International Tribunals: Lessons for Bangladesh

DR. DAVID MATAS

SYED ZAKIR HOSSAIN

As Bangladesh starts on the work of justice for the crimes of 1971, the international experience merits attention. The international community has created a number of tribunals in recent years to prosecute international crimes, eight in all - the International Criminal Tribunal for the Former Yugoslavia (1993), the International Criminal Tribunal for Rwanda (1994), the International Criminal Court (1998, entry into force 2002), the Special Panels of the Dili District Court in East Timor (2000), the Special Court for Sierra Leone (2000), the Internationalized Courts for Kosovo (2000), the Extraordinary Chambers in the courts of Cambodia (2004), and the Special Tribunal for Lebanon (2007). All of these provide relevant experience in dealing with international crimes. Bangladesh has lost thirty-eight years in establishing a legal regime to bring perpetrators of international crimes to justice.

Bangladesh has signed and should ratify the Statute of the International Criminal Court. However, the International Criminal Court has jurisdiction only for crimes committed after the entry into force of the statute of the court, which was July 1, 2002. So that Court is not an option for the 1971 crimes.

Bangladesh enacted a law in 1973 to bring to justice the perpetrators of the 1971 genocide, the International Crimes (Tribunals) Act of 1973. That law was not implemented then for political reasons. I am pleased to see that the Government of Bangladesh has decided now to implement that law, to establish the tribunals for which the law was enacted.

I want to draw on that experience to attempt to answer three questions. How do we combat delay, so that the Bangladesh cases not only get started, but actually get finished in a timely fashion? Second, how to approach cases strategically so that the Bangladesh Tribunals do not get bogged down? Third, how do we fill in gaps in the Bangladesh legal structure?

Combating delay

Trials for violation of international law bring to bear issues not found with ordinary crimes. International crimes are massive. There are a myriad of perpetrators. The law is complex.

The Bangladesh International Crimes (Tribunals) Act, 1973 in section 11 (2) provides that a Tribunal shall confine the trial to an expeditious hearing of the issues raised by the charges and take measures to prevent any action which may cause unreasonable delay. I have five suggestions to make about the mechanics of trials, drawn from the international experience, to prevent unreasonable delay. The suggestions I propose do not require an amendment to the 1973 law.

1) Preventing interlocutory appeals: A primary cause of delays in international criminal trials has been interlocutory appeals. Trials inevitably involve a myriad of interim rulings about procedure and evidence. If each ruling can be appealed and the trial held in abeyance in the meantime, the trial can take forever.

The International Criminal Tribunal for the Former Yugoslavia, which faced this problem, resolved it with a rule that interlocutory appeals were impossible with two exceptions. One was motions challenging jurisdiction. The other was cases where certification has been granted by the Trial Chamber.

The Trial Chamber was given the power to grant certification if two criteria were met. One was that the decision involves an issue which would significantly affect the outcome. The other was that an immediate resolution of the issue by the Appeals Chamber might advance the proceedings. The Bangladesh International Crimes (Tribunals) Act, 1973 provides for a right of appeal to the Appellate Division of the Supreme Court of Bangladesh against conviction and sentence. A recent amendment gave the prosecution a right of appeal against acquittal. These provisions do not address directly the issue of interlocutory appeals.

2) Written witness statements: Another way in which time could be saved is to allow witness evidence to be filed in court through written statements, rather than require witnesses to testify in open court. Again, the International Criminal Tribunal for the Former Yugoslavia provides an example.

Factors in favour of admitting evidence in the form of a written statement or transcript include that the evidence:

(a) is similar to that other witnesses will give or have given in oral testimony;

(b) relates to relevant historical, political or military background;

(c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates;

(d) concerns the impact of crimes upon victims;

(e) relates to issues of the character of the accused; or

(f) relates to factors to be taken into account in determining sentence.

The Bangladesh International Crimes (Tribunals) Act, 1973 allows for written statements from a witness, recorded by a Magistrate or an Investigation Officer, who, at the time of the trial, is dead or whose attendance cannot be procured without an amount of delay or expense which the Tribunal considers unreasonable [section 19 (2)]. This provision does not go as far as the International Criminal Tribunal for the Former Yugoslavia provision.

3) Judicial notice of previously adjudicated facts: A third time saver is a robust doctrine of judicial notice to avoid repetition. The rules of the International Criminal Tribunal for the Former Yugoslavia now provide that a Trial Chamber may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings. This taking judicial notice of previously adjudicated facts is an innovation introduced specifically for international tribunals.

The Bangladesh statute provides that a Tribunal shall take judicial notice of facts of common knowledge, official government documents, reports of the United Nations and its subsidiary agencies and other international bodies including non?governmental organisations [section 19 (3) and 4]. There is no express provision for taking judicial notice of previously adjudicated facts.

4) Limiting witnesses: A fourth time saver is allowing the Court to limit the number of witnesses the prosecution can bring and the time available over all to present its evidence. This rule was introduced into the International Criminal Tribunal for the Former Yugoslavia as a result of the experience through which the Tribunal lived. The rules now provide that the Trial Chamber, "shall determine the number of witnesses the Prosecutor may call; and the time available to the Prosecutor for presenting evidence."

5) Limiting charges: A fifth manner of saving time is given the Court the power to limit charges against the accused. One has to remember that a criminal tribunal bringing to justice perpetrators of international crimes and a truth commission are different. These trials are not meant to compile historical records but exist to realize justice, to determine the guilt or innocence of individual accused.

The International Criminal Tribunal for the Former Yugoslavia found that prosecutors were trying to do too much, that they were inclined to prosecute everyone against whom there was compelling evidence of guilt for every crime which has been committed, partly because that is what the victims wanted. Yet, the crimes were so massive that realizing such an ambition was unrealistic.

The Court, accordingly, amended the rules to give the Trial Chamber power to fix the number of crime sites or incidents comprised in charges about which evidence may be presented by the Prosecutor. The Court also gave the Trial Chamber the power to direct the Prosecutor to proceed on some counts in the indictment and not others.

Choosing cases strategically

The prosecution will have to choose cases strategically. There is likely to be a wealth of cases from which to choose. Proceeding all at once with every possible case is likely to be unmanageable. Criteria need to be developed for case selection. The quality of the evidence available is an obvious criterion. But it should not be the only one.

Also important is the extent and nature of involvement of the accused in the act. Accused directly responsible for grievous actions should be given priority over those who merely aided and abetted.

Higher-level accused should be given priority over lower level accused. There may be a temptation to start the cases with hands on perpetrators in order to build up evidence for those at higher levels. The trouble with that strategy is that the tribunal can become bogged down in those cases. The International Criminal Tribunal for the Former Yugoslavia fell prey to that difficulty.

Some jurisdictions prosecuting perpetrators of international crimes write this limitation into their governing statute. The Cambodian legislation limits the scope of the investigation "to senior leaders of Democratic Kampuchea and those who were most responsible for the crimes". The Sierra Leone Special Court has jurisdiction over leaders who threatened the establishment and implementation of the peace process while committing such crimes.

Because, in the case of Bangladesh, the crimes occurred thirty eight years ago, many of the most senior perpetrators have died. At this late date, for the most part, there will be only junior perpetrators available for prosecution. Even amongst these junior perpetrators, though, there will be degrees of responsibility and status at the time of the crimes which should be borne in mind when choosing who to prosecute.

Specific issues

There are number of issues which need to be addressed about which the Bangladesh statute is silent. A fully operational will have to come to grips with these issues. The current Bangladesh statute, the International Crimes (Tribunals) Act of 1973 is a useful framework. For the trials to take place, the framework will have to be filled out.

This is by no means a comprehensive list. But in the time available, I want to address four specific issues: age of accused, relationship with other courts, witness and victim protection and the treatment of subordinates.

1) Age of accused: The Bangladesh statute is silent on the age jurisdiction of the Tribunals. For Sierra Leone, the relevant age is 15. For the International Criminal Court, the age is higher.

2) Relationship with other courts: There has to be a decision about the relationship of the Bangladeshi International Crimes Tribunals with other Bangladeshi courts. Cases are now being launched in the regular courts to bring to justice perpetrators of the 1971 genocide. What happens to those cases once the Bangladeshi International Crimes Tribunals get going?

In the case of Sierra Leone, jurisdiction is concurrent, with primacy going to the international tribunal. There is a similar provision for Lebanon, for the former Yugoslavia and Rwanda. For East Timor, for crimes committed during the relevant period, the jurisdiction of the Special Panels was exclusive.

A related issue is double jeopardy. Suppose the regular courts have decided a case and the prosecutor wants to bring the accused to a Bangladeshi International Crimes Tribunal or the reverse.

The Sierra Leone tribunal statute provides that a person tried by the international court can not be tried again by the national court for the same offence. A person tried by a national court may however be tried again by the international court where either the act was characterized in the national court as an ordinary crime or the national court proceedings were not impartial or not independent or were designed to shield the individual or the charge was not diligently prosecuted.

In a case where an international prosecution proceeds despite a national court conviction, the international court has to take into account the national court sentence when imposing its own sentence.

3) Witness and victim protection: The Bangladesh statute says nothing on witness and victim protection. Yet, it is a crucial issue for international crimes.

All of the international tribunals address this issue even if only cursorily. The most elaborate is the statute of the International Criminal Court which provides that, as an exception to the principle of public hearings, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. Another provision states that where the disclosure of evidence or information may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary.

4) Superior orders: The Bangladesh statute has a provision on the responsibility of superiors but not of subordinates. Different international tribunals have different provisions dealing with the defense of superior orders. For the Sierra Leone Special Court, a superior order is not a defence to a prosecution but it may be pleaded in mitigation of sentence. There are similar provisions for East Timor, the former Yugoslavia and Rwanda, and Lebanon. The International Criminal Court statute in contrast provides that superior orders may be a defence where three criteria are met:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

(b) The person did not know that the order was unlawful; and

(c) The order was not manifestly unlawful.

Conclusion

Bangladesh has waited far too long to bring the perpetrators of the 1971 crimes to justice. But one advantage of that wait is that many other international tribunals have sprung up in the meantime and gone about their work. They have accumulated experience from which Bangladesh can learn. Their experience will make the work of the International Crimes Tribunals of Bangladesh easier. Bangladesh should make every effort to benefit from that experience.

Dr. David Matas is an international human rights lawyer based in Winnipeg, Manitoba, Canada.

The works need to be done

Highlights of the two-day International Conference on Genocide, Truth and Justice

THE two-day International Conference on Genocide, Truth and Justice ended with a clarion call to all nation and concerned international communities to work towards ensuring that after long delay of 38 years the process of trial of the perpetrators of genocide, crimes against humanity and war crimes in Bangladesh be met with success. The conference highlighted the importance of undertaking multifarious activities involving various sections of the population so that truth and justice prevail. International legal experts, academics and rights activists from various countries including Japan, Korea, Hong Kong, Cambodia, Germany and Canada attended the conference. Besides papers were presented by academics and activists from Pakistan, Australia and UK as well as international organisation like International Centre for Transitional Justice. More than 120 national participants also joined at conference.

The thoughtful presentations and open discussions highlighted the experiences of the world community in organising various trials of the crimes of genocide which would be useful for Bangladesh. Based on the international experiences of such tribunals many practical measures were suggested. The speakers also emphasised on the methodology of documentation, specially in the collection of testimonies and recording the suffering of women. The issue of victims right was a recurrent feature of the discussion. The Cambodian participants dwelt on the work of Victims Unit in the Cambodian Court and emphasised on victim's right for remedies and reparation. Mr. Helmut Scholz, a Member of the European Parliament has drawn attention to the broader dimension of the trial which calls for a holistic approach of social and political rights along with legal measures. Dr. David Matas, an International Human Rights Lawyer, from Canada threw light on the measures which can be taken to prevent unreasonable delays in International Criminal Trials.

In all ten papers were presented by foreign participants and there were eight papers by local participants. In his key-note address Barrister Shafique Ahmed, Minister for Law, Justice and Parliamentary Affairs explained the tragic political developments behind the long delay in ensuring justice and the recent changes brought by the people and the Govt. to initiate the justice process.

The Conference adopted a resolution calling for the ratification of the International Criminal Court (ICC) statute by the Govt. In another resolution October 21, 2009, has been declared as the "International Day to Remember and Renew the Commitment for Peace" as on that particular day in 1971 Oxfam published the book "The Testimony of Sixty" depicting plight of the distressed people of Bangladesh and delivered it to various heads of the Govt. As an expression of gratitude of our people the facsimile edition of the book will be delivered on the same day this year to the respective governments along with an appeal of solidarity with the trial of the perpetrators of genocide initiated by Bangladesh.

The Conference has opened up the possibility to develop various networks and build alliances with different national and international organisations working with same objectives. During the conference the President of Kean University of New Jersey, USA Dr. Dowd Farahi sent a video message expressing their support to the endeavours to address the human rights violations. He informed the audience that the university will organise a conference on "Bangladesh 1971" in October, 2009.

In the declaration the Conference expressed its approval for the process which have been initiated for the trials and highlighted the importance of learning from the experience and expertise of other tribunals and institutions.

In all the Conference opened up greater opportunities to work with all humanity to usher in a new era of truth, justice and peace ending impunity for the perpetrators of genocide.

PHOTO: STAR

Law Minister Shafique Ahmed speaks as the chief guest at the inaugural of "Second International Conference on Genocide, Truth and Justice" at Cirdap auditorium in the city.

Mofidul Hoque
Coordinator, Second International Conference on Genocide, Truth and Justice.