

## **International Tribunals: Lessons Learned**

*(Remarks for the Second International Conference on Genocide, Truth and Justice, Liberation War Museum, July 30, 2009 Dhaka Bangladesh)*

by David Matas

As Bangladesh starts on the work of justice for the crimes of 1971, the international experience merits attention. The international community has created a number of tribunals in recent years to prosecute international crimes, eight in all - the International Criminal Tribunal for the Former Yugoslavia (1993), the International Criminal Tribunal for Rwanda (1994), the International Criminal Court (1998, entry into force 2002), the Special Panels of the Dili District Court in East Timor (2000), the Special Court for Sierra Leone (2000), the Internationalized Courts for Kosovo (2000), the Extraordinary Chambers in the courts of Cambodia (2004), and the Special Tribunal for Lebanon (2007). All of these provide relevant experience in dealing with international crimes.

The development of international justice has waited far too long. The Nuremberg Tribunals established in 1945 were abolished in 1948 with half their dockets unprosecuted, including Kurt Waldheim who later went on to become Secretary General of the United Nations and President of Austria. Moreover, there were many thousands not yet identified, not yet charged who would have been caught by a full blown prosecution effort.

The first of the current set of international tribunals, the International Criminal Tribunal for the Former Yugoslavia was established in 1993. Between 1948 and 1993, for forty five years, there was no tribunal for international justice.

We have lost forty five years in establishing a legal regime to bring perpetrators of international crimes to justice. That is forty five years in which genocide was inflicted with impunity. There is a direct link between the premature termination in 1948 of the

efforts to bring Nazi war criminals to justice and the genocides which followed, including the genocide in Bangladesh in 1971.

Bangladesh has signed and should ratify the statute of the International Criminal Court. Yet, the International Criminal Court has jurisdiction only for crimes committed after the entry into force of the statute of the court<sup>1</sup>. The date of entry into force was July 1, 2002. So that Court is not an option for the 1971 crimes.

Bangladesh enacted a law in 1973 to bring to justice the perpetrators of the 1971 genocide, the International Crimes (Tribunals) Act of 1973. That law was not implemented then for political reasons. I am pleased to see that the Government of Bangladesh has decided now to implement that law, to establish the tribunals for which the law provides.

No legal system springs fully formed from the minds of its drafters. Every legal system requires experience to iron out the wrinkles, to confront the theory with experience, to shake up assumptions with reality. With the current dispensation, we have begun again to get the international legal system to work, and we are slowly learning its lessons. From the start of the International Criminal Tribunal for the Former Yugoslavia, we now have sixteen years of trial and error under our belts.

Today, I want to draw on that experience to attempt to answer three questions. How do we combat delay, so that the Bangladesh cases do not just get started, but actually get finished in a timely fashion? Second, how to approach cases strategically so that the Bangladesh Tribunals do not get bogged down? Third, how do we fill in gaps in the Bangladesh legal structure?

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<sup>1</sup> Article 11(1).

## **A) Combatting delay**

Trials for violation of international law bring to bear issues not found with ordinary crimes. International crimes are massive. There are a myriad of perpetrators. The law is complex.

The sheer size of the crimes raises questions of logistics not found elsewhere. How do we manage these cases so that the work gets done?

Trials need to be conducted without undue delay. This is a fundamental right of the accused. Starting a prosecution against an accused but then never finishing it is unfair both to the accused and the victims.

The Bangladesh International Crimes (Tribunals) Act, 1973 provides that a Tribunal shall confine the trial to an expeditious hearing of the issues raised by the charges and take measures to prevent any action which may cause unreasonable delay<sup>2</sup>. I have five suggestions to make about the mechanics of trials, drawn from the international experience, to prevent unreasonable delay.

The Bangladesh statute further provides that a Tribunal shall adopt and apply to the greatest possible extent expeditious and non-technical procedure<sup>3</sup>. This provision suggests that adopting the sort of rules I here suggest would be consistent with Bangladesh law.

The suggestions I propose do not require an amendment to the 1973 law. They can be effected by the Tribunals themselves through the rules they adopt.

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<sup>2</sup> Section 11(3).

<sup>3</sup> Section 19(1).

## **1) Preventing interlocutory appeals**

A primary cause of delays in international criminal trials has been interlocutory appeals. Trials inevitably involve a myriad of interim rulings about procedure and evidence. If each ruling can be appealed and the trial held in abeyance in the meantime, the trial can take forever.

The International Criminal Tribunal for the Former Yugoslavia, which faced this problem, resolved it with a rule that interlocutory appeals were impossible with two exceptions. One was motions challenging jurisdiction. The other was cases where certification has been granted by the Trial Chamber.

The Trial Chamber was given the power to grant certification if two criteria were met. One was that the decision involves an issue which would significantly affect the outcome. The other was that an immediate resolution of the issue by the Appeals Chamber might advance the proceedings<sup>4</sup>.

The Bangladesh International Crimes (Tribunals) Act, 1973 provides for a right of appeal to the Appellate Division of the Supreme Court of Bangladesh against conviction and sentence<sup>5</sup>. A recent amendment gave the prosecution a right of appeal against acquittal. These provisions do not address directly the issue of interlocutory appeals.

## **2) Written witness statements**

Another way in which time could potentially be saved is to allow witness evidence to be filed in court through written statements, rather than require witnesses to testify in open court. Again, the International Criminal Tribunal for the Former Yugoslavia provides an example. The rules of the Tribunal provide:

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<sup>4</sup> Rule 72(B)

<sup>5</sup> Section 21.

"A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form."<sup>6</sup>

There is a more specific rule which states that a Trial Chamber may dispense with the attendance of a witness in person and instead admit the evidence of a witness in the form of a written statement or a transcript of evidence which was given in proceedings before the Tribunal where the testimony goes to proof of a matter other than the acts and conduct charged against the accused.

Factors in favour of admitting evidence in the form of a written statement or transcript include that the evidence:

- (a) is similar to that other witnesses will give or have given in oral testimony;
- (b) relates to relevant historical, political or military background;
- (c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates;
- (d) concerns the impact of crimes upon victims;
- (e) relates to issues of the character of the accused; or
- (f) relates to factors to be taken into account in determining sentence<sup>7</sup>.

The Bangladesh International Crimes (Tribunals) Act, 1973 allows for written statements from a witness, recorded by a Magistrate or an Investigation Officer, who, at the time of the trial, is dead or whose attendance cannot be procured without an amount of delay or expense which the Tribunal considers unreasonable<sup>8</sup>. This provision does not go as far as the International Criminal Tribunal for the Former Yugoslavia provision. It does not encompass allowing witness statements from witnesses for no

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<sup>6</sup> Rule 89(F).

<sup>7</sup> Rule 92 bis (A).

<sup>8</sup> Section 19(2).

other reason than that the evidence has already been given in oral testimony at another trial.

### **3) Judicial notice of previously adjudicated facts**

A third time saver is a robust doctrine of judicial notice to avoid repetition. Korean Judge O-Gon Kwon of International Criminal Tribunal for the Former Yugoslavia wrote about the problem of repetition this way:

"Because so many of the cases at the Tribunal deal with the same events, a great deal of identical or nearly identical evidence is produced in case after case, consuming considerable time and resources."<sup>9</sup>

The rules of the International Criminal Tribunal for the Former Yugoslavia now provide that a Trial Chamber may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings<sup>10</sup>. This taking judicial notice of previously adjudicated facts is an innovation introduced specifically for international tribunals.

The Bangladesh statute provides that a Tribunal shall take judicial notice of facts of common knowledge, official government documents, reports of the United Nations and its subsidiary agencies and other international bodies including non-governmental organisations<sup>11</sup>. There is no express provision for taking judicial notice of previously adjudicated facts.

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<sup>9</sup> "The Challenge of an International Criminal Trial as Seen from the Bench" Journal of International Criminal Justice published online on February 28, 2007

<sup>10</sup> Rule 94(B).

<sup>11</sup> Section 19(3) and (4).

#### **4) Limiting witnesses**

A fourth time saver is allowing the Court to limit the number of witnesses the prosecution can bring and the time available over all to present its evidence. This rule was introduced into the International Criminal Tribunal for the Former Yugoslavia as a result of the experience through which the Tribunal lived. The rules now provide that the Trial Chamber,

"shall determine the number of witnesses the Prosecutor may call; and the time available to the Prosecutor for presenting evidence."<sup>12</sup>

#### **5) Limiting charges**

A fifth manner of saving time is given the Court the power to limit charges against the accused. One has to remember that a criminal tribunal bringing to justice perpetrators of international crimes and a truth commission are different. These trials are not meant to compile an historical record, though they likely will help to do so. They exist to realize justice, to determine the guilt or innocence of individual accused.

The International Criminal Tribunal for the Former Yugoslavia found that prosecutors were trying to do too much, that they were inclined to prosecute everyone against whom there was compelling evidence of guilt for every crime which has been committed, partly because that is what the victims wanted. Yet, the crimes were so massive that realizing such an ambition was unrealistic.

The Court, accordingly, amended the rules to give the Trial Chamber power to fix the number of crime sites or incidents comprised in charges about which evidence may be presented by the Prosecutor. The choice would be made on the basis that the sites or incidents are reasonably representative of the crimes charged<sup>13</sup>. The Court also gave

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<sup>12</sup> Rule 73 bis (C).

<sup>13</sup> Rule 73 bis (D).

the Trial Chamber the power to direct the Prosecutor to proceed on some counts in the indictment and not others<sup>14</sup>.

### **B) Choosing cases strategically**

The prosecution will have to choose cases strategically. There is likely to be a wealth of cases from which to choose. Proceeding all at once with every possible case is likely to be unmanageable. Criteria need to be developed for case selection. The quality of the evidence available is an obvious criterion. But it should not be the only one.

Also important is the extent and nature of involvement of the accused in the act. Accused directly responsible for grievous actions should be given priority over those who merely aided and abetted.

Higher level accused should be given priority over lower level accused. There may be a temptation to start the cases with hands on perpetrators in order to build up evidence for those at higher levels. The trouble with that strategy is that the tribunal can become bogged down in those cases. The International Criminal Tribunal for the Former Yugoslavia fell prey to that difficulty. Then President Cassese wrote

"the early prosecution strategy of starting with the prosecution of numerous low-level defendants flooded the Tribunal with minor cases and created a backlog of (relatively) petty defendants awaiting trial".<sup>15</sup>

Some jurisdictions prosecuting perpetrators of international crimes write this limitation into their governing statute. The Cambodian legislation limits the scope of the

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<sup>14</sup> Rule 73 bis (E).

<sup>15</sup> A. Cassese, "The ICTY: A Living and Vital Reality", 2 *Journal of International Criminal Justice* (2004) 585, at 595.

investigation "to senior leaders of Democratic Kampuchea and those who were most responsible for the crimes"<sup>16</sup>. The Sierra Leone Special Court has jurisdiction over leaders who threatened the establishment and implementation of the peace process while committing such crimes<sup>17</sup>.

Because, in the case of Bangladesh, the crimes occurred thirty eight years ago, many of the most senior perpetrators have died. At this late date, for the most part, there will be only junior perpetrators available for prosecution. Even amongst these junior perpetrators, though, there will be degrees of responsibility and status at the time of the crimes which should be borne in mind when choosing who to prosecute.

### **C) Specific issues**

There are number of issues which need to be addressed about which the Bangladesh statute is silent. A fully operational will have to come to grips with these issues. The current Bangladesh statute, the International Crimes (Tribunals) Act of 1973 is a useful framework. For the trials to take place, the framework will have to be filled out.

This is by no means a comprehensive list. But in the time available, I want to address four specific issues: age of accused, relationship with other courts, witness and victim protection and the treatment of subordinates.

#### **1) Age of accused**

The Bangladesh statute is silent on the age jurisdiction of the Tribunals. For Sierra Leone, the relevant age is 15. Any person who is accused of committing a crime while aged 15 or over falls within the age jurisdiction of the Court<sup>18</sup>. For the International

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<sup>16</sup> Article 1

<sup>17</sup> Article 1(1)

<sup>18</sup> Article 7(1)

Criminal Court, the age is higher. That court has no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime<sup>19</sup>.

## **2) Relationship with other courts**

There has to be a decision about the relationship of the Bangladeshi International Crimes Tribunals with other Bangladeshi courts. Cases are now being launched in the regular courts to bring to justice perpetrators of the 1971 genocide. What happens to those cases once the Bangladeshi International Crimes Tribunals get going?

In the case of Sierra Leone, jurisdiction is concurrent, with primacy going to the international tribunal<sup>20</sup>. There is a similar provision for Lebanon<sup>21</sup>, for the former Yugoslavia<sup>22</sup> and Rwanda<sup>23</sup>. For East Timor, for crimes committed during the relevant period, the jurisdiction of the Special Panels was exclusive.

For Sierra Leone, the Special Court can assume jurisdiction at any stage of procedure of national courts and request deferral of concurrent national court proceedings<sup>24</sup>. For Lebanon, deferral is an obligation<sup>25</sup>.

A related issue is double jeopardy. Suppose the regular courts have decided a case and the prosecutor wants to bring the accused to a Bangladeshi International Crimes Tribunal. Or suppose the reverse, that a victim wants to start a case against an accused

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<sup>19</sup> Article 26

<sup>20</sup> Article 8(1)

<sup>21</sup> Article 4(1)

<sup>22</sup> Article 9

<sup>23</sup> Article 8

<sup>24</sup> Article 8(2)

<sup>25</sup> Article 4(2).

in the regular courts after that person has already been tried and convicted or acquitted by a Bangladeshi International Crimes Tribunal.

The Sierra Leone tribunal statute provides that a person tried by the international court can not be tried again by the national court for the same offence<sup>26</sup>. A person tried by a national court may however be tried again by the international court where either the act was characterized in the national court as an ordinary crime or the national court proceedings were not impartial or not independent or were designed to shield the individual or the charge was not diligently prosecuted<sup>27</sup>.

In a case where an international prosecution proceeds despite a national court conviction, the international court has to take into account the national court sentence when imposing its own sentence<sup>28</sup>. There are similar provisions for Lebanon<sup>29</sup>, East Timor<sup>30</sup>, Rwanda<sup>31</sup>, the former Yugoslavia<sup>32</sup> and the International Criminal Court<sup>33</sup>.

### **3) Witness and victim protection**

The Bangladesh statute says nothing on witness and victim protection. Yet, it is a crucial issue for international crimes.

All of the international tribunals address this issue even if only cursorily. The most elaborate is the statute of the International Criminal Court.

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<sup>26</sup> Article 9(1)

<sup>27</sup> Article 9(2)

<sup>28</sup> Article 9(3)

<sup>29</sup> Article 5.

<sup>30</sup> Section 11.

<sup>31</sup> Article 9

<sup>32</sup> Article 10

<sup>33</sup> Article 20.

The statute of that Court provides that, as an exception to the principle of public hearings, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings *in camera* or allow the presentation of evidence by electronic or other special means<sup>34</sup>. Another provision states that where the disclosure of evidence or information may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary<sup>35</sup>.

#### **4) Superior orders**

The Bangladesh statute has a provision on the responsibility of superiors<sup>36</sup> but not of subordinates. Different international tribunals have different provisions dealing with the defense of superior orders.

For the Sierra Leone Special Court, superior orders is not a defence to a prosecution but it may be pleaded in mitigation of sentence<sup>37</sup>. There are similar provisions for East Timor<sup>38</sup>, the former Yugoslavia<sup>39</sup> and Rwanda<sup>40</sup>, and Lebanon<sup>41</sup>.

The International Criminal Court statute in contrast provides that superior orders may

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<sup>34</sup> Article 68(2)

<sup>35</sup> Article 68(5)

<sup>36</sup> Section 4(2).

<sup>37</sup> Article 6(4)

<sup>38</sup> Sections 15, 16 and 21.

<sup>39</sup> Article 7

<sup>40</sup> Article 6

<sup>41</sup> Article 3

be a defence where three criteria are met:

- (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
- (b) The person did not know that the order was unlawful; and
- (c) The order was not manifestly unlawful<sup>42</sup>.

**Conclusion**

Bangladesh has waited far too long to bring the perpetrators of the 1971 crimes to justice. But one advantage of that wait is that many other international tribunals have sprung up in the meantime and gone about their work. They have accumulated experience from which Bangladesh can learn. Their experience will make the work of the International Crimes Tribunals of Bangladesh easier. Bangladesh should make every effort to benefit from that experience.

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<sup>42</sup> Article 33