BANGLADESH'S INTERNATIONAL CRIMES TRIBUNAL: A CAUTIONARY TALE AND A CALL FOR HOPE

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ABSTRACT

Since achieving independence, Bangladesh has emerged as one of South Asia's fastest developing countries. Yet, concealed behind its burgeoning international reputation lies a democracy in decline. Recovering from the mire of a genocidal civil war, Bangladesh enacted the International Crimes Tribunal Act of 1973, which established a domestic ad hoc tribunal endowed with the international jurisdiction to prosecute 1971's war criminals. A year after the legislation's passing, the government paused the proceedings as the newborn country refocused its attention on mending its international relations.

In 2009—36 years after the ICT's establishment—Bangladesh's Awami League regime reactivated the Tribunal. Supporters praised the government's noble motives to prosecute the remaining war criminals, while critics questioned the administration's dubious intentions. Following the Economist's exposé on the Tribunal's corruption, revelations from the past decade have come to substantiate the critics' suspicions. International agencies have also observed that the ICT's vague legislation, inconsistent judgments, and disproportionate in-

* Due to the prevailing conditions surrounding freedom of speech in Bangladesh, the Editor-in-Chief of the California Western International Law Journal has approved for this article to be published anonymously. All review procedures, including source checking verification, were followed when editing this article. For further information on how the Bangladeshi government is targeting its critics, *see Bangladesh: End Crackdown Against Journalists and Critics,* HUMAN RIGHTS WATCH (May 3, 2023), https://www.hrw.org/news/2023/05/03/bangladesh-end-crackdown-against-journalists-and-critics (detailing a collective announcement issued by various human rights agencies calling for Bangladesh to cease its "increasing repression and curtailment of the right to freedom of expression.")

dictments of opposition leaders continue to contravene the accused's rights to due process and fair trials.

Regrettably, the deteriorating state of democracy in Bangladesh has left a formidable path forward for defendants who seek redress from the Tribunal's injustices. Nevertheless, the strength and resilience that arose from Bangladesh's victory in 1971 were not inherited by its government, but by its people. As this Comment revisits the ICT's injustices, it also proposes a wide range of solutions that the Tribunal's defendants may pursue—these remedies include establishing a people's tribunal, encouraging Bangladesh's allies to issue sanctions against the State, and bringing forward a case to the ICC through Article 20 of the Rome Statute.

This Comment also aspires to empower not only the individuals incarcerated by the ICT but citizens of all autocratic countries who fear the consequences that may follow from efforts to effectuate meaningful change. With growing calls to action demanding remedies for a State's systemic injustices, the need to reassert global attention upon the ICT's misconduct is uniquely imperative at this moment. The time is ripe for human rights advocates to demand justice in Bangladesh—now, it is up to the courage of its people to seize it.

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INTRODUCTION

Since achieving independence in 1971, Bangladesh has emerged on the international stage as one of South Asia's fastest developing countries.[1] Its accolades include contributing renowned research on developmental economics,[2] supplying humanitarian aid to Rohingya refugees,[3] and spearheading environmental activism on behalf of all climate-threatened countries.[4] Bangladesh's most remarkable feat, however, is the striking speed with which it achieved these successes in light of a tragic beginning replete with grave human rights violations.[5] Indeed, despite the violent circumstances surrounding its formation, Bangladesh's anguish has inspired resilience in its people,

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1. G.A. Res. 76/8, 2021, Graduation of Bangladesh, the Lao People's Democratic Republic and Nepal from the Least Developed Country Category (Nov. 29, 2021). *See also* Tridivesh Singh Maini, *Bangladesh's Economic Rise and the Geopolitical Implications*, 9 J. POL. RISK ONLINE 1 (2021), https://www.jpolrisk.com/bangladeshs-economic-rise-and-the-geo-political-implications/; U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS. [UNHCHR], *UN High Commissioner for Human Rights Michelle Bachelet Concludes Her Official Visit to Bangladesh* (Aug. 17, 2022), https://www.ohchr.org/en/statements/2022/08/un-high-commissioner-human-rights-michelle-bachelet-concludes-her-official-visit [hereinafter UNHCHR Visit to Bangladesh].

2. *Bangladesh: Reducing Poverty and Sharing Prosperity*, THE WORLD BANK (Nov. 15, 2018), https://www.worldbank.org/en/results/2018/11/15/bangladesh-reducing-poverty-and-sharing-prosperity; *Globally Bangladesh Is a Model for Poverty Reduction: World Bank*, THE WORLD BANK (Jan. 29, 2020), https://www.worldbank.org/en/news/press-release/2020/01/29/globally-bangladesh-is-a-model-for-poverty-reduction-world-bank; COUNTRY SUMMARY: BANGLADESH, CIA WORLD FACTBOOK (Feb. 22, 2023), https://www.cia.gov/the-world-factbook/countries/bangladesh/summaries.

3. *Rohingya Refugee Crisis,* UNICEF, https://www.unicef.org/bangladesh/en/rohingya-refugee-crisis (last visited Mar. 2, 2023).

4. Press Release, United Nations Development Programme [UNDP], *Bangladesh Wins COP27 Award for UNDP-Supported Community-led Initiative* (Nov. 13, 2022), https://www.undp.org/bangladesh/press-releases/bangladesh-wins-cop27-award-undp-supported-community-led-initiative; Megan Rowling, *Bangladesh Leads Climate-threatened Nations in Push for Global Action*, REUTERS (June 9, 2020, 10:32 AM), https://www.reuters.com/article/us-climate-change-politics-bangladesh-tr-idUSKBN23G2NB.

5. Eric A. Strahorn, *The Bangladesh Liberation War*, ORIGINS: CURRENT EVENTS IN HISTORICAL PERSPECTIVE (Dec. 2021), https://origins.osu.edu/milestones/bangladesh-liberation-war?language_content_entity=en.

with this new country proving time and again its unique ability to confront adversity.[6]

Yet, concealed behind its burgeoning international reputation lies a democracy in decline.[7] Since 2014, Bangladesh's ruling party—the Awami League—has severely eroded Bangladesh's democratic institutions by criminalizing free speech and curtailing freedom of the press.[8] In an effort to intimidate political dissidents, the country has also witnessed a rise in enforced disappearances and extrajudicial killings.[9] Recently, the fairness of its elections has come under scrutiny

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6. *Haas: US Pays Tribute to Bangladesh for Overcoming Adversity*, DHAKA TRIB. (June 29, 2022, 8:48 AM), https://www.dhakatribune.com/foreign-affairs/2022/06/29/haas-us-pays-tribute-to-bangladesh-for-overcoming-adversity; *FM Momen: Bangladesh Knows How to Deal with Adversity*, DHAKA TRIB. (Dec. 25, 2021, 10:53 PM), https://www.dhakatribune.com/bangladesh/2021/12/28/fm-momen-bangladesh-knows-how-to-deal-with-adversity.

7. *See* Md Saidul Islam, *Trampling Democracy: Islamism, Violent Secularism, and Human Rights Violations in Bangladesh*, 8 MUSLIM WORLD J. HUM. RTS. 1 (2011). *See generally* M. Ehteshamul Bari, *The Incorporation of the System of Non-Party Caretaker Government in the Constitution of Bangladesh in 1996 as a Means of Strengthening Democracy, Its Deletion in 2011 and the Lapse of Bangladesh into Tyranny Following the Non-Participatory General Election of 2014: A Critical Appraisal*, 28 TRANSNAT'L L. & CONTEMP. PROBS. 27 (2018) (recounting Bangladesh's descent into tyranny post the 2011 dissolution of its non-party caretaker government) [hereinafter Bari, *Lapse of Bangladesh into Tyranny*]; Palash Kamruzzaman, *Bangladesh's Painful Journey to Democracy Is Still Far from Over,* THE CONVERSATION (Aug. 11, 2017 at 4:46 AM EDT), https://theconversation.com/bangladeshs-painful-journey-to-democracy-is-still-far-from-over-80498; Arafat Kabir, *Democracy in Bangladesh: It's Complicated*, DIPLOMATIC COURIER (Dec. 12, 2013), https://www.diplomaticourier.com/posts/democracy-in-bangladesh-it-s-complicated.

8. M. Ehteshamul Bari & Pritam Dey, *The Enactment of Digital Security Laws in Bangladesh: No Place for Dissent*, 51 GEO. WASH. INT'L L. REV. 595 (2019); Brad Adams, *Bangladesh Arrests Teenage Child for Criticizing Prime Minister*, HUMAN RIGHTS WATCH (June 25, 2020 11:00 PM EST), https://www.hrw.org/news/2020/06/26/bangladesh-arrests-teenage-child-criticizing-prime-minister; Michael Safi, *Bangladeshi Editor Who Faced 83 Lawsuits Says Press Freedom Under Threat*, THE GUARDIAN (May 18, 2017 at 3:12 AM EST), https://www.theguardian.com/world/2017/may/18/it-all-depends-on-how-i-behave-press-freedom-under-threat-in-bangladesh; *Press Freedom: Bangladesh Slips Two Notches*, THE DAILY STAR (Apr. 27, 2017 at 12:00 AM), https://www.thedailystar.net/backpage/media-never-under-so-much-threat-1397038.

9. U.S. DEP'T OF STATE, 2020 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: BANGLADESH (2020). *See also* HUMAN RIGHTS WATCH, DEMOCRACY IN THE CROSSFIRE (2014) [hereinafter HRW 2014 REPORT]; M. Ehteshamul Bari, *The Use*

as political parties wield partisan violence to secure and maintain power.[10]

However, the most alarming issue involves the ways in which Bangladesh has hampered its judiciary's autonomy, consequently restricting its citizens' rights to seek relief from the country's deteriorating human rights situation.[11] Indeed, over the past few decades, Bangladesh's judicial branch has become embroiled in the ruling party's political feuds.[12] This entanglement has led to concerns regarding the Awami League's motives for reactivating the International Crimes Tribunal ("ICT" or "Tribunal"), a Dhaka-based ad hoc war crimes tribunal tasked with trying the persecutors of Bangladesh's 1971 Liberation War.[13]

Before the formation of the ICT, Bangladesh achieved worldwide recognition for pioneering a novel solution to prosecuting 1971's war crimes. In 1972, the first Bangladeshi government authorized special tribunals to prosecute West Pakistani military commanders and collaborators, representing one of the earliest examples of domestic courts exercising jurisdiction over international crimes.[14] Three years

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of Enforced Disappearance in Bangladesh as a Tool of Political Oppression: Human Rights in Retreat, 29 MICH. ST. INT'L L. REV. 413 (2021).

10. Md. Aurongajeb Akond et al., *Parliamentary Election and Political Violence in Bangladesh*, 89 J. L. POL'Y & GLOBALIZATION 81 (2019); Press Release, *U.N. Secretary General, Secretary-General Concerned Over 'Wave of Violence' in Bangladesh, Urges Restraint, Dialogue Ahead of Elections*, U.N. Doc. No. SG/SM /15430 (Oct. 31, 2013). *See also* Bari, *Lapse of Bangladesh into Tyranny*, *supra* note 7; Abdul Jalil, *War Crimes Trial in Bangladesh: A Real Political Vendetta*, 3 J. POL. & L. 110, 111 (2010). *See generally* Nick Robinson & Narwar Sattar, *When Corruption is an Emergency: Good Governance Coups and Bangladesh*, 35 FORDHAM INT'L L. J. 737 (2012) (describing how Bangladesh's ruling parties have fought for political dominance since the 1990's, with the infighting culminating in a military coup that further entrenched the country in corruption).

11. *See infra* Part III.

12. *Id.*

13. *Id.* at Part III(B). *See also* Emran Hossain, *Trial of War Criminals Should Not Be Politicised, Used as Political Weapon*, THE DAILY STAR (May 16, 2009, 12:00 AM) https://www.thedailystar.net/news-detail-88432 (detailing an interview where Amnesty International's Asia Pacific Programme Director, Sam Zarifi, warns the Bangladeshi government against utilizing the ICT as "a political weapon"); Jalil, *supra* note 10, at 110.

14. *See infra* Part II. *See also* Jalil, *supra* note 10, at 110. Some scholars have referred to Bangladesh's ad hoc war crimes tribunals as the "Asian Nüremberg."

later the tribunals were dissolved and the accused were repatriated following the signing of the Delhi Agreement, which sought to improve relations between India, Pakistan, and Bangladesh.[15]

During this process, the Bangladeshi administration also enacted the International Crimes Tribunal Act of 1973 ("1973 ICT Act"), which granted subsequent governments the power to prosecute 1971's war criminals in a separate quasi-international forum.[16] In 2010, the Awami League utilized an amended version of the 1973 ICT Act to revive the Tribunal,[17] thus commencing a decade-long endeavor to bring justice to the war criminals of 1971.[18] However, the nearly 40-year gap between the ICT's conception and its spurious reactivation has left critics questioning the intentions underlying the Tribunal's reinstatement.[19] Now, revelations from the past decade have offered an intimate view into the ICT's proceedings, exposing a judiciary eager to secure convictions at the expense of defendants' fundamental human rights.[20]

When viewed in isolation, the ICT's procedural and substantive inadequacies could arguably be ascribed to typical flaws associated with a newly formed country's post-liberation reconstruction period.[21]

Khandker Tanbir, *The Normative Significance of the International Crimes Tribunal Legal Regime of Bangladesh* (Sept. 25, 2022) (unpublished manuscript) (on file at https://dx.doi.org/10.2139/ssrn.4319305).

15. *See infra* Part II.

16. *Id.*

17. The International Crimes (Tribunals) Act 1973 as amended in 2009 (Bangl.) [hereinafter ICT Statute].

18. Abdus Samad, *The International Crimes Tribunal in Bangladesh and International Law*, 27 CRIM. L. F. 257 (2016); David Manes, *Bangladesh Establishes Tribunal for 1971 War Crimes*, JURIST (Mar. 26, 2010), https://www.jurist.org/news/2010/03/bangladesh-establishes-tribunal-for/.

19. *See infra* Part II. *See also* Jalil, *supra* note 10, at 110; Mubashar Hasan, *Bangladesh's International Crimes Tribunal: a Critique of the Critics*, OPENDEMOCRACY (Mar. 12, 2012), https://www.opendemocracy.net/en/opensecurity/bangladeshs-international-crimes-tribunal-critique-of-critics/ ("[T]here is doubt about the honest intention of the [Awami League] government to complete this trial within the tenure of this regime . . . Criticism may emerge about how [Awami League] is over politicizing and exploiting a collective emotion of the majority through partisan politics.").

20. *See infra* Part III.

21. Indeed, Bangladesh's judicial deficiencies followed a trajectory common for decolonized states in post-liberation periods. Rounaq Jahan, *Bangladesh in 1972:*

Yet, when these flaws are considered in conjunction with the unearthed evidence of the Tribunal's judicial misconduct,[22] serious doubts arise as to the ICT's legitimacy. In light of these revelations, it is necessary for the international community to confront three sobering realities:

First, the lack of accountability for corruption within the ICT enables autocratic governments to exploit the power of quasi-international tribunals to advance their own political agendas.[23] Second, the overt manipulation of due process by the Tribunal underscores a fundamental disregard for human rights, with the international community's acquiescence to such posing an ominous threat to democracy at large.[24] And finally, global tolerance toward the ICT's transgressions sets a dangerous precedent, one which may embolden other dictatorial regimes to undermine the judicial integrity required to uphold our international order.[25] Therefore, it is crucial that government bodies and individual citizens collaborate in order to rectify the Tribunal's corrupt practices and restore legitimacy to Bangladesh's court systems.

The first step in this process is to ensure justice is secured for those who have suffered from the ICT's malpractices. The chair of Bangladesh's National Human Rights Commission alluded to this duty to pursue justice by presenting the following question during the commission's establishment: *"What else could be the reason for hav-*

Nation Building in a New State, 13 ASIAN SURVEY 199, 200 (1973) ("Like many other new states, Bangladesh at its birth faced the formidable problem of simultaneously building an input and an output sector—both a state apparatus and a political community."). *See also* Petra Goedde, *Decolonization and the Evolution of International Human Rights: Review*, 33 HUM. RTS. QUARTERLY 563, 565 (2011) ("As human rights advocates increasingly focused on the global protection of individual rights, the newly independent states adopted a seemingly contradictory position . . . many of them became frequent violators of their own citizens' human rights."). For a more comprehensive view on the issue, *see generally* RONALD H. SPECTOR, A CONTINENT ERUPTS: DECOLONIZATION, CIVIL WAR, AND MASSACRE IN POSTWAR ASIA, 1945–1955 (2022).

22. *The Trial of the Birth of a Nation*, THE ECONOMIST (Dec. 15, 2012), https://www.economist.com/news/briefing/21568349-week-chairman-bangladeshs-international-crimes-tribunal-resigned-we-explain [hereinafter The *Economist* Exposé].

23. *See infra* Part III.

24. *Id.*

25. *Id.* at Part V.

ing a state other than [the] full realization of human rights?"[26] Due to Bangladesh's reluctance to address issues involving the Tribunal, progress toward justice may appear daunting for accused and convicted defendants. However, it is important to bear in mind that the strength and resilience that arose from Bangladesh's victory in 1971 were not inherited by its government, but by its people. Through this inherited inspiration, this Comment intends to empower not only the individuals who have been unjustly imprisoned by the ICT, but the citizens of all autocratic nations who fear the consequences that may follow from efforts to effect meaningful change.

In the wake of current widespread calls urging governments to redress systemic injustices,[27] the significance of refocusing global attention upon the ICT's injustices is uniquely imperative at this moment. This call to attention is reinforced by the ongoing discourse surrounding the future framework and administration of a Ukrainian-Russian war crimes tribunal.[28] As such, the present moment offers a prime opportunity for human rights advocates to garner the public pressure needed to bring justice for the ICT's accused—now, it is incumbent upon the Bangladeshi people to seize it.

This Comment will explore the post-colonial narrative of Bangladesh's history and how the country's past and present sociopolitical climate have contributed to the ICT's shortcomings. Part I will provide an account of the development of ad hoc war crimes tribunals and the resulting controversies stemming from their political liabilities. Part II will delve into the circumstances of the 1971 Liberation War, how it led to the establishment of the ICT, and how the political context of the Tribunal's reactivation continues to exert influence over its proceedings.

Following its history, Part III will analyze how the ICT's statute, rules of evidence and procedure, and judicial misconduct fail to meet international standards of due process and fair proceedings. Lastly,

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26. NAT'L HUM. RTS. COMM'N OF BANGLADESH (JAMAKON), ANNUAL REPORT (2014).

27. Audra D. S. Burch et al., *The Death of George Floyd Reignited a Movement. What Happens Now?*, N.Y. TIMES (Apr. 20, 2021), https://www.nytimes.com/2021/04/20/us/george-floyd-protests-police-reform.html; Cameron Abadi, *Iran's Revolutionary Year*, FOREIGN POL'Y (Dec. 25, 2022), https://foreignpolicy.com/2022/12/25/iran-protest-revolution-2022-raisi-irgc/.

28. *See infra* Part V.

Part IV will contribute to the literature on the ICT by detailing post-conviction pathways that remaining defendants may utilize to seek justice for the Tribunal's infringement of their human rights and to encourage the reformation of the nation's judicial system. The Comment concludes in Part V with a note of caution to those formulating future war crimes tribunals, as well as a call for hope that the lessons learned from the ICT's injustices will inform transitional justice in the years to come.

I. THE HISTORY AND CONTROVERSIES OF AD HOC WAR CRIMES TRIBUNALS

For centuries, war has been employed as a means to defend territories from aggressive encroachment and emancipate individuals from oppressive regimes.[29] Despite diplomacy's advancements, war remains a devastating constant of the human condition, and in the midst of war, countless atrocities manifest, many of which escaped legal consequences until recent times.[30] Indeed, although war is not novel to the modern era, war crimes are.[31] It was not until the 19th century that the international community outlawed certain acts of war, including military operations targeting civilians or resulting in a disproportion-

29. *See generally* OSCAR CROSBY, INTERNATIONAL WAR: ITS CAUSES AND ITS CURE (1919).

30. 2 L. OPPENHEIM, INTERNATIONAL LAW 368 (8th ed., 1955); ROBERT CRYER, *Selectivity and the International Criminal Law Regime*, in PROSECUTING INTERNATIONAL CRIMES 364 (2005). As Marcus Tullius Cicero remarked during the fall of the Roman Republic: *"Silent enim l g s inter arma.*" (Latin: *"When arms speak, the law are silent."*) MARCUS TULLIUS CICERO, PRO MILONE (N. H. Watts trans., 1931). The history associated with this quote and its orator reveals much about the politics behind war crime prosecutions. *See* Jose Miguel Banos, *The Brutal Beheading of Cicero, Last Defender of the Roman Republic,* NAT'L GEOGRAPHIC (Apr. 9, 2019, 12:37 AM BST), https://www.nationalgeographic.co.uk/history-and-civilisation/2019/02/the-brutal-beheading-of-cicero-last-defender-of-the-roman-republic.

31. *See generally* HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR (1948). Poignantly, the remnants of Cicero's Rome led to the establishment of the first war crimes tribunal. Gillian Brockell, *Russians Could Face War Crimes Tribunal. The First One, in 1474, Ended in a Beheading.* WASH. POST (Mar. 14, 2022), https://www.washingtonpost.com/history/2022/03/14/war-crimes-peter-von-hagenbach/.

ate level of harm.[32] In the 20th century, measures were taken to prosecute violations of these war crimes through the establishment of war crimes tribunals.[33]

Among the types of tribunals that emerged from this development, ad hoc war crimes tribunals—also referred to as hybrid tribunals—became the most prevalent.[34] Introduced in the 1990s, these quasi-international tribunals operate through a country's domestic jurisdiction to prosecute individual actors for their participation in transnational war crimes.[35] Over the past three decades, the United Nations ("U.N.") has sanctioned the creation of ad hoc tribunals to address a multitude of atrocities that have transpired around the world, including the genocides that have taken place in Kosovo, Bosnia and Herzegovina, East Timor, Sierra Leone, Cambodia, and Lebanon.[36] In addition, countries such as Iraq and Bangladesh have initiated ad hoc tribunals through domestic decrees, giving their national courts the authority to try international crimes.[37]

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32. OPPENHEIM, *supra* note 30, at 368. *See generally* Paris Declaration Respecting Maritime Law, April 16, 1856; Convention (II) with Respect to the Laws and Customs of War on Land (The Hague) 29 July 1899, 32 Stat. 1803.

33. *See* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; Conventions (IV) on the Laws and Customs of War on Land (The Hague), Oct. 18, 1907; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277. *See generally* HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR (1948).

34. SHELDON GLUECK, WAR CRIMINALS, THEIR PROSECUTION AND PUNISHMENT 79 (1944). *See also* Sheldon Glueck, *By What Tribunal Shall War Offenders Be Tried?*, 56 HARV. L. REV. 1059 (1942).

35. *Ad Hoc Tribunals*, INTERNATIONAL COMMITTEE OF THE RED CROSS (Oct. 29, 2010), https://www.icrc.org/en/document/ad-hoc-tribunals [hereinafter ICRC Ad Hoc Tribunals Information]. In World War II, the international community limited international forums to offenses in which all states held neutral grounds for jurisdiction, and no preference for domestic proceedings existed. *Declaration of German Atrocities*, 228 DEPARTMENT OF STATE BULLETIN 311 (1943) https://archive.org/details/sim_department-of-state-bulletin_1943-11-06_9_228/page/310/mode/2up (". . . [M]embers of the Nazi party who have been responsible for . . . atrocities . . . will be sent back to the countries in which their abominable deeds were done in order that they may be judged . . . according to the laws of these liberated countries[.]").

36. ICRC Ad Hoc Tribunals Information, *supra* note 36.

37. Michael A. Newton, *The Iraqi High Criminal Court: Controversy and Contributions*, 88 INT'L REV. OF THE RED CROSS 399, 401 (2006). There is, however,

If robustly constructed and properly administered, war crimes tribunals offer incomparable relief to the victims of mass atrocities, providing international recognition of the victims' suffering while simultaneously constructing a historical narrative of the war crimes themselves.[38] However, the reality of war crimes tribunals often fall short of their ambitions to administer impartial justice. Beginning with the Nüremberg and Tokyo trials, the geopolitical interests of WWII's victors frequently overshadowed the tribunals' restorative intentions.[39]

International political experts observed that in Nüremberg, the Allied powers immunized their own war criminals from standing trial while exclusively prosecuting Axis leaders.[40] Furthermore, in exchange for their research expertise in weapons development, the United States dismissed charges against German and Japanese scientists accused of human experimentation.[41] Although tribunals such as the International Criminal Tribunal for the former Yugoslavia ("ICTY") have been hailed for their fairness,[42] *realpolitiking* has permeated al-

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a prominent distinction between U.N.-sponsored hybrid war crimes tribunals and domestic *ad hoc* tribunals—namely in the independence of the judiciary—which makes domestic hybrid tribunals more susceptible to internal strife and improper government influence. Suzannah Linton, *Completing the Circle: Accountability for the Crimes of the 1971 Bangladesh War of Liberation*, 21 CRIM. L.F. 191, 210 n.86 (2010) [hereinafter Linton, *Completing the Circle*].

38. M. OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW 240 (2000); Michael P. Scharf & Paul R. Williams, *The Functions of Justice and Anti-justice in the Peace-building Process*, 35 CASE W. RSRV. J. INT'L L. 161, 175 (2003).

39. RICHARD H. MINEAR, *Problems of Legal Process* in VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIBUNAL 76 (1971). *See also* Otto Kranzbuhler, *Nüremberg Eighteen Years Afterwards,* 14 DEPAUL L. REV. 333, 345–46 (1965); Michael P. Scharf, *Have We Really Learned the Lessons of Nüremberg?*, 149 MIL. L. REV. 65, 70 (1995).

40. DAVID P. FORSYTHE, HUMAN RIGHTS IN INTERNATIONAL RELATIONS 157 (Cambridge Univ. Press ed., 2000) ("Soviet military personnel committed perhaps 100,000 rapes in Berlin after the defeat of the Nazis. Rapes were systematic practice, yet no commanding officers, much less lower ranking soldiers, were ever held accountable. The Soviet Union then sat in judgment of the Germans at Nuremburg.").

41. *Id.* at 158.

42. James Podgers, *A Victory for Process*, A.B.A. J. (July 1997), https://1.next.westlaw.com/Document/I7def0d7149ad11db99a18fc28eb0d9ae/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search).

most every war crimes tribunal,[43] even in the highest of international courts.[44] A phrase notoriously written by Hermann Göring on the cover of his indictment from the International Military Tribunal at Nüremberg delivers an astute summation of the issue: *"The victor will always be the judge and the vanquished the accused."*[45]

Due to their domestic nature, ad hoc tribunals remain acutely vulnerable to *realpolitiks*. Ad hoc tribunals may be initiated through two mechanisms: under mandates ordered by the U.N. or under a country's domestic law.[46] Tribunals operating through the U.N. Security Council are traditionally comprised of a mixed panel of local, foreign, and international justices,[47] which may safeguard the forums from undue

43. *Realpolitik*—which directly translates to "realist politics"—is described by political philosophers as "power-politics," or the pragmatism underlying the political decisions that allow States to retain power. Peter Viereck, *Realpolitik: Fichte, Hegel, and Treitschke,* J. SOC. PHIL. 326, 326 (1941).

44. Max du Plessis & Christopher Gevers, *The Sum of Four Fears: African States and the International Criminal Court in Retrospect – Part I*, OPINIOJURIS (Aug. 07, 2019), http://opiniojuris.org/2019/07/08/the-sum-of-four-fears-african-states-and-the-international-criminal-court-in-retrospect-part-i/. In the International Criminal Court ("ICC"), scholars have critiqued the Court's disproportionate focus on indicting leaders of developing states while remaining apprehensive to investigate "the great powers." FINAL JUDGMENT, THE INDEPENDENT TRIBUNAL INTO FORCED ORGAN HARVESTING FROM PRISONERS OF CONSCIENCE IN CHINA 6, n.6 (Mar. 1, 2020) [hereinafter PEOPLE'S TRIBUNAL OF CHINA, JUDGMENT], https://chinatribunal.com/wp-content/uploads/2020/03/ChinaTribunal_JUDGMENT_1stMarch_2020.pdf. *See also* ARYEH NEIER, THE INTERNATIONAL HUMAN RIGHTS MOVEMENT: A HISTORY 266 (Princeton Univ. Press, 2012). However, scholars also recognize that the ICC serves as an important judicial forum for countries facing obstacles in developing adequate judicial safeguards against corruption in their own criminal proceedings. *See* Stephanie Hanson, *Africa and the International Criminal Court*, COUNCIL ON FOREIGN RELATIONS (July 24, 2008), https://www.cfr.org/backgrounder/africa-and-international-criminal-court.

45. JOSEPH E. PERSICO, INFAMY ON TRIAL 83 (1994). Indeed, even present-day judicial experts voice "concerns about whether if [the Nüremberg trials] took place today it would correspond with our notion of what are considered universally acceptable norms for fair trial." *Id. See also* Jennifer Venis, *Accounting for atrocities*, INT'L BAR ASS'N (Feb. 5, 2021), https://www.ibanet.org/article/EB27B19D-7E53-415A-B78E-200E4DD2A893.

46. SARAH WILLIAMS, HYBRID AND INTERNATIONALIZED CRIMINAL TRIBUNALS: SELECTED JURISDICTIONAL ISSUES 204 (2012).

47. *Id*.

government influence.[48] Hybrid tribunals initiated through domestic law, however, often operate without international oversight, rendering them susceptible to manipulation by authoritarian regimes.[49] Nevertheless, each type of hybrid tribunal is sensitive to the will of political pressure as its domestic benches deliver international justice.

Most recently, the Iraqi High Tribunal ("IHT") received international repudiation for its hybrid proceedings.[50] The Interim Iraqi Governing Council created the IHT to prosecute Saddam Hussein and other prominent Ba'athists for the war crimes committed under Hussein's rule against the Kurdish population.[51] Unfortunately, the country's internal politics significantly hindered the IHT's proceedings, leading the tribunal's international collaborators to withdraw their involvement in its affairs.[52] In its reports on the IHT, the International Center for Transitional Justice—one of the few remaining nongovernmental organizations monitoring the IHT—noted that defendants must confront "impossibly vague charges, and a . . . failure to accommodate defence testimony[.]"[53] Similar allegations of government interference have been made against U.N.-sanctioned hybrid tribunals in Cambodia, Sierra Leone, East Timor, and Lebanon.[54]

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48. Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT'L & COMP. L. 347, 356 (2006).

49. EUGENE DAVIDSON, THE TRIAL OF THE GERMANS: NÜREMBERG 1945–1946, 2–3 (1969). *See also* Newton, *supra* note 37, at 401.

50. Sonya Sceats, *The Iraqi High Tribunal Post-U.S. Involvement,* OPINIOJURIS (Apr. 30, 2008), https://opiniojuris.org/2008/04/30/the-iraqi-high-tribunal-post-us-involvement/. *See also* Michael P. Scharf, *The Iraqi High Tribunal: A Viable Experiment in International Justice?* 5 J. INT'L CRIM. JUST. 258, 258 (2007).

51. Newton, *supra* note 37, at 401. The Iraqi government finalized the IHT statute in 2003 after extensive negotiations that placed the rights to fair trial and due process at the center of the discussions. *Id*. at 402.

52. Sceats, *supra* note 50.

53. *Id. See also* INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, THE ANFAL TRIAL AND THE IRAQI HIGH TRIBUNAL UPDATE NUMBER THREE: THE DEFENSE PHASE AND CLOSING STAGES OF THE ANFAL TRIAL 17 (2006) https://www.ictj.org/sites/default/files/ICTJ-Iraq-Anfal-Tribunal-2006-English2.pdf.

54. CAITLIN REIGER, *Hybrid Attempts at Accountability for Serious Crimes in Timor Leste*, in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE 143, 164 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006); Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in*

Though borne from different circumstances, Bangladesh's ICT faces comparable challenges to Iraq's IHT, becoming yet another ad hoc tribunal suffering under the grievances of *realpolitiks*. Bangladeshi scholars have proposed that the evaluation of the ICT's proceedings should occur with the country's political and cultural landscape in mind, and that critics of the Tribunal must be cognizant of the power dynamics present in Western critiques of Eastern affairs.[55]

Moreover, scholars have also suggested that the international community's reluctance to criticize the ICT originates from the widespread support the Tribunal enjoys among Bangladesh's citizens.[56] Indeed, it is indisputable that the Bangladeshi people's support of the ICT must be factored in when ascertaining the viability of certain legal options available to defendants.[57] However, the constraints on dissent imposed by the Bangladeshi government and the repercussions human rights activists face when contesting the Tribunal's judgments have essentially made popular support for its proceedings obligatory.[58]

Regarding the lens through which ICT's critics should assess the Tribunal's flaws and devise remedies for its injustices, it is pertinent

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International Justice, 12 CRIM. L.F. 185, 186 (2001); Charles T. Call, *Is Transitional Justice Really Just?* 11 BROWN J. WORLD AFF. 101, 107–109 (2004).

55. Hasan, *supra* note 19. In an open letter to the ICT's critics, Hasan asserts that "chief critics have dehistoricized the context in which the [ICT's] trial[s] [are] taking place . . . expressing disdain in terms which position Bangladesh as the under-developed, untrustworthy 'Other'." *Id.* Regarding the ethical standpoint of critics, Hasan opines on how the moralistic viewpoint from which critics assess the proceedings derives exclusively from a Western idea of ethics, claiming "[m]orality is a myth closely related with power." *Id*. Specifically, Hasan perceives Western critics as "intentionally or unintentionally avoid[ing] [the] global reality and see[ing] the role of [Bangladesh's] media in terms of the underdeveloped Other[.]" *Id.*

56. *Id.* (". . . [I]t is due to this overwhelming popular support for the trial that the international community . . . is not stepping beyond occasional criticism of the ICT.") However, other scholars have asserted that the lack of attention toward Bangladesh's tribulations originates from the general disinterest geopolitics has toward a "financially destitute and on the margins" nation. Aldo Borda & Sajib Hosen, *The Challenges of Long-Delayed Prosecutions in Fighting Impunity in Bangladesh*, 35 LEIDEN J. INT'L L. 987, 989 (2022) (referencing A. L. Debnath, *British Perceptions of the East Pakistan Crisis 1971: "Hideous Atrocities on Both Sides"?* 13 J. GENOCIDE RSCH. 421, 424 (2011).

57. *See infra* Part IV.

58. *Id.* at Part III.

to consider Bangladesh's historical development in combination with Western critiques of the country's growing autocracy.[59] Although international criminal tribunals have received criticism for their disproportionate prosecutions of non-Western leaders, experts in international criminal law acknowledge the importance these tribunals hold to the development of transitional justice.[60] Human rights scholars have agreed that "[r]ights . . . are ethical norms with a legal content that requires that they should be honored and enforced by public institutions."[61]

As such, the evaluative framework through which critics must scrutinize the ICT's proceedings derives from the legal content and ethical norms that govern the Tribunal's legislative history, a history which predominantly conformed to Western traditions.[62] Thus, it is appropriate for scholars to examine the ICT's shortcomings through a Western perspective on international human rights law. In this context, the recurring failure of Bangladesh to address its institutional human rights abuses illustrates how the Tribunal's flaws emanate from the country's systemic weaknesses.[63]

In order to ensure lasting change, it is important that scholars adopt a comprehensive approach to the issues vexing the ICT that will eliminate its problems at their core.[64] As this next section will demonstrate, this entails a detailed examination of the historical context in which the Tribunal was created, which will provide the groundwork required to understand the way forward for its defendants.

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59. *Id.* at Parts II, III, and IV.

60. *See* PEOPLE'S TRIBUNAL OF CHINA, JUDGMENT, *supra* note 44. *See also* Hanson, *supra* note 44.

61. ARYEH NEIER, THE INTERNATIONAL HUMAN RIGHTS MOVEMENT: A HISTORY 63 (Princeton Univ. Press, 2012).

62. *See infra* Part III(A). *See also* M. RAFIQUL ISLAM, *Substantial Law of the International Crimes Tribunal (Bangladesh)*, in BANGLADESH AND INTERNATIONAL LAW 234 (Mohammad Shahbuddin ed., 2021).

63. *See infra* Part III.

64. *Id.* at Part IV.

II. BANGLADESH'S LIBERATION WAR AND THE INTERNATIONAL CRIMES TRIBUNAL

Prior to 1971, Bangladesh was known as East Pakistan, a non-contiguous region of Pakistan which was politically subordinate to—yet geographically, culturally, and linguistically distinct from—its Western counterpart.[65] Following Pakistan's partition from India in 1947, East and West Pakistan existed as an amalgamated territory and were administered as a single entity under a centralized government based in West Pakistan.[66] However, approximately 1,000 miles separated Islamabad, the capital of Pakistan, from Dhaka, the urban center of East Pakistan and the current capitol of Bangladesh.[67]

A. The 1971 Liberation War

For decades, East Pakistanis lived under the oppression of West Pakistan, and over time, sentiments for secession grew.[68] The genesis of Bangladesh's freedom movement can be traced back to 1952 when the Pakistani government attempted to designate Urdu as its official language.[69] Desiring equal recognition from West Pakistan, the people of East Pakistan launched the Bengali Language Movement,[70] petitioning the Pakistani central government to recognize Bangla as an additional state language.[71] After months of violent confrontations and

65. Eric A. Strahorn, *The Bangladesh Liberation War,* ORIGINS (Dec. 2021), https://origins.osu.edu/milestones/bangladesh-liberation-war?language_content_entity=en [hereinafter *Bangladesh's History*].

66. *Id*.

67. *Id*. For a map to aid in conceptualizing the separation between the two regions, *see* Mark Dummett, *Bangladesh War: The Article That Changed History*, BBC NEWS (Dec. 16, 2011) https://www.bbc.com/news/world-asia-16207201.

68. *Bangladesh's History*, *supra* note 65.

69. *Id*.

70. *Language Movement*, BANGLAPEDIA (June 18, 2021), https://en.banglapedia.org/index.php/Language_Movement [hereinafter *Bangladesh's Language Movement*].

71. Sanoj Rajan, *Domestication of International Criminal Law: International Crimes Tribunal of Bangladesh, A Case Study*, 13 ISIL Y.B. INT'L HUMANITARIAN & REFUGEE L. 132, 143 (2013). Notably, Bangladesh is the first state to have fought for its language, with UNESCO proclaiming February 21 as International Mother Language Day in honor of Bangladesh's Language Movement. *See International*

student-led protests, the Movement succeeded in its initiative;[72] yet, this cultural victory further fractured the region.

East Pakistan's political opposition gained additional momentum after the 1970 Bhola cyclone, which claimed the lives of an estimated 300,000 East Pakistanis.[73] In the aftermath of the natural disaster, political leaders in East Pakistan accused the central government of deliberately depriving humanitarian aid to the region.[74] Government strikes led by the Awami League—the majority party of East Pakistan—exacerbated tensions within the polarized country.[75] On December 7, 1970, the opposition movement culminated in political upheaval when the Awami League won Pakistan's general elections.[76] Following this victory, Pakistan People's Party actively prevented Awami League's leader, Sheikh Mujibur Rahman, from assuming office, with negotiations between the two parties remaining at an impasse for months.[77]

On March 25, 1971, Mujibur Rahman delivered a historic radio broadcast that declared Bangladesh's independence from Pakistan, marking the beginning of the Liberation War.[78] This proclamation

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Mother Language Day, BANGLAPEDIA (June 18, 2021), https://en.banglapedia.org/index.php/International_Mother_Language_Day.

72. *Bangladesh's Language Movement*, *supra* note 70.

73. Raza Naeem, *Fifty Years of the Cyclone That Triggered a Civil War and Created Bangladesh*, THE WIRE (Nov. 11, 2020), https://thewire.in/history/cyclone-bhola-mujibur-rahman-bangladesh-liberation-yahya-khan-pakistan.

74. *Id*. To learn more about the cyclone and its aftereffects, *see* SCOTT CARNEY & JASON MIKLIAN, THE VORTEX: THE TRUE STORY OF HISTORY'S DEADLIEST STORM AND THE LIBERATION OF BANGLADESH (2022).

75. Naeem, *supra* note 73.

76. *Bangladesh: The Pakistani Period*, BRITANNICA (last visited May 2, 2023), https://www.britannica.com/place/Bangladesh/The-Pakistani-period-1947-71 [hereinafter *The Pakistani Period*]. *See also* Delwar Hussain, *Prosecute Bangladesh's War Criminals*, THE GUARDIAN (Oct. 7, 2009), https://www.theguardian.com/commentisfree/2009/oct/07/bangladesh-war-crimes.

77. *The Pakistani Period*, *supra* note 76.

78. *Declaration of Independence*, BANGLAPEDIA (June 18, 2021), https://en.banglapedia.org/index.php?title=Declaration_of_Independence. Although impactful, the declaration urged East Pakistanis to utilize violence as a means to achieve their self-determination:

> This may be my last message, from today Bangladesh is independent. I call upon the people of Bangladesh wherever you might be and with what-

served as the catalyst precipitating the launch of "Operation Searchlight," a military campaign devised by the incumbent Pakistani government during the period of political turmoil and transitional impasse that preceded Mujibur Rahman's declaration.[79]

Beginning the evening of March 25, 1971, the operation involved egregious human rights abuses, including the mass persecution, rape, and extrajudicial killings of Bangladeshi liberation supporters by West Pakistani government officials and their local collaborators.[80] These collaborators included *Al-Badr* and *Al-Shams* forces—which were militias formed by Jamaat-e-Islami supporters and West Pakistan's secret service—and *Razakars*, who were fighters with no direct political affiliations.[81] India intervened and provided support to the East Pakistani rebels as persecuted Buddhist and Hindu Bengalis fled to its borders.[82]

While Operation Searchlight targeted pro-Bangladeshi civilians, Bengali fighters and Indian guerilla forces responded with retaliatory attacks against the pro-Pakistani Bihari civilians residing in East Pakistan.[83] Experts on the conflict noted that in some instances, these actions bore a resemblance to the severity of the attacks West Pakistani soldiers carried out against Bengalis, thus potentially constituting war

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> ever you have, to resist the army of occupation to the last. Your fight must go on until the last soldier of the Pakistan occupation army is expelled from the soil of Bangladesh and final victory is achieved. *Id.*

79. Rajan, *supra* note 72, at 144. The estimated war toll ranged from hundreds of thousands to almost three million lives lost, with the most condemned casualties amassing during West Pakistan's systematic execution of Bengali intelligentsia. *Id*. Furthermore, approximately 200,000 to 400,000 East Pakistani women were systematically raped, tortured, and forced to give birth by West Pakistani militia. SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE 81 (1975). For a more detailed account of "Operation Searchlight," including the actions the United States failed to take to prevent the massacre, see ARCHER BLOOD, THE BLOOD TELEGRAM: NIXON, KISSINGER, AND A FORGOTTEN GENOCIDE (2013). *See also* Harold H. Saunders, *What Really Happened in Bangladesh: Washington, Islamabad, and the Genocide in East Pakistan*, 93 FOREIGN AFF. 36 (2014).

80. Rajan, *supra* note 71, at 144.

81. *Id*.

82. *Id*. at 145. *See also* SHARMILA BOSE, DEAD RECKONING: MEMORIES OF THE 1971 BANGLADESH WAR 12, 73 (2011).

83. S. M. Hali, *The Forgotten Biharis in East Pakistan*, DAILY TIMES (Dec. 26, 2020), https://dailytimes.com.pk/705972/the-forgotten-biharis-in-east-pakistan/.

crimes.[84] After weeks of battle and months of widespread human rights violations committed by both factions, the West Pakistani military surrendered in Dhaka on December 16, 1971.[85] After 19 years of turmoil, Bangladesh had finally achieved its independence.

B. The Formation of the Tribunal

Although Bangladesh emerged from the carnage of 1971 as a new state, it was forced to reckon with the anguish of a mourning population and the institutional challenges that accompanied the aftermath of a civil war.[86] Dhaka immediately sought accountability for the atrocities perpetrated by West Pakistan and its collaborators, with its officials calling upon the U.N. to "form an international tribunal to investigate and determine the magnitude of the genocide committed by the Pakistani army."[87] In order to initiate these proceedings, the U.N. Sec-

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84. Indeed, some news reports documented Bengali militias "summarily executing a group of captured *Razakar* paramilitary forces who were [sic] claimed to be *Biharis*." Rajan, *supra* note 71, at 145 (referencing H. Stanhope, *Mukti Bahini Bayonet Prisoners After Prayers*, THE LONDON TIMES (Dec. 20, 1971)).

85. *The Pakistani Period*, *supra* note 76.

86. International scholars recognize that the destabilizing consequences following from civil strife impose significant stress on a state's ability to assert sovereign authority over its emancipated region. Andrew Thompson, *Humanitarian Principles Put to the Test: Challenges to Humanitarian Action During Decolonization*, 97 INT'L REV. RED CROSS 45 (2015). Thus, the primary objectives of states overcoming civil war is to establish juridical sovereignty—or its exclusive authority over its political and governmental affairs—and empirical sovereignty—or its legitimate authority originating from its constituents' public approval. *See* Michael Barnett, *The New United Nations Politics of Peace: From Juridical Sovereignty to Empirical Sovereignty*, 1 GLOB. GOVERNANCE 79 (1995). In Bangladesh's instance, constituting a special tribunal established both its juridical legitimacy as a sovereign political entity and its empirical legitimacy as a trusted authority for its newly liberated people.

87. Ashfaque Hossain & Umme Wara, *The United Nations and the International War Crimes (Tribunal) Act 1973 (ICT-BD)**, ACADEMIA, https://www.academia.edu/es/10814355/The_United_Nations_and_the_International_War_Crimes_Tribunal_Act_1973_ICT_BD_ (Oct. 2021). Prior to this request, the U.N. Secretary-General launched the United Nations East Pakistan Relief Operation in December 1971 to provide humanitarian aid to the region. *See United Nations Relief Operations in Dacca/Bangladesh*, U.N. ARCHIVES AND RECORD MANAGEMENT SYSTEM, https://search.archives.un.org/united-nations-relief-operations-in-dacca-bangladesh. However, it is unclear whether these relief efforts launched genocide investigations simi-

retary-General, the Prime Minister of Bangladesh, and the President of Pakistan exchanged correspondence specifying that Bangladesh would "[try accused persons] according to internationally recognized procedures."[88]

In 1972, Bangladesh enacted the Collaborators (Special Tribunals) Order ("Collaborators Act"),[89] which established one-panel special tribunals with exclusive jurisdiction to prosecute war crimes committed by Bangladeshi citizens who collaborated with West Pakistani during the 1971 Liberation War.[90] Under the auspices of domestic law, the special tribunals conducted proceedings from January 1972 to 1973.[91] Notably, this rapid initiation of an ad hoc war crimes tribunal offered Bangladeshi victims immediate remedies by delivering justice without delay.[92] During this time, the Bangladeshi government brought charges against approximately 37,000 individuals for various

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lar to those conducted by U.N. experts in Cambodia, Sierra Leone, and Lebanon. *See also* Hans Corell, *Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea*, U.N. AUDIOVISUAL LIBR. OF INT'L L. (2003) (Cambodia's investigations); S.C. Res. 1315 (2000), U.N. Doc. No. S/RES/1315 (2000) (Aug. 14, 2000) (Sierra Leone's investigations); S.C. Res. 1664 (2006, U.N. Doc. No. S/RES/1664 (2006) (Mar. 29, 2006) (Lebanon's investigations).

88. Hossain & Wara, *supra* note 87 (quoting *Mr. Roberto Gayer's visit to subcontinent*, U.N. ARCHIVES N.Y., U.N. Doc. Series S 1072/5/7 (1972)).

89. Bangladesh Collaborators (Special Tribunals) Order, 1972 (Bangl.).

90. This law was one of the first of its kind in the international community to establish an ad hoc war crimes tribunal within a domestic court system. Linton, *Completing the Circle*, *supra* note 37, at 206–07.

91. *Id*. at 205.

92. In 1973, however, Prime Minister Sheikh Mujibur Rahman granted general amnesty to the indicted, with the exception of "[t]hose who were punished for or accused of rape, murder, attempt to murder, or arson*." Id.* at 205–06 (quoting Humayun Reza, *War Crimes & Genocide in 1971: The Reality of the Trial*, paper presented at the International Conference on Genocide, Truth and Justice, Dhaka, Bangladesh, Mar. 1–2, 2008, CONFERENCE PROCEEDINGS, 57 (2008)). The amnesty came as a result of a negotiated tripartite agreement between Bangladesh, Pakistan, and India, where "[195 Pakistan prisoners would be] repatriated to Pakistan in return for Pakistan's recognition of Bangladesh." Rajan, *supra* note 71, at 146. *See also* Case Concerning Trial of Pakistani Prisoners of War (Pak. v. India), Order, 1973 I.C.J. 347 (Dec. 15, 1973).

war crimes, prosecuting almost 3,000 cases, delivering 752 convictions, and issuing 2,096 acquittals.[93]

However, scholars have recently discovered that the individuals tried under the Collaborators Act encountered similar substantive and procedural due process obstacles as defendants later tried by the ICT.[94] For example, the tribunals failed to charge the Bangladeshis who indiscriminately executed East Pakistani Biharis,[95] foreshadowing the beginning of the country's struggle to uphold judicial impartiality in its legal proceedings. Indeed, the resemblance between the due process inadequacies for both the accused charged under the Collaborators Act and those charged under the ICT Statute reveal recurring systemic flaws in Bangladesh's legal system.

In an attempt to establish an alternative apparatus for accountability, Bangladesh passed the 1973 International Crimes Tribunal Act ("1973 ICT Act"), which served a similar function to the Collaborators Act but consolidated the adjudicatory forums into a single three-panel tribunal.[96] In 1975, the tribunals established under the Collaborators Act were dissolved following Prime Minister Mujibur Rahman's assassination.[97] Although formed prior to the Collaborators Act's dissolution, the ICT's proceedings remained paused for four decades until the Awami League reactivated the ad hoc tribunal in 2009.[98] Under the leadership of the daughter to the late Prime Minister, the Awami League promised to prosecute 1971's fugitive war criminals.[99] In 2010, the administration commenced the Tribunal's investigations and indictments,[100] and in 2012, a second Tribunal was established to expedite trials.[101]

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93. Linton, *Completing the Circle*, *supra* note 37, at 205.

94. *Id*. (referencing Sara Hossain, *A Long and Winding Road: Justice and Accountability for War Crimes in 1971*, paper presented at the International Conference on Genocide, Truth, and Justice, Dhaka, Bangladesh, Mar. 1–2, 2008, CONFERENCE PROCEEDINGS 53 (2008)). *See also infra* Part III.

95. Hali, *supra* note 83.

96. The International Crimes (Tribunals) Act, Act No. XIX of 1973 (Bangl.).

97. Linton, *Completing the Circle*, *supra* note 37, at 207.

98. ICT Statute, *supra* note 17.

99. Rajan, *supra* note 71, at 148.

100. *Id.*

101. ABDUR RAZZAQ, *The Tribunals in Bangladesh* in TRIALS FOR INTERNATIONAL CRIMES IN ASIA 341 (Kirsten Sellars ed., 2015).

However, the government's pattern of arrests, the arrestee's pre-trial conditions, and the gravity of the Tribunal's sentences have raised alarm within the international community.[102] Legal experts have also identified several deficiencies within the ICT's legislation. The initial criticisms surrounding the ICT Act included: (1) the use of outdated language which did not correspond with other international tribunal's statutes, (2) a failure to prosecute the individuals who commissioned attacks against the Biharis, (3) the elimination of fundamental due process protections through amendments to Bangladesh's constitution, and (4) the lack of provisions to submit interlocutory appeals or challenge the Tribunal's jurisdiction.[103] Although human rights agencies have called upon the Bangladeshi government to further amend the 1973 ICT Act to adhere to international law,[104] no additional changes have been made to date.[105] Indeed, as the following section will explore, these issues continue to pervade the Tribunal's current proceedings and deprive defendants of their right to due process and a fair trial.

III. CURRENT PROBLEMS WITH THE INTERNATIONAL CRIMES TRIBUNAL

Given the ICT's authority to impose death sentences,[106] it is essential to reemphasize the concerns international human rights institu-

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102. Rajan, *supra* note 71, at 148. To date, the Tribunal has sentenced sixty-five of the indicted to death and has handed down twenty-four life sentences. Borda & Hosen, *supra* note 56, at 988.

103. Rajan, *supra* note 71, at 148–49.

104. *Id.*

105. Ashutosh Sarkar, *Anti-Liberation Organisations: Not Even One Tried Till This Day*, THE DAILY STAR (Mar. 25, 2023, 2:49 AM), https://www.thedailystar.net/news/bangladesh/news/anti-liberation-organisations-not-even-one-tried-till-day-3279866.

106. Many human rights critics and State allies have condemned the ICT's use of the death penalty. *See Bangladesh: Death penalty will not bring justice for crimes during independence war*, AMNESTY INT'L (Oct. 29, 2014), https://www.amnesty.org/en/latest/news/2014/10/bangladesh-death-penalty-will-not-bring-justice-crimes-during-independence-war/; Marie Harf, *Statement on the Bangladesh International Crimes Tribunal (ICT) Death Sentence of Kamaruzzaman*, U.S. DEP'T OF STATE (Apr. 11, 2015) ("Until [Bangladesh's domestic and international] obligations can be consistently met, it is best not to proceed with executions given the irreversibility of a sentence of death.") [hereinafter *U.S. Statement on Death Sentence of Kamaruzzaman*]. Unfortunately, the issue pervades other areas of Bangladeshi law—in fact, there are

tions have expressed regarding the Tribunal's failure to uphold its due process obligations. The U.N. Human Rights Committee ("UNHRC") has enumerated four key due process issues that continue to impair the Tribunal's proceedings: (1) the incomplete definition the ICT uses for "crimes against humanity," (2) the strict statutory bar preventing defendants from challenging the ICT's jurisdiction, (3) the disproportionate number of political opponents indicted by the court, and (4) the detainment of defendants without adequate legal representation during police interrogations.[107] In addition, the UNHRC has found that the ICT's procedural protections fall short of those typically afforded to defendants under both international and Bangladeshi law.[108]

The International Commission of Jurists—an independent global non-profit dedicated to ensuring international judicial accountability—supported the UNHRC's contentions regarding the ICT in the Commission's 2013 findings.[109] Alarmingly, the Commission noted further issues such as the capricious denial of pretrial release, the extortion and abduction of witnesses, and collusion between the Tribunal's judges and government prosecutors.[110] In order to thoroughly address these identified concerns, the following analysis will be divided into two parts: (1) an examination of the ICT's legal due process issues, including the Tribunal's jurisdictional, definitional, and evidentiary problems; and (2) a revisitation of the ICT's political due process issues, including an exploration of the partisan influence the Bangladeshi government continues to exert over the Tribunal's proceedings.

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at least sixty crimes in Bangladesh's criminal codes that are eligible for death sentences. *See Death Penalty Offenses in Bangladesh*, LAWYERSCLUBBANGLADESH (Apr. 8, 2020), https://lawyersclubbangladesh.com/en/2020/04/08/death-penalty-offenses-in-bangladesh/. *See also* Penal Code, § 194 (Bangl.).

107. U.N. Hum. Rts. Comm., 119th Sess., 3340th mtg. at 3 ¶12, U.N. Doc. CCPR/C/SR.3340 (Mar. 14, 2017) [hereinafter UNHRC ICT ICCPR Report].

108. *Id*. *See also* Press Release, *Bangladesh International Crimes Tribunal Should Pursue Justice, Not Vengeance*, INT'L COMM'N OF JURISTS (Feb. 2, 2013), https://www.icj.org/bangladesh-international-crimes-tribunal-should-pursue-justice-not-vengeance/. [hereinafter INT'L COMM'N OF JURISTS Press Release].

109. INT'L COMM'N OF JURISTS Press Release, *supra* note 108.

110. *Id*.

A. Legal Due Process Concerns

Critics of the ICT have remarked on a myriad of legal due process concerns contained within the Tribunal's codified statute ("ICT Statute") and internal rules of procedure ("ICT Rules"). Though distinct sources of law, the ICT Statute, and ICT Rules of Procedure work in tandem to govern all aspects of the Tribunal's proceedings. The original 1973 ICT Act, which was updated by legislators in 2009, defines the ICT's jurisdiction.[111] It also lists the elements of each war crime with which defendants may be charged.[112] In conjunction with the ICT Statute, the ICT Rules—which were created through the Tribunal's internal apparatuses—provide procedural guidelines for raising motions and evidentiary objections.[113] Together, these documents form the foundation for the ICT's proceedings, yet are also the subject of the legal due process concerns plaguing the Tribunal.

1. Ambiguities in the ICT's Statute

The ICT Statute is among one of the primary sources of controversy regarding the ICT's legal due process. Despite its 2009 amendments, which incorporated multiple recommendations by human rights groups—including a new provision allowing the Tribunal's decisions to be appealed—many substantive issues remain unresolved.[114] In fact, the UNHRC confirmed that parts of the updated ICT Statute continue to abrogate Bangladesh's international obligations under the International Covenant on Civil and Political Rights ("ICCPR"), a treaty that enshrines fundamental human rights that ratifying countries like Bangladesh have pledged to protect.[115]

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111. ICT Statute, *supra* note 17, § 22.

112. *Id.* § 3.

113. INTERNATIONAL CRIMES TRIBUNAL RULES OF EVIDENCE AND PROCEDURE (2010) (Bangl.) [hereinafter ICT Rules].

114. Brad Adams, *Letter to Prime Minister Sheikh Hasina Re: International Crimes (Tribunals) Act*, HUM. RTS. WATCH (July 8, 2009), http://www.hrw.org/en/news/2009/07/08/letter-prime-minister-sheikh-hasina-re-international-crimes-tribunals-act.

115. UNHRC ICT ICCPR Report, *supra* note 107, at 3 ¶ 12. After ratifying the ICCPR in 2000, Bangladesh agreed to provide frequent reports on the country's adherence to the Convenant's articles through its National Human Rights Commission ("NHRB", also known as "JAMAKON"). NATIONAL HUMAN RIGHTS COMMIS-

Two articles of the ICCPR are particularly relevant to the ICT's proceedings: Article 9 and Article 14. Article 9 prohibits States from arbitrarily arresting or detaining individuals without due process,[116] while Article 14 specifies the requirements of this due process, including the guarantee that defendants are given a fair trial administered by a "competent, independent, and impartial tribunal."[117] Nevertheless, numerous aspects of the ICT Statute fail to comport with these international legal obligations.

First, Section 3(1) of the ICT Statute grants the Tribunal absolute jurisdiction over individuals accused of committing any crime set forth in Section 3(2) of the Statute:

> A Tribunal shall have the power to try and punish any individual or group of individuals, or any member of any armed, defence or auxiliary forces, irrespective of his nationality, who commits or has committed, in the territory of Bangladesh, whether before or after the commencement of this Act, any of the crimes mentioned in subsection (2).[118]

These crimes encompass a broad range of offenses falling under the category of crimes against humanity, including: "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[.]"[119] Notably, this provision is a recognizable

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SION, REPORT TO THE UN HUMAN RIGHTS COMMITTEE, JAMAKON (2015) [hereinafter JAMAKON REPORT].

116. International Covenant on Civil and Political Rights, art. 9(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

117. *Id.* at art. 14(1) ("All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him . . . everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.").

118. ICT Statute, *supra* note 17, § 3(1). Moreover, Section 4(1) elaborates on the group component of the ICT's jurisdiction: "[W]hen any crime as specified in section 3 is committed by several persons, each of such person is liable for that crime in the same manner as if it were done by him alone." *Id.* § 4(1). However, contention exists around Bangladesh's choice to impute individual responsibility for group conduct. Samad, *supra* note 18, at 272–81.

119. ICT Statute, *supra* note 17, § 3(2)(a).

adaptation of similar text found in the Rome Statute and the London Charter,[120] which are treaties customarily accepted by States as model codes for war crime prosecutions.[121]

However, absent definitions for the crimes specified, the breadth of Section 3(2) leaves the ICT with a jurisdictional reach that extends far beyond that of its international counterparts.[122] For instance, the ICT Statute excludes "'widespread or systematic attack' against a civilian population" from the elements listed for crimes against humanity, which omits a necessary component to the crime under its traditional interpretation in international law.[123] This inadequate definition carries indicia suggesting that the Tribunal retains unfettered authority to decide the nature of the crimes at issue.

Curiously, the Tribunal appears to recognize its deviation from this customary definition in its *Chief Prosecutor v. Syed Md. Qaiser* decision. There, the Tribunal stated, "[m]erely for the reason that the Tribunal is preceded by the word 'international' and possess[es] jurisdiction over crimes such as Crimes against Humanity . . . it [would] be mistaken to assume that the Tribunal must be treated as an 'International Tribunal[.]'"[124] When viewed in relation to the Tribunal's ex-

120. Rome Statute, *supra* note 33, at art. 7(2)(a)–(i). *See also* Charter of the International Military Tribunal, art. 6(c), Aug. 8, 1945, 82 U.N.T.S. 280 [hereinafter London Charter]; NUREMBERG TRIALS FINAL REPORT APPENDIX D: Control Council Law No. 10, art. II(c) (1945).

121. The Rome Statute governs proceedings in the International Criminal Court, which was instituted by international consensus as the apex international tribunal responsible for prosecuting war crimes. *See generally* YUDAN TAN, THE ROME STATUTE AS EVIDENCE OF CUSTOMARY INTERNATIONAL LAW (2021). In contrast, the London Charter was the first treaty to codify international humanitarian law—much of the Rome Statute's provisions and the conditions encoded in other international tribunals follow precedent set forth by the London Charter. *See* F. B. Schick, *The Nuremburg Trial and the International Law of the Future*, 41 AM. J. INT'L L. 770, 772 (1947).

122. *See* Rome Statute, *supra* note 33, at art. 7(2)(a)–(i).

123. Samad, *supra* note 18, at 266. *See also* Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 248 (Int'l Crim. Trib. For the former Yugoslavia, Appeal Chamber, July 15, 1999). Scholars have asserted that crimes against humanity is the most crucial crime to define in order to properly administer international criminal justice. *See* Margaret deGuzman, *The Road from Rome: The Developing Law of Crimes Against Humanity*, 22 HUM. RTS. QUARTERLY 335, 338 (2000).

124. Chief Prosecutor vs. Syed Md. Qaiser, Judgment, Case No. 4, ICT-BD (ICT-2) ¶ 8 (Dec. 23, 2014) [hereinafter *Qaiser*].

pansive definition of crimes against humanity, the ICT's statement in *Qaiser* warrants intense scrutiny. This is particularly significant given the possibility that such linguistic technicalities could be used to sustain unjust death sentences.

When contemplating the irrevocable weight the Tribunal's decisions carry, it is vital that international norms protecting human rights are granted deference in ICT proceedings. Regrettably, however, experts have observed the Tribunal—as well as the Bangladesh Supreme Court in subsequent ICT appeals—unilaterally departing from established international principles, thereby jeopardizing these fundamental rights.[125] Instead, the courts have relied on widely condemned legal theories and retroactively applied legislation to uphold convictions and execute defendants.[126] This departure from customary international law leaves ICT defendants at the mercy of the Tribunal's arbitrary legal standards and capricious evidentiary analyses, as will be examined in the next section.

2. Absent Protections in the ICT's Rules of Evidence

In addition to its circumscribed definitions of war crimes and the Tribunal's unrestricted jurisdiction, the ICT Statute grants unfettered discretion to the Tribunal in constructing its rules of evidence, with Section 19(1) stating:

> A Tribunal shall not be bound by technical rules of evidence; and it shall adopt and apply to the greatest possible extent expeditious and

125. Samad, *supra* note 18, at 264. *See also* Prosecutor v. Molla, Judgement, Criminal Appeal Nos. 24–25, 241 (Sep. 17, 2013).

126. Samad, *supra* note 18, at 264–65. However, it is contested whether the ICT's retroactive application of law violates international principles. *See* Muhammad Abdullah Fazi, Pardis Moslemzadeh Tehrani & Azmi Bin Sharom, *A Legal Analysis of the International Crimes Tribunal Bangladesh: A Fair Trial Perspective*, 2 ASIAN Y.B. HUM. RTS. & HUM. L. 350, 353–54 (2018). Nevertheless, international jurists and human rights experts agree that the use of retractive application to uphold death sentences is an egregious violation of human rights law. *See* Press Release, *Bangladesh: Abdul Quader Mollah Death Sentence Violates International Law*, INT'L COMM'N OF JURISTS (Sept. 17, 2013), icj.org/bangladesh-abdul-quader-mollah-death-sentence-violates-international-law/. *See also Bangladesh: Death Sentence Violates Fair Trial Standards*, HUMAN RIGHTS WATCH (Sept. 18, 2013, 6:01 PM EDT), hrw.org/news/2013/09/18/bangladesh-death-sentence-violates-fair-trial-standards.

> non-technical procedure, and may admit any evidence, including reports and photographs published in newspapers, periodicals and magazines, films and tape-recordings and other materials as may be tendered before it, which it deems to have probative value.[127]

Section 19(1) of the ICT Statute replicates Article 19 of the London Charter and Article 13 of the Tokyo Charter, each of which determined the admissibility of evidence for the Nüremberg and Tokyo trials, respectively.[128]

However, as transitional justice has evolved, so too have the prospective due process dangers associated with this skeletal and highly deferential framework. Indeed, Human Rights Watch ("HRW")—in its Commentary to the Preparatory Commission of the International Criminal Court ("ICC")—emphasized that "[t]he elaboration of principled and practical Rules of Evidence and Procedure (The Rules) is critical to the functioning of the International Criminal Court . . ."[129] For the ICT, whose judgments carry irreversible consequences, maintaining a detailed set of evidentiary rules that adhere to internationally accepted guidelines is of paramount importance to the Tribunal's processes.

Moreover, human rights watchdogs have observed that the rules of evidence in a court system signal a court's commitment to equality and objectivity.[130] For example, the ICC provides a superficial overview of its evidentiary rules in Article 69 of the Rome Statute,[131] but the Article's provisions are elaborated upon in Chapter 4, Section I of

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127. ICT Statute, *supra* note 17, § 19(1).

128. London Charter, *supra* note 120, at art. 19; Charter of the International Military Tribunal for the Far East art. 13, Jan. 19, 1946, T.I.A.S. No. 1589.

129. In its Commentary to the Preparatory Commission of the International Criminal Court, Human Rights Watch emphasized that "[t]he elaboration of principled and practical Rules of Evidence and Procedure (The Rules) is critical to the functioning of the International Criminal Court (ICC)." HUMAN RIGHTS WATCH, COMMENTARY TO THE PREPARATORY COMMISSION: RULES OF EVIDENCE AND PROCEDURE FOR THE INTERNATIONAL CRIMINAL COURT, PART 1 (1999).

130. *Id*. Furthermore, in its Commentary, Human Rights Watch drew a comparison between the International Criminal Court's ("ICC") detailed statute and the "skeletal statutes of the International Criminal Tribunal for the Former Yugoslavia . . . and International Criminal Tribunal for Rwanda," emphasizing that a tribunal's statute provides the basis for its legitimacy. *Id*.

131. Rome Statute, *supra* note 33, at art. 69.

the ICC's Rules of Procedure and Evidence.[132] Each Article within this Section outlines the general procedures parties must follow when presenting evidence before the ICC, with some Articles denoting individual standards to determine the reliability of specific types of evidence.[133]

Most significantly, however, Article 69(4) of the Rome Statute and Articles 68 and 72 of the ICC's Rules of Procedure and Evidence require the court to balance the probative value offered by evidence against the prejudicial impact the evidence may have on the fairness of the case *sub judice*.[134] This balancing test is likewise found in the ICTY's rules of evidence and constitutes a vital component of the adversarial systems that operate in common law jurisdictions such as Bangladesh.[135]

In contrast to the ICC's and ICTY's evidentiary rules, the notion of prejudicial bias is notably absent from the ICT Rules. This omission may be attributed, in part, to the fact that the London and Tokyo Charters did not incorporate provisions to safeguard against prejudicial bias.[136] The rationale behind this may be that the tribunals found it unnecessary to protect evidence from prejudicial bias when its probative value would be weighed by qualified legal experts rather than laypersons in a jury.[137] This line of reasoning could plausibly justify the ICT Statute's omissions considering the Statute was a legal instrument developed at a time when the London and Tokyo Charters were the only existing frameworks for statutory language. However,

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132. INTERNATIONAL CRIMINAL COURT, RULES OF PROCEDURE AND EVIDENCE, Chapter 4, § 1, arts. 63–75 (2019).

133. *Id*.

134. Rome Statute, *supra* note 33, at art. 69(4). INTERNATIONAL CRIMINAL COURT, RULES OF PROCEDURE AND EVIDENCE, *supra* note 132, at Chapter 4, § 1, arts. 68(1) & 72(2).

135. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, Rules of Procedure and Evidence, U.N. Doc. No. IT/32/Rev.50, rule 89(D) (July 8, 2015) [hereinafter ICTY Rules of Procedure]. *See also* Michaela Halpern, *Trends in Admissibility of Hearsay Evidence in War Crime Trials: Is Fairness Really Preserved?*, 29 DUKE J. COMPAR. & INT'L L. 103, 105 (2018). For an example of the manner in which prejudicial bias is factored into judicial decisions in common law jurisdictions, *see* FED. R. EVID. 403.

136. Halpern, *supra* note 135, at 110.

137. *Id.*

as the ICT Rules were created in 2010, its procedural guarantees and evidentiary safeguards should align with the rules adopted in contemporary international tribunals such as the ICC and ICTY.

Arguably, one could perceive Rule 57 of the ICT Rules as a vague assurance that prejudicial bias will be factored into the Tribunal's decisions. Rule 57 states that "the Tribunal shall apply these Rules which will best favour a fair determination of the matter in issue before it and are consonant with the spirit of the Act."[138] Similar to the London and Tokyo Charters, this provision defers evidentiary discretion to the legal expertise of the Tribunal's justices, whose impartiality should enable them to recognize the prejudicial impact of submitted evidence.

At the ICT's conception, this provision may have been sufficient given the international community would have no reason to assume the Tribunal's duplicitous nature. In its present state, however, overwhelming evidence pointing toward the ICT's substantial corruption has cast doubt upon the Tribunal's judicial integrity,[139] rendering this sole safeguard inadequate to protect defendants' due process guarantees.

In fact, legal scholars need not delve far into the ICT's judgments to discover evidence of prejudicial bias in its decisions. In the Tribunal's *Qaiser* judgment, the ICT permitted the prosecution to utilize Qaiser's previous acquittal under the Collaborators Act of 1972 as a "relevant fact that leads to conclude his [sic] hostile and culpable role he had played by founding 'Qaiser Bahini' in 1971."[140] Although Qaiser's case under the Collaborators Act took place *in absentia*,[141] the Tribunal deduced adverse inferences without determining whether

138. ICT Rules, *supra* note 113, at R. 57.

139. *See infra* Part III(B).

140. *Qaiser*, *supra* note 124, ¶ 108.

141. Having been tried *in absentia* would afford Qaiser "a fresh determination of the merits of the charge" in international human rights courts. Colozza v. Italy, Judgment, App. No. 9024/80, ¶ 29 (Feb. 12, 1985). *See also* Maleki v. It., Comm. 699/1996, U.N. Doc. A/54/40, Vol. II, at 180 (HRC 1999) (finding that the presence of court-appointed counsel was not sufficient to overcome the violations to ICCPR Articles 14(1) and 14(3) a trial *in absentia* raises). However, State practice regarding trials *in absentia* is divided. *See* Int'l Law Commission, Report of the Working Group on a Draft Statute for an Int'l Criminal Court, U.N. Doc. A/48/10, art. 44, cmt. 2 (May 17– July 16, 1993).

Qaiser's previous case had been duly heard, thus unfairly prejudicing him by presupposing his guilt in the previous matter.

This determination is in clear violation of Article 14(7) of the ICCPR, which protects defendants from double jeopardy.[142] The Tribunal reasoned that Qaiser's charges in the case *sub judice* did not amount to double jeopardy because the ICT Statute maintains different elements for its crimes than the 1972 Collaborators Act.[143] By advancing this reasoning, however, the ICT once again chose to deviate from customary international law as both the ICC and the ICTY exclude the retrial of claims involving international crimes previously acquitted by domestic courts.[144]

Similarly, the ICT Rules regarding the admissibility of illegally obtained evidence are a stark departure from the norms and standards upheld by other hybrid tribunals.[145] Such an omission in the ICT Rules is particularly salient in light of the Tribunal's practice of allocating significant weight to hearsay evidence. The ICT permits hearsay witness testimony to be introduced "if [the testimony is] supported by other evidence" such as "relevant facts, circumstances, and testimony of ocular witnesses."[146]

While it is indeed true that other tribunals, such as the ICTY, have concluded that hearsay does not inherently endangers the rights of the accused,[147] it is important to note that the ICTY's acceptance of hearsay is premised on the fact that its judges are able "by virtue of their training and experience, to hear the evidence in the context in which it

142. ICCPR, *supra* note 116, at art. 14(7) ("No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."). In fact, Bangladesh's Constitution—which the ICT must also adhere to—strictly protects against double jeopardy. Constitution of the People's Republic of Bangladesh, art. 35(2).

143. *Qaiser*, *supra* note 124, ¶ 62–63.

144. Michele N. Morosin, *Double Jeopardy and International Law: Obstacles to Formulating a General Principle*, 64 NORDIC J. INT'L L. 261, 264–65 (1995).

145. *See* ICTY Rules of Procedure, *supra* note 135, at R. 89(D) (balancing the probative value of a piece of evidence with the defendant's right to a fair trial).

146. *Qaiser*, *supra* note 124, ¶ 63.

147. Press Release No. 286-E, *Blaskic case: Defence Objection to the Admission of Hearsay is Rejected*, ICTY CHAMBERS, (Jan. 23, 1998), https://www.icty.org/en/press/blaskic-case-defence-objection-admission-hearsay-rejected. *See also* Halpern, *supra* note 135, at 106.

was obtained and accord it appropriate weight."[148] This premise does not hold true for the judges of the ICT, whose inherent partisanship and collusion with state prosecutors heavily compromise their ability to evaluate evidence impartially.[149]

Furthermore, the ICT assesses hearsay testimony's probative value by evaluating the extent to which "the question of hearsay is clarified by other evidence and [is] proved to be reliable."[150] However, the Tribunal only questions the probative value of hearsay if it is anonymous, lacks corroborating sources, and has no circumstantial basis for truth.[151] Defendants have also claimed that the Tribunal will substitute eyewitness testimony with hearsay, even if the relevant eyewitnesses are available to testify.[152] Alongside eight designated forms of evidence that hold probative weight in the Tribunal,[153] the difficulty in challenging hearsay raises substantial reliability concerns in the Tribunal's evidentiary decisions.

These concerns also extend to the types of evidence the Tribunal has considered to be self-authenticating. For instance, in *Qaiser*, the ICT characterized a news report—which depicted events that occurred thirty years prior to its publication—as self-authenticating evidence.[154] The Tribunal's justification for relying upon the report is two-fold: (1) the report was based upon information from a book about the 1971 war, and (2) Qaiser did not dispute the newspaper's allegations when it was originally published.[155] Yet, it is worth noting that such evidence would not be deemed self-authenticating under the International Court of Justice's ("ICJ") evidentiary standards, which hold comparable persuasive authority in international law to the ICC and the ICTY.

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148. Press Release No. 102-E, *Tadic Update 2: Defence Motion on Hearsay Rejected*, ICTY CHAMBERS (Aug. 7, 1996), https://www.icty.org/en/press/tadic-update-2-defence-motion-hearsay-rejected.

149. *See infra* Part III(B).

150. *Qaiser*, *supra* note 124, ¶ 72.

151. *Id.* ¶ 1427.

152. Star Online Reporter, *War Trial: Mir Quasem's Verdict Tomorrow*, THE DAILY STAR (Mar. 7, 2016, 7:47 PM), https://www.thedailystar.net/country/war-trial-mir-quasems-verdict-tomorrow-787645.

153. *Qaiser*, *supra* note 124, ¶ 112.

154. *Id.* ¶ 93.

155. *Id*.

In its *Armed Activities* case, the ICJ warned that courts must exercise "particular caution" when incorporating evidence from the press to corroborate the facts of a case.[156] The ICJ stressed that the truth could not be established solely through "extracts from a few newspapers . . . which rely on a single source[.]"[157] In *Qaiser*, however, the news article presented was the sole source used to substantiate the hearsay presented. Consequently, it is reasonable to find significant doubt in the methods invoked by the Tribunal to ascertain the probative weight of hearsay evidence.

The ICT's inconsistent and non-standard evidentiary practices strip defendants of the normative procedural safeguards that often ensure evidence presented before a court is suitable for trial. Yet, under Rule 44 of the ICT Rules, interlocutory appeals are not permitted to challenge the Tribunal's evidentiary decisions.[158] As a result, the Tribunal's defendants are deprived of their right to contest admitted evidence that unfairly prejudices them, such as previously acquitted charges. The public is also deprived of a critical opportunity to analyze the Tribunal's elusive reasoning behind its conclusions.

In light of the rogue attitude adopted by the Tribunal, the rationale behind their evidentiary decisions is essential to understand, particularly given the limitless jurisdiction the Tribunal maintains, the ambiguous definitions it upholds, and the severity of its sentences. However, as the upcoming section will illustrate, the most concerning threat posed by the provisions in the ICT's Statutes and Rules is the considerable discretion they accord to judges who have exhibited a lack of moral and ethical probity in their judicial conduct.[159]

B. Political Due Process Concerns

The evidentiary, jurisdictional, and definitional flaws in the ICT Statute are but a fraction of the due process issues afflicting the ICT. External political concerns also exist, including the Tribunal's dispro-

156. Armed Activities on the Territory of the Congo (Dem. Rep. Con. v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 68 (Dec. 19, 2005).

157. *Id*. ¶ 61.

158. ICT Rules, *supra* note 113, at R. 44.

159. *See infra* Part III(B).

portionate targeting of opposition leaders.[160] Additionally, the Tribunal's refusal to allow defendants to meet with their defense counsel, review material evidence, and receive timely notice of the charges against them severely undermines their due process protections.[161] In fact, the U.N. Human Rights Committee's ("UNHRC") most recent request to the Bangladeshi government called for supplementary evidence demonstrating that the ICT ". . . [is] in compliance with international standards" granted under ICCPR Article 14.[162]

The U.N. Human Rights Council ("Human Rights Council"), through its Working Group on Arbitrary Detention ("WGAD"),[163] expressed concern in its 2011 opinion over the Tribunal's trial protocols.[164] The WGAD opinion examined challenges to the ICT's deci-

160. *See* UNHRC ICT ICCPR Report, *supra* note 107. *See also* Md. Awal Hossain Mollah, *War Crimes Trials in Bangladesh: Justice or Politics?*, 55 J. ASIAN & AFR. STUDS. 652, 658 (2019); INT'L CRISIS GROUP, POLITICAL CONFLICT, EXTREMISM & CRIM. JUST. IN BANGLADESH 20 (2016); *Political Crisis in Bangladesh*, N.Y. TIMES (Nov. 20, 2013), https://www.nytimes.com/2013/11/21/opinion/political-crisis-in-bangladesh.html; Talha Ahmad, *The Politicalisation of Bangladesh's War Crimes Tribunal*, ALJAZEERA (Oct. 25, 2013), https://www.aljazeera.com/opinions/2013/10/25/the-politicalisation-of-bangladeshs-war-crimes-tribunal/.

161. *See generally* Hum. Rts. Council, Working Grp. on Arbitrary Det., Opinions adopted by the Working Group on Arbitrary Detention on its sixty-second session, 16–25 November 2011, No. 66/2011 (Bangladesh), U.N. Doc. No. A/HRC/WGAD/2011/66, ¶ 2 (June 22, 2012) [hereinafter WGAD Opinion].

162. U.N. Hum. Rts. Comm., *List of Issues in Relation to the Initial Report of Bangladesh*, U.N. Doc. No. CCPR/C/BGD/Q/1, ¶ 16 (May 3, 2016).

163. The WGAD is mandated to investigate cases involving the arbitrary deprivation of liberty contravening a State's international obligations, as well as detentions which do not meet the international standards set for by the Universal Declaration of Human Rights. U.N. HUM. RTS. SPECIAL PROCS, *Topic: Working Group on Arbitrary Detention,* OHCHR, https://www.ohchr.org/en/special-procedures/wg-arbitrary-detention [hereinafter WGAD Overview]. This subsidiary body of the United Nations was created in 1991 by the former Commission on Human Rights. WGAD Opinion, *supra* note 162, ¶ 1. Its mandate was later undertaken by the United Nations Human Rights Council in 2006. *See* U.N. General Assembly, Report of the Human Rights Council, Resolution 1/102. Extension by the Human Rights Council of all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights, U.N. Doc. A/61/53 (2006). Comprised of five appointed independent experts serving for a maximum of six years, the WGAD meet three times a year in Geneva to evaluate individual claims alleging an arbitrary deprivation of liberty. WGAD Overview, *supra* note 164.

164. *See generally* WGAD Opinion, *supra* note 161.

sions for six defendants: Motiur Rahman Nizami, Abdul Quader Molla, Mohammad Kamaruzzaman, Ali Hasan Mohammed Mujahid, Allama Delewar Hossain Sayedee, and Salhuddin Quader Chowdhury.[165] All of these defendants were members of Jamaat-e-Islami, one of Awami League's political opponents.[166] The following analysis provides a synopsis of the ICT's practices that the WGAD called into question.

1. ICT Defendants' Limited Access to Counsel

With respect to Mr. Nizami, the leader of Jamaat-e-Islami, the WGAD confirmed that the ICT prevented him from conferring with his defense attorney during his detainment and that his detainment began prior to him receiving notice of his pending charges.[167] Regarding the cases of Mr. Molla and Mr. Kamaruzzaman, the WGAD concluded that the prosecution had obstructed the defense counsel's access to material evidence.[168] Moreover, the WGAD affirmed that for an entire year following their arrests, all six defendants lacked proper notice of the charges against them, and were similarly not conveyed any additional information by the State to explain their prolonged pretrial detention.[169] Significantly, none of the defendants were permitted to consult with counsel or have counsel present during their police interrogations.[170]

Accordingly, the WGAD established that by holding all defendants in pretrial detention for an extended period of time without justification, limiting defendants' ability to communicate with counsel, and restricting their access to material evidence, Bangladesh violated

165. *Id.*

166. *Id.*

167. *Id.* ¶¶ 4–7.

168. *Id.* ¶¶ 8–13. Not only is the obstruction of evidence a violation of international human rights, but it is also a well-recognized constitutional violation in countries such as the United States. Brady v. Maryland, 373 U.S. 83 (1963) (holding that *Brady* violations exist when the prosecution fails to produce exculpatory evidence for opposing counsel).

169. WGAD Opinion, *supra* note 161, ¶¶ 8–13.

170. *Id.* ¶ 41.

Article 14 of the ICCPR.[171] Subsequently, WGAD issued a disposition insisting ". . . the Government [] take the necessary steps to remedy the situation of [the defendants] . . . in order to bring it into conformity with the norms and standards set forth in the International Covenant on Civil and Political Rights . . ."[172] As of the date of this publication, however, no changes to the ICT's pretrial procedures have been announced.

2. ICT Justices' Improper Political Fidelity

ICT defendants' due process rights have been further compromised by the improper motives of the justices overseeing their trials. Indeed, revelations surrounding the ICT's politicization have uncovered the biased motivations underlying its processes,[173] incentives which are antithetical to the principles of impartiality, fairness, and justice Bangladesh vowed to uphold.[174] Notably, this politicization is not unique to the ICT—rather, it is prevalent within Bangladesh's court system as a whole. Indeed, political scholars have recognized the decades-long chronic tension that has existed between Bangladesh's executive and judicial branches.[175]

Nongovernmental organizations such as the Asian Legal Resource Centre ("ALRC") have also recorded a pattern of political bias in Bangladesh's judiciary appointments.[176] Specifically, ALRC observed political fidelity to be a decisive factor in determining the likelihood

171. *Id.* ¶ 33. *See also* ICCPR, *supra* note 116, at arts. 14(3)(d) (a defendant must "be tried in his presence, and to defend himself in person or through legal assistance of his own choosing . . .") and 14(3)(a) (". . . To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.").

172. WGAD Opinion, *supra* note 161, ¶ 44.

173. *Bangladesh: War Crimes Verdict Based on Flawed Trial*, HUMAN RIGHTS WATCH (Mar. 22, 2016, 10:45 EST), https://www.hrw.org/news/2016/03/23/bangladesh-war-crimes-verdict-based-flawed-trial.

174. *See* ICCPR, *supra* note 117, at art. 14(1).

175. *See* Pranab Kumar Panday & Md. Awal Hossain Mollah, *The Judicial System of Bangladesh: An Overview from a Historical Viewpoint*, 53 INT'L J. L. MANAGEMENT 6 (2011).

176. Hum. Rts. Council, Written Statement Submitted by the Asian Legal Resource Centre, a Non-governmental Organization in General Consultative Status, U.N. Doc. A/HRC/26/NGO/45, ¶ 4 (June 6, 2014).

of an individual's judicial appointment.[177] Anecdotes from war crimes experts have further verified the presence of this loyalty requirement, noting a "deep resistance to the idea of introducing . . . international [actors] into the system in an effect to diffuse the politicization . . . ."[178] Needless to say, the pervasive influence of politics on Bangladesh's court systems is fundamentally at odds with the core values of judicial impartiality recognized by the U.N.[179]

In 2014, the Bangladeshi Parliament further amplified the concerns surrounding judicial independence by unanimously enacting the Sixteenth Amendment to Bangladesh's Constitution.[180] This amendment reinstated Parliament's power to impeach Supreme Court justices while simultaneously dissolving the Supreme Judicial Council of Bangladesh,[181] a three-judge panel tasked with investigating claims of judicial misconduct.[182] Although many legal scholars praised this amendment as a commendable step toward increasing judicial transparency, worries persisted about the dangers it posed to the courts'

177. *Id.*

178. Linton, *Completing the Circle*, *supra* note 38, at 210 n.86.

179. G.A. Res. 40/32 & 40/146, art. 1, Basic Principles on the Independence of the Judiciary (Nov. 29, 1985 – Dec. 13, 1985) ("It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary."). *See also* U.N. Gen. Assembly, Independence of judges and lawyers: Note by the Secretary-General, U.N. Doc. No. A/74/176 (July 16, 2019).

180. Constitution (Sixteenth Amendment) Act, Act No. 13 (2014) (Bangl.).

181. This power was previously granted in Article 96 of the country's 1972 constitution. Moinul Hoque Chowdhury, Sumon Mahbub, Shahidul Islam & Sajidul Haque, *16th Amendment passed to restore Parliament's power to sack judges*, BDNEWS24.COM (Sep. 17, 2014, 10:13 AM), https://bdnews24.com/bangladesh/16th-amendment-passed-to-restore-parliaments-power-to-sack-judges. Awami League's main opposition party, the Bangladesh Nationalist Party ("BNP"), has been vocal in its objections to the amendment. *See BNP Terms Verdict Against 16th Amendment 'Victory of People'*, RISINGBD.COM (July 3, 2017, 12:31 PM), https://www.risingbd.com/english/BNP-terms-verdict-against-16th-amendment-victory-of-people/46183; Star Online Report, *Law Commission's Comments Tantamount to Contempt of Court: BNP*, THE DAILY STAR (Aug. 10, 2017, 6:27 PM), https://www.thedailystar.net/country/law-commission-chief-comment-16th-amendment-bangladesh-constitution-tantamount-contempt-court-bnp-1446571.

182. One peculiar facet of the Supreme Judicial Council was that it was comprised solely of Bangladesh's senior justices. Ashutosh Sarkar & Shakhawat Liton, *Bangladesh HC Scraps 16th Amendment*, THE DAILY STAR (May 6, 2016, 12:00 AM), https://www.thedailystar.net/frontpage/hc-scraps-16th-amendment-1219480.

power of judicial review, as well as to justices who resisted ruling in favor of the majority party's sentiments.[183] The Supreme Court of Bangladesh shared these concerns, striking down the amendment and publicly admonishing the government's attempts to exert political control over the branch.[184]

However, the Supreme Court's response was unable to fully mitigate the effects of the Sixteenth Amendment that reverberated throughout the judiciary. Its passage forced judges who ruled in opposition of the government to resign and flee the country.[185] These ramifications extended to judges of prominent political authority, including former Chief Justice Surendra Kumar Sinha of the Bangladesh Su-

183. Rizwanul Islam, *Impeachment of Judges: A Suggestion*, THE DAILY STAR (Aug. 27, 2014, 12:00 AM), https://www.thedailystar.net/impeachment-of-judges-a-suggestion-38809. *See also* Sarkar & Liton, *supra* note 182, ("'Keeping Article 70 of Bangladesh constitution as it is, the members of parliament must toe the party line in case of removal of any judge of the Supreme Court. Consequently, the Judge will be left at the mercy of the party high command.'"). At the time of writing, Israel enacted a similar piece of legislation, which received significant pushback from citizens and its allies. Aaron Boxerman & Eric Bazail-Eimil, *Israel-U.S. Tensions Rise Over Judicial Overhaul*, THE WALL ST. J. (Mar. 29, 2023, 3:50 PM), https://www.wsj.com/articles/israel-u-s-tensions-rise-over-judicial-overhaul-8ae07f96?mod=latest_headlines.

184. Gov't of Bangl. et al. v. Asaduzzaman Siddiqui et al., Civil Appeal No. 06 of 2017, 281 (Bangl. Sup. Ct., 2017). The Supreme Court's opinion also acknowledged the chilling effect party loyalty has had on Bangladesh's general legal system:

> . . . The High Court Division observed that by reason of article 70, it has imposed a tight rein on the members of Parliament that they cannot go against their Party line or position on any issue in the Parliament; that they have no freedom to question their party's stance in the Parliament, even if it is incorrect and flawed; that they cannot vote against their party's decision; that they are, indeed, hostages in the hands of their party high command; that what is dictated by the Cabinet of the ruling party or the shadow Cabinet of the opposition, members of Parliament must follow them meekly ignoring the will and desire of the electorate of their constituencies. We find no infirmity in the views taken by the High Court Division on construction of article 70[.] *Id.*

185. *See generally* M. Ehteshamul Bari, *The Recent Changes Introduced to the Method of Removal of Judges of the Supreme Court of Bangladesh & the Consequent Triumph of an All-Powerful Executive over the Judiciary: Judicial Independence in Peril*, 4 CARDOZO INT'L & COMP. L. REV. 653 (2021).

preme Court, who presided over the 2014 decision overturning the amendment.[186] In requiring justices among all levels of its court system to adhere to partisan agendas, the Bangladeshi government transformed its judiciary—and subsequently the ICT—into vessels promulgating political ideologies rather than neutral legal philosophies. When taking into consideration the Tribunal's disproportionate indictments against opposition leaders, it is reasonable to conclude that ICT's verdicts continue to be manipulated by political forces.

In addition to its biased motivations, news agencies, and human rights organizations have reported stories of witness intimidation, improper collaboration between the Tribunal's justices and prosecutors, and predetermined sentences in the ICT's proceedings.[187] In the famous leak incriminating ICT Justice Nizamul Huq, the *Economist* publicized intercepted communications between Huq and prosecutors, many of which implicated serious due process concerns for the Tribunal's *Sayeedi* case:[188]

> The e-mails and phone conversations we have seen raise profound questions about the trial. The material suggests the government tried to put pressure on Mr[.] Nizamul, albeit he seems to have resisted it. It seems to show he worked improperly with a lawyer based in Brussels, and that the lawyer co-operated with the prosecution—raising questions about conflicts of interest. And in Mr[.] Sayeedi's case it points to the possibility that, even before the court had finished hearing testimony from the defence witnesses, Mr[.] Nizamul was already expecting a guilty verdict. . . . The judge called our allegations "absolutely absurd" and "all false". . . . Nev-

186. After issuing the judgment, Sinha fled to Australia, claiming that "state security agencies intimidate judges to deliver judgments in favor of the government." *Bangladesh's former chief justice faces graft charge*, UNION OF CATHOLIC ASIAN NEWS (July 12, 2019, 10:24 AM GMT), https://www.ucanews.com/news/bangladeshs-former-chief-justice-faces-graft-charge/85627. To learn more about Bangladesh's judicial intimidation, see SURENDA SINHA, A BROKEN DREAM: RULE OF LAW, HUMAN RIGHTS AND DEMOCRACY (2018).

187. The *Economist* Exposé, *supra* note 22; *Bangladesh: Investigate Killing of Witness*, HUMAN RIGHTS WATCH (Dec. 23, 2013, 6:00 PM EST), https://www.hrw.org/news/2013/12/23/bangladesh-investigate-killing-witness. Although Human Rights Watch specified protection for the prosecution's witnesses in this article, it expanded its recommendations to all witnesses in ICT proceedings, acknowledging that both sides have engaged in witness intimidation. *Id*.

188. The *Economist* Exposé, *supra* note 22.

> ertheless, we believe that, taken together, the material shown to us raises legitimate questions about due process that the Bangladeshi authorities should now investigate thoroughly.

Similar misconduct has been uncovered by HRW. In 2013, HRW revealed suspicious requests made by the judiciary in witness abduction investigations, including requests for the prosecutor to exclusively "verify all allegations of irregularities, including the disappearance[.]"[189] In fact, Justice Nizamul Huq—who presided over the investigations and issued the order—admitted that this request was inconsistent with standard practice in Bangladesh.[190]

Yet, HRW noted that Huq "provided no legal or practical reason for this decision."[191] In response to the mounting concerns surrounding the ICT's internal procedures, international organizations have called for investigations into the Tribunal's procedures and have advised the Tribunal to transfer its caseload to an independent body.[192] Despite such recommendations, the Bangladeshi government has yet to express a willingness to cooperate or adopt corrective measures. Thus, one can surmise that with its silence, Bangladesh has tacitly endorsed the Tribunal's present and future misconduct.

3. Bangladesh's Efforts to Quell Dissent

Beyond judicial impropriety, the ICT's determinations have also been unduly influenced by political violence.[193] Through the use of civil disobedience in the form of *hartals*, political dissidents have employed aggression as a means to express disapproval toward the ICT's judgments.[194] In various instances, the political unrest surrounding

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189. *Bangladesh: Find Abducted Witness*, HUMAN RIGHTS WATCH (Jan. 16, 2013, 11:00 AM EST), https://www.hrw.org/news/2013/01/16/bangladesh-find-abducted-witness (discussing the abduction of the defense witness Shukho Ranjan Bali, who disappeared after being arrested by police subsequent to agreeing to testify).

190. *Id.*

191. *Id.*

192. *Id*.

193. M. Rashiduzzaman, *Political Unrest and Democracy in Bangladesh*, 37 ASIAN SURVEY 254 (1997).

194. Common to Bangladeshi culture, *hartals* are strategic strikes halting public activities for prolonged periods of time. *Id*. at 255. *Hartal* politics, which often

ICT decisions has led to an increase in police brutality resulting in numerous fatalities.[195] For example, the 2013 sentencing of Quader Molla to life imprisonment prompted protests that gave rise to the Shahbagh Movement, which comprised a coalition of Bangladeshis citizens demanding that ICT defendants be condemned to death.[196] In reaction to violent acts committed by Shahbagh Movement members, Molla's verdict was revised on appeal, and the Bangladesh Supreme Court upheld the Movement's demand for a death sentence.[197] Regrettably, the Tribunal yielding to public opinion in this manner foreshadows worrisome obstacles for defendants in future ICT proceedings, especially in light of the ongoing contempt ICT defendants encounter in Bangladeshi society.[198]

In response to the *hartals* incited by the ICT's rulings, the Bangladeshi government imposed restrictions on dissent against the ICT pursuant to Section 11(4) of the 1973 ICT Act.[199] However, the government's reaction generated international backlash due to Section

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uses violence as the principal strategy to influence politics, have been widely criticized by scholars for intentionally obstructing the educational, political, and social development of Bangladesh. *Id*.

195. HUMAN RIGHTS WATCH, *Bangladesh: Independent Body Should Investigate Protest Deaths* (May 10, 2013, 8:00 PM EST), https://www.hrw.org/news/2013/05/10/bangladesh-independent-body-should-investigate-protest-deaths; HUMAN RIGHTS WATCH, *Bangladesh: End Violence Over War Crimes Trials* (Mar. 1, 2013, 6:38 PM EST), https://www.hrw.org/news/2013/03/01/bangladesh-end-violence-over-war-crimes-trials.

196. Expatriate Writers, *Shahbagh Movement: The Expatriate Perspective*, BDNEWS24.COM (Feb. 12, 2013, 6:14 AM), https://bdnews24.com/opinion/comment/shahbag-movement-the-expatriate-perspective.

197. Staff Correspondent, *Shahbagh Movement Will Go On*, BDNEWS24.COM (Feb. 5, 2014, 6:19 AM), https://bdnews24.com/bangladesh/shahbagh-movement-will-go-on.

198. UNB, Dhaka, *Rights Activists Slam US Report's Claims About Jamaat*, THE DAILY STAR (Mar. 25, 2023, 10:23 PM), https://www.thedailystar.net/news/bangladesh/news/rights-activists-slam-us-reports-claims-about-jamaat-3280391.

199. ICT Statute, *supra* note 17, § 11(4) (stating the Tribunal may imprison any individual who "obstructs or abuses its process or disobeys any of its orders or directions, or does anything which tends to prejudice the case of a party before it, or tends to bring it or any of its members into hatred or contempt, or does anything which constitutes contempt of the Tribunal."). *See generally* Surabhi Chopra, *The International Crimes Tribunal in Bangladesh: Silencing Fair Comment*, 17 J. GENOCIDE RSCH. 211 (2015).

11(4)'s explicit criminalization of free speech.[200] Specifically, international advocates criticized the government's use of Section 11(4) to levy contempt charges against journalists who had published critical pieces scrutinizing the ICT's miscarriages of justice.[201]

In a famous example, Justice Huq brought forth contempt proceedings in 2012 against the *Economist* for publicizing his intercepted Skype and email conversations.[202] In 2013, similar contempt proceedings were brought against HRW for highlighting the procedural errors committed in Gholam Azam's trial.[203] In the ICT's most high-profile contempt proceedings, the Tribunal sentenced independent journalist David Bergman to prison for publishing blog articles questioning the Court's decisions and procedures, two of which were posted prior to the implementation of the Tribunal's contempt rule.[204]

Judicial misconduct, external political pressure, and the criminalization of dissent present significant challenges to defendants' due process and will continue to weigh upon each judgment rendered by the Tribunal if changes are not made. Furthermore, Bangladesh's refusal to revise existing issues within the ICT Statute, Rules, and the Tribunal's internal procedures indicates its disregard for the rule of law. However, when the ICT's due process concerns are viewed in their totality, a more troubling revelation becomes known: the clear evidence demonstrating how the Awami League is leveraging the authority of a quasi-international judicial body to execute its political opponents. With such foreboding criticism looming over its verdicts, a forum originally envisioned to deliver justice to a country's tragic past now stands as an emblem of its growing corruption, thereby vitiating the commitments Bangladesh pledged under ICCPR Article 14.

Nevertheless, the purpose of revisiting the ICT's misconduct is not merely to renew attention toward its transgressions but to propose remedies for the victims who have suffered from its injustices. The solutions raised herein are intended to empower not only the accused,

200. *See generally* Chopra, *supra* note 199.

201. *Id.*

202. *Id.* at 214–15. The released conversations revealed that Justice Huq conferred with the same experts used by the prosecution, bringing into question his judicial neutrality which prompted him to resign. *Id*.

203. *Id.* at 215.

204. *Id.*

but also members of civil society who have risked their lives to expose and advocate against state-sponsored terrorism.[205] As conscientious citizens, it is our civic duty to demand change in regimes that seek to halt democratic progress. However, it is equally the duty of the international community to hold States accountable when democracy has been compromised. Therefore, when ad hoc war crimes tribunals fail to serve justice and civil society's demands for their reform have been left unheard, it is incumbent upon international law to ensure those harmed are made whole again.

IV. RECOMMENDATIONS FOR REMEDYING THE TRIBUNAL'S INJUSTICES

To secure justice, ICT defendants who have been subject to the Tribunal's corruption may choose to seek redress on either the domestic or international scale. Fortunately, international human rights law preserves the right to an effective remedy for victims in almost all appropriate forums of their choosing.[206] The ICCPR also guarantees that reparations are awarded to criminal defendants whose convictions were secured through unjust means,[207] a right that Bangladesh has expressly acknowledged in its declared reservations under ICCPR Article 14.[208] Having established that the Bangladeshi government violat-

205. Although state-sponsored terrorism is an undefined term in international law, its basic premise can be applied to the targeting of Jamaat-e-Islami and BNP leaders through the ICT, which evinces Awami League's desire to instill terror in its political opponents. Adele Brown, *Hard Cases Make Bad Laws: An Analysis of State-Sponsored Terrorism and Its Regulation under International Law*, 2 J. ARMED CONFLICT L. 135, 136 (1997).

206. ICCPR, *supra* note 116, at arts. 2(3)(a)–(c) (awarding victims effective remedies for violations of ICCPR treaty obligations). The United Nations General Assembly affirmed this basic right in its "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law," which affords victims of gross violations of international human rights law "adequate, effective, and prompt reparation for harm suffered." U.N. General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, U.N. Res. 60/147, ¶ 23(a) (Mar. 21, 2006).

207. ICCPR, *supra* note 116, at art. 14(6).

208. Despite expressly reserving from Article 14(6)'s provisions, Bangladesh acknowledged in its declaration that "the aggrieved has the right to realise compen-

ed its Article 14 obligations,[209] it now bears the responsibility of implementing remedial procedures that cure or mitigate the harm caused by the country's disregard toward ICT defendants' rights to due process and a fair trial.

A. Domestic Remedies

The most immediate and convenient pathway to justice is to administer trials addressing defendants' due process concerns in Bangladesh's domestic courts. This solution would also be in line with the principle of complementarity, which requires that States manage matters domestically before turning to international solutions.[210] However, herein the answer lies the problem: the same judiciary that is insulated from the consequences of its own injustices would remain the deliberative body deciding whether such injustices warrant trials. Although Justice Huq resigned from his post as chairman of the Tribunal, no retrials were issued by the ICT and, as such, no guarantees were delivered barring the same misconduct from repeating itself.[211] Moreover, under the Tribunal's present judicial composition—which maintains fidelity to the Awami League—the likelihood of its defendants receiving reparations is dubious. Yet, if Bangladeshi civil society enhances pressure on its government to reform its judicial procedures, there is a chance that the regime will feel compelled to reexamine the defendants' sentences.

1. State Trials by a Reformed Judiciary

Prior to applying this pressure, several structural adjustments must be made to address the systemic flaws affecting Bangladesh's judicial system. The primary contention with initiating remedial proceedings

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sation for miscarriage of justice by separate proceedings and in some cases, the court suo moto grants compensation to victims of miscarriage of justice." *Treaties and International Agreements Registered or Filed and Recorded with the Secretariat of the United Nations*, 2121 U.N.T.S. 14668, 308 (U.N., 2003).

209. *See generally supra* Part III.

210. Simon Hentrei, *Generalising the Principle of Complementarity: Framing International Judicial Authority*, 3 TRANSNAT'L LEGAL THEORY 419, 422 (2013).

211. Staff Correspondent, *Tribunal Chief Quits Over Skype Scandal*, THE DAILY STAR (Dec. 12, 2012, 12:00 AM), https://www.thedailystar.net/news-detail-260836.

in Bangladeshi courts is ensuring the remedy is determined by an impartial judiciary. However, the explicit partiality present within Bangladesh's judicial composition gives reason to believe that the country's court systems would not serve as a competent forum to adjudicate remedies for ICT defendants.

Furthermore, the hostile political atmosphere surrounding ICT cases impedes the prompt delivery of domestic justice. As signified through the Shahbagh Movement, local publicity related to any potential corrective trials will instigate outrage and encourage *hartals*.[212] As a natural consequence, this escalation in violence would likely endanger the presiding party's popularity. Therefore, it is unlikely the Bangladeshi government would imperil the country's domestic stability—and Awami League's incumbency—to ameliorate its own wrongdoings.

When assessing Bangladesh's political conditions, it becomes apparent that domestic remedies carry formidable challenges that may dissuade defendants from pursuing this avenue of justice. Nonetheless, a domestic solution stands as the most crucial path for defendants to follow. As a practical matter, administering trials within Bangladesh would facilitate easier access to evidence relevant to the claims at issue.[213] From a policy perspective, a reformed and properly constituted ICT will signal Bangladesh's commitment to democracy and the rule of law. This solution also presents benefits in a geopolitical sense, in that reformation of the ICT will bolster the country's juridical and empirical sovereignty.[214]

In a moral sense, victims of human rights injustices have a vital interest in seeing justice restored—for the ICT's injustices, this means the defendants who have been tried and convicted by the Tribunal. As all of these defendants primarily reside in Bangladesh, they would be best served by having their trials take place in their home country.[215] In essence, restoring fairness in Bangladesh's domestic forums would function as a grand gesture showcasing the government's commitment

212. Rashiduzzaman, *supra* note 193, at 257.

213. Newton, *supra* note 37, at 404.

214. *See* Barnett, *supra* note 86, for an explanation of juridical and empirical sovereignty.

215. Newton, *supra* note 37, at 400.

to honoring human rights and its citizens' interests, as well as its responsibilities toward the international community.

If Bangladesh desires to realign itself with the human rights obligations it ratified under ICCPR Article 14, the country must welcome international aid to help improve the ICT's judicial integrity. Recently, the U.N. High Commissioner for Human Rights ("UNHCHR") made specific reference to the country's "lack of due process and judicial safeguards" and offered its agency's support to address these issues.[216] By availing itself to the assistance of the U.N., Bangladesh may find a viable solution to the issues jeopardizing the legitimacy of its judicial sector, with particular emphasis on those afflicting the ICT.[217]

Nongovernmental international agencies such as the International Center for Transitional Justice—which has issued proposals to Cambodian, Colombian, Moroccan, and South African transitional courts—could further assist Bangladesh in this endeavor.[218] Accepting guidance to reform the ICT's Statute in accordance with international standards would be the first step toward restoring the Tribunal's proper judicial functions. This collaboration would also ally the Tribunal with the U.N.-sanctioned ad hoc tribunals of Yugoslavia, Rwanda, and Cambodia, therefore rebuilding the Tribunal's reputation while bolstering the collective legitimacy of ad hoc tribunals as a forum for achieving transitional justice.

To encourage such juridical reformation in Bangladesh, the appropriate agencies should partner with Bangladesh's National Human Rights Commission ("JAMAKON") to draft recommendations on how to reinstate judicial integrity. Despite the ICT's shortcomings, Bangladesh has made respectable advancements in domestic human

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216. UNHCHR Visit to Bangladesh, *supra* note 1 ("My Office is ready to provide advice on how [an independent, specialized mechanism to investigate obstacles to justice] could be designed in line with international standards.").

217. The United Nations, international and regional partners, and nongovernmental organizations have helped multiple tribunals develop robust procedures to improve the judicial welfare of their domestic courts. *See* INT'L CRIM. TRIB. FOR RWANDA, LESSONS LEARNED FROM THE ICTR PROSECUTOR'S REFERRAL OF INTERNATIONAL CRIMINAL CASES TO NATIONAL JURISDICTIONS FOR TRIAL 17–18 (2015).

218. INT'L CTR. FOR TRANSITIONAL JUST., EFFECTIVE REMEDIES TO HUMAN RIGHTS VIOLATIONS (2009).

rights policy via the creation of the JAMAKON.[219] The JAMAKON is the monitoring agency through which Bangladesh transmits its mandated human rights reports to the UNHRC.[220] It is authorized, *inter alia*, "to review the safeguards of human rights provided by the Constitution or any other law for the time being in force and to make a recommendation to the Government for their effective implementation."[221] Thus, the UNHCHR, UNHRC, and other intergovernmental agencies can collaborate with JAMAKON to realign Bangladesh with the ICCPR's due process standards. The capacity-building initiates can also look to the Bangalore Principles of Judicial Conduct to guide its revisions.[222]

2. Independent Trials by a People's Tribunal

An additional option available to advocates consists of Bangladeshi civil society creating a people's tribunal to investigate the country's judicial misconduct and disclose its findings to the international

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219. The National Human Rights Commission Act, 2009 (Act. No. 53) (July 14) (Bangl.) [hereinafter NHRCB Act]. Established in 2007, the National Human Rights Commission is a government agency "committed to the accomplishment of human rights in a broader sense . . . as enshrined in the Constitution of the People's Republic of Bangladesh and different international human rights conventions and treaties to which Bangladesh is a signatory." *Introduction,* NATIONAL HUMAN RIGHTS COMMISSION BANGLADESH (Nov. 2, 2020), http://www.nhrc.org.bd/site/page/1c65dfa1-f9c2-48e9-a66b-eab8de75d9b1/-.

220. JAMAKON REPORT, *supra* note 115.

221. NHRCB Act, *supra* note 219, § 12(d).

222. U.N. OFF. DRUGS & CRIME, THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT (2002). The Bangalore Principles outline six core standards for an ethical judiciary: (1) impartiality, (2) independence, (3) propriety, (4) integrity, (5) diligence and competence, and (6) equality. *Id.* This seminal work elaborates on Article 11 of the United Nations Convention against Corruption ("UNCC"), which requires each State to "take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary." U.N. OFF. DRUGS & CRIME, UNITED NATIONS CONVENTION AGAINST CORRUPTION, art. 11 (2004) (Indeed, "[s]uch measures may include rules with respect to the conduct of members of the judiciary."). Because Bangladesh acceded to the UNCC, it is obligated to realize these objectives. U.N. OFF. DRUGS & CRIME, *Signature and Ratification Status* (Nov. 18, 2021), https://www.unodc.org/unodc/en/corruption/ratification-status.html. *See also* Vienna Convention of the Law of Treaties arts. 2(1)(b), 15, May 23, 1969, 1155 U.N.T.S. 331 (stating the accession to a treaty holds the same legal effect as ratification, binding member States to the treaty's provisions).

community. People's tribunals are fact-finding entities established by nongovernmental organizations, human rights experts, and members of civil society to draw attention to government abuses that cannot be impartially addressed within domestic courts.[223] Currently, there are a multitude of examples of people's tribunals issuing courageous decisions against autocratic regimes.

For instance, the Independent Tribunal into Forced Organ Harvesting from Prisoners of Conscience in China recently released its final verdict, which found the Chinese Communist Party ("CCP") guilty of organ harvesting.[224] Over the course of almost two decades, the tribunal collected evidence of the industry's existence and the government's targeting of minority religious populations. Ultimately, the tribunal amassed sufficient evidence to classify the CCP's practices as crimes against humanity.[225]

People's tribunals may also be instituted in territories outside of the country at issue in order to protect the tribunal's mission and preserve its factfinders' safety. In London, a people's tribunal on Iran was developed to document the extrajudicial killings and due process violations that occurred during Iran's 2019 protests.[226] Similarly, citizens have created local people's tribunals to address ongoing topics, such as the London-based tribunal tasked with documenting police brutality in the United Kingdom.[227]

Other people's tribunals have issued judgments on historical human rights violations, including the Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery (also

223. Richard Falk, *People's Tribunals, and the Roots of Civil Society Justice*, OPENDEMOCRACY (May 12, 2015), https://www.opendemocracy.net/en/opensecurity/peoples-tribunals-and-roots-of-civil-society-justice/.

224. *See generally* PEOPLE'S TRIBUNAL OF CHINA, JUDGMENT, *supra* note 45.

225. *Id.*

226. JUSTICE FOR IRAN, ISLAMIC REPUBLIC OF IRAN'S COMPLIANCE WITH INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (2020) [hereinafter JUSTICE FOR IRAN HRC REPORT]. As an aside, this author hopes that the Iranian people's tribunal will be used to document the current protests underway in Iran, which have led to numerous extrajudicial killings sanctioned by its government. *Iran executions 'state sanctioned killing': UN rights chief*, ALJAZEERA (Jan. 10, 2023), https://www.aljazeera.com/news/2023/1/10/iran-executions-amount-to-state-sanctioned-killing-un-says.

227. POSITION STATEMENT, THE PEOPLE'S TRIBUNAL ON POLICE KILLINGS (2021).

known as the 'Comfort Women' Tribunal).[228] Thus, members of Bangladeshi civil society could choose to form a people's tribunal with the mission of documenting the country's own miscarriages of justice. Indeed, the people's tribunal could serve as a crucial forum to report any further deprivation of due process committed by the Bangladeshi government, with the expectation that it will present its eventual findings to foreign and international courts.[229]

B. Multilateral Remedies

Unfortunately, depending upon Bangladesh's current regime to restore the country's judicial integrity or waiting upon Bangladeshi civil society to form a people's tribunal may sacrifice time that ICT defendants simply do not have. Nevertheless, there are alternative means of achieving judicial reform without domestic support. Lately, international recognition of Bangladesh's human rights abuses has grown.[230] As disapproval toward its government intensifies, defendants and their advocates can mobilize this social discontent to exert pressure upon Bangladesh to reform its laws and practices.[231]

1. Requesting Economic Sanctions

A potential avenue for such efforts might entail pressuring Bangladesh's bilateral and multilateral donors to leverage aid in order to secure legal safeguards for the ICT's future proceedings. Experts in international relations and comparative politics have acknowledged the singular importance fiscal relationships hold over the domestic behaviors of States.[232] Accordingly, Bangladesh's benefactors should contemplate conditioning their political and economic relations with the country to be contingent upon its judicial reformation.

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228. PEOPLE'S TRIBUNAL OF CHINA, JUDGMENT, *supra* note 44, at 5.

229. *See generally* JUSTICE FOR IRAN HRC REPORT, *supra* note 226.

230. *See e.g., supra* Parts I & III.

231. Cynthia Farid, *New Paths to Justice: A Tale of Social Justice Lawyering in Bangladesh*, 31 WIS. INT'L L. J. 421 (2013).

232. Peter Gourevitch, *The Second Image Reversed: The International Sources of Domestic Politics*, 32 INT'L ORG. 881, 911 (1978) ("Economic relations and military pressures constrain an entire range of domestic behaviors, from policy decisions to political forms.").

Social activists may direct their advocacy efforts toward countries like the United States, which has consistently expressed concern regarding Bangladesh's judicial system.[233] Recently, the U.S. has made its position on Bangladesh's human rights abuses known by excluding the country from its democracy summit,[234] and by imposing sanctions against Bangladesh's Rapid Action Battalion ("RAB") forces.[235] Other allies, such as the United Kingdom, have conveyed similar objections regarding the ICT's misconduct.[236]

Through this international pressure, advocates for ICT defendants could collaborate with human rights agencies to compile guidelines analogous to those outlined in HRW's 2014 report on Bangladesh's RAB, which the U.S. has begun to adopt in its sanctions against the agency.[237] With joint action emanating from defendants' advocates, international organizations, monitoring bodies, and Bangladeshi human rights agencies, tangible changes to correct the ICT's due process violations may be achievable.

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233. Press Release, U.S. DEP'T OF STATE, *Conviction and Death Sentence at Bangladesh International Crimes Tribunal* (Jan. 22, 2013), https://2009-2017.state.gov/r/pa/prs/ps/2013/01/203143.htm; *U.S. Statement on Death Sentence of Kamaruzzaman*, *supra* note 107.

234. Porimol Palma, *Biden's Summit for Democracy: Bangladesh's Exclusion Bewildering*, THE DAILY STAR (Nov. 28, 2021, 12:17 AM), https://www.thedailystar.net/news/bangladesh/news/bidens-summit-democracy-bangladeshs-exclusion-bewildering-2904311.

235. Michael Kugelman, *Why Did the United States Just Sanction Bangladesh?*, FOREIGN POLICY (Dec. 16, 2021, 5:00 PM), https://foreignpolicy.com/2021/12/16/bangladesh-us-sanctions-paramilitary-force/.

236. Jon Lunn & Arabella Thorp, *Bangladesh: the International Crimes Tribunal*, INTERNATIONAL AFFAIRS AND DEFENSE SECTION, HOUSE OF LORDS 3–5 (2012), https://researchbriefings.files.parliament.uk/documents/SN06318/SN06318.pdf.

237. In its 2014 report, Human Rights Watch called upon Bangladesh's donors to reform their alliances with the country through two broad actions: (1) "Press the government . . . to implement all the recommendations made in [Human Rights Watch's 2014] report," and (2) "[i]nsist on full compliance by security forces with international human rights standards and the rule of law, including by . . . end[ing] all training or institution building programs for RAB." HRW 2014 REPORT, *supra* note 10.

2. Pursuing Universal Jurisdiction

Alternatively, ICT defendants may have the option to seek relief through other countries' judicial systems. For example, in the United States, foreigners can pursue civil lawsuits against perpetrators of extraterritorial human rights violations through the Torture Victim Protection Act ("TVPA").[238] Under Section 2 of the TVPA, foreign plaintiffs may seek remedies for extrajudicial killings that occurred outside the U.S.[239]

TVPA Section 3(a) defines extrajudicial killing as "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[240] However, cognizable TVPA claims preclude "any such killing that, under international law, is lawfully carried out under the authority of a foreign nation."[241] The United States Supreme Court determined that international law must be derived from "the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."[242]

Given that international law recognizes due process as an indispensable right guaranteed to individuals,[243] and in light of international courts, international jurists, and customary international law condemning ICT's procedures as unlawful,[244] any death sentences executed by the Tribunal are tantamount to an extrajudicial killing under the TVPA.[245] Thus, there is a fair chance that if family members of deceased ICT defendants were to initiate proceedings under the TVPA in U.S. courts, their claims would be cognizable.

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238. *See generally* Torture Victim Protection Act of 1991, Pub. L. No. 102–256, 106 Stat. 73 (1992) (affording claims against "an individual who, under actual or apparent authority, or color of law, of any foreign nation . . . ").

239. *Id.* § 2(a)(2).

240. *Id.* § 3(a).

241. *Id.*

242. Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980) (quoting U.S. v. Smith, 18 U.S. (5 Wheat.) 153, 160–61 (1820)).

243. ICCPR, *supra* note 116, at art. 14.

244. *See generally supra* Part III.

245. *Id.*

One caveat, however, is that the perpetrator must be served with process while they are within the U.S.'s jurisdiction.[246] Therefore, if family members of executed ICT defendants intend to use the TVPA as a vehicle to sue those involved in the Tribunal's violations, they must remain vigilant of opportunities to serve process against the perpetrators once they enter a U.S. territory.

Moreover, under the principle of universal jurisdiction, the mere documentation of human rights abuses may also open a pathway to conduct trials in another State if dual-citizen defendants convince their second home country to initiate proceedings against Bangladesh.[247] Defendants must be mindful that, in any scenario where foreign court systems are involved, transborder access to evidence may encumber litigation. Obtaining or enforcing a judgment in foreign venues may require costly discovery expenses, including air travel to interview witnesses, arrangements for a prolonged absence from home, and the transportation of physical evidence to distant courtrooms.[248] Yet, as illustrated in the trial of Hissène Habré,[249] defendants may be able to rely on international agencies for assistance.[250]

246. Filartiga, *supra* note 242, at 878.

247. Although universal jurisdiction is subordinate to the injured State's jurisdiction, Bangladesh's obligations under the ICCPR and its reluctance to address the defendants' due process concerns may subject it to the authority of foreign courts. Quincy Wright, *War Criminals*, 39 AM. J. INT'L L. 257, 270 (1945).

248. Daril Gawith, *Litigation for International Online Consumer Transactions is Not Cost Effective – A Case for Reform*, 14 ELEC. L. J. 196, 236 (2007) (describing the costs associated with international arbitration in foreign courts).

249. *See generally* COMMISSIONS OF INQUIRY, CHAD: REPORT OF THE COMMISSION OF INQUIRY INTO THE CRIMES AND MISAPPROPRIATIONS COMMITTED BY EX-PRESIDENT HABRÉ, HIS ACCOMPLICES AND/OR ACCESSORIES 51 (1992) [hereinafter CHAD TRUTH COMMISSION REPORT].

250. John M. Mbaku, *International Law and the Struggle Against Government Impunity in Africa*, 42 HASTINGS INT'L & COMPAR. L. REV. 73, 131–50 (2019). Habré was a Chadian politician responsible for the murder and torture of approximately 240,000 individuals during his time as Chad's president. CHAD TRUTH COMMISSION REPORT, *supra* note 250, at 92. After his presidency, it took approximately 25 years for courts to prosecute him due to the various domestic and regional political complications impeding the process. Mbaku, *supra* note 251. For instance, Habré could not be tried in Chad due to his Senegalese domiciliary at the time of his indictment. *Id*.

3. Collecting Evidence for International Remedies

During Habré's reign, Human Rights Watch collected evidence of his war crimes and brought forth a claim against Habré in Senegalese courts.[251] However, the case was ultimately dismissed by Senegal's Supreme Court for lack of jurisdiction.[252] Following the dismissal, Belgian nationals of Chadian origin filed a suit against Habré in Belgian courts, arguing that Belgian law allowed Habré to be prosecuted for grave violations of international humanitarian law.[253]

In this case, Belgium sought Habré's extradition in order to be prosecuted within its borders.[254] Senegalese courts denied this request on the basis of jurisdictional immunity, instead referring Habré's case to the African Union.[255] After an unsuccessful bid for arbitration, Belgium filed suit with the ICJ, alleging that Senegal breached its obligations under the Convention against Torture for refusing to extradite Habré.[256] The ICJ issued a judgment ordering Senegal to prosecute or extradite Habré—facing mounting international pressure, Senegal initiated its prosecution of Habré.[257]

Notably, the ICJ's decision was not the exclusive force prompting Senegal to administer fair proceedings against Habré. Instead, it was through the independent collaboration of individual advocates with international organizations that justice was eventually delivered.[258] In Habré's case, victims of Habré's human rights abuses were deprived of a forum to seek justice, "either because they [were] dead or live[d] within States in which all avenues of protest, even peacefully, have been taken away by the government."[259] Without domestic support, the victims worked with regional, international, and nongovernmental bodies to eventually secure due process.[260]

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251. Mbaku, *supra* note 250, at 134.

252. *Id*.

253. Questions relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 422, 432, ¶ 19 (July 20).

254. *Id.* at 433, ¶¶ 22–23.

255. *Id*.

256. *Id.* at 437, ¶ 33.

257. *Id.*

258. Mbaku, *supra* note 250, at 146.

259. *Id*. at 143.

260. *Id*. at 146–48.

Similar to the challenges faced in Habré's case, defendants tried by the ICT must strategically navigate the complexities of Bangladesh's politicized legal system to seek redress for their claims, whether these remedies are sought domestically or internationally. Nevertheless, with enough momentum, activists can utilize the collective condemnation of the ICT by the aforementioned international bodies to convince Bangladesh's government to properly administer remedial trials. Indeed, Habré's case serves as an international precedent offering support to those who persevere against injustice and favoring solutions for those unable to secure justice within their domestic legal systems, including the defendants of the ICT.

C. International Remedies

In the event that domestic efforts to invoke reform are ineffective and defendants are unable to litigate in foreign courts, ICT defendants may turn to international institutions for help. Although several avenues of recourse are available to defendants in this realm, it is essential to note that many of these channels involve complex jurisdictional and standing thresholds that often necessitate participation from a State actor in order to have the matter heard. For instance, the first international avenue defendants would typically pursue would be to report Bangladesh's ICCPR infractions to the UNHRC. Under Optional Protocol I of the ICCPR, an aggrieved victim may submit an individual complaint to the UNHRC on any State violation of the Covenant.[261] Before submitting a claim, however, the breaching State must have issued a declaration explicitly recognizing the UNHRC's competence to evaluate individual complaints against the State.[262] Although Bangla-

261. Optional Protocol to the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (Dec. 16, 1966) [hereinafter Optional Protocol I]. *See also* Thomas Buergenthal, *The U.N. Human Rights Committee*, 5 MAX PLANCK Y.B. U.N. L. 341, 367 (2001). Indeed, original jurisdiction over individual complaints involving ICCPR breaches is delegated to the UNHRC, which is the principal body monitoring State compliance with the treaty's provisions. Optional Protocol I, *supra*, at art. 1. Unlike its counterpart (ICCPR art. 41), the functions of the mechanisms in Optional Protocol I operate as a semi-judicial body rather than a conciliation procedure. Buergenthal, *supra* note 262.

262. Optional Protocol I, *supra* note 261, at art. 1:

desh has acceded to the ICCPR,[263] it is distinctly absent from Optional Protocol I's participants.[264] Therefore, the UNHRC is manifestly powerless to handle ICT defendants' human rights claims.

1. The International Criminal Court

Still, other avenues of recourse are available within the ICC and the ICJ. Although defendants tried by the ICT cannot use the ICC as a forum for retrials due to jurisdictional limitations,[265] they may be able to introduce their present due process claims to the apex court. Indeed, recent scholarship on the ICC has construed the Rome Statute as designating the international tribunal the role of a forum for addressing due process grievances that cannot be fairly heard in domestic courts.[266] Therefore, it may be possible that this forum is available to ICT defendants seeking retributive or restorative justice against the individuals responsible for violating their rights under ICCPR Article 14.[267]

Traditionally, the principle of complementarity dictates that the ICC cannot assert jurisdiction over claims that are being actively in-

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> A State Party to the Covenant that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a party to the present Protocol. *Id*.

263. *Status of Treaties, International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-5&chapter=4&clang=_en#4.

264. *Id*.

265. The Rome Statute's entry into force occurred three decades after Bangladesh's Liberation War; thus, any crimes committed during the war would be barred jurisdictionally under Article 11 of the Rome Statute. Rome Statute, *supra* note 33, at art. 11.

266. Elinor Fry, *Between Show Trials and Sham Prosecutions: The Rome Statute's Potential Effect on Domestic Due Process Protections*, 23 CRIM. L.F. 35, 39–40 (2012).

267. *See* Claire Garbett, *The International Criminal Court and Restorative Justice: Victims, Participation, and the Processes of Justice*, 5 RESTORATIVE JUST: AN INT'L J. 198 (2017).

vestigated or have been resolved by a State.[268] However, Article 20(3) of the Rome Statute contains a potential exception to the principle of complementarity that permits the ICC to hear cases that have been decided by domestic courts but lacked sufficient due process.[269] Article 20(3) stems directly from Article 17, which confers jurisdiction on the ICC when the State with primary jurisdiction is "unwilling or unable" to conduct domestic proceedings "independently or impartially."[270] In assessing the proceeding's fairness, Article 17 of the Rome Statute refers to the "principles of due process recognized by international law,"[271] which international criminal law experts have interpreted to be coextensive with the rights enshrined in ICCPR.[272]

As discussed above, Bangladesh has demonstrated an unwillingness to objectively prosecute defendants in accordance with universal principles of due process.[273] In theory, this reluctance would fulfill Article 17's prerequisite conditions. Therefore, because Bangladesh is a signatory to the Rome Statute,[274] and because the ICT's prosecu-

268. Rome Statute, *supra* note 33, at preamble ¶ 4 and art. 17. *See generally* PAUL SEILS, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE: HANDBOOK ON COMPLEMENTARITY (2016). *See also* Peter Widulski, *The ICC's Principle of Complementarity and Domestic Prosecutions*, PACE CRIM. J. BLOG (Oct. 30, 2015), https://pcjc.blogs.pace.edu/2015/10/30/the-iccs-principle-of-complementarity-and-domestic-prosecutions/.

269. Rome Statute, *supra* note 33, at art. 20(3) ("No person . . . tried by another court for conduct also proscribed under [this Statute] shall be tried by the Court . . . unless the proceedings in the other court: . . . were not conducted independently or impartially in accordance with . . . due process . . .").

270. Rome Statute, *supra* note 33, at arts. 17(1)–(2).

271. *Id*. at art. 17(1). *See also* Ruti Teitel, *The ICC and Saif: After International Intervention, Avoiding Victor's Justice*, OPINIOJURIS (Feb. 1, 2012), https://opiniojuris.org/2012/01/02/the-icc-and-saif-after-international-intervention-avoiding-victor%E2%80%99s-justice/. Although ICC prosecutor Luis Ocampo has stated that "[the ICC is] not a system to monitor fair trials[,]" scholars have implored the ICC to adopt responsibility for States that do not host fair trials in order to enforce accountability for their human rights violations. *Id*.

272. Kevin Jon Heller, *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process*, 17 CRIM. L.F. 255 (2006).

273. *See supra* Part III.

274. *Rome Statute of the International Criminal Court, Depositary Notifications*, 2187 U.N.T.S. 3 (U.N., 2002).

tions began after the Rome Statute came into force in Bangladesh,[275] ICT defendants may be able to submit an investigation claim to the ICC prosecutor under Rome Statute Article 20(3). However, any concerned State that is a party to the Rome Statute may submit a claim on the defendants' behalf to the prosecutor's office in order to request investigations into Bangladesh's judiciary.

2. The International Court of Justice

Alternatively, a path toward litigating the defendants' claims in the International Court of Justice ("ICJ") is also feasible, given the ICJ has previously heard several matters regarding individual human rights violations.[276] Compared to the ICC, the ICJ is exclusively reserved as a forum to litigate civil claims between States—therefore, defendants may only bring claims to this court for allegations concerning Bangladesh's breaches of its international duties under the ICCPR. However, defendants must have the means to obtain standing before pursuing a case in the ICJ. Under Article 34(1) of the ICJ Statute, the court is confined to hearing disputes between State parties; therefore, private parties cannot utilize this forum unless a State actor is willing to sue on their behalf.[277] For ICT defendants, the State must also be a party to the ICCPR.[278]

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275. Bangladesh ratified the Rome Statute on March 23, 2010. Press Release, *Bangladesh Ratifies the Rome Statute of the International Criminal Court*, INT'L CRIM. CT. (Mar. 24, 2010), https://www.icc-cpi.int/news/bangladesh-ratifies-rome-statute-international-criminal-court. In contrast, the first indictments for the ICT began in August of 2010. ABDUR RAZZAQ, *supra* note 101, at 341.

276. *See generally* Ahmadou Sadio Diallo (Rep. of Guinea v. Dem. Rep. of the Con.), Judgment, 2010 I.C.J. 639 (Nov. 30). *See also* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ¶ 25, 1996 I.C.J. 226 (July 8).

277. Only States may be party to suits before the ICJ; therefore, absent a willing State consenting to sue on their behalf, ICT defendants lack standing to adjudicate the merits of their claims in the ICJ. Statute of the International Court of Justice, art. 34(1), June 26, 1945, 33 U.N.T.S. 993. *See also* Int'l L. Comm'n, Articles on the Responsibility of States for Internationally Wrongful Acts, art. 42, U.N. Doc. A /RES/56/83 (Jan. 28, 2002); La Grand (Germ. V. U.S.), Judgment, 2001 I.C.J. 466, ¶¶ 76–77 (June 27); Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. 12, ¶ 40 (Mar. 31).

278. This is because the jurisdictional bases of the ICJ's previous human rights cases have involved a State breaching its mutual obligations under a treaty ratified

Even with support from a willing and able State, the State must illustrate a sufficient nexus demonstrating that the defendants qualify as the State's nationals and are thus within the scope of the State's diplomatic protection.[279] Although some defendants carry dual citizenship in countries such as the United Kingdom,[280] it is unclear how the status of this citizenship has been affected by their ICT prosecutions, nor how the ICJ will perceive the defendant's reasons for acquiring foreign citizenship.[281] Absent standing, defendants should look to other international mechanisms for relief. Defendants may also use these platforms to collect evidence for a future ICJ case.

3. Existing United Nations Special Procedures

At the minimum, defendants should endeavor to preserve evidence of their due process violations with international bodies under the U.N., which will ensure a robust portfolio of discovery is available for any inevitable reparation claims, whether criminal or civil. Although defendants are jurisdictionally barred from filing individual complaints with the UNHRC, they may nevertheless utilize the Human Rights Council and its working groups, independent experts, and Special Rapporteurs to document misconduct.

In the ICJ's *Diallo* decision, the court noted that although it need not model its decision upon the UNHRC's communications, "it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of

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by both parties. Ahmadou Sadio Diallo (Rep. of Guinea v. Dem. Rep. of the Con.), Judgment, 2010 I.C.J. 639, 664 (Nov. 30).

279. Nottebohm (Second Phase) (Liech. V Guat.), Judgment, 1955 I.C.J. 4, 22–26 (Apr. 6); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 482–496 (Oxford, 5th ed. 1999). *See also* International Law Commission, Draft Articles on Diplomatic Protection, art. 7(5), U.N. Doc. A/RES/61/10 (2006).

280. Delwar Hussain, *Prosecute Bangladesh's war criminals*, THE GUARDIAN (Oct. 7, 2009), https://www.theguardian.com/commentisfree/2009/oct/07/bangladesh-war-crimes ("Many of [the defendants] fled in the aftermath of the war and some came to the UK.").

281. *Nottebohm (Second Phase)*, *supra* note 279. In *Nottebohm*, the ICJ determined that because Nottebohm fled to Liechtenstein and obtained its citizenship to evade prosecution in another country, he did not maintain a sufficient nexus with Liechtenstein to enjoy its diplomatic protection. *Id*.

that treaty."[282] As the Human Rights Council holds a similar specialized function to the UNHRC,[283] defendants and their advocates should take advantage of the Council's devices to build a strong case for international adjudication in the ICJ. This entails continuing to bring forth claims to the Council's working groups, including—but not limited to—the WGAD.

The WGAD is the only non-treaty-based forum mandated to investigate complaints petitioned by individuals rather than States.[284] Unlike the United Nation's treaty-based adjudicatory platforms, the Working Group "does not require exhaustion of all available domestic remedies for the communication to be admissible for consideration[.]"[285] Therefore, both convicted defendants and those with pending trials may submit complaints to the WGAD.

After receiving the complaint and all requested communications from both parties,[286] the WGAD can adopt one of five measures to

282. Diallo, *supra* note 178 at 664.

283. The Human Rights Council is the investigatory body of the United Nations tasked with examining human rights complaints brought forth by its member States. Human Rights Council, Methods of work of the Working Group on Arbitrary Detention*, U.N. Doc. A/HRC/36/38, ¶ 19 (July 13, 2017) [hereinafter Human Rights Council Mandate].

284. *Complaints and Urgent Appeals,* WORKING GROUP ON ARBITRARY DETENTION, https://www.ohchr.org/en/special-procedures/wg-arbitrary-detention/complaints-and-urgent-appeals.

285. THE WORKING GROUP ON ARBITRARY DETENTION, MODEL QUESTIONNAIRE TO BE COMPLETED BY PERSONS ALLEGING ARBITRARY ARREST OR DETENTION, at 3.

286. To file a complaint, a concerned party must submit a communication to the WGAD through its designated questionnaire. *Complaints and Urgent Appeals, supra* note 284. Any legal or familial representative of the detained individual may submit a complaint on behalf of the detainee, including non-governmental human rights organizations, State officials, and intergovernmental organizations. *Id.* In a similar fashion to a traditional lawsuit, the WGAD will invite the accused State to reply to the allegations made against it, and the complainant to answer to the State's reply. *Id*. The State must respond within 60 days of receiving the complaint, and must include responses to "the facts presented, any relevant legislation and the progress/outcome of any investigations that may have been initiated." *Id*. For a comprehensive overview of WGAD's procedures, see JARED GENSER, THE UN WORKING GROUP ON ARBITRARY DETENTION: COMMENTARY AND GUIDE TO PRACTICE (Cambridge Univ. Press, 2019).

address the claims alleged.[287] In its 2011 opinion, the WGAD issued recommendations to the Bangladeshi government on how to rectify its Article 14 and Article 9 ICCPR violations.[288] Although Bangladesh has yet to implement these recommendations, the documentation derived from each WGAD opinion provides valuable support for future reformation efforts. Moreover, in issuing decisions on six ICT defendants, the WGAD's international monitoring powers have brought credence to the urgency of ICT defendants' due process claims.

Despite Bangladesh's inaction, ICT defendants should continue to work in tandem with the forum as WGAD's opinions are given to the Human Rights Council to include within the Council's annual reports.[289] From this mandatory reporting, any failure to rectify the problems identified in the WGAD opinions has the potential to be heard by the Human Rights Council. This makes it imperative that the remaining defendants who have not filed complaints with the WGAD submit these complaints immediately to preserve evidence of their due process violations.

As the WGAD receives further proof of Bangladesh's violations, its repeated denouncements of Bangladesh's non-compliance with international law could eventually convince Bangladesh's allies of the situation's exigency and persuade them to help advocates induce judicial reform. Even without external State intervention, these international findings will operate as vital evidence in future remedial trials under the order of a new Bangladeshi regime, or future trials in foreign and international forums.

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287. These five options include: (1) issuing an opinion determining the detention was arbitrary, regardless of whether the defendant was released; (2) issuing an opinion finding the detention to be justified; (3) keeping the case pending upon the receipt of further information on the detention; (4) filing a case "provisionally or definitively" if it is not able to obtain sufficient enough information regarding the conditions around the detention; and (5) issuing an opinion finding the detention arbitrary and providing recommendations to the State's government on rectifying the arbitrary deprivation of liberty. *Complaints and Urgent Appeals, supra* note 285. Presumably, the fifth measure would continue to apply to requests submitted by ICT defendants.

288. *See generally supra* Part IV(B).

289. Human Rights Council Mandate, *supra* note 283.

4. Future International Apparatuses

The mechanism through which the WGAD was created may also be of use to address Bangladesh's due process concerns. As seen with the WGAD, Special Procedures are platforms the Human Rights Council may develop to give members of civil society an international forum through which they may file complaints against a State.[290] Special Procedures are comprised of independent experts, special rapporteurs, or working groups which focus on a particular thematic or country mandate.[291] In essence, Special Procedures are international monitoring agencies made to hold States accountable for their human rights abuses.[292] Although Special Procedures do not have the power to enforce compliance,[293] citizens can use these forums to document human rights abuses and receive a neutral opinion on the matter.

ICT defendants may petition the Human Rights Council to create a non-treaty country-based Special Procedure on Bangladesh to investigate ICT misconduct or a new thematic Special Procedure to investigate individual due process violations.[294] Although several thematic procedures already exist that are tangentially relevant to the ongoing issues in the ICT,[295] no country-specific Special Procedure on Bang-

290. Currently, there are 45 thematic special procedures and 13 country mandates. U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, *Special Procedures of the Human Rights Council*, https://previous.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx [hereinafter *Special Procedures of the Human Rights Council*].

291. *Id.*

292. *Id.*

293. *Id.*

294. Hum. Rts. Council, Methods of work of the Working Group on Arbitrary Detention*, U.N. Doc. A/HRC/36/38, ¶ 19 (July 13, 2017).

295. Hum. Rts. Council, Mandate of the Special Rapporteur on extrajudicial, summary, or arbitrary executions, U.N. Doc. No. A/HRC/RES/44/5 (July 22, 2020); Hum. Rts. Council, Freedom of opinion and expression: mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, U.N. Doc. No. A/HRC/RES/43/4 (June 30, 2020) (as of this article, the current holder of this Special Rapporteur's mandate is Bangladesh); Hum. Rts. Council, The rights to freedom of peaceful assembly and of association, U.N. Doc. No. A/HRC/RES/50/17 (July 20, 2022); Hum. Rts. Council, Mandate of the Special Rapporteur on the independence of judges and lawyers, U.N. Doc. No. A/HRC/RES /44/8 (July 23, 2020); Hum. Rts. Council, Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, U.N. Doc. No. A/HRC /RES/45/10 (Oct. 12, 2020).

ladesh nor thematic Special Procedure on due process violations currently exists.[296] Furthermore, the existing thematic Special Procedure most relevant to the ICT's misconduct—the Special Rapporteur on the independence of judges and lawyers—has requested to visit Bangladesh twice but has yet to receive an invitation to investigate the country's conditions.[297]

Nevertheless, experts from five different Special Procedure groups issued a collective statement to the Bangladeshi government in 2016, urging the administration to "annul the death sentence against a senior opposition member of the Jamaat-e-Islami party, Mir Quasem Ali, and to re-try him in compliance with international standards."[298] This declaration alone demonstrates the increasing need for judicial accountability within Bangladeshi courts. Developing a country-based or thematic Special Procedure dedicated to investigating Bangladesh's due process violations could serve two functions: first, it could bring greater visibility to the country's persistent struggles with protecting judicial autonomy; and second, it could induce other countries grappling with comparable concerns to provide greater transparency regarding their own due process protections (or lack therefore).

Even in the absence of a specialized Special Procedure, remaining ICT defendants may still file grievances with appropriate groups within the Human Rights Council, who will continue to monitor and comment on Bangladesh's deteriorating human rights situation. At a minimum, these opinions may convince another State to utilize universal jurisdiction and hold remedial trials in its courts.[299] And, if defendants

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296. *Special Procedures of the Human Rights Council*, *supra* note 290.

297. The Special Rapporteur issued two requests: one in 2007 and one in 2012. U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, *Special Rapporteur on the Independence of Judges and Lawyers: Country Visits*, https://www.ohchr.org/en/special-procedures/sr-independence-of-judges-and-lawyers/country-visits. It is worth noting that both these requests were made prior to any revelation regarding the ICT's corruption, and it is unclear whether any further requests were submitted post-2012.

298. Press Release, *Bangladesh: UN Experts Urge Retrial of Opposition Leader Facing Death Penalty Following International Standards*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS. (Aug. 23, 2016), https://www.ohchr.org/en/press-releases/2016/08/bangladesh-un-experts-urge-retrial-opposition-leader-facing-death-penalty.

299. Universal jurisdiction is reserved for specific crimes, such as those within the 1949 Geneva Conventions; therefore, a State party to the treaties permitting such jurisdiction that is willing to invest resources may be able to adjudicate ICT's mistri-

qualify for a case before either the ICJ or the ICC, these opinions will serve as credible evidence of Bangladesh's consistent disregard for due process.[300]

CONCLUSION: A CAUTIONARY TALE AND A CALL FOR HOPE

Though the road is long for ICT defendants, the strategies discussed above may help provide relief to their situations. Among these strategies, the most practical and impactful course of action is to initiate domestic trials in order to remedy the harm caused by the ICT's due process violations and to obtain the reparations promised to victims of miscarried justice. Such trials may be brought about through Bangladesh's independent initiation or through external pressure from foreign economic sanctions or a local people's tribunal.

However, to preserve the fairness of these trials, Bangladesh must first reform its judicial system and amend the ICT's foundational documents to avoid the same due process concerns that marred the ICT's first trials. If the Bangladeshi government continues to express reluctance toward reform, human rights experts and concerned citizens may choose to form a people's tribunal to document any further due process violations committed by the ICT.

If Bangladesh fails to initiate or utilize domestic procedures with proper standards of due process, defendants may look toward international options in the ICC, the ICJ (if standing is resolved), or through foreign courts via universal jurisdiction. If these options are unsuccessful, defendants may still submit their claims to various Special Procedures within the Human Rights Council. These claims can be introduced as evidence in later proceedings, whether the trials are conducted in international courts, foreign courts, or Bangladeshi courts under a reformed judiciary and new regime. Therefore, despite the daunting challenges that lie ahead, the obstacles are not insurmountable, and the procedures available to defendants can provide relief if their advocates remain tenacious in their efforts to use them.

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als. ROBERT CRYER, HAKAN FRIMAN, DARRYL ROBINSON & ELIZABETH WILMHURST, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 50–51 (Cambridge Univ. Press, 2011).

300. In its own proceedings, the ICJ recognizes reports from U.N. specialized bodies as important pieces of evidence to prove a country's human rights conditions. Armed Activities on the Territory of the Congo*, supra* note 156, ¶ 70.

Although the fundamental importance of protecting due process never wanes, revisiting and remedying the ICT's misconduct is more relevant now than ever, particularly given Russia's recent invasion of Ukraine. As the world confronts the intensifying international crisis in Eastern Europe, legal scholars have begun exploring the feasibility of establishing a war crimes tribunal for Ukraine.[301] Yet, experts have also highlighted the exorbitant costs associated with litigating war crimes on an international scale.[302] Thus, in lieu of commissioning trials at the ICC, some scholars have proposed developing an ad hoc domestic tribunal backed by the U.N. General Assembly to try the war crimes perpetrated by soldiers of both factions.[303]

Despite the differences between the tribunals in terms of political circumstances and evidentiary timelines, Bangladesh's ICT offers a tale of caution for all war crimes tribunals, including the one being considered for Ukraine. Indeed, the ICT serves as a grim example of how internationally supported courts may not always yield a just out-

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301. Oona A. Hathaway, *The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part I)*, JUST SECURITY (Sep. 20, 2022), https://www.justsecurity.org/83117/the-case-for-creating-an-international-tribunal-to-prosecute-the-crime-of-aggression-against-ukraine/; Press Release, *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: "I have decided to proceed with opening an investigation."*, INT'L CRIM. CT. (Feb. 28, 2022), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening.

302. Indeed, the Extraordinary Chambers in the Courts of Cambodia ("ECCC") suffered from fund shortages during its proceedings, jeopardizing its ability to pay workers in the domestic portion of its hybrid tribunal. *See* David Scheffer, *No Way to Fund a War Crimes Tribunal*, N.Y. TIMES (Aug. 28, 2012), https://www.nytimes.com/2012/08/29/opinion/Funding-Cambodias-War-Crimes-Tribunal.html. War crimes tribunal experts criticized the financial burden international governing bodies impose on States to independently fund hybrid tribunals, claiming that "with sufficient long-term funding the Cambodia tribunal [would be] in a far better position to shield itself from outside influences." *Id.* Even the ICC struggles to maintain the finances needed to cover the cost of its lengthy litigation processes. David Schwendiman, *The Way: The Chief Prosecutor, the Int'l Criminal Court, and Ukraine*, JUST SECURITY (Mar. 20, 2022), https://www.justsecurity.org/80757/the-way-the-chief-prosecutor-international-criminal-court-and-ukraine/.

303. *See* U.N. Security Council, Letter dated 12 August 2022 from the Representatives of Latvia, Liechtenstein and Ukraine to the United Nations, U.N. Doc. A /ES-11/7-S/2022/616 (Aug. 17, 2022). *See also* Justin Ling, *How to Prosecute Russia's War Crimes*, FOREIGN POL'Y (Aug. 12, 2022, 1:40 PM), https://foreignpolicy.com/2022/08/12/how-to-prosecute-russias-war-crimes/.

come. Despite its attempts at reform, the Tribunal continues to prosecute individuals in sham trials that lack adequate due process protections and are rife with judicial misconduct. Moreover, the Tribunal's scandals have exposed how its fragile systems operate under the auspices of political persecution. By continuing to issue judgments curated through censured procedures, Bangladesh reinforces its trajectory toward authoritarianism, which presents distressing implications for the state of democracy in South Asia.

The ICT's failure to uphold due process and its apparent political motives further diminish the Bangladeshi government's credibility, tarnishing its nascent reputation and decreasing its overall legitimacy. Not only does such a reputation disservice the ICT's defendants and Bangladesh as a whole, but it evidences a disregard toward the true victims of the Liberation War, many of whom may now face doubts about the relief they received and the whereabouts of the actual perpetrators of 1971's atrocities. If Bangladesh cannot retry its defendants outside the confines of its kangaroo court system, the real perpetrators of these war crimes will continue to enjoy impunity, and their victims will be deprived of the closure they deserve. Thus, it is Bangladesh's responsibility to its people and its history to uphold the rule of law in all aspects of the ICT's proceedings.

Finally, the Tribunal's miscarriages of justice carry consequences that transcend beyond the lives of the defendants and victims involved. As a quasi-international forum, the Tribunal's willful deprivation of due process has the potential to adversely impact the public's perception of all ad hoc war crimes tribunals, bringing into question their procedures, officers, and decisions.[304] The revelations surrounding the ICT's proceedings raise an important concern for these forums of transitional justice: If an ad hoc tribunal can brazenly contravene

304. Similar to the ICT, the Cambodian government "insisted that, for the sake of the Cambodian people, the [ECCC] trial must be held in Cambodia using Cambodian staff and judges together with foreign personnel." *About ECCC*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, https://www.eccc.gov.kh/en/about-eccc. However, unlike the ICT, Cambodia settled an agreement with the U.N. in 2003 to allow assistance in "detailing how the international community will assist and participate in the Extraordinary Chambers." *Id.*

fundamental human rights with impunity, what is to prevent others from doing the same?[305]

Thus, scholars contemplating the path ahead for Ukraine must consider the perils accompanying the administration of a hybrid tribunal and must recognize the pressing need for an evolved framework complete with effective safeguards and accountability measures. Victors' courts may have existed since time immemorial, but the abuse of power evinced by hybrid tribunals has evolved into a disturbing reality that due process advocates must acknowledge and address as transitional justice moves forward.

It is important to emphasize that this Comment does not contend that international tribunals necessitate rigorous oversight in order to succeed. In fact, "the improvised and imperfect nature of postwar justice should not be used . . . to discredit the entire project of prosecution of crimes committed during the war years."[306] Yet, if the international community is to effectively address current and future international violations through ad hoc war crimes tribunals, it must be cautious of situations where such tribunals infringe upon human rights themselves. Indeed, in its noble quest for justice, a tribunal may succumb to corruption and the flaws in its methodologies may reduce its verdicts to mere Pyrrhic victories.[307]

While Bangladesh's ICT serves as a cautionary tale on how the search for justice may result in injustice, the continued recognition of its shortcomings should inspire advocates to continue their pursuits toward achieving real justice. It is this author's hope that Bangladesh's ICT will acknowledge the indispensable significance rule of law holds for its legitimacy and will pioneer a path forward using

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305. The ECCC has come under scrutiny in the past for the Cambodian government's alleged political interference with its trial. Irwin Loy, *Cambodian War Crimes Tribunal Under Pressure After Judge Resigns*, VOA (Mar. 19, 2012), https://www.voanews.com/a/cambodian-war-crimes-tribunal-under-pressure-after-judge-resigns-143482626/180774.html.

306. Devin O. Pendas, *Seeking Justice, Finding Law: Nazi Trials in Postwar Europe*, 81 J. MODERN HIST. 347, 348 (2009) (quoting Martin Conway, *Justice in Postwar Belgium: Popular Passions and Political Realities,* 2 CAHIERS D'HISTOIRE DU TEMPS PRESENT 7 (1997)).

307. Pyrrhic victories are battles that devastate the winners themselves, resulting in hollow achievements that cost more than the battle was worth. *What is a 'Pyrrhic victory'?*, MERRIAM WEBSTER, https://www.merriam-webster.com/words-at-play/pyrrhic-victory-meaning.

these principles. The central purpose of this Comment is to convey support, hope, and encouragement to those who have yet to experience the full benefits of the rule of law. It also seeks to remind the Bangladeshi people of the domestic and international apparatuses within their reach that may be utilized to demand change. There has never been a more opportune time to demand justice in Bangladesh—now, it is up to the strength and resilience of its people to seize it.