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## **International Crimes Tribunals, Bangladesh**

The People's Republic of Bangladesh, formerly East Pakistan, emerged out of a bloody nine-month war of secession from the Federation of Pakistan in December 1971. Shortly after Pakistan's surrender, the provisional President, Mujibur Rahman, proposed two sets of trials: one to deal with local collaborators with the Pakistani authorities, and the other to deal with Pakistanis accused of committing major crimes during the war. The current International Crimes Tribunals, which have been hearing the cases of Bangladeshi citizens accused of involvement with international crimes during the 1971 war, are the completion of this project.

### **First steps: trying collaborators and war criminals**

On 24 January 1972, Rahman issued a Presidential Order, backdated to 26 March 1971, entitled 'Bangladesh Collaborators (Special Tribunals) Order 1972', which established seventy-three 'special tribunals' to try local collaborators. Apparently inspired by the Nuremberg Charter, this Order made explicit reference to crimes against humanity and the crime of 'waging war', as well as to the accused's liability as either an individual or as a member of an organisation. At one of the first 'collaborator' trials in June 1972, Chikon Ali was charged with enlisting in the Razakars, a local anti-independence paramilitary force formed by the Pakistan Army, as well as with murder, looting, arson and rape, and was sentenced to death. At a later trial in November, Abdul Motaleb Malik, the former civilian Governor of East Pakistan, was charged with waging war against Bangladesh, collaborating with the Pakistan Army and 'creating hatred and disaffection', and was sentenced to 'transportation for life' (life imprisonment). In 1972 alone, some forty thousand people were investigated for collaboration, around twenty thousand were charged and taken into custody, but less than a thousand people were convicted (Sellars, p. 22). In December 1973, Rahman announced an amnesty for those accused solely of collaboration, and many thousands of detainees were released. The Collaborators Order was repealed in December 1975.

In the meantime, plans were afoot to try 195 Pakistani prisoners of war accused of war crimes and detained in India. A tribunal charter was drawn up, entitled 'War Crimes Tribunal Order, 1972' (Sellars, p. 20). Following the Nuremberg template, draft Article 10 covered crimes against peace, war crimes, crimes against humanity and 'common plan or conspiracy', while other draft articles denied state immunity and superior orders as defences, encompassed organisations as well as individuals, and allowed for trials *in absentia* and the death penalty. Dhaka thus moved towards what one British official dubbed the 'Asian Nuremberg' (Sellars, p. 20).

The next step took place on 20 July 1973, when the Bangladesh Parliament passed the 'International Crimes (Tribunals) Act, 1973' (or 1973 Act) to provide the legal framework for the proceedings. This Act also bore the hallmarks of Nuremberg, covering crimes against peace, war crimes and crimes against humanity (as well as genocide and the all-embracing

‘any other crimes under international law’). But the tribunal was not established. After Pakistan offered the inducement of its recognition of Bangladesh, and the threat of retaliatory trials against Bangladeshis in its territory, Bangladesh agreed to the repatriation of the 195 suspects back to Pakistan, under the terms of the April 1974 Simla Agreement between Bangladesh, Pakistan and India.

### **The trial plan revived**

Thirty-five years later, the Awami League campaigned on and won the December 2008 election on the promise of trying prominent Bangladeshis implicated in the 1971 bloodbath (the Pakistani perpetrators still remained beyond reach). Once in power, the new Parliament amended the 1973 Act to allow for the prosecution of civilians as well as members of armed forces, and to enable both the convicted and the government to appeal sentences. On 25 March 2010, it established the first three-member International Crimes Tribunal, or ICT-1. The following August, the first four suspects — all leading figures in the Islamist opposition party, Jamaat-e-Islami — were arrested for crimes against humanity and genocide. With more cases in the works, the government established a second Tribunal, ICT-2, on 22 March 2012. Both tribunals are domestic courts, set up under domestic law, to try international crimes.

### **Elements of crimes and modes of liability**

All of the defendants have been charged with either crimes against humanity or genocide or both. The first charges were laid in November 2011 against Delwar Hossein Sayedee, a leader of the local Razakars, for crimes committed in in Pirozpur sub-division — namely, genocide against the Hindu population, and crimes against humanity. The first judgment was handed down in January 2013 on Abul Kalam Azad, another Razakar leader, for crimes committed in Faridpur — namely, genocide against the Hindu population, and crimes against humanity (he was tried and sentenced to death *in absentia*). The first death sentence was carried out on 12 December 2013 against Abdul Quader Molla, an organiser of the paramilitary auxiliary force Al-Badr, for complicity in and the commission of crimes against humanity in the Mirpur area of Dhaka. Defence lawyers argue that in some cases, the tribunals have departed from international criminal law jurisprudence in their articulation of the elements of crimes against humanity (Razzaq, pp. 352-353).

The prosecutors and judges have relied various modes of liability derived primarily from international criminal law, including joint criminal enterprise, superior responsibility, conspiracy, abetment, complicity and incitement (Islam, pp. 308-312). Although the doctrine of joint criminal enterprise is not referred to in the 1973 Act, it has been extrapolated from Section 4(1) on ‘common plan of collective criminality’. In the case of Ali Ahsan Muhammad Mujahid, for example, the Tribunal held that members of Al-Badr were involved in a joint criminal enterprise to ‘cripple the Bengali nation’ by killing members of the intelligentsia at Rayerbazar and Mirpur in December 1971. The doctrine of superior responsibility has also been invoked against civilian and military leaders: in the case of Ghulam Azam, for example, the Tribunal, which addressed the issue in detail, stating that superiors have a duty to respect international humanitarian law and repress breaches, and that ‘failure to do so can be interpreted as acquiescence in the unlawful acts of their subordinates, thereby encouraging further breaches and developing a culture of impunity’.

## **Fair trial issues**

The rights of those accused of 1973 Act crimes are circumscribed by the Constitution of Bangladesh. Article 47(3) of the first amendment to the Constitution, dated 15 July 1973, insists that no law authorising proceedings against those accused of international crimes can be voided or declared unlawful on constitutional grounds. And Article 47A denies the accused the usual constitutional rights accorded other Bangladeshi citizens — namely, the right to the protection of the law; safeguards against retroactive enactments and punishments; the right to speedy and public trial by an impartial court; and the enforcement of fundamental rights. Other issues arise from the 1973 Act and the amendments to it. Under the Act, a witness ‘shall not be excused from answering any question put to him on the ground that the answer to such question will criminate’ them, and that a tribunal ‘shall not be bound by technical rules of evidence’; provisions that have given grounds for concern. So too the amendment to the 1973 Act, introduced in 2013 but backdated to 14 July 2009, which allows for the punishment of organisations under Section 3, thus sweeping anti-independence political parties into the prosecutorial net. That said, some of these issues are addressed by the amendments to the ICT-1 Rules of Procedure (28 June 2011), and the 2012 ICT-2 Rules of Procedure (29 March 2015), which uphold the presumption of innocence, protections against double jeopardy and compulsion to confess, and the rights to being heard and to a fair, public and expeditious hearing.

Even so, the trials have been tainted by irregularities. The defence witness Shukhoranjan Bali vanished from the courthouse steps and reappeared months later in Kolkata, India, claiming abduction by the Bangladesh police. Skype calls leaked to *The Economist* revealed that Justice Nizamul Huq had been offered inducements for winding up cases by 2012, and that Ahmed Ziauddin, the Director of the Bangladesh Centre for Genocide Studies in Brussels, was involved in the drafting of a judgment. Lawyers unsuccessfully sought the recusal of the same Justice Huq for having taken part in an earlier commission investigating war crimes allegations against one of the defendants. As an indication of the highly charged nature of the proceedings, a journalist, David Bergman, was fined for contempt of court for, among other things, questioning its claims that three million people had died in the 1971 war of independence.

## **Conclusion**

The supporters of the trials in Bangladesh have argued that delayed justice is better than no justice at all, and that while the trials are not perfect, they are at least bring some of the worst perpetrators of crimes to book. This process, they say, can only contribute to the healing of some of the wounds of the past. The critics of the trials have pointed out that the legal process is unduly politicised, and that the Awami League may be motivated, among other things, by its desire to silence its conservative Islamist political opponents. International observers, meanwhile, have commended the trials in principle while condemning them in practice, focussing on the inadequate protection of the rights of the accused.

## **KEY WORDS**

Bangladesh, Pakistan, War of Independence 1971, Mujibur Rahman, International Crimes Tribunal, Nuremberg Tribunal, Collaborators Trials

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