

Genocide and Constitutionalism in Bangladesh

By Antonio Angotti

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The aim of this policy brief is two-fold. First, it outlines how the concept of genocide has additional meaning in the context of Bangladesh through the lenses of its national history, criminal justice, civil society, constitutionalism and politics. Second, it considers interactions between the national Bangladeshi perspective on genocide and the international political process for accountability for the 2017 violence against Muslims in northern Rakhine State, Myanmar. Following a discussion of the intensity of the experience and sense of genocide in Bangladesh since the 1970s, the brief cautions international political actors not to instrumentalise such national sentiment.

1. A History of Violence

Situated on a part of the territory of the great Bengal Sultanate of old, Bangladesh has been a secular, sovereign democracy since the early 1970s. Until 1947, the land was ruled by the British colonial administration, then by the (Western) Pakistani government, until Bangladesh's struggle for independence, the Liberation War of 1971. Pakistan disregarded the outcome of the 1970 elections, which would have resulted in Sheikh Mujibur Rahman – celebrated as the 'father of Bangladesh' – becoming Prime Minister. In an attempt to subjugate the rising Bangladeshi liberation movement, Pakistan deployed its army against the people of the region, but later surrendered to the joint force of the independence fighters of Bangladesh and the Indian army. The population had survived natural disaster and the repression of the Bengali language movement – but the crimes committed in 1971 sparked a fierce resistance against the Pakistani army.

The sense of having endured genocide is integral to the history of modern Bangladesh. The very preamble of the Proclamation of Independence mentions explicitly acts of genocide committed by Pakistani authorities.¹ Pakistan's 'Operation Searchlight' began a crackdown on civilians and militants that shook the conscience of mankind. It echoed throughout the world. Even the United States Consulate General in Dhaka conveyed how "the overworked term genocide is applicable".² 'Genocide' became an essential part of the birth of independent Bangladesh, long before any court could assess the applicability

of the Genocide Convention.³

A mere year after the violations, genocide had been woven into the official account of the history of Bangladesh. The preamble of the 1972 Collaborators (Special Tribunals) Order stated that "certain persons [...] aided or abetted the Pakistan Armed forces of occupation in committing genocide and crimes against humanity",⁴ and provided for special tribunals to try and punish them.⁵ The matter at hand was not to determine whether genocide took place, but rather to seek accountability for its perpetrators.

2. The International Crimes Tribunals of Bangladesh

The International Crimes Tribunals were set up by the 1973 International Crimes (Tribunals) Act ('ICT Act') to try persons accused of, among other crimes, genocide: committing acts such as those described in Article 2 of the Genocide Convention with the intent to destroy, in whole or in part, a protected group.⁶ The ICT Act was welcomed by the international community as progressive legislation, being among the first attempts to prosecute core international crimes after the trials in Nuremberg and Tokyo, though it has been subjected to criticism with the passage of time.⁷

There are differences between the international legal definition of genocide and that adopted by Bangladesh. For instance, Bangladesh included political groups among those protected, likely due to the political nature of the violence inflicted on Awami League members in 1971.⁸ This is an example of na-

³ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948 ('Genocide Convention') (<http://www.legal-tools.org/doc/498c38/>).

⁴ The text of the Order is available in Alimuzzaman Choudhury, *Bangladesh Collaborators (Special Tribunals) Order, 1972*, Bangladesh Law Foundation, Dhaka, 1972 (<https://www.legal-tools.org/doc/brqi4q/>).

⁵ *Ibid.*, Article 4, p. 16.

⁶ Bangladesh, The International Crimes (Tribunals) Act, 1973, Act No. XIX of 1973, 20 July 1973, Article 3(2)(c) ('ICT Act') (<https://www.legal-tools.org/doc/c09a98>).

⁷ Open Society Justice Initiative, "Options for Justice: A Handbook for Designing Accountability Mechanisms for Grave Crimes", Open Society Foundations, 2018, pp. 438, 439.

⁸ The students of Dhaka University, engaged in anti-governmental politics, were targeted from the first day of Pakistani operations; see M. Amir-Ul Islam, "Towards the Prosecution of Core International Crimes before the

¹ Bangladesh, Proclamation of Independence, 10 April 1971 (<https://www.legal-tools.org/doc/t2cesq/>).

² United States, Department of State, "Dissent from U.S. Policy toward East Pakistan", 6 April 1971.

tional history influencing the legal definition of genocide. Additionally, while internationally the protected groups must be targeted as such, the ICT Act only requires the objective targeting of a group. Finally, the acts which may amount to genocide are not listed exhaustively, unlike in the Genocide Convention. According to Otto Triffterer, who played an important role in the drafting of the ICT Act, the notion of political group was not included in the definition of the Genocide Convention because it was difficult to construe strictly,⁹ and the ICT Act constituted a “broadening alternative that went beyond [genocide’s] international scope and notion”.¹⁰ This reflects that international consensus is harder to achieve on certain issues, as shown by the drafting history of the Genocide Convention.¹¹ Crimes of genocide, if defined more broadly than in international law, would need to be prosecuted under national law, and States may “prosecute and punish more”,¹² which is what Bangladesh set out to achieve.

After decades of political turmoil and impunity, the first International Crimes Tribunal (‘ICT-BD’) was activated in 2011, with amendments,¹³ and began hearing cases. The ICT-BDs can impose all sanctions provided for by the domestic legal system, including the death penalty. Since 2011, the ICT-BDs¹⁴ have adjudicated 41 cases by the time of writing, providing reasoned judgments. This is a high number, considering the scarcity of available resources.¹⁵ Most convictions of genocide have been sanctioned with a death sentence,¹⁶ signifying that the ICT-BDs regard it as the gravest of crimes. The majority of the convic-

tions for crimes against humanity led to prison terms.

The very first pages of the first ICT-BD judgment assert that genocide was committed in 1971 by the Pakistani forces and their collaborators, expressing how “[t]he road to freedom for the people of Bangladesh was arduous and torturous, smeared with blood, toil and sacrifices. In the contemporary world history, perhaps no nation paid as dearly as the Bangalees did for their emancipation”.¹⁷ Such was the 2013 narrative of the judicial institution tasked with administering long-delayed justice for the violations that many in Bangladesh hold as its birthmark. Sometimes substantive criminal law can reflect national trauma.¹⁸ The Bangladeshi legal perspective on genocide has been shaped by the country’s own history.

3. The Liberation War Museum

The Liberation War Museum in Dhaka is a multi-disciplinary project encompassing visual arts, historiography, storytelling, and international criminal law. Founded in 1996, the Liberation War Museum encourages “reflection upon the sufferings and heroism of the Bangladesh Liberation War and [...] endeavors to link this history with contemporary pressing social and humanitarian issues”.¹⁹

The concept of genocide is at the very heart of the Museum. It is mentioned four times in the Museum’s public description.²⁰ International criminal law is cultivated through the Museum’s Center for the Study of Genocide and Justice. Its recurrent conference, currently at the sixth iteration, is titled “Bangladesh Genocide and Justice”. The annual winter school’s theme is genocide, the common subject of the Museum’s publications. The focus on genocide is due to the Museum’s research interests as much as the importance of the Liberation War in the collective value system of Bangladesh – it represents a commitment to ‘never again’ let such atrocities take place.²¹

It is therefore significant in the Bangladesh context that the Liberation War Museum has contended that genocide occurred in northern Rakhine in neighbouring Myanmar. Its 2018 publication on the issue is entitled “The Rohingya Genocide”.²² In the book, the assessment of genocidal intent is based on a 2016 Report of the United Nations High Commissioner for Human Rights, but it goes much farther than the report itself, which acknowledges “systematic and systemic discrimination” without using the term ‘genocide’ to characterise the situation.²³ The

International Crimes Tribunal”, in Morten Bergsmo and CHEAH Wui Ling (eds.), *Old Evidence and Core International Crimes*, Torkel Opsahl Academic EPublisher, Brussels, 2012, p. 220 (<http://www.legal-tools.org/doc/fl30e1/>).

⁹ Otto Triffterer, “Bangladesh’s Attempts to Achieve Post-war (or Transitional?) Justice in Accordance with International Legal Standards”, in Bergsmo and CHEAH (eds.), 2012, p. 276, *ibid*.

¹⁰ *Ibid.*, p. 273.

¹¹ *Ibid.*, p. 272; Morten Bergsmo and Elisa Novic, “Justice after Decades in Bangladesh: National Trials for International Crimes”, in *Journal of Genocide Research*, 2011, vol. 13, no. 4, p. 507, fn. 23 (<https://www.legal-tools.org/doc/058d05>).

¹² Triffterer, 2012, p. 278, see *supra* note 9.

¹³ The ICT Act was amended in 2009. The Rules of Procedure were promulgated in 2010 and amended in 2011; see Bangladesh, International Crimes Tribunal Rules of Procedure (Amendment), 2011, 28 June 2011 (<https://www.legal-tools.org/doc/92fb50>).

¹⁴ Currently, only the first ICT-BD is active, while the second (‘ICT-BD-2’) functioned between 2012 and 2015.

¹⁵ An initial budget equivalent to approximately USD 1,44 million had been set up for all the foreseeable cases; see International Center for Transitional Justice, “Fighting Past Impunity in Bangladesh: A National Tribunal for the Crimes of 1971”, Briefing Paper, p. 4. By comparison, the Extraordinary Chambers in the Courts of Cambodia (‘ECCC’) have spent approximately USD 357,5 million and delivered two judgments, see ECCC, “Financial Outlook as at 31 December 2019”, 11 February 2020, p. 1.

¹⁶ The death sentence was reduced to a prison sentence by reason of the old age of the accused in cases ICT-BD Nos. 6/2011 (<http://www.legal-tools.org/doc/436ed9/>), 1/2014 (<http://www.legal-tools.org/doc/40deae/>), and ICT-BD-2 No. 1/2012 (<http://www.legal-tools.org/doc/907c69/>). In case ICT-BD No. 6/2016 (<http://www.legal-tools.org/doc/2cae99/>), two of the five accused convicted for genocide were sanctioned with a life sentence, but were handed out death sentences for other crimes. Charges of genocide were levelled in 25 of the 41 adjudicated cases, and the ICT-BDs convicted of genocide in 16 cases.

¹⁷ ICT-BD, *Prosecutor v. Delowar Hossain Sayeedi*, Judgment, Case No. 01 of 2011, 28 February 2013, paras. 5, 14 (<http://www.legal-tools.org/doc/7831d6/>).

¹⁸ In Italy, for instance, the crime of abduction was reformed in light of the abduction and subsequent killing of Prime Minister Aldo Moro in 1978, see Guido Del Toro, “Lotta al Terrorismo: dalle Brigate Rosse alla Jihad”, *Altalex*, 5 July 2019.

¹⁹ Liberation War Museum, “Mission Statement” (available at <https://www.liberationwarmuseumbd.org>).

²⁰ Liberation War Museum, “About Us: Overview” (available on its web site).

²¹ For an anthropological analysis of the Bangladeshi ‘never again’ sentiment through the lens of the Liberation War Museum, see Nayanika Mookherjee, “‘Never Again’: Aesthetics of ‘Genocidal’ Cosmopolitanism and the Bangladesh Liberation War Museum”, in *Journal of the Royal Anthropological Institute*, 2011, vol. 17, no. 1.

²² Mofidul Hoque (ed.), “The Rohingya Genocide”, Center for the Study of Genocide and Justice, Liberation War Museum, Dhaka, 2018.

²³ Situation of Human Rights of Rohingya Muslims and Other Minorities

Museum's publication, on the other hand, infers genocidal intent and concludes that the assessment should be deferred to a judicial institution.²⁴ The publication, coupled with the Museum's activities, showcases the centrality of genocide in the national civil society discourse related to the Bangladesh Liberation War.

4. Constitutionalism, Statehood and Genocide

The concept of Bangladesh as a sovereign State is linked to justice for the Liberation War crimes, genocide in particular. Internationally, a State that is unable to protect its subjects from atrocity crimes may compromise its very sovereignty.²⁵ Barrister Amir-Ul Islam – author of the Proclamation of Independence and member of the drafting committee of the Constitution of Bangladesh – maintains that accountability for international crimes is a prerequisite for statehood and constitutional order. Framing the liberation movement as a lawful entity stemming from a constitutionally elected government, he links the failure to hold perpetrators of the 1971 crimes accountable to the subsequent fragility of “democratic polity, stability of the country, and its constitutional continuity”.²⁶ Amir-Ul Islam employs the domestic definition of genocide, as he is dealing with his national context.²⁷ The argument moves forward to read Pakistan's political instability after the Liberation War – its “constitutional derailment”²⁸ – as a by-product of the failure to try the perpetrators, finding links to the rise of international terrorism, and calling for more study on “the relation between the omission and default in trying the perpetrators of crime, and the destabilisation of the constitution, democracy, and the rule of law”.²⁹

The sense of genocide in Bangladesh is tied to its constitutional order, and achieving justice for the 1971 crimes is an assertion of the birth of Bangladesh as a nation. Accordingly, the stance of Amir-Ul Islam on the violence against Muslims in northern Rakhine, which he frames as genocide with regards to the Rohingya, is that the accountability process is necessary to restore democracy in Myanmar, and to strengthen national security.³⁰ The constitutionalist perspective conveys how the concept of genocide is charged with yet more meaning in the context of Bangladesh, and is directly linked to sovereignty, and State-building.

5. The Political Relevancy of Genocide

Ensuring accountability for core international crimes requires the political will to do so. It seems that politics and genocide are

often intertwined, and that the concept of genocide has been employed for political ends.³¹ Bangladesh is no exception: the trials of perpetrators of the crimes committed in 1971 were included in the electoral manifesto of the ruling party for the elections prior to the activation of the first ICT-BD,³² and many perpetrators since convicted were engaged in politics with the opposition parties. The language of genocide has been adopted by the leadership. For example, the Bangladeshi Parliament instituted a ‘Genocide Day’ to preserve the memory of the Liberation War and seek international recognition.³³ Given the link between the crimes of 1971 and national sentiment, it is not surprising that genocide has a prominent place in the political discourse of the country.

The concept of genocide rose as an international legal term, and Bangladesh has been particularly engaged in international criminal justice. It was the first South Asian State Party to the Rome Statute,³⁴ and its Ambassador remembered the 1971 crimes at the Rome Conference in 1998.³⁵ The international engagement of Bangladesh extends to current events, in particular with regard to northern Rakhine, partially due to the cross-border history of the peoples of the region.³⁶ Again, there is a link between Bangladesh's engagement and its national sentiment on genocide. Explicitly correlating the Bangladeshi and northern Rakhine victimisations, the Prime Minister of Bangladesh stated during the 2017 session of the United Nations General Assembly that “[t]he Myanmar situation repeatedly reminds us of the genocide committed by the Pakistan occupation forces against our people in 1971”.³⁷

6. Bangladesh and the Violence against Muslims in Northern Rakhine

The notion of genocide has additional meanings in Bangladesh that are not reflected in international law. The domestic legal definition is tailored to better fit national history and memory. Both civil society and politics are shaped by a collective perception of what genocide is, against the backdrop of the violations committed in 1971.

International law has its own historical roots. Yet, there are interactions between the international and the Bangladeshi notions of genocide, with *The Gambia v. Myanmar* case before the International Court of Justice (‘ICJ’) being the latest. On

³¹ See Edward S. Herman and David Peterson, *The Politics of Genocide*, Monthly Review Press, New York, 2010.

³² “Proceedings of the 2nd International Conference on Genocide, Truth and Justice”, Liberation War Museum, 30-31 July 2009, p. 4 (<https://www.legal-tools.org/doc/111b6e/>).

³³ “JS Resolution on Day of Genocide Hailed”, *Bangladesh Sangbad Sangstha* [National News Agency of Bangladesh], 15 March 2017.

³⁴ International Criminal Court, “Bangladesh Ratifies the Rome Statute of the International Criminal Court”, ICC-CPI-20100324-PR508, 24 March 2010.

³⁵ Statement by Ambassador Muhammad Zamir, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 18 June 1998, p. 3 (<https://www.legal-tools.org/doc/7a6a87/>).

³⁶ See Jacques P. Leider, “Mass Departures in the Rakhine–Bangladesh Borderlands”, Policy Brief Series No. 111 (2020), Torkel Opsahl Academic EPublisher, Brussels, 2020 (<https://www.toaep.org/pbs-pdf/111-leider/>).

³⁷ Address by Sheikh Hasina, Hon'ble Prime Minister, Government of the People's Republic of Bangladesh, United Nations General Assembly, 73rd Session, 27 September 2018.

in Myanmar, UN Doc. A/HRC/32/18, 29 June 2016, para. 65 (<https://www.legal-tools.org/doc/4vysr4/>).

²⁴ Mofidul Hoque (ed.), “The Rohingya Genocide”, p. 43, see *supra* note 22.

²⁵ This is a commonly inferred principle underlying the doctrine of the responsibility to protect, as recalled in Protection of Civilians in Armed Conflict, S/RES/1674 (2006), 28 April 2006 (<https://www.legal-tools.org/doc/4bf3cc/>).

²⁶ M. Amir-Ul Islam, “Towards the Prosecution of Core International Crimes before the International Crimes Tribunal”, in Bergsmo and CHE-AH, 2012, pp. 228 (fn. 34), 232, 299, see *supra* note 8.

²⁷ The author includes political groups among the protected ones: “[t]he object was to eliminate the Awami League and its supporters in former East Pakistan”, *ibid.*, p. 219.

²⁸ *Ibid.*, p. 227.

²⁹ *Ibid.*, p. 228.

³⁰ M. Amir-Ul Islam, “Recurrence of Systematic and Widespread Persecution of Rohingyas: A Thorn on the Global Conscience”, *The Daily Sun*, 31 October 2017.

this issue, the Minister of Foreign Affairs of Bangladesh has expressed that the “international community is saying it is a genocide. We also say it is a genocide”.³⁸ At the time of writing, the ICJ is dealing with preliminary questions of jurisdiction and admissibility, prior to a possible consideration of The Gambia’s claim that Myanmar has violated the Genocide Convention.

Bangladesh was prevented from filing the case by its reservation to Article 9 of the Genocide Convention, but it has nevertheless been at the helm of an international push for accountability. The Prime Minister of Bangladesh sought the support of the Organization of Islamic Cooperation (‘OIC’) to initiate proceedings before the ICJ.³⁹ The OIC formed an *Ad Hoc* Ministerial Committee on Accountability for Human Rights Violations against the Rohingya (‘Committee’) “to carry out the tasks of ensuring accountability and justice [...] assisting in information gathering and evidence collection for accountability purposes; [m]obilizing and coordinating international political support for accountability”.⁴⁰ The final document of the 2019 OIC summit urged the Committee “led by the Gambia to take immediate measures to launch the case at the International Court of Justice on behalf of the OIC”.⁴¹ In September 2019, the Committee reinstated its aim to pursue litigation before the ICJ, and accepted The Gambia’s briefing on the prospective legal action, inviting OIC Member States to co-pay the expenses. The Gambia was requested to “comprehensively report” on the ICJ case at the next Committee meeting.⁴² Subsequently, The Gambia initiated the case, whose expenses are paid by voluntary contributions of OIC Member States⁴³ through a dedicated OIC account.⁴⁴ After the first hearing in December 2019, Saudi Arabia’s Permanent Representative to the United Nations remarked that the ICJ Order on provisional measures of 23 January 2020 “was the result of the efforts exerted by the OIC members states in New York and the Contact Group on Rohingya Muslims of Myanmar headed by the [Saudi] Kingdom”.⁴⁵ The OIC has welcomed the order, mentioning how The Gambia acted in its capacity of

³⁸ “Bangladesh Minister Speaks of ‘Genocide’ in Myanmar’s Rakhine”, *France24*, 10 September 2017.

³⁹ “Rohingya Crisis – What is OIC’s Role?”, *The Daily Star*, 6 September 2018.

⁴⁰ OIC, “Report of the Contact Group on Rohingya Muslims of Myanmar”, OIC/ACM-2019/CG-Rohingya/Report/Final, 25 September 2019, p. 4.

⁴¹ OIC, “Final Communiqué of the 14th Islamic Summit Conference”, OIC/SUM-14/2019/FV/Final, 31 May 2019.

⁴² OIC, “Report of the Ad Hoc Ministerial Committee on Human Rights Violations against the Rohingya”, OIC/ACM/AD-HOC Accountability/Report-2019/Final, 25 September 2019, paras. 5, 7-9, 11.

⁴³ ICJ, *The Gambia v. Myanmar*, Verbatim Record, CR 2019/19, 11 December 2019, p. 44 (<https://www.legal-tools.org/doc/yfx6vt/>).

⁴⁴ Humayun Kabir Bhuiyan, “OIC to Mobilize Resources for Rohingya Genocide Case against Myanmar”, *Dhaka Tribune*, 11 February 2020.

⁴⁵ “OIC Contact Group Discusses Rohingya Protection with UN Chief”, *Arab News*, 1 March 2020.

Chair of the Committee.⁴⁶

7. Conclusion

The OIC-led multilateral push for accountability could be seen as an expression of a spirit of Islamic solidarity – only the future will tell. The push is, however, the result of a complex political and diplomatic process in which the understanding of genocide plays a role. While a court of law needs to employ firm legal standards, there have been instances where the word ‘genocide’ is used to further State policies at the international level.⁴⁷

The Bangladeshi aspiration of justice for Muslims of northern Rakhine can surely be viewed politically, but it is also likely fuelled by the genuine national sentiment of Bangladesh, shaped by the oppression endured by its people. The complex international politics behind the ICJ case may be driven by diverse considerations. There is speculation following news of multiple funding agreements between Saudi Arabia and The Gambia, with the latter receiving more than USD 100 million from the Saudi Fund for Development between July 2019 and February 2020.⁴⁸

Even in the more benevolent scenarios, there is the risk that – behind the veil of complexity of international relations – there is instrumentalisation of the particular Bangladeshi notion and sense of genocide. I would caution international actors against such instrumentalisation for several reasons. First, as explained above, the unusually willing embrace of the genocide classification among Bangladeshi actors is born out of painful historical and constitutional contexts of Bangladesh, which we should respect. Second, at the centre of the Bangladeshi genocide narrative is a widespread quality of empathy towards victims of mass violence, which external actors should not toy with. Third, several of the Bangladeshi colleagues who are being engaged by international actors concerned with northern Rakhine have themselves suffered from the 1971 atrocities, directly or through their parents or grandparents, which is a very real and not academic matter. International actors should be genuinely respectful and exercise caution when dealing with Bangladesh on matters of genocide.

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⁴⁶ OIC, “OIC Welcomes ICJ Decision Ordering Myanmar to Stop Genocide Against Rohingya”, Press Release, 23 January 2020.

⁴⁷ See Herman and Peterson, 2011, pp. 31-35, see *supra* note 31.

⁴⁸ Tabora Bojang, “Assembly Ratifies \$93M Gambia-Saudi Funding Agreement”, *The Standard*, 31 July 2019; “Saudi Fund Provides \$12m to Upgrade Gambia’s Airport”, *The Point*, 25 February 2020.



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