

OVERVIEW OF OPTIONS FOR DEALING WITH THE PAST IN BANGLADESH
2nd International Conference on Genocide, Truth and Justice, 2009
Liberation War Museum, Dhaka Bangladesh

Associate Professor Suzannah Linton
Director, LLM Programme in Human Rights
The University of Hong Kong

OPTION	HAS IT BEEN USED IN BANGLADESH? EXAMPLES OF USE ELSEWHERE	ADVANTAGES/POTENTIAL	PROBLEMS/LIMITATIONS
PRELIMINARY COMMISSIONS OF INQUIRY		1. Information is acquired which can inform the public debate and aid proper development of policies, strategies and design of mechanisms. 2. Possible role for national human rights commissions (depends on mandate). .	1. Sometimes the reports are kept confidential because the State does not like the result. 2. Can sometimes be used as a whitewash.
Domestic commission of inquiry	1. Justice Hamdoor Rahman Report 2. 1972 Genocide Investigation Commission 3. Could there be a role for the Human Rights Commission? Judicial commission	1. These were conducted close to the events, and so the evidence was 'fresh'. 2. They were – presumably – able to interview some of those directly engaged who have now passed away and can no longer provide direct evidence.	1. There could be objectivity and impartiality issues, although Justice Hamdoor Rahman's report seems genuine and comprehensive. 2. Did the makers have expertise in international criminal law? 3. Lack of publicizing of these reports adds to the lack of transparency and uncertainty, conspiracy theories etc, which are unhelpful.
International commission of inquiry (experts appointed by the United Nations)	No But see the Report of the Group of Experts for Cambodia, International Commission of	1. Impartial expertise from external specialists. 2. Can provide essential and informed policy advice to the government and the international	1. Must ensure impartiality and expertise. Experts should not be pushing vested interests. 2. Possible lack of cooperation if the mechanism is imposed by the international community.

	<p>Inquiry on East Timor and the Report of the International Commission of Inquiry on Darfur.</p>	<p>community. 3. Essential to form an overview of what happened, what the current situation is and what is actually possible in the circumstances of Bangladesh. 4. The big picture is essential for the development of a coherent and comprehensive strategy for dealing with the past. 5. May be able to obtain materials from Pakistan. What to do about Pakistan is a critical issue that cannot be ignored - this was not just about Bangladeshis against Bangladeshis. 6. International involvement may make it more likely that the government will heed the advice given.</p>	<p>3. Government may ignore advice.</p>
<p>ACCOUNTABILITY MECHANISMS</p>		<p>1. This meets obligations in international law to investigate, prosecute and punish certain crimes. Also, it addresses the victim's right to an effective remedy in international human rights law. 2. Assertion of Rule of Law in relation to the past is critical in the reconstruction or recalibration of a nation, especially one that is facing problems with Rule of Law in the present. 3. Apart from accountability in individual cases, they provide a window of opportunity for wider social repair.</p>	<p>1. Evidence shows the impact of these mechanisms has been much exaggerated. 2. Beware of creating unrealistic and unachievable expectations. 3. Accountability mechanisms do not address relevant structural problems or the root causes that led to the extreme violence that was committed in 1971, which may still be latent in Bangladeshi society. 4. The role of an accountability mechanism after a long period of time needs to be carefully considered. Priorities: should one of the poorest countries in the world be taking on this burden, given the extent of the problems around them? 5. These mechanisms are often flawed, especially if done in-country. The impact of an accountability mechanism that is deeply flawed may be worse than doing nothing, for it creates a new round of injustices and wrongs. 6. The entire criminal justice system must be able to work to international standards: investigation, prosecution, defence, trial, appeal, judiciary,</p>

			<p>penitentiaries; there also needs to be an adequate legal framework (including but extending beyond substantive and procedural law into to witness protection and after-care, and also reparations).</p> <p>7. The accountability mechanism may be targeted at just one side, ignoring the criminality of the other side (usually the victorious side) did.</p> <p>8. Witness protection and remedies for victims are always weak points.</p> <p>9. Beware being over-dependant on others. Who is paying for it? If outside support is given, what is the catch, i.e. what is in it for them?</p>
100% domestic court	<p>1. Bangladesh Collaborators (Special Tribunals) Ordinance 1972 (Repealed)</p> <p>2. International Crimes (Tribunals) Act of 1973 (Still in force)</p> <p>See also the Ethiopian Federal High Court in the case of Mengistu Hailemariam et al, and domestic war crimes prosecutions in, <i>inter alia</i>, Canada, Australia, Netherlands and Germany.</p>	<p>1. Bangladeshis dealing with a Bangladeshi situation indicates a State taking steps to meet its international obligations.</p> <p>2. Bangladeshis dealing with a Bangladeshi situation may be more meaningful to the affected population than involving internationals with no understanding of Bangladesh and no commitment to the country and its future. Local ownership.</p>	<p>1. Old law needs revising, significant human rights issues arise with using this legislation in 2009. Need to adapt procedural rules.</p> <p>2. Must NOT use Rome Statute definitions of crimes as they date from 1998. The definition of the crimes must reflect the law as at 1971.</p> <p>3. Need for specialized training in investigating and prosecuting not just historic crimes that are 38 years old, but also exceptionally complex crimes. This is no ordinary law and order task.</p> <p>4. Can there really be fair trial with due process with a 100% Bangladeshi process over such a politically charged matter? How to guarantee that the process is not used as a political ‘witch-hunt’ and to ensure that the accused do get fair trial with due process, and insulate the process from political interference?</p> <p>5. Problems with suspects and evidence in Pakistan. What about suspects in other countries?</p> <p>6. Pardons and the amnesties granted may create problems with domestic law.</p> <p>7.</p>
Internationalised court (domestic court with international participation)	<p>No</p> <p>But see the Extraordinary Chambers in the Courts of Cambodia, Rule 64 Panels in</p>	<p>1. Potential for a higher quality of proceeding, with international involvement.</p> <p>2. Not as expensive as an ad hoc international court.</p>	<p>1. Many problems – see ET, Cambodia.</p> <p>2. UN involvement may require many concessions from Bangladesh in the reform of its criminal justice system.</p> <p>3. Should not be used in a deeply compromised</p>

	Kosovo and the East Timor Special Panel for Serious Crimes.	3. Local involvement increases the ownership.	<p>or dysfunctional domestic court system.</p> <p>4. Can be costly (increases if the underlying system is weak and needs much investment) – would that money not be better spent on other things in Bangladesh?</p> <p>5. Problems with suspects and evidence in Pakistan. What about suspects in other countries?</p> <p>6. Pardons and the amnesties granted may create problems in domestic law.</p> <p>7. Beware exaggeration of claims of ‘capacity building’ that come with such mechanisms.</p>
Ad hoc tribunal or standalone international court	No But see the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the Former Yugoslavia, the Special Tribunal for Lebanon and the Special Court for Sierra Leone.	<p>1. If international crimes were committed, then the recognition of the seriousness by way of a full international accounting is a kind of redress in itself.</p> <p>2. No guarantee that it will work any better than the other judicial options.</p>	<p>1. No international interest. Funding challenges.</p> <p>2. Very costly – would that money not be better spent on other things in Bangladesh?</p> <p>3. Distance and irrelevance to affected community.</p> <p>4. Cultural insensitivity may arise.</p> <p>5. Problems with evidence may still be there.</p>
SOCIAL ENGINEERING/ COMPLEMENTARY MECHANISMS		<p>1. Some societies are so damaged by what has happened that work on social repair/engineering is essential in the attempt to try and repair that damage. But that is not always the case.</p> <p>2. These mechanisms can complement the work of the accountability mechanism.</p>	<p>1. Being treated as a short-term exercise when social engineering and repair is actually a very long process.</p> <p>2. Beware being treated as an experiment or vehicle for other people’s ideas and plans. What is adopted must be suitable for Bangladesh.</p> <p>3. Evidence shows the impact of these mechanisms is greatly exaggerated.</p> <p>4. Beware of creating unrealistic and unachievable expectations. Have to be particularly careful with rhetoric and grandiose promises.</p> <p>5. Beware being over-dependant on others. Who is paying for it? If outside support is given, what is the catch, i.e. what is in it for them?</p> <p>6. Here too there are weaknesses with witness protection, and especially after-care with the possibility of re-traumatisation when the past is relived either through direct participation in the</p>

			process, or through the public processes of the mechanism.
'Truth and Reconciliation Commission'	<p>No</p> <p>But see the various such bodies in South Korea, the Liberian Truth and Reconciliation Commission, Peruvian Truth and Reconciliation Commission and the East Timor Reception Truth and Reconciliation Commission.</p>	<ol style="list-style-type: none"> 1. Can produce the most comprehensive account about the events. Can also use the judicially tested 'truth' that emerged from the trials under the Bangladesh Collaborators (Special Tribunals) Ordinance 1972. 2. Can provide insight into the root causes, structural problems and make informed recommendations. 3. The emphasis on victims shifts the focus into a different type of mechanism, one that may complement the work of a court of law. It may contribute towards social repair. 	<ol style="list-style-type: none"> 1. Beware that this option is very attractive for policy makers trying to get out of a process of accountability. 2. Tendency to indulge in promising results that are unrealistic ("truth will set you free", "truth is the road to reconciliation"etc). 3. Not a legal body but still needs professional staffing and approach. Danger of lack of legitimacy unless there are independent and impartial members, and staff. If that is not possible, there must be balance, i.e. the commission should be representative and not be packed with just one side's people. 4. Beware independence and local ownership: Reliance on internationals can mean that the process is substantially hijacked and the independence or local ownership of the project is impaired. 5. Problems with the quality of the output, given there is general weakness of methodology and poor standards for claiming something as the 'truth'. 6. Big reports that nobody but some interested internationals reads. 7. Lists of recommendations that are irrelevant to ordinary people and no one does anything about. They don't usually have powers to do anything beyond recommend. 8. Focuses on victims but there are serious concerns about the poor handing of victims after-care (retraumatisation etc)
Indigenous/local justice systems	<p>No information.</p> <p>See the traditional practices worked into the 'Community Reconciliation Process' of the East Timor Truth Reception and Reconciliation Commission, and</p>	<ol style="list-style-type: none"> 1. Potential that these may be more meaningful, especially in remote rural communities. 2. Potential that they may work to manage tension and reduce risk of conflict at grassroots level. 3. May help with diffusing social 	<ol style="list-style-type: none"> 1. Beware human rights compatibility especially on sexual violence and gender issues. 2. Beware this being used as a substitute for accountability.

	the ‘gacaca’ courts in Rwanda. Also, see the situation in Northern Uganda where the Acholi people wish to use their traditional dispute settlement practices (eg. Mapo Oput) as opposed to having trials at the International Criminal Court.	tensions over the less serious crimes, and provide an accountability of sorts.	
OTHERS			
Administrative actions (lustration, vetting, systemic changes)	No See Germany, Czech and Slovak Republics, Poland, Hungary	1. If handled properly, can be the fastest way to introduce systemic changes. 2. Can be designed in a way that gives administrators who have not done anything criminal a ‘second chance’ in the new system.	1. Probably not suitable for Bangladesh. Would seem to be more an issue for Pakistan (cf. Justice Hamdoor Rahman Report)
Claims compensation commission	No But see the Iran-US Claims Tribunal, the UN Compensation Commission (1 st Gulf War), the Ethiopia-Eritrea Claims Commission, and the Bosnian Property Claims Commission.	1. Provides a remedy, which can be compensation or restitution of property. 2. Potential to diffuse disputes by resort to Rule of Law.	1. Cost – who is going to pay for the compensation? 2. Complexity (esp for land disputes)
Museums, National Archives and Documentation Centres	Yes Also see the Documentation Centre of Cambodia, Yad Vashem in Israel, US Holocaust Memorial Museum, etc.	1. Preserving the ‘evidence’. 2. Contribution towards building the objective history of the nation. Important role to play in the education of children (school textbooks) in an accurate and responsible way about their true national history. 3. Contribution towards public education. 4. Memorialisation. 5. Symbolic.	1. Objectivity and neutrality issues. Usually those with the motivation to do this will have a particular perspective that colours the work that is done. 2. Symbolism may become offensive if that is all that there is.

Monuments, remembering (can include films, drama, literature, music, art etc.)	Yes	<ol style="list-style-type: none"> 1. Memorialisation, respect for victims. 2. Contribution towards building the objective history of the nation. 3. Contribution towards public education. 4. Symbolic. 	<ol style="list-style-type: none"> 1. Symbolism may become offensive if that is all that there is.
---	-----	--	---