



Institutional Response to Crime against Humanity: A Case Study on Bangladesh

By

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DECLARATION

The work I have submitted is my own effort. I certify that all the material in the Dissertation which is not my own work has been identified and acknowledged. No materials are included for which a degree has been previously conferred upon me.

Signed: Angshu Jyoti Fouzder

Date: 27 May, 2011

Dedicated to the people whose thoughts, struggle and sacrifice were helpful in addressing massive and systematic violation of human rights.

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ABSTRACT

In Bangladesh institutional response to crime against humanity of 1971 has been limited to maximalist and minimalist approach through tribunal and amnesty. Legalism and realism has dominated the debate around institutional response. Seemingly the government is unable to ensure retributive justice for all the crimes committed in 1971 and this creates scope to rethink if restorative justice can be applied for the major crimes remaining unaddressed under retributive mechanism. Maximalist approach through trial had been problematic as the initial process in post war period stalled due to political constraints whereas restorative mechanism has inherent challenges in the context of Bangladesh. Minimalist approach was not free from criticism as large number of perpetrators benefited from the process. Role of international organizations and other state actors was not sufficient to initiate redress to the crime as majority of the international actors only responded when the government reinitiated the justice process in 2009. Social organizations and social movement played effective role to mainstream the issue of justice in national policy and social response to crime against humanity has emerged as subsidiary to institutional response.

Key Words: legalism, realism, retributive justice, restorative justice, amnesty, crime against humanity, social response, Bangladesh.

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TABLE OF CONTENTS

CHAPTER ONE: INTRODUCTION

1.1 INTRODUCTION	7
1.2 RESEARCH QUESTIONS	8
1.3 AIM OF THE RESEARCH.....	8
1.4 SIGNIFICANCE OF THE RESEARCH	9
1.5 BACKGROUND HISTORY OF CRIME AGAINST HUMANITY IN BANGLADESH	11
1.6 OUTLINE OF CHAPTERS	12

CHAPTER TWO: LITERATURE REVIEW

2.1 LEGALISM AND REALISM IN CRIME AGAINST HUMANITY	13
2.2 THEORIES RELATED TO INSTITUTIONAL RESPONSE	15
2.3 BANGLADESH AS A CASE STUDY.....	21

CHAPTER THREE: METHODOLOGY

3.1 RESEARCH METHOD THEORY	22
3.3 SOURCE OF DATA	23
3.4 ETHICAL ISSUES.....	25
3.5 JUSTIFICATION OF METHODS.....	25

CHAPTER FOUR: ANALYSIS AND APPLICATION OF THEORY

4.1 WHY BANGLADESH AS A CASE STUDY?.....	26
4.2 INSTITUTIONAL RESPONSE TO CRIME AGAINST HUMANITY	27
4.3 PRINCIPLE OF JUS COGENS AND OBLIGATIO ERGA OMNES.....	29
4.4 REASONS FOR CHOOSING SPECIFIC TYPE OF INSTITUTIONAL RESPONSE.....	31
4.5 WHY INTERNATIONAL CRIMES TRIBUNAL IN BANGLADESH?.....	32
4.6 INITIATIVES OF ESTABLISHING TRIBUNAL AND PROVIDING AMNESTY IN BANGLADESH	33
4.7 WHAT ARE THE MAJOR PITFALLS IN THE RESPONSE OF CRIME AGAINST HUMANITY?.....	34
4.8 CRITICISM OF OTHER POLITICAL PARTIES	36
4.9 MAJOR ARGUMENTS AND COUNTERARGUMENTS REGARDING THE TRIBUNAL.....	36
4.10 CRITICISM FROM INTERNATIONAL LAWYERS	39
4.11 RIGHT TO JUSTICE AND RIGHT TO FAIR TRIAL	40
4.12 THE JUSTICE BALANCE	42

4.13 IS RESTORATIVE JUSTICE NECESSARY IN BANGLADESH?	43
4.14 SOCIAL RESPONSE	44
4.15 EFFECT OF INSTITUTIONAL RESPONSE ON HUMAN RIGHTS.....	46
4.16 ROLE OF INTERNATIONAL ORGANIZATIONS AND OTHER STATE PARTIES.....	47
4.17 MAJOR OBSERVATIONS FROM THE ANALYSIS IN THIS CHAPTER.....	48

CHAPTER FIVE: CONCLUSION AND RECOMMENDATION

5.1 CONCLUSION	50
5.2 RECOMMENDATIONS.....	52
5.3 LIMITATIONS	54

CHAPTER ONE: INTRODUCTION

Therefore he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the best; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire....Hence it is evident that in seeking for justice men seek for the mean or neutral for the law is the mean.

-Aristotle, Politics (384-322 B.C.)
(The Rule of Law)

1.1 INTRODUCTION

The twentieth century has experienced the highest number of mass killings and state-sponsored murders in human history. Perhaps 'in response during the last century a global human rights discourse has developed and matured, espousing fundamental ideals of human dignity and respect not subject to the whims of state actors' (Verdeja 2004:327). Human rights practice witnessed an improvement in the 1990s with the establishment of international war crimes tribunals in Rwanda and the former Yugoslavia as well as tribunals in Sierra Leone, Congo, East Timor and subsequently with the establishment of International Criminal Court. Truth Commissions further contributed to promotion of human rights through reconciliation and peace building in Latin America, Africa and in other continents.

One of the worst crimes against humanity in human history was committed by the Pakistan army in East Bengal in 1971 that left millions of people killed and more than 10 million people fled to India. According to Adam Jones (2002), 'the mass killings in Bangladesh (then East Pakistan) in 1971 vie with the annihilation of the Soviet POWs, the holocaust against the Jews, and the genocide in Rwanda as the most concentrated act of genocide in the twentieth century.' Nonetheless it remains little known and studied at home and abroad.

In this study I shall analyze the theoretical background and socio-political reasons for adopting maximalist and minimalist approaches of institutional response considering the diversified type and extent of crimes committed. When maximalist approach advocates for legal norms and practices, minimalist approach emphasizes on reconciliation and peace building mainly through societal and political solution. So far government's institutional response has incorporated both legalism and pragmatism through trial and amnesty. Major debates around justice process have

been grounded on legalism and realism or pragmatism. In practical aspect a maximalist approach has been challenging and problematic in Bangladesh as the process faltered due to internal complexities and external challenges. Thus questions around sufficiency and effectiveness of the institutional response to crime against humanity and its effectiveness in promotion and protection of human rights remains important to be explored.

1.2 RESEARCH QUESTIONS

The research will analyze the following questions.

What was the institutional response to crime against humanity in Bangladesh?

What are the major pitfalls in the response process in the crime against humanity?

How the response to such crime can be improved?

To what extent institutional and social response contribute to promotion and protection of human rights?

In this research I shall analyze the above mentioned questions because it deems important to theoretically locate and analyze the institutional responses with a view to discuss its relative advantage and disadvantage through suitable combination of methods. I shall also evaluate the role of institutional response in promotion and protection of human rights through theoretical and practical contextualization as it is important to understand the applicability of the response processes in particular societal context.

1.3 AIM OF THE RESEARCH

The study explains reasons behind the fact that in a society where crime against humanity was committed by the outside rulers aided by some local collaborators, it remains very challenging to provide retributive justice for the key perpetrators as the role of society deems prominent in demanding and materializing justice. The study also explores the discourse: when legalism and realism occupy the debate of institutional response to crime against humanity, a combination of maximalist and minimalist approach is deemed necessary by the government and by the society at large.

The study elaborates the notion that it is very challenging for national and international actors to institutionally respond to crime against humanity due to internal and external complexities and due to multiplicity of factors and actors involved in the process. The study also explains the essentiality of restorative justice given the fact that modern governments are largely unable to provide retributive justice to all the crimes due to inherent constraints although the restorative mechanism is very difficult to undertake due to its pseudo-legalistic nature.

In order to explain the above mentioned facts and discourse, the study mainly takes empirical course as it describes existing response mechanisms to crime against humanity in the society. As explained by Mikael Baaz (2009:30) 'empirical focus describes the order to explain or understand it'. At the end, the study will be directed towards constructive approach as recommendations will be provided for pragmatic improvement of institutional response. The study is partially normative as it evaluates scholarly opinions regarding what ought to be appropriate or justified for institutional response mechanism.

1.4 SIGNIFICANCE OF THE RESEARCH

Numerous human rights scholars have proposed institutional response as the primary step although still the weakest part of international jurisprudence to redress crime against humanity. According to Verdeja (2004:327) retributive justice has become a guiding norm for human rights supporters, yet tribunals have not been the only institutional response offered by the human rights advocates. There have been increasing calls for establishment of truth commission as restorative justice. There remains justification, promises and limits to retributive justice, restorative justice and amnesty.

Maximalist approach through legalism has been advocated by the human rights supporters and victims of crime against humanity in Bangladesh. According to Amir-UI-Islam, former lawmaker and Attorney General of the country, 'over the last decades, failure to prosecute the perpetrators who committed crimes against humanity has already generated a cynicism and distrust towards the legal process and the system' (Islam 2009: 1).

In an attempt to ensure justice, in the post independence period, Bangladesh government initiatives often faltered due to various reasons. Present Prime Minister of Bangladesh, Sheikh Hasina, during her tenure as the leader of opposition party, in a parliamentary speech on 16th April 1992 stated that ‘a little grief enervates, much grief makes one strong...when I see them rise in defense of a war criminal, I have no alternative but to choke my own emotions to strengthen myself’ –a open confession of one of the top politicians of the country that bears testimony of impunity and helplessness in the mechanism to redress crime against humanity.

A minimalist approach usually hinges on political constraints that drive transitional justice choices and outcomes. Appeasing the opposition provides a stable pathway for a successful transition (Olsen 2010: 986). In Bangladesh the government initiated amnesty released about 26,000 accused men of the auxiliary forces who were arrested on charge of different pretty crimes. Olsen observes that ‘a minimalist approach argues that amnesty is superior to trials in bringing reconciliation, particularly in the aftermath of war’ (Olsen 2010: 986). In Bangladesh, decision of amnesty has been criticized by some quarters, it became controversial through leaving chance to big perpetrators in taking opportunity of the process due to weak jurisprudence. In this context it is important to analyze the institutional response and its pitfalls.

The truth commission can be a staple of postconflict peacebuilding efforts in the twenty first century (Brahm 2007: 16). Particularly in those instances where political transitions came about through negotiation rather than due to outright victory by one side of the conflict, the truth commission has become an attractive option (Pion-Berlin 1994). Restorative justice process is seemingly absent from the institutional response in Bangladesh although the de facto premise that not all crimes can be prosecuted particularly in the present context may initiate discussion around naming and shaming of violators. Arguably, institutionally structured truth telling or punishment might serve as a release valve for resentment that might otherwise be expressed as riots, programs, or exclusionary ethnonational political movements (Snyder 2003:16). In this context for Bangladesh it is important to discuss the necessity and effectiveness of restorative justice mechanism for perpetrators staying outside of retributive mechanism.

1.5 BACKGROUND HISTORY OF CRIME AGAINST HUMANITY IN BANGLADESH

The history of Bangladesh as a part of Pakistan from 1947 to 1971 was marked by economic and political disparity which led to independence war in 1971(Kuper 1981:77). When the East Pakistani (Bangladeshi) political party received required majority in the Parliament to form a Government in united Pakistan, west Pakistani army and civilian rulers denied them to handover the power. Later, to repress the demand for autonomy of East Pakistan, the army unleashed its war machine against the civilian population which ultimately resulted in one of the worst crime against humanity in human history.

In the beginning of the war in 1971 the then President of Pakistan General Yahya's comment 'kill 3 million of them and the rest will eat out of our hands' allegedly encouraged army men in spontaneous murder (Payne 1973:50). Mass rape and subsequent confinement of Bengali women was a planned strategy. Rampant torture, arson and plundering resources of civilian population were common during nine-month war in 1971. Majority of these crimes were committed by the men of Pakistani army aided by their auxiliary forces who were both non-Bengali Bihari and Bengali speaking collaborators. Victims were common people of East Bengal.

International organizations like UN failed to take necessary initiative to protect civilian population when crime against humanity was taking place in 1971. Role of other state actors were quite dubious in addressing crime against humanity at that time. Ultimately the war came to an end through intervention of a third country (India) after effective revolt was waged by the Bengali speaking population. In post war period initiatives to bring the perpetrators were not visible on the part of international actors. Major perpetrators of Pakistan army were handed over to Pakistan Government with an aim that justice will be ensured in their own country or under international initiative. Although International Commission of Jurists (1972) expressed the view that there was a 'prima facie case that the crime of genocide was committed... in East Bengal' there was no visible action on the part of international actors to address the crime against humanity until the government of Bangladesh reinitiated justice process in 2009. Earlier in 1972, the government of Bangladesh initiated trial for major Bengali perpetrators who undertook the crimes and aided the Pakistan Army. Simultaneously, the government declared amnesty to the

pretty perpetrators who were not involved in serious crimes like murder, rape arson etc. Initiative of Bangladesh government to hold trials of Bengali perpetrators stalled in 1975 through change of political situation of the country and the justice process resumed recently in 2009.

1.6 OUTLINE OF CHAPTERS

This dissertation will consist of five chapters. The second chapter will provide literature review. In the third chapter I shall provide methodological framework where methods of Discourse Historical Approach through a case study will be analyzed. The fourth chapter will elaborate analytical aspect of institutional response and its implications. The fifth chapter will provide conclusion, recommendation and limitation of this study.

CHAPTER TWO: LITERATURE REVIEW

Nor again, is it at all strange that one who comes from contemplation of divine things to the miseries of human life should appear awkward and ridiculous when, with eyes still dazed and not yet accustomed to the darkness, he is compelled, in a law-court or elsewhere, to dispute about the shadows of justice or the images that cast those shadows, and to wrangle over the notions of what is right in the minds of men who have never beheld Justice itself.

-Plato, *The Republic* (ca. 427-347 BC)
(The Allegory of the Cave)

This chapter consists of review of published works. The review will be presented under sections titled legalism and realism in crime against humanity and theories related to institutional response which encompasses retributive justice, restorative justice, amnesty mechanism and Bangladesh as a case study. In this chapter reviews are contextualized based on debate, knowledge and theoretical framework.

The theoretical framework firstly consists of legalism and realism as in Bangladesh legalist and realist debates have been the centerpiece of discussions around remedies of crime against humanity. Secondly the theoretical framework encompasses retributive justice, restorative justice and amnesty as these methods have been the key to maximalist and minimalist approaches that will be discussed in case study of Bangladesh. So far Bangladesh government adopted retributive justice and amnesty as the official measure to redress crime against humanity where as reconciliatory measures are visible at societal level through grass root response.

2.1 LEGALISM AND REALISM IN CRIME AGAINST HUMANITY

Legalism is premised on logic of appropriateness and pragmatism or realism is premised on logic of consequences. While legalism emphasizes solution through legal process, realism suggests remedy by political or social initiatives through practical considerations. A second orientation is guided by a logic of emotions that recognizes the significance of transitional justice but emphasizes strategies that diverge from the model of legalism (Vinjamuri 2004:345).

2.1.1 Legalism: Shklar defined legalism as ‘the ethical attitude that holds that moral conduct is to be a matter of rule following and moral relationships to consist of duties and rights determined by rules’ (Shklar 1964:1). Legalists recognize a complicated relationship between peace and justice but submit that accountability is critical to a lasting peace.

Legalist scholars and advocates argue that war crime trials that adhere to international standards are the appropriate method for dealing with the perpetrators of mass atrocities and should replace alternatives ranging from vengeance to assassinations or executions (Vinjamuri 2004: 347).

Scholars who have stressed the significance of prosecutions in preventing future atrocities underscore the need for trials that complement a broader commitment (military, political and economic resources) (Akhavan 2001: 30). Public trials demonstrate to people that justice will be done publicly and not privately (Rosenburg 1995). Orentlicher (1991: 2440) suggests that trials may contribute to the society by reexamining their basic values and fundamental principles to respect the rule of law and to uphold the inherent dignity of individuals. According to Vinjamuri, the legalist position suggests that the choice of appropriate forum for accountability should depend on four factors: the gravity of the violation, the extent and severity of the victimization, the number of individuals accused, and the degree of command responsibility of those accused (Vinjamuri 2004: 349).

Minow (1998:50) claims that trials contribute to international criminal justice by articulating both norms and commitment to realize them. He also observes that indictments, prosecutions and convictions can contribute to build up international human rights and promote notions of individual responsibility even if their numbers, reach and results are limited. Bass (2000:7) argues that leaders turn to legalistic approaches when they are seized ‘in the grip of a principled idea.’ Only liberal democracies pursue war crime tribunals, he says because this form of justice meshes with their basic ideal of due process. As pragmatic consideration can enter the playfield, rhetoric calls for justice are not fitful.

2.1.2 Realism: Inability of legal norms and political reality often instigate realist solutions to crime against humanity. According to Vinjamuri, ‘even liberal states are selfish. They are almost never willing to risk their own soldiers simply to bring war criminals to justice and are rarely willing to pursue criminals who victimize only foreigners’ (Vinjamuri 2004: 352). Bloxham (2006:457) observes that pessimism of intellect counters optimism of the will regarding ability of

humanitarian laws to do much beyond punishing those select criminals whom international political constellation allows to be brought to book.

Bass (2000:282) seeks common ground between the legalist and pragmatic concerns, arguing that there is a 'self-serving case for a more legalist world' in which aggression and violent bigotry would be effectively punished. He argues that the threat of trials has a strong deterrent effect on potential war criminals.

In decisions as to who reaches trial are highly influenced by structural factors of the international political economy but the laws that are brought to bear in the courtroom and the procedures in individual court cases are generally not functions of those structural factors (Bloxham 2006: 466).

2.2 THEORIES RELATED TO INSTITUTIONAL RESPONSE

There are several theories related to institutional response. The following section will contain reviews of theories related to justice response: retributive, restorative and amnesty respectively. At first, short outline will be provided to analyze importance of institutional responses.

Institutional responses are an important, though by no means sufficient, element of larger societal efforts to confront the past (Verdeja 2004: 342). Reisman (1997:75) suggests that institutional responses may be synthesized into seven specific goals which are preventing, suspending, deterring public order violation, restoring public order, correcting the behavior that generate such violation, rehabilitating victims and reconstructing in a larger social sense. Institutional arrangement to redress crime against humanity are not interchangeable as each one deals with a specific aspect which might differ from other cases. Any attention to culture should alert us to the recognition that such notions as justice, truth, forgiveness, reconciliation, and accountability-to name a few-are always socially constructed and culturally constituted (Avruch 2002: 43).

Reisman further observes that a wide range of international institutions and practices in different combinations are used in proper context to protect public order in post conflict society. In this

regard eight institutional practices and arrangements are important *inter alia* instituting human rights law and international criminal tribunals, universalization of the jurisdiction of national courts for international crimes, no recognition to allow violators be the beneficial of consequences of unlawful actions, incentives like foreign aid, commissions of inquiry or truth commissions, compensation commissions and amnesties (Reisman 1997:77). A range of such initiatives may be effective for short or medium term although may emerge as very costly in nature. A common denominator of the goals to be achieved through these actions is to achieve public order where violence remains low and heightened respect for human rights is established.

The point of departure for strategies of justice must be the 'logic of consequences' in which choices and actions are shaped by pragmatic bargaining rather than by rule following (Snyder 2003: 7). Implicitly NGOs and legalists advocating war crimes tribunal hold to the constructivist theory. These groups assume that change in pattern of social behavior should start with advocacy for generalized rules ingrained in principled institutions.

2.2.1 Transitional Justice

Transitional justice has been entailed to incorporate different types of justice mechanisms e.g. retributive justice, restorative justice. Transitional Justice is not any special form of justice rather it consists of a set of approaches to bring about justice in extraordinary situations, usually from authoritarianism and/or violent conflict to peace and democracy. Transitional justice is aimed to deal with the legacy of systematic and massive rights abuse. Transitional justice keeps the victim at the center and empowered as fully rights-bearing citizens and aims to restore their dignity (Davis 2004:4).

Lambourne (2004) observes that Transitional justice is specially premised on the concept of domestic stability, security and domestic governance after atrocity. This can be strengthened by a commitment of justice and accountability. In order to prevent future victimization, to achieve peace and reconciliation, it is essential to face the legacy of past violence in a pragmatic way. Bassiouni (2009:5-14) suggests that transitional justice encourage a comprehensive and integrated approach to address atrocities. The process involves quick action, national

consultations, long-term planning, participation of diverse stakeholders, understanding sensitivity of local context and culture and broad institutional reform. Transitional justice requires national and international commitment to link justice, peace and reconciliation.

2.2.2 Retributive justice

Vardeja observes that the approach of retributive justice ‘rooted in classical notions of justice, is regarded as the driving force behind criminal prosecution in domestic courts and in the establishment of international tribunals’ (Verdeja 2004:328). Retributivism is a justificatory theory as it adopts a backward-looking perspective which focuses on the moral duty to punish past wrongdoing (Cahill 2007:818). A complete theory of justice should recognize, consider the relations between, and offer guidance to all of the players and institutions involved in the process (Cahill 2007:821).

Proponents of retributive justice provide numerous reasons to try the perpetrators of crime against humanity and explain the effects of failure to do so. Prunier observes that the process of identifying and punishing the leaders of crimes against humanity assists in placing individual guilt on key perpetrators, organizers and institutions. Through identification of individual leaders as perpetrators, the claims of collective guilt that falls upon an entire group can be avoided (Prunier 1997:342). Robertson argues that tribunals have excellent capacity to promote domestic rule of law which has been the foundation for a democratically stable and peaceful society (Robertson 2000: 243-285). Although Landsman criticizes the prosecution system reminding its intrinsic pitfalls as the prosecution may raise difficult questions regarding the selection of defendants. He also cautions that it is likely to be impossible, in a real life world, to prosecute all human rights violations (Landsman 1996: 85).

Proponents of retributive justice warn about adherence to proper proceedings to assess crimes. According to Shklar ‘trials can deflect and temper intent of vengeance into institutionalized and fair proceedings and reduce the victim’s probability of taking justice in their own hands’ (Shklar 1986: 158). Often retributive justice is used as an excuse for vengeance although real retributive justice tempers the demand for quick retaliation with substantive protection for the accused and thereby distances itself from vengeance. Verdeja (2004:328) observes that it replaces victim’s willingness for immediate reprisal with the rule of law. Cahill (2007:821) argues that in real-

world, theory of retribution may confront the scarcity of resources as justice system usually operates on a limited budget. Any justice system may easily face constraint to catch, prosecute and punish all criminals.

Martin Shaw (2006:52) expressed the need for purification of the perpetrators from their violence. Raphael Lemkin in his paper "*Terorisme*" proposed that punishment could act as a deterrent to crimes against humanity and genocide (Lemkin 1935). Lemkin observes that there would be no necessity to issue admonitions to countries not to provide refuge to war criminals if punishment of genocide practices had formed a part of international law since 1933. Mendeloff (2004:360) observes that sense of justice is necessary for healing at personal and psychological level that allows for reconciliation. Although Mendeloff has suggested that the trials can dampen motives for revenge killing and can break the cycle of violence, realist scholars have heavily argued that instead of identifying the social causes of the crimes, only justice may recreate the cycle of crime in the society.

2.2.3 Restorative justice

In many countries over the past decades outgoing elites often sought amnesties in order to protect themselves from tribunal for rights violation. In some cases amnesties were passed and truth commissions were established as viable moral alternative to prosecutions (Verdeja 2004:332). Sherman (2007:12) observes that the theory of restorative justice proposes that justice can prevent crime through making offenders feel more sympathy for their victims and this premise may be just as plausible as the deterrence doctrine, if just as unreliable.

In restorative justice, commissions sometimes arrange public hearing in participation of accused and the victims and commissions may recommend institutional reform and reparations. Restorative justice is a way of thinking about what is best for the many connections among crime victims, their offenders and the criminal justice process (Sherman 2007: 12). Truth commissions basically occupy unique space between government and civil society as the most functional commissions were composed of prestigious citizens (authors, public intellectuals, lawyers and so forth) who were not holding public office. As truth commissions can not punish the human rights violators, they use symbolic forms of punishment by shaming and humiliating perpetrators publicly. South Africa's Truth Commission morally condemned those persons associated with

abuses (Verdeja 2004:333). Proponents of restorative justice observe that a truth commission can recommend reparation and rehabilitation of the victims through access to medical, psychological and legal services and by providing financial compensation to the victims. Advocates of restorative justice observe that unearthing the past is the first step of reconciliation. Although reparation may not be enough to return lost loved ones or erase the trauma, often they can have positive impact on victims and can serve as an acknowledgement by the state about past crimes. Advocates of restorative justice observe that unearthing the past is the initial step of reconciliation. The past 'can be openly discussed lest resentments and tensions continue to poison social relations' (Verdeja 2004:334). Scholars are still dubious as to how criteria for application of restorative justice mechanism in any special situation can be formulated and which combination with other forms of institutional response can be more effective in any particular setting.

2.2.4 Amnesty

Since the mid-1970s at least fourteen states have declared amnesties and/or enacted laws immunizing past regimes from accountability and liability (Burke-White 2000:4). Amnesties or other minimal efforts to address the problem of past abuses have often been the basis for durable peaceful settlements (Snyder 2003:43).

Each of the three categories of amnesty-blanket, politically and internationally legitimized represent vastly different approaches to the paradox of conflicting needs of reconciliation and accountability (Burke-White 2000:26). Naqvi suggests that

'Amnesties are purely internal to a State, for example those agreed in a peace deal between the government and rebel groups or between such groups ending a civil war, or which have been negotiated between such groups ending a civil war, or which have been negotiated between an outgoing and incoming regime during a period of political transition are not formally binding on other states' (Naqvi 2003: 589).

Landsman observes the theological logic behind amnesty. According to landsman,

'Many of the great religions of the world have concluded that 'an eye for an eye' is a sterile sort of justice that is far less satisfactory than breaking the cycle of violence or vengeance once and for all. It is certainly legitimate to argue that turning the other cheek

or freely pardoning offenses is a better means of managing affairs and establishing lasting peace than is to strict accounting through criminal prosecution. The pardoning of offenses may be the best means of healing the deepest wounds' (Landsman 1996: 87).

Both amnesties and trials require effective state institutions and political coalitions to enforce them (Snyder 2003:44). Scholars point to Mozambique and Namibia as success cases in which the choice of amnesty has directly led to the consolidation of peace and the healing of society in the wake of mass crimes. (Olsen 2010: 986).

According to Bruke-White (2000:3) amnesty laws can be treated as violation of fundamental obligations to prosecute serious and systematic crimes against humanity as well as a violation of victim's right to seek redress if immunity from prosecution is granted to alleged and even confessed perpetrators. Reisman (1997:79) observes that 'amnesties also may be important as a technique for stitching together the wound of civil society that precipitate and often result from conflicts'. Article 6(5) of protocol II Additional to the Geneva Conventions of 1949 provides that 'at the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained'. Scholarly debates on suitability of any special form of amnesty are ongoing and which combination of amnesty and other types of justice can be effective still remains important to explore.

Huntington's (1991:213-15) discussion of post-transitional justice offers several of the most basic and enduring hypotheses about the causes and consequences of justice strategies. Huntington asks whether it is more appropriate to punish past atrocities in newly democratizing states or to forget them. Huntington suggests: '[d]o not prosecute, do not punish, do not forgive, and above all, do not forget' (Huntington, 1991:231). It deems necessary to reduce or eliminate the factors that provide incentive to such crimes in the society.

2.3 BANGLADESH AS A CASE STUDY

In this part I shall review scholarly works on these subjects which are explicitly tied to Bangladesh because it will provide the framework for analysis in the country context.

Mizanur Rahman-a noted legalist and present Chairman of the Human Rights Commission of the country, in his article ‘War Crimes and Genocide 1971: Bringing the Perpetrators to Justice’ described that the magnitude of war crimes that took place during liberation war of Bangladesh was unprecedented in the region. He analyzed few questions regarding confusion around trial of war criminals as an attempt to redress. He suggested that comparison with other international criminal tribunals can assist the government in carrying out the justice process in appropriate manner (Rahman 2009).

Hoque in his book ‘Bangladesh Genocide 1971 and the Quest for Justice’ suggests that political and legal measures were not enough to address the heinous crime. Hoque also suggests that the experiences of the world community in organizing various justice mechanisms to address the crimes of genocide would be useful for Bangladesh (Hoque 2009). Necessity for justice process justified by scholarly observations provides ways to discuss practical aspects of justice initiatives and to analyze its societal implication in Bangladesh.

As confusions regarding effectiveness of institutional response mechanism and its applicability in promotion of human rights are still looming in Bangladeshi society, it requires in depth study to explore the pros and cons of the institutional response mechanism to (a) identify the pitfalls and (b) to propose improvement in the response process with a view to long term promotion of human rights in the country. Matters related to pitfalls and ways to overcome them will be discussed in this study in chapter four and chapter five respectively. First, however methodological choices will be accounted in the following chapter.

CHAPTER THREE: METHODOLOGY

We are thus driven to the unfashionable conclusion that the trouble with our species is not an excess of aggression, but an excess capacity for fanatical devotion.

-Arthurs Koestler

(Janus: a Summing Up, p.14)

This chapter will elaborate the methods adopted for this research and will discuss the theoretical underpinning behind those methods. Discourse Historical Approach will be analyzed as the principle method adopted for the exploratory research whereas a case study will assist the discussion on a particular incidence of crime against humanity.

3.1 RESEARCH METHOD THEORY

This research follows Discourse Historical Approach (DHA). According to Reisigl (2009:89), DHA emphasizes on macro-topic relatedness, pluriperspectivity and argumentivity as constitutive elements of a discourse. DHA deals with politics and develops conceptual framework for political discourse. Wodak (2009) mentions that ‘the Discourse Historical Approach (DHA) explicitly tries to establish a theory of discourse by linking fields of action’. According to Wodak (2009: 26), grand theories play a minor role in DHA whereas, Mouzelis (1995) mentions that DHA does not ‘invest too much in the operationalization of inoperationalizable grand theories’. This approach thus develops conceptual tools adequate for specific social problems and usually does not get lost in theoretical labyrinths but rather utilizes several theories in this case, theories related to institutional response of crime against humanity. Essentially, the human rights paradigm requires analyses of a range of ideas and theories applicable in modern society with an aim to redress the worst forms of human rights violations.

Semi structured interview has been adopted as a part of research method. The interviews were aimed to collect first hand information regarding the opinion of different group of the Bangladeshi population and stakeholders around state response methods.

3.2 DISCOURSE HISTORICAL APPROACH FOR THIS RESEARCH

DHA has been the primary tool to conduct the research which has been supported by interviews. In order to verify some of the present information and to collect necessary information regarding public opinion, interviews have been conducted. Discourse Historical Approach has been utilized to analyze type and pattern of institutional response to crime against humanity and to discuss the advantages and disadvantages of such approach in the society.

Discourse Historical Approach facilitates the study in the following steps: (i) activation and consultation of preceding theoretical knowledge, (ii) systematic collection of data and context information (iii) selection and preparation of data for specific analyses, (iv) formulation of critique. In the first step recollection, reading and discussion of previous research has been done. In second step discourses related to institutional actions have been identified and analyzed. In third step, selection and summarization of data and information have been done following the adopted criteria. In the fourth step interpretation of findings, considering the relevant context knowledge has been done.

3.3 SOURCE OF DATA

The research utilizes qualitative data available in published, unpublished and recorded documents. In Bangladesh, government and non government authorities have collected information related to crime against humanity. Institutional response process has been well covered in local and international media. Work of independent researchers and institutes were important source of secondary information. All these secondary sources were explored to gather necessary information to conduct discourse analysis.

A number of international organizations including UN and the European Commission observed the process and commented on it. Other state actors are quite vigilant by appointing special envoys and representatives to follow the process. Observations of international actors on the process of tribunal on crime against humanity have been significant. Methodology of the research is also aimed to analyze opinion of the international actors regarding the process of the tribunal and to elaborate probable observation of international community about the tribunal process.

A number of target group people were interviewed to get first hand information for the research. The research has focused on semi-structured interview for which random sampling has been done from purposively chosen clusters. Two specific clusters have been targeted for the interviews which are (i) people who are victim of the crimes (ii) people whose family members are victim of the crimes. For sampling, list of respondents were identified from names and addresses published in recognized sources. About fifteen respondents were interviewed. Respondents were randomly selected from purposively chosen clusters. Clusters have been divided based on age group and profession of the respondents.

Necessary rapport was developed with the interviewee during the interview process to receive information in a friendly manner. Some interviews were recorded (with due permission of the interviewee) to reduce errors in data recording. Questions were ordered in logical manner so that optimum information can be obtained spending minimum effort and time. Required measures for maintaining accuracy in the data collection process were undertaken in sampling and data analysis process. Necessary actions were taken to avoid errors in data collection.

A brief interview guide saved time and provided necessary instructions to ask specific questions. This is aimed to proceed in a structured manner so that optimum information can be brought out through minimum efforts during interview. Guidelines for every question ensured that the data collection process followed the line of information necessary to conduct the research. The guide detailed out the mode of asking questions, alternative methods of asking questions and modalities to deal with the situations created.

According to Bryman, semi-structured interview 'typically refers to a context in which the interviewer has a series of questions that are in the general form of an interview schedule but is able to vary the sequences of questions' (Bryman 2008:196). One major advantage of semi structure interview is that the questions are relatively general and the interviewer has more freedom to ask subsequent questions for further clarification.

3.4 ETHICAL ISSUES

In general, principles of ethics in conducting research were strictly followed. Principle of non-maleficence was followed to ensure that the research does not harm the participants. No information has been used without informed consent of the participants. Principle of beneficence will help the future researchers in further study. During interview of the victims or victim's relatives, informed consent has been taken and interview has been conducted in careful manner so that the victims are not psychologically harmed in any point. To record the interview, due permission was taken from interviewee. The research was conducted in a transparent and accountable manner and all the information will be kept open-source (subject to permission of the host university). Principle of autonomy was followed to ensure rights and dignity of the participants.

3.5 JUSTIFICATION OF METHODS

For the present research qualitative data was used as the research mainly focuses on discourse analysis around crimes against humanity. To analyze the type and extent of crime, qualitative information available in the documents are the best sources instead of collecting first hand information. Discourse Historical Analysis and Interviews were helpful to analyze pattern of institutional response, its pitfall and its effect in promotion and protection of human rights in present societal context.

DHA based on secondary and primary information has been suitable in this study to address complexities emanated from debates at the national and international level about institutional responses and its appropriateness as the debate was further aggravated by international actor's long reluctance and then vigilance soon after government's initiative of maximalist response and then to analyze challenges through demand from society for justice of crime against humanity.

CHAPTER FOUR: ANALYSIS AND APPLICATION OF THEORY

[T]he core challenge to the Security Council and to the United Nations as a whole in the next century; to forge unity behind the principle that massive and systematic violation of human rights—wherever they may take place—should not be allowed to stand.

Kofi Annan – Secretary-General’s Annual Address to the General Assembly (1999)

In this chapter I shall discuss the analytical aspect of institutional response and its implications. Discussions will focus on application of theory in the process of institutional response with a case study on Bangladesh which will analyze the pitfalls of the process as well as the effects of the response in human rights.

4.1 WHY BANGLADESH AS A CASE STUDY?

During the independence war of Bangladesh in 1971 massive violation of human rights were committed by West Pakistani forces and their local aides. Crimes against humanity were committed at an unprecedented scale and rampant murder, rape, arson and torture were major crimes committed by the perpetrators. Allegedly, propaganda of segregation, racial superiority and hatred was used before the crimes were committed by the Pakistan army. The key perpetrators were assisted by a group of local aides. About mental setup of Pakistan army personnel, Rummel cites one of them saying: ‘as the Muslim Bengalees, they are to live on the sufferance of the soldiers, any infraction, any suspicion cast on them, any need for reprisals could mean their death. And the soldiers were free to kill at will’ (Rummel 1994:335). The sanguinary war left millions of people killed, several thousand women raped, more than 10 million people taken life of refugees in India and thousands of people tortured.

In post independence period, apparently the government was not efficient to try the perpetrators as the major attention was directed towards reconstruction, redevelopment and revitalization of the state. The government successfully implemented the amnesty order of the pretty perpetrators in 1973. Trial of the major perpetrators was started in 1972 which was stalled due to the government change. In 2009 the tribunal of crime against humanity started the trial of the perpetrators. Beside these, the government has not yet taken any initiative of restorative justice.

The Constitution of Bangladesh in the Preamble ensures ‘rule of law’ and ‘social justice’ which deems impossible to achieve if the crimes against humanity are not properly addressed.

Crime against humanity that took place in Bangladesh in 1971 had a deep influence on the socio-economic structure of the country. Indeed, problematic ways of addressing remedies to such crimes gradually created a vacuum in the decision making structure of the state system in a way that weakened the justice process of the country. Common people’s perception regarding non-materialization of the expected result of independence can be attributed to the lack of justice. Direct and indirect effects of the impunity are increase in violence and arrogance of power in the society and flourishing of religious fundamentalism. Degradation of the women’s liberty and status in the society, creation of a sense of tolerance to heinous crime and peoples’ increasing faith on fatalities and religious superstitions are also some of the effects of lack of justice of the worst forms of crimes. In this context, Bangladesh has been taken as the case study to analyze the state response to crime against humanity as well as pitfalls in the process of response and its effect on promotion and protection of human rights in the society.

4.2 INSTITUTIONAL RESPONSE TO CRIME AGAINST HUMANITY

In chapter two I have given philosophical overview of institutional response whereas here I shall provide specific examples of institutional response and analyze their relative advantage and disadvantage.

In recent times, institutional response to crime against humanity has been quite diversified in nature which ranges from tribunal to truth commission and encompasses amnesty initiatives. Transitional justice mechanisms have been adopted in societies which are undergoing substantial political changes after massacres.

Reisman (1996:76) observes that international practices and institutional arrangements are not interchangeable in addressing crime against humanity. Each practice and institutional arrangement deals with a specific aspect of the problem and in most of the cases not appropriate for other circumstances. In every case, each practice institution need not be consistent with all the sanctioning goals. According to Arriaza (1996:98) ‘the complex processes of coming to

terms with past crimes or serious human rights violations take place on a number of levels: the international, national, regional and local.’

In this research institutional response stands for response from the state actors or international institutions (e.g. intergovernmental organization). Response from other authorities may not have sufficient legitimacy which is necessary for recognition of the process at local and international level. Keeping this in view, initiatives of the governments and intergovernmental organizations like United Nations can be regarded as the institutional response to crime against humanity.

Retributive justice has been the primary guiding norm for human rights supporters around the world. Most of the human rights advocates including the top officials of Human Rights body of UN has repeatedly supported retributive justice as a mechanism of establishing human rights around the globe. According to Reisman (1996:75) no matter how structured, courts are considered as indispensable institutions in many criminal and civil systems at domestic level. Reisman also proposed that courts must construct varying degrees of institutionalization with legal provisions to deal with concrete cases.

Tribunals are not the only institutional response proposed by the human rights advocates. Over the last few decades increasing calls have been heard to establish truth commissions which provided opportunity to compile official histories of oppression and offered for survivors to recount their personal stories. Verdeja (2011:2) observes that because of political constraints, eschewing formal trials and commissions actions have focused on restoring the dignity of survivors and producing account of the past espousing what advocates call restorative justice.

Reisman (1996: 79) observes that amnesties can be an important technique to stitch together the wounds in civil society that very often precipitate and result from conflicts. Article 6(5) of protocol II Additional to the Geneva Conventions of 1949 provides that ‘ at the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained’. Arriaza (1996:96) argues that still a

lot of domestic courts are not familiar with recent international law on investigation and amnesty. So far very little attention has been paid to local-level responses to impunity.

Tribunal and amnesty has its own merits and demerits. It has been argued by the scholars that mechanism to redress crime against humanity in future will involve building both anti-impunity and reconciliation measures at local level projects (Arriaza, 1996: 98). Amnesties sometimes facilitate suspension of ongoing violations but it also undermines deterrence, the law of state responsibility and human rights (Reisman, 1996: 77). International criminal tribunal may act as a deterrent to violations in future but may turn out a costly venture if violators conclude that resistance is preferable to facing a tribunal.

Arriaza (1996:98) observes that national truth commissions and compensation bodies as well as prosecutions help establish the rule of law and provides opportunity to reestablish peace through political commitment in the society. Retributive justice and restorative justice both aims to reestablish rule of law, reintegrate survivors into national polity and provides scope for a new government to distance from the old practices of impunity although the methods of implementation are different.

4.3 PRINCIPLE OF JUS COGENS AND OBLIGATIO ERGA OMNES

Jus cogens norms and *obligation erga omnes* are quite important as the present initiative of Bangladesh government to establish tribunal for crime against humanity has raised the urgency to follow international norms. Where the state responsibility is to maintain international standard of the tribunal through adherence to international legal instruments (*Jus Cogens*), it is also important that the courts hold the individuals responsible for the misdeeds and it is duty of every state to ensure the justice which falls under the *obligation erga omnes*.

Jus Cogens norms: The term *Jus cogens* literally stands for ‘the compelling law’ and as such the *jus cogens* norms hierarchically hold the highest position among all other norms and principles. Due to that standing, *jus cogens* norms are deemed to be ‘preemptory’ and ‘non-derogable’ (Bassiouni 1996: 67). *Jus Cogens* norms –the laws or norms that are known as binding throughout humanity – form the clearest basis for identifying distinctly international crimes as

violations of international law (May 2005:25). As Bassiouni (Bassiouni 1996: 68) observes, aggression, genocide, crimes against humanity, war crimes, piracy, slavery, slave-related practices and torture are *jus cogens* as disclosed in sufficient legal literature. There are certain crimes that affect the interests of the world community as a whole as these crimes shock the conscience of humanity and ultimately threaten the peace and security of humankind. If these elements are present in a given crime, it can be concluded that the crime is obviously a part of *jus cogens*.

A *jus cogens* crime is characterized by state policy or conduct in explicit or implicit manner, irrespective of whether it is manifested by commission or omission. Essentially ‘the derivation of jus cogens crimes from state policy or action fundamentally distinguishes such crimes from other international crimes’ (Bassiouni 1996:69). It has been a matter of discussion as to whether the right to fair trial should turn out to be inviolable norm (*jus cogens*) despite its customary legal status.

Obligation Erga Omnes: According to Bassiouni the *erga omnes* and *jus cogens* concepts are:

“often presented as two sides of the same coin. The term *erga omnes* means ‘flowing to all’, and so obligations deriving from *jus cogens* are presumably *erga omnes*. Indeed, legal logic supports the proposition that what is ‘compelling law’ must necessarily engender an obligation ‘flowing to all’” (Bassiouni 1996:72).

The principle of territorial sovereignty has been a ‘preemptory norm’ as all state recognize the legitimate right of states to exercise exclusive territorial jurisdiction.

Landsman (1996: 81) observes that as grave violations of human rights should not go unremarked, it is important to catalogue their extents, expose their details and explore causes. However, *Erga Omnes* ‘is a consequence of a given international crime having risen to the level of *jus cogens*. It is not, therefore a cause of or a condition for a crime’s inclusion in the category of *jus cogens*’ (Bassiouni, 1996: 73). Traditionally international law has distinguished *erga omnes* and *jus cogens* doctrines from universal jurisdiction as Joyner (1997:169) observes that ‘both the former principles pertain to state responsibility, while the latter concerns violations of individual responsibility’.

4.4 REASONS FOR CHOOSING SPECIFIC TYPE OF INSTITUTIONAL RESPONSE

Landsman (1996: 84) observes that many fledgling democracies lack sufficient power, popular support, legal tools or conditions necessary for effective prosecution. In some cases, governments could not undertake justice as they have been too weak to pursue powerful defendants. Adjudicatory mechanism in many new democracies is weak and unskilled to undertake fair and expeditious justice mechanism. In many cases lack of an adequate judiciary and imposition of court martial system may tarnish acceptability of the prosecutions. Sometimes faltering policy in carrying out justice may undermine their credibility or popular support.

In the practical world fact based inquiry may turn out as the best means of encouraging stability and avoiding the uncertainties created by prosecutions. In most cases societies wish to avoid uncertainties which may invite turmoil. Scholars have observed that inconclusive prosecutions may create way to drag on for years allowing doubts and disputes although fact-gathering without prosecution may speed the healing process. There remains high possibility of serious backlash against democratic institutions if inflated expectations raised by a series of high profile prosecutions are disappointed.

Consedine proposes that transformative justice is essential in a society that experience crime against humanity. Restorative justice can bring harmony to some extent but may not be effective to promote such transformation. Philosophy of restorative justice embraces a wide range of human emotions including 'healing, compassion, forgiveness, mercy, reconciliation as well as sanction when appropriate' (Consedine 2003). Restorative justice obviously due to its own nature not equipped to solve the long systemic issues like class, race and gender divisions and this needs wider communal efforts that seek to bring about equity and justice for all.

Process of justice is not only determined by its necessity only, rather a good number of outside factors decide which form of justice will be implemented. Governments have repeatedly been prevented from prosecution not only by internal problems but also by external threat. Sometimes the military play crucial role when tensions prevail with external foe. Prosecution against the military may even weaken the country's defense. The economic situation and quality of democratic institutions also play a major role in deciding a country's choice of institutional

intervention. Adding to that political problems may emerge as the most important question in deciding institutional response. Efficacy of the process is highly determined by the attitude of the populace and intention of their representatives. Presenting a fair process deems extremely important to be accepted in the society. Landsman (1996: 86) cautions that in a time when the popular demand runs too high to ensure fairness in justice, wisdom may counsel against proceeding and obviously it is wise to avoid trials that make justice a mockery or set of provocative example that might fuel revanchist reaction. In negative situations a specific type of intervention may turn out disastrous or destructive for the fabric of the society. Deterrence theory has often instigated specific mechanisms to ensure justice in some particular context. Grounded in deterrence theory Braithwaite (1999:56) suggests that restorative justice practices deter crime better than criminal justice practices although he observes that deterrence have been failed as a policy not because it is irrelevant but mainly due to the gains from contexts where its works are cancelled by the losses from the context where it backfires.

4.5 WHY INTERNATIONAL CRIMES TRIBUNAL IN BANGLADESH?

Prosecuting the human rights violations of a predecessor regime can yield numerous benefits to the democratic government (Orentlicher 1991: 2542-44). According to Landsman (1996:83) prosecution can: first substantially enhance the prospects for the establishment of the rule of law; second educate the citizenry to the nature and extent of prior wrongdoing; third identify and credit the predicate for the compensation of victims of a predecessor regime's misdeeds; fourth, provide a means of punishing wrongdoers for their criminal conduct; fifth, enhance a society's ability to deter future violations of human rights; sixth, heal the social wounds caused by serious human rights violations.

Implementation of human rights is ultimately driven by people's own willingness and ability to take it forward. In Bangladesh the popular support goes in favor of trial of war criminals and anti impunity movement is so strong that any proposal of impunity is highly criticized by the people who suffered in 1971. In interviews with the victims and affected people it was identified that to uphold the basic notion of justice, most of the respondents were in favor of tribunal of the perpetrators and many of the affected people demanded exemplary punishment of the

perpetrators so that others are discouraged to perpetrate such type of crimes in future. Joyner observes that all civilized states share a real interest in the prosecution and punishment of war crimes. Indeed ‘the unpunished war criminal is a menace to the social and political order. He is a symbol of prostituted impunity, of justice denied’ (Joyner 1997: 172). In the case of Bangladesh the victims and sympathizers hold a similar view and demand trial as the first method of justice.

4.6 INITIATIVES OF ESTABLISHING TRIBUNAL AND PROVIDING AMNESTY IN BANGLADESH

To hold the Pakistani perpetrators and their collaborators responsible for their crimes, the International Crimes (Tribunals) Act, 1973 was passed on 20th July 1973. The act was amended on 14 July 2009 through the International Crimes (Tribunals) (Amendment) Act, 2009. However, the Bangladesh Collaborators (Special Tribunals) Order, 1972 (hereafter 1972 Order) was repealed on 31 December 1975 and under the order all those trials that commenced were stopped. Earlier on 17 May 1973, those who were incarcerated under the 1972 Order but against whom no specific allegations could be brought were pardoned. The government issued a press note on General Amnesty referring to Bangladesh Gazette on 17 May 1973 which ensured that those who had been convicted or awaiting trials for any one of 18 charges mentioned in the press note, including murder, attempted murder, treason, arson, abduction and so on do not come within the purview of the pardon. Due to the amnesty ‘of the 37,000 accused arrested under the 1972 order, 26,000 were released but the rest remained in custody and their trial continued until the 1972 order was repealed’ (Joarder, 2010:84). According to Rumana Islam (2009:17) ‘considering the very crucial situation and for the greater interest of the nation and for peace and stability’ Sheikh Mujibur Rahman’s government in the year 1973 declared a general amnesty .

Masterminds and key perpetrators of the massive crime against humanity remained outside the purview of justice especially due to the initiative to protect them by key interest groups. The newly formed Government of Bangladesh decided to hand over the key perpetrators of the Pakistan army. Initially ‘in 1972 the Bangladesh government announced plans to try 1,100 Pakistani military officers that included General Niazi and Rao Forman Ali for war crimes’ (The New York Times, 30 March 1972, p. 3). At that time India agreed to hand over 150 war criminals

including General Niazi provided that Bangladesh presented prima facie cases against them (The New York Times, 18 March 1972, p. 1). The idea propounded was to hold a two tier trial process (i) international jurists to try major war criminals, these being the chief architects of genocide, war crimes and crimes against humanity, who operated from an official position of power and (ii) all national courts to try the rest of the war criminals notably the collaborators. (The New York Times, 30 March 1972, p.3). But later the initiative to try Pakistani Army Generals apparently failed due to international pressure. Subsequently 'on 9th April 1974, a tri-partite agreement was signed by Bangladesh, India, Pakistan by virtue of which Bangladesh sent back 195 Pakistani alleged war criminals without holding a trial' (Joarder 2010:84).

In 2009, after assuming office the new government initiated trial of the perpetrators under the International Crimes (Tribunals) (Amendment) Act, 2009. The government appointed judges and investigators to carry out the tribunal in free and fair manner maintaining expected standards. This time the prime accused are the leading figures of the auxiliary forces of the Pakistan army. The government has formed the tribunal and investigation agency. Structure and function of the tribunal has been articulated in the above mentioned act of 2009.

In order to maintain international standards in tribunal and to meet the pre-requisite of being a signatory to the Rome Statute the Bangladesh government ratified the ICC statute in 2010. According to a press release from ICC in Hague on March 24, Bangladesh became the first South Asian country to ratify the Rome Statute that established International Criminal Court (ICC) and 'gave it a mandate for trying people accused of genocide, crimes against humanity and war crimes' (Khan, 2010).

4.7 WHAT ARE THE MAJOR PITFALLS IN THE RESPONSE PROCESS OF CRIME AGAINST HUMANITY?

Government initiative to ensure justice is indeed a critical process which is entangled with a number of challenges. Justice may provide mental satisfaction to the sufferers and subsequently uphold their belief in justice as the founding principle of society, but inherent weakness and procedural flaws can jeopardize the initiative.

Tribunal initiated by the government is a form of retributive justice which was the primary demand of majority of the victims of murder, rape and torture. General amnesty was declared by the state to those who were not involved in heinous crimes like murder, rape, arson. During that time several thousand perpetrators were arrested on charges of major crimes and prosecution of those criminals were going on. Even some of those prosecutions against some members of the auxiliary forces were completed and they received punishment of different terms. The abolition of the Collaborators Act in 1975 provided new opportunity for some perpetrators (ranked at the low level of the crimes) to enjoy impunity and helped them return to society. In this complex backdrop of initiative of justice and its previous record to falter due to political change, it is important to analyze the proper conditions and socio-political situation that influence the justice process. If we consider actions like retributive, restorative, hybrid type of justice or amnesty as a part of remedy or redress obviously it will be necessary to investigate which form of the remedy or its combination will be suitable in the context of Bangladeshi society.

As a democratic state where governments are elected through vote of universal franchisees, political parties are quite bound to follow the election manifestos. In election politics it is important for a party to implement the promises in election manifesto to go back to the people to ask vote for the next election. Given the present government's election pledge to ensure justice of the crime against humanity by holding free, fair and impartial trial, retributive justice for the major perpetrators has been the first priority. Provided the situation that still the decisions are not clear whether government is interested in justice of relatively petty perpetrators, speculation about the remedies in present situation leaves us with less choice. Consequently, major pitfalls of the justice process have been articulated in criticism of political parties, international lawyers and legalists of the nation as further discussed afterwards.

4.8 CRITICISM OF OTHER POLITICAL PARTIES

On April 2, 2010 the main opposition party in Bangladesh Parliament, Bangladesh Nationalist Party (BNP) came up with an altogether different observation about the trial. After the meeting of its standing committee, the secretary general commented that instead of establishing trials of war criminals the government is holding tribunal for crime against humanity which is a deviation from the election manifesto. The party even opposed the formation of a special tribunal since, in its opinion, it could be done under the existing criminal law. According to the official position of BNP, crimes against humanity and war crimes are two separate matters, and the government does not have the mandate to do that. Jamaat-e-Islami, at present which has two seats in the national Parliament, strongly oppose the tribunal as most of the high level accused in the international crimes tribunal are from top-echelons of the party leadership.

Major political debates about the justice process of Crime against Humanity can be explained from legalist and realist point of view. Whereas the sympathizers of victims and pro independence faction (largely left leaning or center left) supports legalist view, sympathizers of the accused and center-right factions have taken a relatively realist position.

4.9 MAJOR ARGUMENTS AND COUNTERARGUMENTS REGARDING THE TRIBUNAL

(1) As the Superiors Escaped, why Trial of the Second Line?

Larry May observes that 'rarely is it contended that selective prosecution of the laws is consistent with the rule of law' (May, 2005:211). The strongest argument that has been advanced and reported about the trial is that as the main responsible persons (of Pakistan Army) have escaped the trial, why the next lines (their collaborators) be brought to the book? There is a social advantage of this allegation; it is a tacit confession of second line person's involvement in the crime against humanity. In this regard it is important to ask as to how the prosecution establishes the criminality of the offenders. It is significant to see how the tribunals interpret the 'incitement' and 'planning' in commission of the offence. Role of local collaborators in Bangladesh war are treated quite differently from the role of collaborators of other instances of crimes against humanity. Main reasons behind this lies in the unfamiliarity of the Pakistan army

with the context of Bangladesh as most of the army men were brought from 1200 miles away and essentially it was quite difficult for them to launch targeted killings of the intellectual and specific member of particular religious group. As the auxiliary force local collaborators with their local knowledge were invaluable tool in Pakistan Army's arsenal of crime against humanity. Landsman (1996:85) observes that the targeted subsets of violators may consist of powerful few and/or group of malefactors whose crimes are visible or egregious. He cautions that if only the highest echelons are prosecuted, those further down the ladder may conclude that they are free to act as long as they avoid becoming prominent.

It is important to note here that by an Ordinance (East Pakistan Razakar Ordinance, 6th June 1971) the razkar, al-badr, al-shams were declared to be the auxiliary forces of the Pakistan Army during Bangladesh war. The second line peoples' status of auxiliary force has been established through Pakistan Government's Ordinance and surrender document of 16th December 1971 and they appear to come within the definition of 'auxiliary forces' a term which the constitution of Bangladesh also mentions in Article 47.

ICC statute specifically ensures command responsibility and superior order responsibility. The International Criminal Court statute provides that superior orders may be a defense where three criteria are met: (a) The person was under a legal obligation to obey orders of the Government or the superior in question, (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful. Provisions of different international tribunals were different in dealing with the defense of superior orders. In the Bangladesh statute of 1973 after amendment individual responsibility of the crimes has been established to prosecute the auxiliary forces which raise questions about impunity of primary responsible persons.

(2) Question of Standard and Procedural Fairness

International Criminal Court (ICC) has provided some standards for tribunal although ICC plays a complementary role to national legal system. Olsen observes that 'the Convention on the Prevention and Punishment of the Crime of Genocide explicitly outlines the duty of countries to enact domestic legislation to punish perpetrators of genocide and their responsibility to provide effective penalties for those found guilty' (Olsen 2010: 984). The major obstacle to the

prosecution is political indifference in the country. Legalists have identified challenges of the trial which are i) fear of judges and prosecutors for their personal security, ii) inadequacy in witness protection mechanisms, iii) inadequacy in legal resources and poor dissemination of law reports and legal texts, iv) difficulties locating and securing the attendance of witnesses and defendants, v) inadequacy in structures and procedures, vi) lengthy processing of war crimes cases and vii) insufficiency in training on international criminal law. Actually these points are challenges as well as questions of standards.

It is frequently advocated that procedural fairness has no universal shape. Each and every tribunal becomes unique because of its scope, political and historical context and mandate provided by the law. Media reports indicate that concerns regarding procedural fairness can act as a constructive framework upon which the tribunal can deliver the justice. According to Rahman, ‘what is expected is that the tribunal should conform to minimum international standards of procedural fairness to make its credibility visible. It is expected that justice, once there is a procedure for its delivery, will have its own momentum’ (Rahman 2010).

(3) Question of Death Penalty as the Highest Punishment

The Tribunal is yet to receive acceptance of the European Commission as the European Commission does not in principle support a tribunal which considers death penalty as the highest punishment. Joyner observes that ‘a war criminal properly should be deemed *hostis humanis generis*. The acts committed are so odious and evil that they offend the conscience of human spirit and the very sensibilities of international law’ (Joyner 1997: 171). ICC statute provisions fall into *jus cogens* for the country. Bangladesh is a party to the ICC statute and the statute virtually excludes death penalty from its list of penalties to be imposed. Under Article 77, the statute ensures imprisonment of a maximum of 30 years as the most severe punishment, while a term for life is designated only when justified by the extreme gravity of the crime and on the individual circumstances. But the ICC statute did not totally discard national practices. Article 80 of the statute under title ‘Non prejudice to national application of penalties and national laws’ states that ‘nothing in this Part affects the application by states of penalties prescribed by their national law, nor the law of states which do not provide for penalties prescribed in this Part’. ICC

statute thus ensures that the ICC will not impose the death penalty but recognizes rights of the state parties to provide penalties different from the statute. This has been recognized as an example of the pre-eminence of national laws and procedures over the ICC.

(4) Why trial at domestic level?

As Joyner suggests, the universality principle stems from the notion that any state could have the legal competence and authority to define and punish offenses, regardless of whether it had any connection with that offenses at issue (Joyner 1997: 167). The reluctance of the international community to bring the perpetrators of the 1971 was the reason for the curtain of impunity in previous periods. In post 70s, international tribunal's emerging jurisprudence in prosecuting atrocities has increased the possibility of trying criminals at national level which are empowered and cooperated by the international community. It has been often argued that a multifaceted approach that marshals justice process at national level---along with primary actions with other tools such as asset freezes, travel restrictions and political stigmatization—should have a meaningful impact on deterring future crimes. If ‘the risk of being caught in the net of criminal tribunals grows, so will the prospects for deterrence’ (Rahman 2010). Limited number of international criminal tribunals and scarce resources for such tribunals emphasizes initiation of national tribunals. According to Mizanur Rahman (2010) , present chairman of Human Rights Commission of the country ‘Bangladesh was the pioneer in formulating the first national war crimes law in the history of the world back in 1973, the spirit of which was later inculcated in the ICC statute’ . Rahman (2010) also observes that through implementation of an effective justice, ‘the country can again become an example of effective national prosecution of international crimes with a blend of national and international criminal jurisprudence.’ The tribunal in Bangladesh is completely domestic in nature although it is mandated to try international crimes.

4.10 CRITICISM FROM INTERNATIONAL LAWYERS

In a seminar held in Dhaka in October 2010, British lawyer Stven Kay QC, (who counseled Yugoslavia's former President Slovdan Molosevic against war crime charges) criticized the International Crimes (Tribunals) Amendment Act 2009 for not maintaining conformity with international standards. In the same discussion Kay mentioned that the current system of war

crimes trial and its law in Bangladesh does not include international concerns, required to ensure a fair, impartial and transparent trial. He commented that ‘you are importing things like ‘international crime’ but exporting your national and fundamental human rights. You are open to great criticism’ (The Daily Star, October 14, 2010). In the same event another British Lawyer Toby Cadman who was head of the prosecution section of War Crimes in Bosnia and Herzegovina and supposed to counsel the accused of crime against humanity in Bangladesh observed that ‘it is the court not the government which should be committed to holding trial of the war criminals’ (ibid, October 14, 2010). Earlier Jaamat-e-Islami Bangladesh reportedly appointed three British lawyers (including the above mentioned ones) to defend the accused of crimes against humanity. The three lawyers (Kay QC, Toby Cadman and John Cammegh) were supposed to provide advice before starting their assignment as the defense counsels of the accused (Deccan Herald, February 6, 2011).

The International Bar Association (IBA) Committee, in a report to the UK Parliament's Human Rights Group, has raised some concerns regarding the tribunal. It has commented that the legislation (1973 Act) ‘appears out of date and behind the more recent practice in international tribunals.’ However, the committee’s opening remark was ‘the 1973 legislation, together with the 2009 amending text, provides a system which is broadly compatible with current international standards’ (Rahman, 2010).

4.11 RIGHT TO JUSTICE AND RIGHT TO FAIR TRIAL

The Magna Carta, that classic document on democratic governance asserts ‘*Nulli vendemus, nulli negabimus aut differemus, rectum aut justitiam*’. Which can be translated as ‘to no man will we sell, or deny, or delay, right or justice’. The ‘broader notion of justice includes victim’s right to get appropriate remedy. International human rights law treats the question of a remedy as independent human rights’ (Freeman 2006:98). The ‘victims of war crimes in 1971 or their families have the right to seek justice’ (Faruque 2010:43). ‘The right to remedy should also belong to victims of crime against humanity. State has an obligation to remedy serious human rights violations’ (Faruque 2010:43). The right to a remedy appears in major human rights instruments. Article 8 of the Universal Declaration of Human Rights and article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) recognizes the right to an

‘effective’ remedy for the violation of human rights. The Constitution of Bangladesh also provides the right to seek justice by the affected persons. Article 27 of the Constitution provides that ‘all citizens are equal before law and are entitled to equal protection of law’.

Unquestioningly, actions of Pakistan army in 1971 along with their Bengali collaborators were grave violation of international human rights instruments. Broadly, it was violation of Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Convention on the Elimination of all forms of Racial Discrimination etc. Those criminal activities are also violation of several international human rights instruments which are adopted after 1971 e.g. Convention on Elimination of All forms of Violence Against Women, International Convention for the Protection of all Persons from Enforced Disappearance, Convention on the Rights of the Children. Actions of Pak army in 1971 was violation of the rights of human provided in the international human rights instruments and the victims have right to seek justice provided in national and international human rights instruments.

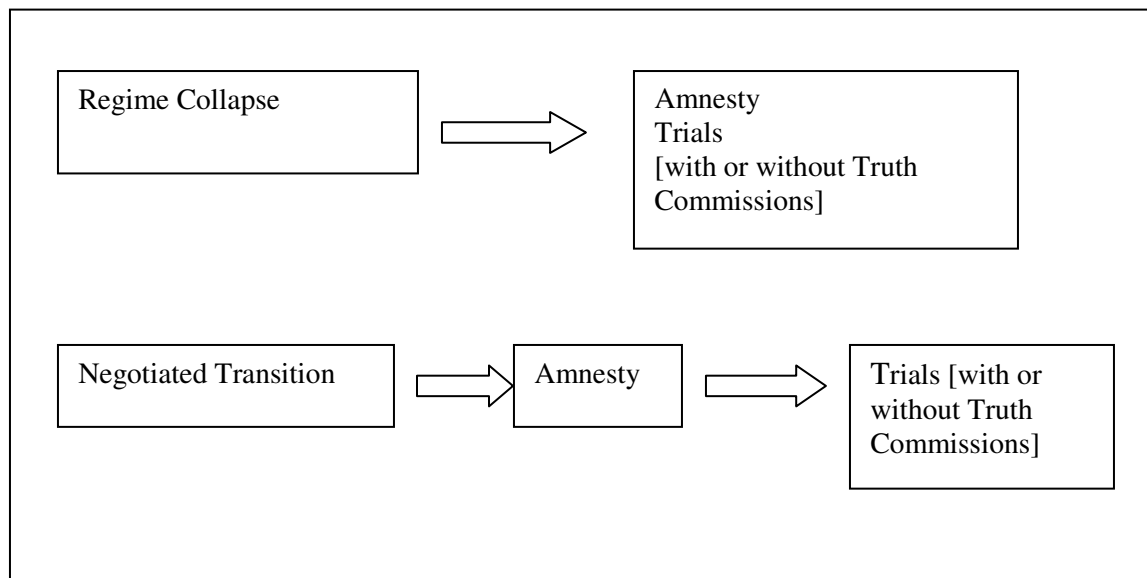
The Universal Declaration of Human Rights 1948 ensures the right of everyone facing trial to have a fair and public hearing by an independent and impartial tribunal. The International Covenant on Civil and Political Rights 1996 (ICCPR), which Bangladesh acceded to in 2000, contains in its Article 14 a series of fair trial rights including the accused's right to be presumed innocent until proved guilty and the right to be tried 'without undue delay'. International Criminal Court (ICC) and international criminal tribunals e.g. the International Criminal Tribunal for the former Yugoslavia (Articles 20 and 21) guarantees the accused his right to a fair trial.

Concept of fair trial has attained central place in international human rights norms. Criminal Justice process requires that the trial must be just and fair so that legitimacy and moral authority are not eroded. The three-member International Crimes Tribunal of Bangladesh has recently framed its Rules of Procedure (with effect from March 25, 2010), which have opened up both opportunities for, and challenges in attaining fairness in the war crimes trial (Hoque 2010).

4.12 THE JUSTICE BALANCE

It is important to find the right balance of maximalist and minimalist approach to address crime against humanity. Olsen et. al. in a research finding published in article titled ‘The Justice Balance: When Transitional Justice Improves Human Rights and Democracy’ observes that ‘trials and truth commissions, or amnesties and truth commissions rarely produce positive results. Instead only two combinations work: (1) trials and amnesties, and (2) trials, amnesties and truth commission’ (Olsen 2010: 996).

Figure 1: The Justice Balance



(Source: Olsen, 2010:1002)

One of the central points in psychological assumption of transitional justice literature suggests that ‘there can be no peace without justice’. Mendeloff (2004: 367) proposes that the concept of justice is extremely relative as he observes: ‘individual conceptions of justice differ from person to person, place to place and time to time. No one definition is universally accepted’. Avruch (2002:39) observes that truth commissions cannot by their nature deliver this sort of justice and quasi-justice forms or entities (e.g. retroactive justice, restorative justice) in the end move away from criminal justice process and shift toward truth seeking reconciliation.

In the case of Bangladesh, so far amnesty and prosecution has been the combination of justice by state response. If we accept Olsen's hypothesis (elaborated in figure 1), so far the initiative of the government is in the right track. Even if the government undertakes restorative justice, it will be in harmony with the hypothesis of Olsen's second combination that works to address crime against humanity.

4.13 IS RESTORATIVE JUSTICE NECESSARY IN BANGLADESH?

As it is seemingly an impossible task to try all the crimes committed in 1971, demand for a holistic approach to address the issue creates ground for restorative justice. Discussion can be initiated on establishment of truth telling mechanism to hold more suspects accountable. Democratic environment is a necessary precondition to organize truth seeking process as Ignatieff (1996:119) argues that 'democracy is a pre-condition for that free access to historical data and free debate about its meaning on which the creation of public truth depends'. Ignatieff also observes that if institutions are too undemocratic, they cannot allow 'countervailing truth to circulate' (Ignatieff 1996:119).

Payne in a study based on Transitional Justice Data Base which includes over 150 countries tracked over 30 years identifies that 'countries that adopted trials and truth commissions reduced by about half the homicide rate of countries that adopted some form of amnesty' (Payne, 2008:15). The finding suggests that in present situation maximalist approach seems to be more effective than minimalist approach like amnesty.

It deems extremely necessary to analyze and justify before adopting a specific method of institutional response to crime against humanity. As the proponents of justice observe that virtually there remains no 'one size fits all solution' to the state response to crime against humanity, it is necessary to be cautious about implication of the proposed interventions. As Snyder (2003:20) observes that truth commissions 'contribute to democratic consolidation only when prodemocracy coalition holds power in a fairly well institutionalized state'. In promoting reconciliation the capacity of truth commissions is far more limited than their proponents suggest. However the experience of Bangladesh is not good with truth commissions as the Truth and Accountability Commission for voluntary disclosure of corruption-accused which was

formed in 2008 under Voluntary Disclosure of Information Ordinance-2008 was declared illegal and unconstitutional by the Supreme Court on May 16, 2011. Earlier the Commission's activities stalled due to High court verdict that declared it illegal although a number of persons voluntarily disclosed information and participated in the process. Keeping this experience in view, it needs proper analysis and justification for initiating restorative mechanisms like truth and reconciliation commission in the country.

According to a report of the leading English daily newspaper of the country, The Daily Star, Member of EU Parliament Helmut Scholz observes that reconciliation is necessary as it may create a climate of dialogue and understanding, a climate that produces cross-generational interest in order to process the complex motives and societal causes of violence. He also observed that as long as complex social causes and consequences of conflict remain in the dark, legal actions to cast blame on individuals is pointless (The Daily Star, August 8, 2009). Without change from society itself, punishment and atonement only continue the cycle of revenge and allows concepts of justice to be ideologically abused.

4.14 SOCIAL RESPONSE

Social response, which can be measured through analyzing demand and activities of civil society, NGOs and media is extremely important to fathom overall demand about type of response to the crimes committed. The modern state is virtually unable to intervene in every case and to provide remedy to all the crimes, especially when large scale violation of human rights takes place. In this regard society plays the key role to bring workable solution to many crises.

Landsman suggests that the misdeeds of the predecessor may be extensive enough to create difficulties in documenting and independent gathering of information. In such circumstances it may be necessary for the society to come forward to uncover the whole truth, to provide incentives to potential defendants to tell what they know (Landsman 1996: 86). That kind of incentive may include immunity from prosecution and sometimes societies may decide to barter prosecution for full disclosure.

In Bangladesh, the justice was supposed to be ensured at a much earlier period. But due to change in government and in political priorities of the country, the process has been delayed. However, the country took time to create a critical mass of informed citizenship that supported justice for promoting liberty, freedom and justness in the society. This critical mass of informed citizenry played crucial role to create a favorable political environment to initiate institutional intervention. The role of free media (both print and electronic), and improved communication facilities at the personal level enhanced the process of creating the critical mass of informed citizenship to demand justice of the perpetrators.

Jenkins in an article on social movement summarizes debate over relative centralization and later adds that social movement organizations may remain effective.

‘Bureaucratic structures provide technical expertise and coordination essential in institutional change efforts but are less effective at mobilizing ‘grass roots’ participation. Decentralized structures maximize personal transformation, thereby mobilizing ‘grass roots’ participation and insuring group maintenance but often at the cost of strategic effectiveness’ (Jenkins 1983: 542).

After massive violation of human rights, in order to achieve short-term and long term goals of stability, discipline and development, ontological study suggests that decentralization of the response process especially at grassroots level may sometime bring better result in the cases of pretty crimes. In social movement organizations, epistemological examples imply that decentralization of power can create more societal effect than centralization by a select few. Although the legal structure in Europe and elsewhere has been premised on the principle *nullum crimen sine lege* which can be translated as no crime without law, it is extremely difficult for the government especially in a developing country to ensure justice for all the crimes particularly in the case of large scale crime against humanity.

Modern democratic state rarely takes a holistic approach to crime against humanity. Retributive, restorative and amnesty initiatives are just part of the solution. Social response ultimately decides as to how the problem is addressed at the local level and how it creates way to further advance the remedy in the society. This study identifies that, in Bangladesh in many cases society assimilated the pretty criminals (e.g. who were involved in small scale arson, plunder, limited

torture) being inspired by the social commitment to forgiveness and later on these perpetrators could live in harmony in rural areas although being subject to compassion.

4.15 EFFECT OF INSTITUTIONAL RESPONSE ON HUMAN RIGHTS

States play the most crucial role in initiating institutional response to human rights violation although the decisions of the state are highly influenced by the policymakers especially regarding the adoption of specific method of remedy. Different redress mechanisms have variant effect on promotion and protection of human rights in the society. May observes that states can be conceptualized as ‘a complex set of interactions and relationships among individuals. The complexity of interactions among individuals creates a situation such that ...there are things that act like a mind within the State, as in many other kinds of groups’ (May 2005:143). Miliband argues that ‘the two main impulses that are generated by the executive power of the state are self-interest on the one hand, and a conception of ‘national interest’ on the other’ (Miliband 1983:69). It is highly possible that even in a democratic state decisions are influenced by some select few which may not be fully democratic by nature. In this regard it is important that the type of decisions for specific redress be considered while measuring the effects of institutional response on human rights promotion.

Legalist tactics for strengthening human rights norms can backfire when institutional and social preconditions for the rule of law are lacking (Snyder 2003: 12). The people who were affected are worried about the consequences if justice process fails to materialize their demand for trial of the perpetrators. It is also important to consider the probable effects that may take place if the latest initiative of justice fails. Arguably, institutionally structured truth telling or punishment might serve as a release valve for resentment that might otherwise be expressed as riots, or exclusionary ethno-national political movements (Snyder 2003: 16).

In interviews in Bangladesh, victims also argued that tribunal process does not provide any indication that all the perpetrators will be tried. So far only a group of selected perpetrators (who were allegedly the leading figures of perpetrating force) have been arrested for trial. They also supported that justice should be equally applicable for all the alleged perpetrators.

Olsen (2010: 995) observes that ‘the Transitional Justice Data Base (TJDB) produces the empirical evidence about which transitional justice mechanisms-or mechanism-combinations-improve human rights and democracy’. Transitional justice has an overall positive effect in human rights and democracy measures. (Olsen, 2010: 996). Payne in a study based on Transitional Justice Data Base which includes over 150 countries tracked over 30 years identifies in the abstract that ‘not only whether transitional justice improves democracy and human rights but also one or more mechanism does so better than other mechanisms’ (Payne 2008). In the case of Bangladesh it will take time to know a visible effect of tribunal on the society. But it has been observed that the victims and sympathizers were disappointed with the amnesty as the administration was very immature to deal with the issue in 1973.

4.16 ROLE OF INTERNATIONAL ORGANIZATIONS AND OTHER STATE PARTIES

International organizations and other state parties responded to the government initiative for justice of crimes against humanity in Bangladesh. Until the government initiated the tribunal process, no visible action was observed on the part of international organizations and/or other state parties. In 2009 when the new government assumed power committing initiative for justice of crime against humanity, United Nations Bangladesh country office offered required technical assistance to the newly formed Government. Present Law Minister Shafique Ahmed also acknowledged the assurance of UNDP for help of international experts (Ahmed 2009: 13). UN country office proposed some experts who can be consulted for holding the trial in an acceptable manner. Subsequently, US government appointed Ambassador on War Crimes Stephen J Rapp to discuss with Bangladesh government about the international criminal tribunal. On May 3, 2011, in a view exchange meeting with civil society members and freedom fighters at Dhaka, Rapp expressed his satisfaction over professionalism in trying the war crimes, but suggested expediting the process saying it would be bad if individuals are kept in custody without an opportunity for proceedings. Civil society members in the meeting observed that ‘the trial of crimes against humanity is never an issue of political motivation or vengeance, rather the desire of the people to seek justice, and it must be held to end the practice of impunity.... We only need international support for the trial to be held. All observers will be welcome, but no interferers’. In the meantime Pakistan government spokesperson observed that the justice process initiated by

the government of Bangladesh is an internal issue of the country and Pakistan Government has no reservation about the issue.

The present Law Minister of Bangladesh Shafique Ahmed writes ‘international help will be needed for getting access to documentary evidence, which we know, many countries have in their libraries or archives or different places’ (Ahmed, 2009:13). Earlier leading English daily of the country, The Daily Star reported that, Member of EU Parliament, Helmut Scholz, in a conference held in Dhaka on 2009 observed that several factors are crucial for Bangladesh-first, guaranteeing high degree of transparency and accessibility to information for the general public, second, legal processes are supported by the society and protected against false judgments and third, installing procedure which guarantee an independent exercise of criminal justice process. (The Daily Star, August 8, 2009). Although subsequently in a statement, European Commission Delegation to Dhaka observed that the tribunal is solely a matter of Bangladesh government and it should take necessary steps to maintain international standards.

4.17 MAJOR OBSERVATIONS FROM THE ANALYSIS IN THIS CHAPTER

The crime against humanity in Bangladesh was committed by the order of a military regime and the International Commission of Jurists (ICJ) recognized the regime as ‘unconstitutional and illegal under domestic Pakistan law’ (ICJ, 1972). International actors in such a situation was expected to play a constructive role either through non-cooperation to the illegal regime or through providing effective support to the people (particularly of East Bengal) who revolted against the illegal regime. When key accused of Pakistan army left the country, there was no visible international initiative to ensure justice to the massive violation of human rights. At present, the International Criminal Court (ICC) does not have the mandate to try the crimes committed before its establishment in 1990s. In this respect, it seems highly necessary to establish an effective mechanism to ensure justice for crimes against humanity committed before 1990s by ‘illegal and unconstitutional’ regimes.

Institutional response to crime against humanity was extremely insufficient. International actors largely failed to address the issue whereas national government faltered due to turbulent political situation. Society and social organizations played important role to press the duty bearers

reinitiate the process and helped in mainstreaming it in the political agenda. Social response thus became subsidiary to government institutional response in ensuring justice. So far government response through maximalist and minimalist approach received criticism from both pro and against institutional response groups. Major debates around institutional response have taken place from legalist and realist viewpoints.

Major pitfalls of the maximalist institutional response process remains in trials of auxiliary forces instead of the masterminds. Concern regarding standard and procedural fairness, debates around maintaining death penalty as the highest punishment, domestic nature of the trial, criticisms waged from international lawyers and the opposition parties about the motive of government and fairness of the trial remains the major challenge for the government to deal with. The sufferers and victims have urged the government to hold trial in efficient and acceptable manner.

Globally institutional response to crime against humanity has a positive effect on promotion and protection of human rights in those societies. In Bangladesh civil society and other social organizations have widely supported the justice process with a view to having a favorable effect of the process on promotion of human rights. It may take time to evaluate the visible effects of justice process on promotion of human rights in the country.

The study explains that subsidiary role of the society is prominent in demanding and materializing justice as it remains very challenging to ensure retributive justice due to the multiplicity of actors and factors. The study emphasizes the essentiality of restorative justice as modern governments are largely unable to provide retributive justice to all the crimes due to inherent constraints albeit the restorative mechanism is very difficult to undertake due to its own characteristics. The study finds that in a specific country context, where legalism and realism occupy the debate of response mechanism, a combination of maximalist and minimalist institutional response can be useful which might be popularly demanded by the societal actors. The government must have enough capacity to undertake the process and international recognition remains very crucial in institutional response to crime against humanity.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATION

The fact, however, is that the crimes against humanity were an organized corporate enterprise expressing a policy deeply rooted in a national ideology, just as were the military policy, establishment, and operations. One is not dealing here with a handful of deviants, but with a social movement, and this makes the relationship between the causes of and responsibility for these acts exceptionally problematic.

- Judith N. Shklar
Legalism (1964: 192)

5.1 CONCLUSION

Legalist and realist considerations have influenced the debate of institutional response to crime against humanity for a considerable period of time. However, determination of whether maximalist or minimalist approach can be effective on a particular setting largely depend on the situation existing in that society. Vinjamuri observes that ‘some pragmatists have argued that the feasibility of trials depends in part on the stage of the conflict. They agree that justice should be deferred until peace is secured but differ as to the timing of successive attempts to prosecute’ (Vinjamuri 2004: 354).

Graubart suggests that ‘it needs reevaluation of how to integrate idealistic values and pragmatic concerns’ (Graubart 2010:422). It has emerged as a lawful right of an independent state to take measures of justice according to its own laws and regulations. Several developments indicate that, international legal doctrine has evolved in a way which intimates that the world community has accepted the right for all states to ensure justice for war criminals. Joyner observes that ‘these developments include the evolution of international criminal law, the *erga omnes* and *jus cogens* doctrines and the generally universal condemnation of these offenses’ (Joyner, 1997: 171). In Bangladesh institutional response has been limited to tribunal and amnesty. Considerably large number of the accused people could reap the benefit of amnesty. Initial step of trying the perpetrators stalled due to political change and recent initiative of international criminal tribunal itself received criticism from both pro trial and against trial groups. When pro trial groups accuse the tribunal as weak and lacking necessary facilities to carry out designated task, anti-tribunal groups criticized it for following the rules and regulations that may not be fully compatible to international norms. Government clarification in this regard gives limited hope to

both the parts. However, the victims and their sympathizers appeal to the government to carry out the justice process with necessary care and efforts.

Pitfalls of the justice process are largely pointed by the international lawyers and political parties who are criticizing the tribunal. The tribunal has some intrinsic problems ingrained in its own formation and structure. Debates regarding the ways to get rid of those pitfalls are still continuing and it will take time to observe any visible outcome to the process of overcoming the pitfalls.

Paul Goodman, a social critic who linked utopian ideals to pragmatic proposals distrusted central global institutions: '[s]ince present central powers are dangerous and dehumanizing, why trust super-power and international organization?' (Goodman 1970:144). Debates are still looming around the capacity of international organizations like UN to play a major role in crime against humanity. However, international response to the crime against humanity in Bangladesh was not remarkable at all. There was no initiative in the intergovernmental organizations like UN or its Human Rights Committee to address the crime against humanity that happened in Bangladesh in 1971. However, in 2009 government's commitment to try the perpetrators was initially supported by the UN and Bangladesh office of UN expressed interest to provide technical cooperation to hold the tribunal in a globally acceptable manner. However the role of Security Council when the crime was taking place was not sufficient enough to protect the civilian population. Other international organizations and state parties were not able to carry out remarkable role to redress the large scale human rights violation.

According to Bassiouni, 'in the last two thousand years, the humanistic evolution of our contemporary civilization has been painstakingly slow and arduous. The progress has nonetheless been consistent, notwithstanding occasional periods of regression into barbarism' (Bassiouni 1994: 486). Increased international cooperation and constructive role of international community to save humanity from the grave violation of human rights have emerged as a common demand in societies facing massive violation of human rights. In this regard state and non state actors need to take a step forward towards protection and promotion of human rights in the probable hot spots of heinous crime against humanity. Snyder argues that 'external pressure and assistance should be targeted on future-oriented tasks such as human rights training of police

and military personnel, improved human rights monitoring of field operations, reform of military finances and military justice, and punishment of new abuses once the reforms are in place' (Snyder 2003:44).

Member of EU Parliament Helmut Scholz observes that 'no case of reconciliation can be relativized, but instead must always serve as part of the struggle to understand how violence, war and crime happen in the first place' (The Daily Star, August 8, 2009). A mentality open to learning lessons from the past happening can serve as a lesson for the future generations which helps them to be kept in remembrance and can find out a durable solution toward the problems.

Social organizations working on the crime against humanity issues demand maximalist approach through retributive justice specially for the major perpetrators who have been 'symbol of prostituted impunity' whereas at the grass root level victims and the sympathizers are not against forgiveness to the petty perpetrators who were engaged in small scale crime and thus the grass root organizations and many of the victim citizens are not against minimalist approach through amnesty for petty perpetrators. Government so far has taken both maximalist and minimalist approach and social response to crime against humanity has emerged as subsidiary to the institutional responses.

5.2 RECOMMENDATIONS

Following recommendations suggest some policy intervention and change in ways of practice at national and international level. Keeping the constraints in view, the recommendations are focused on improvement of institutional response to crime against humanity particularly for Bangladesh.

- (a) Institution building and institution reform: Institution building must begin with the strengthening of general state capacity and then move on to regularize the rule of law more deeply (Snyder 2003: 44). In order to undertake justice for crime against humanity, government institutions should strengthen their capacity. Line ministries, judiciary and autonomous agencies involved in the process should have proper knowledge and expertise to

undertake the justice process. If necessary, new institutions can be built and existing institutions can be reformed within the legal framework of the state.

- (b) Accountability mechanism: Accountability of the government appointed personnel in the prosecution and investigation process should be ensured. Accountability of media and of political actors needs to be increased during the justice process. If needed, required capacity building initiatives can be undertaken supported by national and international organizations. In a post conflict society, it is extremely important that the views of the media properly reflect the fact and that the political actors properly present the demand of common people for whom they advocate. It is extremely necessary that the institutions are less politically influenced and can work impartially.
- (c) Consultative approach: More consultation with international representatives, line experts and media should be encouraged to make the response process free, fair and impartial in nature. State should make the process more accessible to international community to undertake the activities in a flawless and internationally accepted manner. Empirical evidence shows that the more the consultation, the better the quality of output of the intervention process. Local and international actors interested in the process may form a local consultative group in order to monitor the process and provide necessary suggestion and assistance to the state to carry out the response process in a standard manner.
- (d) Policy intervention: Government should formulate proper policy to reduce scars created from crime against humanity in the society. It is extremely important that the state prepares action plans for justice and rehabilitation mechanism. Government economic policies should provide enough allocation for response to crime against humanity. Allocation should specifically focus necessary rehabilitation mechanism for the victims and provision of facilities and budget for the proposed justice mechanism. Short term and long term policies of the government should properly address issues around the crime against humanity.
- (e) Undertake necessary research and study: government sponsored studies should be initiated in academic and research institutes. Investigative journalism should be promoted under the auspices of the government. Collaborative initiatives can be taken in cooperation with national and international actors. International organizations can field missions and research projects to address crime against humanity. Research initiatives are extremely necessary to assist the policymakers for informed decision making.

- (f) Increased role of United Nations and the Security Council: Historically the United Nation's role in addressing crime against humanity failed to inspire many stakeholders. Nonetheless, UN is an organization that can better undertake the issue in a more acceptable manner. Consensus and discussion can be the most effective way to reach a resolution to act upon. Responsible and well functioning Security Council can be the best place to initiate pragmatic actions for addressing large-scale crimes against humanity instantly.
- (g) An international authority for monitoring: Inter-governmental organization like United Nations and the Human rights agencies can take initiative to establish an international authority for monitoring the issues related to crime against humanity in order to warn beforehand and suggest rapid actions in any situation. Raphael Lemkin, the framer of the Genocide Convention of UN, in his book 'Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government and Proposals for Redress', at the international level, was supportive of establishing 'an international controlling agency vested with specific powers, such as visiting the occupied countries and making inquiries' (Lemkin 2005). He proposed to act when the crime is initially exposed with a view to prevent before much damage has been caused to people and society. Establishment of such an authority is deemed more relevant than any other period in human history.

5.3 LIMITATIONS

The major limitation of this study is to fit into any special format of institutional response that can be compared with the other instances around the globe. Discourse Historical Approach has its own advantages and disadvantages as in this method it is difficult to situate the incidents into a specific theoretical framework rather it relates to a number of different theories and sometimes it is difficult to harmonize these theories in a concise manner. This was the main reason for utilization of a range of theories *inter alia* maximalist and minimalist approach, legalist and realist approaches and forms of justice mechanism for analyzing state response.

Providing proper recommendation of the challenges faced by the institutional responses also lacks substantial analysis of the local situation as very few scholarly works are available on recommendation issues particularly when Bangladesh is a case study. As a complex case of

crime against humanity, it creates opportunity for in depth discussion at the same time opens up the pathways to divert from the focus due to multiplicity of the scenarios. Manifestation of the challenges in the real world is so critical that theoretical and practical integration sometimes involves many actors (e.g. political, legal, social, to name a few) as to why contextualization and generalization was extremely challenging.

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Annex I

Definition of Crime against Humanity

Crimes against humanity has been defined in the International Crimes Tribunal act as ‘ Crimes Against Humanity: namely murder, extermination, enslavement, deportation, imprisonment, abduction, confinement, torture, rape or other inhumane acts committed against any civilian population or persecutions on political, racial, ethnic or religious grounds, whether or not in violation of the domestic law of the country where perpetrated’.

Crimes against humanity has been defined in the ICC statute 1998 as ‘crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack: (a) murder, (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health’(Article 7 of Rome Statute of International Criminal Court, 1998)

Article 3 of the Statute of the International Tribunal for Rwanda, 1994 defines the ‘Crimes Against Humanity’ as ‘Crime against humanity: The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) murder, (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape; (h) Persecutions on political, racial and religious grounds; (i) other inhumane acts’.

Article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, 1993 defines the 'Crimes against Humanity' as: 'Crimes against Humanity: The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts'.