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**An informal reflection on truth and justice in Bangladesh**

Patrick Burgess, Asia Director  
International Center for Transitional Justice.

**Introductory note**

As I was invited to attend the conference but was unable to do so due to other commitments the organizers requested that I make a contribution in writing to the discussions which will take place in Dhaka. I understand that the conference will also be open to on-line participation and I intend to follow it closely. Below are some of the thoughts which I have put together at short notice, which are limited to some comments on transitional justice and prosecutions and a brief general outline of the role of Truth and Reconciliation Commissions. I hope that some of you find them helpful.

**Transitional justice in the Bangladesh context.**

I was very surprised when I was invited to speak at a workshop in Dhaka several months ago, and several participants voiced the opinion that “Bangladesh does not need transitional justice, as justice should not be watered down to a softer approach.” I was surprised because these comments reflected a clear misunderstanding of what transitional justice actually refers to.

When we use the term transitional justice, or TJ, we are referring to the approach that needs to be taken to deal with a past history of mass human rights violations. This approach can include many different tools but we find it most useful to concentrate on four major mechanisms. These are the *prosecution* of those responsible, *uncovering the full truth* of what happened so we can learn why and how it took place and determine what needs to be done to avoid recurrence, assisting the *rehabilitation of innocent victims*, and *reforming security sector institutions* such as the police and army, which often have played a central role, so that those responsible do not maintain positions of authority and steps are taken to avoid recurrence.

So transitional justice is in no way a replacement for justice, for prosecution of those responsible, but includes this as a central pillar of the approach. However, the transitional justice model does include a belief that prosecutions alone will not be sufficient if we wish to heal the wounds of the past. We also need to uncover the complete truth, to stimulate public debate and awareness focused on the past, to do what is possible to recognize the suffering of victims and attempt to rehabilitate them both morally and physically, and to reform institutions. Thus it makes sense for us to speak of transitional justice as a holistic approach.

**The challenge of conducting prosecutions in Bangladesh**

After almost 40 years the elected government of Bangladesh has taken the decision to conduct trials with the bringing those responsible for the terrible crimes committed during the period surrounding the birth of the nation in 1971. Such an approach is in line with recent advances in the fight against impunity which we can now observe in many countries around the world. Decades after horrendous crimes have been committed those responsible, who have long thought of themselves as protected and safe, are being brought before courts to

account for their crimes. The message is clear. Leaders who commit or are complicit in the commission of mass violations can no longer sleep soundly believing they are above the law. Around the globe we are seeing old men being brought to account for the crimes they committed as young men, with even past and present Heads of State no longer immune from the reaches of international law. We see it in the current UN sponsored hybrid court in Cambodia where the leaders of the Khmer Rouge are currently on trial. We see it in the Sierra Leone tribunal where Charles Taylor stands accused, and in the recent conviction of former President Fujimori of Peru. In Argentina and Chile amnesty laws which were passed to protect abusive regimes were later set aside, opening the door for the prosecution of those such as former President Pinochet. The International Criminal Court has now taken the unprecedented step of issuing an arrest warrant for a sitting Head of State, President Bashir of Sudan, on charges related to the continuing violations in Darfur.

In taking steps to bring those responsible for mass atrocities to trial the government of Bangladesh is joining with these recent developments, and acting in fulfillment its international legal obligations. However, it is easy to declare these obligations to be binding and to support progress towards accountability. It is much more difficult to ensure that investigations and indictments are conducted professionally, objectively and impartially, and that any subsequent trials are conducted in accordance with international standards. If this does not take place then the goals of national healing and reconciliation may be severely undermined. In a number of other national contexts, such as Cambodia, Sierra Leone and Timor Leste, a choice has been made to ensure a certain level of perceived and actual objectivity through establishment a 'hybrid' tribunal model which includes both international and national judges and prosecutors. Bangladesh has chosen to conduct the trials in a purely national model, which of course is its right. However, this increases the pressure to ensure that the process is a credible one, and that justice is not only done, but seen to be done.

#### **Decay of evidence**

Investigating and prosecuting offences which took place 38 years ago will bring many challenges. Among these are the fact that evidence decays. This is true for both physical and forensic evidence, and for that which exists as the memories of witnesses. In some cases the evidence may be sufficiently preserved and the memories clear and strong. In others there will be no hope of recovering vital forensic materials, and recollections may be blurred by the passage of time. Gathering sufficiently strong evidence to support solid prosecutions will be a major challenge in the Bangladesh context. It will require a major program of reaching out to the community and searching for information and materials which may have at some time been in one place but which has been scattered or destroyed in the intervening decades.

#### **The legal complexity of mass crimes**

Another challenge will be the necessity for investigators, prosecutors, defense counsel and judges to deal with highly complex and unfamiliar legal concepts and principles. National criminal justice systems are designed for situations in which there is general peace and security, and serious crimes are committed as an exception. The opposite is true when a country faces a situation of war or mass atrocities. In the Bangladesh context it is estimated that not only thousands but millions of victims were killed, hundreds of thousands raped and tortured. To take just one example, consider the role of commanders and command responsibility in these events. In normal domestic crimes it is the actor him or herself who usually centrally implicated, although there are other situations in which members of a group conspiracy will all be liable, others may commit crimes by aiding and abetting etc. In situations of mass violations it is very different as it is the commanders, not the direct actors, who bear greatest responsibility. In such a context, international law recognizes that a commander may commit a crime by failing to take effective steps to prevent or punish those under his control who are involved in serious crimes, even if he gave no specific orders. Such a degree of criminal responsibility for *omission*, i.e. for not doing something rather than

*commission*, is logical and necessary in contexts of mass crimes but is not present in the same way in most national legal systems.

The issue of command responsibility is only cited here to provide one example from a myriad of specialized issues which arise in situations of mass violations and which are far beyond the general comments included in this paper. The legal principles which apply to such contexts according to international law are highly complex but fortunately have been significantly developed during the period of rapid advancement of international criminal law since the 1990's. The Rome Statute of the International Court has clarified many of the elements of international crimes as we understand them today, as have the decisions of UN mandated international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR,) as well as a number of 'hybrid tribunals.' Those who are involved in the Bangladesh investigations and prosecutions could greatly benefit from the lessons learned through the experiences of the international community in dealing with other examples where those responsible for the commission of mass violations have been investigated and prosecuted.

### **Sexual violations**

Unfortunately, conflicts inevitably involve the brutal targeting of classes of victims which have no direct role, in particular women who become victims of sexual violations. The estimations of the number of such victims during the Bangladesh conflict are astounding, and the weight of these allegations demands that this class of crimes is included a core element of the prosecution strategy. Innocent women victims should not have their suffering compounded through denial or indifference to their experience. And yet how can this be achieved without further traumatizing these victims? Will they be willing to come forward to provide the necessary evidence for prosecution, recognizing that society often punishes such victims, labeling and stigmatizing them even though they have done nothing at all wrong and are deserving of our assistance and sympathy rather than negative judgments.

This issue of shame, of stigma, or reluctance of victims to come forward, is present in every situation in which there are efforts to achieve justice after conflicts, for in almost every conflict there is mass rape and in every culture there is prejudice against victims of rape. Whether I am working in Nepal, Timor Leste, Indonesia, Afghanistan or other Asian contexts, in each situation I am consistently told that the degree of shame, stigma and difficulties is greater than in any other context. I am sure this is also the case for Bangladesh, and in a sense all of these views are correct. The issues are so localized, so complex, so daunting, that they seem insurmountable. And yet we must face them if justice is to be done, if the victims are to be offered a chance to redeem their honor, and perpetrators are to be appropriately punished. Otherwise a clear message is given that this class of crime is OK, there will be no accountability for it, in the past or the future. Once again, valuable lessons have been learned in the international courts during the past fifteen years in relation to how sexual crimes can be effectively prosecuted whilst protecting the identities, emotions and reputations of victims as far as possible. Much care needs to be taken at all stages of the process, from the initial approach and contact with victims, through the investigation and prosecution, and this should involve specialists who are skilled and experienced in dealing with victims of sexual violations. The procedures themselves need to be designed to protect the victims from unwarranted trauma whilst at the same time fully recognizing the rights of the accused person to a fair trial. Specialized victim support units with personnel specifically tasked to deal with sexual offences have been established in some jurisdictions to deal with these issues.

### **The limitations of the trial process.**

Prosecution of those responsible for mass violations is fundamentally important for the national identity of countries which have experienced widespread conflict, and is a necessary part of their transition. The fact that this issue is being actively pursued in Bangladesh so long after the crimes were committed is clear evidence of its importance to the national feeling of identity, pride and justice. Prosecutions can help to satisfy the deep hunger for justice felt by

the population although they will never in fact be able to meet this. Public shaming and punishment of those responsible will provide a deterrent to those who may become involved in similar future events. It is also essential if a population is to regain their confidence in the judicial system and the rule of law. Prosecution following mass violence will often be blocked by those who remain powerful but were either involved in the crimes themselves or have an incentive to protect others who are implicated. However, even when such blocks are overcome and prosecutions are successfully conducted they will not answer all of the demands of victims and society. This is why the transitional justice model includes other major mechanisms in a holistic approach. I have been alarmed to hear some commentators in Bangladesh voice an opinion that the trials will be a platform for participation by a wide range of victims, that they will provide a national public catharsis and bring forward the truth of the real story behind what happened in Bangladesh before, during and after the violations in 1971. In fact it is unlikely that the trials will achieve many of these broader goals, which are similar to those often cited as the work of truth seeking mechanisms such as a TRC. It will be very important during the process of investigation and prosecution to manage expectations about what can in fact be achieved. Some of the general limitations of prosecutions include the following.

A case brought to court will require substantial resources including investigators, prosecutors, defense counsel, judicial officers, court administrators, witnesses, victims and others involved in the facts of the case. However, the nature of prosecutions is that only evidence which is directly relevant to one of the elements of a particular crime committed may be admitted in the court. This means that the facts which emerge during a trial will present only a relatively small part of the entire picture of what has taken place. The historical background, causes, contributing socio-economic, political, security or other factors will not necessarily be directly relevant to the crime the individual is charged with. Nor will the actions of other persons who are not charged with that particular crime be allowed to be discussed or questioned unless relevant to the charges. Prosecutions will only provide a relatively small segment of the 'big picture' of what has taken place in situations of mass violations.

Victims and witnesses only have limited roles in court cases. Victims will often give evidence but this will be limited to exactly what they experienced. They may not have an opportunity to express their feelings, how the violations affected them and their families, because this information does not assist in directly proving whether a perpetrator committed the particular crime against the victim, which is the only issue which the court can consider and allow evidence to be admitted on when determining guilt. Likewise whether there were other victims who suffered similar fates may be irrelevant and only a small percentage of cases will eventuate in court hearings.

Courtrooms have only limited potential to transfer knowledge to the general public. Although courts are open to the public only a relatively small number of observers attend. Those who have the opportunity to observe must travel to the courtroom itself and information concerning the wider account of what has taken place will often make up only a small proportion of evidence and legal argument in the courtroom. If the court proceedings are directly televised or covered by radio broadcast the information will have a much broader reach. However, the fact that much of what takes place in the courtroom is of a technical nature and that it may not be electronically shared will limit the interest and access of the general population.

### **Truth Seeking: the role of Truth and Reconciliation Commissions**

During my previous visit to Dhaka I received many questions about how an accurate and complete account of what took place in Bangladesh, with lessons learned from the experience, could be achieved. This is a large topic, which includes consideration of a range of non-formal and formal mechanisms. Many non-formal steps have already been taken in Bangladesh, such as the documentation programs of non-government organizations and the various commissions and reports which have been completed. In order to answer the question

of how a broad, accurate picture of what had happened could be established, in the following section I will provide a brief account of some of the important core aspects of a truth and reconciliation commission.

Unlike the courts 'Truth and Reconciliation Commissions' are not limited to accepting evidence which is relevant to a particular case. However, also unlike courts, TRC's will not be able to take any direct action against any individual who is found to have committed a crime. The TRC will usually be given a mandate which allows it to gather all available information, to take statements, undertake research, and hold public hearings. This will enable a Commission to make findings about not only particular cases but also the 'big picture' of what has occurred. In many situations where massacres, disappearances, rape and torture have been common there is such secrecy and denial that in fact no-one knows exactly what has occurred across the entire nation. Patterns, background, causes and broad impacts cannot be known unless information from the entire territory is systematically gathered and analyzed.

### **Characteristics of a truth commission**

The majority of TRC's have been established by the respective national governments. One, in El Salvador, was entirely funded and staffed by the United Nations. Others, such as Sierra Leone included a mixture of both international and national Commissioners and staff. Many of the most recent commissions have been funded through assistance from the United Nations and donor governments who believe that a truth commission will assist the maintenance of peace and national development.

Each commission has had a different mandate, depending on the context. However, some of the broad, common characteristics include the following:

**Commissioners:** The Commissioners will be responsible for fulfilling the legal duties of the commission, ensuring that it is objective, and making conclusions and recommendations based on the information gathered. It is essential that those who are chosen have a reputation as moral, objective leaders who have through their work demonstrated a strong commitment to the principles of human rights.

A truth commission is not a political committee in which different factions negotiate to try to get a result which is most beneficial for those they represent. It is a body whose function should be above political issues, and which should not be affected by such complications. For these reasons representatives of political factions or organizations who were involved in the historical events may be disqualified from being chosen. In a number of truth commissions, including South Africa, Peru and Timor Leste, the Commissioners were chosen by a committee composed of experts who conducted a highly public and transparent selection process. For example, in South Africa the interviews of each candidate were covered by national television.

**Mandate:** Some commissions have received a mandate to inquire into all human rights violations. Others have been limited to 'serious violations' such as killings, disappearances and torture. It is important that the mandate include sufficient breadth to cover the background, causes, contributing events and impact of the violations. Deciding on the relevant time period is a difficult challenge as in many cases there will be various periods which should be examined. A balance must be achieved in which the most important time frame is included, but the period is not so broad as to make it impossible for a thorough or deep investigation to be made.

**Truth Seeking:** Most commissions are given the duty to interview and take statements from victims, witnesses, perpetrators and others with relevant information. They also have the authority to examine documents, films, photos etc from sources which are both domestic and international. The statement-taking and research undertaken will be used to gather information on which the Commissioners base their findings and conclusions and recommendations.

The truth seeking exercise is a complex one as its purpose is to gather a massive amount of information, in an objective manner, and then somehow distil tens of thousands of pages of such information into a report which explains the background and causes of the violations, describes how they took place, their impact and what can be done to prevent recurrence. Research will include targeted interviews of key players, gathering documents, films, photos etc, searching overseas for reports, witnesses, etc which may also include participation of foreign actors. Statement taking involves designing a format and data-base which will enable the Commission to gather many thousands of personal accounts together. If the forms are designed properly and those who take the statements well trained the information which is subsequently entered into the computerized data base will be able to be combined, providing a very powerful tool. For example, it will enable the Commission to report on how many total cases of killing, rape, torture etc were reported to the TRC, in what percentage of cases were perpetrators identified as belonging to a particular group, in what areas and time periods the violations were committed, the approximate age and sex of the victims and perpetrators etc etc

**Final Report:** One of the major goals of each TRC is to produce an objective report. In many transitional contexts there are widely differing accounts concerning what has taken place, which is a hindrance to settling the past and focusing on building a national identity.

Although each report is different it may include

- an accounting for the work of the commission,
- an explanation of the mandate
- a summary of the historical background to the conflict
- findings in relation to particularly significant issues or cases
- findings in relation to patterns of violations
- findings in relation to particular aspects of the conflict. For example, in Sierra Leone a particularity of the conflict were the influence of the trade in diamonds and the practice of cutting off the hands of victims
- findings on institutional responsibility for violations. This may included government agencies, the military, police, judiciary, international agencies, foreign governments, international corporations etc.
- findings on individual responsibility for violations
- findings in relation to the identity of and impact on victims
- recommendations on steps which should be taken to address the past. These may include legal and institutional reform, prosecutions, compensation and/or restitution, building of monuments, maintenance of historical archives etc

**Exhumations:** A number of commissions have been given powers to exhume bodies, particularly where there are allegations of massacres and disappearances. Exhumation can be both an investigative tool and as a means of providing closure which allows victims the opportunity to respect and bury their dead in accordance with their cultural and religious beliefs.

**Public Hearings:** One of the primary goals of truth and reconciliation commissions is to inform the public of what has taken place, and assist a national healing and reconciliation. Commissions such as those in Peru and South Africa held many months of national public hearings which were covered by television and radio, and became the focus of national attention and debate. Proponents believe that this national interest and discussion is highly beneficial to settling old issues and coming to terms with a problematic past. Without a public presentation of the truth painful issues continue to live and do harm beneath the surface and within the national psyche. Public hearings may be held in the national and regional capitals, and also in smaller centers and villages which have been directly affected.