

Fighting Past Impunity in Bangladesh: A National Tribunal for the Crimes of 1971

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Executive Summary

The partition of India in 1947 created a single country of Pakistan out of two primarily Muslim territories separated by 1,600 kilometers. Many in Bengali East Pakistan resented the concentration of economic and political power in West Pakistan and tensions steadily rose. What became known as the Bangladesh “Liberation War” started in March 1971 when then West Pakistan initiated an attack on then East Pakistan. The conflict lasted until December 16, 1971, when India interceded and defeated the Pakistani forces. The conflict was characterized by widespread killings and other atrocities—including the displacement and disappearances of civilians, sexual violence, and widespread violations of human rights—carried out by the Pakistan Army, with support from political and religious groups in both East and West Pakistan.

After the war ended and Bangladeshi emerged as an independent state, the new government made attempts to bring the perpetrators of those atrocities to justice. However, internal and international political pressures prevented that from happening. In 2008 the Awami League (AL) came to power with a promise to prosecute these crimes. The recent establishment in Bangladesh of the International Crimes Tribunal, a domestic court with a mandate to prosecute Bangladeshi collaborators involved in the 1971 atrocities, provides an opportunity for domestic justice for the victims of these crimes. However, certain factors, such as the availability of the death penalty, the independence of the process, the limits on the rights of suspects/accused, and the lack of experience in investigations and prosecutions, must be carefully monitored to ensure that this justice meets international standards.

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Background

Historical Overview of the Conflict

In response to the victory of the AL—led by Bengali nationalist leader Sheikh Mujibur Rahman (Sheikh Mujib)—in the 1970 Pakistan general elections, the Pakistan Army launched Operation Searchlight in late March 1971, a campaign of terror designed ostensibly to quell nationalist tendencies in East Pakistan. The West Pakistan-based military dictatorship refused to hand over power and instead arrested Sheikh Mujib; it then sought to eliminate the Bengali nationalist movement and other threats to West Pakistan’s rule. The army was overwhelmingly composed of non-Bengalis from West Pakistan, even though the

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majority of the country's people lived in East Pakistan. Members of the local auxiliary forces and militias, which the army created, were mainly non-Bengali Muslims; many of them were Bihari, an ethnic group from the Indian states of Bihar and Uttar Pradesh, as well as surrounding areas in India and Nepal. Significant numbers of Bengali officers and soldiers deserted the army and joined with student militias and others to form an armed resistance, which came to be known as Freedom Fighters or Mukti Bahini.

The conflict caused a massive humanitarian crisis, with 10 million refugees fleeing to India (many through forced displacement resulting from confiscation of Hindu land and property). It lasted 10 months and involved widely documented massacres, torture, forced displacement, destruction or confiscation of property, disappearances, and sexual violence. The targets of the atrocities included university students, Muslim, Hindu, and Buddhist communities, AL or other Bengali nationalist supporters, secularists, and intellectuals. Many observers and international legal scholars commented at the time that there was strong evidence that the Pakistani army was committing genocide and crimes against humanity.

Although no systematic or comprehensive accounting was ever done, multiple large-scale mass graves have been uncovered around the country, and the popularly accepted figure within Bangladesh is that up to three million people were killed or tortured to death.¹ Sexual violence was also a dominant feature of the conflict. At least 200,000 women reportedly were raped in organized camps and as forces swept through villages; a great many of them were subjected to forced pregnancy.² While there are reports of reprisal attacks against Bihari communities particularly at the end of the conflict, the overwhelming majority of crimes were committed by the Pakistani army and their local collaborators against East Pakistani civilians. The conflict ended when India invaded in December 1971 and decisively beat the Pakistani forces within a matter of days, capturing 93,000 troops. Shortly afterward, Bangladesh declared independence, and Sheikh Mujib became the new country's first prime minister.

Political Background

Democracy has remained fragile in Bangladesh since then, with a persistent culture of divisive politics. With the exception of the first post-independence government in which the AL had an overwhelming majority, slim majorities and coalitions have characterized subsequent governments. Sheikh Mujib was assassinated in 1975, and his government was overthrown by a military coup, followed by a counter-coup. In 1979 the newly established Bangladesh Nationalist Party (BNP) won the general election. Although the BNP was composed of many former Freedom Fighters, it moved quickly toward a rapprochement with Pakistan.

Bangladesh has had several "caretaker governments" following coups, and both the AL and BNP have depended on coalitions with Jamaat-e-Islami, an Islamist party that sided with Pakistan during the Liberation War and re-emerged as a minority political force in the late 1970s. Major corruption scandals involving all political parties have dominated the political landscape in recent years, and the Anti-Corruption Commission is investigating large numbers of political figures.

Although Bangladesh has a common law legal tradition, with many excellent legal professionals, the judiciary is not free from political pressure, as evidenced by a well-

established tradition by all governments using legal measures to target political opponents, such as corruption charges and related lawsuits.

2008 Election Promise to Prosecute War Criminals

In December 2008, voters elected an AL government with a strong parliamentary majority. The current prime minister is Sheikh Hasina, the daughter of Sheikh Mujib.³ During the 2008 campaign, the AL highlighted prosecution of war criminals as a major issue in its election manifesto. The main pressure for prosecutions has emanated from civil society, including victims' and veterans' groups that have long been advocating for justice. Some of these groups, such as the Sector Commanders' Forum, have circulated lists of those widely suspected to be most responsible, not just on the Pakistani side but also Bangladeshi collaborators, many of whom occupy prominent public and political positions within the ranks of opposition parties.⁴ Government representatives claim that the promise to prosecute was directly responsible for a significant level of support they received from young voters.

Transitional Justice Efforts to Date

Prosecutions in the Aftermath of the Violence

After the Liberation War ended, the government took immediate efforts to ensure accountability. On January 24, 1972, the Bangladesh Collaborators (Special Tribunals) Order (Collaborators Order) was promulgated by Presidential Decree. It provided for the prosecution of "collaborators" before "special tribunals." Between 1972 and 1974, some 37,400 people were arrested and investigations commenced.⁵ The acts it criminalized were wide ranging and drawn from the Bangladesh *Penal Code*. They included murder, rape, arson, and genocide. Many potential suspects fled into exile and were never charged.

In addition, India was holding 93,000 Pakistani troops as prisoners of war (POWs). Of these, Bangladesh asked India to turn over 195 Pakistani military and civilian officials so that they could be prosecuted for their role in the atrocities. In response, Pakistan filed a claim against India in the International Court of Justice (ICJ) claiming that only Pakistan could try its citizens for breaches of the Genocide Convention. Until its POWs were released, Pakistan was holding at least 250,000 East Pakistanis in internment camps in West Pakistan at the time, who became known as "stranded Bangladeshis."

On July 20, 1973, the Bangladeshi parliament passed the International Crimes (Tribunals) Act (ICTA). Its purpose is "to provide for the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes, and other crimes under international law." Drafted with the help of prominent international lawyers, this law was a groundbreaking step in the development of international criminal law. It drew heavily from the International Military Tribunal (IMT) Charter used at Nuremberg and the resulting principles prepared by the International Law Commission. The ICTA was to serve as the basis for the establishment of a national tribunal and specialized investigation/prosecution unit to try people for crimes against humanity, crimes against peace, genocide, war crimes, and "other crimes under international law."

Amnesties and Clemencies

Numerous clemency measures halted the plans for trials. In February 1973, prior to the passage of the ICTA, Prime Minister Sheikh Mujib issued the Bangladesh National

Liberation Struggle (Indemnity) Order, which granted Freedom Fighters immunity from prosecutions for acts committed if they were in connection with the “Liberation Struggle.”

On May 16, 1973, Sheikh Mujib also declared a clemency to those convicted for petty offenses under the Collaborators Order. On November 30, 1973, the Bangladeshi government announced a general amnesty for all collaborators (except those accused of murder, rape, arson, or genocide).⁶ As a result of these two clemencies, 26,000 people detained under the Collaborators Order were released; another 11,000 lower-level local alleged collaborators went on to face trial, and approximately 750 were convicted.⁷ Shortly afterward, in early 1974 India, Pakistan, and Bangladesh signed a tripartite agreement that addressed a number of post-war humanitarian issues: the remaining Pakistani POWs and “stranded East Pakistanis” were able to return home, and Pakistan withdrew its ICJ claim, promised to conduct its own trials at home. It also paved the way for Pakistan’s eventual recognition of Bangladesh’s independence.

After Sheikh Mujib was assassinated in 1975, the new government repealed the Collaborators Order, disbanded tribunals set up under it, and pardoned and released all those detained and convicted. The government also passed the Indemnity Act that gave those involved in the president’s assassination immunity from legal action. The ICTA, however, was never repealed.

Subsequent Transitional Justice Developments

From 1975 until the early 1990s, very few transitional justice efforts were made. In 1992, an unofficial Peoples’ Tribunal was constituted in Dhaka that conducted a mock trial of several leading high-level Bangladeshi suspects; they were “convicted” in absentia and “sentenced” to death, results which had no official status.⁸ There were also a few limited fact-finding and documentation efforts by civil society, such as the 2000 Nirmul Committee. However, for the most part transitional justice was confined to the efforts of organizations like the Liberation War Museum, which began private initiatives to honor victims through memorialization of mass graves, collecting documentation, and carrying out public education and oral history projects. The Liberation War Museum has held two conferences (in 2007 and 2009) on justice for the genocide, inviting international participants, with a view to raising the issue’s profile.

In 1996 the AL revoked the Indemnity Act, and trials commenced for those suspected of the murder of Sheikh Mujib. Two years later Sheikh Hasina—then the country’s prime minister—signed the Rome Statute on July 17, and Bangladesh ratified it on March 23, 2010.

The Current Situation

Establishment of the International Crimes Tribunal

In March 2009, the AL government announced that it was preparing to establish the International Crimes Tribunal (ICT) to prosecute collaborators accused of international crimes, using the 1973 ICTA.⁹ Amendments to the law were passed in late 2009, including a new provision that “The Tribunal shall be independent in the exercise of its judicial functions and shall ensure fair trial.”¹⁰ Rapid developments are now under way. An initial budget of TK 10 crore (roughly \$1.44 million)¹¹ has been set aside, and the historic former East Pakistan High Court building in central Dhaka (currently home to the Law Commission) is in the process of being refurbished, complete with a public gallery

specifically for international observers whom the authorities hope will come to see the trial. Dedicated space has been set aside for media, and members of the public should be able to view the proceedings on large screens in rooms outside the courtroom.

Three judges (a current and former high court judge and a current district court judge) have been appointed. Another district court judge is the registrar, and he has a team of administration staff coordinating preparations. A team of prosecutors, supported by police investigators, has commenced work, and investigations are under way. In mid-July 2010 the judges issued rules of procedure, and on July 27, the ICT issued arrest warrants for four suspects.¹² To date, no indictments have been issued.

Issues of Concern

The current developments in Bangladesh constitute a rare example of a national search for accountability for serious past crimes. Nonetheless, certain factors raise concerns that the process could fall short of international standards or suffer from serious challenges.

Availability of the death penalty: The ICT has the power to impose the death penalty on any person found guilty. In recent high-profile criminal cases, including those convicted of Sheikh Mujib's murder, the death penalty was used. If the death penalty remains in place, the international community's ability to support the process will be hampered.

The independence of the process (real and perceived): The combined effect of the political rhetoric from government officials, such as statements on who may be the targets of investigation, and the previous history of immunity granted to Freedom Fighters have contributed to perceptions that this is a politicized process intended to target certain people or opposition members. And while the recent judicial appointees to the tribunal have reputations for integrity and objectivity, judicial independence has been a major problem throughout Bangladesh's short history. For example, the ICT's chief investigator resigned shortly after his appointment when allegations surfaced that he had been involved with Jamaat's student wing during the war. Challenges to ICT officials are likely to continue. The high court recently dismissed challenges to the appointment of two ICT judges.

Limits on the rights of suspects/accused: While ICTA includes some basic due process protections during trial, pre-trial rights are scant, such as safeguards during the questioning of suspects. Of particular concern is the lack of a clear process that the defense can follow to challenge the legality of the tribunal's exercise of jurisdiction. Shortly before ICTA was passed in 1973, the Constitution of Bangladesh was amended to exempt proceedings for international crimes from certain basic constitutional rights, including but not limited to the prohibition of applying criminal law retroactively.

Lack of specialized experience in investigations and prosecutions of mass crimes: Gathering evidence of crimes committed on a systematic scale more than 30 years ago that is sufficient to sustain a case against indirect perpetrators requires specialized techniques of analysis, information management, and legal expertise. Specific attention to questions of protection and support to witnesses and victims, and proper training in investigation of gender crimes is also needed, particularly considering the allegations of mass rape.

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Conclusion

These developments in Bangladesh represent some of the classic dilemmas in dealing with long legacies of impunity and the complexity of crafting effective national solutions. While there is political will from the Bangladeshi government as well as genuine support from some sections of Bangladeshi civil society to see justice for past crimes, the process remains controversial in Bangladesh and highly politically charged. The International Crimes Tribunal is faced with a historic opportunity to bring truth and justice to victims, who have been fighting for these ideals for the past four decades.

However, real concerns about the fairness and independence of the process cannot be brushed aside as political rhetoric. At the same time, critiques of the process should not provide cover for ongoing impunity and denial of the rights of victims to an effective remedy for crimes against humanity and genocide. Official willingness to revise the ICTA framework to learn from international experiences, accompanied by broad-based public debate about a range of accountability options, would go a long way toward addressing these concerns and meeting popular hopes for justice.

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- 1 See the Liberation War Museum's website at www.liberationwarmuseum.org/liberation-war/51-genocide-and-atrocities.
 - 2 East Pakistan's total population at the time was around 70 million.
 - 3 Some reports estimate the figure is at least double this number.
 - 4 Sheikh Hasina was the prime minister from 1996 to 2001, the only other time the AL has been in power since 1975.
 - 5 See <http://beta.thehindu.com/opinion/lead/article422672.ece>
 - 6 Some reports say as many as 100,000 were investigated.
 - 7 In a 1992 speech to parliament, then opposition leader Sheikh Hasina declared that this amnesty was only enacted to placate Pakistan enough to secure the repatriation of the 250,000 East Pakistanis who were being held at the time in West Pakistan.
 - 8 While details are difficult to obtain, the low conviction rate seems due in part to the wide scope of the charges.
 - 9 The members of this effort (including the current law minister, who served as a judge) were then prosecuted for sedition for illegally constituting a court. The case never proceeded beyond initial charges.
 - 10 In general, the definitions in the 1973 ICTA are broadly reflective of international law at that time and heavily influenced by the IMT charter (with the notable exception of adding "political groups" to the definition of "genocide"). As a result, they do not reflect some of the important advances in international law that have been made since.
 - 11 Other amendments include provisions to try individuals or groups of individuals, for English and Bangla to be the official languages of the proceedings, and for appeal against an order of acquittal.
 - 12 Bangladeshi currency is the taka. Crore is a unit in the Bangladeshi numbering system equal to 10 million taka.
 - 13 Manik, Julfikar Ali, and Ashutosh Sarkar, "Arrest Order for 1971 Genocide," (Dhaka) Daily Star, July 27, 2010, www.thedailystar.net/newDesign/news-details.php?nid=148383.



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