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Transitional Justice and Witness Protection: Bangladesh Perspective

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1. Introduction

Since World War II alone, it is estimated that there have been some 250 conflicts in almost every region of the world which have been caused, at the low end, an estimated 70 million casualties, and at the high end, 170 million. These conflicts often involve significant and systematic violations of fundamental human rights, including genocide, crimes against humanity, war crimes, torture, disappearances, massacres, rape, and mass displacement.¹ Yet only a few of those responsible for such atrocities have been prosecuted. In general, institutionalized impunity protects perpetrators while victims' demands for accountability are ignored. More often than not, justice for past atrocities is sacrificed for political expediency, often as a means to negotiate the end of a conflict.²

However, there is a growing international acknowledgment that building a responsive and democratic society in the wake of atrocity requires an open engagement with the demands of victims and a corresponding commitment to truth, justice, and reconciliation. Increasingly, the international community, governments, and civil society organizations seek accountability for past atrocities as expressed through a diverse set of ideas and practices known as "transitional justice." The development of transitional justice represents a significant shift in the international politics of peace, security, and national reconstruction, as well as an important stage in the evolution of the global movement to protect and defend fundamental human rights. The term "transitional justice" is used with an understanding that there exist a number of similar or related concepts including "transitional justice", "strategies for combating impunity", "peace building", and "transitional reconstruction".³

Transitional justice is a relatively new concept whose coherence is only now emerging after two decades of theoretical and practical development. The essential commitments of transitional justice are grounded in the foundational global promises that established the modern human rights system over fifty years ago. However, the specific processes described by the term represent a significant and relatively recent development.⁴

The intellectual roots of transitional justice can be traced to the period following World War I when the emerging international community began to seriously consider the value of seeking justice in the aftermath of conflict, despite taking little substantive action. After World War II, the international community established key institutions of transitional justice, including the International Military

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¹ Nils Petter Gleditsch, Peter Wallensteen, Mikael Kriksson, Argareta Sollenberg & Havard Strand, "Armed Conflict 1946–2001: A New Dataset", *Journal of Peace Research*, vol. 39, no. 5, 2002, pp. 615–637

² M. Cherif Bossiouni, "Accountability of Violation of International Humanitarian Law and other Serious Violation of Human Rights" in M. Cherif Bossiouni (ed.), *Transitional Justice*, Transnational Publishers, New York (2002), pp.4-6.

³ M. Cherif Bassiouni & Daniel Rothenberg, "Facing Atrocity: The Importance of Guiding Principles

on Transitional Justice, in International Human Rights Law Institute, *The Chicago Principles on Post-conflict Justice*, 2007, pp. 5-14 at 2.

also available at <http://www.isisc.org/public/chicago%20principles%20-%20final%20-%20July%209%202007.pdf>, accessed on 5 July 2009

⁴ *Ibid*, p.5.

Tribunals at Nuremberg and Tokyo and supported related domestic war crimes prosecutions in Europe and Asia. These initiatives were linked to the birth of the modern human rights system through the creation of the United Nations and the broad acceptance of the Universal Declaration of Human Rights.⁵

In recent years, transitional justice ideas, strategies, and processes have gained substantial momentum. These diverse practices mark a shift in the way the nations and the international community understand national reconstruction, peace, and democracy. Issues of truth-telling, reconciliation, and legal and moral accountability are now viewed as essential elements of peace negotiations and form the foundation of many national reconstruction programs. As a result of the widespread implementation of transitional justice policies around the world, it is now possible to draw upon and learn from prior experiences. Alongside growing global consensus regarding the validity and necessity of a commitment to transitional justice, there is a pressing need for increased comparative research as well as the establishment of clear guidelines and principles.⁶ The aim of this paper is to have an idea about transitional justice and to understand its different forms and to identify the role of witness protection for ensuring transitional justice.

2. What is Transitional Justice?

Transitional justice is a response to deal with the legacy of systematic and massive human rights abuse, recognising and acknowledging victims, and contributing to the processes of peacebuilding and democratisation. It is not in itself a special form of justice, but a set of approaches that seek to bring about justice in extraordinary conditions, usually in transitions from authoritarianism and/or violent conflict, to democracy and peace. A key element of transitional justice is placing the victim at the centre: ensuring that the victims of oppression are recognised as such, are empowered as fully rights-bearing citizens and have their dignity restored to them.⁷

Transitional justice is premised on an understanding that domestic stability, security, and democratic governance in the aftermath of atrocity are strengthened by a commitment to justice and accountability. Openly facing the legacy of past violence is essential for preventing future victimization, achieving peace and reconciliation, and protecting human rights.⁸

Transitional Justice encourage a comprehensive, integrated approach to addressing past atrocities involving quick action, long-term planning, national consultations, the participation of diverse constituencies, sensitivity to local context and culture, broad institutional reform, and a domestic and international commitment to linking justice, peace and reconciliation.⁹

3. Basic Approaches to Transitional Justice

Transitional justice can be implemented through a number of interdisciplinary strategies. They are as follows-

3.1 Prosecutions

Criminal justice is an essential part of an integrated response to massive human rights violations and should be pursued whenever possible. Prosecutions must focus on individual accused, yet these efforts also have the potential to reveal how large-scale crimes are committed and restore victims' dignity and public confidence in the rule of law. Domestic courts for such prosecutions remain the preferred forum to bring lasting change. In the past, however, trials at the domestic level have been rare. This has led to significant advances in international justice efforts, such as the creation of ad hoc international criminal tribunals, various hybrid courts, and the International Criminal Court.¹⁰

3.1.1 Domestic/ National Prosecutions

⁵ *Ibid.*

⁶ *Ibid.*, p.7.

⁷ Laura Davis, *Transitional Justice and Security System Reform*, The International Center for Transitional Justice (ICTJ), p.4, June 2009

⁸ Wendy Lambourne, "Transitional Peace building: Meeting Human Needs for Justice and Reconciliation", *Peace, Conflict and Development* – Issue Four, April 2004

⁹ M. Cherif Bassiouni & Daniel Rothenberg, see *supra* note 3 at 11.

¹⁰ The International Center for Transitional Justice (ICTJ), "Transitional Justice Approaches: Prosecution", available at: <http://ictj.org/en/tj/781.html>

States have primary jurisdiction over gross violations of human rights and humanitarian law that occur within their territory. States may create specific legal mechanisms to address past violations based on domestic and international standards.¹¹ The importance of the national prosecution is further highlighted by their reach as indeed, international tribunal generally focuses only on the senior level decision makers and planners. National Prosecution should include all persons who have committed criminal acts, subject, however, to reasonable and justified prosecutorial discretion.¹² Domestic prosecution initiatives can have tremendous impact but also often experience problems of capacity and political will. It remains a challenge to determine which domestic prosecutions deserve support.¹³

3.1.2 Hybrid Tribunals

Where domestic courts cannot prosecute gross violations of human rights and humanitarian law without outside assistance, states may work with the international community to develop hybrid systems involving domestic and international law, personnel, technical assistance, and financing.¹⁴ These courts offer an important model for bolstering national capacity with adherence to international standards while ensuring that the proceedings have relevance for affected communities. The examples of hybrid tribunals constituted till now are appended below:

The Special Court for Sierra Leone

The Serious Crimes Unit and special panels in Timor-Leste

The mixed panels in Kosovo.

The Extraordinary Chambers in the Courts of Cambodia (also known as the Khmer Rouge Tribunal)

The Special Tribunal for Lebanon

3.1.3 International Prosecution

Where domestic courts are unable or unwilling to prosecute gross violations of human rights and humanitarian law, and where mixed tribunals are not feasible, cases may be adjudicated by international tribunals. As a matter of policy, international prosecution should be limited to leaders, policy makers and senior executors. This policy, however does not and should not preclude prosecution of other persons at the national level which can be to achieve particular goals.¹⁵ Prosecution at the international level is important because it is likely the only way to reach the leaders, senior executors, and policy makers who may otherwise be de facto beyond the reach of local law.¹⁶ The International Criminal Tribunal for former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are the examples of the existing ad hoc international criminal tribunal.

3.1.4 The International Criminal Court (ICC)

The establishment of a permanent criminal court to deal with gross human rights violation is a historical event. The International Criminal Court have jurisdiction over the crime of genocide, crime against humanity and war crimes.¹⁷ Importantly, the ICC will only exercise its jurisdiction over individuals who are either nationals of state party or who have committed a crime on the territory of a state party.¹⁸ The ICC will only exercise its jurisdiction prospectively.¹⁹ This effectively precludes it

¹¹ E. Higonnet & M. Hanna, *The Chicago Principles on Post- conflict Justice*, International Human Rights Law Institute, 2007, p.29. also available at

<http://www.isisc.org/public/chicago%20principles%20-%20final%20-%20july%209%202007.pdf>, accessed on 5 July 2009

¹² M. Cherif Bossiouni, “Accountability for violation of International Humanitarian Law”, in M. Cherif Bossiouni (ed.), *Post-Conflict Justice*, Transnational Publishers, New York (2002), p.33.

¹³ The International Center for Transitional Justice (ICTJ), “Transitional Justice Approaches: Prosecution”, available at: <http://ictj.org/en/tj/781.html>

¹⁴E. Higonnet & M. Hanna, see *supra* note 11.

¹⁵ M. Cherif Bossiouni, “Accountability for violation of International Humanitarian Law”, in M. Cherif Bossiouni (ed.), *Post-Conflict Justice*, Transnational Publishers, New York (2002), p.27.

¹⁶ *Ibid*, p. 28.

¹⁷ See ICC Statute Article 6, 7, 8.

¹⁸ See *Ibid*, Article 12

¹⁹ See *Ibid*, Article 11 & 24

from dealing with crimes committed on a state territory or by one of its nationals prior to that state's ratification of the treaty embodying the ICC Statute.

3.2 Truth Commission

Truth commissions are generally understood to be "bodies set up to investigate a past history of violations of human rights in a particular country -- which can include violations by the military or other government forces or armed opposition forces."²⁰ Simply put, the truth commission's main goal is to establish what happened in the past. Truth commissions do not normally have the power to prosecute.

Hayner delineates four main characteristics of truth commissions.²¹

- First, they focus on the past. The events may have occurred in the recent past, but a truth commission is not an ongoing body akin to a human rights commission.
- Second, truth commissions investigate a pattern of abuse over a set period of time rather than a specific event. In its mandate, the truth commission is given the parameters of its investigation both in terms of the time period covered as well as the type of human rights violations to be explored.
- Third, a truth commission is a temporary body, usually operating over a period of six months to two years and completing its work by submitting a report. These parameters are established at the time of the commission's formation, but often an extension can be obtained to wrap things up.
- Fourth, truth commissions are officially sanctioned, authorized, or empowered by the state. This, in principle, allows the commission to have greater access to information, greater security, and increased assurance that its findings will be taken under serious consideration. Official sanction from the government is crucial because it represents an acknowledgment of past wrongs and a commitment to address the issues and move on. Furthermore, governments may be more likely to enact recommended reforms if they have established the commission.

The table below provides a brief summary of truth commissions created through early 2004.²²

Country	Date of Commission	Time Covered	Report Publicly Issued?
Uganda	1974	1971-1974	1975
Bolivia	1982-1984	1967-1982	Commission Disbanded
Argentina	1983-1984	1976-1983	1985
Uruguay	1985	1973-1982	1985
Zimbabwe	1985	1983	No
Uganda	1986-1995	1962-1986	No
Philippines	1986	1972-1986	No
Nepal	1990-1991	1961-1990	1994
Chile	1990-1991	1973-1990	1991
Chad	1991-1992	1982-1990	1992
Germany ^a	1992-1994	1949-1989	1994
El Salvador	1992-1993	1980-1991	1993
Rwanda ^b	1992-1993	1990-1992	1993
Sri Lanka	1994-1997	1988-1994	1997
Haiti	1995-1996	1991-1994	Limited, 1996

²⁰ Priscilla B. Hayner, "Fifteen Truth Commissions -- 1974 to 1994: A Comparative Study." In *Human Rights Quarterly*, Volume: 16 Issue: 4. 1994, p. 558.

²¹ Priscilla B. Hayner, *Unspeakable Truths*. New York: Routledge, 2001, p. 14.

²² Available at: <http://www.usip.org/library/truth.html>, accessed on 25 July 2009.

Burundi	1995-1996	1993-1995	1996
South Africa ^c	1995-2000	1960-1994	1998
Ecuador	1996-1997	1979-1996	Commission Disbanded
Guatemala	1997-1999	1962-1996	1999
Nigeria	1999-2001	1966-1999	Report in Process
Peru	2000-2002	1980-2000	2003
Uruguay	2000-2001	1973-1985	Report in Process
Panama	2001-2002	1968-1989	2002
Yugoslavia	2002	1991-2001	Commission Ongoing
East Timor	2002	1974-1999	Commission Ongoing
Sierra Leone	2002	1991-1999	Commission Ongoing
Ghana	2002	1966-2001	Commission Ongoing

^aWhile Germany conducted a truth commission consistent with the definition adopted here, it focused on the former East Germany. Comparative regional measures do not exist for the pre- and post-unification East. Because comparisons cannot be made, the case is not included in the analysis.

^bRwanda is included because the commission was granted quasi-official status and received some cooperation from authorities.

^cAlthough the commission issued its report in 1998, it continued to work on the granting of amnesty and making reparation recommendations.

The commission's final report is its legacy. It is a summary of the key findings. Patterns of abuse are outlined. Most importantly, the commission's report provides recommendations for rebuilding society. Truth commissions also make recommendations for reparations to be given to victims of state terror. Symbolic reparations, through public memorials or national remembrance days, are often part of commission recommendations.²³

3.3 Reparations

Victims have the right to reparations for violations of human rights and humanitarian law. States and others should provide victims with appropriate reparations for both acts and omissions resulting in past violations. The provisions for remedy and reparations for victims of the violation is a fundamental component of the process of transitional justice. To this end, states and their national legal systems serve as the primary vehicle for the enforcement of human rights and international humanitarian law. Accordingly, the existence of a state's duties to provide a remedy and reparations forms a cornerstone of establishing accountability for violations and achieving justice for victims.²⁴

3.4 Lustration or Vetting Policies

Vetting prevents individuals responsible for past violations from participating in government or holding official positions. Vetting may operate for a set period of time or may involve lifetime bans. Vetting policies, sanctions, and related administrative measures are designed to punish perpetrators, prevent future violations, and distinguish the new government from prior repressive regimes by expressing clear support for accountability and fundamental human rights. States should ensure that vetting policies and related sanctions are proportional to responsibility for past violations and link a commitment to accountability with the long-term goals of national reconciliation and peace. States may develop institutional systems for vetting, sanctions, and administrative measures using courts or non-judicial administrative systems. States may implement vetting through public or confidential processes.²⁵

3.5 Memory, Memorials and Museums

²³Brahm, Eric. "Truth Commissions." *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Research Consortium, University of Colorado, Boulder. Posted: June 2004 <http://www.beyondintractability.org/essay/truth_commissions/>.

²⁴ M. Cherif Bossiouni, see *supra* note 12, p.37-38.

²⁵ M. Cherif Bassiouni & Daniel Rothenberg, see *supra* note 3, pp.48-49.

Historical Memory, a field that has developed in tandem with transitional justice and is deeply related to it, is the idea that efforts to collectively remember past human rights abuse and atrocity can contribute to a more democratic, peaceful, and just future. These efforts include public memorials, monuments, and museums about past human rights abuse, crimes against humanity, war crimes, and genocide (or the social movements that sought to confront these evils), among many others. They consist of physical spaces that are places of mourning, and in some cases healing, for victims and survivors.²⁶

Public memorials are an important component of a holistic transitional justice approach. They confront the legacies of atrocity by drawing on representations of the past to teach lessons about democratic citizenship and human rights. Memorialization and memorials have become tools of human rights education in the broadest sense of the word-combining public art, civic space, and the power of memory to help build better societies in the future. In these civic spaces an ongoing dialogue and discussion on past trauma can be achieved, and diverse opinions, interests, and perspectives can be discussed. The obligation to memorialize past atrocity is also an emerging norm under international law.²⁷

While these initiatives are widely understood to form a basis for transitional justice efforts, they do not represent an exclusive list. Many societies have developed other, creative approaches to past abuse-one reason why the field has gained both strength and diversity over the years. It is also true that no single formula can apply to all types of conflict. It is a task that must be guided by legal, moral and ethical considerations and also depends on the socio-economic and political situation of a specific transitional state.²⁸

4. Transitional justice: Bangladesh Perspective

The progressive development of civilization has always been obstructed by gross human rights violation. The incidents of human rights violation happened in Bangladesh during the liberation war in 1971 is one of the important example in this regard.²⁹ The unjust and unlawful war of Pakistan against the unarmed people of East Pakistan (now Bangladesh) is evidenced as war crimes, genocide and crime against peace and humanity.³⁰ The birth of Bangladesh on 16 December 1971 was a unique phenomenon in that it was the first nation-state to emerge after waging a successful liberation war against a postcolonial state.³¹ From March to December 1971, the nine-month long liberation war drew world attention because of the genocide committed by Pakistan, which resulted by murder of approximately 3 million people³² and nearly a quarter million girls and women were raped, leading to approximately 25,000 pregnancies.³³ Ten million Bengalis reportedly took refuge in India to avoid the massacre of the Pakistani army, and thirty million people were internally displaced within the country.³⁴ The above crimes undoubtedly rank first after Nazi holocaust during the Second World War, followed by genocide committed by Khmer Rouge regime of Pol Pot in mid-seventies in Cambodia, brutal elimination of about one million Hutus by the Tutsis in Rwanda in the late eighties

²⁶ The International Center for Transitional Justice (ICTJ), “Transitional Justice Approaches: Memory, Memorials and Museum”, available at: <http://ictj.org/en/tj/781.html>

²⁷ *Ibid.*

²⁸ Neil J. Kritz, “The Ongoing search for Transitional Justice”, in M. Cherif Bossiouni (ed.), *Transitional Justice*, Transnational Publishers, New York (2002), pp.80-83.

²⁹ Dr. Rahmatullah, “Trail of 1971 War Criminals: A Politico-Legal Fiasco”, in Dr. Mizanur Rahman(ed.) *Human Rights and Domestic Implementation Mechanism*, ELCOP, Dhaka(2006), p 128.

³⁰ *The Events in East Pakistan, 1971, A Legal Study by the Secretariat of the International Commission of Jurists* (The International Commission of Jurists 1972).

³¹ Rounaq Jahan, “Genocide in Bangladesh”, in Samuel Toffen, William S. Parsons and Isreal W.Charny (ed.) *Century of Genocide*, Routledge, New York (2004), p.295.

³² *See generally*, Mohammad Ayoob and k. Subramahmanyam, *The Liberation War*, S. Chand and Company, New Delhi (1972), David Losak, *Pakistan Crisis*, New York: McGraw- Hill (1971), Anthony Mascarenhans, *The Rape of Bangladesh*, New Delhi: Bikash Publication (1971), Charles Peter O'Donnell, *Bangladesh*, West View press (1984)

³³ Susan Brownmiller, *AGAINST OUR WILL: Men, Women and Rape*, Toronto, Bantam Books, 1975, pp. 78-86 at 81.

³⁴ *See generally*, Tanweer Akram, A Critical Evaluation of the ICJ Report on the Bangladesh Genocide(April 14, 2007). available at SSRN: <http://ssrn.com/abstract=981254>, Anthony Mascarenhans, *The Rape of Bangladesh*, New Delhi: Bikash Publication (1971).

and the ethnic cleansing of the Muslims by the Serbs in Bosnia in the early nineties of the last century.³⁵ While these latter crimes have been prosecuted, or are being prosecuted, it is preposterous that the crimes committed in Bangladesh during 1971 have remained to date with impunity. The victims have never been compensated. There are no reparation schemes or other non-judicial remedies for victims of serious human rights violation.³⁶

Crimes with impunity, or not bringing the perpetrators to justice, or the absence of transitional justice lead to commission of more crimes, resurgence of ideas or ideologies in the name of which crimes had been committed. It also retards social and national development. Crimes with impunity are threat to justice and law and order of the nation. Injustice and lawlessness leads to chain reactions. This is exactly what has happened in Bangladesh. Many of the ills of to-day's Bangladesh are explained by the default of justice of 1971. In the last four decades of the existence of independent Bangladesh, there have been systematic and series of genocidal killings almost with impunity.³⁷ These have put under serious pressure the very existence of the state of Bangladesh as it was so conceived as a model of democratic and secular entity. It is believed that ensuring justice for the incident of 1971 would vindicate the past injustices and greatly contribute towards the national development of Bangladesh. Ensuring justice is also necessary for the rule of law, and to relieve the nation of a moral and legal burden of non-trial which increasingly hangs heavy on the nation. With this burden the nation has advanced little.³⁸

Bangladesh must do its best to bring as many war criminals as possible to justice. Not to act now is to reinforce the longstanding status quo of evading justice and keeping the surviving victims and their relatives under a cloud of gross injustice. Persistent immunity in Bangladesh also undermines the international community's commitment to render global justice for heinous crimes.³⁹

Aftermath the war the Government has taken several initiative to preserve the values and sacrifices of the people made in the liberation war. To preserve the national feeling on this issue the Government established National Martyrs Memorial, Bangladesh Liberation War Museum. For bringing political stability the Constitution was framed just within one year of the liberation war acknowledging the sacrifices of the freedom fighters.⁴⁰ Besides this the Government banned politics based on religion⁴¹ and made provision for ejecting the collaborators from voter list and politics.⁴² But all these vetting provisions were nullified⁴³ by Gen. Ziaur Rahman, the then president and perpetrators of 1971 genocide were politically rehabilitated.

The newly born State of Bangladesh took some concrete steps to prosecute the war criminals and perpetrators. But subsequently due to political changes, international conspiracy and ignorance of human rights violation in Bangladesh acted as the main reason of failure to try the perpetrators of 1971. Recently, the newly elected government took a decision in the first session of the parliament to set up tribunals to try war criminals. It is true that prosecute of the war a criminal is one of the main methods to ensure justice aftermath of conflict and it should be ensured.⁴⁴ But relying solely on formal legal action generally fails to fully address victims' needs and may reveal serious limitations within a

³⁵ M. Shah Alam, "Prosecuting the 1971 Perpetrators of Genocide, Crimes Against Humanity and War Crimes", *The Daily Star*, January 5, 2008.

³⁶ See Redress, *Torture in Bangladesh 1971-2004*, August 2004, at 24.

³⁷ M. Shah Alam, *supra* note 35.

³⁸ M. A. Hasan, "War Crime trails: Our failure and Future", *The Daily Star*, December 14, 2007.

³⁹ Dr. Rafiqul Islam, "Trial of war criminals under International Humanitarian law in Bangladesh", *The Daily Star*, January 31, 2009.

⁴⁰ According to the preamble of the Constitution of Bangladesh "We, the people of Bangladesh, having proclaimed our Independence on the 26th day of March, 1971 and through a historic war for national independence, established the independent, sovereign People's Republic of Bangladesh. which inspired our heroic people to dedicate themselves to, and our brave martyrs to sacrifice their lives in the war for national independence, shall be fundamental principles of the Constitution"

⁴¹ Article 12 and 138 of the Constitution of Bangladesh 1972

⁴² Article 66 and 122 of the Constitution of Bangladesh 1972

⁴³ By the Second Proclamation Order (No. 3) of 1975 and 1976.

⁴⁴ See Principle 1 of the Chicago Principles on Transitional Justice, available at:

<http://www.isisc.org/public/chicago%20principles%20-%20final%20-%20July%2009%202007.pdf>, accessed on July 10, 2009.

government that ultimately weakens society's faith in the legitimacy of judicial processes. If prosecutions are not integrated into a broad strategy of accountability, they can appear as political acts and may run the risk of allowing perpetrators to become martyrs or otherwise creating barriers to a more socially coherent vision of justice.⁴⁵

Aftermath war justice can be implemented through a number of interdisciplinary strategies, including: prosecutions; truth commissions; reparations; vetting, sanctions and administrative measures; memorialization, education and archives; traditional, indigenous and religious approaches; and, institutional reform. While specific strategies may be successfully implemented on their own, the larger objectives of transitional justice are best served through a coordinated, coherent, and comprehensive approach.⁴⁶

It is desirable a comprehensive, integrated approach to addressing past atrocities involving quick action, long-term planning, national consultations, the participation of diverse constituencies, sensitivity to local context and culture, broad institutional reform, and a domestic and international commitment to linking justice, peace and reconciliation.⁴⁷

In order to ensure justice States should commit to implementing meaningful social, political and economic policies designed to prevent the occurrence and recurrence of violations. A policy to deal with the past human rights abuses should have overall objectives to prevent the recurrence of such abuses and to repair the damage they caused, to the extent that is possible. However in all cases, the policy must meet certain condition of legitimacy: such as i) any measures to deal with past human rights abuses must be adopted in full knowledge of the truth about what happened ii) the policy must represent the will of the people specially victims, and iii) the policy must not violate the international law relating to human rights and humanitarian law. The policy should be included prosecution, reparative and preventive measures. At the same time meaningful policies for ensuring justice must have a high degree of legitimacy and require substantial political will on the part of leaders inside and outside of the government.⁴⁸

Strategies for ensuring justice aftermath war should be as representative and inclusive as possible and should exhibit special sensitivity toward vulnerable groups, including women and religious, ethnic, and other minorities. Successful transitional justice strategies benefit from national consultations, public and civil society involvement, and the participation of victims and their families. The Strategies will also reveal as much truth as possible; achieve as much reconciliation as is feasible; provide as full and complete reparations as are affordable; and, address past violence in an open, transparent, and truthful manner.⁴⁹

5. Transitional Justice and Witness Protection

In transitional justice whether it is in the form of prosecution or of truth commission or of vetting, it strongly requires the testimony of the witnesses. So, in transitional justice the intended outcome also depends on spontaneous and fear free participation of witnesses.⁵⁰ The war crimes being an special

⁴⁵ M. Cherif Bassiouni & Daniel Rothenberg, "Facing Atrocity: The Importance of Guiding Principles on Transitional Justice, in International Human Rights Law Institute, *The Chicago Principles on Transitional Justice*, 2007, pp. 5-14 at..

also available at <http://www.isisc.org/public/chicago%20principles%20-%20final%20-%20July%209%202007.pdf>, accessed on July 01, 2009.

⁴⁶ *Ibid.*

⁴⁷Office of the United Nations High Commissioner for Human Rights, Rule-of-Law Tools for Transitional States, United Nations, New York and Geneva, 2006, pp. available at <http://www.ohchr.org/Documents/Publications/RuleoflawTruthCommissionsen.pdf>, accessed on 7 July 2009

⁴⁸ Jose Zalaquett, "Confronting Human rights Violations Committed by Former Government: Principles Applicable and Political Constrains" in Neil Z. Krutz (ed.) *Transitional Justice (Volume I: General Considerations)*, Washinton DC, United States Institute of Peace, pp. 5-13.

⁴⁹ M. Cherif Bassiouni & Daniel Rothenberg, see *supra* note 27.

⁵⁰ KI Vibhute, 'Justice to Victims of Crime: Emerging Trends and Legislative Models in India' in KI Vibhute (ed.), *Criminal Justice* (Eastern Book Company, Lucknow, 2004) pp. 370 – 395, at 373.

category of crime depends most of the time on credible witnesses and their depositions. The affect of inadequate witness protection is evident from various trials of war crimes. Impunity has always found to be facilitating the fear of witnesses and as such the witnesses feel reluctant to depose in the matter before the Court. Achieving accountability through national war crimes trials, therefore, requires measures to protect witnesses prior to, during, and after trials. In some cases, effective witness protection requires a long-term witness protection program or resettlement in another country. Witness protection not only required at pre-trial stage but it has a role to play in post trial stage also. Understanding the importance of testimony of the witnesses the ICC Statute also has given emphasize on this issue. In Article 68 of the ICC Statute a detail guideline in respect of witness protection. Article 68 of ICC Statute puts an obligation upon the Court to protect safety, physical and psychological wellbeing, dignity and privacy of the witnesses. So, this article is a good reference to understand the importance of witness protection.

6. Witness and Victim Protection in Bangladesh

The criminal justice system in Bangladesh, based on the adversarial model, focuses heavily on the offender and his rights and is blamed for its insensitivity and inaction towards victim and witness protection. In Bangladesh, there are no adequate victim and witness protection provisions under the main substantive and procedural laws. Although the criminal justice system in Bangladesh guarantees certain safeguards and confers a set of constitutional and statutory rights to the accused, it does not demonstrate equal concern for victims of crime for the losses incurred or physical, mental or emotional injury sustained by them. However, in some recent judgements, the Supreme Court expressed concern for the protection of victims and their well being. In the case of *Tayazuddin & another Vs. the State*, where the victim was burn by acid throwing, the High Court Division held that the State has a duty to protect and safeguard the rights of its citizens, including victims and witnesses, to equality before the law, equal protection of law and the right to life and personal liberty, to which corresponds a right to protection of those concerned.⁵¹ It also emphasised on the right of a victim to have a fair trial⁵² and directed the responsible government agencies to take all steps to secure the safety of the informant, victim and witnesses to enable them to give testimony in support of prosecution case.

In 1973 an Act was enacted to try the war criminals in Bangladesh who committed genocide during 1971. But unfortunately the Act has a notable gap in defining the security considerations that need to be detailed for witnesses while prior to and while giving testimony and after they leave the court. There should be provisions made in case witnesses do not wish to give testimony in the presence of the accused, they can still do so during the trial proceedings but in a safe and comfortable environment. Security considerations for court staff, including judges and lawyers, both prosecution and defense also need to be outlined. Security provisions for the defense need to be articulated.⁵³ Recently the Parliament passed the International Crimes (Tribunals) (Amendment) Act 2009 on July 9, 2009. In this amendment nothing included regarding the security and protection of the witness.

7. Conclusion

Though the concept of transitional justice is emerging but its effectiveness is already understood. It is also true that the processes of transitional justice may not be applied in every conflict. The initiative of the Government for trying the perpetrators of 1971 is really appreciable. But it is to be mentioned here that the policy makers and the legislature can think about the approach of transitional justice to effectively try the war criminals of 1971.

⁵¹ *Tayazuddin and another v The State* 21 (2001) BLD (HCD) 503.

⁵² "...In a democratic country governed by the Rule of Law, the Government is responsible for ensuring free and fair trial not only to the accused but also to the victim of crime. It is, also, emphasised that the Court is not only to see the right of the accused persons, but also to see the right of the victim of crime and society at large. The Court is to see that the victim of crime can have a trial free from all fear and insecurity." *Tayazuddin and another vs. The State*, 21 (2001) BLD (HCD) 503, para.26.

⁵³ Available at: http://unheardvoice.net/blog/wp-content/uploads/2009/07/dp_response_1973warcrimesact.pdf, accessed on 25 July 2009.