the RoP of ICT-BD included some provision to provide victims and witnesses necessary protection, it is not enough to simply to make legal provisions. In addition to making legal provision, it is fundamentally important to develop logistics and institution. Further, it is equally important to train the officials who would identify the witnesses at risk and adopt appropriate measures to deal with the issues. Also, there should be a supervising body to monitor the performance of the officials and periodic review should be prepared concerning the continuous risk of the witnesses.

Along with the witnesses, at least two judges of the ICT-BD were targeted in 2013.[1373] The death of Mostafa Hawlader is the result of ineffective witness protection measures or lack of appropriate protective measures.[1374] A particular Judge stated that, '…one of the main deficiency of the ICT-BD is that of the witness protection, there was no sufficient mechanism to give protection'.[1375] That is why some of the witnesses were killed because those convicted people were very influential.[1376]

A critical analysis of the Bangladeshi situation suggests that a number of suspects before the ICT-BD were high profile politicians from Jamaat-e-Islami and BNP and had their own base of supporters and followers.[1377] As a result, some prosecution witnesses, who had testified against the suspects, were targeted by the agents of the suspects for the purpose of retaliation.[1378]

Another prosecution witness, Ranjit Kumar Nath, who testified in the case of Ali Ahsan Mujaheed was targeted with a petrol bomb.[1379] Not only the witnesses but also their

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1373 Farhad (n 1357).
1374 The Daily Star 'INJURED WAR CRIMES WITNESS DIES: Who will protect us?' asks his wife' (11 December 2013) available from <https://www.thedailystar.net/news/who-will-protect-us-asks-his-wife> accessed 18 November 2018.
1375 J1-Q-C3
1376 J1-Q-C3
1377 Farhad (n 1357).
1378 Ibid.
1379 Human Rights Watch (n 1364).

family members were targeted, for example, Ahmed Imtiaz Bulbul was a prominent witness in the case of *Ghulam Azam*, his brother Ahmed Miraz was killed to frighten the other prosecution witnesses.[1380] Mr Miraz's dead body was found near a railway track in Kuril, Dhaka.[1381] The witness Ahmed Imtiaz said that, 'I feel insecure and so do my wife and son'.[1382]

In June 2018, another prosecution witness Mr Shumon Zahid was found dead near the railway tracks in the Bagicha area of Khilgaon.[1383] It was reported by Shahjahanpur police station that Shumon lodged a General Diary (GD) with the police station seeking protection after which, a police patrol team used to look after him on a regular basis.[1384] There is a similarity between the deaths of Mr Miraz and Mr Zahid, both their bodies were found near railway tracks in Dhaka. It is unknown to date whether the deaths are linked to lack of witness protection or if these are mere coincidences. It was not possible during the course of this research to follow up on the murder cases filed for the above-mentioned deaths of the witnesses who testified before the ICT-BD due to lack of resources.

1380 The Daily Star, 'Ahmed Imtiaz Bulbul's brother found dead in city' (19 March 2013) available at < https://www.thedailystar.net/news/ahmed-imtiaz-bulbuls-brother-found-dead-in-city> (Last accessed 19 December 2018).

1381 Ibid.

1382 The Daily Star 'Prosecution witness seeks protection: Links brother's murder with his testimony against Ghulam Azam' (11 March 2013) available from https://www.thedailystar.net/news/prosecution-witness-seeks-protection Last accessed 15 November 2018.

1383 The Daily Observer 'Another uncalled-for death of a prosecution witness' (24 June 2018) available from https://www.observerbd.com/details.php?id=144221 Last accessed 15 November 2018.

1384 Ibid.

8.4.2 National and District Committees

The Human Rights Watch (HRW) had previously made a suggestion to the Bangladeshi authorities to set up a competent body within the ICT-BD's administration, in order to look after the protection of witnesses before the ICT.[1385] The Law Commission made recommendations on two occasions, to develop witness protection measures and institution. As a result, the National and District level committees have been formed to look after the witness protection issue.[1386] Following the Law Commission's recommendation, District committees headed by deputy commissioners have been formed, but the witnesses did not play an active role in reporting any threats they received, and this formation of committees became ineffective.[1387] The aim of forming the national and local committees were to strengthen the local authority within the existing local administration. This attempt was indeed cost effective but proved to be ineffective due to lack of experience. The committees failed to assess the individual risk of the witnesses and their family members, who testified before the ICT-BD. Also, the witnesses did not engage with the committee members and there was a lack of co-ordination. The idea introduced by the Bangladeshi government, is a unique one in terms of cost effectiveness, but it could not be fully developed due to lack of training, logistics and strategies.

8.4.3 Interim orders and Witnesses' Protection

The issue of witness protection and its effect on trial process can be observed from the interim order of the ICT-BD. On 20 March 2012, the prosecution filed an application requesting the tribunal to admit the statements made by 46 witnesses and recorded by the investigating officer, on the grounds that their attendance could not be procured without an

1385 Human Rights Watch (n 1274).
1386 The Daily Star 'INJURED WAR CRIMES WITNESS DIES: Who will protect us?' asks his wife' (11 December 2013) available from https://www.thedailystar.net/news/who-will-protect-us-asks-his-wife Last accessed 18 November 2018.
1387 Ibid.

amount of delay.[1388] In the petition, it was stated that prosecution witnesses (P.W) Usha Rani Malaker, was too ill and had lost her memory and was unable to travel to the tribunal in Dhaka.[1389] It was also reported that Sukharanjon Bali had left his house around four months before the petition was filed, and since then he has been untraceable.[1390] It is further reported that prosecution witnesses, Ashish Kumar Mondal, Sumoti Rani Mondal, and Samar Mistri were also untraceable since the 1st week of February 2012, and it has been said that they had secretly left for India because they did not feel safe being witnesses for the prosecution.[1391] The petition made by the prosecution revealed that many eyewitnesses who became witnesses for the prosecution had been threatened by the arms cadre of Pirojpur who were supporters of the accused [Delowar Hossain Sayeedi], as a result of which the witnesses felt terrorized and went into hiding, and their whereabouts could not be traced.[1392] For these reasons, the prosecution urged the tribunal to admit written statements of the said witnesses as evidence under section 19(2) of the Act because their attendance could not be procured without an amount of unreasonable delay.[1393] However, the accused contested the petition by filing a reply on 28 March 2012, contending that the application, if allowed, would seriously hinder the rights to a fair trial under the domestic and international criminal legal system.[1394]

Regarding Sukharanjan Bali, it was argued that if he was really missing, then the GD would have been filed at the very least. The defence denied that the following witnesses: Ashish Kumar Mondal, Sumoti Rani Mondal, and Samor Mistri were missing.[1395]

The judges of the tribunal observed that the defence lawyers had submitted newspaper clippings annexed with written objections against the prosecution lawyer's

[1388] *Sayeedi* (n 55) [Order No-135 of 07 July 2012].
[1389] Ibid.
[1390] Ibid.
[1391] Ibid.
[1392] Ibid.
[1393] Ibid.
[1394] Ibid.
[1395] Ibid.

application to admit written statements from some of the witnesses as evidence. In the interim order, Judge stated that:

> Regarding the annexure of some newspaper clippings of the Sangram dated 24.03.2012, Naya Digonta dated 27.03.2012 and Amar Desh dated 25.03.2012 which were annexed with the reply of the defence. The Tribunal took a serious view on some matters stated in those reports which included interviewing some witnesses, publishing and placing those before the tribunal after annexing them with the reply while the matter was in session of the tribunal and order has not yet been passed. This was clearly interfering [with] the justice process.[1396]

It appears that a particular newspaper named the Daily Naya Diganta, had made detailed reports about the discussion of a journalist and some of the witnesses; it was surprising that a journalist could talk to a witness on a sub-judicial matter, reproduce it in the newspaper and in addition to that, make comments involving merit of the matter.[1397] The judges of the tribunal also observed that the accused persons had appointed paid journalists to meet the prosecution witnesses and report the discussed matter using their own interpretation.[1398] The judges were convinced that the allegation from the prosecution, which stated that people in support of the accused were going to prosecution witnesses and threatening them from attending the tribunal was true.

8.4.4 Hostile Witness

Mr Bali,[1399] who was the primary prosecution witness in relation to his brother's murder, later became a witness for the defence team.[1400] The prosecution presented this particular witness before the ICT-BD, but the tribunal did not take his statement.[1401] A particular defence lawyer stated that their witness Mr Bali was searched by police intelligence and he

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1396 Ibid.
1397 Ibid.
1398 Ibid.
1399 Shukho Ranjan Bali was initially a prosecution witness in relation to his brother's killing in the case of *Sayeedi (*n 55)
1400 DL1-Q-C1
1401 DL1-Q-C1

was abducted in front of them.[1402] He also stated that he made a complaint before the tribunal and acknowledged that they were a bit loud at the tribunal during appeal.[1403] Subsequently, the tribunal made an inquiry with the prosecution team, which contended that no such thing happened.[1404] The senior police officer was also sent to investigate the matter, and he confirmed that no such events took place.[1405] The court then concluded that there was no evidence before them regarding the allegation of witness abduction; moreover, the court issued a 'show cause' notice in response to the aggressive behaviour of the defence lawyers.[1406] This particular defence lawyer stated that the abducted witness was later discovered in a jail cell in India.[1407] It was not possible for the researcher to independently verify the reason as to why the prosecution witness Mr Bali became a defence witness and why he went to India. However, presumably, this particular witness was subjected to intimidation. This is an important lesson on how a witness may be subject to intimidation and future transitional justice mechanisms can adopt appropriate policies to avoid such issues for the purpose of fair disposal of justice.

During a press conference held on the 8th of November 2012, the Chief prosecutor, referred to a GD No. 773, which was filed on the 25th of February 2012 and alleged that Bali, who was one of the witnesses was intimidated by the defence team and as a result, gone into hiding.[1408] He had also stated that the defence engaged in 'False Propaganda'.[1409] The Investigation Officer's deposition on the 5th of August 2012 stated that this GD was filed at the 'Undur Kani' Police station by the witness's daughter around 10 months ago.[1410]

[1402] DL1-Q-C1
[1403] DL1-Q-C1
[1404] DL1-Q-C1
[1405] DL1-Q-C1
[1406] DL1-Q-C1
[1407] DL1-Q-C1
[1408] Ibid.
[1409] Press Briefing of the Office of Chief Prosecutor, International Crimes Tribunal Bangladesh, Old High Court Building, Dhaka (08 November 2012).
[1410] Ibid.

Regarding witnesses Ashish Kumar Mandol, Sumoti Rani Mandol and Samor Mistry, the prosecution stated that after 31 January 2012, they went to a village from Dhaka and since then, they are untraceable.[1411] People had speculated that they had probably travelled to India.[1412] The local police officer was requested to send them to the tribunal, and he informed the respected parties that the witnesses were not present at their address and explained the possibility that the witnesses might have left for India, therefore, their presence at the tribunal was not possible.[1413]

A particular prosecution lawyer stated that fearing for their safety, many eyewitnesses and victims were unwilling to describe crimes, for example, rape victims, due to social stigma were unwilling to disclose information of the crimes that were committed against them.[1414] This prosecution lawyer also stated that despite their fear, some witnesses came forward to give evidence to enable the tribunal to serve justice for the victims.[1415] According to him, many people were unwilling to give evidence fearing the perpetrators and that if they give evidence, they will be targeted and harmed.[1416] He said there were a couple of incidents with the security and safety of the witness protection, and two witnesses were murdered, but it could not be conclusively said that they lost their lives because they were providing evidence before the tribunal. [1417]

Another prosecution lawyer stated that the ICT-BD has some provisions regarding witness protection, but there are no provisions to provide protection after trial. [1418] However, an analysis of the ICT Act 1973 reveals that there is no express provision for witness

[1411] *Sayeedi* (n 55) [Order No-135 of 07 July 2012].
[1412] Ibid.
[1413] Ibid.
[1414] PL1-Q-B1-B2
[1415] PL1-Q-B1-B2
[1416] PL1-Q-B1-B2
[1417] PL1-Q-C3
[1418] PL1-Q-C3

protection. It seems that the prosecution lawyer might have referred to the Rule 58A (1) of the RoP of the ICT-BD. This prosecution lawyer acknowledged that due to financial constraints, the current protection measures are not sufficient, but still, they are trying to provide protection to the witnesses as much as they can.[1419] According to him, there should be a clear mechanism for witness protection.[1420] Many of the witnesses are under police protection at the moment.[1421] Although it is mentioned in the ICTA 1931, that protection to the witnesses has to be ensured, there is however, no law on this area[1422] and no witness protection measures have been implemented to date.[1423]

A prosecution lawyer stated that due to time-lapses, a lot of fear was injected into the minds of victims and witnesses. [1424] He said the first barrier they had to overcome was fear; they had to reassure witnesses regarding their safety, and only then the witnesses could come forward and provide their testimonies.[1425] He explained that, 'After five or six executions of our sentences, the witnesses and the victims started to believe [in the] tribunal's capacity'.[1426] He also stated that even now when the accused are being tried, the victims are still afraid due to the social and political statuses of the accused.[1427] He further mentioned that witness often asked him that, '…you can save me in Dhaka but can you save me at my home at night?.[1428] This represents the ongoing fear of the witnesses before the ICT-BD. He further elaborated on this point that the witnesses expressed their concern that they have to share the village where relatives or family members of the accused persons reside and they would not feel safe if they gave evidence before the Tribunal.[1429] So, even now, the security of the witnesses is a

1419 PL1-Q-C3
1420 PL2-Q-A3-A
1421 PL1-Q-C3
1422 PL2-Q-A3-A
1423 PL2-Q-A3-A
1424 PL3-Q-B1-B
1425 PL3-Q-B1-B
1426 PL3-Q-B1-B
1427 PL3-Q-B1-B
1428 PL3-Q-B1-B
1429 PL3-Q-B1-B

big challenge for the Tribunal.[1430] A prosecution lawyer further observed a lot of attempts to create impediments for the tribunal such as bribing the witnesses with money, threatening the witnesses, murdering the witnesses, etc.[1431]

8.5 Conclusion and Interim findings

The protection of witnesses plays a key role in the successful functioning of the court. Majority of the interviewees are of the opinion that in Bangladesh, the trend is such that the witnesses do not wish to come to the courts to give their statements and evidence as they feel unsafe. One particular participant stated that the court has a duty to take appropriate measures to protect the safety, physical and psychological well-being, dignity, and privacy of witnesses.

In the RoP of the ICT-BD, provisions were introduced to provide witness and victim protection because witnesses will not come forward to give evidence if they do not feel safe for themselves and their family members. There is a possibility that cases may collapse if witnesses do not come forward to give evidence. For this reason, witness protection is fundamental. However, the ICT-BD could not develop a satisfactory mechanism concerning witness protection so far. The witness protection measure does not solely depend on the ICT-BD rather, the total judiciary, executives, local authorities and law enforcement agencies may find a plausible solution. They could identify the issues of witness protection at various stages such as pre-trial, during trial and after trial. During investigation, the investigators may conduct risk assessments of the potential witnesses and report to the local authorities and law enforcement agencies. There should be a clear policy defining the role of the various agencies regarding witness protection and appropriate training should be given to the people associated with the witness protection aspect before starting the trial.

[1430] PL3-Q-B1-B
[1431] PL4-Q-B1

The protection of witnesses at the pre-trial and post-trial stages has particular significance, and it is important at the pre-trial stage, that witnesses are able to receive protection without seeking judicial order.[1432] As a precaution, names of the witnesses should be kept secret during the investigation stage because at this stage, many civil parties have access to the sensitive information which could jeopardize the safety issue of the witnesses.[1433] Also, post-trial protective measures are also significant to look after the physical and psychological well-being of witnesses after they return to their normal daily life.[1434] Some witnesses may live in rural areas where police protection is limited, and in that case, local authorities may be given support and training to protect the witnesses along with the local police.[1435]

When the ICT-BD was established, there was no specific legal provision for witness protection measures to deal with the witnesses of the ICT-BD. Later in 2011, the RoP was amended to include witness protection measures in the legal framework. The ICT-BD did not have any specific witness protection measures at the pre-trial stage. Later, following the recommendation from the Law Commission of Bangladesh, they established the district committee to oversee the overall safety and well-being of the witnesses before the ICT-BD. However, there were at least two problems they had to overcome in order to make the witness protection measures effective: firstly, inadequate training or experience of the personnel dealing with the witness protection issue of the ICT-BD. It appears from various news reports that respective police stations were given the responsibility to provide protection to the witness, and they were not trained to identify the risk factors at various stages of the trial. Secondly, a witness who lives in the rural area could not be provided appropriate protection due to lack of resources.

1432 Romana Weber, 'Witness Protection at International Criminal Tribunals: Previous Experiences as Lessons for the Extraordinary Chambers in the Courts of Cambodia' (2010) 2 CITY U HK L REV 137, 158.
1433 Ibid.
1434 Ibid.
1435 Ibid.

According to Eikel, it is important to develop an inclusive 'inter-organ approach' for appropriate protective measures for the witnesses and victims and define main duties for the relevant organs of the tribunals at the same time.[1436] But the ICT-BD could not develop any such approach, and the ICT-BD registrar did not establish any permanent witness protection body within the tribunal's registry.

The legal mechanism itself is not enough to ensure the safety and security of the witnesses before criminal tribunals. Only the actual implementation of protective measures can achieve the desired outcome. All the parties involved with the proceedings that have sensitive personal data of the witnesses should be careful not to publish the information publicly. The main deficiency of the ICT-BD in terms of witness protection is the inability to keep personal information of the witnesses' secret. The witnesses that had testified against the powerful and influential accused, found that their names were published in the national daily newspaper which had posed serious threats to the safety and security of the witnesses.

The majority of the interviewees were of the opinion that, in Bangladesh, the ICT-BD had given very little attention to assessing the risk of the witnesses who testified before the tribunal and did not take appropriate measures keeping witness identity safe. On the other hand, when cases were still ongoing, some newspapers were able to interview the witnesses who gave evidence before the court. The identities of the witnesses were publicly available. As discussed earlier, at least three witnesses of the ICT-BD were murdered, and family members of the witnesses also live in continuous fear.

The safety and security of the witnesses before international courts and tribunals are risky if there are no appropriate witness protection measures. It is always challenging to ensure the safety and security of the witnesses. The high-profile cases before the ICT-BD involved some influential figures with a great deal of financial resources and local power. The

[1436] Eikel (n 1274) 99.

ICT-BD has not been able to reflect the witness protection measures adopted by the earlier international tribunals. As a result, there were allegations of witness intimidation both by the prosecution and defence team.

The ICT-BD has been unable to establish any formal permanent witness protection program. Furthermore, it has also been unable to adopt any non-judicial measures. There is no information on assessment of the potential risk of witness protection before the tribunal started functioning. There is no specific domestic law to provide sufficient protection to the witnesses before the ICT-BD. The investigators, prosecutors, the registrar, and defence could not assess the scale of risk the witnesses possess. Also, in terms of securing personal data of the witnesses before the ICT-BD, there were no measures taken to keep the witnesses anonymous.

Valuable lessons may be learned from the ICT-BD, such as providing appropriate training to the workforces who would administer the witness protection measures. To deal with the witness protection issue in Bangladesh, the Law Commission had provided a series of recommendations, the governing RoP was amended to include a legal provision relating to witnesses and victim protection. Further to that, committees were made at the district level to oversee the witness-protection issue. However, there was a shortage of logistics and adequately trained personnel to run the witness protection scheme.

The policymakers did not give sufficient importance to strengthen the witness protection aspect of the ICT-BD. The politicians, who took part in the interview, chose to remain silent on this point or avoided providing any answers whereas lawyers from both parties and judges did talk about witness protection in the ICT-BD. The reason behind the government's silence could be due to the lack of financial resources. Because establishing and running a permanent witness protection program is costly.

The contribution made by the ICT-BD concerning the development of witness protection is strengthening the local authorities. The authority in Bangladesh adopted a

delayed policy to deal with the witness protection issue. It now requires a significant investment of time and resources to train the personnel of the witness protection committee so that they can make an assessment of risk at various levels of the tribunal and adopt an appropriate strategy to deal with the issues.

CHAPTER 9

SENTENCING AND CAPITAL PUNISHMENT

9.1 Introduction

This chapter analyses the sentencing principles of the ICT-BD. Firstly, the researcher has analysed literature and guidance of determining punishment surrounding the ICL area. Secondly, he has analysed the interview data collected through semi-structured interviews. Thirdly, he has analysed some of the judgements of the ICT-BD (including judgements from the Court of Appeal of the Supreme Court of Bangladesh) in determining the practices of the ICT-BD when determining the sentences. As part of the literature analysis, this section dealt with the general objective of punishment, the historical context of punishment, theories of punishment and international norms and practices. This chapter also dealt with the relationship of human rights and sovereignty with the death penalty.

There is no clear guidance in the IHL and criminal law treaties regarding applicable penalties and sentencing issues.[1437] Also, there is no provision on penalties in ICL conventions relating to the 27 categories of crime.[1438] The main reason for this absence of penalties is that the conventions were adopted to apply through the 'indirect enforcement system'.[1439] It was thought that individual States will adopt the provisions of the conventions and reflect those into their domestic legislation and the issue of punishment was left to the individual States trying their own nationals in accordance with their domestic law.[1440] However, problems would arise if international crimes are applied through the 'direct enforcement system'.[1441]

1437 Cryer (n 340) 494.
1438 Bassiouni (n 295) 474.
1439 Ibid.
1440 Ibid.
1441 Ibid 475.

In Bangladesh, the death penalty is a recognised punishment throughout its judicial history. Also, Bangladesh is a Muslim majority country and the death penalty is seen to be the reflection of the Islamic criminal law principle which is strongly based on retribution and deterrence. Before analysing the general literature and practices of sentencing guidelines, it would be helpful to keep in mind the sentencing legal framework of the ICT-BD and criticisms it has attracted for retaining death penalty provision.

9.1.1 Theories of punishment

According to Allison, 'the current system of international criminal law poses theoretical challenges to any philosophical justification for criminal punishment and due to '…structural limitations, the system of ICL delivers exemplary justice, not equal justice'.[1442]

There are two philosophical models justifying criminal punishment to the offenders. The first model is predominantly supported by utilitarianists who justify punishment by reference to societal good.[1443] The second model is adhered by the retributivists who think the punishment is a deserved response to the offenders and the nature of punishment should be proportional to the gravity of the crimes committed. Also, other theorists suggest a hybrid model of utilitarianism and retribution justifying punishment in the sense that, the utilitarian view is the aim of the punishment and retributivist view is the guide to the extent of the punishment to be given to an individual offender.[1444]

According to Drumbl, there are three types of objectives of punishment such as retribution, deterrence/utilitarian and expressivism.[1445] The Just Deserts principle and the retributive objective support the theory that criminals deserve punishment.[1446] Fear of

[1442] Allison Marston Danner, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing' (2001) 87 VA L REV 415, 438-439.
[1443] Ibid 437.
[1444] Paul Robinson & John Darley, 'The Utility of Desert' (1997) 91 Nw U L Rev 453, 454.

[1445] M.A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 2003) at 149.
[1446] Ibid.

punishment and the possibility of safer society due to dissuasion towards committing crimes is the core objective of the deterrence theory which supports that the law can be used effectively to facilitate this.[1447] The expressivist theory is public trust and respect orientated,[1448] building faith of the public towards the system by way of trial, punishments and convictions rather than punishing criminals for their acts or for the purpose of deterrence.[1449]

All of the above objectives have some operational challenges. The retributive objectives have two limitations in terms of selectivity and severity of punishment. Only some extreme evil gets punished, whereas many escape its grasp, often for political reasons.[1450] Retribution requires proportionality between the gravity of the offence and the severity of sanction, it is the most difficult task of the judges to determine punishment. The main problem of deterrence is the lack of evidence that mass atrocity criminal trials have a deterrent function.

In the particular context of Bangladesh, the *just deserts* theory is more convincing, justifying punishing the perpetrators of 1971. If we consider the gravity of the crimes and the impunity the perpetrators have already enjoyed, retribution may serve two purposes. Firstly, perpetrators will be punished for their wrongdoings. Secondly, the victims will feel that justice been served. The ICT-BD in its sentencing practices has adopted its own unique structure and sentencing practices are solely based on national law and the will of the people. As a Muslim majority country, the ICT-BD, in Bangladesh, has retained death penalty as the highest punishment.

9.1.2 Scope of criminal punishment

The ICL Conventions did not place any limits on penalties except for the Convention on the prohibition of torture and other forms of cruel, inhumane and degrading treatment or

[1447] Ibid, 169.
[1448] Ibid, 173.
[1449] Ibid.
[1450] Ibid, 149.

punishment.[1451] According to Bassiouni, international human rights law applies to the sentencing issue of an individual for international crimes and the death penalty is prohibited.[1452] Although 94 countries have prohibited death penalties and 44 countries have limited its application, prohibition of death penalty is not yet universally recognised.[1453] The RPE of the ICTY and ICTR provides the guidance that, judges shall take into account the gravity of the offence, the individual circumstances of the offender and any aggravating and mitigating circumstances.[1454] At the drafting stage of the governing statute of the ICTY, it was suggested that national penalty norms would be the starting point before determining the sentence.[1455] However, the international criminal tribunals such as ICTY, ICTR and ICC's legal provision did not include the provision of death penalty in the governing statutes and RPE.

But the prohibition of the death penalty is inconsistent with the retributive nature of international criminal justice and the sentencing principle of 'just deserts'.[1456] The principle of 'just deserts' contends that punishment should be proportionate to the crimes committed by the perpetrator. So, lesser punishment for heinous crimes committed does not go with the core principle of 'just deserts'.

Islamic criminal justice suggests that capital punishment should be available so that criminals receive the highest punishment and respect the norms in society.[1457] During the preparatory work of the ICC, the sentencing issue was widely discussed and some delegates from Islamic countries proposed to include death penalty as the maximum punishment so that it can be representative of all legal systems.[1458] Due to the fact that other delegates opposed

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1451 Torture Convention.
1452 Bassiouni (n 295) 475.
1453 Ibid.
1454 Ibid.
1455 Shahram Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing' (2009) 99 J CRIM L & CRIMINOLOGY 857, 874.
1456 Bassiouni (n 295) 475.
1457 Farhad Malekian, *Principles of Islamic international criminal law: a comparative search* (2nd Edn, Koninklijke Brill NV 2011) 399.
1458 Bassiouni (n 295) 475.

it, the ICC finally decided not to include death penalty but Article 80 of the Rome statute ensured that penalties provided under the statute will not affect the sentencing practice under the domestic law of individual States.[1459] Accordingly, individual states are entitled to exercise their national practices of sentencing including the death penalty. To this extent, the ICT-BD's retention of death penalty as highest punishment is permissible under domestic jurisdiction.

9.1.3 State Sovereignty

State sovereignty is an important aspect relating to how a particular State would apply sentencing principles. In explaining sovereignty and human rights, White's following remarks are important:

> The students I teach are quite bright, quite white, quite male, and quite conservative. And like most Americans, they are very unaware of the scope and depth of international criticism of the death penalty. When they are made aware of that, their response tends to be something like this: that's a violation of our sovereignty; we shouldn't pay any attention to that.[1460]

The above view has actually reflected the view of John Ashcroft in the case of *Zacarias Moussaoui*, where France objected to the death penalty for their citizen, but Ashcroft made reference to their sovereign status as a defence.[1461] Ashcroft also said that they are a sovereign nation and make judgments about crimes and penalties that exist in their land and they require their counterparts to respect their sovereignty and in return, they will do the same.[1462]

1459 Article 80 of the Rome Statute.
1460 Lawrie Ann White in Alan Clarke, 'The Death Penalty in International Law' (2003) 60 GUILD PRAC 86, 90.
1461 Ibid.
1462 Ashcroft to announce a decision on Moussaoui in coming week, AGENCE FRANCE PRESSE (24 March 2002).

It is argued that sovereignty is a mechanism used by politicians to justify human rights violations.[1463] In the case of *Jens Soering*, the ECHR held that the death penalty was not necessarily a violation of international human rights but it would be cruel and inhuman in the particular case of *Soering,* considering his age and illness.[1464] However, the *Soering* case was heard before the introduction of Protocol 13 of the ECHR and now the position of death penalty is different.

9.2 International norms and practices in relation to sentencing principles

Before analysing the interview data and the judgements, it is pertinent to discuss the existing literature on the punishment of ICL and transitional justice. An analysis of the literature suggests that there is no unified convention on criminal punishment and the prohibition of the death penalty did not yet gain the status of customary international law.

According to the Article 3 of the UDHR and the Geneva convention and Protocol 1, States are obligated to prosecute and punish grave breaches such as war crimes.[1465] Blumenson is of the opinion that, justice is not achieved without punishment.[1466] Mettraux has expressed that it is hard to identify crimes more difficult to sentence than international crimes.[1467] However, we will be approaching sentencing principles in the context of the ICT-BD which is a domestic tribunal and it's sentencing principle is primarily focused on retribution. Ashworth in his commentary stated that there needs to be a rational and coherent objective for sentencing.[1468] The logic behind that is to achieve fairness, certainty and establish a precedent for cases with similar facts for other tribunals to follow. Punishment for war crimes is a relatively new and developing concept and has evolved in the Nuremberg, Tokyo, ICTR and ICTY tribunals. As it stands, there are no concrete guidelines in relation to sentencing

[1463] White (n 1460) 91.
[1464] *Soering v United Kingdom 161 Eur Ct HR* (ser. A) (1989)

[1465] Geneva Convention, Protocol 1 1977
[1466] Ibid
[1467] Guenael Mettraux, *International Crimes and the ad hoc tribunals* (Oxford University Press, 2005) p 258
[1468] Ibid

principles and penalties under ICL, and there seems to be a wide discretion in sentencing principles depending on the facts of each case.

Inconsistency in sentencing principles in the ICT's exists due to the application of judicial discretion in complex cases dealing with crimes of genocide, crimes against humanity and war crimes.[1469] Article 27 of the Nuremberg statue which stated that, "The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just" echoed that of Article 6 of the Tokyo Charter that left the sentencing entirely to the discretion of the judiciary to determine a 'just' punishment including capital punishment.[1470] Judge Webb while drafting the Tokyo trial judgement, considered both retributive and deterrent justifications, he especially relied on deterrence as the primary justification and retribution as a secondary form of penological justification.[1471] Although the IMT tribunals did not have any provisions to consider mitigating circumstances in determining sentences, the judges took into account the personal circumstances of the accused as aggravating and mitigating factors.[1472] Nevertheless, the judgements did not provide sufficient reasoning behind sentencing and future tribunals were unable to rely on the IMT's for sentencing guidelines.[1473]

The ICTY and ICTR have adopted a similar mandate to that of each other and provided a much clearer insight into sentencing practices, however, they were many inconsistencies. Article 24(1) of the ICTY and Article 9(3) of the ICTR limited punishment to imprisonment and dictated to consider the gravity of the offence and the circumstances of the accused when

[1469] Melissa Hacking, 'Sentencing in International Criminal Law: The UN Ad Hoc Tribunals and Future Perspectives for the ICC' (2012) 71(3) Cambridge Law Journal 716.
[1470] Article 27 of Nuremberg and Article 6 of the Tokyo Tribunal.
[1471] During the drafting of the Tokyo judgment, the judges referred to both the retributive and deterrent rationales: Judge Webb in particular expressed the view that deterrence was the main penological justification of sentencing, whereas retribution should have been seen as a subsidiary purpose.
[1472] Alice Riccardi, *Sentencing at the International Criminal Court. From Nuremberg to the Hague* (Eleven International Publishing 2016) 47.
[1473] Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reapprisal* (OUP Oxford 2008) 270.

determining sentences.[1474] Furthermore, Rule 101 (a) [1475] from the RoPE of the ICTY considers mitigating and aggravating factors (e.g. cooperation with the prosecution and sentencing norms of the local courts) as stated in the guideline case of *Nikolic.*[1476]

The cases of *Tadic*[1477] *and Erdemović*[1478] confirmed that the general practice of following guidelines from the previous courts in the former Yugoslavia is not binding, and the trial chambers should consider the applicability of written laws in a modern context and they did so by relying on the expertise of Prof. Sieber in his sentencing report.[1479] In the *Delalic* case, the sentence exceeded that of the normal sentencing practice in the courts of former Yugoslavia which was followed by other case laws.[1480] Although the ICTY and ICTR have attempted to provide sufficient reasonings behind sentencing principles, no cohesive framework was available. Pickard proposed life imprisonment for genocide and crimes against humanity, 7-17 years for torture as crimes against humanity and 10-28 years for rape as crimes against humanity.[1481]

In the particular context of Sierra Leone, where a significant number of offenders were underaged, two sets of punishments depending on the ages of the offenders were developed in the SCSL statue. Article 19 stated that the punishment for adults was imprisonment for a specified term and Article 7.2 excluded juveniles from this punishment and instead provided

[1474] Daniel Pickard, 'Proposed Sentencing Guidelines for the International Criminal Court' (1997) 20 Loy. L.A. Int'l & Comp. L. Rev. 123
[1475] Rule 100 (A) ICTR Rules of Procedure and Evidence.
[1476] Dregan Nikolic, Sentencing judgment, Case No. IT-94-2-S, 18 December 2003, para 141 < https://www.icty.org/x/cases/dragan_nikolic/tjug/en/nik-sj031218e.pdf> Accessed 13 August 2020
[1477] *Prosecutor v. Dusko Tadic,* ICTY Case No. IT-94-1-T [Sentencing Judgement, 11 November 1999], para 39
[1478] William Schabas, 'Perverse Effects of the nulle poena principle: National Practice and the ad hoc Tribunals' (2000) 11(3) European Journal of International Law 528
[1479] *Prosecutor v. Dregan Nikolic*, Case No. IT-94-2-S [Sentencing judgment, 18 December 2003] para 148 < https://www.icty.org/x/cases/dragan_nikolic/tjug/en/nik-sj031218e.pdf> Accessed 13 August 2020
[1480] Delalic, Trial Judgement, 16 November 1998, para 1998
[1481] Pickard (n 1474)

counselling, foster care, training and rehabilitation programmes and ordered them to be taken into care or supervision.[1482]

Article 77 of the ICC Rome statue imposes life imprisonment depending on the gravity of the crime, specified term of imprisonment not exceeding more than 30 years and as an additional penalty, the imposition of fines and the possibility of confiscation of property.[1483] The RoPE of the ICC also states that the punishment must be a reflection of the culpability of the accused and mitigating and aggravating factors must be considered including the level of harm caused and the circumstances of the accused including age, economic conditions, mental capacity or duress, prior convictions and any steps undertaken by the accused to compensate the aggrieved parties and cooperation with the prosecution.[1484]

The provisions of the Nuremberg and Tokyo trials and the ICTR, ICTY and SCSL have provided minimum guidelines for a definite sentencing framework and this was usually left to judicial discretion for sentencing. The ICC in contrast, provided specific provisions and sentencing phases, however setting a maximum penalty does not pledge fairness in sentencing.[1485] Some academics are of the opinion that the sentencing framework provided by the ICC are articulate however, drafter's application of these guidelines lacked rationale in justification and allowed flexibility.[1486]

9.2.1 Death penalty in International Criminal Law

The limited extent of directives relating to punishment can be traced back to the Genocide Convention which states that penalties shall be 'effective' and, the Torture

[1482] Article 19 and 7.2 of SCSL Statute
[1483] Article 77 ICC Statute.
[1484] Rule 145 ICC Rules of Procedure and Evidence.
[1485] Bruce Broomhall, 'Nulla Poena Sine Lege', in Triffterer. (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Beck-Hart-Nomos 1999), p. 44; Werle G., Principles of International Criminal Law, TMC-Asser Press, 2005; Ambos K., Nulla Poena Sine Lege in International Criminal Law, in Haveman
[1486] Alice Riccardi, *Sentencing at the International Criminal Court. From Nuremberg to The Hague* (Eleven International Publishing 2016) 5

Convention states that penalties shall be 'appropriate' following the grave nature of the crimes concerned.[1487]

As a result, the international criminal tribunal's judges have broad discretion in relation to sentencing. The Nuremberg and Tokyo Tribunals provided the death penalty as a just punishment for the mass atrocities committed by the perpetrators.[1488] However, both the Tribunals did not provide any useful guidance in relation to sentencing and even the judgments paid little attention to the issue of sentencing as discussed above.

The recent development of human rights impacted the sentencing issue in the ICTY and ICTR and capital punishment was removed from both the tribunals' legal provision. It should be noted that originally, the ICCPR and ECHR did not prohibit the death penalty provision but restricted its use.[1489] However, the additional protocols of the ICCPR and ECHR now prohibit the death penalty in all circumstances under Protocol No.13 of the ECHR.[1490]

According to Schabas, some of the authorities of international law supports that international crimes are punishable by death not only under national law but also under international law.[1491] The *Lieber Code*, promulgated by President Abraham Lincoln, also made frequent reference to the death penalty as an appropriate punishment for crimes under ICL.[1492] Also, in the commentary on post-WWII war crimes trials, the UN War Crimes Commission

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1487 Cryer (n 340) 494.
1488 Article 27 of the Nuremberg Charter and Article 16 of the Tokyo Charter.
1489 Cryer (n 340) 494.
1490 Article 6 of the ICCPR & Article 2 of the ECHR; 2nd Optional Protocol of ICCPR dated 15 December 1989 and Protocol No. 6 to the ECHR dated 28 April 1984.
1491 William Schabas, *The Abolition of Death Penalty in International Law* (Cambridge University Press 2002) 235.
1492 Instructions for the Government of Armies of the United States in the Field, Prepared by Francis Lieber, LLD, Originally Issued as General Orders No. 100 available from https://www.loc.gov/rr/frd/Military_Law/Lieber_Collection/pdf/Instructions-gov-armies.pdf Last accessed 18 May 2018.

declared that under international law, perpetrators of war crimes may be punished with the death penalty.[1493]

It is observed that 24 men were given the death penalty by the Nuremberg Tribunal for war crimes and other similar offences such as crimes against peace, crimes against humanity and membership in a criminal organization.[1494] The notable aspect of this sentencing is that nobody was executed for committing crimes against humanity or crimes against peace without any element of war crimes. So, it appears that war crimes were an important factor in executing capital punishment.

9.2.2 Death penalty as retribution & deterrence

In the case of *Todorovic*, the ICTY held that the main purposes of punishment in ICL are retribution and deterrence.[1495] The retentionists of the death penalty argue that capital punishment is embodied within the social context and serves justice through retribution for the most heinous criminals.[1496] However, the abolitionists argue that retribution is cruel and modern criminal law does not endorse cruel and inhumane treatment.[1497] Empirical data of the western world on death penalty, provide contradictory conclusions and scholars in the other parts of the world often make reference to those research findings when putting forward an argument in favour of the abolition.[1498] On the other hand, retentionists adhere to the research findings of American studies that each death penalty can prevent at least 18 murder cases from reoccurring.[1499]

1493 Schabas (n 1491) mentioned 'Punishment of Criminals', (1948) 15 LRTWC 200.
1494 Schabas (n 1491).
1495 *Prosecutor v Stevan Todorovic,* ICTY Case No. IT-95-9/1-S , [Todorovic Sentencing Judgement of 31 July 2001].
1496 Zhigang Yu, 'The Abolitionist and Retentionist Debate' in Bin Liang and Hong Lu (eds) *The Death Penalty in China: POLICY, PRACTICE, AND REFORM* (Columbia University Press 2016) 162.
1497 Ibid.
1498 Ibid.
1499 Ibid.

9.2.3 Death penalty: The abolitionist and retentionist debate

The theoretical basis of the death penalty debate can be traced back to the philosophical debate about morality, the value of life, and human rights.[1500] In the 1700's. arguments against the death penalty was put forwarded by English philosopher Jeremy Bentham based on his utilitarianism.[1501] On the other hand, Emmanuel Kant put forward an argument in favour of the death penalty based on the 'just deserts' principle.[1502]

Abolitionists argue that nothing can justify taking someone's life if there are alternative ways to escape the death of a person and capital punishment is a serious compromise to someone's human rights.[1503] One view suggests that the death penalty is an integral part of nature and that every individual will die one day and for this reason, the death penalty is even more humanly than life imprisonment.[1504] According to Schabas, 'the death penalty is the only sanction that can be justified from the standpoint of retribution, but he also made reference to the observation of Chief Justice Gubbay of the Zimbabwe Supreme Court who stated 'retribution has no place in the scheme of civilised jurisprudence'.[1505]

Abolitionists argue that the death penalty is such that if we wrongly execute someone, we cannot give his life back as there is always a chance that human judgment can be fallible.[1506] There may be a regional customary rules in relation to the death penalty in European countries, but that practice does not extend to the world as a whole.[1507] According

[1500] Zhigang (n 1496)) 166.
[1501] Tung Yin, 'The Death Penalty Spectacle' (2013) 3 U DENV CRIM L REV 165, 167

[1502] Ibid.
[1503] Zhigang (n 1496) 167.
[1504] Ibid 162-163.
[1505] William A Schabas, 'War Crimes, Crimes against Humanity and the Death Penalty' (1997) 60 ALB L REV 733, 768.
[1506] Joseph A Malusky and Keith A Pesto, *Capital Punishment* (Greenwood Publishing Group 2011) 154.
[1507] Michael Hor, 'The Death Penalty in Singapore and International Law' (2004) 8 SYBIL 105, 106.

to Schabas, the ICCPR allows retentionist States to continue to apply the death penalty in most serious crimes.[1508]

Despite contradictory opinions, both the abolitionist and retentionist agreed upon one point that based on current social structure, the complete abolition of the death penalty would be difficult and instead restrictive use of death penalty would be at least representative of the world's criminal jurisdiction.[1509] As a result, the death penalty remains in force in many countries but its use is declining day after day however still, prohibition did not gain the status of customary or universal norms.[1510]

9.3 Legal framework of the ICT-BD relating to sentencing practices

Section 20(1) of the 1973 Act requires that judges should give reasons for the verdict.[1511] So, if judges hand out capital punishment to any convict, they should give reasons for the conviction. Also, if they ordered any lesser punishment or acquittal, the Act requires them to give reasons. Section 20(2) of the 1973 Act provides that the ICT-BD is empowered to award capital punishment as the highest punishment and this particular section provides directive in determining punishment. When considering appropriate punishment, the Act requires the judges to make a balance between the gravity of the crimes and proportionate punishment.[1512] However, it is up to the judges' interpretation to consider whether a particular punishment is just and proper.

9.3.1 Outcry related to ICT-BD's death penalty

According to Robertson, '…the worst punishment is reserved for the worst offenders' and death penalty provision in the 1973 Act was particularly aimed at the Pakistani army

[1508] Article 6(2) of the ICCPR.
[1509] Zhigang (n 1496) 168.
[1510] William A Schabas, 'International Law and Abolition of the Death Penalty' (1998) 55 WASH & LEE L REV 797, 845.
[1511] The ICT Act 1973, Section 20 (1), Section 20 (1) [Bangladesh]
[1512] The ICT Act 1973, Section 20 (1) [Bangladesh].

officers who gave orders to commit the mass atrocities and local collaborators merely assisted the Pakistani Army officers and they should not attract capital punishment.[1513]

According to Amnesty International, death sentences given by the ICT-BD are 'extremely regrettable'.[1514] Amnesty International's researcher Abbas Faiz stated that, 'The death penalty violates the right to life as recognised in the Universal Declaration of Human Rights and is the ultimate cruel, inhuman and degrading punishment. We oppose it in all cases, without exception'.[1515] However, Robertson in his book stated that, '…despite the clear modern trend in state practice towards abolition, there is still not sufficient consensus for execution to be prohibited as a matter of customary International Law'.[1516]

UN Special Rapporteur Christof Heyns raised concerns regarding the death penalty and stated that capital punishment may be imposed in a limited extent after full compliance with the fair trial principles and due process safeguards as stated in the ICCPR.[1517]

9.4 Interview Data Analysis

A particular interviewee stated that from historical perspectives, in the Bangladeshi transitional situation, amnesty and reconciliation failed to serve justice.[1518] For this reason, criminal prosecution was necessary to end the dispute of providing justice for the crimes committed a long time ago.[1519]

[1513] Robertson (n 386).
[1514] Amnesty International, 'Bangladesh: death sentence at war crimes tribunal is extremely regrettable' (17 July 2013) available from https://www.amnesty.org.uk/press-releases/bangladesh-death-sentence-war-crimes-tribunal-extremely-regrettable Last accessed 21 September 2019.
[1515] Ibid.
[1516] Geoffrey Robertson QC, *Crimes Against Humanity* (3rd Edn, Penguin 2006) 141.
[1517] 'UN human rights experts urge Bangladesh to ensure fair trials for past crimes' (7 February 2013) available from <https://news.un.org/en/story/2013/02/431482-un-human-rights-experts-urge-bangladesh-ensure-fair-trials-past-crimes> accessed 15 May 2018.
[1518] J3-Q-A1
[1519] J3-Q-A1

9.4.1 Sentencing aspect of the ICT-BD

Bangladesh is a Muslim majority country and death penalty is permitted under the national criminal code. Since retribution is one of the fundamental aspects of Islamic criminal law, Bangladesh retained the death penalty as the highest form of criminal punishment. In the last 10 years, the ICT-BD has announced verdicts in 41 cases. As of 24 March 2019, a total 6 people were executed.[1520] In explaining the sentencing aspect of the ICT-BD, an interviewee stated that perpetrators, who have been found guilty, should be served appropriate punishment proportionate to the crimes they have committed.[1521] It seems the judges of the ICT-BD predominantly relied on the philosophical foundation of Emmanuel Kant, which states that wrongdoers should be given punishment which they deserve.[1522] So, similar to other ICT's, the ICT-BD relied on retribution in its sentencing principles.

Another interviewee stated that in the Bangladesh legal system, criminal jurisprudence and principles of sentencing are not entirely based on the concept of retribution but also deterrence.[1523] He said the judges of Bangladesh follow the same sentencing principles as followed in other common law countries particularly UK, India, Australia, Canada and so on so.[1524] According to him, retribution can play a part but the main objective of the sentencing system is actually deterring other people from committing crimes.[1525] So, the ICT-BD's objectives of punishment are retribution and deterrence.

This particular interviewee further stated that punishment in Bangladesh is a warning to the convict and to others who would potentially commit similar crimes.[1526] In explaining the

[1520] Mizanur Rahman, 'What ICT has achieved in 9 years' (2019) < https://www.dhakatribune.com/bangladesh/court/2019/03/24/what-ict-has-achieved-in-9-years> accessed 7 July 2020

[1521] J3-Q-A1

[1522] Schabas (n 1399) 845.

[1523] J3-Q-A1

[1524] J3-Q-A1

[1525] J1-Q-A1

[1526] J1-Q-A1

national penal code of Bangladesh, this interviewee also stated that in the legal system of Bangladesh, the death penalty is permissible under the penal code.[1527] He said under domestic criminal law, a murderer can either be sentenced to death or alternatively, he can be sentenced to life imprisonment.[1528] He also explained that in relation to determining punishment, there is a degree of discretion which depends on many factors like the gravity of the offence and mitigating factors.[1529] He said that sentencing is determined by balancing between the aggravating and mitigating circumstances.[1530] In explaining the effect of punishment in society, this particular judge said that, '…it has always been felt that you can establish peace in the society by punishing the criminals' [and] 'there can be no peace, no reconciliation with leaving the criminals at large'.[1531] He also adhered that the punishment given by the ICT-BD is an example that will deter future crimes similar in nature and heal the pain of the victims for not getting justice for a long time.[1532]

Another judge stated that the death penalty remains a big debate from a human rights perspective, but it is not uncommon in many other common law jurisdictions.[1533] According to this judge, the advantages of the ICT-BD are that it is not very expensive, it is dealt by its own legal experts and attracts less interference from the international community and it is a quick process.[1534] However, he acknowledged that the ICT-BD has attracted criticisms from human rights activists and organisations in relation to the death penalty.[1535]

One important aspect of the death penalty is that if Bangladesh could have prosecuted the perpetrators soon after the liberation war was over, then the punishment of the death

1527 J1-Q-A1
1528 J1-Q-A1
1529 J1-Q-A1
1530 J1-Q-A1
1531 J1-Q-A1
1532 J-2-Q-A1
1533 J-3-Q-B
1534 J-3-Q-B
1535 J-3-Q-C

penalty would not have been such a big issue. As during that time, the human rights issue was not fully developed. Even a defence lawyer, who took part in the interview, stated that, '…if the tribunals were to establish soon after the liberation war, there may not have been outrage or dispute about the death penalty'.[1536]

In explaining the decisive factors of capital punishment by the ICT-BD, a participant stated that universal sentencing guidelines have always been relevant in passing the sentence.[1537] The judge also made reference to the Indian Supreme Court's decision on passing sentence where context was considered to be a decisive factor in determining capital punishment.[1538] Another judge said there are so many arguments in favour or against the death penalty but it is the demand of the mass people of Bangladesh to retain death penalty at least for the perpetrators of the crimes of the Liberation war of 1971.[1539]

9.4.2 Approaches of the ICT-BD in determining sentence

In explaining the sentencing principle in Bangladesh, a participant stated that, a court when trying a general case for murder, has to give reason to whether it passes a sentence of death or it passes life imprisonment and there should be justifiable reasons.[1540] This judge also made reference to the judicial norm of India and stated that there is a slightly different approach in India where the norm is that the death penalty will be given, but only in exceptional cases.[1541] However, in Bangladesh, the death sentence is not exceptional.[1542] He also said that the Indian Supreme Court and the high court have passed many death sentences in exceptional cases.[1543] This judge further stated that, death penalty depends on the circumstances of the crimes and whether there are any aggravating or mitigating factors, how

1536 DL-1-Q-B
1537 J1-Q-C
1538 J1-Q-C
1539 J2-Q-C
1540 J1-Q-C
1541 J1-Q-C
1542 J1-Q-C
1543 J1-Q-C

the offence was committed, etc. He also mentioned that Indian courts have their own sentencing policy and in defining their sentencing policy they have given number of guidelines as to which cases the death sentence should be passed and in which cases life imprisonment should be passed.[1544] According to this judge, the ICT-BD had more or less followed those guidelines in passing the sentence and the offences under the ICT 1973 Act.[1545] He also explained that the crimes during the liberation war in 1971, were so grave that nothing short of the death sentence would have satisfied the aims of justice and that's why the tribunals have passed death sentence and their sentences have been affirmed by the AD in those cases.[1546]

In explaining the cautious approach of determining death penalty, he said that the judges have taken in to account all the circumstances surrounding the case because they '..kept in mind that life is precious and if possible life should be spared, but the offences they committed were so gruesome and dastardly' and '…affected not only one individual, hundreds of people were killed and the evidence of rape that came before us were so aggressive and so inhumane that we felt nothing short of death sentence would satisfy the aims of justice'.[1547]

In relation to the abolitionist view, this judge acknowledged that, '…presently there is a demand for the abolition of death sentence but even then, half the world follow death sentences'.[1548] He further stated that, '…if you look at the far Eastern countries, death sentence can be imposed for a much lesser offence like drug offences'.[1549] So, the application of death penalty varies based on context. This interviewee also made reference to the practice of capital punishment by the US and stated that, '…half of the States carry out death

[1544] J1-Q-C3
[1545] J1-Q-C3
[1546] J1-Q-C3
[1547] J1-Q-C3
[1548] J1-Q-C3
[1549] J1-Q-C3

sentences'.[1550] According to him, '…it is not quite right that death sentences have been abolished'.[1551] This particular judge made another valuable observation that, in some countries, death sentences were put on a moratorium and have been revived now because, they felt that due to absence of death sentences, crimes had gone up.[1552]

All of the judges who took part in the interview were of the opinion that Bangladesh has created an example in the field of Transitional Justice for the states that failed to prosecute the perpetrators for genocide such as Mexico and Vietnam. According to the majority of the interviewees, other countries will come forward to prosecute international crimes after seeing that Bangladesh has successfully completed their trials. A particular participant stated that there is a possibility that other countries in a similar situation will follow the Bangladeshi trend and will enact domestic law to prosecute the perpetrators with limited resources[1553].

9.5 Judgment Analysis

The judgments of the ICT-BD have provided valuable insight into how the judges came to determine sentences. The sections below have analysed some notable judgments relating to sentencing issues that arose from the ICT-BD's practices.

9.5.1 Death penalty principles in the case of Abul Kalam Azad

In the first case of *Abul Kalam Azad*[1554], he was convicted by trial in absentia because he had absconded for a long time and was awarded the death penalty. Abul Kalam Azad was a member of Razakar force and later became the local commander of Al-Badar Bahini and took part in the atrocities in 1971. In the judgment, it is said that, '…It has been proved from testimony of witnesses that the accused had directly participated to the commission of crimes

1550 J1-Q-C3

1551 J1-Q-C3
1552 J1-Q-C3
1553 P5-GDNC-Q-A1
1554 *Abdul Kalam Azad* (n 439).

as an armed member of Razakar force'.[1555] In relation to the verdict on sentence the following paragraphs are worth mentioning:

> **Paragraph 333**
>
> We have taken due notice of the intrinsic gravity of the offence of 'genocide' and murders as 'crimes against humanity' being offences which are particularly shocking to the conscience of mankind. We are of agreed view that justice be meet with if a single 'sentence of death' under section 20(2) of the Act of 1973 is awarded to accused Abul Kalam Azad @ Bachchu for convictions relating to the offences of murder as 'crimes against humanity' (listed in charge no.s 3, 4 and 6) and for the offence of 'genocide' (listed in charge no.7) of which he has been found guilty beyond reasonable doubt.
>
> **Paragraph 334**
>
> However, we are of the further view that considering the proportionate to the gravity of offences the accused Abul Kalam Azad @ Bachchu deserves imprisonment i.e. lesser punishment for convictions relating to the remaining offences as crimes against humanity (listed in charge no.s 1, 5 and 8).[1556]

It appears from the judgment that Abul Kalam Azad was given death penalty for the grave crimes (Charges no 3, 4 and 6) and, he was also given lesser punishment for the other crimes (Charges no 1, 5 and 8). The above paragraphs of the first judgment indicate that judges came to determine the punishment by considering the gravity of the offence and proportionality with the severity of the punishment.

9.5.2 Death penalty principles in the case of *Abdul Quader Molla*

The ICT-BD delivered its second judgment for *Abdul Quader Molla* on 5 February 2013, where the tribunal awarded him life imprisonment instead of the death penalty. There are at least three important aspects to this judgment. Firstly, in determining life imprisonment,

[1555] Ibid para. 324..
[1556] Ibid paras. 333-334.

the judges have considered '…the intrinsic magnitude of the offence of murders as 'crimes against humanity' being offences which are predominantly shocking to the conscience of mankind'.[1557] Secondly, judges '…have carefully considered the mode of participation of the accused to the commission of crimes proved and the proportionate to the gravity of offences'.[1558] Thirdly, the 'principle of proportionality implies that sentences must reflect the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender'.[1559] The people who are on the side of the victims were quite unhappy due to the fact that the ICT-BD did not award the highest punishment to the convict. As a result, there was a social movement in Bangladesh (popularly known as Shabagh movement)[1560] demanding the highest punishment to the convict in accordance with the law.

The ICT-BD had awarded Abdul Quader Molla life imprisonment. However, the Court of Appeal eventually awarded him the sentence of death penalty saying that, '…the sentence of imprisonment of life awarded to the appellant in respect of charge No.6 is based on total non-application of mind and contrary to the sentencing principle'.[1561] In explaining the charge no. 6, one of the three judges mentioned the following:

> that during the period of War of Liberation, on 26.03.1971 at about 06:00 pm you [accused Abdul Quader Molla] being accompanied by some Biharis and Pakistani arm[y] went to the house being house number 21, Kalapani Lane No.5 at Mirpur Section-12 belonging to one Hajrat Ali and entering inside the house forcibly, with intent to kill Bengali civilians, your accomplices under your leadership and on your order killed Hazrat Ali by gunfire, his wife Amina was gunned down and then slaughtered to death, their two minor daughters named Khatija and Tahmina were also slaughtered to death, their son Babu aged 02 years was also killed by dashing him to

1557 *Abdul Quader Molla (n 13)* para. 428.
1558 Ibid para. 428.
1559 Ibid.
1560 Tahmima Anam, 'Shahbag protesters versus the Butcher of Mirpur' (13 February 2013) *The Guardian* available from https://www.theguardian.com/world/2013/feb/13/shahbag-protest-bangladesh-quader-mollah Last accessed 15 July 2018.
1561 *The Chief Prosecutor v Abdul Quader Molla,* Criminal Appeal No.24-25 OF 2013 (17 September 2013), p.247.

> the ground violently. During the same transaction of the attack, your 12 accomplices committed gang rape upon a minor Amela aged 11 years but another minor daughter Momena who somehow managed to hide in the crime room, on seeing the atrocious acts, eventually escaped herself from the clutches of the perpetrators. The atrocious allegation, as transpired, sufficiently indicates that you actively participated, facilitated, aided and substantially contributed to the attack directed upon the unarmed civilians, causing the commission of the horrific murders and rape.[1562]

Many critiques including Robertson suggest that the Court of appeal awarded death penalty due to public sentiment.[1563] However, the people in favour of the movement claim that the amendment to the law was nothing but to ensure equality of arms to ensure a fair trial both for the victims and accused.[1564] The researcher if of the opinion that if there is inequality in the right of appeal, it must be rectified whenever it comes to light. In assessing the critics' claim that whether the Court of Appeal awarded death penalty arbitrarily, it is important to look into the reasoning given by the Court of Appeal panel. The Court of Appeal in interpreting Section 20(2) of the ICT Act 1973 observed that:

> A plain reading of sub-section (2) shows that if the tribunal finds any person guilty of any of the offences described in subsection (2) of section 3, awarding a death sentence is the rule and any other sentence of imprisonment proportionate to the gravity of the offence is an exception. Therefore, while deciding just and appropriate sentence to be awarded for any of the offences to any accused person, the aggravating and mitigating factors and circumstances in which the crimes have been committed are to be balanced in a disproportionate manner…[1565]

The Court of Appeal further observed that, '…in awarding the appropriate sentence, the tribunal must respond to the society's cry for justice against perpetrators of crimes against

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[1562] Ibid 276.

[1563] Robertson (n 386).

[1564] Tahmima Anam, 'Shahbag protesters versus the Butcher of Mirpur' (13 February 2013) *The Guardian* available from <https://www.theguardian.com/world/2013/feb/13/shahbag-protest-bangladesh-quader-mollah> accessed 15 July 2018.

[1565] *Quader Molla,* Criminal Appeal (n 1442) 247.

humanity'.[1566] This aspect is worth to consider that the Court of Appeal considered that 'society's cry for justice' is an important factor which has to be properly balanced with the crimes against humanity.[1567] There is a subtle difference between the sentencing approaches of the ICT-BD and the Court of Appeal in the case of *Quader Molla*. The ICT-BD had taken the approach of the 'mode of participation of the convict' as a deciding factor of sentencing on the other hand, the Court of Appeal had taken 'society's cry for justice' as a deciding factor along with the interpretation of Section 20(2) of the ICT Act 1973 that death penalty is to be awarded in general and life imprisonment is to be awarded as an exception.

The Court of Appeal in justifying the death penalty stated that the convict has committed worst and barbarous types of crimes against humanity and participated in the killing and rape of innocent persons without just cause.[1568] The Court of Appeal further observed that in determining the sentence for the convict, the court should not only focus on the right of the convict for just and fair punishment but also the expectations of the victims of the crimes and '…the society's reasonable expectation from the court for the proportionate deterrent punishment conforming to the gravity of the offence and consistent with the public abhorrence for the heinous crime committed by the accused'.[1569]

In the development of sentencing guidelines of ICL, the case of *Quader Molla* is quite significant where judges considered the 'society's reasonable expectation from the court'.[1570] Since the purpose of criminal punishment is to ensure retribution and deterrence, it is important to consider the social aspect that how people from a particular society perceive the death penalty and life imprisonment. Being a Muslim majority country, the public conception of justice in Bangladesh is that, for the gravest crimes the highest punishment of death penalty

[1566] Ibid.

[1567] Ibid.
[1568] Ibid.
[1569] Ibid.

[1570] Ibid.

must be awarded. Another important aspect is that the Court of Appeal interpreted Section 20(2) of the ICT Act 1973 in a way that if certain crimes are proved beyond a reasonable doubt, then the death penalty is inevitable unless there are any exceptional issues involved.

In relation to the 'Shabagh movement', it appears that the protesters were able to pressure the government to amend the law so that the prosecution can appeal on the grounds of sentencing. There is no strong evidence as to whether the movement had any impact on the mind of the judges of the Court of Appeal since they have given reasoning in favour of the death penalty based on the interpretation of Section 20(2) of the ICT Act 1973. From the Court of Appeal's judgment, it appears that 'society's cry for justice' was an important factor to reassess the punishment. It seems the interpretation of section 20(2) of the ICT Act 1973 is the main basis for awarding death penalty. If we consider the charge no. 6 and the gravity of the crimes committed by the convict, it is just to say that he deserves the highest punishment on the land in accordance with the law.

Justice Wahab Miah in his dissenting stated that judges are human beings, and as citizens of Bangladesh, they have reasons to be emotional as to the atrocities.[1571] However, he said judges are oath-bound to faithfully discharge the duties of their office according to law '…without fear or favour, affection or ill-will'.[1572] According to him, although there was a civil movement in Bangladesh demanding the highest punishment for Quader Molla, it did not affect the core aspect of the judgment given that they are oath-bound to serve justice.[1573]

9.5.3 Death penalty issues from the case of Sayeedi

In the case of *Delowar Hossain Sayeedi*, the ICT-BD judges stated that, 'in conside[r]ation of the gravity and magnitude of the offences committed particularly in charge

[1571] Ibid.
[1572] Ibid.

[1573] Ibid 265.

Nos. 8 and 10, we unanimously held that the accused deserves the highest punishment as provided under section 20(2) of ICT Act of 1973'.[1574] This particular convict was given the death penalty and he appealed against the conviction to the Court of Appeal. Mr Sayeedi's appeal was allowed by majority and he was finally awarded life imprisonment instead of death penalty considering his age and the circumstances in which he committed crimes and punishment to be given in line with the gravity of crimes as required under the just deserts principle. However, a particular Justice has given his dissenting in relation to the charges No. 8 & 10 that, 'Having analysed in-depth the sentencing policy and practice prevalent in various jurisdictions, I am astutely[sic] convi[n]ced that the extreme sentence is the only appropriate one that would be conducive to the ends of justice'.[1575]

9.5.4 Dissenting regarding capital punishment in the case of Sayeedi

In the dissenting judgment, Justice Shamsuddin stated that, 'We have not as yet promulgated any textbook or rules on sentencing and by the same time, we have not developed uniform sentencing principles or criteria to assist in promoting the equitable administration of criminal laws'.[1576] This particular judge made reference to the U.K Streatfield Committee's (1961) recommendation that, the sentence to be given is to be proportionate to that of the offender's culpability.[1577] In this particular case, to assess the adequacy of a sentence the following factors are considerable:

> …the circumstances of its commission, the age and character of the offender, injury to individuals or to society, the effect of the punishment on the offender, and eye to the correction and reformation of the offender are some factors amongst many other factors which would ordinarily be taken into consideration by courts…[1578]

1574 Ibid. 252.
1575 *The Chief Prosecutor v Delowar Hossain Sayeedi,* CRIMINAL APPEAL NOS.39-40 OF 2013 (Court of Appeal Judgment of 17 September 2014), p. 610
1576 Ibid.
1577 Ibid.
1578 Ibid.

In determining the sentencing principle, Justice Shamsuddin made reference to various academics and legal scholars such as professor Andrew Ashworth, who observed that, 'there is no doubt that the task of sentencing imposes a great burden on the Judges and that many of them say that it is the hardest and most disturbing of judicial task'.[1579] Also, reference is made to Lord Bingham CJ who observed that borderline case is 'one of the most elusive problems of criminal sentencing'.[1580] Another notable reference reflected in the judgment is Lord Taylor CJ's opinion that Judges are free to determine the sentence on the basis of the facts and circumstances of a particular case and maintaining public confidence in criminal justice.[1581] Justice Shamsuddin also made reference to Lord Taylor's 'right-thinking public approach' in determining the sentence.

9.6 Conclusion and interim findings

The international criminal tribunals established by the UN's assistance did not include the provision of the death penalty for the world's worst crimes - genocide, war crimes and crimes against humanity.[1582] It is one of the developments of the international criminal sentencing principle that the concept of fairness should be applied to sentencing and punishment must not be based on revenge.[1583]

Since ICL combines international law and criminal law through the mechanism of indirect enforcement, Carcano suggested that in assessing the gravity of international crimes, national criminal law approach would be valuable guidance.[1584] It appears that ICL conventions did not provide any prescribed form of penalties and expressly did not prohibit the death

[1579] Ibid p. 415.
[1580] Ibid p.529 mentioned *R-V-Howells, 1999 1 WLR-307.*
[1581] Ibid p.529 mentioned Taylor 1993, p.130.
[1582] Richard J Wilson, 'International Law Issues in Death Penalty Defence' (2003) 31 HOFSTRA L REV 1195
[1583] Andrea Carcano, 'Sentencing and the Gravity of the Offence in International Criminal Law' (2002) 51 INT'L & COMP LQ 583, 608-609.
[1584] Ibid.

penalty. However, the question arises in relation to the applicable norms of human rights on the prohibition of death penalties.

It appears from the Interview data that judges referred to the 'just deserts' principle in determining the highest punishment as the death penalty. Section 20(2) of the ICT Act 1973 allowed the ICT-BD to award death penalty as the highest punishment. This particular section was interpreted by the Court of Appeal that if certain crimes are proved beyond a reasonable doubt, then death penalty is inevitable and if death penalty is not given then there should be appropriate reasoning for not awarding death penalty. However, the sentencing practices of the ICT-BD has not been consistent. In the first case of *Adul Kalam Azad*, he was awarded death penalty in abstention. On the other hand, in the case of *Quader Molla*, he was initially awarded life imprisonment due to the level of responsibility towards the crimes. However, *Quader Molla's* conviction was changed to death penalty by the highest court of Bangladesh. In another case of *Delowar Hossain Sayeedi*, the tribunal awarded him the death penalty, but it was reduced to life imprisonment by the Court of Appeal by the majority. The dissenting judgment given in the Sayeedi case is significant in relation to assessing sentence in ICL from contextual approach.

The application of the international criminal justice in the Bangladeshi situation has been reflected through 'indirect enforcement system' and this process of domestication of ICL has included the national practices of punishment including the death penalty. In the first judgment of the ICT-BD, the judges came to determine the punishment considering the gravity of the offence and proportionality with the severity of the punishment. In the second judgment of *Quader Molla*, mode of participation of the accused to the commission of crimes and degree of responsibility were important factors in determining his punishment. However, the Court of Appeal in the same case interpreted Section 20(2) of the ICT Act 1973 from a different point of view stating that it had required the judges to award capital punishment if charges are proved beyond reasonable doubt. Another important aspect of this particular appeal judgment is that 'social conception of justice' is also a decisive factor in determining punishment so that

victims feel that justice been served through the punishment. If a particular society feels that justice has not been served, then the punishment would not serve any valuable purpose in terms of retribution and deterrence. This echoed the approach adopted by Lord Taylor's 'right-thinking public approach' in determining punishment.[1585]

In relation to the case of *Quader Molla*, many critics claim that movement by the section of the society impacted the punishment of Quader Molla. However, the reasoning given by the Court of Appeal indicates a different position that the social movement of Shahbagh enabled the government to amend the law which allowed the Prosecution to appeal against the conviction. The judgment of the Court of Appeal reflected that judges are human beings; they may become emotional knowing the facts of the heinous crimes, but they are oath-bound to serve justice and would not take any decisions based on ill-motives or external influence.

In the case of *Delowar Hossain Sayeedi,* the ICT-BD awarded him the death penalty. But on appeal, he was awarded lesser punishment of life imprisonment. This case was particularly a borderline case and it was difficult for the judges of the AD to determine punishment. As observed by Lord Bingham CJ, determining sentence in borderline cases is the most difficult task of the judges in practice.[1586] It appears that Henham has rightly identified that inconsistency in sentencing does exist in almost all the international criminal tribunals which may affect the credibility of a particular tribunal as an institution.[1587] In relation to Robertson's criticism mentioned earlier, it seems that the gravity of the crimes committed by the perpetrators of 1971 is gruesome. Robertson's argument is that sentencing guidelines should follow the individual convict's responsibility. However, the court of appeal in the case of *Quader Molla*, rejected such an approach. According to Robertson, the death penalty was

[1585] *Delowar Hossain Sayeedi,* Criminal Appeal (n 1456) p.529 mentioned Taylor 1993, page 130
[1586] Ibid p. 529 mentioned *R-V-Howells, 1999 1 WLR-307.*
[1587] Ralph Henham, *Punishment and Process in International Criminal Trials* (Aldershot 2005) 16-24.

presumably retained to punish the Pakistani army officers, not the local collaborators who merely assisted the Pakistani army. However, the analysis of the judgments demonstrated the seriousness of the charges against the convicts and how judges have balanced between the gravity of the offence and proportionality with the severity of the punishment.

In relation to the criticism adhered by Amnesty International, it important to consider whether the death penalty given by the ICT-BD is contrary to the right to life and human rights principle. The theoretical analysis suggests that prohibition of death penalty is not yet customary international law but there is a growing trend to make its use limited. Regionally, European countries accepted to prohibit the death penalty but, in the Asian regions the death penalty is still a valid punishment. Also, Islamic countries have retained the punishment of death penalty due to religious and cultural aspects. Moreover, Bangladesh is a sovereign country and it has the privilege to exercise its sovereign power to retain death penalty as the highest punishment. Considering the judicial history and political and economic culture in Bangladesh, there is nothing wrong, at least legally, to retain the death penalty for the crimes under the ICT Act 1973. Even in some societies, retribution and deterrence would not work merely by imposing life imprisonment. As explained above, a particular judge observed that Pakistan did not prosecute the identified war criminals handed over to them and as a result, the Pakistani army officers are reportedly committing the same offence in the *Balochistan* region of Pakistan.[1588] The majority of the judges who took part in the interview were of the opinion that in the situation of delayed justice, the abolition of death penalty would not serve any useful purpose of retribution and deterrence. If the death penalty is not given in a situation like Bangladesh where there was a long period of a culture of impunity, life imprisonment as the highest punishment for most heinous crimes would become only a symbolic punishment. The perpetrators have already enjoyed a free life over the past three decades and they are at their last stages of life. The majority of the interviewees have stated that the ICT-BD judgments

[1588] J1-Q-A1

provided valuable insights in relation to the sentencing approaches adopted by a particular society. In assessing the punishment, the judgments of the ICT-BD referred to national wishes and the long wait of the victims.

CHAPTER 10

KEY FINDINGS AND LESSONS FOR ICL AND TJ

10.1 Introduction

Analysing the ICT-BD's operation as a transitional justice mechanism provides us a valuable insight on how crimes under international criminal law can be prosecuted through a domestic judicial mechanism. Although, there are both restorative and retributive mechanisms of transitional justice, Bangladesh has decided to adopt a retributive response to deal with gross human rights violations during the country's Liberation War in 1971.

The age old debate between universalists and cultural relativists in the context of transitional justice have presented International customary law such as UDHR as a western concept and a one size fits all model with little importance for diversity and cultural norms, the local approach to global transitional justice must be met with equal importance as the global approach to local transitional justice systems and efforts.[1589] The development of transitional justice in a Muslim majority country such as Bangladesh provided that a balance between universality and cultural relativity can be maintained as demonstrated by the ICT-BD. The system of transitional justice in the context of Bangladesh has succeeded in achieving the inclusivity of local practices and universally recognised norms into its transitional justice system.

Returning to the questions posed at the beginning of this study, it is now possible to state that this thesis has provided a more in-depth insight into the domestication of ICL. This research also attempted to make a comprehensive assessment of the delayed justice based on domestic legislation, undertaken by an ad hoc domestic tribunal without the direct help of the international community. The analysis of the semi-structured interview data undertaken

[1589] Lieselotte Viaene & Eva Breams 'Transitional Justice and cultural Context: Learning from the Universality Debate' (2010) 27 Netherlands Quarterly of Human Rights 199-224.

for this research has extended our knowledge of the domestic prosecution of international crimes in Bangladesh. This research may add valuable insights to the growing body of research that indicates even though justice is delayed, justice can be served. The findings of this research would enhance our understanding of delayed justice in post-conflict situations and methods used for the ICT-BD may be applied to other post-conflict situations elsewhere in the world.

10.1.1 Transitional Justice in the context of Bangladesh

Public trust in the transitional justice system in the context of Bangladesh is crucial to the operation and appreciation of the ICT-BD. Drawing examples from the struggle of the transitional justice process in countries like Nepal[1590] and Sri Lanka[1591] due to lack of faith and loss of trust from the public, the transitional justice process in Bangladesh and the ICT-BD can be exampled as an effective model for a systematic approach to justice in similar situations of conflict, especially in situations where prosecution is delayed. Bangladesh in adopting a domestic tribunal, placed a considerable importance on internal actors and local laws based on local practices and has rejected international assistance.

The balance between International human rights and cultural norms in the context of Bangladesh has drawn criticisms from across the globe. The ICT-BD recognises the fair trial rights under Article 17 of the ICT Act 1973, however, there are many criticisms in relation to guaranteeing a fair trial under Article 14 ICCPR, due to the appointment of judges by the government of Bangladesh, lack of witness protection and the lack of supervision from International bodies. However, the amendment of ICT BD's RoP has included the provisions for a fair trial in accordance to customary international law and the verdicts of the ICT-BD can be challenged in the highest court of the land.

[1590] Shiva Bisangkhe, 'Nepal's Transitional Justice: The Role of Civil Society' (2019) 13 NJA LJ 195
[1591] Maleeka Salih and Gameela Samarasinghe, 'Families of the Missing in Sri Lanka: Psychosocial Considerations in Transitional Justice Mechanisms' (2018) 99 Int'l Rev Red Cross 497

10.2 Lessons Learned: The way forward for the ICT-BD

The ICT- BD, as the transitional justice mechanism in Bangladesh, was constructed to address violations committed during the Liberation War of 1971. There had been a gap of 39 years between when the atrocities were committed and the establishment of the ICT-BD. Since it began operations, the ICT-BD has been continuously prosecuting local collaborators and auxiliary forces that had aided, assisted or participated in committing mass atrocities against the Bangladeshi population. These crimes included crimes against humanity, genocide, war crimes, crimes against peace, and other crimes under ICL. The majority of the interviewees stated that the perpetrators had enjoyed a long period of impunity due to the political turmoil and the assassination of Prime Minister Sheikh Mujibur Rahman in 1975.

The ICT Act 1973, was the first legislation based on the legacy of the Nuremberg Tribunal, and historically, it was a significant development for the national prosecution of international crimes.[1592] The parliamentary debates suggest that during the bill stage, the ICT Act 1973 had incorporated the then international criminal jurisprudence. Furthermore, the Act has contributed to the development of the ICL in 1973 and being domestic legislation, it has made provisions for an appeal right to be given to the accused. The only international element of the tribunal is the definition of the crimes which are borrowed from customary international law. Though in their jurisprudence, the judges, prosecution and defence also referred to international due process standards.

While a majority of the interviewees supported criminal prosecutions, the defence lawyers and the politicians of Jamaat-e-Islami suggested an alternative mechanism of conditional amnesty. Moreover, the majority of the interviewees, opposed restorative means of justice without criminal prosecution because it could not provide an acceptable remedy to the victims. However, the same interviewees were of the opinion that reparation could be an

[1592] Robertson (n 386) 54.

effective supplement to prosecution. Most of the interviewees have stated that in the absence of criminal prosecution, accountability would not serve any meaningful purpose in the Bangladeshi society.

Kelsall in assessing the efficacy of the SCSL, in the particular context of Sierra Leone, argued that, '…Western legal precepts and procedures were unsuited to judging adequately' the facts, nature of crimes and credibility of witnesses in the cultural context of Sierra Leone.[1593] According to him, local culture is an important factor, to take into account, for administering proper justice.[1594] Similarly, the majority of the interviewees stated that the ICT-BD, being a domestic tribunal, is in a better position than other modes of accountability mechanisms such as ad hoc or hybrid tribunals. So, it seems that domestic prosecutions may be better than international ones because of the nuances of culture. Considering the situation in Bangladesh, a domestic tribunal would have a greater social impact and more acceptability from the citizens of Bangladesh. There are however, divided opinions about the efficacy of domestic tribunals dealing with international crimes. The defence lawyers and politicians of Jamaat-e-Islam shared their concerns regarding the high risks of judges in domestic tribunals performing their duties partially as they were linked to the country and therefore potentially susceptible to political influences. Public sentiments and personal political ideologies may also motivate the judges. Nevertheless, the authority of Bangladesh decided to set up a domestic tribunal because domestic experts were very well equipped with local knowledge and culture. Also, there was a legal framework to establish domestic tribunals since 1973, e.g. the ICT Act 1973. The local policymakers resisted forming an international criminal tribunal as they considered it to be a threat to the sovereignty of Bangladesh and thought that it would be a gateway for international political interference in Bangladesh. Contrarily, being a purely domestic tribunal, the ICT-BD did not receive any financial or technical assistance internationally. The ICT-BD also employed local personnel to run the Tribunal. This has

[1593] Kelsall (n 1178) 256.
[1594] Ibid.

resulted in a cost-effective mechanism. In less than a period of ten years, the ICT-BD has delivered at least 38 Judgements as of July 2019.

Concerning the substantive laws of the ICT-BD, the definition of crimes against humanity under the ICT Act 1973 deviated from current definitions of these crimes because it does not explicitly contain the 'widespread or systematic' element for constituting the crimes against humanity.[1595] Also, the requirement of 'knowledge' of the accused, about the nature of atrocity is absent from the definition. According to Linton, this ambiguity is against the principle of legality.[1596] However, there was no dispute that the atrocities committed in Bangladesh were 'widespread or systematic'.

Under the ICT Act 1973, the definition of genocide extended to 'political group' which also reflected the contemporary understanding of genocide as understood from the perspective of Bangladesh. This aspect of the definition of genocide in itself can be classed as a contribution to the development of ICL. However, the ICT-BD did not find anyone guilty of genocide for attacking a political group. The nature of genocide charges before the ICT-BD are mostly related to the perpetrators who have encouraged or assisted in the commission of genocide.[1597] The application of the substantive laws of the ICT-BD has also heavily relied on the inchoate offense and joint enterprise in ICL.

The definition of genocide adopted by the ICT Act 1973 can be criticized, stating that it has departed from the treaty law and customary international law. However, it could also be conversely argued that the inclusion of political groups as a protected group within the ambit of genocide by the ICT Act 1973 is a progressive, forward-thinking approach of protecting political groups. Many academics, including Schaack, support this notion.[1598]

[1595] *Abul Kalam Azad (n 439) para*. 72.
[1596] Linton (n 23) 240.
[1597] *Md. Mahbubur Rahman* (n 396) para. 301.
[1598] Beth Van Schaack, 'The Crimes of Political Genocide: Repairing the Genocide Convention's Blind Spot' (1997) 106 Yale Law Journal 2259.

The governing Act of the ICT-BD enabled it to try and assess those individuals who merely attempted, abated, conspired or involved or failed to prevent any crimes under the Act. It appears from the judgment that in cases where the principal offenders could not be brought to justice, it was still possible to prosecute the accomplices. This aspect of the ICT-BD is crucial as it could possibly contribute towards the deterrence of crimes in the future.

ICL can learn many lessons from the procedural aspect of domestic prosecution of international crimes. The unique features of the ICT-BD's procedural framework are stipulation of time limit to complete investigation within 12 months, right of appeal to highest court of land, right of review the Court of Appeal's decision and appointing qualified judges of the Supreme Court of Bangladesh. Equally, lessons can be learnt, from the several weaknesses of the procedural framework, such as lack of independence in the appointment procedure of the judges and prosecutors, lack of initial experience. These weaknesses offer lessons for improvement in the future.

The ICT-BD's sentencing principles are determined by the social and cultural aspect as well as long denial of justice and public wishes. The procedural laws of the ICT-BD have been criticized by various quarters from the very beginning. As a result, both the governing act and the RoP's had to be amended to incorporate the accepted standard of due process. Presumption of innocence, beyond a reasonable doubt, interlocutory appeal was also included as part of procedural laws.

Critics have also pointed to the judge and prosecutor appointment process of the ICT-BD. There is no separate body to appoint judges and prosecutors; therefore, the Bangladeshi government is empowered to appoint the required individuals. This appointment process is questionable in terms of independence of the judges.

This thesis has also analysed in detail, the effectiveness of the ICT-BD as an avenue of transitional justice through which mass atrocities can be addressed and impunity fought. It has brought to light the inherent tension between fighting impunity and seeking delayed justice

in Bangladesh. Part of this research was dedicated to collecting data from judges, politicians, and lawyers (defence and prosecution) and a semi-structured interview method was adopted to facilitate this data collection. The view of the majority of the interviewees was that the ICT-BD can contribute in the development of ICL and transitional justice. They based their opinions in regard to lessons from the ICT-BD concerning ending impunity, delayed justice, providing reparation, due process, considering old evidence, witness protection and sentencing practices. The findings from the semi structured interviews and academic literature are presented in the sub sections below to provide a framework for the lessons that can be learnt from the ICT-BD.

10.2.1 Ending Impunity

In relation to culture of impunity, this study set out to gain a better understanding of the nature of the culture of impunity in the context of Bangladesh, and this may contribute towards the development of ICL. The culture of impunity is one of the main problems of ICL. Many countries around the world could not serve justice for the past atrocities that they have suffered.[1599] Hence, the establishment of the ICT-BD is a significant milestone to decrease the culture of impunity for the past atrocities in Bangladesh, which may serve as an example for other jurisdictions in the future.

Majority of the interviewees stated that although the prosecution was delayed, the ICT-BD has taken a substantial step to end the culture of impunity. They have also asserted that the establishment of the ICT-BD will bring peace in the society in the long run, and the judgments delivered by the tribunal will establish historical truth.[1600] Despite the approval, there are divided opinions from other interviewees who think that criminal prosecution is creating a social division in Bangladesh and igniting the distressing past and suffering of the nation.

[1599] Lemarchand (n 574).
[1600] J4-Q-A

As an institution, the majority of the interviewees considered the establishment of the ICT-BD to be remarkable because it would affirm that there is no scope of impunity. One judge stated that as an institution, the ICT-BD is establishing a precedent in the area of delayed prosecution.[1601]

The Bangladeshi situation provided valuable insight into how impunity may develop in a post-conflict society. Soon after the liberation war, a country like Bangladesh had to focus on other issues such as rebuilding international relationships and the necessary infrastructure of the country. According to Opotow, 'the main root of the impunity is the political consideration and compromise'.[1602] Most of the interviewees stated that the primary source of the impunity in Bangladesh is set on political consideration. Majority of the interviewees also opined that ineffective early legal attempts, due to relying on the domestic evidence Act, also contributed towards the culture of impunity. Additionally, majority of the politicians stated that a newly independent country's priority should be focused on rebuilding the nation rather than instigating criminal prosecutions, this contributed towards the culture of impunity.

The ICT-BD's contribution to the ICL concerning a culture of impunity can be summarized from three different points of views. Firstly, the establishment of the ICT-BD is an attempt to decrease the culture of impunity and increase accountability in Bangladesh, even after a long delay. Secondly, the ICT-BD addresses the issue of historical trauma that has been built up through the development of the culture of impunity and, the majority of the interviewees suggested that it would have a general deterrent effect in ICL. Thirdly, the majority of the interviewees stated that after a substantial period of delay, restorative means of justice no longer played any meaningful role in addressing the issue of impunity and accountability in the Bangladeshi situation. Most of the interviewees also stated that although

[1601] J1-Q-C
[1602] Opotow (n 560) 149.

this study focuses on the situation in Bangladesh, the findings may well have a bearing in the field of ICL jurisprudence.

10.2.2 Delayed Justice

Regarding delayed justice, this research set out to understand the views and experiences of the delayed justice process in Bangladesh. The ICT-BD reaffirmed that there is no bar under international criminal jurisprudence to set up domestic tribunals to deal with delayed prosecutions.

Most of the interviewees stated that the ICT-BD had offered new lessons and insights into the area of delayed prosecutions. In terms of such delayed prosecutions, the ICT-BD has at least two significant lessons to offer. Firstly, while the several violations which had been committed during the 1971 Liberation war were well-known, these had gone unpunished for many decades, breeding a sense of impunity and injustice in the Bangladeshi society. The first lesson, therefore, is that where there have been massive violations of IHL, there may be no peace without justice. Secondly, the ICT-BD has shown that it is possible to bring criminal prosecutions to address the culture of impunity even after the passing of several decades from the original events. Despite this, the ICT-BD has also shown that such delayed prosecutions bring with them significant challenges.

The ICT-BD is, of course, not the first instance of delayed prosecutions. In Cambodia, the ECCC's were established in 2003 for violations that had occurred in the 1970's. Germany had also convicted a 91-year old Nazi war criminal, John Demjanjuk on 12 May 2011. John Demjanjuk acted as a guard at the Sobibór extermination camp 70 years ago. This suggests that in some cases, justice may be delayed but justice must be served.[1603] Similarly, the contribution made by the ICT-BD with respect to delayed justice can be quite significant. The establishment of the ICT-BD tends to support the view that even long delays should not act

[1603] Jn Arno Hessbruegge, 'Justice Delayed, Not Denied: Statutory Limitations and Human Rights Crimes (2011-2012) 43 Geo. J. Int'l L. 335, 384.

as an impediment for prosecuting atrocities around the world, because there is no time bar for prosecuting crimes under ICL. Further to that, the ICCPR enabled states to abolish any legal provisions which may potentially hinder the prosecution of gross violation of human rights.

This research has raised important questions about the nature of delayed prosecutions of international crimes. As an institution, it can be said that the ICT-BD contributed to the justice process by decreasing the culture of impunity. The lessons learned from the Bangladeshi situation in terms of delay would help assist in designing similar tribunals elsewhere in the world. Majority of the interviewees stated that the ICT-BD contributed as an institution in establishing the fact that although justice was delayed, justice was served.

10.2.3 Reparation

According to Teitel, criminal prosecution of international crimes is the partial objective of transitional justice and to maximize achieving the goals of transitional justice, reparatory justice is necessary.[1604] In Bangladesh, there was a prolonged denial of justice, and as a result, many perpetrators have died naturally without facing a trial. A concise study of the data collected from the interviews presented that all lawyers, judges, and politicians have acknowledged that the ICT-BD could not develop a comprehensive reparation mechanism for the victims of 1971. It is still open for the judges of the ICT-BD to amend its RoP's to include reparation and compensatory provisions for the victims. At the same time, the legislators of Bangladesh could introduce reparation related national laws.

It is not too late for the government in Bangladesh to look into the issue of creating appropriate legislation which would enable the victims to seek compensations from the convicted war criminals. The interview data from the policymakers mirrored the view that the first challenge of the ICT-BD was to prosecute the perpetrators of the 1971 and there was

[1604] Teitel (n 174) 119.

speculation that the main purpose of establishing the ICT-BD would be affected if the focus was to be shifted to reparation.

10.2.4 Due Process

In relation to due process, this research has examined the tensions between a lengthy denial of justice for the victims and due process rights for the accused. The generalized concept of due process was elaborately articulated in Article 14 of the ICCPR and majority of the interviewees stated that the ICT-BD had provided adequate due process safeguards to the accused.[1605] The initial stages of drafting the governing Act of the ICT-BD appeared to show that, due process was considered at least to the extent that the perpetrators were saved from summary execution to give them legal rights by trial. However, the critics alleged that the amended ICT Act 1973 did not provide suspects a right against self-incrimination or a right to legal counsel when being questioned by the police, nor did it give them adequate time to prepare a defence.[1606] The majority of the interviewees stated that the ICT Act 1973 and its RoP afford all the standard fair trial safeguards under Article 14 of the ICCPR to the accused. On the other hand, there is conflicting opinion by other interviewees that in practice, due process principles have not been followed appropriately.[1607]

There are also divisive opinions on the procedural due process of the ICT-BD. The judges of the Tribunal stated that sufficient time was handed to the defence team to prepare their case, and interlocutory appeal rights were available. In contrast, the politicians of Jamaat-e-Islam and the defence lawyers provided a contradictory opinion that in practice, there was no proper procedural due process for the accused in the pre-trial stage and accused could not challenge the appointment of the judges of the tribunal.

[1605] PL4-Q-B1
[1606] Chopra (n 935) 4.
[1607] DL2-Q-C2

The judgments of the ICT-BD reflect that while due process comprises some minimum standards, it is a contextual concept, and the ICT-BD has defined due process in line with the national context, long denial of justice and recognized international norms and jurisprudence. The majority of the interviewees opined that minimum standard of due process has been provided to the accused under the ICT Act 1973 because, the RoP's were amended in 2011 to include right to the presumption of innocence, right to a fair and public hearing with counsel of their choice, right to apply for and be granted bail, prohibition on convicting a person twice for the same crime, prohibition on requiring the accused to confess guilt, prosecution bears the burden of proving guilt beyond reasonable doubt, creation of a victim and witness protection system.[1608] The Human Rights Watch comments on the amendments were that the ICT-BD's RoP's, addressed the key problems of the due process issues but left out other aspects such as clarifying the definition of crimes, victim and witness protection.[1609]

Despite these criticisms, the constitutional issue of the ICT Act 1973 can also be a significant aspect of development in the area of domestication of the ICL. The ICT Act 1973 was given special protection under Article 47A of Bangladeshi Constitution. Many critics, including Robertson, Menon, and Chopra argued that since the subsequent amendment of the Act excluded the accused from constitutional safeguards, it has an impact on the quality of the due process. However, Professor M Rahman argued that the validity of Constitution is derived from the people of Bangladesh and Bangladesh is a democratic country, so it is entirely a domestic judicial matter of Bangladesh on how they define due process applicability to the accused under the national criminal code and the accused under the 1973 Act.[1610]

[1608] Jon Lunn and Arabella Thorp, 'Bangladesh: The International Crimes Tribunal' (3 May 2012) House of Commons: International Affairs and Defence Section 3.
[1609] Bangladesh: Guarantee Fair Trials for Independence-Era Crimes, *Human Rights Watch*, 11 July 2011 available from https://www.hrw.org/news/2011/07/11/bangladesh-guarantee-fair-trials-independence-era-crimes Last accessed 15 March 2019.
[1610] Rahman & Billah (n 26) 18.

In relation to the rights of an accused during the investigation stage, it appears from the Rule 9(5) of the RoP that, the suspects have the right to bail if the investigation cannot be completed within one year. This stipulation of time can be of significance because other ICT's mention a reasonable time without providing a time frame. In terms of clarity and arbitrary detention, this aspect of the ICT-BD may be considered as a small contribution to the development of ICL.

This study has found that most of the interviewees were supporters of the Tribunal and opined that due process is broadly consistent with the international standards. On the other hand, there are divided opinions from the defence lawyers and politicians. Despite inviting criticisms, the ICT-BD has reassessed one significant aspect of the due process principle of how over a period of time, the notion of due process has evolved in the area of ICL. It has demonstrated the nature of competing interests of due process and rights of an accused and delayed prosecution. To this extent, the ICT-BD emphasized that the national wishes and long denial of justice to victims are significant factors to define due process when domestic tribunals would deal with crimes under ICL.

10.2.5 Evidential Rules and Old Evidence

In relation to evidential rules, the ICT-BD has adopted comprehensive rules of evidence and the judgements referred to the practices established by the earlier tribunals. Both the RoP and Judgments, reflected that presumption of innocence had been maintained and the overall burden of proof is on the prosecution. In relation to the availability of evidence, it appears that the judges had ample evidence before them to establish judicial truth. There were many eyewitnesses, along with documentary evidence.

It appears from the judgments that, in assessing oral evidence of the witnesses, the judges have considered the totality of evidence rather than undermining the whole evidence, based on mere inconsistencies. The judges have reflected on the significant period of time lapse which might have affected the memory of the witnesses. The ICT-BD judges had the

relevant cultural knowledge to assess the evidence in its contextual framework. This is an important aspect according to Cryer, as such cultural factors are relevant when considering the evidence and giving weight.[1611]

The ICT-BD's rules of evidence clarified that, although it is the prosecution that must prove the allegation against the accused, the defence has to prove the claim of an alibi of defence. However, from a critical point of view, it seems the shifting of the burden of proof may hamper the right of an accused that the accused is presumed to be innocent until proven guilty. In order to safeguard this right, the RoP of the ICT-BD was amended in 2011. The rules made it clear in this regard that, '...Mere failure to prove the plea of an alibi and or the documents and materials by the defence shall not render the accused guilty'.[1612]

When considering hearsay evidence, the judges were able to assess the probative value of the evidence. Most importantly, the judges of the ICT-BD adopted a newer, more rigorous approach of corroborative evidence. The Prosecution referred to the case of *Tadić* and argued that, there is no requirement that hearsay evidence must be supported by corroborative evidence. Nevertheless, during several occasions, the judges declined to accept hearsay evidence for the lack of corroborative evidence. The ICT-BD has now developed guidelines for adopting hearsay evidence. For there to be probative value, hearsay evidence should be supported by other corroborative evidence. In assessing the probative value of hearsay evidence, the judges of the ICT-BD considered the 'social value' and 'human behaviour' of the Bangladeshi society.

Dealing with old evidence (evidence of events that happened several decades ago) is another important aspect of the ICT-BD's evidential rule. The ICT-BD has demonstrated a specific approach in dealing with old evidence. Due to significant time-lapses, the judges

[1611] Cryer (n 1193).

[1612] Rule 51(3) of the ICT-BD.

discounted minor inconsistencies of the witnesses if the core aspect of the statement is credible and in other situations, considered the cultural factors.

10.2.6 Witness Protection

Concerning the witness protection, the primary deficiency of the ICT-BD is the inability to keep the personal information of the witnesses confidential. In Bangladesh, the ICT-BD had given very little attention to assessing the risks to the witnesses who had testified before the tribunal and did not take appropriate measures in concealing witnesses identity. The identity of the witnesses was available in the public domain. The majority of the interviewees stated that at least three witnesses of the ICT-BD were murdered, and family members of the witnesses were also living in continuous fear of their lives.

The ICT-BD has been unable to establish any formal permanent witness protection programme. Furthermore, it could not employ any non-judicial measures. There is no specific domestic law to provide sufficient protection to the witnesses before the ICT-BD. The investigators, prosecutors, the Registrar, and defence were not able to assess the scale of risks that the witnesses faced.

To effectively deal with the witness protection issue in Bangladesh, the Law Commission had provided a series of recommendations. The governing RPE was amended to include legal provisions relating to witness and victim protection. In addition to that, committees were set up at the district level to oversee the problems associated with witness protection. However, there was a shortage of logistics and adequately trained personnel to run the witness protection scheme. The policymakers did not give sufficient importance to strengthen the witness protection aspect of the ICT-BD. Most of the politicians who took part in the interview remained silent on the arising dilemmas of witness-protection. However, lawyers from both parties and the judges did speak about the witness protection of the ICT-BD and opined that the reason behind the Government's silence could be due to the lack of financial resources.

Even with these shortcomings, the ICT-BD has indicated the development of witness protection committees within local authorities. The authority in Bangladesh adopted a delayed policy to deal with witness protection issues. Valuable lessons may be learned from the ICT-BD, such as providing appropriate training to persons that oversee the administration of witness protection measures.

10.2.7 Sentencing Practices

Focusing on the sentencing principles, the majority of the Judges made references to the 'just deserts' principle in determining the severest punishment as the death penalty. The theoretical analysis suggests that prohibition of the death penalty is not yet customary in international law, but there is a growing trend to make its use limited.[1613] However, the sentencing practices of the ICT-BD has not been consistent. Taking the example of the case of *Abdul Kalam Azad*, he was awarded the death penalty in absentia. Whereas, in the case of *Quader Molla*, he was initially awarded life imprisonment due to the level of involvement in the crimes. However, *Quader Molla's* conviction was changed to the death penalty by the highest court of Bangladesh. In the case of *Delowar Hossain Sayeedi,* the ICT-BD awarded him the death penalty. Although, on appeal, he was awarded the lesser punishment of life imprisonment.

The majority of the interviewees stated that if the death penalty is not awarded in a situation like that of Bangladesh where there has been a long period of a culture of impunity, life imprisonment as the highest punishment for the most heinous crimes would become only a symbolic punishment. The judgments of the ICT-BD provided valuable insights in relation to the sentencing principles adopted by a particular society. It is suggested by the ICT-BD that punishment should reflect the cultural factors, national wishes, and the sufferings of the victims due to a lengthy period of impunity.

[1613] Bassiouni (n 295) 475.

10.3 Concluding Remarks

It is now possible to state that this thesis has provided a more in-depth insight into the domestication of ICL. This research also attempted to make a comprehensive assessment of delayed justice based on domestic legislation, undertaken by a domestic tribunal without the direct help of the international community. The analysis of the semi-structured interview data undertaken for this research has extended our knowledge of the domestic prosecution of international crimes in Bangladesh. A consistent theme among the majority of the participants was that, the ICT-BD has both institutional and symbolic value providing an operative platform for the victims to seek justice and witnesses to give evidence.

The establishment of the ICT-BD is an important contribution to ICL because it has established that perpetrators cannot enjoy impunity indefinitely. Bearing similarities to other ICT's, the ICT-BD is not free from criticisms and deficiencies. For instance, the governing Act of the ICT-BD has no independent appointment process for judges. Also, it could not develop an effective witness protection scheme or reparation programme. Nevertheless, the ICT-BD can encourage other South Asian and Muslim majority counties in similar situations to tackle impunity and create an avenue for justice.

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APPENDIX

Appendix A

THE INTERNATIONAL CRIMES (TRIBUNALS) ACT, 1973

(ACT NO. XIX OF 1973)

[20 July, 1973]

An Act to provide for the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and other crimes under international law.

WHEREAS it is expedient to provide for the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and other crimes under international law, and for matters connected therewith;

It is hereby enacted as follows: -

Short title, extent and commencement

1. (1) This Act may be called the International Crimes (Tribunals) Act, 1973.

(2) It extends to the whole of Bangladesh.

(3) It shall come into force at once.

Definitions

2. In this Act, unless there is anything repugnant in the subject or context, -

(a) "auxiliary forces" includes forces placed under the control of the Armed Forces for operational, administrative, static and other purposes;

[1][(aa) "armed forces" means the forces raised and maintained under the Army Act, 1952 (XXXIX of 1952), the Air Force Act, 1953 (VI of 1953), or the Navy Ordinance, 1961 (XXXV of 1961);]

(b) "Government" means the Government of the People's Republic of Bangladesh;

(c) "Republic" means the People's Republic of Bangladesh;

[2][***]
(e) "territory of Bangladesh" means the territory of the Republic as defined in article 2 of the Constitution of the People's Republic of Bangladesh;

(f) "Tribunal" means a Tribunal set up under this Act.

Jurisdiction of Tribunal and crimes

3. [3][(1) A Tribunal shall have the power to try and punish any individual or group of individuals, [4][or organisation,] or any member of any armed, defence or auxiliary forces, irrespective of his nationality, who commits or has committed, in the territory of Bangladesh, whether before or after the commencement of this Act, any of the crimes mentioned in sub-section (2).]

(2) The following acts or any of them are crimes within the jurisdiction of a Tribunal for which there shall be individual responsibility, namely:-

(a) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, imprisonment, abduction, confinement, torture, rape or other inhumane acts committed against any civilian population or persecutions on political, racial, ethnic or religious grounds, whether or not in violation of the domestic law of the country where perpetrated;

(b) Crimes against Peace: namely, planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(c) Genocide: meaning and including any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, such as:

(i) killing members of the group;

(ii) causing serious bodily or mental harm to members of the group;

(iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(iv) imposing measures intended to prevent Births within the group;

(v) forcibly transferring children of the group to another group;
(d) War Crimes: namely, violation of laws or customs of war which include but are not limited to murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population in the territory of Bangladesh; murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages and detenues, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(e) violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949;

(f) any other crimes under international law;

(g) attempt, abetment or conspiracy to commit any such crimes;

(h) complicity in or failure to prevent commission of any such crimes.

Liability for Crimes

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

(2) Any commander or superior officer who orders, permits, acquiesces or participates in the commission of any of the crimes specified in section 3 or is connected with any plans and activities involving the commission of such crimes or who fails or omits to discharge his duty to maintain discipline, or to control or supervise the actions of the persons under his command or his subordinates, whereby such persons or subordinates or any of them commit any such crimes, or who fails to take necessary measures to prevent the commission of such crimes, is guilty of such crimes.

Official position, etc not to free an accused from responsibility for any crime

5. (1) The official position, at any time, of an accused shall not be considered freeing him from responsibility or mitigating punishment.

(2) The fact that the accused acted pursuant to his domestic law or to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal deems that justice so requires.

Tribunal

6. (1) For the purpose of section 3, the Government may, by notification in the official Gazette, set up one or more Tribunals, each consisting of a Chairman and not less than two and not more than four other members.

[5][(2) Any person who is a Judge, or is qualified to be a Judge, or has been a Judge, of the Supreme Court of Bangladesh, may be appointed as a Chairman or member of a Tribunal.]
[6][(2A) The Tribunal shall be independent in the exercise of its judicial functions and shall ensure fair trial.]

(3) The permanent seat of a Tribunal shall be in [7][Dhaka]:

Provided that a Tribunal may hold its sittings at such other place or places as it deems fit.

(4) If any member of a Tribunal dies or is, due to illness or any other reason, unable to continue to perform his functions, the Government may, by notification in the official Gazette, declare the office of such member to be vacant and appoint thereto another person qualified to hold the office.

(5) If, in the course of a trial, any one of the members of a Tribunal is, for any reason, unable to attend any sitting thereof, the trial may continue before the other members.

(6) A Tribunal shall not, merely by reason of any change in its membership or the absence of any member thereof from any sitting, be bound to recall and re-hear any witness who has already given any evidence and may act on the evidence already given or produced before it.

(7) If, upon any matter requiring the decision of a Tribunal, there is a difference of opinion among its members, the opinion of the majority shall prevail and the decision of the Tribunal shall be expressed in terms of the views of the majority.

(8) Neither the constitution of a Tribunal nor the appointment of its Chairman or members shall be challenged by the prosecution or by the accused persons or their counsel.

Prosecutors

7. (1) The Government may appoint one or more persons to conduct the prosecution before a Tribunal on such terms and conditions as may be determined by the Government; and every such person shall be deemed to be a Prosecutor for the purposes of this Act.

(2) The Government may designate one of such persons as the Chief Prosecutor.

Investigation

8. (1) The Government may establish an Agency for the purposes of investigation into crimes specified in section 3; and any officer belonging to the Agency shall have the right to assist the prosecution during the trial.

(2) Any person appointed as a Prosecutor is competent to act as an Investigation Officer and the provisions relating to investigation shall apply to such Prosecutor.

(3) Any Investigation Officer making an investigation under this Act may, by order in writing, require the attendance before himself of any person who appears to be acquainted with the circumstances of the case; and such person shall attend as so required.

(4) Any Investigation Officer making an investigation under this Act may examine orally any person who appears to be acquainted with the facts and circumstances of the case.

(5) Such person shall be bound to answer all questions put to him by an Investigation Officer and shall not be excused from answering any question on the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such person:

Provided that no such answer, which a person shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding.

(6) The Investigation Officer may reduce into writing any statement made to him in the course of examination under this section.

(7) Any person who fails to appear before an Investigation Officer for the purpose of examination or refuses to answer the questions put to him by such Investigation Officer shall be punished with simple imprisonment which may extend to six months, or with fine which may extend to Taka two thousand, or with both.
(8) Any Magistrate of the first class may take cognizance of an

offence punishable under sub-section (7) upon a complaint in writing by an Investigation Officer.

(9) Any investigation done into the crimes specified in section 3 shall be deemed to have been done under the provisions of this Act.

Commencement of the Proceedings

9. (1) The proceedings before a Tribunal shall commence upon the submission by the Chief Prosecutor, or a Prosecutor authorised by the Chief Prosecutor in this behalf, of formal charges of crimes alleged to have been committed by each of the accused persons.

(2) The Tribunal shall thereafter fix a date for the trial of such accused person.

(3) The Chief Prosecutor shall, at least three weeks before the commencement of the trial, furnish to the Tribunal a list of witnesses intended to be produced along with the recorded statement of such witnesses or copies thereof and copies of documents which the prosecution intends to rely upon in support of such charges.

(4) The submission of a list of witnesses and documents under sub-section (3) shall not preclude the prosecution from calling, with the permission of the Tribunal, additional witnesses or tendering any further evidence at any stage of the trial:

Provided that notice shall be given to the defence of the additional witnesses intended to be called or additional evidence sought to be tendered by the prosecution.

(5) A list of witnesses for the defence, if any, along with the documents or copies thereof, which the defence intends to rely upon, shall be furnished to the Tribunal and the prosecution at the time of the commencement of the trial.

Procedure of trial

10. (1) The following procedure shall be followed at a trial before a Tribunal, namely:-

(a) the charge shall be read out;

(b) the Tribunal shall ask each accused person whether he pleads guilty or not-guilty;

(c) if the accused person pleads guilty, the Tribunal shall record the plea, and may, in its discretion, convict him thereon;

(d) the prosecution shall make an opening statement;

(e) the witnesses for the prosecution shall be examined, the defence may cross-examine such witnesses and the prosecution may re-examine them;

(f) the witnesses for the defence, if any, shall be examined, the prosecution may cross-examine such witnesses and the defence

may re-examine them;

(g) the Tribunal may, in its discretion, permit the party which calls a witness to put any question to him which might be put in cross-examination by the adverse party;
(h) the Tribunal may, in order to discover or obtain proof of relevant facts, ask any witness any question it pleases, in any form and at any time about any fact; and may order production of any document or thing or summon any witness, and neither the prosecution nor the defence shall be entitled either to make any objection to any such question or order or, without the leave of the Tribunal, to cross-examine any witness upon any answer given in reply to any such question;

(i) the prosecution shall first sum up its case, and thereafter the defence shall sum up its case:

Provided that if any witness is examined by the defence, the prosecution shall have the right to sum up its case after the defence has done so;

(j) the Tribunal shall deliver its judgment and pronounce its verdict.

(2) All proceedings before the Tribunal shall be in [8][Bangla or] English.

(3) Any accused person or witness who is unable to express himself in, or does not understand, English may be provided the assistance of an interpreter.

(4) The proceedings of the Tribunal shall be in public:

Provided that the Tribunal may, if it thinks fit, take proceedings in camera.

(5) No oath shall be administered to any accused person.

Trial in absentia

[9][10A. (1) Where a proceeding is commenced under sub-section (1) of section 9, the tribunal, before fixing the date for the trial under sub-section (2) of the said section, has reason to believe that the accused person has absconded or concealed himself so that he cannot be produced for trial, may hold the trial in his absence following the procedure as laid down in the Rules of Procedure made under section 22 for such trial.

(2) Where the accused person is tried under sub-section (1), the Tribunal may direct that a Counsel shall be engaged at the expense of the Goverment to defend the accused person and may also determine the fees to be paid to such Counsel.]

Powers of Tribunal

11. (1) A Tribunal shall have power-

(a) to summon witnesses to the trial and to require their attendance and testimony and to put questions to them;

(b) to administer oaths to witnesses;

(c) to require the production of document and other evidentiary material;

(d) to appoint persons for carrying out any task designated by the Tribunal.

(2) For the purpose of enabling any accused person to explain any circumstances appearing in the evidence against him, a Tribunal may, at any stage of the trial without previously warning the accused person, put such questions to him as the Tribunal considers necessary:

Provided that the accused person shall not render himself liable to punishment by refusing to answer such questions or by giving false answers to them; but the Tribunal may draw such inference from such refusal or answers as it thinks just;

(3) A Tribunal shall-

(a) confine the trial to an expeditious hearing of the issues raised by the charges;

(b) take measures to prevent any action which may cause unreasonable delay, and rule out irrelevant issues and statements.

(4) A Tribunal may punish any person, who obstructs or abuses its process or disobeys any of its orders or directions, or does anything which tends to prejudice the case of a party before it, or tends to bring it or any of its members into hatred or contempt, or does anything which constitutes contempt of the Tribunal, with simple imprisonment which may extend to one year, or with fine which may extend to Taka five thousand, or with both.

(5) Any member of a Tribunal shall have power to direct, or issue a warrant for, the arrest of, and to commit to custody, and to authorise the continued detention in custody of, any person charged with any crime specified in section 3.

(6) The Chairman of a Tribunal may make such administrative arrangements as he considers necessary for the performance of the functions of the Tribunal under this Act.

Power to transfer cases

[10][11A.(1) At any stage of a case, a Tribunal may, on its own motion or on the application of the Chief Prosecutor, by an order in writing, transfer the case to another Tribunal, Whenever it considers such transfer to be just, expedient and convenient for the proper dispensation of justice and expeditious disposal of such cases.

(2) Where a case has been transferred under sub-section (1), the Tribunal which thereafter tries such case shall, subject to the

provisions of this Act, proceed from the stage at which it was so transferred.]

Provision for defence counsel

12. Where an accused person is not represented by counsel, the Tribunal may, at any stage of the case, direct that a counsel shall be engaged at the expense of the Government to defend the accused person and may also determine the fees to be paid to such counsel.

Restriction of adjournment

13. No trial before a Tribunal shall be adjourned for any purpose unless the Tribunal is of the opinion that the adjournment is in the interest of justice.

Statement or confession of accused persons

14. (1) Any Magistrate of the first class may record any statement or confession made to him by an accused person at any time in the course of investigation or at any time before the commencement of the trial.

(2) The Magistrate shall, before recording any such confession, explain to the accused person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him and no Magistrate shall record any such confession unless, upon questioning the accused making it, he has reason to believe that it was made voluntarily.

Pardon of an approver

15. (1) At any stage of the trial, a Tribunal may with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any of the crimes specified in section 3, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the crime and to every other person concerned, whether as principal or abettor, in the commission thereof.

(2) Every person accepting the tender under this section shall be examined as a witness in the trial.

(3) Such person shall be detained in custody until the termination of the trial.

Charge, etc

16. (1) Every charge against an accused person shall state-

(a) the name and particulars of the accused person;

(b) the crime of which the accused person is charged;

(c) such particulars of the alleged crime as are reasonably sufficient to give the accused person notice of the matter with which he is charged.

(2) A copy of the formal charge and a copy of each of the documents lodged with the formal charge shall be furnished to the accused person at a reasonable time before the trial; and in case of any difficulty in furnishing copies of the documents, reasonable opportunity for inspection shall be given to the accused person in such manner as the Tribunal may decide.

Right of accused person during trial

17. (1) During trial of an accused person he shall have the right to give any explanation relevant to the charge made against him.

(2) An accused person shall have the right to conduct his own defence before the Tribunal or to have the assistance of counsel.

(3) An accused person shall have the right to present evidence at the trial in support of his defence, and to cross-examine any witness called by the prosecution.

No excuse from answering any question

18. A witness shall not be excused from answering any question put to him on the ground that the answer to such question will criminate or may tend directly or indirectly to criminate such witness, or that it will expose or tend directly or indirectly to expose such witness to a penalty or forfeiture of any kind:

Provided that no such answer which a witness shall be compelled to give shall subject him to any arrest or prosecution or be proved against him in any criminal proceeding, except a prosecution for giving false evidence.

Rules of evidence

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

(2) A Tribunal may receive in evidence any statement recorded by a Magistrate or an Investigation Officer being a statement made by any person who, at the time of the trial, is dead or whose attendance cannot be procured without an amount of delay or expense which the Tribunal considers unreasonable.

(3) A Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof.

(4) A Tribunal shall take judicial notice of official governmental documents and reports of the United Nations and its subsidiary agencies or other international bodies including non-governmental organisations.

Judgment and sentence

20. (1) The Judgment of a Tribunal as to the guilt or the innocence of any accused person shall give the reasons on which it is based: Provided that each member of the tribunal shall be competent to deliver a judgment of his own.

(2) 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.

[11][(2A) A copy of judgment under the seal and signature of the Registrar of a Tribunal shall be provided, free of cost, to the prosecution and the accused person on the date of delivery of the judgment.

(2B) Notwithstanding anything contained in any other law, rule or legal instrument for the time being in forcé, when a copy of Judgment is provided under sub-section (2A), it shall be used as certified copy of the judgment of the Tribunal for the purpose of preferring an appeal under section 21.]

(3) The sentence awarded under this Act shall be carried out in accordance with the orders of the Government.

Right of Appeal

[12][21. (1) A person convicted of any crime specified in section 3 and sentenced by a Tribunal may appeal, as of right, to the Appellate Division of the Supreme Court of Bangladesh against such conviction and sentence.

(2) The Government or the complainant or the informant, as the case may be, may appeal, as of right, to the Appellate Division of the Supreme Court of Bangladesh against an order of acquittal or an order of sentence.

(3) An appeal under sub-section (1) or (2) shall be preferred within 30 (thirty) days from the date of conviction and sentence, or acquittal or any sentence, and no appeal shall lie after the expiry of the aforesaid period.

(4) The appeal shall be disposed of within 60 (sixty) days from the date of its filing.

(5) At the time of filing the appeal, the appellant shall submit all documents as may be relied upon by him.]

Rules of procedure

22. Subject to the provision of this Act, a Tribunal may regulate its own procedure.

Certain laws not to apply

23. The provisions of the Criminal Procedure Code, 1898 (V of 1898), and the Evidence Act, 1872 (I of 1872), shall not apply in any proceedings under this Act.

Bar of Jurisdiction

24. No order, judgment or sentence of a Tribunal shall be called in question in any manner whatsoever in or before any Court or other authority in any legal proceedings whatsoever except in the manner provided in section 21.

Indemnity

25. No suit, prosecution or other legal proceeding shall lie against the Government or any person for anything, in good faith, done or purporting to have been done under this Act.

Provisions of the Act over-riding all other laws

26. The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

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1 Clause (aa) was inserted by section 2(a) of The International Crimes (Tribunals) (Amendment) Act, 2009 (Act No. LV of 2009).

2 Clause (d) was omitted by section 2(b) of The International Crimes (Tribunals) (Amendment) Act, 2009 (Act No. LV of 2009).

[3] Sub-section (1) was substituted by section 3 of The International Crimes (Tribunals) (Amendment) Act, 2009 (Act No. LV of 2009).

[4] The words and comma “or organisation,” were inserted after the word and comma “individuals,” by section 2 of the International Crimes (Tribunals) (Amendment) Act, 2013 (Act No. III of 2013) (with effect from 14th July, 2009).

[5] Sub-section (2) was substituted by section 4 (a) of The International Crimes (Tribunals) (Amendment) Act, 2009 (Act No. LV of 2009).

[6] Sub-section (2A) was inserted by section 4 (b) of The International Crimes (Tribunals) (Amendment) Act, 2009 (Act No. LV of 2009).

[7] The word “Dhaka” was substituted for the word “Dacca” by section 4 (c) of The International Crimes (Tribunals) (Amendment) Act, 2009 (Act No. LV of 2009).

[8] The words “Bangla or” were inserted before the word “English” by section 5 of The International Crimes (Tribunals) (Amendment) Act, 2009 (Act No. LV of 2009).

[9] Section 10A was inserted by section 2 of The International Crimes (Tribunals) (Second Amendment) Act, 2012 (Act No. XLIII of 2012).

[10] Section 11A was inserted by section 2 of the International Crimes (Tribunals) (Amendment) Act, 2012 (Act No. XXI of 2012).

[11] Sub-section (2A) and (2B) were inserted by section 3 of The International Crimes (Tribunals) (Second Amendment) Act, 2012 (Act No. XLIII of 2012).

[12] Section 21 was substituted by section 3 of the International Crimes (Tribunals) (Amendment) Act, 2013 (Act No. III of 2013) (with effect from 14th July, 2009).

Appendix B

INTERNATIONAL CRIMES TRIBUNAL RULES OF PROCEDURE, 2010

[as amended by the International Crimes Tribunal Rules pf Procedure (Amendment), 2010 and International Crimes Tribunal Rules Of Procedure (Amendment), 2011]

INTERNATIONAL CRIMES TRIBUNAL

Old High Court Building

Dhaka, Bangladesh

NOTIFICATION

Dated: 28 June 2011

No. Anto: Apo: Tri:/87/Bidhi/10 The Tribunal, in exercise of the powers conferred by section 22 of the International Crimes (Tribunals) Act,1973 (Act XIX of 1973) (hereinafter referred to as the "Act"), has introduced the following amendments in the International Crimes Tribunal Rules of Procedure, 2010 (hereinafter referred to as the "Rules"):

Chapter I

General Provisions

1. Short title and commencement.

1) These Rules may be called the International Crimes Tribunal Rules of Procedure, 2010.

2) It shall be deemed to have come into force on and from 25th March of 2010.

2. Definitions: —

In these Rules, unless there is anything repugnant in the subject or context,

1) [**"accused"** means the person against whom an investigation of an offence under the Act has been started;][1614]

2) **"Act"** refers to the International Crimes (Tribunals) Act, 1973 (Act XIX of 1973);

3) **"bail"** refers to setting an accused at large on furnishing bond before the Tribunal;

4) **"Chairman"** refers to the Chairman of the Tribunal;

5) **"charge"** refers to the accusation of crimes against an accused framed by the Tribunal;

6) **"complaint"** means any information oral or in writing obtained by the Investigation Agency including its own knowledge relating to the commission of a crime under section 3(2) of the Act;

[1614] Amended by International Crimes Tribunal Rules of Procedure (Amendment), 2011 by substituting the following: '**"accused"** means the person against whom formal charge is submitted before the Tribunal'.

7) **"counsel"** refers to a person who is enrolled as an advocate in the Bangladesh Bar Council;

8) **"Deputy Registrar"** refers to the Deputy Registrar of the Tribunal;

9) **"evidence"** means all statements which the Tribunal permits or requires to be made before it by witnesses, and it includes all other materials, collected during investigation, placed before the Tribunal in relation to matters of fact;

10) **"Form"** refers to Forms as are contained in the Schedule;

11) **"formal charge"** means accusation of crimes against the accused in the form of a petition lodged by the Prosecutor with the Tribunal on receipt of the Investigation Report;

12) **"International Crimes Tribunal"** refers to the Tribunal constituted under section 6 of the Act;

13) **"Investigation Agency"** refers to the Agency established under section 8 of the Act;

14) **"Investigation Officer"** refers to any member of the Investigation Agency;

15) **"Investigation Report"** refers to the report submitted by the Investigation Agency after completion of investigation in a case under the Act;

16) **"law enforcing agency"** refers to any member of the Bangladesh Police under the Police Act,1861 (Act V of 1861), or the Armed Police Battalions or the Rapid Action Battalions (RAB) under the Armed Police Battalions Ordinance, 1979 (Ord. XXV of 1979), or the Bangladesh Rifles under the Bangladesh Rifles Order, 1972 (P.O. 148 of 1972), or the Ansar Force under the Ansar Force Act, 1995 (Act 3 of 1995), or the Battalion Ansar under the Battalion Ansar Act, 1995 (Act 4 of 1995), or the Coast Guard Force under the Coast Guard Act, 1994 (Act 26 of 1994);

17) **"Member"** refers to a Member of the Tribunal;

18) **"oath"** refers to making such declaration or affirmation by a witness prior to testifying before the Tribunal in Form No. 12;

19) **"offence"** means any of the crimes described in section 3(2) of the Act;

20) **"Prosecutor"** refers to a Prosecutor appointed under section 7 of the Act;

21) **"Registrar"** refers to the Registrar of the Tribunal;

22) **"Rules"** refers to these Rules of Procedure;

23) **"Schedule"** refers to the SCHEDULE appended at the end of these Rules;

24) **"seal"** refers to the seal of the Tribunal;

25) **"section"** refers to the section of the Act.

[26) "**victim"** refers to a person who has suffered harm as a result of the commission of the

crimes under section 3 (2) of the International Crimes (Tribunal) Act, 1973.][1615]

Chapter II

Powers and Functions of the Investigation Agency

3. 1) The Investigation Agency established by the Government shall be responsible for investigation of a case.

2) [The Government may nominate or assign a member of the Investigation Agency as Coordinator to -

a. supervise overall functions of the Agency;

b. control and monitor the speedy progress of any investigation; and

c. perform any other function for efficient running the Agency.][1616]

4. An Investigation Officer shall act and work in accordance with the provisions of sections 8(1), 8(3), 8(4), 8(5), 8(6) and 8(7) of the Act while investigating a case.

5. The Investigation Agency shall maintain a Complaint Register with necessary particulars on putting date and serial numbers of the complaints meant for initiating investigation under the Act.

6. If the Investigation Officer has reason to believe that any offence has been committed, he shall proceed in person to the spot, investigate the facts and circumstances of the case and if necessary, take steps for the discovery and arrest of the accused.

7. If the Investigation Officer finds and is satisfied that there is no sufficient ground for investigation, he may stop investigation with the concurrence of the Chief Prosecutor.

8. (1) The Investigation Officer shall maintain a Case Diary for each case in connection with the investigation mentioning its day-to-day progress until completion of such investigation.

(2) The Investigation Officer may use the Case Diary at the time of deposition before the Tribunal to refresh his memory or to explain any fact entered therein.

(3) The defense shall have no right to examine or use the Case Diary in defense of a case.

(4) The Tribunal may peruse the Case Diary for clarification or understanding of any fact transpired at the time of investigation.

[(5) The Tribunal, if it considers expedient, may direct the prosecutors to present the progress report of investigations for its perusal.][1617]

[1615] Sub-rule 26 was inserted by International Crimes Tribunal Rules of Procedure (Amendment), 2011.

[1616] Amended by International Crimes Tribunal Rules of Procedure (Amendment), 2010 substituting the following: 'Government may nominate one of the members of the Investigation Agency as Chief Investigator for supervising overall functions and speedy progress of the investigation.'

[1617] Sub-rule 5 inserted by the International Crimes Tribunal Rules of Procedure (Amendment), 2011

9. (1) The Investigation Officer, through the Prosecutor, may obtain a warrant of arrest from the Tribunal for arrest of a person at any stage of the investigation, if he can satisfy the Tribunal that such arrest is necessary for effective and proper investigation.

(2) The law enforcing agency of the area where the person to be arrested resides shall execute the warrant of arrest issued by the Tribunal.

(3) At the time of executing the warrant of arrest under sub-rule (2) [or later on][1618], a copy of allegations is to be served upon such person.

[4) If a person is already in custody in connection with an offence or any case other than under the Act and the Tribunal is satisfied that a detention order is necessary for effective and proper investigation of any offence under the Act, the Tribunal may issue a production warrant and direct the person to be detained in custody.][1619]

[5) If an accused is in custody during investigation period, the investigation officer shall conclude the investigation within one year of his arrest under the Rules. In case of failure to complete the investigation as specified above, the accused may be released on bail subject to fulfillment of some conditions as imposed by the Tribunal. But, in exceptional circumstances, the Tribunal by showing reasons to be recorded in writing may extend the period of investigation and also the order detaining the accused in custody for a further period of six months.

6) After every three months of detention of the accused in custody the investigation officer through the prosecutor shall submit a progress report of investigation before the Tribunal on perusal of which it may make a review of its order relating to the detention of the accused.][1620]

10. An Investigation Officer, if he thinks it necessary, may search and seize any documents or things under a seizure list prepared in presence of two witnesses.

11. After completion of investigation, the Investigation Officer shall submit an Investigation Report together with all the documents, papers and the evidence collected during investigation of offence(s) as specified in the Act committed by a person(s) before the Chief Prosecutor.

12. The Investigation Officer shall prepare more than one set of his Investigation Report together with all the accompanying documents for the purpose of preserving one set in the office of the Investigation Agency.

13. Each and every document, paper and evidence accompanying the Investigation Report

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[1618] The words “or later on” were inserted by the International Crimes Tribunal Rules of Procedure (Amendment), 2010.

[1619] Sub-rule (4) was inserted by the International Crimes Tribunal Rules of Procedure (Amendment), 2010.

[1620] Sub-rules (5) and (6) were inserted by the International Crimes Tribunal Rules of Procedure (Amendment), 2011.

under rules 11 and 12 shall be duly authenticated and endorsed by the Investigation Officer who investigated the case.

14. The [Prosecutors][1621] and the Investigation Agency shall take necessary measures to ensure the confidentiality of any information, the protection of any witness or victim and the preservation of all the evidence collected.

15. Any Judicial Magistrate of the first class may take cognizance and hold trial of an offence under sub-section (7) of section 8 of the Act upon a complaint in writing by an Investigation Officer.

16. (1) The Investigation Officer if thinks it necessary, may apply through the Prosecutor to the Tribunal to commit the arrested person(s) in his custody for the purpose of interrogation and the Tribunal can pass order for such custody of the person(s) arrested, for a maximum period of three (3) days if it upon consideration of facts and circumstances of the case is of opinion that for proper investigation such order is indispensable.

(2) No person during investigation under the Act shall be subjected to any form of coercion, duress or threat of any kind.

Chapter III

Powers and Functions of the Prosecution

17. [The Chief Prosecutor or any other Prosecutor authorized by the Chief Prosecutor shall conduct the prosecution of a case or appear before the Tribunal for any matter relating to the case.][1622]

18. [(1)][1623] Upon receipt of report of investigation of offence(s), the Chief Prosecutor or any other Prosecutor authorized by him shall prepare 8a formal charge in the form of a petition on the basis of the papers and documents and the evidences collected and submitted by the Investigation Officer and shall submit the same before the Tribunal.

[(2) The Investigation Agency shall

a. work with the Prosecutors in preparing the report under rule 18 (1), and after submission of the report, shall assist the Prosecutors in the task of formulating the formal charge including arrangement of documents and materials; and

b. also assist the Prosecutors in tendering evidence at any stage of trial.

[1621] The word 'Prosecutors' was substituted for the word 'Prosecution' by the International Crimes Tribunal Rules of Procedure (Amendment), 2011

[1622] Rule 17 was amended by the International Crimes Tribunal Rules of Procedure (Amendment), 2010 by substituting the following words: '[a]ny Prosecutor who is authorized by the Chief Prosecutor shall conduct the prosecution of a case before the Tribunal'.

[1623] Rule 18 was renumbered as Sub-rule (1) of Rule 18 by the International Crimes Tribunal Rules of Procedure (Amendment), 2011.

(3) As and when directed by the Tribunal, the Investigation Agency shall produce witness before the Tribunal as required by the Prosecutors. The law enforcing agency of the concerned area shall provide all necessary assistance to the Investigation Agency in executing the process issued for securing attendance of witness.

(4) The Chief Prosecutor shall file extra copies of formal charge and copies of other documents for supplying the same to the accused(s) which the prosecution intends to rely upon in support of such charges so that the accused can prepare his defense.

(5) The Chief Prosecutor shall also file three sets of formal charge and other documents intended to be relied upon before the Tribunal in compact disk (CD) or digital versatile disk (DVD) while submitting the formal charge under sub-rule (1).

(6) The defense shall also require to submit three sets of list of witnesses along with the documents which the defense intends to rely upon before the Tribunal in compact disk (CD) or digital versatile disk (DVD) while furnishing the same under section 9 (5) of the Act.][1624]

19. If any Investigation Report does not disclose a prima facie case against an accused the Chief Prosecutor may initiate further investigation or stop the said investigation.

20. (1) At the time of submitting a formal charge in the form of a petition, it must contain the name and address of the accused person, witness, and the date, time and place of the occurrence.

(2) The Chief Prosecutor, or any other Prosecutor authorized by him in this regard, shall file necessary [papers, documents and materials][1625] in support of such case for a process to be issued by the Tribunal for appearance of the accused before the Tribunal if the accused is not already arrested.

Chapter IV
Procedure

21. All the offences as are described in section 3(2) of the Act shall be cognizable, non-compoundable and non-bailable.

22. After taking cognizance of an offence the Tribunal shall fix a date for appearance [if he is not already in custody][1626] of the accused and issue summons or warrant for appearance

[1624] Sub-rules (2), (3), (4), (5) and (6) were inserted by the International Crimes Tribunal Rules of Procedure (Amendment), 2011.
[1625] The words 'papers, documents and materials' were substituted for the words 'papers and documents' by the International Crimes Tribunal Rules of Procedure (Amendment), 2010.
[1626] The words 'if he is not already in custody' were inserted by the International Crimes Tribunal Rules of Procedure (Amendment), 2010.

as it thinks proper.

23. If the Tribunal does not take cognizance of an offence, the case shall be dismissed.

24. [1) Where the Tribunal makes an order for recording of confession, a Judicial Magistrate of the first class directed by the Tribunal shall record the confession of an accused pursuant to that order.

[1A) At the time of recording confession under rule 24 (1) the Judicial Magistrate shall allow the engaged counsel for the accused to be present there, provided that the counsel shall not be allowed to interfere or speak in course of recording such confession.][1627]

2) If any member of the Investigation Agency makes a petition to any Judicial Magistrate of the first class for recording of any statement of witness, that Magistrates shall record such statement.][1628]

25. (1) The Judicial Magistrate shall record the confession of an accused or the statement of a witness in plain white papers.

(2) The Judicial Magistrate shall then make a memorandum or endorsement indicating whether the confession so recorded is voluntary, and while recording confession, shall also comply with the requirements of section 14(2) of the Act.

26. (1) Presence of all the Members in all sittings of the Tribunal is not compulsory, but at the time of taking cognizance of an offence and delivery of the judgment the presence of all the Members of the Tribunal is compulsory.

(2) All other orders may be passed even by one Member in sitting and shall be deemed to have been passed by the Tribunal.

[3) The Tribunal, on its own motion or on the application of either party, may review any of its order including the order of framing charge (s) in the interest of justice.][1629]

27. After recording of the testimony, the witness shall put his signature or thumb impression on each page of the deposition sheet.

28. [1)][1630] Bench Officers and Assistant Bench Officers shall be individually and collectively responsible for preservation of the documents, materials and evidence produced before the Tribunal along with the records of the respective cases pending before the Tribunal.

[2) Record of disposed of cases shall be preserved and archived forever by the

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[1627] Sub-rule (1A) was inserted by the International Crimes Tribunal Rules of Procedure (Amendment), 2011.

[1628] Sub-rule (1) and (2) were inserted substituting the original Rule 24 by International Crimes Tribunal Rules of Procedure (Amendment), 2010. The original Rule 24 was as follows: "Any Judicial Magistrate of the first class shall record the confession of an accused and the statement, if any, of a witness as and when he is required to do so by an order of the Tribunal."

[1629] Sub-rule (3) was inserted by the International Crimes Tribunal Rules of Procedure (Amendment), 2011.

[1630] Rule 28 was renumbered as Sub-rule (1) of Rule 28 by the International Crimes Tribunal Rules of Procedure (Amendment), 2011.

Tribunal at the place and in the manner as arranged by the government.][1631]

Chapter V

Powers and Functions of the Tribunal

29. (1) The Tribunal shall take cognizance of an offence against any accused upon examination of the formal charge, the Investigation Report, the papers, documents and the evidence submitted by a Prosecutor in support thereof, if they disclose a prima facie case for trial of the accused.

[2) If no such disclosure as mentioned in sub-rule (1) is there, the Tribunal shall dismiss the case.][1632]

30. After cognizance of an offence is taken, the Tribunal shall issue process or warrant, as it thinks fit and proper, in accordance with rule 22.

31. If the process issued under rule 22 is returned unserved, the Tribunal shall make an order to publish a notice in two daily newspapers, one in English and another in Bangla asking the accused to appear before the Tribunal on the date fixed therein.

32. If the accused, despite publication of notice in daily newspapers, fails to appear before the Tribunal on the date and time so specified therein, and the Tribunal has reason to believe that the accused has absconded or concealing himself so that he cannot be arrested and produced for trial and there is no immediate prospect for arresting him, the trial of such accused shall commence and be held in absentia.

33. In Pursuance of any summons, when an accused appears before the Tribunal, he shall be sent to the prison if he is not enlarged on bail by the Tribunal.

34. (1) The Police shall produce the arrested accused direct before the Tribunal within 24 (twenty-four) hours of arrest excluding the time needed for the journey.

(2) When the accused is produced before the Tribunal under sub-rule (1), he shall be sent to the prison if he is not enlarged on bail by the Tribunal.

[3) At any stage of the proceedings, the Tribunal may release an accused on bail subject to fulfillment of some conditions as imposed by it, and in the interest of justice, may modify any of such conditions on its own motion or on the prayer of either party. In case of violation of any such conditions the accused may be taken into custody cancelling his bail.][1633]

35. When the case is ready for trial, the Tribunal shall proceed to hear the case in accordance with the procedure of trial under section 10 of the Act on the basis of a charge to

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[1631] Sub-rule (2) was inserted by the International Crimes Tribunal Rules of Procedure (Amendment), 2011.
[1632] Sub-rule (2) was deleted by the International Crimes Tribunal Rules of Procedure (Amendment), 2011.
[1633] Sub-rule (3) was inserted by the International Crimes Tribunal Rules of Procedure (Amendment), 2011.

be framed considering the formal charge, Investigation Report together with the documents and materials produced and submitted in support of such report.

36. Persons accused of the same offence committed in the course of the same transaction, or persons accused of abatement or attempt to commit such offence, or persons accused of conspiracy or planning or design in the commission of an offence or more than one offence, or persons accused of more than one offence may be charged with, and tried at one trial for, every such offence.

37. When the accused appears or is brought before the Tribunal, and if the Tribunal, upon consideration of record of the case and documents submitted therewith and after giving the prosecution and the accused an opportunity of being heard, finds that there is no sufficient ground to presume that the accused has committed an offence, it shall discharge the accused and record its reasons for so doing.

38. [1)][1634] If, after consideration and hearing under rule 37, the Tribunal is of opinion that there is sufficient ground to presume that the accused has committed an offence, the Tribunal shall frame one or more charges for the offences of which he is accused and he shall be asked whether he admits that he has committed the offence with which he is charged**.**

[**2)** An accused pleading not guilty will get at least three weeks' time for preparing his defense.][1635]

39. If the accused admits that he has committed the offence charged with, his admission shall be recorded in his own words, and upon such admission the Tribunal may convict him accordingly or may keep such admission with the record for consideration usually at the time of trial and pronouncement of judgment.

40. Whenever the Tribunal considers that the production of any document or other thing is necessary or desirable for the purpose of investigation or trial or other proceedings under the Act, the Tribunal may issue a summons, or an order to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it at the time, place and date stated in the summons or order.

41. The Tribunal may, for ensuring fair justice, appoint one or more amicus curie to assist the Tribunal in a particular case.

42. The Tribunal may allow appearance of any foreign counsel for either party provided that the Bangladesh Bar Council permits such counsel to appear.

43. [1)][1636] Where an accused is not represented by any counsel in the trial of a case, the

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1634 Rule 38 was renumbered as sub-rule (1) of Rule 38 by the International Crimes Tribunal Rules of Procedure (Amendment), 2011.

1635 Sub-rule (2) was inserted by the International Crimes Tribunal Rules of Procedure (Amendment), 2011.

1636 Rule 43 was renumbered as sub-rule (1) of Rule 43 by the International Crimes Tribunal Rules of Procedure (Amendment), 2011.

Tribunal shall appoint a counsel to defend such an accused at the expense of the Government.

[2) A person charged with crimes as described under section 3 (2) of the Act shall be presumed innocent until he is found guilty.

(3) No person shall be tried twice for the same offence described under section 3 (2) of the Act.

(4) The accused shall be entitled to a fair and public hearing and to engage his counsel at his choice who is legally authorized to appear before this tribunal.

(5) The accused shall be tried without undue delay.

(6) No accused shall be punished without giving him an opportunity of being heard.

(7) No accused shall be compelled to testify against his will or to confess his guilt.

(8) The accused is entitled to get a copy of judgment (under section 10 (j) of the Act) free of cost.][1637]

[43A. If the accused on bail fails to appear and or the accused being in custody refuses to come to the Tribunal for any reason and or he could not be brought to the Tribunal due to his long ailment, the Tribunal shall have authority to proceed with the proceedings in presence of his counsel or pass any order which it thinks fit and proper.][1638]

44. The Tribunal shall be at liberty to admit any evidence oral or documentary, print or electronic including books, reports and photographs published in newspapers, periodicals, and magazines, films and tape recording and other materials as may be tendered before it and it may exclude any evidence which does not inspire any confidence in it, and admission or non-admission of evidence by the Tribunal is final and cannot be challenged.

45. In pursuance of section 11(4) of the Act, the Tribunal may draw a proceeding against any person who obstructs or abuses the process of the Tribunal, or disobeys any order or direction of the Tribunal, or who does anything which tends to prejudice the case of a party before the Tribunal, or tends to bring the Tribunal or any of its Members into hatred or contempt, or does anything which constitutes contempt of the Tribunal.

46. [1)][1639] Upon hearing the person and consideration of the explanation submitted, if any, to a notice to show cause issued, if the Tribunal is of opinion that such person is guilty of an offence under section 11(4), it may accordingly convict and punish such person.

[2) Upon conviction of an accused person under section 20 (2) of the Act, the sentence of imprisonment shall commence from the date of judgment. In case of absconding convict, it shall commence from the date of his surrender before the Tribunal, or from the date of his

[1637] Sub-rules (2), (3), (4), (5), (6), (7) and (8) were inserted by the International Crimes Tribunal Rules of Procedure (Amendment), 2011.
[1638] Rule 43A was inserted by the International Crimes Tribunal Rules of Procedure (Amendment), 2011.
[1639] Rule 46 was renumbered as sub-rule (1) of Rule 46 by the International Crimes Tribunal Rules of Procedure (Amendment), 2011.

arrest.

3) Proportionate to the gravity of the crime, in sentencing the accused, the Tribunal may also impose fine and or pass reparation order which is deemed to be fit and proper.

4) Clerical or numerical errors or omissions in the judgments or orders may at any time be corrected by the Tribunal either on its own motion or on the application of either party.][1640]

[46A. Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Tribunal to make such order(s) as may be necessary to meet the ends of justice or to prevent abuse of the process.][1641]

Chapter VI

Evidence

47. Prior to testifying before the Tribunal, every witness shall swear an oath or make an affirmation in Form 12 of the Schedule.

48. (1) The Tribunal may, at any stage of trial of a case, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or re-call and re-examine any person already examined.

(2) The Tribunal shall summon and examine or re-call and re-examine any such person if his evidence appears to it essential to the just decision of the case.

49. The Tribunal may take consideration of the confession of an accused or the statement of a witness recorded by the Judicial Magistrate under rule 25(1) and in the manner as stated in rule 25(2) if the confession is proved by such Judicial Magistrate or any other Judicial Magistrate who is acquainted with his signature or writing when the recording Judicial Magistrate is dead or not available.

50. The burden of proving the charge shall lie upon the prosecution [beyond reasonable doubt][1642].

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

(2) The defense shall also prove the documents and materials to be produced by them in accordance with the provisions of section 9(5) of the Act.

[1640] Sub-rules (2), (3) and (4) were inserted by the International Crimes Tribunal Rules of Procedure (Amendment), 2011.

[1641] Rule 46A was inserted by the International Crimes Tribunal Rules of Procedure (Amendment), 2011.

[1642] The words 'beyond reasonable doubt' were inserted by the International Crimes Tribunal Rules of Procedure (Amendment), 2011.

[3] Mere failure to prove the plea of *alibi* and or the documents and materials by the defense shall not render the accused guilty.][1643]

52. Where there are several accused, the reference of the accused on behalf of whom the evidence was submitted, shall be noted.

53. The testimony of a witness shall be recorded either in English or in Bangla as the Tribunal directs [and mode of its recording will be decided by the Tribunal at the time of trial][1644].

54. [1)][1645] The prosecution may prove a document by the person who was the author of such document or who knows the handwriting or signature of such author, and when any of such persons is dead or not available, the person from whom it was collected or who knows from whose possession it was collected.

[2) Pursuant to section 19 (1) of the Act, the Tribunal may admit any document or its photocopies in evidence if such documents initially appear to have probative value.][1646]

55. Once the document is marked as exhibit, the contents of a document shall be admissible.

56. (1) The Tribunal shall give due weight to the primary and secondary evidence and direct and circumstantial evidence of any fact as the peculiar facts and circumstances of the case demand having regard to the time and place of the occurrence.

(2) The Tribunal shall also accord in its discretion due consideration to both hearsay and non-hearsay evidence, and the reliability and probative value in respect of hearsay evidence shall be assessed and weighed separately at the end of the trial.

[3) Any statement made to the investigation officer or to the prosecutor in course of investigation by the accused is not admissible in evidence except that part of the statement which leads to discovery of any incriminating material.][1647]

57. The Tribunal shall apply these Rules which will best favor a fair determination of the matter in issue before it and are consonant with the spirit of the Act.

58. (1) Evidence that is produced by the prosecution or the defense shall be suitably identified, proved by the respective party and marked with consecutive numbers as exhibits.

(2) Exhibits of the prosecution shall be marked with English numerals while those of the defense with English alphabets and all exhibits shall constitute part of the record.

[1643] Sub-rule (3) was inserted by the International Crimes Tribunal Rules of Procedure (Amendment), 2011.
[1644] The words 'and mode of its recording will be decided by the Tribunal at the time of trial' were inserted by the International Crimes Tribunal Rules of Procedure (Amendment), 2011.
[1645] Rule 54 was renumbered as sub-rule (1) of Rule 54 by the International Crimes Tribunal Rules of Procedure (Amendment), 2011.
[1646] Sub-rule (2) was inserted by the International Crimes Tribunal Rules of Procedure (Amendment), 2011.
[1647] Sub-rule (3) was inserted by the International Crimes Tribunal Rules of Procedure (Amendment), 2011.

Chapter VIA

Witness and Victim protection

58A. (1) The Tribunal on its own initiative, or on the application of either party, may pass necessary order directing the concerned authorities of the government to ensure protection, privacy and well-being of the witnesses and or victims. This process will be confidential, and the other side will not be notified.

2) The government shall

a. arrange accommodation of witness(s)/victim(s), if so prayed for;

b. to ensure security and surveillance during the stay of witnesses/victims as directed by the Tribunal; and

c. take necessary measure to escort the witnesses/victims to the courtroom by the members of the law enforcing agency.

3) In case of holding proceedings in camera under section 10 (4) of the Act, both the prosecution and the defense counsel shall provide undertakings regarding confidentiality of the proceeding including identity of the witness. Violation of such undertaking shall be prosecuted under section 11 (4) of the Act.][1648]

Chapter VII

Office of the Tribunal

59. (1) The Office of the Tribunal shall be composed of a Registrar, a Deputy Registrar, [Assistant Registrar(s)][1649] and other personnel and employees.

(2) The Registrar shall, with approval of the Chairman, organize and direct the works of the Office.

(3) The Office shall provide necessary secretarial services to the Tribunal and perform such other duties as may be assigned by the Chairman.

(4) All communications intended to the Tribunal shall be delivered to the Registrar.

(5) The working hours of the Office shall be from 10.00 A.M to 01:00 P.M and 02.00 P.M to 05.00 P.M, and the judicial work shall be held from 10.30 A.M to 04.30 P.M with recesses of one hour from 01.00 P.M to 02.00 P.M.

(6) The Office shall be closed on Friday and Saturday for weekly holidays.

(7) The Tribunal shall fix up fresh official and judicial working hours for the month of

[1648] Chapter VIA, including Rule58A, was inserted by the International Crimes Tribunal Rules of Procedure (Amendment), 2011.

[1649] The words Assistant Registrar(s) was inserted by the International Crimes Tribunal Rules of Procedure (Amendment), 2011.

Ramadan.

[(8) In case of absence or temporary indisposition of the chairman, the Senior Member of the Tribunal shall be acting as the Chairman.][1650]

Chapter VIII

Powers and Functions of Registrar and Deputy Registrar

60. The Registrar shall

1) be the Chief Administrative Officer of the Office of the Tribunal and receive the cases submitted by the Prosecutor for the purpose of laying them before the Tribunal;
2) assist the Tribunal in the performance of its functions under the authority of the Chairman and shall be responsible for the administration and service of the [Tribunal, shall represent the Tribunal as its spokesman][1651] and shall serve as its channel of communication;
3) maintain a Duty Roster of other personnel and employees of the Office;
4) maintain a Case Register of the cases in Form-15 and shall make entry of necessary particulars thereof, and such cases so registered and numbered shall be called as **ICT-BD Case;**
5) be responsible for custody of the record of the cases;
6) make correspondence with the government and other offices on behalf of the Chairman;
7) be responsible for issuing summons or warrant of arrest under his signature for securing attendance of the accused or the witness or search warrant etc. from the Office as required by the Tribunal, bearing its seal, and be responsible also for maintaining a Process Register in this regard;
8) be the 'Drawing and Disbursing Officer' (DDO) and be responsible for the accounts of the money sanctioned to the Tribunal, and he shall manage and deal with the financial matters by taking initiative for placement of budget and spend the fund when needed for providing services to the Tribunal on sanction of the Chairman;
9) keep Taka 20,000/00 as Permanent Advance in hand to meet up day to day expenses of the Tribunal either in cash or in voucher, or in both;
10) maintain the Office Order Book and other registers including the Register of Letters Issued and the Register of Letters Received, and the Daily Attendance Register of staff of the Office shall be duly maintained and signed by him, and also maintain a Peon Book;

[1650] Sub-rule (8) was inserted by the International Crimes Tribunal Rules of Procedure (Amendment), 2010.
[1651] A comma and the words 'shall represent the Tribunal as its spokesman' were inserted by the International Crimes Tribunal Rules of Procedure (Amendment), 2011.

11) supply or cause supply a certified copy of the Judgment of the Tribunal, upon an application filed by the accused or Prosecutor, prepared in offset white paper on payment of a fees of Taka 10(ten) for each page of the copy while an absconding accused shall not get the such a copy unless he surrenders before the Tribunal or he is arrested; and

12) be bound to do any official work meant for smooth functioning of the Tribunal as assigned by the Chairman.

61. Except clause (1), (2), (8) and (9) of rule 60, the Registrar may delegate any of his powers under these Rules to the Deputy Registrar and in such a case he shall inform the matter to the Chairman.

62. (1) For the smooth functioning of the Tribunal, the Registrar may control the entry of people including the counsels in the courtroom of the Tribunal as and when required by the Tribunal for maintaining discipline and order.

(2) For ensuring orderly and disciplined state of affairs inside the court- room of the Tribunal, no counsel, journalist, media person or other people shall be allowed to enter the court room without having 'entry pass' issued by the Registrar.

63. (1) The Deputy Registrar shall assist the Registrar in his works and act as per direction of the Registrar.

(2) The Deputy Registrar shall automatically assume the powers and perform necessary functions of the Registrar under these Rules during the absence of the Registrar.

Chapter IX
Representation and Fees etc.

64. A counsel may represent a party before the Tribunal upon filing a *'Vakalatnama'* duly executed by and obtained from such party.

65. Every application to the Tribunal shall bear a court-fee of Taka 10 (ten) and the *'Vakalatnama'* shall be affixed with a court-fee of Taka 50 (fifty).

Chapter X
Amendment

66. These Rules [are not exhaustive and][1652] may be amended, altered, added or repealed by the Tribunal if it thinks necessary and expedient for the smooth functioning of the Tribunal.

[1652] The words 'are not exhaustive and' were deleted by the International Crimes Tribunal Rules of Procedure (Amendment), 2010.

Appendix C

PARTICIPANT CONSENT FORM

Name of the Participant:

Title of the project: What is the role and impact of the International Crimes Tribunal of Bangladesh (ICT-BD) in International Criminal Law?

Main investigator and contact details:

Name: Sajib Hosen
Email: sajib.hosen@pgr.anglia.ac.uk

First supervisor: Dr Aldo Zammit Borda

1. I agree to take part in the above research. I have read the Participant Information Sheet (Version: 16/03/2017) for the study.
I understand what my role will be in this research, and all my questions have been answered to my satisfaction.

2. I understand that I am free to withdraw from the research at any time, without giving a reason.

3. I am free to ask any questions at any time before and during the study.

4 I understand what will happen to the data collected from me for the research.

5. I have been provided with a copy of this form and the Participant Information Sheet.

Data Protection: I agree to the University[1653] processing personal data which I have

supplied. I agree to the processing of such data for any purposes connected with the

Research Project as outlined to me*

Name of participant (print)…… …..**Signed**……..….**Date**…….

I WISH TO WITHDRAW FROM THIS STUDY.

If you wish to withdraw from the research, please speak to the researcher or email them at (sajib.hosen@pgr.anglia.ac.uk) stating the title of the research.
You do not have to give a reason for why you would like to withdraw.
Please let the researcher know whether you are/are not happy for them to use any data from you collected to date in the write up and dissemination of the research.

[1653] "The University" includes Anglia Ruskin University and its Associate Colleges.

Appendix D

Anglia Ruskin University

PARTICIPANT INFORMATION SHEET

I would like to invite you to take part in a research study. Before you decide you need to understand why the research is being done and what it would involve for you. Please take time to read the following information carefully. Ask questions if anything you read is not clear or would like more information. Take time to decide whether or not to take part.

Section A: The Research Project

1. **Title of project:** *What is the role and impact of the International Crimes Tribunal of Bangladesh (ICT-BD) in International Criminal Law?*

2. **Brief summary of research.**

The nature of accountability under domestic criminal justice system is much higher than that of the international criminal justice system. By means of the international legal mechanism, such as International Criminal Court (ICC) and internationalised tribunals, it is difficult to establish effective retributive justice system to increase accountability in the field of International Criminal Law (ICL). The main aim of this research is to assess the appropriateness of the domestication of international criminal law to ensure an effective system of accountability. The subject matters of this research are the International Crimes Tribunal of Bangladesh (ICT-BD) and judgments delivered by the tribunal(s).

3. **Purpose of the study**

I am conducting this research as part of my PhD degree at Anglia Ruskin University. This research will attempt to contribute increasing accountability and decreasing impunity in the field of international criminal law.

4. **Name of my Supervisor:** Dr Aldo Zammit Borda

5. **How many people will be asked to participate?**

Total 15 people will be asked to participate.

6. **What are the likely benefits of taking part?**

This study will help us to increase the understanding of the importance of accountability in international criminal law.

7. **Can I refuse to take part?**

Taking part is voluntary. If you don't want to take part, you do not have to give a reason and no pressure will be put on you to try and change your mind. You can pull out of the discussion at any time.

8. **Has the study got ethical approval?**

This study has ethical approval from an ethics committee at Anglia Ruskin University.

9. **What will happen to the results of the study?**

The result of this study will be disseminated for writing up my PhD thesis.

10. **Contact for further information**:

Email: sajib.hosen@pgr.anglia.ac.uk
Mob: (0044)07428668336

Section B: Your Participation in the Research Project

1. **What will I be asked to do?**

If you agree to take part, we will ask you to answer some questions relating to International Crimes Tribunal(s) of Bangladesh. There aren't any right or wrong answers – we just want to hear about your opinions. The discussion should take about an hour at the longest.

2. **Will my participation in the study be kept confidential?**

All the information you give us will be confidential and used for the purposes of this study only. The data will be collected and stored in accordance with the Data Protection Act 1998 and will be disposed of in a secure manner. The information will be used in a way that will not allow you to be identified individually.

Only the people associated directly related to this project will have access to confidential information.

3. **Whether I can withdraw at any time, and how**.

You can withdraw from the study at any time and without giving a reason by email (sajib.hosen@pgr.anglia.ac.uk) or any other means of communication. Therefore, you have the option to withdraw from the study and have your data removed. However, it must be effectively communicated before I have written up my thesis. After I complete my thesis, it will not be possible to remove any data but may be amended.

4. **Contact details for complaints.**

If you have any complaints about the study, you are encouraged to speak to me or my Supervisor in the first instance. You also have the option for formal complaint following Anglia Ruskin University's complaints procedure.
Email address: complaints@anglia.ac.uk
Postal address: Office of the Secretary and Clerk, Anglia Ruskin University, Bishop Hall Lane, Chelmsford, Essex, CM1 1SQ.

Version: 16/03/2017

Appendix E

Semi Structure Interview

Target group: Lawyers & Judges

Name of Interviewer		
Name of Interviewee		
Place of Interview		
Date of Interview		
Confirm that the interview has read and understood the Participant Information Sheet and agreed to the Consent Form		YES / NO

The study addresses the following main questions.

g. Is the ICT-BD an appropriate mechanism for the specific circumstances in Bangladesh in the context of transitional justice? And why? **(A)**

-How does the Bangladeshi model relate to the notion of transitional justice? **(A1)**
-Is the ICT-BD only mechanism in place, Was there a policy of lustration or other forms of reparative justice? (A2)
-How appropriately ICT-BD is functioning in relation to other forms of transitional justice**? (A3)**

h. Why it took over 42 years to establish ICT-BD in Bangladesh? **(B)**

-What are the problems ICT-BD facing because of time lapse? **(B1)**
- Why Bangladesh could not establish tribunals soon after the liberation war is over? **(B2)**
- Why is it necessary to prosecute people who have committed crimes 42 years ago**? (B3)**

i. Are the judgments of the ICT-BD contributing to develop international criminal law? **(C)**

-To what extent ICT-BD is successful in terms of ensuring justice? **(C1)**
-To what extent due process has been followed in the ICT-BD? **(C2)**
- What are main criticisms of the ICT-BD and why? **(C3)**

Semi Structured Interview

Questions	Remarks
Introduction	
1. What's your role in the ICT-BD and what do you do on a day-to-day basis? How long have you been working with the ICT-BD? What is your experience of working with the ICT-BD?	
How ICT-BD is functioning related question	
1. How would you evaluate the importance of ICT-BD to deal with past human rights violation and/or gross violation of international humanitarian law?	
2. What in your view are the main purposes for which the ICT-BD was established?	
2. How does the Bangladeshi model relate to the notion of transitional justice?	
Some of the goals of transitional justice include prosecuting perpetrators, achieving peace and reconciliation, establishing the truth and delivering reparations to victims.	

3. In your opinion, is the ICT-BD a sufficient mechanism to ensure the goals of transitional justice in Bangladesh? Yes or NO. If NO, what further measures/mechanisms would you recommend to complement it?	
4. What other alternative(s) could have been adopted in Bangladesh, if any? Do you think some measure should be taken to complement the achievements of the prosecution process? If so, what measures/mechanisms would you recommend.)	
5. Is the ICT-BD only mechanism in place, Was there a policy of lustration (*a measure barring officials and collaborators of a former regime from positions of public influence in a country after a change of government) or other forms of reparative justice*?	
Time lapse related question	
6. What problems have you faced as a defense/prosecution lawyer because of time lapse? How could these problems be resolved? (Gathering evidence/ witnesses)	
7. How may this time-lapse have impacted on the prescription of crimes, retrospectivity of punishment, and compliance with international standards to ensure due process of all parties involved?	
8. What would be different if ICT-BD type tribunal could be established soon after the liberation war ended in 1971?	
In your opinion, how effectively are the judges/lawyers dealing with the time-lapse related issues? Are you aware of any training which has been provided? In your opinion, is such training necessary?	
9. How important is it to prosecute people who committed crimes over 3 decades ago?	
10. What are the impacts of time lapse on the witnesses / victims of crimes/perpetrators? And How would you evaluate this?	
11. What legal issues have risen because of time lapse?	
12. How has the time-lapse impacted on the deterrence effect of ICT-BD?	
Evaluating ICT-BD related question	
13. To what extent is the ICT-BD successful/unsuccessful? In terms of number of people prosecuted, convicted and released? To what extent ICT-BD is successful? In terms of time, costs, fairness	
14. In your opinion, does the framework of the ICT-BD enable lawyer to carry out their duties effectively?	
15. To what extent is due process been followed effectively by the ICT-BD? How would you evaluate the judgments of the ICT-BD?	
16. In its operation, have you come across any novel aspects of law or process, which had not arisen in that past? If yes, what were they and how did you resolve them?	
17. In your opinion, what are the greatest contributions that the ICT-BD as an institution will make to *Bangladeshi society* **and** *international criminal law* in the present and future? (How would you evaluate the judgments of the ICT-BD establishing truth?)	

18. What are the advantages/disadvantages of the ICT-BD as a *domestic* mechanism for the prosecution of crimes in Bangladesh? What could be different if ICT-BD would have been established as an *international* or *internationalised* tribunal? What are the main criticisms of the ICT-BD and why?	
19. One of the most common criticism levelled towards domestic tribunals is that they may be more susceptible to political interference. Have you got any views on this?	
20. How important is it conducting research in this particular area, what is your opinion? Have you got any further views or observations you wish to add, which we have not covered? Have you got any recommendations to improve the work of the ICT-BD going forward?	
Thanking the interviewee & End	

<u>Semi Structure Interview</u>

Target group: Politicians

Name of Interviewer		
Name of Interviewee		
Place of Interview		
Date of Interview		
Confirm that the interview has read and understood the Participant Information Sheet and agreed to the Consent Form		YES / NO

The study addresses the following main questions.

a. Is the ICT-BD an appropriate mechanism for the specific circumstances in Bangladesh in the context of transitional justice? And why? **(A)**

-How does the Bangladeshi model relate to the notion of transitional justice? **(A1)**
-Is the ICT-BD only mechanism in place, Was there a policy of lustration or other forms of reparative justice? (A2)
-How appropriately ICT-BD is functioning in relation to other forms of transitional justice**? (A3)**

b. Why it took over 42 years to establish ICT-BD in Bangladesh? **(B)**

-What are the problems ICT-BD facing because of time lapse? **(B1)**
- Why Bangladesh could not establish tribunals soon after the liberation war is over? **(B2)**

- Why is it necessary to prosecute people who have committed crimes 42 years ago**?(B3)**

c. Are the judgments of the ICT-BD contributing to develop international criminal law? **(C)**

-To what extent ICT-BD is successful in terms of ensuring justice? **(C1)**

-To what extent due process has been followed in the ICT-BD? **(C2)**

- What are main criticisms of the ICT-BD and why? **(C3)**

Semi Structured Interview

Questions	Remarks
Introduction	
1. What's your role in the ICT-BD and what do you do on a day-to-day basis? How long have you been working with the ICT-BD? What is your experience of working with the ICT-BD?	
How ICT-BD is functioning related question	
2. In your view, what are the main purposes of establishing ICT-BD?	
3. How would you evaluate the level of support of Bangladeshi society for the establishment of the ICT-BD?	
4. In your opinion, does the ICT-BD have any political value in Bangladesh? What is your observation on diplomatic relationship with other countries relating to ICT-BD?	
5. How would you evaluate the performance of the ICT-BD in prosecuting perpetrators?	
6. How would you evaluate the ICT-BD in terms of resources it has to deal with crimes under international law? How is the budget of the tribunal finalized?	
***Some of the goals of transitional justice include prosecuting perpetrators, achieving peace and reconciliation, establishing the truth and delivering reparations to victims*.** 7. In your opinion, is the ICT-BD a sufficient mechanism to ensure the goals of transitional justice in Bangladesh? Yes or No. If Yes, how (ask to elaborate) If No, what further measures/mechanisms would you recommend to complement it? Are you aware of any other mechanisms in Bangladesh to address the above goals?	
8. In some media articles, it was suggested that there have been some instances of lustration (a measure barring officials and collaborators of a former regime from positions of public influence in a country after a change of government) in government. Have you got any views on this?	
Time lapse related question	
9. Why could Bangladesh not establish tribunals soon after the liberation war was over?	
10. Why is it necessary to prosecute people who have committed crimes 42 years ago?	
11. What are some of the political or legal challenges which arisen because of time lapse?	
12. What are the impacts of time lapse on the witnesses / victims of crimes/perpetrators? And how could these challenges be addressed?	

13. Because of the time-lapse and the ordinary time it takes courts to do their work, it is likely that some perpetrators will not face criminal justice because of the length of time. In these circumstances, what are your views on the provision of reparations to victims?	
14. What is your opinion on ICT-BD in terms of public faith/trust in judicial process?	
Evaluating ICT-BD related question	
15. To what extent is the ICT-BD successful? In terms of time, costs, perceptions of fairness	
16. How would you evaluate the ICT-BD from your own political ideology/perspective?	
17. In your opinion, to what extent due process has been followed in the ICT-BD?	
18. In your opinion, what are the greatest contributions that the ICT-BD as an institution will make to *Bangladeshi society* **and** *international criminal law* in the present and future? (How would you evaluate the judgments of the ICT-BD establishing truth?)	
19. How would you evaluate the judgments of the ICT-BD in terms of political/economic stability?	
20. To what extent the ICT-BD has achieved its goal/objectives? How would you evaluate the fact that the ICT-BD rendering justice to victims, families/relatives, and the society as a whole?	
21. One of the most common criticism levelled towards domestic tribunals is that they may be more susceptible to political interference. Have you got any views on this?	
22. Is it worthy conducting research on ICT-BD? Have you got any further views or observations you wish to add, which we have not covered? Have you got any recommendations to improve the work of the ICT-BD going forward?	
Thanking the interviewee & End	