SADF WORKING PAPER
27 September 2018
Issue n° 11
ISSN 2506-8202

Crimes against humanity

An assessment of Bangladesh's response in a comparative perspective; the cases of Cambodia and Iraq

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Abstract

SADF has dedicated a good number of research papers and events to the Bangladeshi 1971 genocide. SADF has raised the awareness of the international community by organising and attending conferences both in Brussels and in Dhaka. SADF now aims to further develop its previous work on Bangladesh by conducting a comparative analytical study. This study assesses Bangladesh's contemporary judicial initiative in contrast with the cases of internationally led or influenced initiatives, like the ones of Cambodia and Iraq. In so doing, this paper appraises the application of the rule of law by the International Crimes Tribunal (ICT), the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the Iraqi High Tribunal (IHT) in prosecuting authors of crimes against humanity. Our findings show that the Bangladeshi authorities were able to apply the rule of law and, most importantly, combat impunity, in a far more robust and lawful way than the international community's highly influenced justice procedures of Iraq and Cambodia.

Keywords

Universal human rights, genocide, international law, Bangladesh, Cambodia, Iraq, impunity, International Crimes Tribunal Bangladesh, Extraordinary Chambers in the Courts of Cambodia (ECCC), Iraqi High Tribunal (IHT)

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Introduction

In the past 150 years, 'tens of millions of men, women and children have lost their lives in genocide or mass atrocities. Millions have been tortured, raped or forced from their homes' (United to end Genocide, 2016, para.1). However, even before genocidal vocabulary existed, the scourge of large-scale killings has endured since the beginning of recorded history. One of the first major cruelties of the twentieth century was the massacre of the Armenians. According to the Michigan Journal of International Law, this particular case is noteworthy because:

> 'Not only does modern day Turkey deny that this atrocity occurred, but this particular massacre would later be cited as an example of impunity for other atrocity crimes. To make matters worse, the world community knew of the Armenian genocide while it was occurring and failed to act. This sort of willful blindness is just one part of the cycle of atrocity crimes—a dismaying pattern of inaction that persists today' (Petty, 2013, p. 752).

The failure of the international community to take action on mass killings has been a reoccurring theme throughout the century. This has set a strong message to criminals of crimes against humanity that accountability is not a priority. More savageries followed after the Armenian genocide and an innumerable amount of unmitigated human suffering. According to the Michigan Journal of International Law, the worst of the mass murdering states were 'the Soviet Union (62 million victims from 1917-1987), communist China (35 million victims from 1949- 1987), Nazi Germany (21 million victims from 1933-1945), and Chiang Kai-Shek's nationalist China (10 million victims from 1928-1949)' (Petty, 2013, p.752).

In 1949, in an effort to offer protection from the barbarities of war, the Geneva Conventions were enacted. They served to 'protect people who do not take part in the fighting (civilians, medics, aid workers) and those who can no longer fight (wounded, sick) (ICRC, 2010, para. 1). In the spirit of humankind, the Geneva Conventions of 1949 aimed at addressing the end of an era of repeated crimes against humanity. Article 1 of the Convention states that: 'The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances' (ICRC, 2012, p. 35). 196 States ratified the four conventions; however, this did not stop them from

breaching the Conventions and recommencing mass crimes against humanity. In the 1970s, '3 million Bengali civilians were slaughtered by Pakistani forces in 1971' (Bangladesh Genocide Archive, 2018, para.14). From 1975-1978, '2 million Cambodians were massacred by the Khmer Rouge, and 800,000 Rwandans killed in 1990' (United to end Genocide, 2016, para.2).

In July 1998, the Rome Statute was passed, establishing the International Criminal Court (ICC). A major landmark for international accountability, the preamble of the Statute affirms that 'the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation' (Seibert-Fohr, 2003, p. 554-555). According to Article 5 of the Rome Statute, serious crimes include: '(a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; and (d) The crime of aggression' (ICC, 1998 p. 3). By ratifying and signing this Statute, States were 'determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes' (Seibert-Fohr, 2003, p. 555). The 1990s, with the end of the Cold War, was thought to bring greater international cooperation and give way to an era of peace. Although multilateral institutions prospered, 'they were still incapable of preventing atrocities in Iraq, Liberia and Sierra Leone, Bosnia and Kosovo, and Rwanda' (Petty, 2013, p.753).

The South Asia Democratic Forum (SADF) has given its utmost attention to the Bangladesh genocide of 1971 and has written extensively on the issue; In 2015, SADF published its first Policy Brief titled "The democracy stalemate in Bangladesh", a paper titled "The politics around the crime of genocide, and a report written by Siegfried O. Wolf, Director of Research at SADF, titled "The Bangladesh war trials: the need to stop the culture of impunity and the rise of Islamic fundamentalism". In 2017, SADF published its Policy Brief N° 5 titled, "Facing Jamaat-e-Islami in Bangladesh: a global threat in need of a global response", drawing specific attention to the importance of the international community's role in supporting the International Crimes Tribunal (ICT) to bring peace and stability to Bangladesh. In the same year, SADF participated in the international conference on the Bangladesh genocide and justice in Dhaka, focusing on the threat of Jamaat-e-Islami (JeI) and the need for an international response.

These are only some of the many initiatives that SADF has developed and taken part in to raise awareness and contribute to the Bangladeshi cause. Now, SADF aims to deepen its prior work on Bangladesh by conducting a comparative study, where the case of Bangladesh's judicial initiative to end impunity is assessed in contrast with the cases of Cambodia and Iraq.

While several other examples of genocides and mass crimes against humanity exist, both Cambodia and Iraq seem the most fitting for this comparative study. The Cambodian genocide is the closest case in dimension, time, and geography to the Bangladeshi genocide. Additionally, Cambodia was one of the countries that more closely followed the international community's advice on applying a judicial model to try the genocide perpetrators, and thus, it is a convenient benchmark for what could be expected from Bangladesh.

The Iraqi case is specifically important for having resulted from an international military intervention that was partially justified by the crimes committed by the Baath regime. The most strident critics of the Bangladeshi justice response were also the most strident campaigners for an intervention in Iraq; therefore, it is essential to compare the Bangladeshi and Iraqi justice responses and the levels of criticism they received.

This paper aims to showcase how the ICT's application of the rule of law is comparable and even exceeds the standards of ECCC and the IHT. The ICT, since the beginning of its operations, has been heavily criticised by different organisations, namely, the Human Rights Watch. However, critics fail to assess the ICT by the two basic principles of international customary law: equality and proportionality. This comparative study evaluates the ICT in line with these two essential principles.

2. The contemporary ICTs and the rule of law

On the 25th of March 1971, the Government of West Pakistan brutally attacked East Pakistan (present-day Bangladesh). Mofidul Hoque, the Founder-Trustee of the Liberation War Museum, depicts the violence: 'it was a bloody war with three million people dead, 300,000 women becoming victims of sexual violence and 10 million people seeking refuge in India'(2013, p.1).

The 1973 International Crimes Tribunal[1] was 'one of the earliest systematic attempts to seek justice for genocide- the first major one since the Nuremberg Trials, and the first in history in which the vocabulary of "genocide" was front-and-centre'(Jones, 2014, p.14). The Bangladeshi case precedes similar national attempts at prosecution in Cambodia and it also precedes the 'ad-hoc international tribunals established for Yugoslavia, Rwanda, Cambodia, and Sierra Leone- not just by years, but by decades' (Jones, 2014, p.14).

However, the ICT has had to deal with an extensive amount of criticism, as well as genocide denial arguments. The four main arguments are:

> '(1) the aim of the Court is political, since those who stand accused are members of the political opposition; (2) the number of victims, the motivations for the genocide, the nature of the conflict, although previously well established and overwhelmingly accepted by the international community, are being portrayed as major sources of controversy; and (3) the number of years passed does not justify the continuation of the procedures' (Casaca, 2015, p.6).

Paulo Casaca, in assessing these arguments states that 'the second and third lines of reasoning are typical of all genocide revisionist movements, and they do not differ from those we are accustomed to hearing on behalf of the Holocaust perpetrators' (2015, p.6). However, Casaca points out that the first line of reasoning that the ICT is politically-motivated is distinct. He explains:

[1] The International Crimes (Tribunals) Act, 1973 (ACT NO. XIX OF 1973),
'was enacted by the sovereign parliament of Bangladesh to provide for the detention, prosecution and punishment of persons responsible for committing genocide, crimes against humanity, war crimes and other crimes under international law' (SADF, 2015, p.1).

> 'The difference in arguments is the result of the difference between situations. In the case of the Holocaust, its perpetrators were denied a return to power, whereas in Bangladesh, not only did the perpetrators return to power, but they also founded a vast economic, social and financial empire, including banks, universities, companies and hospitals'(2015, p.6).

In summary, 'as the genocide perpetrators remain powerful, any measure to investigate their past is seen as a political measure against the opposition' (Casaca, 2015, p. 6).

The ICT was also accused of undergoing politically-motivated investigations in the pre-trial Chamber. However, in a report of the Northern University Journal of Law, Rahman and Billah oppose this accusation and use the ICT's due process of law in response to this criticism. Rahman and Billah highlight that:

> 'The 1973 ICT Act not only envisages the right of appeal of a person convicted by the tribunal to the Appellate Division of the Supreme Court but also incorporates rights of the accused during trial. The accused may give explanation relevant to the charge, can conduct his own defence or have the assistance of counsel, shall have the right to present evidence in support of his defence and to cross-examine any prosecution witness' (2010, p.19).

Rahman and Billah conclude: 'These are the manifestations of the due process of law and fair trial and make the 1973 Act more humane, jurisprudentially sound and legally valid and therefore, an improvement over the Nuremberg Charter- the founding stone of modern international criminal justice administration (2010, p.19).

Additionally, M. Zahurul Haque in the book "Shifting Horizons of Public International Law" goes on to further highlight the successes and accomplishments of the ICT in upholding the rights of the accused:

> 'After the amendments of the Rules of Tribunal, accused persons have the right to be presumed innocent and have the right to apply and be granted bail. Now, the prosecution bears the burden of proving a charge beyond any reasonable doubt and no person may be convicted twice for the same offense as the amendments suggest. The Tribunal also assented to create a witness and victim protection system' (2018, p.261).

M. Rafiqul Islam adds to Haque's description on the rights given to the accused:

> 'The ICT directed the prison authority to provide all necessary medical support and hospital treatment in cases of the accused with old age and health complications. They also allowed defence counsels to have privileged communication with the accused in custody and ordered for the appointment of state defence counsel to defend absconded accused (s10A). Pursuant to Rule 34(3), the ICT entertained bail petitions and granted bails to the accused and ordered the investigation agency to interrogate the accused at his own home instead of interrogating in a safe home given by the prosecution' (2014, p.81).

Furthermore, another accomplishment of the ICT is that its jurisdiction is wide in scope: Professor Islam explains:

> 'The ICT enjoys jurisdiction and competence to detain, try, and punish any persons accused of the designated crimes under the 1973 Act. Under the 2009 amendment to s3(1) of the 1973 ACT, the ICT has the power to try and punish any individual or group of individual, or any member of any armed, defence or auxiliary forces, irrespective of his/her nationality, who committed any of the crimes in the territory of Bangladesh in 1971' (2014, p.75).

Moreover, in response to the criticism that the number of years passed does not justify the continuation of the ICT procedures, Haque focuses on the legality of the general amnesty given to the prisoners of war. He states:

> 'Interestingly those who do not hesitate to criticise in the strongest terms the substance and procedure of the ICT Act- an Act of Parliament- remains mysteriously silent when it

> comes to questioning the legality of the general amnesty (to local collaborators) of Sheikh Mujibur Rahman, and the clemency shown to the 195 prisoners of war (POW) (charged with the crimes of genocide) under the tripartite agreement which had not been passed by any parliament' (Haque, 2018, p.254).

Rahman and Billah agree with Haque and further argue that:

> 'The Simla Pact itself is void to the extent of its inconsistency with, or repugnancy to, a body of existing jus cogens principles of international law. Hence, there appear to be no insurmountable legal obstacles to prosecute Pakistani and Bangladeshi nationals for their alleged commission of genocide' (2010, p. 17).

Lastly, Rahman and Billah emphasise that: 'The immunity provided in the Simla Pact exonerating the perpetrators of the said crimes contradicts the international obligations of the Pact-states' (2010, p.17). And, although Pakistan promised to prosecute the blue-printers of genocide, they failed to do so. Bangladesh, 'cannot and should not fail the rest notable perpetrators at least (who belonged to auxiliary forces like Razakars, Al-badrs and Al-shams)' (Rahman and Billah, 2010, p.15).

Dr. Mizanur Rahman, Chairman of the National Human Rights Commission, Bangladesh, shares his point of view on the matter:

> 'There have been questions from all squares regarding the ICT from the very beginning. There have been questions regarding its legitimacy, mandate, impartiality, equal opportunity between the victim and the accused and so on' (2013, p.138). 'What makes me embarrassed is that more worries have been shown for the protection of the accused persons than justice for the victims' (2013, p.138).

A war veteran interviewed by The Diplomat shared his views about the ICT's justice process. He explains:

> 'A tribunal process without any inefficiency is desirable, but in the circumstances of this country, this is not fully possible. Putting the Jamaatis on trial was not easy, as can be seen by the many decades it has taken to set up a war crimes tribunal. The Jamaatis may have lost the liberation war but they remain extremely powerful in post-1975 Bangladesh. Indeed, the many challenges faced by the ICT underscores how difficult it is to try powerful people for war crimes' (Ramachandran, 2013).

Overcoming the challenges of the ICT and convicting perpetrators of the 1971 genocide sends a powerful message of hope to the victims that, despite the difficulties, those who did harm will not go unpunished for the crimes they have committed.

Casaca points out that:

> 'The long silence held by most of the international public and supranational entities on the plight for justice to those who lost their lives in the 1971 genocide was unexpectedly in stark contrast to the uproar on the aftermath of the Bangladeshi authorities' announcement of the re-establishment of the criminal court procedures against genocide perpetrators' (Casaca, 2015, p.1).

Not only is this utterly painful for the genocide victims, but it also supports a continued culture of impunity, which has contributed to the continuation of the country's fragile democracy. Human Rights Watch (HRW), 'a private organisation that does not disclose the sources of its funding, waged the most aggressive and least scrupulous attacks against the Bangladeshi court proceedings' (Casaca, 2015, p.6). This organisation not only lacks credibility in its research (NGO Monitor, 2012, para 31) but, in 2016, it was rated to be 'among the least transparent think tanks in the United States' (MPN News, 2016, para. 1). With that being said, this gives an appropriate context to HRW's baseless arguments against the ICT, as it has never conducted an in-depth study on the trials, and even more surprising, Casaca states that 'representatives of the organisation have never actually visited the tribunals to establish a basis for its criticism' (2013, para. 10).

In 2009, HRW wrote a letter to the Prime Minister, Sheikh Hasina, titled "Recommendations to improve human rights in Bangladesh". In the letter, HRW 'urges the government and parliament to change existing laws to initiate a process for bringing to trial those responsible for war crimes in connection with the 1971-war' (Casaca, 2015, p.10). However, not too long afterwards, HRW publishes a general report titled "Ignoring executions and torture: impunity for Bangladesh's security forces", which, Casaca points out that 'while rightfully criticising the long-existing culture of impunity for crimes against humanity in the country, HRW also contradicts their earlier call to end impunity' (Casaca, 2015, p.7).

In the general report, HRW specifically states:

> 'In January 2009, the Bangladesh parliament adopted a resolution requesting the government to take immediate action to try war criminals. In March, Law Minister Shafique Ahmed announced that the trials would be held under the International Crimes Tribunal Act 1973. The Act does not require Bangladesh's regular criminal procedure and evidence laws to be applied. This raises concerns that the trials may not meet international fair trial standards and may be subject to political influence. Death sentences may be handed down' (Casaca, 2015, p.7).

What is appalling is that HRW mentions the possibility of the trials being politically influenced without having any evidence of that being the case. As Casaca states, 'the only reason HRW gives for raising the issue of "politics" in the ICT procedures is because of a declaration from the leader of the main Bangladeshi opposition party, the BNP. It is quite extraordinary that HRW's accusation of mixing politics with human rights is done on the sole basis of the declaration of a political leader' (Casaca, 2015, p.7). These statements completely undermine the work of the Bangladeshi authorities in trying to end the culture of impunity and bringing peace to the victims. While afterward HRW frequently published politically biased press releases, 'it said very little on the widespread terror acts targeting minorities by the defenders of those convicted for genocide' (Casaca, 2015, p.7). SADF's Policy Brief Nº 5 depicts the atrocities that are being committed by

the JeI against minorities: 'Members of the JeI and Islami Chhatra Shibir (ICS)[2] are conducting large-scale orchestrated attacks on homes, businesses and places of worship of minorities, as well as engaging in the abductions and forced conversions of Hindu girls. The violence also targets Christians and Buddhists' (2017, p.21). Instead of discrediting the ICT, HRW should have focused its attention to the fact that the perpetrators of the 1971 genocide are once again destroying civic peace in Bangladesh (Wolf, 2015, p.7).

In March 2014, Toby Cadman, a 'British lawyer and an international lobbyist who has historically been employed by the Islamist group JeI'(Oldmixon, 2018, para.3), asked Geoffrey Robertson QC, a Human Rights barrister, 'to review all the cases concluded by the ICT so far and to provide his "independent opinion" on the ICT's proceedings' (Robertson, 2015, p.13). Robertson, like Cadman, participated in many lobbying events for the JeI. We, Paulo Casaca and Susan Guarda consider him the most highly skilled proponent of the group.

As the report written by Robertson acknowledges:

> '[the report] has been commissioned and published by the International Forum for Democracy and Human Rights, a group of international lawyers some of whose members have been involved in giving advice to counsel defending those accused in the International Crimes Tribunal in Bangladesh'(Robertson, 2015, p.6).

Robertson's report entitled "Report on the International Crimes Tribunal of Bangladesh" is an in-depth analysis and an exhaustive study of the ICT trials. Paulo Casaca and Susan Guarda, on behalf of SADF, are presenting his assessment of the ICT because we believe that – although acting on behalf of JeI - his evaluation is more consistent and less biased than HRW's numerous pamphlets and declarations as well as others.
Robertson begins by stating that:

[2] Although 'the constitution of the JeI does not refer to any official associate or front organisation, in practice, the student organisation, ICS, is its closest associate' (SADF Policy Brief Nº5, 2017, p.15).

> 'For all the criticism that has been levelled at the ICT, there has been as yet no comprehensive study of its background or its work. Bangladesh has not been in the news much, internationally, other than as a result of the tragic Rana Plaza garment factory collapse in 2013 which killed 1,129 people. Although the Tribunal verdicts and especially the execution of Abdul Quader Molla have provoked protests, riots and strikes, at which almost two hundred people have lost their lives, the drawn out proceedings have not been reported in detail outside the country' (2015, p.13).

This is a warranted criticism to HRW and others on their lack of a comprehensive study conducted on the ICT before Robertson's report.

In his detailed report, Robertson thoroughly provides the historical context of the genocide. He then gives an account of the complicity of the international community, in particular, US President Nixon and his advisor Henry Kissinger.

Nixon and Kissinger supported the then president of Pakistan, Ayub Khan, 'through thick and thin, and who were to turn a blind eye to his later atrocities and supply him with weapons to commit further war crimes' (2015, p.26). Robertson also details the failure of the United Nations in upholding its responsibility to intervene and states that they instead 'offered purely humanitarian assistance' (2015, p.38). Not only did the international community and the UN fail humanity, but it also exacerbated the culture of impunity. Robertson illustrates an example of the result of impunity:

> 'General Tikka Khan, architect of the operation and commander of the eastern military, bears greater responsibility than President Yahya Khan. His callous calculations of the groups to be killed -Professors and students, non-Urdu speakers, Hindus- made this "Butcher of Bengal" as guilty as General Mladic, the Bosnian Serb who "ethnically cleansed" Srebrenica. Tikka Khan went straight into Bhutto's cabinet, as Defence Minister and later became Secretary General of the P.P.P. and later Governor of Punjab. When he died in 2002, he was given a State funeral with full military honours' (2015, p.32).

Robertson shares the victim's frustration in bringing an end to impunity and justifies their right to bring the perpetrators of the 1971 genocide to justice.

Moreover, Robertson then describes what he believes to be setbacks of the Tribunal. Concerning the 1973 Act and its amendments, Robertson states 'what is most damaging is that the government kept the wording of s.20 (2):

> 'Upon conviction of an accused person, the Tribunal shall award sentence of death or such other punishment" (2015, p.56) Robertson explains that 'the sentence of death, acceptable in most countries in 1973, had ceased to be so by 2009, and had been removed from the power of international courts, but Awami League leaders had a visceral wish to execute the leaders of those who had sided with the army forty years before' (2015, p. 126).

Robertson rightfully analyses the issue of the death penalty. M. Rafiqul Islam, professor of law at Macquarie University, Australia, agrees with Robertson in that a notable deviation of the ICT from the International Covenant on Civil and Political Rights (ICCPR) is 'the provision in the 1973 Act for a non-mandatory death penalty'(2014, p.82).

However, Professor Islam shares his views on this deviation:

> 'The sentencing of capital punishment appears to be a cause of concern for many in the international community. But capital punishment, however undesirable, is yet to be abolished altogether by the international community and human rights law. Many jurisdictions of the world impose and execute capital punishment' (2014, p.82).

Casaca also offers his perspective on the issue of the death penalty and states:

> 'Questions about the Tribunals were recently complicated by the hanging of one of those convicted of genocide. This focus is completely misguided. I personally oppose the death penalty. In this case, however, the question is whether or not the crimes of which the

> accused has been convicted deserve the maximum penalty allowed under the law. In this regard, my position is definitely yes' (Casaca, 2013, para. 4).

Although the death penalty is a concern for many, it should not in any way discredit all the work of the ICT.

Robertson explains what he deems to be another setback of the ICT. From the point of view of the defendants: 'There is no provision for adequate time and facilities to prepare a defence -the prosecutor is only obliged to produce witness statements and disclose evidence three weeks before the start of the trial (Section 9(3)) – a minimum period, which has become routine in the case of all defendants' (Robertson, 2015, p.58).

In Robertson's opinion, 'This is inadequate for preparation to defend wide-ranging allegations of the commission of atrocities so many years ago' (2015, p. 58). However, at the same time, Robertson states that:

> 'Any fair reading of the trial and appeal transcripts would show that the defendants have been represented by capable and courageous counsel, especially in most of the JeI cases, where defence teams have been led by Abdur Razzaq, a Lincoln's Inn barrister' (Robertson, 2015, p.117).

Although lack of time and facilities has been a concern for many, Robertson emphasises an important aspect of the 1973 Act in upholding fair trials:

> 'Critics of the Tribunal, academics and NGO's in particular, have pointed out the inadequacy of its 1973 Statute, and the rules of evidence and procedure which it has decided to adopt, but it must be emphasised that the 2009 amendments included section 6(2) (A) which states that "The Tribunal shall be independent in its judicial functions and shall ensure fair trial". This provision is the Tribunal's saving grace, at least on paper. For all the inadequacy and unfairness of its statue, independent judges are still left with enough discretion to ensure the overriding objective of fair trial' (2015, p.59).

Consistent with his acknowledged work for the JeI, Robertson states that 'the Jamaat's commitment to democracy does appear genuine, as a basis for trying to prevent the break-up of Pakistan and securing a central government which would be run in accordance to Islamic law'(2015, p.23).

On the contrary, SADF's Policy Brief N°5 points out that:

> 'The JeI's socio-political thought and action 'promotes modern jihadism as an alternative to the notions of the nation-state, secularism and democracy (the guiding principles enshrined in the country's constitution). Moreover, it considers the participation in elections a tactical necessity and claims it is the sole arbiter of what counts as Islamic. To achieve this, JeI seeks to manipulate public opinion and create the image of a religious, conservative, but socially aware force' (SADF, 2017, p.14).

SADF's Policy Brief N°5 further states that:

> 'The true objectives of JeI's social activities surface when the organisation underlines that all constitutional, legal, and social principles of a state and its society must derive from the Holy Quran and Sunnah of Prophet Muhamad. It clearly aims to abolish democratic institutions and establish a theocratic Islamic State' (2017, p.14).

In Summary, in his report, Robertson assesses the ICT's application of the rule of law, and lists "shortcomings" of the tribunal; the latter could be understood as him trying to be credible enough in defending the JeI. In any case, his report shows that even the defence proves to be more plausible than the unsubstantiated criticism of the HRW and others.

In this respect, Robertson states: 'the Government of Bangladesh is to be congratulated on reactivating a Tribunal which was properly established in 1973 but prevented from doing any work (Robertson, 2015, p.11). The Tribunal has made conscientious efforts, within the unfair confines

of the ICTA and their shoestring budget, and it has collected evidence of some of the crimes against humanity committed in 1971' (2015, p.125).

3. Assessment of Cambodia's judicial treatment of the genocide

On April 17th 1975, the Khmer Rouge took over Cambodia. For four years, Democratic Kampuchea (DK) was a prison camp state. The Khmer Rouge regime set out to:

> 'Mould Cambodian society into a utopian communist ideal through the repression of culture, technology and religion, as well as forced labour and marriages. In the process they systematically worked, starved and beat to death 1.7 million ethnic and non-ethnic Cambodians' (Jasini, 2016, p.5).

In 2006, the UN negotiated with the Cambodian Government and established 'the ECCC as a transitional justice mechanism to deal with these events' (Jasini, 2016, p.5). The ECCC, similar to the ICT, only came into being many years after the mass graves were discovered and evidence was made available from the killing fields of Cambodia.

> 'The ECCC has played a valuable role in the creation of a common history; ending impunity; capacity building amongst the Cambodian judiciary; and also allowing victim participation in the proceedings as civil parties' (Scully, 2011, p.338).

Although the ECCC was an important initiative to bring about legal accountability for the Khmer Rouge genocide, there are three crucial shortcomings that have hindered the success of the tribunal in properly applying the rule of law to prosecute criminals. These inadequacies are: the lack of judicial independence, a limited jurisdiction, and insufficient legal protections.

The Asian-Pacific Law and Policy Journal illustrate the lack of judicial independence during the Khmer Rouge trials at the ECCC. In 2003, former UN-Secretary General Kofi Annan stated that 'There are continued problems relating to the rule of law and functioning of the judiciary in Cambodia resulting from interference by the executive with the independence of the judiciary' (Scully, 2011, p. 325).

Prime Minister of Cambodia, Mr. Hun Sen, has been heavily involved in breaching the rule of law at the Khmer Rouge trials. Seth Mydans of The New York Times explains:

> 'The government includes several former members of the Khmer Rouge, including Mr. Hun Sen himself, and it has been careful to protect its own. In addition to trying to limit the number of defendants, it has denied access to potential witnesses who now hold influential government positions' (Mydans, 2017, p.2).

Scully states that Mr. Hun Sen interferes in the 'autonomy of the court to conduct investigations and to reach its own conclusions about whether or not more trials are necessary' (Scully, 2011, p.325). As a result, Open Society Justice Initiative (OSJI), an independent ECCC monitoring group warned that:

> 'An ECCC official who bows to this political interference violates the Law of the Extraordinary Chambers, which requires that judges and prosecutors shall be independent in the performance of their functions, and shall not accept or seek any instructions from any government or any other source'(Scully, 2011, p.326).

Scully highlights that not only was the Prime Minister interfering with the judicial process of the trials, but that the Cambodian ECCC staff were, in turn, complying with his wishes 'at every stage of the process'(2011, p.326). Because of their acquiescence, the Chamber and the Cambodian judged were 'split along national and international lines as to whether the investigation should be allowed to continue' (Scully, 2011, p.327).

Political interference derives from the insufficient legal protections in the Law on the Extraordinary Chambers. The Law, which is based on the Cambodian Criminal Procedure Code, 'Suffers from shortcomings regarding access to evidence and court files, access to counsel, right to confront the accusers, and the right to cross-examine witnesses, as well as failing to ensure the independence of judges and prosecutors, adequate protection of witnesses, and the right to international counsel'(Scully, 2011, p.323).

Thus, strong links between the national court staff and Hun Sen's government are easily formed and maintained, as there are no legal provisions to remove or penalise Cambodian judges.
Scully points out that 'the ECCC fails to adequately address the widespread crimes committed by the Khmer Rouge at all levels (2011, p.323). The jurisdiction of the ECCC is limited because 'there are only two qualifying categories: (1) that suspects are either senior leaders of Democratic Kampuchea or (2) those most responsible for the serious crimes committed' (Scully, 2011, p.324).

Scully explains the repercussions:

> 'Limiting the ECCC's jurisdictions to only trying those in these two categories necessarily means that the thousands, or possibly tens of thousands, of lower-ranking Khmer Rouge cadre will not face any form of criminal justice for crimes they have committed. The limited scope of personal jurisdiction leaves victims of the regime in a difficult situation: former perpetrators may live among them in their villages, and may even hold positions of power, yet these perpetrators who actually dealt the death blows will never face prosecution at the ECCC or in domestic courts' (2011, p.324).

For example, Im Chaem, a middle-ranking Khmer Rouge district chief, was charged with crimes against humanity, including murder, extermination and enslavement. The court's co-investigating judges concluded that:

> 'Im Chaem was not high-ranking enough to fall into the category of senior leaders, and she did not qualify for prosecution as a person "most responsible" for atrocities, because the evidence of specific crimes attributed to her did not meet acceptable legal standards' (VOA, 2017, p.2).

Furthermore, although the Chamber acknowledged that some of the Cambodian judges may be corrupt, they lack the power and mechanisms to directly appoint, discipline, or remove Cambodian judges' (Scully, 2011, p.337).

There were concerns from the outset that the Cambodian procedural law would not provide sufficient safeguards for the rights of the accused. Scully (2011) explains the inefficiencies:

> 'The procedural provisions laid down in the Law on the Extraordinary Chambers, being based on the Cambodian Criminal Procedure Code, suffers from shortcomings regarding access to evidence and court files, access to counsel, right to confront the accusers, and the right to cross-examine witnesses, as well as failing to ensure the independence of judges and prosecutors, adequate protection of witnesses, and the right to (international) counsel' (p.323).

This fear has proven to be justified, as demonstrated by the inability of the Trial Chamber to remove or discipline Cambodian judges due to a lack of provisions within Cambodian law.

4. How Iraq dealt with crimes against humanity following the 2003 invasion

Casaca (2008; 2010; Casaca et. al. 2016, namely 'War on Terror' pp. 206-218) has dedicated extensive research on the rationale of the invasion of Iraq.

Casaca stresses that the US National Commission on 9/11 (2002) dismisses any links of Saddam Hussein's regime with 9/11 and, quite on the contrary, emphasises the links of Iran, Pakistan and Saudi Arabian citizens and high officials with the terrorist operation. The 9/11 Commission distances itself from a lobbying pressure to act on Iraq, which it identifies with former U.S. Deputy Secretary of Defence, Paul Wolfowitz.

The so-called 'neo-conservatives' (Wolfowitz never liked this etiquette) such as Richard Perle and David Frum – did indeed implicitly envisage an alliance with Iran to confront not only Iraq but also Saudi Arabia.

The issue of oil as a motor for the invasion was also carefully considered by Casaca (2008) in his book "The Hidden Invasion of Iraq", and developed in later papers, such as "A Green Ray over Iraq" (2010).

Whereas oil was obviously a major element to be taken in consideration on the invasion of Iraq, it could not justify it per se.

James Baker, the former Secretary of State – together with Lee Hamilton, the main co-author of "The Iraq Study Group Report: The Way Forward – A New Approach" (2006) dedicates an unwarranted attention to Iraqi oil (Casaca, 2010, op. cit. pp. 9-10). The former lawyer of the Bush clan oil business since 1963 and the US State Secretary of George Bush in the first Gulf war proposed in this report a withdrawal of the US forces and an accommodation to the Iranian domination of the country, together with the establishment of a new single company monopolising Iraqi oil. President George W. Bush, however, resisted the report and fundamentally took the opposite course of action in 2007-2008.

Nevertheless, the pressure for the invasion did not come either only or mainly from Paul Wolfowitz, or his 'neoconservative' associates, or from James Baker. Casaca (2008 op. cit.) analyses the strong role of the Iranian disinformation apparatus on both the narratives of 'weapons of mass destruction' and the 'crimes against humanity' as well as the role of the US personalities close to the Iranian authorities' perspectives.

The only voluminous and consistent book pleading for the invasion in 2002 was authored by Kenneth Pollack ("The Threatening Storm - The Case for Invading Iraq"), the main responsible for Iraqi affairs in the Clinton administration.

As Casaca (2008, pp. 203-204) highlights, Mr Pollack's writings and actions show a consistent pro-Iranian regime position and his obsession for the invasion of Iraq cannot be seen out of this context.

His arguments are manifold, but he has two main lines of argument; the first on the famous "arms of mass destruction" and the second on "crimes against humanity" from the Iraqi regime.

Human Rights Watch (HRW) will be the main organisation developing the second line of reasoning, although, it is important to stress that HRW also played a role in disseminating false stories on the Iraqi "weapons of mass destruction". These stories were closely aligned with the ones disseminated by Chalabi and other Iranian agents. (Casaca, 2008, op. cit. pp. 73-74).

Further to this, HRW made overt propaganda for the Iranian proxies that would occupy Iraq in the wake of the US invasion while harshly criticising the diplomatic attempts to avoid the invasion. (Casaca, 2008, pp. 147-153).

Furthermore, HRW had been the utmost critic of the failure of the international community to intervene in Iraq for allegedly stopping human rights violations (see: HRW's Briefing Paper, 2003) under "The Failure of the United Nations to Act".

Formally, HRW claims it did not support the concrete timing of invasion of Iraq in March 2003 as the invasion should have taken place earlier:

> 'As in the case of other armed conflicts, Human Rights Watch thus does not support or oppose the threatened war with Iraq. We do not opine on whether the dangers to civilians in Iraq and neighbouring countries of launching a war are greater or lesser than the dangers to U.S. or allied civilians - or, ultimately, the Iraqi people - of not launching one. We make no comment on the intense debate surrounding the legality of President George Bush's proposed doctrine of "pre-emptive self-defence" or the need for U.N. Security Council approval of a war'(HRW, n.d., para.4).

HRW continues by stating:

> 'The sole exception that Human Rights Watch has made to its neutrality on the decision whether to go to war is in the case of humanitarian intervention - the military invasion of a country to protect its people. We have advocated military intervention in limited circumstances when the people of a country are facing genocide or comparable mass slaughter. Horrific as Saddam Hussein's human rights record is, it does not today appear to meet this high threshold - in contrast, for example, with his behaviour during the 1988 Anfal genocide against the Iraqi Kurds' (n.d. para.4).

This supposed "neutrality" towards the invasion is taken at face value, namely by David Forsythe, author of the Encyclopaedia of Human Rights (2008, p. 449), but it cannot be accepted by any

honest, knowledgeable, and impartial analysis of the whole of the HRW's declarations and positions in context.

In concluding whether HRW was neutral or not, the decisive criterion is not to see if it explicitly expressed its wish for the invasion to take place. The Western armies do not follow the instructions of HRW, and an explicit opinion of HRW for the invasion would be worthless. HRW's role in pressing for the invasion is to influence the public opinion in this direction, and an objective analysis confirms that HRW did all it could to influence the public opinion to accept the invasion to take place.

Whereas the details of the human rights violations of Saddam Hussein regime are open for argument, no one can question that this regime committed serious crimes against humanity and that any thoughtful human rights organisation should openly condemn it.
However, the question is why did HRW not commit the same energy and make the same efforts to evaluate the egregious crimes against humanity committed by the opponents of Iraq, fundamentally the Iranian regime and its Syrian proxy?

Why did HRW present the Iranian stooges that would follow the Western military force and became the real occupiers of Iraq as "freedom fighters" rather than instruments of the Iranian regime expansionism?

Why did HRW mimic the narrative of the Iranian theocracy of a "Shiite" oppressed majority, instead of the reality of the dictatorship of a clan that smashed whoever resisted it?

Why did HRW denounce the diplomatic steps done in the region to avert the invasion through the side-stepping of Saddam Hussein on the ground of the lack of "human rights credentials" of the Baathist dissidents when no such criteria was considered for the Iranian stooges?

The fact is that HRW did not call explicitly for the invasion of Iraq since this would probably be counterproductive in face of the unpopularity of the move, but it used all possible arguments –

including the famous "weapons of mass destruction" – to justify such invasion in the eyes of the public opinion and to paint the Iranian backed militia as trustworthy freedom fighters.

From October 2005 to July 2006, 'Saddam Hussein and seven co-defendants were tried for crimes against humanity in the first of several planned trials before the Iraqi High Tribunal (IHT) -a judicial institution originally created by the Iraqi Interim Governing Council on December 10th, 2003, and later approved by the democratically elected Iraqi National Assembly on August 11th, 2005' (Newton and Scharf, 2006, para. 1).

The IHT was created with the aim to 'bringing personal accountability to those Baathists who were responsible for depriving Iraqis of their human rights, and for virtually extinguishing the real rule of law for over three decades' (Newton, 2006, p. 401).

The IHT 'incorporated international norms into the domestic criminal code, and was consistent with the established practice of the international community, and prevented a widespread sense of hopelessness' (Newton, 2006, p. 404). With regards to the jurisdiction of the IHT:

> 'The IHT covers any Iraqi national or resident of Iraq charged with crimes listed in the Statute that were committed between 17 July 1968 and 1 May 2003 inclusive. In addition, its geographical jurisdiction extends to acts committed on the sovereign soil of the Republic of Iraq, as well as those committed in other states, including crimes committed in connection with Iraq's wars against the Islamic Republic of Iran and the State of Kuwait' (Newton, 2006, p.407).

However, when assessing the rights of the accused, the IHT fares worse than the other tribunals. Newton depicts the trials:

> 'The Dujail trial was marred by assassinations of defense counsel, resignation of judges, disruptive outburst by defendants and their lawyers, hunger strikes, boycotts, and even underwear appearances- making it one of the messier trials in legal history' (Newton and Scharf, 2006, para. 5).

Newton further demonstrates the inadequacies of the IHT:

> 'Political interference undermined the independence and impartiality of the court, causing the first presiding judge to resign and blocking the appointment of another. The court failed to take adequate measures to ensure protection of witnesses and defense lawyers, three of whom were assassinated during the course of the trial' (Newton, 2006, para. 2).

Lastly, Newton states that 'Saddam Hussein was denied access to legal counsel for the first year after his arrest, and complaints by his lawyers throughout the trial relating to the proceedings do not appear to have been adequately answered' (2006, para. 3).

In December 2003, HRW sent a memorandum to the Iraqi authorities on "The Statute of the Iraqi Special Tribunal (also known as the IHT)", where it repeats the general principles defended by the international community on fair trials, and the criticisms in subsequent press-releases.

HRW, however, bluntly ignored the main human rights issue post-invasion, the constitution of death squads by the Iraqi section of the Iranian Revolutionary Guards, known at this time as the "Badr Brigades". This cannot be seen as a surprise since HRW had previously painted these brigades as 'freedom fighters'.

The operation of these squads was very well-known in Iraq since the invasion, and Casaca (2008) documented some of its episodes that also got coverage in the international press (see for instance, http://news.bbc.co.uk/2/hi/middle_east/4719252.stm).

However, HRW kept silent on the issue up until 2005. At this date, it finally released a declaration on the death squads (https://www.hrw.org/news/2005/01/09/us/iraq-reject-use-death-squads) pretending however that the death squads were starting operation only at the time, and not at the time of the invasion. Furthermore, the declaration obliterated the role of the Iranian outfits – namely those that were promoted by HRW – in setting these death squads.

The same is true on the widespread system of secret prisons, torture and disappearances that were only mentioned by HRW when their existence was widely acknowledged and always minimising the role of the Iranian authorities on these developments.

To have a clearer picture of the double standards used by HRW, we can compare the way the organisation dealt with the condemnation of two famous criminals, Ali Hassan al-Majid from Iraq, and Mir Qasem Ali, from Bangladesh.

Whereas during the trial of Mr Ali Hassan al-Majid, HRW published at least four press releases solely dedicated to the depiction of his crimes (https://www.hrw.org/news/2005/02/25/give-chemical-ali-his-due-fairly, https://www.hrw.org/news/2005/02/16/iraq-documents-link-chemical-ali-massacre, https://www.hrw.org/news/2003/01/16/prosecute-iraqs-chemical-ali, https://www.hrw.org/news/2003/04/06/who-was-ali-hassan-al-majid-chemical-ali most of the others, supposedly geared at calling for a fair trial actually mostly speak of his crimes) nothing of the sort is done with Mr Mir Qasem Ali. He is presented as a 'senior member of the executive committee of opposition party Jamaat-e-Islami' and his persecution by the Bangladeshi justice is presented as politically motivated, not only once mentioning the crimes against humanity he was condemned for.

Further to this, HRW speaks about flaws in both trials, as if there could be any possible comparison between the denial of the most basic defendant rights of Mr Ali Hassan al-Majid and the mostly procedural or circumstantial criticisms regarding the trial of Mr Mir Qasem Ali.
As HRW conceded, the trial of Mr Hassan al-Majid was made on the basis of anonymous witnesses whose testimonies, by definition, could not be challenged:

> 'The court has relied so heavily on anonymous witnesses that it has undercut the defendants' right to confront witnesses against them and effectively test their evidence' (HRW, 2006.08.17).

Otherwise, the legal framework did not forbid the use by the Court of confessions obtained under torture:

> 'The Iraqi Special Tribunal statute lacks significant fair-trial protections, including explicit guarantees against using confessions extracted under torture' (HRW, 2004.12.16).

This situation cannot be compared with the way the ICT handled its work.

It is important to note that, Mr Mir Qasem Ali, was one of the main financial pillars of the Jihadist organisation he was leading, that he had publicly spent tens of millions of dollars in legal counselling and lobbying in the US, and that HRW does not disclose its accounts. These three elements put together raise a suspicion of conflict of interests that only HRW can clarify.

5. Conclusion

The Armenian genocide, one of the first massacres of the twentieth century, was unjustly ignored by the international community. This marked an era of impunity for the later perpetrators of genocides to come. Although the 1949 Geneva Conventions were enacted to end crimes against humanity, and the 1998 Rome Statute was passed to ensure international accountability, this was not enough put an end to the magnitude of killings or to hold perpetrators accountable.

When accessing the Bangladeshi genocide in a comparative context with other genocides of the twentieth century, 'it was one of the most severe and destructive genocides of the century' (Jones, 2014, p.11). Yet, this genocide has received very little international attention. Jones (2014) highlights that, 'this inattention also accounts for the woeful lack of international interest and intervention at the time of the crimes' (p.11). However, 'the commencement of the trials of war criminals in Bangladesh in 2010 provided an opportunity once thought lost, to claim justice for millions of victims, and to establish truth that was denied to the nation for 40 years' (Hoque, 2016, p.17).

After appraising the application of the rule of law of the ICT with the ECCC and the IHT, the ICT fares the same or better in terms of jurisdiction, rights of the accused, and legal protections. Both the ICT and the IHT enjoys a wide scope of jurisdiction. By the ICT and IHT being able to try and punish any persons accused of crimes against humanity, this allows for a greater chance to bring to justice perpetrators from all ranks, not just the leaders. In contrast, the ECCC has a limited

jurisdiction in that it can only try and punish perpetrators of two categories: those that are top-ranked Khmer Rouge cadre and those that are most responsible. This implies that the ECCC will never be able to try low-ranking officials who are criminals. A limited jurisdiction of this sort allows perpetrators to live freely, as in the case of Im Chaem, who was charged with crimes, including murder and enslavement. This is extremely painful for the victims.

After analysing legal protections and the rights given to the accused in these three tribunals, the IHT fares the worst. The IHT trials are known to be one of the messiest: defence counsels were assassinated, judges resigned, hunger strikes and boycotts took place among other events. Additionally, the tribunal lacks fair trial protections in assuring that confessions are not extracted under torture. Likewise, although not as bad, the ECCC also suffers from shortcomings in providing rights to the defendants. There are limitations in providing access to counsel, adequate protection of witnesses, and the right to cross-examine witnesses. On the other hand, the ICT does have the right to cross-examine prosecution witnesses, among many other rights, including the right of appeal of a person convicted by the tribunal to the Appellate Division of the Supreme Court. The ICT also provides additional support systems for the accused, such as medical and hospital treatment for those with health complications.

After evaluating the criticism levelled at the ICT vis-à-vis the IHT, the international community – or to be more precise, most of the Western international community – acted with two weights and two measures facing the violations of human rights in Iraq during the Saddam regime and in Bangladesh after the elections of 1970. As a consequence of this fact, the international community had incommensurately heavier special responsibilities in upholding the rule of law in Iraq than it did in Bangladesh. This rule applies with special emphasis to the organisation that was more involved in campaigning for the moral obligation to stop human rights violations in Iraq: HRW.

However, although HRW seemed very concerned about ending violations in Iraq, in reality, it was the opposite: little attention was actually paid to the violations of the rule of law in Iraq compared with their heavy criticism on Bangladesh's ICT to follow of the rule of law.

In assessing Robertson's report, we conclude that his evaluation of the ICT's application of the rule of law is overwhelmingly more consistent than the HRW. Therefore, although he is a lobbyist for the JeI, along with Cadman, he provides more substantiated arguments than other organisations.

This paper proves that more concerns have been shown for the protection of the rights of the accused as opposed to obtaining justice for the 1971 Bangladesh genocide victims. Upholding fair trials is the rule of law, but combatting impunity is also the rule of law. This should be weighed evenly when assessing the successes and shortcomings of any war crime tribunal.

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