The Bangladesh War Crimes Tribunal: Reconciliation or Revenge?

By
John Cammegh¹

Justice Without Politics?
The steady development of international criminal law and of war crimes tribunals in particular over the past 20 years has owed much to the maxim 'No Peace Without Justice'. But there can be no peace without a winner; and in the aftermath it is the winner who gets to dispense the justice and write the history. All too frequently, the international judicial process has drawn accusations of providing a means of revenge rather than reconciliation.

The perception of victor's justice has bedeviled ad hoc war crimes tribunals since Nuremberg: the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) placed disproportionate emphasis on prosecuting the vanquished. Even at the Special Court for Sierra Leone (SCSL), where trials of victorious pro-government leaders were supposedly given equal billing to those of the defeated RUF rebels, sentences for crimes of equal gravity were cynically disproportionate. This is not to say the International Tribunal system cannot be made to work; the International Criminal Court (ICC) makes for a process less vulnerable to political manipulation. But, so far as the ad hoc tribunals go, experience drives an inescapable conclusion: if there is no peace without justice, there can be no justice without politics. The trouble is, politically motivated, selective justice is

¹ John Cammegh is a barrister at 9 Bedford Row, London and was called in 1987. Besides many years experience in a wide range of domestic criminal practice, he acted as lead counsel from 2004-2009 for Augustine Gbao in the RUF war crimes trial at the Special Court of Sierra Leone. He is currently instructed to advise in the cases of Sayedee and others before the Bangladesh International Crimes Tribunal.
anathema to civilized democratic society and is ultimately doomed to fail- as it eventually did in totalitarian states in the 20th century.

Today, on a tide of nationalist fervour, the ad hoc Bangladesh International Crimes Tribunal (ICT) is set to embark on a series of trials concerning surviving individuals allegedly responsible for atrocities committed in the 1971 Liberation War. Swept into power in 2008 on a manifesto to hold these trials 40 years after the event pursuant to legislation mothballed since 1973, Prime Minister Sheikh Hassina and her Awami League government are about to deliver on their promise. But will these trials avoid the mistakes of the past? Speaking in October 2011, State Minister for Law Qamrul Islam attempted to allay any such doubt:

‘The international criminal trial process will be more neutral and transparent than that of other war crimes trials so far held elsewhere in the world. It will be exemplary for the world community...working with full independence and complete neutrality’.

On the face of it, such aspirations are encouraging, if perhaps naïve. At the very least, they suggest a desire for openness, balance and restraint- qualities I found desperately lacking at the SCSL as lead counsel for one of the RUF indictees. Taking Mr Islam at his word, Bangladesh has a privileged opportunity to change the course of ad hoc international criminal justice. If it were to get things right, the ICT could set a brave example to the developing world in particular in banishing impunity whilst cementing national reconciliation. But if it were to get things wrong, the consequences might be disastrous: not only for the wellbeing of international justice but for the region as a whole. The trials are yet to commence and time will tell; but despite the Minister’s lofty assurances, the opportunity seems likely to be wasted.

The 1973 International Crimes (Tribunals) Act: A Brief History
Pakistan’s partition from newly-independent India in 1947 was the culmination of a long and bloody struggle in which hundreds of thousands died on both sides, leaving a legacy of mistrust between the two states that persists to this day. To accommodate religious and cultural differences, newly-created Pakistan was divided into two separate territories, western and eastern Pakistan, separated by
the vast expanse of northern India. Of the two, east Pakistan was the poor relation, prone to natural disasters and suffering widespread social, economic and political discrimination from the western-based ruling elite. By 1970 the impetus of Sheikh Mujibur Rahman’s nationalist movement in east Pakistan forced the military ruler, General Yahya Khan, to hold free elections in which Mujibur’s Awami League triumphed over Zalfiquar Ali Bhutto’s Pakistan People’s Party in the west. Bhutto was a bad loser; Mujibur was equally reluctant to compromise. As they squabbled over power, Gen Yahya Khan postponed the sitting of the National Assembly. The open revolt that followed in the east in March 1971, and in Dhaka in particular, led to a savage civil war of epic proportions. Although lasting only nine months until India’s decisive intervention in December, it cost the lives of hundreds of thousands: the majority of whom were neither freedom fighters nor anti-liberation forces but defenceless civilians.

As with all conflicts, there is competition over the truth; fact and myth merge after years of propaganda and prejudice generated on both sides. Whilst nationalist claims of up to 3 million dead are surely far-fetched, the Bangladesh Liberation War certainly saw large-scale acts of genocide with the hounding out, killing and displacement of individuals by virtue of their profiling as members of religious or ethnic groups. Hindus in particular suffered brutal ethnic cleansing at the hands of Pakistani military forces opposed to independence. Many such wounds are yet to heal: the call for justice and reconciliation, albeit 40 years on, cannot and should not be denied.

The ICT had its genesis in the International Crimes (Tribunals) Act of 1973 (ICTA), which proposed to hold the first international criminal tribunal since 1946. Using Nuremberg as a template, ICTA cited genocide, crimes against humanity and war crimes, amongst others, as the basis for bringing anti-liberation military personnel (former Pakistan Army combatants) and their auxiliary forces (local ‘Razakar’ units of anti-liberation volunteers) to justice for crimes committed against civilians and pro-liberation freedom fighters alike. The idea was stillborn; in the spirit of peace and reconciliation Sheikh Mujibur swiftly repatriated several hundred Pakistani prisoners of war following the tri-partite
Simla Agreement with India and Pakistan. Following Mujibur's Presidential Order No. 16 in 1973, in which a blanket amnesty was granted to all participants ‘in connection’ with the conflict, ICTA was seemingly put to rest: until its resuscitation during the Awami League's 2008 election campaign, that is.

A Selective Prosecution?

Whether today’s Bangladesh war crimes tribunal evokes a genuine desire to heal past wounds, or is simply a blunt instrument of political expediency to mask socio-economic difficulties at home, the promise of trials has triggered widespread, populist demands for vengeance amidst this, the war’s 40th anniversary year. But who should be tried? The Pakistan military were all sent home; most of the Auxiliary leaders either left with them or have since died. In any event, all combatants were effectively pardoned by Sheikh Mujibur in 1973.

Deft amendment of the 1973 Act found a way past this problem in 2009, adding the new category of ‘individuals’ to the original ICTA targets of anti-liberation armed forces and auxiliary personnel. By contrast, immunity for pro-liberation ‘freedom fighters’ remained intact, irrespective of their conduct in the conflict. Now, with this loophole in place, what was originally drafted in 1973 as a vehicle to prosecute military excesses during the conflict had assumed the appearance of a means of pursuing pre-selected civilian targets 40 years later. Certainly, the initial arrest phase from June to December 2010 suggested a co-incidental pattern: five of the six detained comprised the leadership of Bangladesh’s most powerful Islamic political party, Jamaat e Islami; the other was a central figure in the Bangladesh National Party (BNP). Considering that Jamaat actively opposed independence in 1971, and that their alliance with the BNP ensured the Awami League’s defeat at the 2001 election, questions arise as to whether the Awami League-sponsored ICT may, after all, have more urgent motives other than bringing those responsible for the events of 1971 to justice.
ICTA 1973- The Hangman's Charter

Regardless of the government’s motive, it is important to grasp both the full extent of the draconian powers conferred by ICTA on the tribunal and the prosecution, and the frightening extent to which the rights of the accused are curtailed in proceedings that allow for the death penalty. Brief inspection of the statute immediately casts a shadow on Qamrul Islam’s assurances of a fair trial process. Whilst this was the first statutory attempt to create a war crimes tribunal after Nuremberg - which hardly set a glowing precedent - there can be no excuse for the Act’s spectacular denigration of the rights of accused persons. For the Act to be resurrected almost 40 years later in virtually unchanged form suggests, at best, that the government has little interest in conforming with modern standards- despite being a state party to the International Criminal Court and a signatory to the International Covenant on Civil and Political Rights. At worst, two years ahead of the next general election, it betrays a cynical determination to eliminate opposition figures for political gain.

A detailed exposition of ICTAs many excesses would be too lengthy here. In summary, its Pre-trial provisions confer rights on government-appointed investigators to detain and question any person without notice; there is no statutory right to any form of prior disclosure to the suspect, no right to silence in interview, and there is no right to have a lawyer present. While the first arrestee, Jamaat’s leading cleric Delwar Hossain Sayeedee, was interviewed, his attending lawyer was forced to ‘observe’ from an adjoining room: his task hindered by the absence of a window or the ability to hear what was being said. During lunchbreaks excited investigators briefed the expectant press corps on the suspect’s ‘confession’, duly sensationalized in the national press and on the internet the following day. Formal charging (on an indictment ‘framed’ by the judges themselves) is ordained to proceed in a specially convened hearing whereupon the accused is arraigned immediately. When formal charges were eventually put to Sayeedee, he was prevented from conferring with his lawyer and was instead ordered immediately to enter pleas to a lengthy series of charges, most of which alleged multiple offences drafted with an alarming lack of
specificity as to date, location and details of alleged victims. Following arraignment, the Act allows just *three weeks* until commencement of trial, on which day the defence is to disclose full details of its case, including identities of witnesses and exhibits. Compared to proceedings at the ICC, or indeed at recent *ad hoc* tribunals where the gap between arraignment and trial can typically extend to six months or more, this might be considered a little harsh—particularly when the alleged conduct took place 40 years ago.

The Act’s impact on the Trial process itself is equally disturbing. As with investigators, all judges on the tribunal panel are to be appointed by the government; proceedings may continue in a judge’s absence, and there is no right to challenge judicial appointments. Judges have an unfettered right to question witnesses with no right for defence counsel to re-examine.

Fundamental rules of evidence are dispensed with *entirely*: the 1872 Evidence Act, and the 1898 Criminal Procedure Code, largely derived from the statute that until recently governed English proceedings and which continues to govern the rules of evidence and procedure in Bangladesh’s domestic criminal courts, are *specifically* outlawed by ICTA for the tribunal’s purposes. Remarkably, ICTA deliberately provides for the admissibility of newspaper articles, film, radio and other media reports as evidence, notwithstanding the natural tendency in the press to exaggeration, and the fact that such material will inevitably be incapable of forensic scrutiny.

But there is yet worse to come: in the event of a controversial ruling by the bench, Article 47 (3) of the Bangladesh Constitution, an amendment incorporated in 1973, removes any right for interlocutory appeal from the tribunal to a separate or higher court. Indeed, the only right to appeal provided within ICTA is that against conviction and sentence to the Bangladesh Supreme Court. Whilst the tribunal is empowered to entertain a *review* of its own decisions, results have proved predictable: the tribunal has been disinclined thus far to overrule its own judgment.
The most egregious example of this up to now in Sayedee’s case was the tribunal’s rejection of a petition for review of their earlier decision not to give clarification to the ICT’s definition of crimes against humanity. In so doing, the tribunal appears to have withdrawn the accused’s right to be informed of the nature of the case against him, contrary to Article 14 of the ICCPR and, ironically, s16 of ICTA itself. As a consequence, it has permitted a case to proceed on the allegation of a crime that resembles something very different in 2011 to what it did when it first appeared at Nuremberg in 1946.

Crimes against humanity have traditionally encompassed offences such as murder, extermination, enslavement, deportation, imprisonment, torture, rape and persecution, amongst others. But the basic legal requirement for crimes against humanity per se has been a subject of debate. The precondition at Nuremberg was the existence of an international armed conflict between at least two states when the crimes were committed. But this requirement was absent from the 1994 ICTY statute’s definition, a position confirmed in 2010 at the Extraordinary Chamber of the Courts of Cambodia (ECCC), which claims jurisdiction over crimes dating back to 1975. The ECCC case of Duch confirmed that the need for an armed conflict was dispensed with altogether, and replaced with the familiar chapeau requirements of a widespread or systematic attack directed against a civilian population on national, political, ethical, racial or religious grounds.

Leaving aside the fact that ICTA fails also to define the individual offences that may qualify as crimes against humanity (murder, extermination, etc) in contrast to the ICC and earlier ad hoc tribunals, it makes no attempt to clarify a definition of crimes against humanity per se. Does the court intend to apply the Nuremberg precondition of an international armed conflict, still applicable in 1971, or does it intend to employ the current definition of a widespread or systematic attack? To import the latter would be unlawful: the nullum crimen sine lege maxim enshrined within Article 15 of the ICCPR prevents retroactive application of law not in force at the material time. One would imagine the simple solution would be for the court to apply the law as it stood in 1971: namely the requirement of an international armed conflict. But this won’t work either: on any view of the facts, the 1971 Liberation War was an internal, not an international armed
conflict. Indeed, Bangladesh was not recognized as a sovereign state by any foreign nation until their ally India did so on 6th December 1971, ten days before the war's end. The next to follow suit was East Germany on 11th January 1972: *ergo* the Nuremberg definition, requiring an international armed conflict between at least two states cannot apply.

In other words, when it comes to trying crimes against humanity, the ICT is caught between two stools. On this analysis, it is surely disqualified from trying the crime at all. Unfortunately, owing to the amended Constitution’s bar on interlocutory appeals, there is no higher court available to tell them so. Instead, the tribunal is left with the indignity of entertaining charges on an indictment where nobody—not the prosecution, nor the defence, nor even the judges themselves - has a clue about what must be proved for a crimes against humanity conviction to stick. The tribunal’s announcement that they may at a later stage in the proceedings choose to adopt developments on the definition of crimes against humanity from recent tribunals adds insult to injury: the suggestion doesn’t just amount to a tacit admission that they are undecided about the law, it also suggests the judges are open to making up the law as they go along.

One is tempted at this point to ask: how serious is the government-backed ICT about legality, or even the appearance of a fair trial? Again, there’s worse to come: wheras Article 31 of the Constitution states ‘*To enjoy the protection of the law, and to be treated in accordance with the law, and only in accordance with the law, is the inalienable right of every citizen*,’ Article 47 (3), as amended, effectively removes that protection from those charged under ICTA. Thereby, ICT suspects are rendered second-class citizens before the law. Just to emphasise the point, in proceedings brought against the amendment a Supreme Court judge held that a reasonable distinction could properly be drawn between the rights afforded to ‘*ordinary citizens and other citizens accused of war crimes*’. All this acts as a grim reminder of the past: rather than Qamrul Islam’s vision of a tribunal ‘exemplary for the world community’, the provisions of ICTA and Article
47 (3) of the Constitution chillingly create the perfect habitat for a political show trial, culminating with the provision of the death penalty.

Current Situation
On 3rd October 2011, after 14 months in custody, Delwar Hossain Sayedee was finally charged with 20 counts of genocide and crimes against humanity. A petition to review the ‘framed’ indictment, objecting to the tribunal’s failure to define the offences charged, and to duplicity and lack of specificity within the charges awaits disposal. Meanwhile, four further Jamaat e Islami suspects, all of advanced age and now in custody for well over a year, remain detained without charge or any advance disclosure whatsoever.

At the time of writing (November 2011), Delwar Hossain Sayedee’s trial for his alleged participation in the atrocities of 1971 is delayed pending a petition for recusal against the chairman of the bench following discovery of his involvement in a 1993 Commission of Enquiry into the alleged participation of several anti-Awami League figures. The defence were recently informed that the chairman has agreed not to sit on the tribunal’s deliberations into the matter. The 1993 Commission, which can hardly be said to have been independent, found that four of the five Jamaat suspects currently in detention were criminally liable for atrocities in 1971. Examination of the Commission’s report shows it to be one sided and arbitrary. It appears to overlook both the limited influence of Jamaat as a political force in east Pakistan at the time as well as widespread accounts of Jamaat members and their affiliates offering protection to Hindus and others from attack and persecution by Pakistani military personnel. The outcome of the recusal petition is awaited with interest; the unexpected withdrawal of the chairman could be a serious setback to the government’s intention to complete the process in time for the 2013 general election.

Despite Qamrul Islam’s proud boast, the ICT has received nothing but criticism, raising alarm all over the world. So far, pleas for restraint from the US State
Department, the International Bar Association, the International Center for Transitional Justice, Human Rights Watch, Amnesty International, members of the UK House of Lords and the European Parliament have fallen on deaf ears. Widespread calls for ICTA to be amended in line with ICC Statute provisions and the repeal of Article 47 (3) have been similarly ignored.

Today in Dhaka, opposition to the tribunal is growing. Following a mass demonstration on 19th September in which hundreds were arrested and many injured, an arrest warrant was issued for the Jamaat detainees’ Bangladeshi lead counsel citing involvement with the mob ringleaders. The authorities overlooked the fact that rather than being in Dhaka on 19th September, as the arrest warrant alleged, the suspect was in Europe, where he had been for some time. More recently, a key defence witness in the Sayedee case, ironically a former nationalist freedom fighter, was arrested on unknown allegations. Separately, five other defence witnesses were also arrested and urged not to involve themselves in the trial.

Enthusiasm for the trials within government circles is unbridled: in an address to the UN’s General Assembly in New York in September 2011, Prime Minister Sheikh Hassina signaled not only her determination to carry on regardless but also her confidence in the ICT’s outcome, when, speaking of the accused, she declared

‘Their eventual punishment will strengthen our democracy, demonstrating that the state is capable of just retribution’.

The prosecution are equally bullish: in November ICT prosecutor Rana Dasgupta claimed

‘One can say 2012 is the year of verdict of the war crimes trial and 2013 the year of verdict execution’.
A Disaster in the Making?
As part of the UK-based defence team instructed to advise the Jamaat e Islami detainees, I visited Dhaka in March 2011. I encountered an austere, foreboding atmosphere that could almost be described as Orwellian. Leaving my hotel I was tailed by hapless Bangladeshi security operatives; armed militia roamed the streets; massive murals celebrating the freedom fighters’ sacrifice hung from tall buildings in a throwback to Soviet times. As the trials draw near, the pro-government press is increasingly fervent in its vitriolic attacks on the ‘war criminals’; last month a national daily’s report on an Awami League rally featured lurid photographs of the simulated public hanging of the Jamaat detainees.

One must not prejudge, but appearances suggest that the ICT is the focal point for a government-led crusade seeking vengeance rather than reconciliation amidst a political culture that brooks no consent. Revenge, it seems, wins votes. But tension is mounting: it is increasingly likely that these trials will become a rallying point for both secular, Awami League nationalists and anti-government, largely Islamic opposition groups. In declining socio-economic conditions one can only hope the trials do not trigger a call to arms by extremists on both sides. Such an outcome would be a grievous betrayal not just of the rule of law, but of the victims of the conflict. For what a tragedy it would be if, 40 years after the event, these trials were to lead to the same hatred, chaos and impunity they were supposed to lay to rest.

John Cammegh
9 Bedford Row
8/11/11