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Has the International Crimes Tribunal Bangladesh (ICT-BD) assisted to Reconcile Society?

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Abstract: Following the Liberation War of 1971 between Bangladesh (formerly East Pakistan) and West Pakistan, Bangladesh, a newly formed country, enacted the International Crimes (Tribunals) Act in 1973 to prosecute and punish war criminals. However, it was not until 2009 that the Bangladeshi government revived the vision of trials, announcing its intention to establish a war crimes tribunal. By appointing judges, investigators, and prosecutors, the tribunal was finally established in 2010. Although the tribunal formed by the 1973 Act is claimed to operate independently, this article argues that several significant shortcomings hinder the overall judicial process of criminalizing and sentencing individuals. To do that, it examines several provisions of the 1973 Act and the tribunal's operations in light of international standards. The paper concludes that while the Bangladeshi government's efforts to bring the suspects to justice are praiseworthy, the domestic tribunal fell short of guaranteeing the accused's right to a fair trial and justice for society. It further contends that instead of uniting society, the tribunal splintered it. The study continues by noting that combining a hybrid tribunal and a Truth Commission could have helped unite the community and ensured justice.

Keywords: International Criminal Justice; International Criminal Trial; Fair Trial Rights; Justifications of Punishment

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1. Introduction

Mass crimes affect entire societies, so it is essential to incorporate the stakeholders of communities as much as possible into the reconciliation process (Staub, 2006, p. 867; 873). Reconciliation refers to a process, outcome, or goal (Zalta, 2015). Reconciliation processes aim to develop relationships damaged due to the atrocities (Hughes, 2001, p. 123). The question is, however, how far the fragile society has been reconciled by the International Crimes Tribunal Bangladesh (ICT-BD), which deals with atrocities perpetrated in 1971.

Bangladesh passed an Act[1] in 1973 in response to the horrific crimes committed in 1971 to bring charges against those responsible for the mass murders. Although the Act was passed in 1973, the government of Bangladesh established a tribunal in 2010, which is purely domestic[2]. Despite being domestic, the tribunal deals with international crimes. Since the tribunal deals with international crimes, international criminal law's (ICL) objectives should take priority over domestic purposes.

Although ICL does not have a defined list of objectives, international tribunals like the International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for the former Yugoslavia (ICTY) have had similar goals. The International Criminal Court (ICC) also shares identical objectives, which include retribution, utilitarianism, and rehabilitation, among others (Cotton, 2000, p. 1313; Greenawalt, 2014, p. 969; Klabbers, 2001, p. 249; Ku & Nzelibe, 2006, p. 777). The functions of international tribunals and courts also acknowledge the relevance of expressivist justifications (Cotton, 2000, p. 1313; Greenawalt, 2014, p. 969; Klabbers, 2001, p. 249; Ku & Nzelibe, 2006, p. 777). Apart from the objectives mentioned, other ICL scholars promote some other ambitions which are often associated with ICL: reconciliation, incapacitation, restoration, historical recording building, preventing revisionism, crystallizing international norms, general affirmative prevention, establishing peace, preventing war, vindicating international law prohibitions, setting standards for fair trials, and ending impunity (Schabas, 2012; Drumbl, 2012; Galbraith, 2009; Teitel, 2005; Wilson, 2005; Henham, 2004; Robinson, 2008).

Among the approaches mentioned above, international tribunals and courts most frequently applied the retributive theory among these as well as other approaches. Although the Bangladeshi tribunal primarily emphasizes the retributive theory, the

[1] The International Crimes (Tribunals) Act, (Act No. XIX of 1973).
[2] The Tribunal was established on March 25, 2010, by notification in the official gazette under Section 3 of the Act. See the official website of the International Crimes Tribunal-1, Bangladesh; https://www.ict-bd.org/ict1/.

concern is whether this approach is sufficient to bring about social harmony.[1] If not, what could have been done differently to reconcile society?

The purpose of this article is to address the questions mentioned above. Comprised of four parts, it begins with exploring various punishment theories employed by international courts and tribunals like the ICTY, ICTR, and the ICC. It should be noted, however, that the ICTR, ICTY, and ICC differ significantly from the tribunal established in Bangladesh in terms of their elements. For instance, while other tribunals deal with recently committed atrocity crimes, the Bangladeshi tribunal deals with temporally distant international crimes (TDICs)[2]. The section, therefore, also investigates whether the Bangladeshi tribunal can profit from the theories of punishment employed by those international tribunals.

Part Two covers the policies adopted by the Bangladeshi government to address the crimes committed in 1971. To begin with, an overview of the 1971 Liberation War between Pakistan and Bangladesh is provided. The discussion then focuses on the Bangladeshi government's measures to pursue the suspects. For this purpose, the government passed the International Crimes (Tribunals) Act in 1973. The study particularly examines whether the Act's punishment provisions meet international standards.

Part Three reviews the ICT-BD's activities to discern whether they were sufficient to reconcile society. Janine Natalya, a political scientist, cited in her paper that "international war crimes tribunals can foster reconciliation in three principal ways: by seeing that justice is done; by establishing the truth about crimes committed; and by individualizing guilt." (Clark, 2008, p. 331; 332). To discern whether these three norms were upheld, the author looks into each assertion by investigating the activities of ICT-BD.

The author points out that the Bangladeshi Tribunal flawlessly accomplished none of these aspects. The ICT-BD is deemed helpful in achieving one of the ICL's goals: ending the culture of impunity, but it alone cannot unite the community. Instead, the author suggests using a combination of strategies that can help eradicate the impunity culture and promote social harmony. Part Four offers several alternative approaches,

[1] The tribunal can only impose punishment, such as the death penalty or imprisonment. See section 20(1) of the International Crimes (Tribunals) Act, 1973, which states that "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."

[2] Although the crimes in Bangladesh were perpetrated in 1971, the tribunal was not constituted until 2010, more than 40 years after the crimes were committed.

such as retributive justice, restoring the victims' families, repairing society, and more, which could be employed to achieve multiple ICL objectives.

It is suggested in this article that prosecuting and punishing the perpetrators of crimes committed decades ago may not be enough to restore the integrity of the affected community. Policymakers need to consider other policies as well. One such policy could be establishing a truth commission to help uncover historical truths the community needs to know. Policymakers, however, should not be limited to one approach, such as trials or truth commissions, as this could lead to suboptimal outcomes. Instead, they should consider adopting a multi-dimensional approach to address atrocities committed decades ago.

2. Objectives of International Criminal Law (ICL) and Justifications of Punishment

International crimes tend to be qualitatively more severe than domestic crimes. These crimes directly impact many more people, and their effects on the community are significantly more powerful and long-lasting. Given the extreme nature of these atrocity crimes, it is crucial to discern which punishment would be appropriate for perpetrators who have killed hundreds, thousands, or perhaps tens of thousands of civilians. Should theories of punishment be distinctive from domestic criminal law, or should they be similar? According to Mark A. Drumbl, ICL has yet to develop its own penology; therefore, it had to borrow penological rationales from domestic criminal law (Drumbl, 2005, pp. 539, 549).

The following section discusses some prevalent theories of punishment used by numerous international tribunals and courts. However, exploring common objectives does not prevent ICL from effectively advancing other goals. Thus, the next part also covers additional ICL objectives.

2.1. Retributive Theory

Retributive theory is based on the notion that criminal offenders should receive a just punishment (Duff, 2001; Kremnitzer, 2020). Punishment is justified because unlawful activities disrupt the peaceful balance of society, and penalty helps restore the balance. In this regard, Kant argues that:

> "Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil

> society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else….. He must first be found to be deserving of punishment before any consideration is given to the utility of this punishment for himself or for his fellow citizens." (Murphy, 1979).

From his vantage point, an offender must deserve punishment before considering any other benefit for society. That said, punishing the perpetrator is the primary ground of retributive theory. Although there are many contradictions among the advocates of retributive schools, retributivists commonly understand that punishment rectifies the moral balance through the condemnation of criminal conduct (Hart, 1968, pp. 234-235).

The preamble of the Rome Statute of the ICC outlines the position of the retributive theory in relation to international crimes.[1] In several judgments, the ICC directly pointed out the significance of retributive theory. For example, in the Bemba sentencing judgment, delivered in June 2016, an ICC Trial Chamber directly referred to the Preamble of the Rome Statute, which declares that "the most serious crimes of concern to the international community as a whole must not go unpunished."[2] The Chamber asserted that the Preamble identifies the two primary objectives of punishment at the ICC as retribution and deterrence.[3]

In the *Katanga* case, a different ICC chamber voiced the same opinion. The Chamber weighed some considerations before delivering judgment. The requirement that the most severe offenses not go unpunished was one of the considerations.[4] Besides, the importance of retributive theory also has been highlighted in the ICTY,[5] ICTR, and the Extraordinary Chambers in the Courts of Cambodia (ECCC)'s[6] judgments. When

[1] In the preamble to the Rome Statutes, it states that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured."

[2] The Prosecutor v. Jean-Pierre Bemba Gombo (Decision on Sentence Pursuant to Article 76 of the Statute) ICC-01/05–01/08, para 10 (2016).

[3] ibid.

[4] The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui (Decision on Sentence pursuant to article 76 of the Statute) ICC-01/04-01/07, para 37 (2014).

[5] The Appeals Chamber further recalls that in view of the gravity of the crimes in respect of which the Tribunal has jurisdiction, the two main purposes of sentencing are retribution and deterrence; the purpose of rehabilitation should not be given undue weight; see: Prosecutor v. Vujadin Popovic, et el, ICTY Appeal Chamber, IT-05-88-A, para 1966 (30 January 2015).

[6] The Chamber stated that "among a number of recognised purposes of criminal punishment, the Supreme Court Chamber is of the view that retribution and deterrence are particularly relevant to this

considering the ECCC, remember that the Cambodian tribunal dealt with elderly offenders, and the tribunal stated that the retributive approach may apply to all criminals, regardless of age.

2.2. Utilitarian Theory

Jeremy Bentham — an English philosopher — was prominent for his utilitarian theory[1]. He developed the theory of utility by defining it as a measure of maximizing pleasure while minimizing pain.[2] From Bentham's vantage point, any action is morally right if that produces the most good. That said, punishment is justifiable if it brings benefit for others (Duff, 2001). Crime prevention or social protection is typically cited as the primary advantage to support the enforcement of punishment in the context of criminal law (Bentham, 2009; Fletcher, 2007).

Utilitarian theory's primary goal is to prevent future criminal behaviour by advocating legislation outlining the penalties for criminal behaviour. That said, this theory is "consequentialist" in nature (Beccaria, 1764). It acknowledges that punishment has consequences for both the criminal and society (Beccaria, 1764). It denotes that punishment should impact criminals specifically and society in general. Deterrent theory, for example, operates on a specific and a general level (Sander, 2019).

Preventing the same wrongdoer from committing crimes further is the primary purpose of specific deterrence, whereas general deterrence aims to deter potential criminals (Sander, 2019). Specific deterrence has two objectives: first, the offender should be in prison for particular period, so that he will be prevented from committing the crime(s) for that specific period (Sander, 2019). Second, incarceration is intended to be abhorrent, deterring the offender from committing further misdeeds. Additionally, imprisonment sets a good example for society and conveys that crimes will be punished (Sander, 2019).

The deterrence theory, as mentioned earlier, draws its roots from domestic criminal law. However, its application to international crimes remains debatable. To shed light on this matter, a close observation of the practices of international tribunals and

case in light of the gravity of KAING Guek Eav's crimes." See: Co-Prosecutors v. Kaing, Case 001, Appeal Judgement, F28, Case File/Dossier No. 001/18-07-2007-ECCC/SC

[1] 3 Suri Ratnapala, Jurisprudence, 35 (Cambridge Publication 2017).

[2] ibid, 39

courts becomes imperative. Notably, most trial chambers of international tribunals emphasize that deterrence is crucial to international sentencing.[1]

In *Delalić's* case, for instance, the chamber stated that "deterrence is probably the most important factor in the assessment of appropriate sentences for violations of international humanitarian law."[2] An ICTR trial Chamber stated that punishment "dissuade[s] forever others who may be tempted in the future to perpetrate such atrocities [...]."[3] Even in 2005, the former UN Secretary-General, Kofi Anan, acknowledged the value of international criminal tribunals in "deter [ring] further horrors".[4]

The preceding discourse highlights the importance of deterrent theory in international criminal law (ICL). However, it raises questions regarding the efficacy of specific and general deterrence in trials involving decades-old atrocity crimes. While general deterrence may be effective, specific deterrence proves ineffective in cases where offenders have a prior history of criminal conduct. For instance, a perpetrator who previously held a position of authority, committed crimes several decades ago, and is now advanced in years is very unlikely to commit any more heinous crime.

2.3. Rehabilitation

Rehabilitation is a process of getting "back to normal" (Raynor & Robinson, 2009; Allen, 1959). The process changes the offender internally and transforms him into a non-criminal and productive member of society. Therefore, it would assist in decreasing recidivism (Bagaric & Morss, 2006). Decreasing recidivism is, in fact, the primary goal of rehabilitation (Bagaric & Morss, 2006).

[1] Prosecutor v. Delalić, Appeals Judgment, ICTY Case No.: IT-96-21-A, para 806 (20 February 2001); Prosecutor v. Deronjić, Sentencing Judgment, ICTY Case No.: IT-02-61-S, para. 142 (30 March 2004); Prosecutor v. Rutaganda, ICTR Case No. ICTR-96-3-T, Judgment and Sentence Case No. ICTR-98-39-S (Dec. 6, 1999), < http://www.unictr.org/Portals/0/Case/English/Rutaganda/judgement/991206.pdf> and Prosecutor v. Serushago, Case No. ICTR-98-39-S, Sentence), para 20 (Feb. 5, 1999). https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-98-39/trial-judgements/en/990215.pdf.

[2] Prosecutor v. Delalić, ICTY Case No. IT-96-21-T, para. 1234 (November 16, 1998).

[3] Prosecutor v. Delalić, Appeals Judgment, ICTY Case No.: IT-96-21-A, para 456 (February 20, 2001)

[4] Report of the Secretary-General, In Larger Freedom – Towards Development, Human Rights, and Security for All, UN Doc. A/59/2005, 138 (March 21, 2005).

The judges occasionally mentioned this concept's importance in numerous ICTY and ICC judgments. This is because rehabilitation, considered a secondary purpose in sentencing, is favoured over retribution and deterrence values[1]. A defendant found guilty by the ICTY was qualified for early release even though rehabilitation was not the primary goal of punishment.[2] To qualify for early release, the chamber considered a few factors. In the case of *Prosecutor v. Delalić*, for example, the chamber stated that:

> "It therefore becomes necessary to reintegrate them into society so that they can become useful members of it and enable them to lead normal and productive lives upon their release from imprisonment. The age of the accused, his circumstances, his ability to be rehabilitated and availability of facilities in the confinement facility can, and should, be relevant considerations in this regard."[3]

In *Delalić*, the court took the accused's age, personal circumstances, and potential for rehabilitation into account. Meanwhile, in *Katanga*, the Trial Chamber recognized the perpetrator's young age and family situation as mitigating factors. These factors were considered necessary for facilitating the perpetrator's eventual reintegration into society.[4] Recently, the ICC also mentioned rehabilitation in *Dominic Ongwen's* case. In this case, the court stated that "….at the same time, such a joint sentence safeguards the prospect of successful social rehabilitation and, consequently, the concrete possibility of future reintegration into society which, as explained above, is a relevant consideration in a peculiar case like the present one."[5]

[1] Prosecutor v. Stakić, ICTY Case No. IT-97024-A, Appeals Chamber, Judgment, para 402 (22 March 2006); Prosecutor v. Gotovina et al., ICTY Case No. IT-06-90-T, Trial Chamber, Judgment Volume ii of ii, para 1598(15 April 2011); Prosecutor v. Haradinaj et al., ICTY Case No. IT-04-84-T, Trial Chamber, Judgment, para 488 (3 April 2008); Prosecutor v. Krajišnik, ICTY Case No. IT-00-39-T, Trial Chamber, Judgment, para 1138 (27 September 2006); Prosecutor v. Krajišnik, ICTY Case No. IT-00-30-A, Appeals Chamber, Judgment, para 806 (18 March 2009); Prosecutor v. Popović et al., ICTY Case No. IT-05-88-T, Trial Chamber, Judgment, paras 2130 & 1211(10 June 2010)

[2] Article 28 of the ICTY Statute states that "If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law".

[3] Prosecutor v. Delalić, ICTY Case No. IT-96-21-T, para. 1233 (November 16, 1998)

[4] The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui (Decision on Sentence pursuant to article 76 of the Statute) ICC-01/04-01/07, para 144 (2014)

[5] The Prosecutor v. Dominic Ongwen, No.: ICC-02/04-01/15, para 396 (4 February 2021).

For example, in situations where historic crimes are brought to the attention of a court or tribunal, it is common to encounter some elderly defendants. There is a growing belief that imposing punishment on individuals who committed crimes many years ago may not serve any meaningful purpose. For example, if an offender abstains from criminal activities for a prolonged period, it could be inferred that they have undergone rehabilitation and no longer warrant criminal sanctions (LaFave, Israel, King, & Kerr, 2004; Adlestein, 1995, pp. 199, 262; Adlestein, 1954, pp. 630, 634). According to several legal experts, society's propensity for retribution sometimes wanes and is replaced with compassion for the accused who is being held accountable for forgotten crimes (Adlestein, 1954).

Although the laws governing *ad hoc* tribunals and the Rome Statute do not explicitly outline the specific goals of penalizing international crimes, the sentencing objectives that have been occasionally mentioned in many trials of the *ad hoc* tribunals and the ICC comprise a blend of deterrence, retribution, and, to a lesser extent, rehabilitation. In recent years, expressive theories of punishment have gained significant attention, which can be traced back to a ground-breaking article by Joel Feinberg (Feinberg, 1970).

2.4. Expressivist Theory

When it comes to trials and punishment, we tend to focus solely on the offender. However, there is a more constructive approach that takes into account a more comprehensive range of factors. Expressive justification involves acknowledging the criminal act and determining who is responsible, as well as finding an appropriate sanction, communicating the punishment, and exploring potential ways to make things right. This approach aims to be more effective and restorative rather than simply punitive (Stahn, 2020). According to Feinberg, "punishment is a conventional device for the expression of attitudes of resentment and indignation [...] on the part of either the punishing authority himself or of those in whose name the punishment is inflicted." (Feinberg, 1970). However, instead of expressing resentment and anger, the expressivist punishes advancing faith in the rule of law among the people (Drumbl, 2007).

Due to the seriousness and scope of international crimes, punishment's "expressive" function has recently received more attention. According to Deirdre Golash, "surviving victims, devastated by their own injuries and the deaths of many friends and relatives, must be vindicated; we must recognize and acknowledge how

seriously they were wronged and show an appropriate level of concern for them" (Golash, 2009). That said, acknowledgment of the moral status of the crimes is imperative for victims, criminals, and other members of society.

Acknowledging the moral status of crimes via various processes, such as criminal trials and others, is feasible. Justice Albie Sachs, for example, theorizes a typology of four truths: microscopic truth, logical truth, experiential truth, and dialogic truth. According to him, courts create microscopic and logical truths from chronological proof of facts (Drumbl, 2000, p. 1221; 1283). On the other hand, dialogical and experiential truths are separate and can be developed through storytelling. According to Sachs, restorative mechanisms such as truth commission or traditional dispute resolution may be the suitable option in this regard (Drumbl, 2000, p. 1221; 1283).

International crimes hurt individuals and may be deemed to hurt collective feelings. Considering this rationale, punishment has not only a denunciatory function, but it should have a curative effect for the "international community." (Durkheim, 1982, pp. 31–163; 124). Punishment is deemed to be buttress solidarity, make community members feel good, and contribute to prevention. Thus, it is not vital to sketch the punishment based on the severity; rather, it should have broader expressive effects that make the punishment distinctive (Stahn, 2020, p. 325). In this regard, some voices have recommended that punishment lies mostly in condemnation rather than sanction. William Schabas, for example, noted that:

> "For the victims, and for the public in general, the thirst for justice may be better satisfied by society's condemnation of anti-social behaviour than by the actual punishment of the offenders. What is desired is a judgment, a declaration by society, and the identification and stigmatization of the perpetrator. This alone is often sufficient redress. What is actually done to the offender as a result of conviction may be far less important" (Schabas, 1997, pp. 461–517; 502).

According to Schabas, society's condemnation is enough and far more effective than the actual punishment of the offenders. For the expressive theory of punishment, the symbolic and communicative element is the pivotal footing for the normative justification of punishment (Sloane, 2007, pp. 77-78).

2.5. Other Theories

On many occasions, criminal trials may not be possible. Examples, such as South Africa or the Rwandan genocide, demonstrate that it is impractical to sanction all crimes through formal imprisonment. Besides, imprisonment may be limited to particular offences or categories of offenders. Thus, condemnation may be expressed in other forms, i.e., social and political justice mechanisms (Sander, 2019, p. 237). Mahmood Mamdani has recently expounded this vision (Mamdani, 2014, p. 61).

Mamdani advocates a shift from criminal justice to political justice. He pointed out the Convention for a Democratic South Africa ('CODESA'), which signifies "the larger political project that chartered the terms that ended legal and political apartheid and provided the constitutional foundation to forge a post-apartheid political order." (Mamdani, 2014, p. 63). From his vantage point, South Africa decriminalised and legitimised former enemies and transformed them into political adversaries by moving from criminal justice to political justice (Mamdani, 2014, p. 67).

Besides, instead of punishing individuals, the process aimed to "change of rules that would bring them and their constituencies into a reformed political community." (Mamdani, 2014). Furthermore, Mamdani also advocates social justice in the aftermath of extreme violence. In this regard, his focus was on the non-binding process, such as South Africa's Truth and Reconciliation Commission (Mamdani, 2014).

Apart from the theories discussed above, other ICL scholars promote some other ambitions which are often associated with ICL: reconciliation, incapacitation, restoration, historical recording building, preventing revisionism, crystallizing international norms, general affirmative prevention, establishing peace, preventing war, vindicating international law prohibitions, setting standards for fair trials, and ending impunity (Schabas, 1997). Although scholars are advocating these theories to transcend ICL, applications of these theories are extremely limited.

However, the practice of prosecuting aged defendants indicates that ordinary theories such as specific deterrence, and rehabilitation are not sometimes suitable to deal with them. In addition, as previously indicated, courts assist in unearthing microscopic and logical truths, which are nothing more than a part of history. So, policymakers may need to consider other approaches to help them get to the bottom of the atrocity's history.

3. Policies Taken by Bangladesh to Deal with Temporally Distant International Crimes (TDICs)

In order to adequately address the policies implemented by the Bangladeshi government, it is crucial first to examine the events of 1971 and the factors that led to the passing of the 1973 Act. The historical context of the 1971 Liberation War, which catalysed the pursuit of war criminals through the 1973 Act, will be briefly outlined in the following section.

3.1. The Liberation of War of Bangladesh

Between March 26 and December 16, 1971, the courageous people of East Pakistan and the (West) Pakistan Army were engaged in a nine-month-long struggle for independence known as the Liberation War of Bangladesh. This historic conflict resulted in the establishment of Bangladesh as an independent nation (Salim, 1971, p. 166). The crisis that unfolded in 1952 paved the way for a series of events that culminated in a politically charged environment in 1971. Two incidents that occurred in late 1970, namely a cyclone and subsequent floods, devastated East Pakistan, making it difficult to ascertain the exact number of casualties. Estimates range from 250,000 to 500,000, underscoring the devastating impact of these natural disasters (Beachler, 2011, p. 15). The Bengalis perceived the central government of West Pakistan as having responded to the crisis insufficiently and slowly (Beachler, 2011, p. 15).

The national election that took place in December 1970 was the second event. Elections for a New Constituent Assembly to draft a new national constitution were held in Pakistan in December 1970 (Beachler, 2011, p. 15). The Awami League, which has its headquarters in Bengal and is led by Sheikh Mujibur Rahman, earned the majority of seats in the Assembly in the election (Beachler, 2011, p. 15). Despite the Awami League's primary victory, President Yahya Khan and Bhutto's Pakistan People's Party denied the East Pakistani political party the chance to form a new government (Ouassini & Ouassini, 2019).

The horrific massacre on March 25, 1971, marked the beginning of the war, which resulted from political and economic turmoil. Yahya Khan, the president of West Pakistan, issued a command to conduct "operation searchlight", a military operation in Dacca on March 25, 1971, which led to the brutal slaughter of countless civilians (Beachler, 2011). In a campaign of murder, rape, and looting that lasted until December 1971, the Pakistani military massacred 3 million Bengalis in a systematic

and discriminatory manner (Chaudhury, 1972). In addition, 200,000 women were raped over the nine months of the massacre, leading to 25,000 pregnancies (Brownmiller, 1975).

With the assistance of local collaborators, the West Pakistani troops slaughtered many intellectuals just before their surrender (Bhatnagar, 1971, p. 132). Many renowned, esteemed individuals from all Bangladeshi cities and towns—including doctors, teachers, engineers, and public servants—were hauled up from their homes and brutally murdered on December 12, 13, and 14, 1971 (Bhatnagar, 1971). Among them, many had little to do with politics and posed no immediate danger to the ruling class of Pakistan (Bhatnagar, 1971).

The Pakistani forces' surrender on December 16th, 1971, ended the war (Ouassini & Ouassini, 2019). The International Crimes Tribunal Act, passed in 1973, indicates that Bangladesh sincerely tried to hold the perpetrators of the liberation war responsible despite the fragile nature of the new State.[1] The following section discusses the 1973 Act, which is the sole policy the Bangladeshi government took to deal with atrocity committed during the liberation war.

3.2. The International Crimes (Tribunals) Act, 1973, And its Amendments

One may wonder if the 1973 Act is the sole statute that addresses the atrocities perpetrated in 1971. The answer is negative. As Presidential Order No. 8 of 1972, the Bangladesh Collaborators (Special Tribunals) Order 1972 was proclaimed in 1972.[2] Although some trials were held in accordance with this Act, these were halted in 1973.[3] However, following the 1973 general election, the parliament approved the presidential decree and gave it a new name—the International Crimes (Tribunals) Act of 1973 (ICT-BD Act)—so that suspects of atrocities committed during the Liberation War might be brought to justice.[4] The Act's key provisions are discussed in the following paragraphs.

Let us begin by exploring the scope of the tribunal's authority. This esteemed body possesses the ability to thoroughly investigate and impose penalties upon any individual or group, regardless of their citizenship, who has committed criminal

[1] The International Crimes (Tribunals) Act, 1973.
[2] President's Order No. 8 of 1972 (Bangladesh); Collaborators (Special Tribunals) Order (1972) (Bangladesh).
[3] ibid.
[4] International Crimes (Tribunals) Act of 1973.

offenses in Bangladesh. This includes crimes that may have been committed before or after the Act's inception, as outlined in Section 3(1). This particular clause allows the tribunal to hold accountable those in the military or civilian sectors who may have played a role in the commission of heinous acts.

The tribunal has jurisdiction over the following crimes committed during the war: crimes against humanity, crimes against peace, genocide, war crimes, violations of any humanitarian rules outlined in the 1949 Geneva Conventions applicable in armed conflicts, attempts, aiding and abetting the commission of any crimes, and complicity in or failure to prevent the commission of any of those crimes, according to Section 3(2) of the Act.

Second, the nature of the tribunal is domestic. For instance, according to 6(2) of the Act, the tribunal judges will be Bangladeshi, meaning no foreign judge will be appointed.[1] One intriguing clause is that a government-appointed judge is final and cannot be contested.[2] Additionally, although having jurisdiction over international crimes, the Act allows the tribunal to impose the death penalty, the maximum punishment for a crime outlined in the Penal Code of Bangladesh, or a term of imprisonment proportionate to the magnitude of the crime.[3] Furthermore, as there is no option for financial restitution, the tribunal can only apply the retributive theory of punishment but not any reparation.

Third, the tribunal is flexible in allowing evidence. For example, technical rules of evidence are not binding on the tribunal.[4] The tribunal also has the authority to admit any evidence with probative value, meaning that it may allow hearsay evidence.[5] The

[1] Section 6(2) of the Act states that "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."
[2] Section 6(8) of the Act states that "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."
[3] Section 20(2) of the Act states that "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."
[4] Section 19 (1) states that "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."
[5] ibid.

Evidence Act of 1872 shall not apply in any proceedings under this Act, which is another intriguing clause.[1]

3.3. Analysis of the ICT-BD Act, 1973 and the Activities of the International Crimes Tribunal Bangladesh (ICT-BD)

As previously mentioned, there are three primary ways that international war crimes tribunals might promote reconciliation: by seeing justice done, by establishing the truth about crimes committed, and by individualizing culpability (Clark, 2008, pp. 331-332). This part of the paper assesses the ICT-BD Act and the ICT-BD's operations to discern whether the tribunal brought society together.

Before evaluating the 1973 Act, readers should know that Bangladesh ratified the Rome Statute of the ICC on March 23, 2010.[2] The former president of the ICC commented regarding Bangladesh's ratification of the Rome Statute, "…I applaud its decision to join the growing commitment of states to end impunity for war crimes, crimes against humanity and genocide."[3] There is no disagreement that a member state must pursue those who commit core international crimes.

Yet, part of the responsibility also involves prosecuting the suspects in accordance with international norms. The international community, therefore, anticipates that the Act and tribunal proceedings will adhere to minimum international practices. Let us investigate the Act and the tribunal's operations to assess the standards and whether the tribunal ensured that the victims and suspects received justice.

3.4. Analysis of the 1973 Act

The investigation of the Act focuses on many elements, including the independence and fairness of the tribunal, the definition of crimes outlined in the Act, types of evidence allowed in the tribunal, and the nature of punishment. Section 6(2A) mandates that the tribunal must exercise its judicial powers independently and must

[1] According to 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."

[2] International Criminal Court, *Trying individuals for genocide, war crimes, crimes against humanity, and aggression, Bangladesh ratifies the Rome Statute of the International Criminal* Court (24 March 2010); https://www.icc-cpi.int/news/bangladesh-ratifies-rome-statute-international-criminal-court#:~:text=On%2023%20March%2C%202010%2C%20the,the%20Rome%20Statute%20to%2011 1.

[3] ibid.

guarantee a fair trial.[1] A judge must be impartial and free of political bias, which is one of the fundamental components of an independent tribunal. Let us analyze the appointment process to evaluate how independent the tribunal judges are. Anyone currently serving as a judge on the Supreme Court of Bangladesh has the necessary qualifications to serve in that capacity or has held that position in the past and is eligible to be appointed as a chairman or member of a tribunal, per section 6(2) of the Act.[2]

However, because there are no explicit rules governing the selection of Supreme Court judges, they have usually been appointed by the government from among supporters of the political party in power (Afrin, 2009, p. 341; 344). Thus, there is no assurance that politically selected judges will be able to function freely, independently, and without any external interference.

Moreover, according to section 6(5), if one or more judges cannot attend a hearing for any reason during a trial, the remaining judge(s) may still hear the case.[3] Section 6(5) could impact a trial's fairness. Consider a scenario in which there are three judges on the bench. Two judges are unable to attend the hearing for some reason. Hence, under section 6(5), the remaining judge can hear the case and deliver a decision. If the remaining judge is biased, the outcome will be adversely affected, and the administration of justice will be hampered. In addition, section 6(8) states that neither the prosecution nor the accused parties or their attorneys may question the chairperson or the other tribunal members.[4] The immunity from legal challenges to the tribunal's constitution granted to the chairman and other tribunal members may likely jeopardize the tribunal's impartiality.

Every person accused of a crime has the legal right to a fair trial and to be presumed innocent until and until proven guilty per the law.[5] However, a court shall not force someone to testify against themselves or admit guilt to prove their guilt. This is the "right to silence," a legal right provided by Article 14(3)(g) of the International

[1] According to section 6(2A), "the Tribunal shall be independent in the exercise of its judicial functions and shall ensure fair trial."
[2] Section 6(2) states that "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."
[3] Section 6(5) states that "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."
[4] Section 6(8) states that "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."
[5] Article 11 of the Universal Declaration on Human Rights states that "everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

Covenant on Civil and Political Rights (ICCPR).[1] In addition to guaranteeing a right to silence, the Rome Statute also states that silence cannot be used to establish guilt or innocence.[2]

Although the rights to stay silent and the privilege against self-incrimination are not directly specified in the European Convention, the ECtHR ruled in Murray that these rights are essential to the concept of a fair trial under Article 6 and are universally recognized by international standards[3]. However, the Court acknowledged that the right to remain silent is not an absolute right.[4]

Since the right is not absolute, it is not surprising to know that the 1973 Act does not mention the right to remain silent. However, section 8(5) of the 1973 Act is problematic. According to this section, refusal to answer a question presented by an investigation officer will result in a simple imprisonment sentence of up to six months.[5] This specific clause might compel the defendants to respond, which could be used to prove their guilt. Hence, this clause can undermine the impartiality of any trial. Securing justice for the accused and society may be at risk if a trial is not fair and impartial.

Moreover, although Bangladesh ratified the Rome Statute, the crimes listed in the 1973 Act are not the most recent iterations of those listed in the Rome Statute. The definition of crimes against humanity provides the most compelling illustration. Each offense in the Rome Statute has a *chapeau* provision that specifies its severity.[6] For instance, a crime against humanity must be perpetrated as a part of a widespread and systematic attack against a civilian population, and the offender must be aware of it, according to the Rome Statute[7].

Contrary, a crime against humanity need not be committed as a part of a widespread or systematic attack against any civilian population with awareness of the attack, as

[1] Article 14(3)(g) of the ICCPR provides a right to an accused "not to be compelled to testify against himself or to confess guilt."
[2] Articles 66 & 67 of the Rome Statute
[3] Murray v. UK 22 E.H.R.R. 29 (ECHR) (1996).
[4] ibid.
[5] According to section 8(5) of the 1973 Act, "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."
[6] Rome Statute of the International Criminal Court.
[7] Article 7 of the Rome Statute of the International Criminal Court

stated in section 3(2)(a) of the 1973 Act.[1] Since the 1973 Act's definition lacks a *chapeau* clause, it begs the question of whether the tribunal can convict a person of crimes against humanity for murder, rape, or even torture without proving the crime as a part of the widespread and systematic attack?

Furthermore, sexual enslavement, forced prostitution, forced pregnancy, forced sterilization, and any other kind of sexual abuse of equivalent intensity defined explicitly in the Rome Statute are not included in the 1973 Act's definition of crimes against humanity[2]. Therefore, unlike victims of murder or torture, the prosecutor has never given the rape victims the utmost importance. Any war crimes tribunal that does not penalize perpetrators or promoters of sexual assault will fall short of upholding the public's expectation of justice (Afrin, 2009, p. 344). In addition, focusing only on a few crimes would challenge figuring out the truth of other instances, which may hamper writing proper history.

Knowing the rules of evidence provided by the 1973 Act is significant since they assist in establishing the crimes' veracity. The 1973 Act offers lenient rules for the admissibility of evidence. The Act clearly states that it shall not be bound by technical rules of evidence and may include any evidence it deems to have probative value.[3] But does it matter if the Act allows the tribunal to include any evidence with probative value? Indeed, it does not matter.

Evidence gathering process for international crimes and domestic crimes is different. For example, the Cantonal court in Zenica stated that "in a normal situation, the victim's post-mortem would have been completed by a qualified individual, not by a general practitioner. The crime scene would have been marked rather than cleaned; the access to the crime scene would be restricted, and the weapons confiscated…" (Popovic, 2012). The decision demonstrates that, as long as the designated authority has access to the crime scene to gather and preserve evidence, collecting evidence soon after a crime is possible in any domestic situation.

In contrast, international crimes differ, resulting in a significantly higher death toll than domestic crimes. Therefore, following the domestic procedure to gather evidence is a pipe dream since gathering evidence during a war, such as eyewitness

[1] Section 3(2)(a) of the 1973 Act states that "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;"
[2] ibid.
[3] Article 19(1) of the 1973 Act.

testimony and other evidence, is complex and unreal. Flexible rules may be, therefore, required. In fact, many international crimes tribunals' laws had flexible rules of evidence. For instance, according to rule 87(1) of the Internal Rules (Rev. 9) of Extraordinary Chambers in the Courts of Cambodia, "unless provided otherwise in these IRs, all evidence is admissible…"

The Iraqi High Tribunal (IHT) and Senegal's Extraordinary African Chambers had similar provisions as the ECCC. An investigative judge can gather evidence from any source under Law No. (10) 2005 Law of the Iraqi Higher Criminal Court.[1] Similarly, the Senegalese Extraordinary African Chambers had the power to ask for the transfer of any evidence that the state's competent authorities had verified.[2]

Nonetheless, flexible rules of evidence may raise some concerns. While incorporating such rules into the Act is permissible, it could become problematic if tribunals misuse them to prove guilt. For instance, a tribunal may allow hearsay evidence, but when and how would it be appropriate to use it? How fair would it be for a court to punish a suspect based on third-degree hearsay evidence only?[3]

Furthermore, it is even more essential to analyse the different punishments mentioned in the Act when it comes to the issue of international criminal justice. The Act permits the tribunal to impose the death penalty, the maximum penalty for a crime specified in the Bangladeshi Penal Code, or a period of imprisonment equal to the seriousness of the offense.[4] The relevant clause of the Act specifies that by imposing the death penalty or imprisonment, the tribunal will achieve retributive justice only. But how appropriate is it to impose the death sentence in international criminal trials?

[1] Article 8 (6) of the Law No. (10) 2005 Law of The Iraqi Higher Criminal Court states that "An Investigative Judge shall collect evidence from any source he deems appropriate and question all relevant parties directly."

[2] Article 18(2) of the Statute of the Extraordinary African Chambers states that they may request the transfer of any criminal prosecutions and in this context may validate the statements and any piece of evidence established by the competent authorities of the requested state.

[3] The ECCC discussed the several forms of hearsay evidence in a case. The court stated that "the female detainees at Au Kanseng who had witnessed or otherwise perceived their husbands' mistreatment (first degree hearsay); the male detainees who informed their wives of such mistreatment (second degree hearsay); and female detainees who had communicated stories of other detainees' husbands' mistreatment (third degree hearsay);" see The Prosecution v. Khieu Samphan and Nuon Chea, Case No. 002/19-09-2007/ECCC/TC, para 2904 (16 November 2018)

[4] Section 20(2) of the Act states that "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."

Although "everyone has the right to life," as stated in the International Declaration of Human Rights, which was ratified on December 10, 1948, the death sentence is not explicitly prohibited by international law.[1] In fact, the Nuremberg and Tokyo tribunals imposed the death penalty as a suitable punishment for war crimes.[2] However, the compatibility of the death penalty with international human rights norms seems to be evaporating more than 70 years after the adoption of the Universal Declaration of Human Rights (UDHR).

The second generation of international criminal tribunals—the Special Court for Sierra Leone, the Special Panels in Kosovo, the Special Panels in East Timor, the *Ad Hoc* Tribunals, the ECCC, and the ICC—exclude the possibility of the death penalty even for the most heinous crimes.[3] On the other hand, things are very different in Bangladesh. By the Bangladeshi war crimes tribunal, more than 20 accused have already received death sentences.[4] Although it is undeniable that the application of the death penalty as a form of punishment is not prohibited by international law, the tribunal should exercise prudence when applying it. The issue is whether the accused in Bangladesh had sufficient protection.

According to the description above, it seems the fundamental provisions of the 1973 Act would significantly hinder conducting fair and impartial trials. Let us look at the tribunal's efforts to assess whether it adhered to international standards to uphold justice.

[1] Article 6 of the International Covenant on Civil and Political Rights

[2] Article 27 of the Charter of the International Military Tribunal, Aug. 8, 1945; article 16 of the International Military Tribunal for the Far East, Apr.26, 1946; Article II(3)(a) of the Control Council Law No. 10

[3] Article 24 of the Statute of The International Tribunal For The Former Yugoslavia; Article 23 of the Statute Of The International Tribunal For Rwanda; Article 77 of the Rome Statute; Article 19 of the Statute of the Special Court for Sierra Leone, 16 January 2002; Section 44.6 of the Transitional Rules of Criminal Procedure of the Special Panels of the Dili District Court 2002; Article 3 of the Law on The Establishment of Extraordinary Chambers In The Courts of Cambodia For The Prosecution of Crimes Committed During The Period of Democratic Kampuchea.

[4] International Crimes Tribunal-1, Bangladesh, https://www.ict-bd.org/ict1/ and International Crimes Tribunal-2, Bangladesh, https://www.ict-bd.org/ict2/.

3.5. Analysis of the Activities of the Bangladeshi War Crimes Tribunal

Certain key provisions of the 1973 Act have been examined to identify deficiencies, albeit from a theoretical point of view. It is, therefore, imperative to investigate the actual functions of the tribunal in order to determine whether its practical outcomes have indeed served the interests of both accusers and victims.

In order to detain an accused person before and during trial, the prosecution must adhere to certain procedural guidelines that safeguard some procedural rights of defendants. However, it appears that the actions of the Bangladeshi tribunal have violated international standards. Six alleged war criminals—Motiur Rahman Nizami, Abdul Quader Molla, Mohammad Kamaruzzaman, Ali Hasan Mohammed Mujahid, Allama Delewar Hossain Sayedee, and Salauddin Quader Chowdhury—were detained for more than a year without being charged.[1] Along with being unlawfully detained, they were also denied access to legal counsel.[2]

Furthermore, the defense attorneys were unable to attend sessions when the defendants were interrogated.[3] They have not had unfettered access to the evidence either. The UN human rights working committee stated that the detentions and other issues were against both general principles of law and Articles 9(2) and (4) of the ICCPR.[4] The Working Committee further noted that unlawful detention hinders individual liberty, which is prohibited by Article 9 of the UDHR.[5]

In addition, as stated above, there are four forms of truth: microscopic, logical, experiential, and dialogic (Drumbl, 2005). From chronological evidence of facts, courts derive microscopic and logical truths.[6] A tribunal may face difficulty establishing truth without sufficient evidence, such as eyewitness testimony. In fact, eyewitnesses play a crucial role in every criminal trial. Let us first investigate the challenges faced by eyewitnesses before testifying in the tribunal.

[1] UNGA, Human Rights Council: Working Group on Arbitrary Detention, Opinions adopted by the Working Group on Arbitrary: Detention at its sixty-second session, 16–25 November 2011 No. 66/2011 (Bangladesh) (A/HRC/WGAD/2011/66) 22 June 2012; Staff Correspondent, *Detention of Accused Unlawful*, The Daily Star, (16 February 2012); https://www.thedailystar.net/news-detail-222591
[2] UNGA, Human Rights Council: Working Group on Arbitrary Detention, Opinions adopted by the Working Group on Arbitrary: *Detention at its sixty-second session*, 16–25 November 2011 No. 66/2011 (Bangladesh) (A/HRC/WGAD/2011/66) 22 June 2012, para 41
[3] ibid
[4] ibid
[5] ibid, para 43
[6] ibid

The claim that Shukhoranjan Bali, an eyewitness, was abducted had been going around since November 2012. While on his way to testify, he was allegedly abducted by the Bangladesh police outside the Tribunal's gates and reappeared months later in Kolkata, India.[1] *Delwar Hossain Sayedee* was found guilty of two crimes, one of which was the murder of Bali's brother in 1971. The prosecution contended that Sayedee killed Bali's brother during the war, and the tribunal condemned Sayedee to death by hanging for both offenses (Bergman, 2013).

Bali, however, asserted that he was not present when his brother was killed; therefore, he is unsure whether Saydee killed him (Bergman, 2013). The story of Bali's abduction and the fabrications made by the prosecution, in the opinion of Human Rights Watch, seriously call into question the justice system's impartiality (Bergman, 2013). Furthermore, Bali was not the only witness who encountered problems during trials; others did. For engaging with the defense, several witnesses and a defense investigator claimed they were threatened and harassed.[2] Some prosecution witnesses acknowledged that they were warned against aiding the defense.[3]

The Economist also noted the Skype chats between Ahmed Ziauddin, the director of the Bangladesh Centre for Genocide Studies in Brussels, and Nizamul Huq, a tribunal judge, as another odd issue. The tribunal's head in 2012 was Mr. Nizamul Huq, whereas Ziauddin Ahmed, a Bangladeshi citizen, formerly lived in Belgium.[4] Mr. Nizamul Huq and Ziauddin Ahmed had a friendly relationship. The Economist recorded over 230 emails and 17 hours of phone calls between the two, indicating solid and effective communication between them.[5]

Mr. Huq stated during a conversation on October 14, 2012, "the government is absolutely crazy for a judgment. The government has gone totally mad. They have gone completely mad, I am telling you. They want a judgment by 16th

[1] *Bangladesh: Find Abducted Witness: Reveal Steps Taken to Locate Shukho Ranjan Bali*, Human Rights Watch, (16 January 2013); https://www.hrw.org/news/2013/01/16/bangladesh-find-abducted-witness

[2] *Bangladesh: Stop Harassment of Defense at War Tribunal, Lawyers and Witnesses at ICT Report Threats*, Human Rights Watch (2 November 2011); https://www.hrw.org/news/2011/11/02/bangladesh-stop-harassment-defense-war-tribunal .

[3] ibid.

[4] *Discrepancy in Dhaka: The War-crimes Court in Bangladesh Has Some Explaining to do*, THE ECONOMIST (8 December 2012); https://www.economist.com/banyan/2012/12/08/discrepancy-in-dhaka

[5] ibid.

December...it's as simple as that."[1] Furthermore, the government envoy also visited Mr. Huq's residence and asked him to complete the verdict as soon as possible. The Skype exchange makes it clear how the judge was influenced when making a decision.

Moreover, it should be emphasized that the original Act did not include a clause allowing for a trial *in absentia*; nevertheless, the government amended the Act in 2012 and added it.[2] Furthermore, section 20 of the International Crimes Tribunal Rules of Procedure, 2010, added a protection clause against trial *in absentia*.[3] However, it is crucial to consider if this measure of protection is adequate. Even though the ICCPR guarantees the right to be present in court,[4] there are some circumstances where a defendant may not be present in a trial.

For example, although a defendant may not be required to appear at a trial under Common law, it should be highlighted that their absence must have a valid reason (Gardner, 2011, p. 91; 99). For instance, the defendant may have appeared at the beginning of the trial but later absconded, or the tribunal may have removed the defendant from the courtroom due to his disruptive behaviour or because of an illness, or the defendant may have voluntarily waived his right to be there (Gardner, 2011, p. 91; 99). In Common law, the protections are well-defined. On the other hand, it appears that protection provided by Bangladesh is insufficient. According to Surabhi Chopra, "it was foreseeable that some of the accused before the ICT, politically powerful and connected individuals, would flee Bangladesh, but the ICT Act's provision for this—trial *in absentia*, with the possibility of the death penalty and without a right to retrial on return to Bangladesh—is extreme and undoubtedly unfair" (Chopra, 2015, p. 211; 213).

In fact, a couple of accused received the death penalty in their absence. For example, former Jamat-e-Islami party of Bangladesh leader *Abul Kalam Azad* was found guilty

[1] *The Trial of the Birth of a Nation*, The Economist (15 December 2012). <https://www.economist.com/news/briefing/21568349-week-chairman-bangladeshs-international-crimes-tribunal-resigned-we-explain>.

[2] Section 10A of the International Crimes (Tribunals) (Second Amendment) Act, 2012 (Act No. XLIII of 2012).

[3] Under Article 10A of the International Crimes (Tribunals) Act, Bangladesh, 1973, the tribunal can prosecute a suspect in his absence. Section 32 of the International Crimes Tribunal Rules of Procedure, 2010 states that "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*."

[4] Article 14(2) of the ICCPR.

in absentia of six crimes against humanity and one act of genocide.[1] In addition to Abul Kalam, other perpetrators, such as Abu Muslim Mohammad Ali, Jachhijar Rahman, Abdul Wahed Mondol, and Mohammad Khalilur Rahman, also received the death penalty in their absence.[2]

Unfortunately, they do not have the option of getting a new trial if they show up later. In fact, without abiding by the rights specified in international and regional conventions like the ICCPR and ECHR, Bangladesh has already prosecuted more than 30 individuals without their presence.[3] However, the International Crimes Tribunal Rules of Procedure, for example, do not guarantee the right to a retrial. The ECtHR, on the other hand, decided that in situations where the accused's knowledge of proceedings is questionable and a trial *in absentia* resulted in a conviction, the state must ensure a retrial if the defendant is apprehended.[4]

The Bangladeshi tribunal believes that once the proper authorities publish the summons, the defendant will possess sufficient awareness of the charges levied against them. Consequently, if the accused does not appear before the tribunal, the accused has chosen to forgo their right to attend court. When juxtaposed with those enshrined in international and regional laws such as the ICCPR and ECHR, this guarantee is undoubtedly lacking. In this regard, however, the ECtHR stated in *Sejdoviv* case that "the mere absence of the applicant [accused] from his usual place of residence and the fact that he was untraceable does not necessarily mean that he had knowledge of the trial against him."[5]

The procedures for conducting trials *in absentia* in Bangladesh have been a subject of ongoing discussion. The UN Special Rapporteur on extrajudicial, summary, or arbitrary deaths, Christof Heyns, has raised concerns about the right to a fair trial for

[1] Chief Prosecutor v. Moulana Abul Kalam Azad, ICT-BD Case No. 05, para 333 (2013).
[2] The Chief Prosecutor v. (1) Abu Saleh Md. Abdul Aziz Miah alias Ghoramara Aziz [absconded] (2)Md. Ruhul Amin alias Monju [absconded] (3) Md. Abdul Latif (4) Abu Muslim Mohammad Ali [absconded] (5) Md. Najmul Huda[absconded] and (6) Md. Abdur Rahim Miah [absconded] ICT-BD [ICT-1] Case No. 03 of 2016 , para 383(4) (Date of delivery of Judgment:22 November, 2017); the Chief Prosecutor v. 1. Md. Ranju Miah, 2. Md. Abdul Jabbar Mondol, [absconding] 3. Md. Jachhijar Rahman @ Khoka [absconding], 4. Md. Abdul Wahed Mondol [absconding] and 5. Md. Montaz Ali Bepari alias Momtaz [absconding], ICT-BD [ICT-1] Case No.02 of 2017, paras 429(2) & (3) (15 October, 2019); the Chief Prosecutor vs. Mohammad Khalilur Rahman (absconding), ICT-BD [ICT-1] Case No.09 of 2017, para 615 (13 September, 2022).
[3] International Crimes Tribunal-1, Bangladesh, <https://www.ict-bd.org/ict1/> and International Crimes Tribunal-2, Bangladesh, <https://www.ict-bd.org/ict2/>
[4] B. v. France, Application No. 10291/82,16 EHRR 1 (1994).
[5] Sejdovic v. Italy, Application No. 56581/00, ECtHR (First Section), Judgement (Merits and Just Satisfaction) (2004).

those accused before the Bangladesh War Crimes Tribunal, particularly when trials are held *in absentia*.[1]

As already stated, many tribunals, including the Bangladeshi tribunal, apply the death penalty since international law does not entirely prohibit it.[2] The execution of the death penalty is not subject to any tight restrictions; however, some international standards must be followed during the death penalty proceedings. But does the Bangladeshi tribunal follow the standards outlined in international law? For instance, if a trial concludes by providing the death penalty, a tribunal must strictly adhere to the fair trial requirements inherent in international law.[3] It implies that applying the death penalty in cases where a state fails to maintain the rights to a fair trial guaranteed by Article 14 of the ICCPR would be improper. In particular, a tribunal must observe the minimal safeguards stated in Article 14(3) of the ICCPR if it decides to execute a suspect.[4] The narrative above, however, indicates that the Judges frequently failed to protect the fair trial rights of the accused. Hence, it would be challenging to argue for the death penalty as a punishment in Bangladesh.

The tribunal has extensive flexibility under the 1973 Act to determine what is admissible, relevant, and probative evidence. The judges used their extensive power, often allowed hearsay evidence, and penalized the accused based on only third-degree hearsay evidence, which is very unusual in international prosecutions.[5] Data

[1] United Nations Office at Geneva, *Bangladesh: United Nations Experts Warn that Justice for the Past Requires Fair Trials*, News & Media (7 February, 2013): http://www.unog.ch/unog/website/news_media.nsf/%28httpNewsByYear_en%29/56813FE83E407DCBC1257B0B00516190?OpenDocument.

[2] Article 6 of the International Covenant on Civil and Political Rights, 1966.

[3] Articles 6(1) and 14 of the International Covenant on Civil and Political Rights, 1966; The Human Rights Committee's views in Pinto vs. Trinidad and Tobago, Case no. 232/1987.

[4] Article 14(3) of the ICCPR states that "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt".

[5] Different types of hearsay evidence in a case were discussed by the ECCC. The court stated that "the female detainees at Au Kanseng who had witnessed or otherwise perceived their husbands' mistreatment (first degree hearsay); the male detainees who informed their wives of such mistreatment (second degree hearsay); and female detainees who had communicated stories of other detainees'

reveals that the Bangladeshi tribunal allowed hearsay evidence in more than 90% of its trials.[1]

Although allowing hearsay testimony is acceptable, the question is under what conditions a tribunal may do so. In Bangladesh, the tribunal accepted hearsay testimony both as a means of corroborating other evidence and as the sole means of convicting the suspect. For instance, *Quader Mollah* was accused of murder and given life imprisonment based only on hearsay testimony.[2] Even if a defendant may be charged with a crime using hearsay evidence, sentencing someone with solely third-degree hearsay evidence poses serious concerns regarding judges' independence and fairness of the trial.

Based on the narrative above, the trial process employed by the Bangladeshi tribunal has several noteworthy shortcomings that fail to meet the minimum requirements outlined by international law. Notably, the defendants were not afforded sufficient time to prepare their arguments and could not engage foreign legal counsel. Additionally, the independence of the judges was called into question, and there was a need for an increase in the number of defense witnesses. Given these concerns, it is worth exploring whether Bangladesh had alternative options to address these issues and ensure compliance with international standards. If so, what measures could have been taken?

4. Approach that Could Have Taken to Attain ICJ Goals

While considering the context of democratic transitions, some academics concentrate primarily on the importance of trials as a response to international crimes (Malamud-Goti, 1990). Trials represent the formal denial of actions that may not have previously been condemned (Malamud-Goti, 1990). A dedication to the rule of law and faith in the law might be symbolized or fostered by punishment (Murphy, 2010). Without punishment, victims would be unable to express their rage and resentment and would not be able to feel satisfied (Murphy, 2010). It is also asserted

husbands' mistreatment (third degree hearsay);" see The Prosecution v. Khieu Samphan and Nuon Chea, Case No. 002/19-09-2007/ECCC/TC, para 2904 (16 November 2018).

[1] International Crimes Tribunal-1, Bangladesh, <https://www.ict-bd.org/ict1/> and International Crimes Tribunal-2, Bangladesh, <https://www.ict-bd.org/ict2/>

[2] The Chief Prosecutor v. Abdul Quader Molla, ICT-BD Case No. 02 of 2012, para 172 (05 February, 2013).

that criminal prosecution and punishment play a significant role in fostering social harmony (Murphy, 2010).

It is commonly believed among international experts that conducting international trials is the most effective way to ensure justice is served. Holding those who commit international crimes accountable through criminal charges is a powerful deterrent against future offenses, and it sends a message that these crimes will not be tolerated (Garkawe, 2012). However, international criminal justice goes beyond international criminal law to measure how much "justice" can be ensured. As a result, the legislators may need to consider various policies along with criminal prosecution simultaneously. As was seen above, the Bangladeshi tribunal is a domestic tribunal with some shortcomings, including issues with the independence of the judges and fair trials. Bangladesh could have established an alternate rather than a domestic tribunal to overcome the obstacles.

4.1. Hybrid Tribunal

An independent hybrid tribunal with international credibility, for instance, may function more effectively than a domestic one. In fact, one of the most recent initiatives to pursue justice for mass atrocity crimes is the hybrid tribunal (Katzenstein, 2003). The hybrid model, which was created in part in reaction to critiques of the ICTY and the ICTR, is a system that divides judicial accountability between the state in which it operates and the United Nations (Katzenstein, 2003). By combining the advantages of local prosecutions and the strengths of ad hoc tribunals, the hybrid model aims to maximize both (Katzenstein, 2003). Many hybrid tribunals have been established over the past three decades, including the Special Panels for Serious Crimes (SPSC), East Timor, Extraordinary Chambers in the Courts of Cambodia (ECCC), Special Court for Sierra Leone (SCSL), and most recently, the Special Tribunal for Lebanon (STL).

A hybrid tribunal, combining national and international components, holds great promise and offers a method that might alleviate some worries about strictly international and local justice (Dickinson, 2003, pp. 1059-1060). This institution offers significant advantages by integrating both international and local law into the institutional framework (Garimella, 2013, pp. 27-28). For instance, international judges participate in trials alongside domestic judges and are defended by local attorneys with support from their international associates (Garimella, 2013, pp. 27-28).

Combining both legal systems, a hybrid tribunal offers a blend of legitimacy by granting ownership without impairing independence and impartiality (Garimella, 2013, pp. 27-28). It assists in prosecuting more offenders in less time, as opposed to the costs of an international tribunal (Garimella, 2013, pp. 27-28). It also helps conduct domestic trials that ensure adherence to international fair trial standards (Garimella, 2013; Alvarez, 1999, pp. 365-375). Moreover, hybrid tribunals are thought to be more effective in re-establishing local justice systems, meaningful to victim populations, and less polarizing politically (Katzenstein, 2003).

One may ask a question, instead of suggesting an international tribunal, why a hybrid tribunal? Strengthening local courts and institutions is frequently necessary for post-conflict states (Cohen, 2007). Trials being moved to an international level divert resources and focus away from achieving this objective (Cohen, 2007). Since international tribunals frequently respond to their advocates, the international community, and only incidentally to victims, they lack responsibility and perceived credibility concerning the victims (Alvarez, 1999).

Since international tribunals do not always include the local populace, they risk lacking a sense of national ownership (Cohen, 2007). If the trials aim to foster reconciliation, nurture a culture of accountability, or build respect for judicial institutions in a post-conflict society, then the affected nation's citizens ought to have some sense of participation connection to the proceedings (Cohen, 2007). These objectives necessitate local and national outreach, education, and other capacity-building initiatives to ensure that the local populace is aware of the development of these judicial institutions and that the tribunal contributes to the reconstruction of the national infrastructure, particularly the judiciary (Cohen, 2007).

However, prior experience suggests that the international tribunal frequently fails to connect with the local population. Due to their distance from the crime scene, the key participants in the trial may not be familiar with the conflicts or the society where the crimes were committed. For instance, the crimes were perpetrated in Rwanda, while the ICTR was established in Arusha, Tanzania. It is doubtful whether the genocide trials substantially impacted local lives in Rwanda as the tribunal was located outside of the country (Drumbl, 2002, p. 227). Drumbl asserts that a more significant externalization of justice occurred in Rwanda due to international trials (Drumbl, 2002, p. 227).

However, as already noted, the trial process can only uncover microscopic and logical truths, which are just some parts of the atrocities. Bangladesh might have implemented other policies to further ICL objectives to reveal the entire past. Former

United Nations Secretary-General Kofi Annan once said that transitional justice (TJ) has many goals, including bringing those responsible for mass crimes to justice, ensuring justice and dignity for victims, documenting the past, fostering national reconciliation, and others.[1] The trial process cannot record the entire history, even though a hybrid tribunal could have guaranteed individual culpability. Uncovering and publishing the historical event in front of society is crucial to educate and reconciling society. What measures may have been implemented by the Bangladeshi government to reveal all details of the 1971 Liberation War? Bangladesh might set up a truth commission in addition to a hybrid tribunal.

4.2. Truth Commission (TC)

At the international level, the formation of democracy and respect for the rule of law are seen as preconditions for calling for the disclosure of historical human rights violations and the punishment of those guilty.[2] In Bangladesh, a hybrid tribunal could have been established to punish the most severely accused, whereas a truth commission could have been established for the rest. Truth commissions are a component of one type of transitional justice: a collection of measures states may use to address chronic human rights breaches and their effects (Zvobgo, 2020, p. 609; 611). Commissions are quasi-judicial and seek to enhance accountability through extensive inquiries of political violence. They look over documents, get testimony from witnesses, and gather proof (Zvobgo, 2020, p. 609; 611).

Even though the TC established in South Africa is the most well-known, many others have been founded worldwide over the past three decades (Murphy, 2010). One of the key responsibilities of these commissions was to create reliable and unbiased historical records of human rights violations while prioritizing the victims' protection and well-being during the investigation process. In addition, they provided recommendations for policy changes to prevent future abuses from occurring, supported the justice system's efforts, and promoted local reconciliation (Cantero, 2011, p. 35). The TC's operations are open to the public unless the interests of justice require otherwise. Truth commissions supplement the approach of courts of law by establishing the social and historical context of violations and the broad trends underlying many instances (Cantero, 2011, p. 35).

[1] The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General 23 August 2004 UN Doc. S/2004/616 para. 38 (UNSG Report).
[2] Report of the Secretary-General the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies S/2004/61623August 2004.

A TC might have served as an excellent substitute for prosecutions and a crucial tool to combat cultures of denial, as victims of sexual violence have not received adequate attention from the Bangladeshi tribunal. On both an individual and communal level, it has been asserted that formal exposure to the truth can lead to victim restitution, healing, and harmony (Fischer, 2011). Additionally, the trial process was anticipated to create division within the community. Therefore, implementing a mechanism to seek the truth could unite society. The use of nationalist mythmaking, which is based on distorted historical events, has been a contributing factor to both intrastate and interstate conflicts. It is, in fact, imperative to prevent the manipulation of historical facts and circumstances from leading to violent conflicts in the future (Mendeloff, 2004, pp. 355-357).

Although some may question the validity of TC, it is becoming more widely acknowledged that TC mechanisms play a crucial role in the aftermath of violent conflicts. In countries such as El Salvador, Guatemala, Peru, and Chile, TCs have been highly regarded for their ability to both document past atrocities and aid in the healing process of affected communities (Laplante, 2007, p. 141;148).

5. Conclusion

Without a doubt, the culture of impunity must end, and war criminals must be held accountable for their horrible crimes, regardless of how long it takes (Razzaq, 2015). A domestic approach is always where responsibilities should begin to ensure accountability (Linton, 2010). It was commendable that Bangladesh passed the law in 1973 to punish the suspects for atrocity crimes committed in 1971 (Linton, 2010). Undoubtedly, everyone agrees that Bangladesh had the primary power to execute its territorial jurisdiction.

However, it is required to ensure that no fresh injustices are committed to combat historical injustice and reconcile society. As pointed out above, the Bangladeshi government's policies appear insufficient to address historical injustice. Especially the domestic tribunal Bangladesh established, which is an improper forum for addressing international crimes committed decades ago. Why did this domestic tribunal project fail? It is crucial to keep in mind that if a nation obtains its independence via revolution or war, there is always the possibility that the prosecution will be more or less politically motivated and the judiciary will be less independent, which is a threat to upholding the rights of the accused. This is what happened in Bangladesh.

One potential solution to address concerns and protect the rights of the accused could have been implementing a hybrid tribunal. This approach could have helped the government overcome legitimacy challenges. Moreover, considering a hybrid approach can ensure a fair and just process for all parties involved. As stated above, criminal trials may only uncover partial truths and hold some individuals accountable. However, to reveal the complete truth, a TC is also necessary.

A TC is able to identify patterns of atrocities and human rights violations (Murphy, 2010). Therefore, one way for a society to remember the past is through the findings of truth commissions (Murphy, 2010). It is an arduous task to recall the facts, particularly concerning crimes or abuses that have been denied and are shrouded in obscurity. However, remembering such events cannot be overstated, as we must learn from the past and create a better future. Therefore, it is imperative that we exert our mental capabilities and put in the effort required to uncover the truth (Murphy, 2010). In order to bring clarity to the ongoing controversy surrounding the historical account of the Bangladeshi liberation war, an independent group operating within the TC could have conducted a thorough investigation to uncover the truth.

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