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‘The Messaging Effect’: Eliciting Credible Historical Evidence from Victims of Mass Crimes

Mahdev Mohan[*]

10.1. Introduction

The 1971 ‘war of independence’ was an armed conflict that pit then East Pakistan and India against then West Pakistan. It led to the secession of East Pakistan and the formation and recognition of the independent State of Bangladesh. The conflict claimed countless lives,[1] and displaced 10 million people.[2] The atrocities committed in 1971 have been described as “selective genocide” by the U.S. embassy in Dhaka in a cable in March 1971, revealed in declassified documents in 2002.[3]

The current administration led by the Bangladesh Awami League in Bangladesh recently established an International Crimes Tribunal (‘ICT-BD’) within its domestic court structure to try those accused of crimes against humanity, genocide, and war crimes during that tragic period in the country’s history. The ICT-BD’s first trial commenced on 20 November 2011, almost four decades after the conflict took place. The ICT-BD’s affiliates opine that justice delayed is better than having it denied. The

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[1] The Rahman Commission estimates 26,000 died in the conflict (available at http://www.bangla2000.com/bangladesh/Independence-War/Report-Hamoodur-Rahman/default.shtm, last accessed on 19 October 2012), while others such as Bina D’Costa has estimated that the number is closer to three million; see Bina D’Costa, “Frozen in time? War crimes, justice and political forgiveness”, in *Nation building, gender and war crimes in South Asia*, Routledge, London, 2011.

[2] D’Costa, 2011, p. 145, *supra* note 1.

[3] U.S. Consulate in Dacca, “U.S. Department of State Telegram on ‘Selective genocide’”, 27 March 1971, see available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB79/BEBB1.pdf, last accessed on 19 October 2012.

ICT-BD prosecutor Advocate Zead-Al-Malum stated that, "[t]he international community had never any reason to be concerned about the standard of Bangladesh's legal system […] my team members and I are committed to do our best to ensure justice, that is not for the victims only, but also for the accused".[4]

The trials have been criticised as being politically charged, and as facing significant challenges in terms of their legitimacy, due process and procedural fairness.[5] U.S.-based Human Rights Watch stated in a letter to Prime Minister Sheikh Hasina that without significant amendments to the International Crimes (Tribunals) Act, 1973 ('1973 Act'), the judicial process would fail to meet international standards of fair trial[6]. In March 2011, U.S. Ambassador-at-large for War Crimes Issues Stephen J. Rapp drafted a series of recommendations suggesting amendments to the rules of the ICT-BD, which may help to ensure that the ICT-BD's proceedings are fair and transparent.[7]

Ambassador Rapp recommended that provisions enshrining the right to appeal against interlocutory orders be incorporated, along with provisions adopting the International Criminal Court's "elements of crime"[8], an interpretive tool which assists the ICC in the interpretation

[4] Zead-al-Malum, Meeting on Bangladesh: Exchange of Views on War Crimes Trials and on Accountability Issues, The Delegation for Relations for the Countries of South Asia, 31 January 2012, European Parliament, Brussels, available at http://icsforum.org/blog/icsf/text-of-speech-before-the-eu-parliaments-delegation-by-ict-prosecutor/, last accessed on 19 October 2012.

[5] John Cammegh, a British lawyer advising the defense, argues that the trials "mak[e] a mockery" of the principle of accountability against impunity, due to its inadequate protections / safeguards for the defense of the accused. See further John Cammegh, "In Bangladesh: Reconciliation or Revenge?", New York Times, 17 November 2011.

[6] Human Rights Watch, "Letter to Prime Minister Sheikh Hasina Re: International Crimes (Tribunals) Act", available at http://www.hrw.org/news/2009/07/08/letter-prime-minister-sheikh-hasina-re-international-crimes-tribunals-act, last accessed on 19 October 2012.

[7] "Recommendations made by Stephen J Rapp, US Ambassador at Large, War Crimes Issues & the extent of their implementations by the International Crimes Tribunal and the Government of Bangladesh", in *ICT-BD Watch*, 28 November 2011, available at http://ictbdwatch.wordpress.com/2011/11/28/recommendations-made-by-stephen-j-rapp-us-ambassador-at-large-war-crimes-issuesthe-extent-of-their-implementations-by-the-international-crimes-tribunal-and-the-government-of-bangladesh/, last accessed 19 October 2012.

[8] U.N. Doc. PCNICC/2000/1/Add.2 (2000)

and application of the crimes of genocide, crimes against humanity and war crimes – all crimes within the jurisdiction of the ICT-BD as well.[9] He also suggested that the accused should be ensured the rights under Part III of the International Covenant on Civil and Political Rights (1966), as well as to include provisions detailing the detention of the accused similar to that used by the International Criminal Tribunal for Rwanda ('ICTR'). He further recommended the inclusion of rules on the presumption of innocence and placing the burden of proof on the prosecution. He additionally suggested incorporating rules on witness protection and granting visas to foreign counsel whose advice has been sought.[10]

10.2. Message as Medium in Bangladesh?

With justice processes that seek accountability for core international crimes, it is not enough to merely denounce alleged perpetrators, as the credibility and legitimacy of such processes are locally perceived and assessed – that is by the very local constituents they are meant to vindicate and serve.[11] As Rama Mani observes, "[i]f ideas and institutions about as fundamental and personal a value as justice are imposed from the outside without an internal resonance, they may flounder, notwithstanding their assertions of universality".[12]

Ambassador Rapp has observed,

> […] these trials […] are of great *importance to the victims* of the 1971 war of independence from Pakistan. What happens in Bangladesh today will *send a strong message* that it is possible for a national system to bring those responsible for grave human rights abuses to justice (emphasis added).[13]

Ambassador Rapp appears to view the trial as, among other things, an expressivist exercise for victims of the war: a process that is designed

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9 See Rapp's Recommendations in *supra* note 7.

10 *Ibid.*

11 Mark Drumbl, "Rights, Culture and Crime: The Role of Rule of Law for the Women of Afghanistan", in *Columbia Journal of Transnational Law*, 2004, vol. 42, p. 349.

12 Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War*, Blackwell Publishers, 2002, p. 49.

13 "Bangladesh International Crimes Tribunal: The judges, at the first opportunity, must define what the term 'crimes against humanity' means", Voice of America, 6 December 2011.

to tell a story and, through trial, verdict and punishment, affirm the value of law, strengthen social solidarity and incubate a moral consensus among victims.[14] His view accords with the UN Secretary-General Ban Ki-Moon's definition of 'legacy' as:

> […] a court's lasting impact on bolstering the rule of law in a particular society, including by conducting effective trials to contribute to ending impunity, while also strengthening domestic judicial capacity.[15]

Put differently, expressivism is less concerned with whether the law deters or punishes, than it is with the message victims get from the law. Diane Marie Aman reminds us, however, that for the law to have expressive value, the "message understood, rather than the message intended, is critical".[16] To send the right message, justice processes and their affiliates must be attentive to their primary constituents – their victims. This attentiveness can pave the way for justice and reconciliation, which are maximised when undertaken in a manner that resonates in local cultures and communities, the environs in which law matters most and in which the actual abuses take place.[17]

Ambassador Rapp's recommendations are consistent with international law and practice and should be applauded. But further research should be undertaken to consider contemporary Bangladeshi sentiments about the ICT-BD and Rapp's recommendations. In order to have resonance and to be properly understood and received, any proposed legal reforms to the ICT-BD must be context-sensitive, and not simply adopt a one-size-fits-all approach to transitional justice.[18] As Ambassador Rapp

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[14] Mark Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, New York, 2007, p. 17.

[15] "Guidance Note of the Secretary-General *on the* United Nations Approach to Transitional Justice" was issued on 10 March 2010 by the U.N. Secretary-General.

[16] Diane Marie Aman, "Message As Medium in Sierra Leone", in *International Law Students Association* (hereinafter '*ILSA*') *Journal of International and Comparative Law*, 2001, vol. 7, p. 238.

[17] See generally, Drumbl, 2004, see *supra* note 11; Elizabeth S. Anderson and Richard H. Pildes, "Expressive Theories of Law: A General Restatement", in *University of Pennsylvania Law Review*, 2000, vol. 1503, p. 148; and Dan M. Kahan, "The Secret Ambition of Deterrence", in *Harvard Law Review*, 1999, vol. 113, no. 2.

[18] Increasingly, research is being undertaken to explore innovative and contextual approaches to transitional justice, including research and writing by this author in collaboration with others.

himself concedes, it is crucial to "keep in mind that different countries have different procedures and different courts have had different procedures".[19] After all, victims of massacres that transpired nearly four decades ago often have an astute appreciation of the historical and political baggage that hinders efforts to secure accountability. Survivors of the liberation war are no different.

Drawing on lessons the author has learnt from litigation at the Extraordinary Chambers in the Courts of Cambodia ('ECCC')[20], including gathering victim evidence in relation to its putative *Cases 003* and *004*, this chapter considers: (a) the inherent challenges of eliciting non-contemporaneous or 'old' evidence from victims/witnesses; (b) how to gather and verify old evidence from victims/witnesses; and (c) what courts should take into account when applying for and enforcing protective measures for them.

These considerations are critically important to the fair administration of justice by the ICT-BD and the sober reality that the tribunal is, and should be, only one component of transitional justice processes in Bangladesh. Such processes ought to respond to the country's context while anchored in international norms and standards to address the impact of large-scale past abuses in order to ensure accountability, serve justice and achieve reconciliation, which may include non-judicial mechanisms.

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[19] Stephen J. Rapp, Ambassador-at-Large, War Crimes Issues, Press Conference, 13 January 2011, p. 20.

[20] The ECCC is a hybrid tribunal established on 6 June 2003 by a bilateral agreement between the U.N. and the Cambodian government as an "Extraordinary Chambers within the existing court structure of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea"; albeit with international assistance. See "Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea", U.N.-Cambodia, 6 June 2003, available at http://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf, last accessed on 19 October 2012. The KRT was recognized by the Cambodian legislature on 27 October 2004 when it ratified and implemented the U.N. "Agreement through the adoption of enabling legislation named the Law on the Ratification of the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea and Law on Amendments to the Law on the ECCCC for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea", U.N. Cambodia, 5 October 2004.

10.3. The 'War of Independence', Politics and Elusive Justice

The seeds of a conflict as complex as the war of independence did not begin with the armed attacks of 1971, but can be traced to deep-seated grievances, politicking and unrest. The declaration by Muhammad Ali Jinnah as early as 1948 of Urdu as the official language of Pakistan as a whole was deeply resented by East Pakistanis, and led to an uprising in 1952, and the deaths of several demonstrators. Conflict mounted with economic and political grievances in East Pakistan. Although East Pakistan's population was larger, West Pakistan received the lion's share of fiscal support, and opportunities in government.

Additionally, in 1970, a cyclone devastated large parts of East Pakistan, with a reported death toll between 300,000 and 500,000.[21] Pakistani President General Yahya Khan mismanaged the relief efforts and tried to suppress the magnitude of loss, leading to protests against the regime in Dhaka. In the same year, the Awami League led by Mujibur Rahman ('Mujib') achieved a landslide victory in East Pakistan, obtaining an overall majority of parliamentary seats in Pakistan. However, Zulfikar Ali Bhutto was unwilling to allow Mujib become the Prime Minister, and proposed a joint-P.M. solution, which was not well received by the East Pakistanis. Subsequently Bhutto and Yahya Khan travelled to Dhaka to seek a solution.

However, unrest was brewing and West Pakistan secretly flew a number of soldiers to East Pakistan. On 25 March 1971, the Pakistani army launched Operation Searchlight, an attempt to quash the movement for liberation by the then East Pakistanis. The army began to gun down students, intelligentsia and Bengali members of the military, especially targeting the Hindu areas. Mujib was arrested, but not before he reportedly declared the emergence of the State of Bangladesh in the early hours of the next morning.

Over the next nine months of conflict, an estimated three million people were killed,[22] although the Hamoodur Rahman Commission esti-

[21] Nicholas D. Kristof, "Cyclone in Bangladesh Tests the Fragile New Democracy", 19 May 1991.

[22] D'Costa, 2011, p. 145, see *supra* note 1. Although it is difficult to independently confirm this figure.

mates only 26,000 victims.[23] Also, it is estimated that there were about 10 million refugees crossing the border into India.[24] Around 200,000 women were raped by West Pakistani soldiers, leading to a generation of 'war babies'.[25] The international community failed to stop the atrocities, although the United Nations condemned the human rights violations. India finally intervened, sending arms and soldiers into East Pakistan, and training guerrilla fighters, resulting in a war between the two countries. The West Pakistani army surrendered on 16 December 1971. General Yahya Khan was subsequently ousted, and Zulfikar Ali Bhutto was declared the Prime Minister of Pakistan.

Prime Minister Bhutto negotiated with India for the return of land lost by Pakistan as well as the release of Pakistani POWs. India held 90,000 POWs, the most since World War II. Pakistan refused to recognise the new State of Bangladesh, and thus Bangladesh and India refused to settle the issue of POWs. Mujib wanted to try 1,500 of the POWs for alleged war crimes,[26] although later the number was reduced to 195 accused of genocide and other serious crimes, and the other 90,000 POWs were given amnesty and returned to Pakistan. On 17 April 1973, the government decided to convene war crimes trials, however political factionalism within the country and compromises struck with Pakistan led to them being shelved indefinitely. Mujib and his family were assassinated in 1975 after the Awami League was removed from power,[27] and Bangladesh went through 15 years of martial law, poverty and economic hardship.

In the aftermath of the war, the new government was unable to prosecute alleged war criminals. In 1972, the Bangladesh Collaborators (Special Tribunals) Order came into force, to indict those who collaborat-

[23] The Hamoodur Rahman Commission was appointed by the President of Pakistan in December 1971 to inquire into the circumstances of the surrender of the Pakistani forces to India. The Commission examined 213 witnesses and its report was submitted in July 1972. See also Ziauddin Ahmed, "The Case of Bangladesh: Bringing to Trial Perpetrators of the 1971 Genocide", in ed. *Contemporary Genocides: Causes, Cases, Consequences*, Albert Jongman, 1996, pp. 95–115.

[24] D'Costa, 2011, p. 145, see *supra* note 1. See also Susan Brownmiller, *Against Our Will: Men, Women and Rape*, Simon and Schuster, 1975.

[25] D'Costa, 2011, see *supra* note 1.

[26] D'Costa, 2011, p. 145, see *supra* note 1.

[27] D'Costa, 2011, p. 149, see *supra* note 1.

ed with the Pakistani forces.[28] There are conflicting reports on the number of arrests and trials conducted by the tribunals;[29] however, it is generally believed that evidentiary difficulties held up the trials.[30] Pressing humanitarian and economic concerns also derailed any plans for legal proceedings[31].

The promulgation of the International Crimes (Tribunals) Act of 1973 ('1973 ICT Act') was the only concrete legislative step taken towards accountability.[32] In November 1973, however, the government granted a general amnesty and released most of the detainees.[33] Organisations that were previously labelled collaborators and banned were permitted to participate in politics, and many of their members were appointed to influential positions in government, making the establishment of a tribunal even less probable.[34]

The assassination of Mujib and the political events that followed forestalled all accountability processes for the next several years. In the 1990s, powerful civil society advocates, movements and campaigns called for erstwhile alleged collaborators to be removed from power and brought to justice.[35]

10.4. New Parliamentary Resolve and a Push to Prosecute Core Crimes with an Old Statute

The Liberation War Museum, located in Dhaka, Bangladesh, was established on 22 March 1996, and it has since been archiving documents and testimonies of the war.[36] The Museum is located in two buildings, with a

[28] Suzannah Linton, "Completing The Circle: Accountability For The Crimes Of The 1971 Bangladesh War Of Liberation", in *Criminal Law Forum*, 2010, vol. 21, no. 2, p. 204.

[29] Some reports state 11,000 suspects were in custody and 73 tribunals constituted.

[30] Linton, 2010, p. 205, see *supra* note 28.

[31] D'Costa, 2011, p. 151, see *supra* note 1.

[32] D'Costa, 2011, p. 150, see *supra* note 1.

[33] Linton, 2010, p. 205, see *supra* note 28.

[34] D'Costa, 2011, p. 151, see *supra* note 1.

[35] D'Costa, 2011, pp. 151–152, see *supra* note 1. For example, Jahanara Imam's campaign against Golam Azam and the Ghatok Dalal Nirmul Committee.

[36] Liberation War Museum, "About Us", available at http://liberationwarmuseum.org/about-us. It is directed by Mr. Mofidul Haque, also a trustee of the museum.

total of six galleries.[37] The collection has over 10,000 artefacts, including rare photographs, documents and pamphlets. The museum has an outreach programme that educates students who visit it.[38] Another outreach project consists of a large bus mounted with 360 photographs and objects, acting as a mobile exhibition, which travels to different parts of the country.

The process of pursuing justice for the victims of the 1971 atrocities moved forward in April 2008, with the War Crimes Fact Finding Committee releasing a list of 1,597 war criminals involved in the 1971 war.[39] The list included Pakistani Army officers, political collaborators and members of the Jamaat-e-Islami, a junior coalition partner in the previous government.[40] In a bold move in 2009, the Bangladesh Parliament adopted a resolution to try persons accused for crimes under the 1973 Act.

The Resolution provides for individuals and groups to be tried, institutes an appeal process and includes English as an official language of the court along with Bengali.[41] While these amendments are designed to ensure that the ICT-BD's process accords with international standards, there is still a long way to go. Several provisions of the 1973 Act have been criticised for being insufficient with regards to ensuring that international standards of fairness and due process are met.[42]

After all, the demands for fairness and justice should not centre exclusively on victims, with scant regard to the corollary rights of alleged perpetrators. In order to achieve a justice system free of what has been termed an "impartiality deficit", its statutory foundation must allude to the

[37] Liberation War Museum, "The Museum", available at http://liberationwarmuseum.org/the-museum, last accessed on 19 October 2012.

[38] Liberation War Museum, "The Museum", available at http://liberationwarmuseum.org/programs, last accessed on 19 October 2012.

[39] D'Costa, 2011, p. 153, see *supra* note 1.

[40] Members of this group under the name Al-Badr allegedly rounded up approximately 150 academics and journalists and killed them the day before Pakistan's surrender. Mark Dummett, "Bangladesh war crimes stir tension", BBC News, 30 June 2008.

[41] The International Crimes (Tribunals) Act, 1973, ('Act No. XIX of 1973')

[42] Human Rights Watch, "Bangladesh: Upgrade War Crimes Law", 8 July 2009, available at http://www.hrw.org/news/2009/07/08/bangladesh-upgrade-war-crimes-law, last accessed on 19 October 2012.

defence function, equal in status, resources and respect to the judicial, administrative and prosecutorial functions.[43]

The temporal jurisdiction[44] of Article 3(1) is wide, stating that the tribunal has jurisdiction over any individual who has committed any of the crimes listed "before or after the commencement of [the] act". The subject matter jurisdiction[45] of the 1973 Act has also been called into question. It permits prosecution for "genocide, crimes against humanity, war crimes and other crimes under international law".

Commentators have argued that the statute lacks precise definitions of war crimes, crimes against humanity, genocide and sexual violence.[46] The extant statutory definitions of these crimes are adapted from the International Military Tribunal (Nuremberg) Charter, with certain amendments. For instance, crimes against humanity in the 1973 Act includes imprisonment, abduction, confinement, torture and rape. Ethnicity is contemplated as one of the grounds of discrimination, though it is unclear if this will reflect customary international criminal law in this regard.[47] The last provision, "any other crimes under international law", is vague and may not be held to be consistent with the principle of specificity, an important tenet of international criminal law.[48]

It is noteworthy that the court conceded that it was bound to enforce domestic legislation which gives effect to international treaties to which Bangladesh is a State Party. However, the tribunal held that it saw no reason to borrow definitions of crimes within its subject-matter jurisdiction, from "fairly recent international tribunals", and that it may only "take into account jurisprudential [and normative] developments from other jurisdic-

43 See William A. Schabas, Ramesh Thakur, and Edel Hughes, (eds.), *Atrocities and International Accountability: Beyond Transitional Justice*, United Nations University Press, Tokyo, 2007.

44 'Temporal jurisdiction' refers to the jurisdiction of a court of law over an action in relation to the passage of time.

45 'Subject-matter jurisdiction' refers to the authority of a court to hear cases of a particular type or cases relating to a specific subject matter.

46 Jyoti Rahman and Naeem Mohaiemen, "1973 War Crimes Act: Getting it right", The Daily Star, 10 July 2009.

47 See Linton, 2010, pp. 231–239, see *supra* note 28, for an exhaustive treatment on the differences between the provisions for the definition of 'crimes against humanity'.

48 Linton, 2010, p. 268, see *supra* note 28.

tions should it feel so required in the interests of justice".[49] With respect, this is unsatisfactory as although the ICT-BD is a national tribunal, it should have recourse to relevant case law and international standards which are widely accepted at both national and international courts.

It is unclear from the first decision of the ICT-BD, from the way in which the charges are described, in the context of the pronouncement "that there is a prima facie case against the accused", whether the judges are merely reciting charges by the prosecutor for the accused to hear, read and understand, or whether they have agreed that these charges form the exclusive and unchallengeable scope of the trial.[50] It appears that it is the latter – that since a prima facie case has been made against the accused, the defence is now being called to answer, which raises significant concerns of perceived impartiality or lack of it.

In particular, certain charges name suspected victims of rape in connection to a crime against humanity, without taking into account whether such identification would adversely affect the physical and psychological security of the victim. This is inconsistent with international standards and best practises.

Strikingly, the 1973 Act also fails to guarantee the independence of prosecutors and the judiciary or the protection of victims and witnesses.[51] In response to these and other criticisms, the 1973 ICT Act was further amended by the International Crimes Tribunal Rules of Procedure (Amendment), 2011 ('2011 Amendment Act')[52], with provisions guaranteeing the rights to: the presumption of innocence[53], not to be tried twice for the same offence[54], a fair and public hearing with counsel of his choice[55], trial without undue delay[56], be heard in his defence[57], not to be

[49] Order issued on 3 October 2011 by the ICT-BD, on file with the author, p. 10.

[50] There is indication to say that not all the charges were accepted: 20 out of 31 submitted by the prosecutor.

[51] *Ibid.*

[52] International Crimes Tribunal Rules of Procedure (Amendment), 2011, dated 28 June 2011.

[53] Rule 43(2).

[54] Rule 43(3).

[55] Rule 43(4).

[56] Rule 43(5).

[57] Rule 43(6).

compelled to testify or confess his guilt against his will[58], to have access to the judgment at no cost[59], and to be released on bail at any stage of the proceedings subject to certain conditions being fulfilled.[60]

Importantly, the 2011 Amendment Act also provides for the protection of victims or witnesses.[61] The ICT-BD is authorised to ensure the physical well-being of victims/witnesses and to order in-camera-proceedings to preserve the anonymity of victims/witnesses if that is in their best interests.

The establishment of the tribunal and the earlier amendments to the 1973 Act should be applauded, and these changes have been heralded as positive steps by some legal experts.[62] Article 58(A) of the 2011 Amendment Act, for instance, states that the ICT-BD may order government authorities to "ensure [the] protection, privacy and well-being" of victims/witnesses, and to maintain the confidentiality of this protective process.[63] The government shall also be required to "arrange accommodation", ensure "security and surveillance" during their stay in connection with the protective process and take "necessary measures" to ensure that law enforcement officials "escort" victims/witnesses to the courtroom.[64] Where proceedings are held *in camera*, the prosecution and defence counsel are also required to maintain the confidentiality of the proceeding and any related information, including the identity of the victims/witnesses.[65]

Before assessing the potential efficacy of these recent amendments in facilitating the gathering of old evidence from victims/witnesses, it would be appropriate to consider another historical conflict and attendant

58 Rule 43(7).

59 Rule 43(4).

60 Rule 34(3).

61 Rule 58(A); I understand that drafters of the 2011 Amendment Act benefited from the expertise of, among others, the University of California Berkeley's International Human Rights Law Clinic directed by Clinical Professor Laurel E. Fletcher.

62 See generally "Recommendations made by Stephen J Rapp", 2011, see *supra* note 2. For the history of the framing of the 1973 Act, see Wali-Ur Rahman, "A Brief History of the Framing of the International Crimes (Tribunals) Act 1973", Bangladesh Heritage Foundation.

63 Rule 58(A)(1).

64 Rule 58(A)(2).

65 Rule 58(A)(3).

ongoing justice process which may offer useful lessons – the of the Khmer Rouge crimes and the ECCC.

10.5 Do Not Fail to Keep Therapeutic Promises: Victims will Lose Respect and Confidence

Led by Pol Pot, who died in 1998, the ultra-Maoist Khmer Rouge emptied Cambodia's cities in a bid to forge an agrarian utopia in the 1970s. Up to two million Cambodians died of starvation, overwork and torture or were executed during the regime's 1975–1979 reign. Khmer Rouge prison chief Kaing Guek Eav alias 'Duch' was convicted for overseeing the torture and execution of around 17,000 detainees at Tuol Sleng prison, also known as S-21. Four other former senior Khmer Rouge leaders are currently being tried for core international crimes at the U.N.-backed ECCC, which was formed in 2006 after nearly a decade of wrangling between the U.N. and the Cambodian government.

Cambodia, like Bangladesh, has endured its share of seemingly intractable political impasses amidst allegations that high-ranking officials of the ruling government bear responsibility for having ordered or permitted large-scale human rights violations between 1975 and 1979. Notwithstanding this, the establishment of the ECCC in 2003, the conclusion of its first trial in July 2010, and its ongoing trials of four senior Khmer Rouge leaders, one of whom was formerly granted a royal amnesty for his crimes as part of a political compromise, is expected to attest to the fact that there may yet be hope for accountability in Cambodia.

Under the 2011 Amendment Act, a victim refers to a person who has suffered harm as a result of crimes under the ICT-BD's jurisdiction, without limitation as to whether such harm is physical, material or psychological.[66] Like the ICT-BD, anyone who has suffered from physical, psychological, or material harm as a direct consequence of the crimes committed by the Khmer Rouge between 1975 and 1979 is considered a victim and may apply to become a 'civil party' to the proceedings at the ECCC.

[66] Article 2(26) of the 2011 Amendment Act states that "'Victim' refers to a person who has suffered harm as a result of commission of the crimes under section 3(2) of the International Crimes (Tribunals) Act, 1973".

The ECCC's procedural rules permit an unprecedented degree of victim participation that surpasses the Rome Statute.[67] By allowing victims to participate in the trials as 'civil parties', the ECCC also seeks to involve Cambodians in the pursuit of justice and national reconciliation.[68] Civil parties enjoy rights at trial akin to the prosecution and the defence. The ECCC's civil party process thus derives from a victim-oriented approach to punishment, which suggests that a victim needs to tell her story before an impartial judge within the framework of a formalised process in order to feel better.

Commentators have applauded the ECCC for giving victims a robust role, saying that it is a long overdue "recognition, after fifteen years of international and hybrid courts like [the ECCC], not to exclude victims from the justice that is being dispensed on their behalf".[69] Kheat Bophal, the former Head of the ECCC Victim's Unit, claimed that participation has the potential to transform Cambodian victims into both agents and beneficiaries of a rule of law culture:

> It is essential for the effectiveness and legitimacy of the Court that victims are part of the [Khmer Rouge Tribunal's] process, and that they have their own voice.
>
> Participation restores faith in the justice system and provides the first hand-satisfaction of making public the harm suffered.
>
> The process of participation also allows victims the opportunity to denounce the crimes committed against them and

[67] Rome Statute of the International Criminal Court ('Rome Statute'), 17 July 1998, U.N. Doc. A/CONF. 183/9 (entered into force on 1 July 2002).

[68] On 12 June 2007, the ECCC's Judicial Committee on the Rules of Procedure, composed of both national and international judges serving in their capacity as rule-makers, issued Internal Rules ('2007 Internal Rules') that, *inter alia*, provided for civil party action purporting to confer victims extensive participatory rights. These Internal Rules will guide the investigation and trial process and help ensure that the court meets international standards for fair trials. Note that the Internal Rules have been amended several times since.

[69] Seth Mydans, "In the Khmer Rouge Trials, Victims will not Stand Idle By", The New York Times, 17 June 2008. Mydan states, "Diane Orentlicher, Special Counsel of the Open Society Justice Initiative believes that the Tribunal marks the evolution of international criminal justice".

> support norms and laws that prohibit such actions and events.[70]

In theory, the notion that victims benefit from participation is difficult to dispute, but, as we shall see, in practice victim participation has significant limits. Participation is not always a 'panacea', nor should the trial function as a sort of modern-day 'degradation ceremony'.[71] As Morten Bergsmo has noted, "victims' interests are variegated". Victims want "not only to have someone convicted, but also to have a court verify what exactly the facts were and whether the accused is responsible for those acts", and if others may have been complicit.[72]

While not perfect, *Prosecutor v. Kaing Guek Eav* ('the *Duch* case') is noteworthy in this respect. Significantly, the ECCC Trial Chamber did not merely pronounce on Duch's guilt, but upheld his due process rights, ruling that his pre-trial detention for more than eight years by the Military Court of Cambodia was illegal and merited a reduction in his sentence. At the time of writing, the ECCC's Supreme Court Chamber is to issue its first final judgement in relation to the *Duch* case. The Chamber's reasoning for its decision will be thoroughly examined in the context of the Judgement's implications for strengthening the rule of law in Cambodia.

The *Duch* case is of great importance to stability in Cambodia in the long run, as in Cambodia the test of legitimacy is not arrests – the Cambodian government knows how to arrest people it does not like – but whether 'fair trials' can be carried out so Cambodian victims can see that justice is possible in their country.

Bergsmo has added a cautionary note about balancing victims' interests for truth and justice through adherence to the highest legal professional and evidentiary standards in court:

> A people should be entitled to its own history, even when every detail is not documented. Yet, in comparison higher standards of evidence should apply to core international

[70] Interview with Kheat Bophal, Head of the Victim's Unit at ECCC, Access Victims' Rights Working Group Bulletin, Spring 2008, vol. 11, p. 4.

[71] See, generally, James Cockayne, "Hybrids or Mongrels? Internationalized War Crimes Trials as Unsuccessful Degradation Ceremonies", in *Journal of Human Rights*, 2005, vol. 4; and Harold Garfinkel, "Conditions of Successful Degradation Ceremonies", in *American Journal of Sociology*, 1956, vol. 61, no. 5, pp. 420–424.

[72] Morten Bergsmo, "Using Old Evidence in Core International Crimes", *FICHL Policy Brief Series*, 2011, no. 6, p. 4.

> *crimes processes, where penalties are particularly severe. If old evidence should not be an excuse not to prosecute, it requires greater caution. The fact that it relates to events carrying highly emotional burdens may render it more fragile* (emphasis added).[73]

Complexities arise when this caution is cast aside. They are compounded when promises are made to victims about their role in formal accountability and truth-telling process, which are not honoured. These complexities have occurred at the ECCC, and should then be carefully examined. In particular, I have encountered significant problems in connection with victim-oriented approaches being misunderstood or misapplied at the ECCC, which the ICT-BD's affiliates may wish to consider.

The ECCC's civil party process derives from a victim-centred approach to punishment, which suggests that a victim needs to tell her story before a decision-maker within the framework of a formalised process in order to feel better.[74] Suggestions abound about the soothing effects of participation.

To Naomi Roht-Arriaza, victims gain "a sense of control, an ability to lessen their isolation and be reintegrated into their community, and the possibility of finding meaning through participation in the process".[75] For Jamie O'Connell, participation may also restore a victim's dignity by giving him "a sense of agency and capacity to act that the original abuse sapped".[76] More than testifying as a witness, playing a role in the prosecution is said to "assist victims to take back control of their lives and to ensure that their voices are heard, respected, and understood".[77] Leila Sadat

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[73] Bergsmo, 2011, p. 4, see *supra* note 59.

[74] Naomi Roht-Arriaza, *Impunity and Human Rights in International Law and International Law and Practice*, Oxford University Press, 1995, p. 21. The author notes: "[…] more formalized procedures, including the ability to have an advocate and to confront and question their victimizers, may be more satisfying for victims than less formal, less adjudicative models."

[75] Roht-Arriaza, 1995, p. 19, see *supra* note 61; see also Raquel Aldana-Pindell, "An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes", in *Human Rights Quarterly*, 2004, vol. 26.

[76] Jamie O'Connell, "Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?", in *Harvard International Law Journal*, 2005, vol. 46 The author quotes from a telephone interview with Mary Fabri, clinical psychologist.

[77] Yael Danieli, "Victims: Essential Voices at the Court", Victims Rights Working Group, London, U.K., 2004, p. 6.

notes that war crimes trials "will not only provide a forum for the particular defendant but also an arena in which the victims may be heard".[78]

In short, participation is equated with "truth-telling", which is held out as being fundamentally and necessarily beneficial, validating the victims' experience and permitting them to heal.[79] Yet, legal justice is often too "thin" to support therapeutic goals. The notion that victims benefit from participation is powerful but it should be closely examined if tribunals wish to send the right message to victims.

Based on conversations with and observations of Cambodian victims and civil parties at the ECCC, it is my view that unless modestly conveyed and properly managed, the message of victim participation can devolve into a rhetorical device.[80] A device that soothes the ECCC's affiliates and donors, but not all victims, some of whom complain that their token participation in the ECCC trial proceedings has "revive(d) memories, bitterness and misery", and engendered a "loss of faith in the ECCC".[81]

Despite being a hybrid court based in Phnom Penh, the ECCC has at times externalised justice away from Cambodian victims. The ECCC's promise that victims have a place in the proceedings results in heightened

[78] Leila Nadya Sadat, "Redefining Universal Jurisdiction", in *New England Law Review*, 2001, vol. 35, pp. 241–263.

[79] Judith Lewis Herman, Trauma and Recovery, Basic Books, New York, 1992, p. 181. The authors note: "The fundamental premise of psychotherapeutic work [with survivors of severe trauma] is a belief in the restorative power of truth-telling".

[80] See generally, Mahdev Mohan and Vani Sathisan, "Erasing the Non-Judicial Narrative: Victim Testimonies at the Khmer Rouge Tribunal", in *Jindal Global Law Review*, 2011, vol. 2, issue 2; and Mahdev Mohan, "The Paradox of Victim-Centrism – Victim Participation at the Khmer Rouge Tribunal", in *International Criminal Law Review*, 2009, vol. 5.

[81] Press Release, Victims' Press Conference at the ECCC, Victims Voice their Hopes and Concerns about ECCC (3 December 2009), on file with author:

> We hope participation in this process will provide us with some relief, a sense that justice has been done and an understanding of our history; but it also revives memories, bitterness, and misery. We began with hope that the ECCC would provide some satisfaction, but we are now concerned about the delays, the allegations of corruption, the sufficiency of available resources, and the lack of information on the progress made by the ECCC and prospects for our involvement. These problems prompt many of us to lose hope and faith in the ECCC.

disillusionment for victims when the process turns out to be unreceptive to and incompatible with their subjective impressions, general reminiscences, emotions and renditions of truth.[82]

Some Cambodian civil parties have been disillusioned because the court process has turned out to be unreceptive to and incompatible with their subjective impressions, emotions and renditions of truth. Others who have applied to become civil parties but have been told that their applications are inadmissible for jurisdictional reasons – for instance, because the crimes they suffered took place outside the 1975–1979 timeline – have felt affronted because their status and identity as victims has been questioned. Still others wish to speak in their own voice in court rather than through prosecutors and are distraught when the evidence they take pains to re-tell do not make their way to the official record.[83]

Historically, the indigenous lowland Khmers or 'Khmer Krom' have been a marginalised minority group due to their geographical, historical, and cultural ties to both Cambodia and Vietnam. Their distinct identity also made the Khmer Krom community the target of crimes during the Khmer Rouge regime. In the Khmer Krom heartland of the Bakan district, Pursat province, up to 80 percent of the community was singled out and slaughtered *en masse* by the Khmer Rouge, who considered them to be traitors associated with the Vietnamese – persons with "Khmer bodies but Vietnamese minds". This was a calculated mass murder with some chilling parallels to the notorious Srebrenica Massacre of 1995 in Bosnia and Herzegovina.

Yet, for the past two years, the Khmer Krom community has remained a blind-spot for the Investigating Judges and Co-Prosecutors at the ECCC, who have repeatedly failed to acknowledge their evidence. In January 2010, the ECCC's co-investigating judges decided to charge the suspects for crimes against Cambodia's Cham Muslim and ethnic Vietnamese minorities, but not the Khmer Krom – ethnic Khmers with roots in southern Vietnam. This omission stemmed in part from the prosecution's exclusion of the Khmer Krom from its investigation, which left the tribunal's judges unable to pursue such charges, despite compelling

[82] Marie-Benedicte Dembour and Emily Haslam, "Silencing Hearings? Victim-Witnesses at War Crimes Trials", in *European Journal of International Law*, 2004, vol. 15, no. 151, p. 156.

[83] See generally Mohan and Sathisan, 2009, see *supra* note 80.

evidence of mass killing and forced displacement of the Khmer Krom throughout Cambodia.[84]

However, Khmer Krom survivors continued to press their case with the court, submitting extensive evidence of the atrocities they suffered and detailing prison sites and mass graves. These efforts paid off.

On 13 June 2010, the ECCC's international co-prosecutor Andrew Cayley reached out to Khmer Krom survivors. Meeting for the first time with nearly 200 of them in Pursat Province, on the grounds of a pagoda where Khmer Krom had been executed, Cayley acknowledged the need to present to the court the atrocities committed against the Khmer Krom people.

On 17 June 2011, Mr. Cayley lived up to his word. He filed "Request for Investigative Action and Supplementary Submission" which adds additional crimes to a new case at the court (*Case 004*), including crimes committed against the Khmer Krom population in Takeo and Pursat provinces, based primarily on civil party evidence.

Now, at the time of writing, more than 130 Khmer Krom survivors will have an opportunity to participate in the next trial of senior Khmer Rouge leaders, which is expected to begin at the end of the month. Their evidence, which has thus far not been documented, could also become the centre-piece of *Cases 003/004*.

As one civil party eruditely put it when speaking to court officials,

> Give me, give us [civil parties] the voice that you promised. Do not play with the hearts and the souls of the victims and my (dead) parents. Justice must be transparent, if not it will be for nothing, and you will have a real problem on your hands.[85]

For its part, the ECCC fearing an onslaught of 3,866 Cambodians who have been admitted as civil parties in the next case, all jostling for an opportunity to address the court, has back-pedalled on several of the rights it originally conferred to civil parties. All in all, the civil party pro-

[84] The ECCC grounded its decision partly on a technicality. Months before, prosecutors had sent a memorandum to investigating judges about possible genocide against Khmer Krom in the Pursat province. They entitled the memorandum an "investigative request" rather than a "supplementary submission". The latter title would have triggered an investigation.

[85] *Ibid.*

cess promises far more than it can deliver. Legal accountability processes often buckle under the strain of supporting ambitious therapeutic or restorative goals. The ECCC and other accountability processes should instead abide by their foundational goal of delivering accountability under the law. To ask more of it may be asking too much of any criminal trial. Restorative justice may better reside with complementary processes that can be more receptive to strategies that commemorate victims in the non-legal arena using pre-existing traditions that are communicated in a manner that resonate with victims.

As we shall see, practice at the ECCC offers important lessons to the ICT-BD on the inherent challenges of eliciting 'old evidence' from victims or witnesses; how to gather credible old evidence from them; and the protective processes that ought to be supported and strictly enforced when seeking to inspire victims/witnesses to come forward to share their traumatic narratives with the tribunal.

10.6. Beware the Taint of Sham Trials and Selective Justice: Send the Message that Trials are Independent

Notwithstanding the recent legislative amendments and the confidence they are meant to inspire in Bangladeshi victims/witnesses, there are likely to remain significant challenges in eliciting old evidence for the core crimes charged. This is not because the ICT-BD's affiliates and lawyers are saviours who "know best" or have to deal with victims who are powerless, helpless innocents whose naturalist attributes have been negated.[86] As Mutua notes, that presumption, which has at times unwittingly informed the larger international criminal justice process, is often as flawed as it is offensive. On the contrary, victims or witnesses are keenly aware of the possible risks that their testimony may involve. After all, piecemeal investigations or purported laws promising protection but that may not be enforced are problematic in the eyes of Bangladeshi victims who have historical reasons not to trust any exercise that resembles official information gathering.

Victims of mass crimes which transpired over three decades ago and who have not benefited from timely justice processes and legal remedies are keenly aware of the fact that such processes and remedies, when

[86] Makau Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights", in *Harvard International Law Journal*, 2001, vol. 42, p. 201.

promised, may be but a mirage. Despite the due process guarantees that have been introduced by the above-mentioned legislative amendments, other extant constitutional provisions send a different message.

Under Article 47(A) of the Bangladesh Constitution, traditional fair trial rights which are accorded to all other citizens have been deliberately withdrawn from persons detained, suspected or charged in connection with crimes within the scope of the 1973 ICT Act. Linton highlights additional difficulties undermining due process, as well as concerns over the retention of the death penalty – all of which do not augur well for the legitimacy of the ICT-BD in the eyes of the victims whose evidence it is mean to elicit.[87] As Linton notes, "such considerations could have enriched and improved the Bangladeshi law in the amendments of 2009, in a way that is consistent with the overarching principle of legality".[88]

Steven Kay too has been moved to lament as follows:

> The overall effect of these measures was to put persons questioned, detained, suspected of committing crimes or charged with crimes within the International Crimes (Tribunal) Act 1973 outside the norms of the national legal system. For the first time inequality has been introduced into the Bangladesh justice system by the Constitution that claimed to promote equality.[89]

War crimes courts cannot apply justice selectively and all applicable legislation undergirding the ICT-BD's judicial process should be harmonised. The process and the victims it seeks to vindicate are not helped by anything which may resemble a 'degradation ceremony', regardless of how heinous the alleged crimes may be. In fact, the greatest danger to such a process is the perception that it may be denouncing certain groups, whilst implicitly condoning others that are equally or more culpable.

Such a perception robs the court of its legitimacy in the eyes of local and international stakeholders and undermines its goals. This is precisely what happened when Pol Pot and Khmer Rouge Foreign Minister, Ieng Sary, were tried *in absentia* for genocide and other international

87 Linton, 2010, see *supra* note 28.

88 Linton, 2010, p. 209, see *supra* note 28.

89 Steven Kay, Q.C., "Bangladesh War Crimes Tribunal – A Wolf in Sheep's Clothing?" *International Criminal Law Bureau*.

crimes in 1979 by the so-called People's Revolutionary Tribunal ('PRT') established by the Vietnamese-installed Heng Samrin administration.[90]

Although foreign lawyers had been invited to serve as prosecutors and defence counsel in order to "reflect international standards of justice" and thereby enhance the legitimacy of the proceedings, the PRT was not well received by local and international stakeholders. The short duration of the trial, the denial of due process rights to the defendants who were convicted *in absentia* and a poor defence combined to create the impression of mob justice. These factors created the impression of "primitive political justice" which was seen to be "akin to the Stalinist show trials of the 1930s".[91] Many Cambodian victims of the Khmer Rouge regime saw the trial as an assertion of Vietnamese sovereignty over Cambodia. The reaction in the West to the verdict was conspicuous silence – all it commanded was two square inches in the back pages of the *New York Times*.

In contrast, the U.N.-backed ECCC was established by virtue of a great deal of patience and skilful negotiation. Cold War politics and competing national interests impeded the establishment of a tribunal to try Khmer Rouge leaders throughout the 1980s. Painstaking negotiations among the U.N., various member states and Cambodia over much of the ensuing decade reflected a mixture of – depending on the government in question – ambivalence, conflicting priorities and/or active hostility to the tribunal.

Despite this, Cambodian Prime Minister Hun Sen, himself formerly a Khmer Rouge cadre, was moved in 1997 to request the U.N. to assist in bringing senior Khmer Rouge leaders to book through war crimes trials. Mr. Hun Sen invited international participation in the trials due to the weakness of the Cambodian legal system and the international nature of the crimes, and to help in meeting international standards of justice.

Until the requisite political will and donor support aligned to permit the creation of the ECCC, the idea of a U.N.-backed tribunal was kept alive by a variety of diplomats, other actors at the U.N., INGOs and Cambodian NGOs, including, among others, the Office of the High Commissioner for Human Rights, U.S. Senator John Kerry, U.S. Ambassador-at-

[90] Cambodia: Information on P.G. Jail in Phnom Penh from 1979–1981, available at http://www.unhcr.org/refworld/country,,USCIS,,KHM,,3f52079b4,0.html, last accessed on 3 October 2012.

[91] Peter Maguire, *Facing Death in Cambodia*, Columbia University Press, 2005, p. 65.

large for War Crimes, David Scheffer, the Director of Genocide Watch, Gregory Stanton, academics from the Yale Genocide Program, and Cambodian civil society leaders such as Youk Chhang, Director of the Documentation Centre for Cambodia ('DC-Cam').

International negotiators and experts, such as the Group of Experts, which was established by the U.N. Secretary-General in 1999, were instrumental in laying the foundation for the present day tribunal. At times, they settled for a compromise, such as when the U.N. decided against the Group's recommendation of establishing an *ad hoc* tribunal pursuant to the U.N. Security Council's powers under Chapter VII of the U.N. Charter to restore international peace and security, and instead established a hybrid tribunal situated in Cambodia so that local communities could better identify with the process.

On other occasions, negotiators stood firm, such as when the U.N. withdrew from negotiations with Cambodia in 2002 because negotiations had failed and the Cambodian court would not guarantee impartiality and independence, which is required for U.N. co-operation. Finally, the ECCC was established in 2003 with U.N.'s chief negotiator, Under-Secretary General Hans Corell, stating that the ECCC's foundational documents and processes were "designed to ensure a fair and public trial by an independent and impartial court".[92]

Mr. Corell's faith in the ECCC was vindicated earlier last year when the ECCC's Trial Chamber delivered its first judgment in the *Duch* case – a well-reasoned decision which has been praised for its sound treatment of the facts before the court. Had the ECCC been rushed into action ahead of its time, rather than through a phased-in approach over several years, or had international negotiators caved in to pressure to allow national judges to have greater say in deciding cases rather than ensuring that decisions will require a 'super-majority' to be conclusive, it is likely that any chance of securing justice would have been scuttled outright or led to results that would not have been viewed as credible, fair or impartial by national and international stakeholders alike. This is noteworthy for the ICT-BD.

[92] Press Release, "UN and Cambodia reach draft agreement for prosecuting Khmer Rouge crimes", available at http://www.un.org/apps/news/story.asp?NewsID=6487&Cr=cambodia&Cr1=, last accessed on 19 October 2012.

It is striking that despite the more than 30 years that have elapsed since the fall of the Khmer Rouge, the trials now underway are broadly considered meaningful and important by the Cambodian public. Despite the long delay, the general public followed the *Duch* trial with great interest, as indicated, among other things, by the very large television viewing audience the trial attracted. While a delay in justice is hardly advisable as a matter of course, it is important to bear in mind that justice delayed is not always justice denied – war crimes trials that come long after a conflict may nonetheless enjoy very considerable public support and may operate to promote reasoned reflection upon the past. Having said this, it is too early to tell whether, as some ECCC affiliates argue, the trials will in themselves make a significant contribution to societal reconciliation by 'healing' survivors.

Tribunals such as the ECCC have grand ambitions of delivering "justice", in the broadest sense of the word. Judging by continued obstacles to accountability at the ECCC, however, it appears justice does not come easy or cheap. Even though the trials have begun, Cambodians face a long road to justice. At the time of writing, the final two cases pending before the ECCC, referred to as *Cases 003/004*, were submitted for judicial investigation in September 2009 and concern former Khmer Rouge cadres who are part of or are closely associated with the ruling political party and the Hun Sen administration.[93] Unsurprisingly, little has been done since, due in no small part to the reluctance of national investigators to co-operate.

The reluctance of the ECCC's top Cambodian investigators to proceed with *Cases 003/004* is likely in response to statements from high ranking Cambodian officials indicating that these trials should not go forward. The clearest example of ostensible interference came from Prime Minister Hun Sen when he told the UN Secretary-General, "Case 003 will not be allowed […]. The court will try the four senior leaders successfully

[93] See generally, Rob Carmichael, "Tribunal's Credibility Under Threat as Controversial Cases Head for Closure", 11 May 2011, available at http://www.robertcarmichael.net/Robert_Carmichael/Radio/Entries/2011/5/11_Tribunals_credibility_under_threat_as_controversial_cases_head_for_closure.html, last accessed on 19 October 2012; James A. Goldston, "Justice Delayed and Denied", in *New York Times*, 13 October 2011, available at: http://www.nytimes.com/2011/10/14/opinion/14iht-edgoldston14.html?_r=1, last accessed 9 October 2012.

and then finish with Case 002".[94] At the time of writing, the international Co-Investigating Judge resigned from his post, ostensibly in protest against his inability to make headway in *Cases 003/004*.[95] Both cases have attracted an overwhelming amount of criticism from commentators due to the serious and consistent allegations of political interference by the Cambodian Government. In the last years several senior ECCC officials have resigned from their posts citing the government's interference as making it impossible for them to carry out their functions.[96]

Despite the success of the first trial before the ECCC the current controversy aroused by the Prime Minister's remarks threatens to undermine the tribunal's legitimacy. If in fact the cases now under investigation are not permitted to go forward because of political interference, the tribunal will be seen as having failed both to provide accountability and to serve as a model of the rule of law for Cambodia. The lesson we can glean from this is that if the independence, impartiality, and effectiveness of an accountability mechanism cannot be guaranteed at its inception, the expectations of victims may be disappointed and the culture of impunity may be reinforced rather than overcome.

This lesson is particularly apposite in Bangladesh as genuine concerns have been expressed by victims that the ICT-BD trials could be advanced by the current administration to gain political or electoral mileage, and if there is a change in power, the ICT-BD may be strangled at birth. Like the suspects in *Cases 003/004* at the ECCC, many of the suspects and accused persons at the ICT-BD have long-standing political ties.[97]

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94 "Hun Sen to Ban Ki-moon: Case 002 last trial at ECCC", in *Phnom Penh Post*, 27 October 2010.

95 See the following reports by civil society members that called for (and achieved) this resignation due to the fact that the ECCC has not made any progress on cases 003/004: Open Society Justice Initiative, Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: June 2011 Update, available at http://www.soros.org/initiatives/justice/articles_publications/publications/cambodia-eccc-20110614/cambodia-eccc-20110614.pdf; Human Rights Watch, "Cambodia: Judges Investigating Khmer Rouge Crimes Should Resign", 3 October 2011, available at http://www.hrw.org/news/2011/10/03/cambodia-judges-investigating-khmer-rouge-crimes-should-resign, last accessed on 3 October 2012.

96 See Human Rights Watch, *ibid*.

97 "War Crimes and Misdemeanours: Justice, reconciliation—or score-settling?", *The Economist*, 24 March 2011, available at http://www.economist.com/node/18446875, last accessed on 3 October 2012.

Bangladeshi victims would not be alone in harbouring such suspicions, as expert commentators too have argued that the trials may be politically motivated, calculated to shift focus away from other issues which impair the current administration's political control.[98]

As Ambassador Rapp notes, it is "important that the trials be carried out in a way that will stand the test of time".[99] While this is far easier said than done, no effort should be spared in order to insulate the tribunal from political interference. The best tool for such insulation is for the tribunal to adhere to domestic and international legal standards which will help it make clear that it is a separate and independent body within the judicial branch of government that is beyond executive interference.

It is important, therefore, that the ICT-BD's affiliates have modesty of ambition when it comes to devising and calibrating its' process. In view of the current political climate in Bangladesh, and the historical lens through which the ICT-BD may be viewed by victims and the international community, I suggest that the ICT-BD ensure that its legal and judicial officials possess the requisite training and resources to ensure that the process is seen to fruition and comports with Bangladeshi law and international law and standards.

For a start, the ICT-BD's practical challenges and capacity constraints must be anticipated and addressed. It has been reported that approximately USD $1.5 million has been approved by the Cabinet for the trial.[100] Yet, the elements of the legal process covered by the budget are unclear and the sheer scope of crimes and alleged criminals within its jurisdiction is staggering.[101] The ECCC has done well to have planned for similar exigencies[102] so that it could have deployed its resources more ef-

98 D'Costa, 2011, pp. 158–159, see *supra* note 1.

99 Stephen J. Rapp, Ambassador-at-Large, War Crimes Issues, Press Conference, 13 January 2011, p. 22.

100 D'Costa, 2011, p. 159, see *supra* note 1.

101 See Linton, 2010, p. 309, see *supra* note 28; D'Costa, 2011, see *supra* note 1; D'Costa and Hossain, "Redress for Sexual Violence before the International Crimes Tribunal in Bangladesh: Lessons from History and Hopes for the Future", in *Criminal Law Forum*, 2010, vol. 21, pp. 331–332.

102 The ECCC plans to spend close to $200 million to try five defendants; a process it anticipates could take until March 2014. That is a big increase from the court's initial three-year budget of $56.3 million – an amount unfathomable to many ordinary Cambodians who live on less than $1 a day. The court's spokespersons have emphasised that Cambodia's hybrid court looks like a bargain compared with tribunals in Rwanda

fectively in the last five years. The ICT-BD should not repeat the ECCC's mistakes in this regard.

As intuitive as it may be to commence war crimes trials, absent systematic investigations, sufficient resources and sustained political will, or an adequate mandate and principled completion strategy, such trials may be mired in challenges. They may also divert precious attention and resources from achievable restorative goals. Criminal prosecution is just one element in a toolbox of post-conflict justice and accountability. In any given context, those who seek accountability must closely examine their objectives to ensure that the mix of tools they select is best tailored to the particular need. Exaggerating what just one tool – prosecution – can reasonably accomplish may mean that other avenues which are more meaningful and effective are not explored or are prematurely foreclosed.

10.7. Investigate, Document and Preserve: Send the Message that Victims' Narratives Matter

Another innovative way to bolster the ICT-BD's legitimacy would be for it to make appropriate reference to and rely on other independent and complementary transitional justice processes which may be well-received by Bangladeshi victims. The experience in Cambodia points to the key role that civil society may play. The lessons from these contexts indicate that international practitioners who wish to engage in investigation and documentation of alleged mass atrocities are more likely to succeed if they engage and work with local experts who enjoy the trust and confidence of victims and, in some cases, of at least some governmental actors. In my experience partnering with local experts in a respectful and constructive manner is a necessary pre-requisite for gaining a sound legal and forensic understanding of the nature of the mass atrocities, their scale, and their geographical sweep. This sets the foundation stone for proper documentation of victim narratives, which will in turn form the basis for comparative assessment and corroboration of new testimonial evidence of old crimes which may emerge in the course of the ICT-BD's investigations and trials.

and the former Yugoslavia, which have cost about $150 million a year. The Cambodian side of the court has begun to run out of money to pay salaries, but donors have yet to publicly commit funds for fear that the funds will be siphoned away by corrupt officials at the highest levels.

In Cambodia, leading local NGOs have assisted in interviewing vulnerable survivor communities and put forward data that has assisted the ECCC to charge defendants for crimes such as genocide and forced marriage, which were hitherto unknown to ECCC prosecutors.[103] By way of analogy, the ICT-BD's affiliates should look to NGOs in Cambodia such as DC-Cam which was first established by international funding and supported by academic research, to conduct research, documentation and training on the Khmer Rouge Regime. DC-Cam and the Tuol Sleng Museum serve as the principal sources of evidentiary material for the ECCC. DC-Cam's very inception can be traced back to a statute passed by the U.S. Congress in April 1994 – the Cambodian Genocide Justice Act – that led to the establishment of the Yale Genocide Program in the U.S., and to the birth of DC-Cam in 1997.

The organisation's motto, "searching for the truth", gives it the aura of an investigative entity tasked with finding, corroborating and recording facts. DC-Cam's Director, Youk Chhang, emphasised this when he told the press, "They say that time heals all wounds, but time alone can do nothing. You will always have time. To me, research heals. Knowing and understanding what happened has set me free".[104] In its methodical approach to gathering data, we observe how DC-Cam is "analysing an oral text, and correlating it with other, written documents and other pieces of information" to "'restore' the text to its 'original' version, and situate this version in its social context, establishing the particular perspective on the past that the 'oral document' takes".[105]

As the nation's primary repository of documents relating to the Khmer Rouge that provided the ECCC with its secondary evidence, we ask how the very act of "searching for the truth" has been significantly influenced by DC-Cam. The lesson to be learnt here is that under the right circumstances a limited and well-calibrated mandate to document and preserve old evidence can achieve success in establishing the truth, while

[103] Similarly, in Timor-Leste, for example, it was national NGOs that led the way in documenting systematic sexual violence, providing a report that spurred investigation into such crimes.

[104] Stefan Lovgren, "Documenting Cambodia's Genocide, Survivor Finds Peace", in *National Geographic News*, 23 January 2008, http://news.nationalgeographic.com/news/2005/12/1202_051202_cambodia.html, last accessed on 9 October 2012.

[105] James Fentress and Chris Wickham, *Social Memory*, Blackwell Publishers, Oxford, 1992.

a broader mandate might well undermine it, regardless how noble its intentions.

Nevertheless, despite the best efforts of archives and libraries in Cambodia and elsewhere, over the years much evidence of and witnesses to the Cambodian 'killing fields' have been destroyed, disappeared or perished and unfortunately will not form part of Cambodia's historical record.[106] For victims of mass violence who have now come forward to give evidence, including their testimony in the ECCC's legal record or in some other virtual space which acts as a repository of their important narratives and aspirations may become the only formal acknowledgment they will receive of the atrocities they endured under the Khmer Rouge regime.[107] The ICT-BD should explore similar initiatives. ECCC International Co-Prosecutor Andrew Cayley puts it well:

> [I]t is crucial that evidence be documented as soon as possible and as regularly as possible thereafter. This documentation should be preserved in a form which will permit it to be understood and interpreted. Also it is very important that original documents be retained and that chains of custody are able to be proven.
>
> With regard to crimes committed decades ago […] the above circumstance may not be present; however those prosecuting international crimes should seek out interested persons and organizations that have been collecting evidence from the relevant period. Furthermore, electronic data systems and other advanced technologies should be used to discover, pre-

[106] Tuol Sleng has been in a state of gross disrepair, with inadequate facilities to house and archive old primary documents, despite its status as a 'Museum'. Observers have noted that its staff lack training in the proper preservation of such materials and little has been done to fulfil the wishes of survivors who were interred there, to refurbish it and turn it into a proper memorial site. Efforts may be under way soon, however, by UNESCO and other stakeholders to redress this.

[107] A Victims Register or *Kraing Meas* (or 'Golden Book') whereby victims' information and narratives will be maintained in physical and online formats by the ECCC in co-ordination with NGOs. The online format of the register will be a major component of the Virtual Tribunal, an online database chronicling the regime and the work of the ECCC maintained by the War Crimes Study Centre of University California Berkeley. The core idea of the Virtual Tribunal is to expand the conventional notion of the archive for International Criminal Tribunals into a powerful educational legacy tool, accessible to local citizens, schools, and universities as well as international audiences.

> serve, organize, analyze and disseminate evidence of crimes. These are invaluable tools to both those who are prosecuting and defending.[108]

Archivists at the Liberation War Museum and related documentation organisations in Bangladesh should work towards interviewing potential witnesses, identifying and analysing narratives of survival, securing important primary evidence, implementing measures to prevent the destruction of documents and forensic evidence, and providing a basis to begin to confront the conflict and its consequences. By identifying and preserving evidence, both through traditional and electronic means, this archive may yet make a significant contribution to the success of future prosecutions.

10.8. Engage but Do Not Over-burden Civil Society: Send the Message that there is a Distinction between Judicial and Non-Judicial Actors

Investigation and documentation of alleged mass atrocities can be led by formal or informal truth and reconciliation commissions and referenda, by civil society, or by researchers at academic and documentation institutions dedicated to contemporaneous data collection and analysis. Where effective formal judicial accountability mechanisms are stalled, transitional justice processes devoted to truth and reconciliation can nonetheless provide a foundation for sustained accountability, not to mention strengthen local legal capacity and justice institutions which maintain the rule of law.

The lessons from Cambodia show how important the role of civil society can be in locating and preserving the documentary record of a conflict. Ideally, collaborative civil society and court initiatives can make use of that documentary record and victim testimonies and narratives for education, for assisting victims to come to terms with the past, and for fathoming how to prevent and deter mass atrocities.

Yet, compulsory truth-telling is not always effective or well-received in Asian or non-Judeo-Christian societies, where speech may be seen as performative and not necessarily consistent with justice and reconciliation.

An initiative spearheaded by a Cambodian NGO a few years ago is instructive in this regard. From 2006 to 2008, the Centre for Social De-

[108] Bergsmo, 2011, p. 2, see *supra* note 72.

velopment ('CSD') sought to create an outreach programme that was one of the most ambitious and far-reaching efforts by any NGO at that juncture. Its then Executive Director, Theary Seng, stated during one such public forum that "[…] the goal is to broaden the conversational space and to put down the burden of the past, which many have carried silently for too long. In that sense, ours is an informal truth and reconciliation commission".[109]

The combined effect of these informal public forums and the legal outreach work of civil society organisations in the context of the ECCC is to extol "truth telling" and positivist ideas of the law as the main paths to reconciliation. As one Cambodian victim said during one of these forums, "[w]e need *clear and exact facts/cases* from Cambodian people. In the past they did not collect written evidence but they can tell what they have suffered. But in law it is not enough to be regarded as evidence, so it's not relevant".[110]

Several difficulties arose in the course of this civil society organisation ('CSO') initiative, which typify legal outreach and informal transitional justice processes that CSOs have conducted in Cambodia.

First, as the victim's quote above demonstrates, the discourse of truth-telling has become synonymous with 'facts' established within the court of law, rather than 'truth' and is evidenced by the sorts of impassioned remarks made by victims at non-judicial *fora*: in the course of public forums, press interviews and civil society meetings. If allowed to overreach themselves, CSO-led non-judicial truth-telling processes may often become freighted with the same baggage that weighs heavily upon judicial war crimes trials – *id est*, a desire to compel a population that preferred to heal through forgetting into "truth-telling subjects who would, after adequate sensitization, recognize their 'need' to talk about the violence".[111]

However, when CSOs take a legal tone it has a profound impact on how people are expressing their memories; how they understand justice

[109] Theary C. Seng, "Opening speech at the Phnom Penh Public Forum", 14 November 2007.

[110] On file with author.

[111] Rosalind Shaw, *Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone*, United States Institute of Peace, February 2005, Special Report, no. 130, p. 4.

and the law. As Rosalind Shaw aptly stated with regards to the Truth and Reconciliation Commission in Sierra Leone,

> [d]ifferent regions and localities, moreover, have their own memory practices and often their own techniques of social recovery that may have developed during the course of their own history. How do these practices intersect with public truth telling during a truth commission?[112]

In the case of Sierra Leone, Shaw indicates that local practices were largely focused on "forgiving and forgetting" and that "valorizing verbally discursive remembering" was problematic as a result.

Shaw's words are apposite in the ECCC context as well. Even if she was referring to a truth and reconciliation commission and not a tribunal as is the case in Cambodia, the combined effect of these informal public forums and the legal outreach work of CSOs in the context of the ECCC is to extol "truth telling" and positivist ideas of the law as the main paths to reconciliation. Non-judicial initiatives which seek to establish a historical record and smooth out the creases of conflicting versions of the truth or collective memory in the public's mind can be antithetical to the victim's desire to disclose vital nuanced truths and layered memories which depart from the 'standard total view'.[113]

Insisting on forming or adhering to collective memory can also run contrary to the judicial endeavour. In other words, judges cannot presume to accept 'facts of public notoriety' which have not been established as agreed or probative facts in accordance with the applicable standard of proof.[114]

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[112] *Ibid*.

[113] Michael Vickery, *Cambodia 1975–1982*, South End Press, Boston, 1984.

[114] Bergsmo, 2011, p. 3, see *supra* note 72; ECCC Supreme Court Judge Agnieszka Klonowiecka-Milart states:

> [beware] the danger of collective memory, as forged through secondary sources such as reports or books. First the demonstration of individual criminal responsibility should clearly be distinguished from the establishment of the background of facts. Second, tribunals should be very careful in addressing what might be presented to them as 'facts of public notoreity'. Such concepts might serve the economy of the trial, but they de facto lower the standard of proof.

In order to elicit credible old evidence, one must keep in mind what remembering and recounting traumatic and deeply personal events entails. After all, to remember is to have a "reading" of the past which,

> […] requires linguistic skills derived from the traditions of explanation and story-telling within a culture and which [presents] issues in a narrative that owes its meaning ultimately to the interpretative practices of a community of speakers.[115]

A key problem in Cambodia is the lack of adequate investigation into what local practices are in this regard. Cognizant of this *lacuna* at the ECCC and its attendant processes, the ICT-BD should explore the non-judicial arena when considering victim-oriented measures premised on restorative justice, regardless of how alien that may seem to lawyers. Non-judicial initiatives which run or will run parallel to the ECCC's trials give victims confidence that restorative justice can be meted outside the courtroom at a spiritual ceremony or ritual, through testimonial therapy, on a dramatic stage or through the arts.[116] There are informal transitional justice mechanisms like the *Shalish* in Bangladesh which is akin to the *Gacaca* in Rwanda which can also be further researched and explored.[117]

Second, by taking on the mantle of the court when speaking to victims about their evidence and using and encouraging the language of the law, CSOs externalise their greatest strength – their roots in and connection to the community and the trust and confidence that this connection inspires and the narratives it elicits. Without this connection, victims or witnesses will look upon civil society as an extension of the court or the government, which is not always beneficial. The proposition that the involvement of judges necessarily makes proceedings more accessible to local constituents is doubtful. It has been my experience that Cambodian victims are generally more suspicious of justice initiatives that are linked to local authorities and judges, some of whom are regarded as corrupt.

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[115] David Bakhurst, "Social Memory in Soviet Thought", in D. Middleton and D. Edwards (eds.), *Collective Remembering*, Sage, London, 1990, pp. 209.

[116] For further details on the sort of initiatives which can be supported, see Mohan and Sathisan, 2011, see *supra* note 80.

[117] See generally, http://www.banglapedia.org/httpdocs/HT/S_0281.HTM on *shalish*, last accessed on 19 October 2012.

Third, inexperienced or untrained local CSOs can also miss the point and undermine the legal process. Speaking extra-judicially, ECCC Supreme Judge Agnieszka Klonowiecka-Milart remarked as follows:

> [Beware of] the frailty of contemporaneously adduced evidence, especially in relation to its physical availability and credibility. The latter is especially salient when civil society participates in the collection of evidence as its lack of adequate training may impede the process. This is one of the reasons why the adversarial nature of the proceedings should be enhanced, if necessary through international involvement.[118]

Non-judicial processes must therefore retain their independence and separation from the judicial arena. Suffice it to say that Bangladesh's national efforts over the years have not produced authoritative or reliable evidence of the period in question upon which collaborative transitional justice processes can be based or build upon. The ICT-BD's affiliates should be wary of civil society-led or entirely national commissions of inquiry, surveys, referenda or truth commissions which profess to deliver healing. However noble the intentions of such commissions or processes may appear, they are, as mentioned earlier, inherently problematic in complex political contexts such as Bangladesh.

10.9. Retooling Law and Ethnography: Send the Message that Victims Deserve Proper Presentation

What then of the ICT-BD's adversarial judicial process as a method to elicit credible old evidence from Bangladeshi victims? Noting that old evidence is not necessarily bad evidence, ICTY Judge Alphons M.M. Orie has suggested the following instructive suggestions on how ICT-BD judges may do so:

> When drawing inferences from the evidence presented, what matters the most is to understand the psychological mechanisms underlying such a process, beyond a mere legal approach. The story of the criminal event needs to be tested in all its details, even when conclusions seem easy to draw. The search for positive and negative indicia should aim at verifying or falsifying the elements of the story. This sounds even

[118] Bergsmo, 2011, p. 3, see *supra* note 72.

> more imperative when inferences rely on witness statements, considered as the most 'vulnerable' evidence.[119]

Yet, the judicial arena too is not without its inherent constraints which, if lawyers and judges are not careful, result in critical old evidence being compromised and the victims who possess them being scarred. The experience of Civil Parties in the *Duch* case is noteworthy in this regard. The judicial endeavour of the ECCC, to maintain a legally authoritative account of what happened, crippled the participation of the Civil Parties as they were excluded from the process of asking questions that were vital in aiding them deal with their post-conflict trauma. Several Civil Parties were also forced to leave the stand as their identities as victims were questioned by the Tribunal. During the testimony of Civil Party Mr. Ly Hor,[120] an alleged survivor of S-21, inconsistencies in his account led Duch to publicly challenge his identity as a victim.[121] Such an experience, scholars and trial monitors assert, may "defeat the positive outcomes of participation and instead lead to re-traumatization".[122] Civil Party Ly Hor took the stand only to have his oral testimony and credibility come under fire as it deviated materially from both his written statement and the written confession purportedly produced at S-21 that he insisted was his own. Ly Hor's lawyers,[123] who appeared none the wiser, were unable to offer any satisfactory reason for why the ECCC Trial Chamber should nevertheless regard the documents as supportive of Ly Hor's claim.[124] "I suppose you would agree with me that this civil party has been very poorly prepared for this morning's experience," was Judge Sylvia Cartwright's wry ad-

[119] Bergsmo, 2011, p. 2, see *supra* note 72.

[120] Civil party E2/61.

[121] See KRT Trial Monitor, Report Issue No. 12: Week Ending 9 July 2009, p. 2, available at http://krttrialmonitor.files.wordpress.com/2012/07/aiji_eccc_case1_no12_09july09_en.pdf (hereinafter 'KRT Report No.12').

[122] Michelle Staggs Kelsall *et al.*, "Lessons Learnt from the Duch Trial", Berkeley C.A., Asian International Justice Initiative's KRT Trial Monitoring Group, p. 34.

[123] Ly Hor was represented by lawyers from Civil Party Group 1.

[124] The '*Duch*' trial, Transcript of Trial Proceedings, 6 July 2009, pp. 58–59. According to one of Ly Hor's lawyers, the use of an informal instead of official translation resulted in the true purport of his client's documentation being unclear. See *ibid.*, pp. 55 and 58.

monishment to Ly Hor's lawyers,[125] after a morning of questioning that saw Ly Hor become visibly and increasingly distressed.[126] Also taken to task by the Chamber were the lawyers for civil party Nam Mon[127] for Nam Mon's belated disclosure of new allegations, which were eventually rejected.[128]

But to Ly Hor and Nam Mon, the inaccuracy of the written statements was peripheral to the fact that Phaok Khan was able to recount his "very interesting" experiences before the Trial Chamber.[129] The applications of Ly Hor and Nam Mon were ultimately rejected by the Trial Chamber.[130] By rejecting their non-judicial narrative – those parts of their stories which did not comply with the legal and evidential requirements of the court – the judges gravely underestimated the cost to survivors of laying bare their personal histories in open court, having their stories publicly undermined and their efforts potentially laid to waste. The credibility of the civil parties' testimonies was, in their presence, questioned by the Chamber, and more fiercely, by Duch himself, and ultimately discredited.[131]

Attempting then to create a space for victims in the judicial arena alone is misguided. Victims recount their stories of pain and distress to an audience that is more interested in seeing how these facts neatly fit evi-

[125] '*Duch*' Trial, 2009, p. 56, see *supra* note 124. Ly Hor had informed the Trial Chamber that the last time he spoke to his lawyers was a month before his Court appearance. See *ibid.*, pp. 55 and 58.

[126] KRT Report No. 12, p. 7.

[127] Civil party E2/32, who was represented by lawyers from Civil Party Group 2.

[128] Nam Mon's new allegations pertained to her alleged rape at S-21. According to Nam Mon's lawyers, Nam Mon had not informed them of these allegations until just before her Court appearance. Nam Mon's lawyers subsequently filed a written request for these allegations to be put before the Chamber. This was rejected on the ground that the allegations were belated. See the '*Duch*' trial, *supra* note 30, Decision on Parties Requests to Put Certain Materials Before the Chamber Pursuant to Internal Rule 87(2), p. 14, 28 October 2009, available at http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E176_EN.pdf, last accessed on 19 October 2012.

[129] '*Duch*' Trial, 2009, pp. 94–95, see *supra* note 109 (emphasis supplied).

[130] See *supra* note 124, pp. 223–225.

[131] For example, with regard to Li Hor's testimony, Duch, after bringing the Trial Chamber through certain documents, insisted that Li Hor was wrongly claiming as his own a written confession of a different S-21 detainee who had already died. '*Duch*' Trial, 2009, pp. 83–87, see *supra* note 124.

dentiary matrices. In that process, victims' non-evidentiary voices, claims and desires for vindication, are unfortunately not heard and taken into account, but carelessly side-lined and silenced.

Rosalind Shaw notes that when interacting with victim communities, "it is important to examine, through ethnographic rather than quantitative survey methods, the range of practices of conflict resolution and reconciliation that people and communities are adapting and retooling *now*".[132]

Like Shaw, I find that ethnography, which mainly consists of extended periods of participant observation and informal interviews with victims, is the most appropriate approach to eliciting genuine narratives and evidence from victims on their terms. Piecemeal investigations that "get in, extract information, get out" are undoubtedly problematic in contexts in which victims are emerging from mass violence and have historical reasons not to trust any exercise that resembles official information gathering. In my experience as a civil party lawyer gathering old evidence from Cambodian victims in relation to *Case 002* and putative *Cases 003* and *004*, I have found that investigation that respects ethnographic field research and its subjects could give access to a very different body of knowledge from that accessible to someone who examines, documents and evaluates stories of historical trauma from mass crime victims.[133] In order to find out what my client communities want, my legal team and I have had to look beyond the physical space of the hearings, evidentiary documents or victim information forms prepared by CSO intermediaries and spend time in rural provinces talking to people who have never met investigators or prosecutors, or in villages from which they had been driven, as well as those in which they were welcomed. Ultimately, this form of ethnographic investigation and lawyering is a useful approach to dealing with victims of mass crime as it entails spending time with ordinary people (as opposed to court affiliates) and listening to them on *their* terms – not through the

[132] Shaw, 2005, p. 4, see *supra* note 111.

[133] Scholars have pondered whether memory can be distilled, with all of the chaff of personal inhibitions, prejudices and inaccuracies sloughed off, so that one can arrive at an accurate picture – indeed, a virtual photographic snapshot – of a particular moment in time, at how such stories and narratives remain unclassifiable, incomplete and marred with controversy. See generally Maurice Halbwachs, *The Collective Memory*, Harper and Row Colophon Books, New York, 1980.

medium of our survey forms, or in our sensitisation workshops, or through local NGOs and intermediaries. With this general ethos in mind, these are my specific recommendations for the ICT-BD's affiliates when they seek to meet with and elicit credible evidence from vulnerable Bangladeshi mass crime victims.[134]

1) *Work with Local Partners.* Work with local organisations, which enjoy the community's trust and confidence. Based on the indications of this intermediary organisation, investigate, trace and interview victims who are keen to be civil parties and may be in a position to provide valuable evidence or testimony. Nonetheless, however good the local NGOs are, it bears mentioning that over-reliance can marginalise victims who do not wish to speak the lingo of NGOs, human rights, and humanitarian assistance.
2) *Identify Focal Sites.* Identify geographical locations and sites that have been recognised in the existing literature or data currently housed at documentation centres and archives that evince a targeted attack against the victims. Trace and map these sites on physical documents and note any patterns of alleged crime and relevant conduct which may emerge. This will serve as a good starting point when speaking with victims and ultimately help establish or corroborate charges relating to core international crimes[135].
3) *Adopt a* '*Thick Description*'.[136] Adopt a qualitative approach that views members of the victim community as subjects rather than

[134] For further details, see generally Mahdev Mohan, "Re-constituting the Un-Person": the Khmer Krom and the Khmer Rouge Tribunal", in *Singapore Yearbook of International Law*, 2008, vol. 12.

[135] See John Ciorciari, *The Khmer Krom and the Khmer Rouge Trials*, August 2008, online: Documentation Center of Cambodia, available at http://www.dccam.org/Tribunal/Analysis/pdf/Summer_Assn_John_KRT_Khmer_Krom.pdf, last accessed on 19 October 2012. For example, documents recovered from the Khmer Rouge's infamous Kraing Ta Chan prisonin Takeo province, one of the few provincial prisons to leave behind a large trove of paperwork, suggest that the Khmer Krom were frequent suspects of espionage and other counter-revolutionary activities and were singled out for torture and imprisonment. According to Dr. Ciorciari, senior legal advisor of DC-Cam, roughly 1,000 pages of documentary material from Kraing Ta Chan prison are on file at DC-Cam.

[136] Clifford Geertz, *The Interpretation of Cultures: Selected Essays*, Basic Books, New York, 1973.

objects and allows time for interviewers to roll up their sleeves and properly document the victims' genuine historical narrative, examine their desires and reservations regarding reparations and answer their questions about the process. Only then can we hope to arrive at, in Clifford Geertz's words, a "thick description" of the community that includes information about who they are as a people, the context of the crimes they suffered, and their present plight and desires for social change.[137] Social scientist Roger Henke cautioned me against relying on using quantitative surveys in group settings as a data source; Henke believes that country-wide surveys that do not have a qualitative element were prone to distortion, bias and mimicry of opinions – "getting them altogether in a dreadful focus-group to fill forms is counter-productive; they may not be forthcoming, some who have been made to fill surveys may have rehearsed answers and others may echo popular sentiments, leading to a distortion of data".[138]

4) *Further Systematic Research*. Design concise and clear interview questions, in consultation with experienced social scientists who have conducted empirical research in Cambodia's rural and urban provinces. Future researchers and investigators should investigate the data you have collected in a scientific manner. With more reliable field-data, researchers could seek to refine the typology presented and sharpen the explanations of individual dynamics.

5) *Representation and Reparation*. Provide independent legal representation to victims. Victims need to have lawyers looking out for their rights which may not always coincide with the interests and obligations of investigators and prosecutors at the ICT-BD. Victims lawyers' communications with their victim-clients are clothed with confidentiality and their role would include conducting interviews

[137] Ibid. As Joseph Ponterotto notes in "Brief Note on the Origins, Evolution, and Meaning of the Qualitative Research Concept", in *The Qualitative Report*, 2006, vol. 11, no. 3, p. 538. ("Thick description accurately describes observed social actions and assigns purpose and intentionality to these actions, by way of the researcher's understanding and clear description of the context under which the social actions took place. Thick description captures the thoughts and feelings of participants as well as the often complex web of relationships among them.")

[138] Author's Interview with Roger Henke, Institutional Development Specialist, Phnom Penh, Cambodia, 5 December 2008.

with victims, preparing victim impact statements, collecting and analysing evidence where appropriate, and taking instructions from and keeping victims informed of the legal proceedings as they unfold and with a view of supporting the prosecution of the alleged crimes and identifying possible forms of judicial and non-judicial reparation measures. Having their own legal counsel gives victims confidence and insulates them to a degree from the clinical rigour of transitional justice processes. It reminds them that there are those whose duty it is to have their best interests at heart.

10.10. Be Sensitive to Vulnerable Victims: Send the Message that Victims will be Protected

For victims of mass crime to feel confident that they can come forward and speak to official authorities about traumatic events which may be attributable to persons who occupy or may have occupied political office, it is important that they know that the law will be their guardian. The law must guarantee their safety, security and well-being before, during and after their testimony. It is also essential that vulnerable victims are given protection not just from physical violence, but also from social pressures and stigmas, which can often be far more damaging to their identity and place in society.

A pre-cursor to the ICT-BD, the Peoples' Tribunal for Trial of War Criminal and Collaborators ('Gono-Adalot'), was infamously unable to insulate victims/witnesses who gave evidence before it from ostracisation and remains a cautionary tale to victims/witnesses who may wish to come forward to provide evidence.

Held in 1992, the Gono-Adalot in Dhaka drew close to 200,000 participants from across the country. It comprised of several retired and respected judges and heard evidence from a cross-section of the community, including four women from a remote area in the Jessore District who publicly testified about the sexual crimes that they had endured and other attacks against their community.[139] The testimony of the women contained sensitive allegations which illustrated the "failure" of the men in the community to protect them and thus their collective honour. In a different

[139] D'Costa, 2011, p. 152, see *supra* note 1. For further details see Partha S. Ghosh, "Bangladesh at the crossroads: religion and politics", in *Asian Survey*, 1993, vol. 33, pp. 697–710.

context, this testimony and the courage which it took these women to come forward to present it, would have been hailed as a local and international touchstone for victim-cantered justice.

Yet, due to a government-sponsored attack on the tribunal, the victims or witnesses who testified were brought into harm's way. Unlike the other victims or witnesses, these four women were especially socially and economically vulnerable. Nonetheless, their photographs were printed in the newspapers, and a documentary filmmaker who visited their village subsequently discovered that as a result of the exposure of the women in the press, they were ostracised by their community, and faced problems such as being barred from using the local well, or difficulty finding a suitable match for their daughters.[140]

These and other vulnerable victims/witnesses of the 1971 sexual violence experienced "their own narratives being taken over by a broad based social movement, without any comprehension of the impact of violence on their lives, and the failure to provide them with any concrete, legal, financial or moral support".[141] Bina D'Costa and Sara Hossain point out that gender sensitivity needs to be maintained even while referring to the crimes committed against women during the conflict.[142] The crimes committed against the women have been largely described in terms of the loss to the community, rather than the individual. Additionally, the question of whether giving evidence leads to re-traumatisation needs to be addressed.[143] The language and cultural context within which rape and sexual offences is couched is also significant and has a marked expressive effect. Mujib coined the term 'Birangona' to depict the 'sacrifice' of the women for their country,[144] through the roles women played during the war, even when this alluded to their being raped or forcibly impregnated. Whilst the term was ostensibly intended to provide honour and confer a special status on these women, instead it just singled them out for further ostracisation.[145] Quite clearly, the message understood was far from what

[140] D'Costa and Hossain, 2010, p. 347, see *supra* note 101.

[141] D'Costa and Hossain, 2010, pp. 347–348, see *supra* note 101.

[142] D'Costa and Hossain, 2010, p. 333, see *supra* note 101.

[143] *Ibid.*, p. 333.

[144] *Ibid.*, p. 340. The term means 'war heroine' or 'valiant' woman.

[145] *Ibid.*, pp. 340–341.

was intended, but it is the former that sticks and unwittingly leads to victims being 'othered'.

Unfortunately, these victims are not alone. Chim Math, one of the few female survivors of Duch's notorious Tuol Sleng torture centre in Cambodia, underwent a similar fate. In July 2007, a group that was on a tour of Tuol Sleng, organied by CSD, identified Chim Math's photo – one of the countless haunting black and white faces of prisoners interred there during the Khmer Rouge period. They knew the woman, they said and furthermore, she was still alive. A photo-journalist caught wind of the conversation and arranged to have Chim Math brought to Tuol Sleng, where she stood beside her photo and verified that in fact, she had survived torture at Tuol Sleng and much more. CSD quickly tasked us with drafting a press release to state that CSD, through its ground tours and outreach activities, had succeeded in finding the "sole female survivor of Tuol Sleng".[146] Chim Math was thrust into the public domain, her original name and identity revealed to the world. In a matter of days, she became the metaphorical "site" of conflict between a journalist associated with a well-known European news agency and CSD on the issue of who had the authority to claim they had "discovered" her.[147]

If the "resequencing, decontextualizing and suppressing of social memory in order to give it new meaning is itself a social process", I witnessed a victim undergo a profound process.[148] In a brief period, Chim Math experienced both the terror of public scrutiny and the peculiar sense of righteousness that comes from the "duty to remember". Her case seems to hinge a great deal on how accessible the ECCC is to a witness like Chim Math and on whether the witness can continue to have her voice

[146] Bronwyn Sloan, "Unique Pol Pot Survivor", DPA Wire News Agency, 24 July 2007; Veasna Mean, "Purported Survivor Claims She was tortured in Tuol Sleng", VOA Khmer, 3 August 2007; Rosemary Righter, "A Paralysed Nation, afraid to unlock its tortured past", *Times Online*, 3 August 2007.

[147] After her interview with the press, CSD staff I had accompanied in our visit to Chim Math's home said that her mannerisms and her statements regarding her experiences suggested that there were significant personal reasons for why she had been wary to reveal any of these experiences to family. But these nuances were lost on the media and, importantly, the ECCC which viewed her as another repository of information and evidence. Chim Math was called to testify as a witness in *Case 001* (the '*Duch* case'). Her formal testimony is available at http://www.eccc.gov.kh, last accessed on 11 October 2012.

[148] Fentress and Wickham, 1992, p. 201, see *supra* note 105.

heard, long after the media has switched off its tape-recorders and video cameras. In other words, her evidence has to be made to matter and the sacrifices inherent in coming forward to give it should be respected. It is not enough that it is intrinsically important in the courtroom; victim/witnesses like Chim Math must be protected beyond it if they are to feel comfortable in coming forward.

The ICT-BD's statutes provide only one crime of sexual violence, rape, as a core crime within the definition of crimes against humanity; and omit other offences, as well as a definition of 'rape'.[149] Additionally, in Bangladesh, the stigma associated with these crimes has led to the suppression of evidence, and social problems associated with forced pregnancies.[150] In such cases, where the testimonies provided by vulnerable victims/witnesses may be sensitive, especially where women are testifying, the court needs to ensure adequate and sustained protection that goes beyond just physical protection. D'Costa and Hossain advocate gender-sensitivity training for the tribunal staff, as well as caution and sensitivity when interviewing witnesses and victims, with which I wholly agree:

> If the Tribunal is to deal with sexual crimes, then an informed review of the available evidence and an exploration of possible gender-friendly approaches is urgently needed.
>
> While the Tribunal does set up a possibility for some form of accountability, the investigation and trial process is a particularly thorny one in cases of sexual violence, and needs to be navigated with care and caution, given the risk of repercussions for the survivors.[151]

These observations are important and should be carefully heeded as the first judgement of the ICT-BD contains names of suspected sexual violence victims and makes little or no meaningful effort to provide them with adequate witness or victim support and protection.

10.11. Conclusion

The ICT-BD's legacy will depend on its ability to contribute to building the capacity of Bangladesh's justice sector, and the degree to which it harmonises the Bangladesh justice system with international rule of law

[149] D'Costa and Hossain, 2010, p. 343, see *supra* note 101.

[150] *Ibid.*, p. 344.

[151] D'Costa and Hossain, 2010, p. 338, see *supra* note 101.

norms. This entails transferring knowledge, skills and practices from the ICT-BD to the rest of the national justice sector, and fostering local ownership of judicial and legal reform.

As Diane Marie Aman has observed, while "conveying a concrete message of accountability may begin to break (the) cycle of violence, that message must be managed with the utmost care and respect for victims of mass violence".[152] If the ICT-BD trials are to have any resonance for Bangladeshi victims and to have a lasting and positive legacy in Bangladesh, its affiliates should pay close attention to the lessons which the ECCC offers and which I have distilled herein. I have couched these lessons in the form of genuine and concrete messages that should be sent to victims/witnesses when seeking to elicit credible evidence from them in relation to core crimes. Of course, these lessons are by no means exhaustive, but they cast light on potential problems that need careful consideration.

The ICT-BD should also give effect to Ambassador Rapp's recommendations in this regard. First, its affiliates should do all they can to ensure that the witness protection system envisioned by Article 58(A) of the 2011 Act be developed in practice and made available for both prosecution and defence witnesses.

Second, the ICT-BD's proceedings must be accessible to all – ideally broadcast on television or radio, or possibly shared through reports by independent trial observers and victim associations that would show key testimony, arguments, and rulings and ensure that they are properly explained to victims and take into account their concerns and communal desires for vindication and reparation.

Third, the ICT-BD should make an effort to incorporate the recommendations made by Ambassador Rapp on ensuring the rights of the accused, taking inspiration from similar protections granted by the ICTR/ICTY.

Without these guarantees, victims may feel that their role at the ICT-BD is a token one and may not be prepared to provide genuine and independent evidence, thereby significantly diminishing the legitimacy of the ICT-BD. Victim/witness protection, in particular, is critically important to eliciting and preserving the veracity of both 'old' and 'new' evidence. Its central relevance to old evidence, however, is sometimes un-

[152] Diane Marie Aman, 2001, p. 245, *supra* note 16.

derestimated as the common misconception is that victims or witnesses of old evidence have come to terms with their past or are no longer under threat.

As we have seen, real and perceived threats are often not diminished by the passage of time: they may remain unchanged or sometimes take on heightened dimensions due to changed political realities. In order to elicit credible evidence from victims/witnesses who have suffered so much, the law must send them the right message and, more importantly, it must have the modesty of ambition and live up to honour these messages, lest victims/witnesses lose what little confidence they may have in the process.

The ICT-BD's process should match available resources and political will from local and international actors. Its mandate should be tailor-made to suit operational realities. Consideration of the Cambodian experience shows that it is important not to create a flawed mechanism and then try to patch it up with quick fixes in response to criticisms levelled against it. Finally, prosecution is just one element in a toolbox of accountability. The Bangladesh government and the ICT-BD's affiliates must closely examine their objectives to ensure that the mix of tools they select is best tailored to the particular need. Exaggerating what just one tool, prosecution, can reasonably accomplish may mean that other avenues that are more meaningful and effective are not explored or are foreclosed.

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Old Evidence and Core International Crimes

Morten Bergsmo and CHEAH Wui Ling (editors)

It is often only years after the commission of core international crimes that prosecutions and investigations take place. This anthology addresses challenges associated with such delayed justice: the location, treatment, and assessment of old evidence. Part I considers the topic from the perspective of different actors involved in the prosecution of core international crimes at the domestic and international levels. Part II comprises chapters focusing on the efforts of the Bangladeshi authorities to investigate and prosecute international crimes perpetrated during the 1971 war.

This book brings together experienced judges, prosecutors, lawyers, scientists, and commentators who have dealt with questions of old evidence in their work. Among the contributors are Shafique Ahmed, Andrew Cayley, David Cohen, Seena Fazel, Siri S. Frigaard, M. Amir-Ul Islam, Md. Shahinur Islam, Agnieszka Klonowiecka-Milart, Alphons M.M. Orie, Stephen J. Rapp, Patrick J. Treanor, Otto Triffterer and Martin Witteveen.

The chapters describe the challenges encountered in practice and suggest concrete solutions that can be tailored to fit the circumstances of the case or country. By providing a comprehensive analysis of the relevant problems in this area and a variety of views, this anthology will serve as an invaluable resource for criminal justice actors and researchers seeking to address questions of old evidence.

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