LAW OPINION

The Bangladesh ICT trial process in the British Supreme Court SOME OBSERVATIONS

Bangladesh established the ICT to render transitional justice, a judicial process that adopts a special and distinctive approach to justice in unique conditions of a society undergoing transition from its violent past to embrace peaceful future. Each post-conflict society is unique warranting measures tailored to suit its own circumstances.

PROFESSOR M RAFIQUL ISLAM

The British Supreme Court (SC) in *Mueen-Uddin v Secretary of State for the Home Department* decided a libel case on 20 June 2024. Mueen-Uddin, a Bangladeshi, has been living in the UK as a citizen. In 1971, he was a member of Islami Chatra Sangha, the student wing of Jammat-e-Islam that politically and violently opposed the independence of Bangladesh. He was alleged to be the head of a para-militia Al-Badar, responsible for the killings of intellectuals on 14 December 1971 immediately before the liberation of Bangladesh (The New York Times, 3 January 1972). Immediately after its liberation on 16 December 1971, Bangladesh announced on 24 December 1971 that the trials of alleged 1971 war crim inals, both civilians and military, would be held (The New York Times, 27 December 1971). Mueen-Uddin left Bangladesh in December 1971 (SC para 12). The ICT tried him in absentia and convicted, which was not appealed to the Bangladesh Supreme Court. In granting the appeal of Mueen-Uddin, the SC invoked a collateral ground that the ICT trial process that convicted Mueen-Uddin was unfair and inconsistent with 'international standard' (SC para 108).

Bangladesh established the ICT to render transitional justice, a judicial process that adopts a special and distinctive approach to justice in unique conditions of a society undergoing transition from its violent past to embrace peaceful future. Each post-conflict society is unique warranting measures tailored to suit its own circumstances. There are qualitative differences in the legal definition and constituent elements of ordinary crimes like murder, and international law recognised war crimes, crimes of genocide, and crimes against humanity. That 'the accused is innocent until proven guilty' is widely followed in national criminal law dealing with ordinary crimes. Does such a common procedural standard exist in trials of international crimes? Prior to seeking an answer, addressing some pertinent narratives of the SC judgment is in order.

The *International Crimes (Tribunal) Act 1973* of Bangladesh was drafted by world-renowned international criminal law experts who drew heavily from the Nuremberg Charter, judgments, and principles of 1950 to make the Act consistent with then-existing international criminal law standards. That the ICT is not an 'international' tribunal (SC para13) appears to be a misreading as the Act title clearly qualifies the *crimes*, not the *tribunal*, as 'international'. The ICT is domestic and permissible under international criminal law. For an international or hybrid tribunal, the Bangladesh Prime Minister on 27 January 2009 requested, through the UN Coordinator in Dhaka, for the UN help in holding the trial (The Daily Star, Dhaka, 28 January 2009) which did not eventuate due to the strong lobby by Pakistan backed by its allies, the US, France, China, and Muslim and African countries. The polarised UN politics and lobbying tactics of the powerful prioritised impunity over accountability, preventing the UN from supporting the Bangladesh call. What palatable option did Bangladesh have to end impunity and restore justice other than to go ahead all by itself?

The SC mentions Article 47A of the Bangladesh Constitution as barring any challenge against the ICT proceedings (para 13). Such statutory protection to the law establishing special international crimes tribunals is common. Examples include—Nuremberg Charter (Arts 3, 26-29), ICTY (Art 23), ICTR (Art 22), Special Court of Sierra Leone (SCSL) (Art 10), Regulation of the East Timor Panels (Art 17), Law of the Cambodian ECCC (Art 40new). International crimes and their perpetrators are precluded from the scope of any statutory relief, amnesty, and limitation available to the ordinary citizens, because no derogation from the *jus cogens* prohibition of these crimes is permissible.

The ICT trial of Mueen-Uddin happened in absentia as he opted not to appear for fear of conviction. The Bangladesh criminal law and the 1973 Act permit trials in absentia. Trials in absentia are not necessarily tantamount to a denial of procedural due process. The ICCPR Human Rights Committee (General Comment 13) and ECHR conditionally permits trial in absentia. The Nuremberg Tribunal, Special Tribunal for Lebanon (STL), Cambodian ECCC Internal Rules 80(4) provide for the continuation of trials in the absence of an accused refusing or failing to be present at his/her trial. The ICTY Rule 80B and SCSL Rule 60A allow trials in absentia when the right to be present is waived by being 'at large and refuses to appear'. The ICTR ruled that an accused might waive his/her right to be present, which does not prevent the case from proceeding in his/her absence (*Jean-Bosco Barayagwiza*, ICTR-97-19-T, Defence Motion to Withdraw, 2 November 2000, para 6). The ICC allows its pretrial in absentia when the accused waives his/her right to be present or has fled or cannot be found after reasonable steps (Art 61(2)). The ICT held the trial in absentia after providing repeated opportunities for Mueen-Uddin to appear in the trial. Not knowing his UK contact address, the ICT had to opt for public notification through media. By not availing the opportunity to be present in the trial, he voluntarily decided not to exercise his right to be present.

'If the [ICT] conviction [of Mueen-Uddin] was the result of an unfair process, then no weight can be attached to it' (SC para 108). This is because 'the ICT rules of procedure failed to bring the law and rules into compliance with international standards' (SC para 17(1), also 21-22). Despite the existence of some past and present *ad hoc* international crimes tribunals' decisions, a consistent body of standardised procedural rules and due process to be followed in all such trials is yet to be developed. This is because each extraordinary crimes trial is different, unique, and case-specific, established sporadically as a *post-facto* pursuit of justice on one-off basis. The statutes of these trials are tailored prospectively to apply retrospectively in their respective fact situation and one statute is not necessarily worthy of adoption in another due to their dealing with dissimilar facts. This special regime of ad hoc international crimes trial procedure has received no consideration in the SC judgment.

The Nuremberg proceedings were widely regarded as procedurally inadequate. Its due process prejudged guilt with limited procedural rules for the accused. Its Charter Article 19 mandated the tribunal to follow an *expeditious and non-technical procedure, not to be bound by technical rules of evidence, and to 'admit any evidence which it deems to have the probative value'*. The prosecution introduced *ex parte* affidavits against the accused regardless of legitimate objections. The US, UK, France, and Soviet Union drafted the Charter under the London Agreement 1945, created the tribunal, appointed tribunal judges (one from each), and controlled its operation. The tribunal jurisdiction extended only to the trials of those who were from the Axis states to the exclusion of alleged war criminals from the Allied Powers. Notwithstanding these procedural inadequacies, the UN Nuremberg principles derived from the judgment constitute the guiding principles of international crimes trials.

Lessons from contemporary international crimes trials suggest no common procedural standard to be followed as they are tailored to suit the specific circumstances of a given trial and it is an evolving process. Commencing in 1993-1994, ICTY and ICTR (closed in 2015) developed, and is still developing their trial procedural rules (Rule 73bis A, B, C, D, E). Their trial processes do not allow victims' participation in the proceeding unlike the 2007 Cambodian ECCC Internal Rules 23. There is nothing in the law that prevents the ICT to develop its own procedural rules and standard as the need arises in course of conducting the trials. If other *ad hoc* international crimes tribunals can develop their procedural rules to cater for varying needs of their trials, so can the ICT. The claim that there exists a uniform international procedural standard in *ad hoc* international crimes trials that the ICT has failed in convicting Mueen-Uddin does not appear to be borne out by the fact and experience of similar trials in contemporary history.

Due process is an important 'means' of ensuring fair trial but not an 'end' in itself. Its standard is not self-defining, nor does it possess any intrinsic value independent of the trial to which it relates. Being a 'means' of fair trial, due process, however passionately stressed, must be understood to facilitate, not to evade or hinder, the 'end' of justice, particularly in trials of international crimes. If justice to the victims is compromised, whose interest does the procedural standard plead for? Illustrative of such miscarriage of justice is the trial of Ieng Sary, who played an important leadership role as the Khmer Rouge foreign minister and standing committee member. The chronic procrastinating trial process prevented the Cambodian ECCC to complete investigation and commence trial before his death in 2013 after over seven years of preparation for his trial. Since his charges were dropped by death, he died as 'innocent'. But the complex trial process preceding his death perpetually deprived his victims of the right to justice. Indeed, the procedural due process should not be the monopoly of the accused; the victims too are entitled to it.

Pertinently, the UK SC itself did not consider (a) the ICT procedural rules, (b) the ICT proceedings followed in the Mueen-Uddin case, and (c) any available positive views on the ICT process. Instead, the SC cited some negative opinions and assertions by individuals, NGOs, and UN body, which suffer from questionable neutrality, credibility crisis, and partisanism. These entities are not judicial bodies, nor are their statements judicial precedents or judicially endorsed record of facts worthy of adoption as admissible evidence. It is difficult to fathom how these subjective statements without testing their probative value can constitute objective evidence in a court of law.

Critics of the ICT process, with their Anglo-American legal background, purport to contemplate their 'procedural standard' as an impartial due process valid worldwide. The portrayal of the ICT trial process as incapable of delivering fair trial for want of compliance with the so-called 'international standard' is grossly exaggerated by an orientalist superiority complex that hails a preconceived trial standard as universal to be followed by all national trials. These views mirror the geopolitical history of international law overwhelmingly dominated by Eurocentrism within which this 'international standard' operates, encapsulating European imperial values, ideals, narratives, vocabularies, and perspectives as its foundation, superimposed by colonial patronage.

If the alleged procedural inadequacies undermine the validity of the ICT process and conviction, then the validity of all *ad hoc* international and hybrid tribunals from Nuremberg to Cambodia is open to question for their respective procedural limitations and failings. The history of their diverse trial processes rebuts any assertion that procedural inadequacy justifies nullifying or circumventing the trial and conviction for falling short of the supposed 'international standard'.

Grave atrocity crimes are committed predominantly in non-western countries, which do not contemplate the Eurocentric trial process as appropriate to administer justice due to their dissimilar legal values, traditions, and expectations. It is naïve to think that non-western countries would blanketly apply the Eurocentric trial process despite its inconsistency with the local needs and uniqueness, which is precisely reflected in the ICT trial process.

The writer is Emeritus Professor of Law, Macquarie University, Sydney, Australia.

LAW LETTER

Legal implications of prenatal injuries

Prenatal injury refers to such injury that occurs before birth while the fetus develops inside the womb of a mother. Previously, there was a trend of considering an unborn child part of the mother and it was only the mother who could claim compensation for injuries caused to a fetus. Over time, many jurisdictions have crafted scopes for both tortious and criminal liabilities to be claimed by a child for prenatal injuries.

Bonbrest v *Kotz* (1946) is an early decision in this context in the USA. In this case, the district cour of Columbia, recognised the standing of a child to bring forth a lawsuit for injuries sustained thereby while in the womb. The *Bonbrest* judgement was later relied on in several other cases.

The UK provides a valuable example of providing legal protection to an unborn child through the enactment of the Congenital Disabilities (civil liability) Act 1976. This Act allows for actions not only on the grounds of injury sustained by an unborn child but also on grounds of an occurrence which potentially affected either parent of the child to have a healthy child. Tortious liabilities on the ground of prenatal injury have also evolved to some extent in our neighboring country, India.

According to section 316 of the Penal Code 1860, whoever causes death of a quick unborn child shall be punished with imprisonment which may extend to 10 years and/or shall be liable to fine. The circumstances of causing such death ought to be such that would otherwise constitute the offence of culpable homicide. Thus, our country provides for criminal liability in case of the death of an unborn child. However, tortious liabilities for injuries to an unborn child still remain an underdeveloped issue here. As a result, cases related to prenatal injuries are rather non-existent in our country. Indeed, prenatal injuries are yet another under addressed area that remind us of the state of tort law within the legal system of Bangladesh and why it requires our attention.

Umme Habiba
Law student,
University of Chittagong.