

## Some inconvenient facts for the critics of Bangladesh ICT

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RITICS often accuse the Bangladesh international crimes trials (ICT), being exclusively domestic ✓ without any international/UN involvement, are a recipe for injustice. Here I briefly highlight some monumental failures of international and mixed tribunals. Polarised international politics, dogmatic self-interest, and resource constraints have circumscribed the effective functioning of these international and mixed tribunals, which are conveniently ignored or overlooked in the relentless criticisms against the Bangladesh trials.

Let me begin with Nuremberg. The US, UK, France, and Soviet Union drafted the Nuremberg Charter under the London Agreement 1945, created the Tribunal, appointed tribunal judges, one from each, and controlled its operation. All prosecutors were from the Allied powers. All defence lawyers were German and had limited access to facilities to prepare their cases. The jurisdiction of the Tribunal extended only to the trials of the war criminals from European Axis states to the exclusion of alleged war criminals from the Allied Power. All these provisions were designed to legitimise the punishment of the Nazi leaders with no pretence of fairness and impartiality.

The trial clearly violated the due process principles by prejudgment of guilt, limited procedural rules that inadequately protected the rights of the accused, judicial biasness, lack of procedural equality between prosecution and defence, some trials were held in absentia, no right to appeal and/or review (Art 26), and the unavailability of certain defences to the defendants. Prosecution introduced ex parte (one party) affidavits against the accused regardless of any legitimate objections. The accused attempted in vain to raise the defences of ex post facto (after the fact) application of law in that there could be no punishment of crime without pre-existing law. These irregularities and inadequacies pervaded the trials, which appeared more of a political than judicial exercise.

Western states remain hostile to the ICC and resistant to surrendering their nationals. The US Service Members Protection Act 2002 prohibits US cooperation with the ICC and grants the President power to 'use all means necessary' to secure the release of US nationals or allies if detained by the ICC (s 2008:a). The US intimidated states to sign bilateral treaties preventing ICC parties from surrendering to the ICC any US national guilty of ICC crimes. The US and European NATO members are free to commit ICC crimes in Iraq and Afghanistan, Russia in Chechnya and Georgia, China in Tibet, and Israel in the occupied Palestinian territories with complete impunity.

The ICC jurisdiction seems to be operating only in weak states, not in powerful states and their allies. The ICC Prosecutor has failed to undertake any investigations beyond Africa. The ICTY and ICTR are UN tribunals operating with adequate resources under favourable conditions in The Hague with no connection whatsoever with the nationals and victims of the territories and actual place of the commission of the crimes. It appears patronising that the UN runs these tribunals outside the countries affected and without their participation, creating almost no enduring social impact. East Timor and Cambodia addressed this failure by establishing in-house hybrid courts with the UN partnership.

The East Timor Panels suffered from resource limitation and politics of cooperation and could not try many alleged accused, who were the nationals of Indonesia, which declined to turn them over to East Timor or the UN. This was a parallel situation with the Bangladesh tribunals, which cannot try the alleged Pakistani war criminals for want of cooperation from Pakistan. Of 400 indictments, there were only 55 trials involving 88 accused. The UN in 2004 abruptly stopped funding when there were 514 investigated outstanding cases and 50 cases under investigation. The inability of the Serious Crimes Unit to investigate the charges against many serious crimes detainees led to

their large scale release in 2000. Several appeal cases remained unfinished. Many in East Timor felt let down and betrayed.

The ongoing Cambodian trials also suffer from both resource constraint and tension between its national and international divide. Chronic delays, political tension, and funding crisis hang over the Chambers, which struggle with Case 002 after the death of its prime accused Ieng Sary with bleak prospect to proceed with Cases 003 and 004. The trial proceedings for expert witnesses came to a halt on 4 March 2013 when the translation and interpretation unit stopped working for unpaid salaries, resulting in indefinite recess of trials. Funds for the international side ran out in 2012, caused hiring freeze, and non-renewal of existing contracts resulting in staff uncertainty and loss.

The International Co-Investigating Judge Ansermet (Switzerland) resigned in April 2012 and it took five months to appoint a successor (Mark Harmon of US) in October 2012. These successive delays and interruptions in trials have raised considerable public antipathy and denied justice to many victims of the Khmer Rouge.

The unreasonable delay in conducting the Slobodan Milosevic trial was largely responsible for his death on 11 March 2006 after more than four years of trials. His death in



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the UN Detention Unit at The Hague raised worldwide concern about the propriety of his trial as to whether the trial could have been done expeditiously in the interest of justice and fairness to the victims. Similarly the death of Ieng Sary, who played an important leadership role as the foreign minister and standing committee member of the Khmer Rouge, has significantly diminished the Khmer Rouge crimes on trials. This failure has been frustrating for the victims of the Khmer Rouge. It was abundantly clear from extensive public documents available prior to the start of the trials in 2006 that Ieng Sary was a prime target for prosecution, yet the mixed Chambers with active UN presence failed to complete the trial before his death in

Since the charges against Slobodan Milosevic and Ieng Sary terminated by their death, they remain legally entitled to the presumption of innocence. Their accountability for heinous crimes continues to enjoy impunity and their victims continue to be deprived of their right to justice forever. The cardinal goal of these trials was made subservient to lengthy due process only to attain so-called procedural justice at the cost of substantive justice for their

Given these failures of international and mixed tribunals, the role of national tribunals in ending the safe haven and impunity of perpetrators is being increasingly appreciated. National trials are in proximity to the victims, which renders the pursuit of justice more meaningful to the country.

The ICTs operating within Bangladesh and in proximity to the victims render the pursuit of justice a more meaningful exercise. The ICTs whose primary audience is the local population have been a rewarding experience of local ownership and empowerment in seeing justice done and creating a lasting impact. The ICTs, being free from external politics, control, and resource dependence, have better prospect of maximising justice for the victims and minimising the impunity of perpetrators on a continuing basis.

International criminal law promotes international crimes trials by national courts. The relationship between international and national criminal jurisdictions is mutually supportive to each other in maximising justice for victims and minimising impunity of perpetrators. Article 17 of the ICC Statute expressly endorses the complimentarity between the ICC and domestic jurisdictions of states.

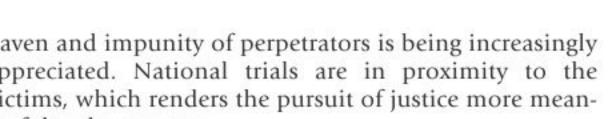
Bangladesh, with its long-standing and established common law tradition and capable criminal justice system, fulfils the ICC conditions of political willingness and judicial ability to try international crimes more convincingly than the current Libyan judiciary, which is now trying Saif-al-Islam Gaddafi despite his indictment by the ICC for allegedly committing war crimes during the Libyan revolution in 2011.

International political appetite for justice has been shortlived in East Timor and Cambodia, entrenching rather than combating impunity. Justice has been elusive to many victims. Have the UN, US, EU, and other critics of the ICTs ever raised their voice against the demonstrated failures of their own making in international and hybrid trials? Would their involvement in the Bangladesh trials have been any different from the fate of the East Timor and Cambodian trials? Their self-serving politics of cooperation would have been stultified the progress of the Bangladesh trials, which have some very old-age accused and could have faced the same result as the Slobodan Milosevic and Ieng Sary trials.

The principled-position of some human rights NGOs and the EU against death sentence is understandable. But the frequency and intensity in which they have displayed their sustained criticisms against the capital punishment of the 1973 ICT Act and death sentence to Mollah in contrast to occasional whisper against death penalties in the US, Saudi Arabia, and other states expose their double standard. Even in Bangladesh, past death sentences and very recent death sentences to 8 convicts in the Bishwajit case have not seen the same level of roaring criticisms from these NGOs and the EU? Why are the ICTs and Mollah execution singled out? Does something sinister lie beneath their principledopposition to capital punishment?

Pakistan in its state-capacity committed international crimes in 1971 and preserved the impunity of its war criminals in defiance of the findings and recommendations of its own Hamdoor-ur-Rahman Commission Reports 1972 and 1974. It also expected the continuation of the same impunity for the Bangladeshi accused and convicts, who committed these crimes on behalf of Pakistan. With the past heinous Armenian genocide and recent ruthless massacre of Kurdish self-determination to their credit, Turkey and its Islamist leaders find it expedient to support the Bangladeshi war criminals. Pakistan, Turkey, and Jamat are the birds of the same feather due to their politicoreligious affinity and their opposition to the Bangladesh international crimes trials is merely a foregone conclusion.

The establishment and operation of the ICTs in Bangladesh is perfectly legal. What makes it an easy target of criticisms is the government's initial underestimation of the political and financial clout of Jamat at home and abroad. International critical narratives of the Bangladesh trials are attributable also to the well-resourced lobbying network of Jamat as opposed to the apparent public inaction of





Legal remedies

against violence

ECENT time we have witnessed a burning Bangladesh. We, the owner of this State are forced to greet aberrant, brutal and cruel killing. Common people of this soil, who are not beneficial from any political party, pay extreme cost. They did not get any sort of legal remedy as if it is their misfortune to born in this society. This manuscript tries to locate some offences relating to present subversive activities and available legal remedies against that violence.

Arson: Last few days we have watched mass people of this independent territory died in public transport by arson. Offenders threw gunpowder and petrol bomb in public vehicle to create fear among the citizens to restrain them from free movement. Consequently, politically powerless electors burnt on road and subsequently crying in the hospital to stop this power grabbing game. As per our existing law, whoever does a violent act with any explosive substance or fire or any flammable matter rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person shall be punished with maximum six months jail or with highest one thousand taka fine or with



Moreover, if anybody does any act so rashly or negligently which endanger human life or the personal safety of others shall also be liable for highest three months imprisonment or with maximum two hundred taka fine or with both.

Sometime alleged picketers do this by entering into a bus/vehicle as a passenger, which also constitutes a separate offence i.e. criminal trespass. Whoever enters into or upon property in possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property or having entered into or upon such property unlawfully remains there with same intent will liable for criminal trespass and shall be punished for maximum three months prison or with highest five hundred taka fine or with both. Despite criminal case, a victim is entitled to get all sorts of damages from all parties who are engaged with this.

Unlawful gathering: Presently we notice some people made obstacle on highway, railway and waterway so that the communication system can be interrupted. They also resisted police from removing such obstacles. They may be liable for sabotage under the Special Powers Act, 1974. In addition, when five or more persons have common object to overawe criminal force or show of criminal force or to resist to Government, Legislature or any public servant in the exercise of the lawful power of such; or to commit any mischief, criminal trespass or other offence; or by means of criminal force, or show of such, to anybody to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way or the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or by means of criminal force, or show of such, to compel anybody to do what he is not legally bound to do, or to omit to do what he is entitled to do is committing unlawful assembly, which punishment is maximum six months imprisonment or with fine or with both. Whoever joined in an unlawful assembly with deadly weapon shall be punished with highest two years imprisonment or with fine or with both.

Hire of person: Frequently, it is proved that somebody hires some people to do this act while our Penal Code, 1860 provides relief and says if anybody hires, engages, employs or promotes any person to join or become a member of an unlawful assembly, shall be punished as a member of such assembly and for any offence which may be committed by any such person in pursuance of such hiring he shall be punished in the same manner as if he had been a member of such unlawful assembly.

Mischief: Now it is very easy to devastate one's car/vehicle at any chance. A victim can take support of law to prevent damage of his property. In spite of criminal action, he can bring civil suit for compensation. Whoever with intent to cause wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminished its value or utility, or affects it injuriously, commits mischief and he shall be punished with highest three months lockup or with fine or with both.

Attack on police: At this moment, we observe that the police are also assailed by the violators. If someone assaults or threatens to assaults or obstructs any public servant in discharge of his official duty, he shall be punished with maximum three years detention or with fine or with both.

Currently 'cocktail' is the much used explosive during hartal and blockade. The Explosives Act, 1884 has provisions against unauthorized use of such explosives and these offences are also cognizable, which means in that event police can arrest the alleged culprits without warrant. Action can also be taken under the Explosive Substances Act, 1908 for the same offences and the punishment under these laws are more rigorous than the Penal Code that may extend to death penalty.

Apart from the Penal Code, 1860; these offences can be tried under the Special Powers Act, 1974 as sabotage, where the punishment is more severe and may extend to capital punishment or life imprisonment or minimum fourteen years confinement and fine.

Government may try them those who are involved in this kind of act under the Speedy Trial Act and the Anti Terrorism (Amendment) Act, 2013 to prevent this type of perilous political activities. Finally, it is not necessary to be a victim to take legal actions against the perpetrators and not essential to be a police to arrest them. Any person whether he is a victim or not, can file case to police or magistrate to ensure punishment and get relief from this intolerable situation.



## Towards extinction

KISHOR DUTTA ANGLADESH is crowned with the splendid archeological heritage. Over the thousand years so many dynasties have ruled this vast territory leaving their ineffaceable grandeur in giant citadels, prodigious monuments, elephantine towers and mammoth cities they established. With the passage of time the splendor of these heritages may be eclipsed, but they echo the time gone by. The historical remnants signal an historical continuity which must not end with the present generation but must be preserved for our progeny. The Apex Court therefore directed the authorities concerned to preserve and protect the national heritage

[BAPA v Bangladesh 58 DLR 441]. Although numerous literary and epigraphic records testify to the existence of a large number of cities, fortified palaces, temples, monasteries and stupas - with the splendor of such structure being described as ' high as mountain peaks'- there are alas no vestiges of any such grandiose edifice surviving ground today. Most of them perished due to cataclysmic natural catastrophes and if few of them survived the frenzied wrath of nature, they had not been spared by the iconoclastic fury of vandals.

The decrepit shrine of Ram Saha featured by Life Style under the title 'In grand remembrance' depicts the traumatic vulnerability of the heritage sites against the predatory foes. Flouting the slumbering government machineries, the influential quarter has swooped upon the hapless shrine. Also divested it of its adjacent vacant land by grabbing thereof. The senseless encroachment has reduced the once glittering shrine to a gloomy abode of ghosts. The govern-

ment must act with alacrity to restore the occupied land of the shrine as it has a constitutional obligation to preserve the heritage [Article- 24]. The Apex Court observed that Article 24 though unenforceable bestows upon the government a sacrosanct obligation to protect and preserve the national heritage [Abul Kashem v Bangladesh 64 DLR 286]

Heritage of cities in particular are endangered with impending obliteration due to unplanned urbanization and illegal encroachment upon them. To stave off this ill-designed urbanization the Town Improvement Act 1953 has authored a pragmatic strategy of Master Plan which requires all future construction to be in consonance with the Plan [Section -74]. The first ever Master Plan was prepared in 1959. The latest Master Plan namely Dhaka Metropolitan Development Plan was formulated in 1995. In pursuance of the latest Master Plan, Detailed Area Plan (DAP) has been forged. Para-3.3.13 of this DAP guarantees the preservation and protection of the heritage.

Lately the government has piloted Dhaka Megacity Building (Construction, Development, Preservation and Removal) Rule 2008 of which Rule 61 deals with the preservation of the heritage. The Rule 61 obliges the authority concerned to take some enabling steps such as-

- Making a list of heritage sites
- Non-demolition and alteration of the listed heritage without sanction from
- appropriate authority No development work within the 250
- radius of an antiquity Acquisition of the heritage sites for public purpose if necessary

Declaration of protected heritage.

The vast realm of the statutory laws of Bangladesh contains single enactment namely the Antiquities Act 1968 to deal with the preservation and protection of Antiquity. Section 2(c) of the Act defines antiquity which includes any ancient site of historical, ethnographical, anthropological or military or scientific interest. The Act has envisioned an Advisory Committee to decide whether any product, object or site is an antiquity [Section-3]. Where any antiquity is found ownerless, the Director shall take steps for the custody, preservation and protection of it [Section-5].

The government may acquire any land containing any antiquity under the Land Acquisition Act 1894 [Section-7]. This power of acquisition extends to the acquisition of any religious site of historical importance [Ismail Faruqui v Union of India AIR

1995]. The government may declare any antiquity to be a protected antiquity [Section -10]. None is entitled to destroy or alter any antiquity in which government has taken any interest [Section- 19]. The Director may take lease or accept a gift or bequest of antiquity and in case of sale of antiquity is entitled to exercise the right of pre-emption with respect to such antiquity [Section - 8 & 9].

The judiciary embittered by the executive's failure in protecting the heritage sites has come forward to safeguard the national heritage against incessant encroachment upon them. The Apex Court is of the opinion that the court cannot remain silent by-stander while the national heritages are being annihilated. Recently the Supreme Court has thwarted the malicious intrusion by construction upon the Lalbagh Fort [Abul Kashem v Bangladesh 64 DLR 286]." In another instance interested quarters backed by political elites were found grabbing the periphery of historic Mahasthangar Monument. The Apex Court directed immediate restoration of the occupied land and protection of the splendid monument [HRPB v Bangladesh, Writ Petition No- 9592 of 2010].

The Supreme Court also resisted the whimsical initiative of the government to build residential palaces upon land earmarked for recreation in derogation of Louis Kahn's plan of national assembly which the court termed part of our national heritage to be protected from distortion.[BAPA v Bangladesh 58 DLR 441]. It is high time that a concerted endeavor shall be made to preserve all the heritage which we ärë lëft with.