



# TORTURE IN BANGLADESH 1971-2004

**MAKING INTERNATIONAL COMMITMENTS A REALITY AND  
PROVIDING JUSTICE AND REPARATIONS TO VICTIMS**

**AUGUST 2004**



**REALISED WITH FINANCIAL SUPPORT FROM  
THE EUROPEAN INITIATIVE FOR DEMOCRACY AND HUMAN RIGHTS**

The Redress Trust  
87 Vauxhall Walk, 3<sup>rd</sup> Floor  
London, SE11 5HJ  
Tel: +44 (0)207 793 1777 Fax: +44(0)207 793 1719  
Website: [www.redress.org](http://www.redress.org)



## INDEX

|   |           |
|---|-----------|
| <b>I. INTRODUCTION .....</b>  | <b>4</b>  |
| <b>II. CONTEXT OF TORTURE IN BANGLADESH .....</b>   | <b>5</b>  |
| A. POLITICAL HISTORY .....  | 5         |
| B. TORTURE AND OTHER SERIOUS ABUSES COMMITTED IN THE COURSE OF THE 1971 WAR.....                      | 7         |
| i. Violations attributed to Pakistani forces and “collaborators” .....                                | 7         |
| ii. Violations attributed to the Mukthi Bahini and Bengali civilians.....                             | 8         |
| C. THE PRACTICE OF TORTURE IN BANGLADESH FROM 1971-2004 .....   | 9         |
| <b>III. BANGLADESH’S OBLIGATIONS UNDER INTERNATIONAL LAW AND IMPLEMENTATION IN DOMESTIC LAW .....</b> | <b>13</b> |
| A. INTERNATIONAL OBLIGATIONS .....  | 13        |
| B. INCORPORATION OF INTERNATIONAL OBLIGATIONS IN BANGLADESHI DOMESTIC LAW .....                       | 16        |
| i. Ratification of treaties .....   | 16        |
| ii. Legal Framework relating to the prohibition of torture.....                                       | 17        |
| <b>IV. ENFORCEMENT OF INTERNATIONAL OBLIGATIONS.....</b>  | <b>24</b> |
| A. RESPONSES TO VIOLATIONS COMMITTED IN THE COURSE OF THE 1971 WAR .....                              | 24        |
| i. Pakistan .....   | 24        |
| ii. Bangladesh.....   | 26        |
| iii. Third countries .....  | 28        |
| B. RESPONSES TO ALLEGATIONS OF TORTURE AND ILL-TREATMENT COMMITTED FROM 1971 TO THE PRESENT .....     | 29        |
| i. The procedural framework.....  | 29        |
| ii. In practice .....   | 33        |
| <b>V. CONCLUSION .....</b>  | <b>39</b> |
| <b>VI. RECOMMENDATIONS .....</b>  | <b>41</b> |



## I. INTRODUCTION

Bangladesh ratified the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter Convention against Torture) in 1998 and the International Covenant on Civil and Political Rights in 2000, both of which prohibit the use of torture and oblige States parties to hold perpetrators of torture accountable and to provide remedies and reparation to survivors. These ratifications constituted major steps forward in Bangladesh's efforts to bring about an end to the entrenched practices of torture and ill-treatment. Nonetheless, numerous reports suggest that the practice of torture continues unabated and that there is near complete impunity for perpetrators.<sup>1</sup>

This Report analyses why there has been so little apparent progress since these recent ratifications and explores a range of measures that could usefully be undertaken to break what can be described as an ingrained cycle of impunity, dating as far back as to the abuses committed in the course of the 1971 war. The aim of this Report is to stimulate dialogue within Bangladesh on the concrete steps that may need to be taken for Bangladesh to be in full compliance with the Convention against Torture. The Report provides a detailed analysis of the domestic remedies available in Bangladesh in cases of torture. It provides an overview of the relevant Bangladeshi laws and how they measure up to international standards, and examines how these laws are implemented in practice. We approach the subject from the perspective of survivors of torture, and identify some of the primary obstacles they face in their efforts to seek justice and reparation.

Civil society organisations in Bangladesh have actively encouraged greater accountability for serious violations of human rights, including torture. In 2001, the organisation Odhikar produced the seminal publication *Breaking the Cycle of Impunity*,<sup>2</sup> and the Bangladesh Legal Aid and Services Trust (BLAST), together with others, petitioned the High Court Division of the Supreme Court to challenge legislation that facilitates torture. As a result, the Supreme Court directed the Government to take a number of concrete steps to combat the practice of torture more effectively.<sup>3</sup> Of utmost importance, this judgment also paves the way for reparation awards by the High Court Division in future torture cases.<sup>4</sup> These developments show the extent of the problem and the commitment of civil society to find workable solutions.

On 27 February 2004, REDRESS organised a seminar on the right to reparation for torture survivors in Dhaka together with the Bangladesh Rehabilitation Council for Trauma Victims (BRCT).<sup>5</sup> This meeting provided a useful forum for experts and practitioners to discuss key problems and to begin to strategise on the necessary steps to improve survivors' access to justice and reparations. The recommendations in this Report reflect some of the main outcomes of this seminar.

REDRESS has carried out the research for this report in collaboration with several NGOs and human rights activists in Bangladesh and wishes to acknowledge their invaluable

---

<sup>1</sup> See *infra* at II C.

<sup>2</sup> See Odhikar, *Breaking the cycle of impunity*, 2001 (this book and other Odhikar publications referred to in this report are available at <http://www.odhikar.org/>).

<sup>3</sup> *Bangladesh Legal Aid and Services Trust (BLAST) and others vs. Bangladesh and others*, High Court Division (Special Original Jurisdiction), The Supreme Court of Bangladesh, Writ Petition No 3806 of 1998, 7 April 2003, 55 DLR (2003) 383. The judgment will be discussed in more detail below at III B (ii) and IV B (ii).

<sup>4</sup> *Ibid.*

<sup>5</sup> See Bangladesh Observer, *Law to ensure reparation for torture demanded*, 29 February 2004, at [www.bangladeshobserveronline.com/new/2004/02/29/city.htm](http://www.bangladeshobserveronline.com/new/2004/02/29/city.htm). A report on the conference proceedings is expected to be published by BRCT later in 2004.

contribution. The information collected has been complemented by secondary sources, both official documents and NGO publications. REDRESS made several attempts to travel to Bangladesh to conduct further research for this Report and to conduct additional interviews, including with Government officials. Despite several attempts, Bangladesh authorities did not issue a visa for such a visit and did not provide any explanation as to possible reasons.

REDRESS wishes to express its gratitude for the assistance and invaluable contributions of Mr. Masood Alam Ragib Ahsan, Director, Odhikar; Mr. Arafat Ameen, Advocate, Bangladesh Supreme Court, Researcher, Odhikar; Mr. Asaduzzaman, Partner, Syed Ishtiaq Ahmed & Associates, Member of Ain O Salish Kendra; Mr. Shamsur Rahman Biplob, Lawyer, Bangladesh Rehabilitation Council for Trauma Victims (BRCT); Mr. Akram H. Chowdhury, Executive Director, BRCT; Mr. Jesmul Hasan, Deputy Director, Programme of Odhikar; Dr. M.A. Hasan, Convener, War Crimes Fact Finding Committee, Bangladesh; Mr. Ridwanul Hoque, Department of Law, University of Chittagong; Ms. Sara Hossain, Barrister at the High Court Division of the Supreme Court; Mr. Amir-UI Islam, Barrister-at-Law, The Law Associates; Mr. Shahriar Kabir, Journalist and Human Rights Activist; Professor Muntassir Mamoon, Department of History, Dhaka University; Mr. Syed Afzal Hasan Uddin, Partner, Syed Ishtiaq Ahmed & Associates; Mr. Ansar Ahmed Ullah, UK Committee for Resisting Killers & Collaborators of Bangladesh Liberation War of 1971; Dr. Ahmed Ziauddin, Convener, Asian Network for the International Criminal Court and Ms. Claire Loussouarn for their collaboration and various contributions to this report.

The report was written by Lutz Oette and edited by Carla Ferstman.

## II. CONTEXT OF TORTURE IN BANGLADESH

### A. Political History

Bangladesh, located in South Asia bordering on India and Burma, has an estimated population of 150 million. The majority of the population is Muslim and there are considerable minorities of Hindus, Buddhists, Christians and other religions<sup>6</sup> as well as 27 ethnic minorities, mainly concentrated in the Chittagong Hill Tracts and Northern Bangladesh.<sup>7</sup>

The seeds for Bangladesh's existence were sown by the partition of India in 1947 when Bangladesh became part of Pakistan, commonly referred to as East Pakistan. The balance of power in the new State was tilted towards West Pakistan. After the imposition of military rule and periods of martial law in 1958 under General Ayub Khan, resentment grew in East Pakistan against what was perceived to be increasing discrimination and exploitation in the political and economic spheres.<sup>8</sup> After General Yahya Khan assumed power in 1969, and throughout 1970 and early 1971, tensions continued to mount in East Pakistan. The Bengali Awami League, which demanded substantial self-government, won the local elections in December 1970.<sup>9</sup> On 1 March 1971, the Government postponed the Constitutional

<sup>6</sup> See Interim report of the United Nations Special Rapporteur of the Commission on Human Rights on the elimination of all forms of intolerance and of discrimination based on religion or belief, Addendum 2, Situation in Bangladesh, UN Doc. A.55/280, Add.2, 9 August 2000, para. 6: "According to the most recent census carried out in Bangladesh, in 1991, the religious distribution among the population is as follows: Muslims 88.3 per cent; Hindus 10.5 per cent; Buddhists 0.6 per cent; Christians 0.3 per cent; other religions 0.3 per cent."

<sup>7</sup> See *ibid.*, para.10 and *Minorities in South Asia*, Paper prepared by I.A. Rehman, Director, Human Rights Commission Pakistan, UN Doc. E/CN.4/Sub.2/AC.5/2003/WP.13, 5 May 2003, pp.16 et seq.

<sup>8</sup> See Richard Sisson and Leo E. Rose, *War and Secession, Pakistan, India, and the Creation of Bangladesh*, University of California Press, Berkeley, Los Angeles, Oxford, 1990, pp.17 et seq. and, International Commission of Jurists, *The Events in East Pakistan, 1971*, A Legal Study by the Secretariat of the International Commission of Jurists, Geneva, 1972, pp.7 et seq.

<sup>9</sup> The election had been contested on the basis of the six-point programme, declared by Sheikh Mujibur Rahman in 1966. This programme set the basis for Pakistan to become a Federal State, with the Central Government to retain jurisdiction only over matters of

Assembly, which had been due to meet two days later. It also declared martial law. In East Pakistan, these steps were greeted with nation-wide strikes and calls for non-violent resistance. Following the breakdown of negotiations between the Government and leaders in East Pakistan, the Government deployed the Central army to East Pakistan, with the task of restoring law and order and pre-empting a potential rebellion by Bengali forces.<sup>10</sup> The army made a concerted effort to weaken the Awami League, which was seen by many leading politicians in West Pakistan as preparing for secession. Ultimately, military force was used by the army and there was an outbreak of hostilities in East Pakistan.<sup>11</sup> In the wake of growing tensions between India and Pakistan, India invaded on 21 November 1971. On 16 December of the same year, Pakistan's forces surrendered unconditionally and withdrew from East Pakistan.

Mujibur Rahman became the first leader of independent Bangladesh on 16 December 1971. The Constitution was adopted about a year later, providing for a parliamentary democracy characterised by the separation of powers with a unicameral legislature, i.e. consisting of a single legislative chamber, a strong Prime Minister and an independent judiciary. The Constitution proclaimed a State policy of nationalism, secularism, socialism and democracy. In 1977, these fundamental principles were modified to absolute trust and faith in the Almighty Allah, nationalism, democracy, and socialism, referring to economic and social justice.<sup>12</sup>

In the first parliamentary elections in March 1973, the Awami League registered a clear victory. In 1974, Mujibur Rahman declared a state of emergency and dissolved Parliament. Steps were taken to change the power structure and Bangladesh was turned into a one-party state, namely the newly formed BAKSAL party.

Mujibur Rahman's assassination by the military in August 1975 triggered a succession of military coups in the years to come. The Army Chief of Staff General Ziaur Rahman effectively ruled from November 1975 to 1981 when he was himself assassinated by the military. Following a brief interim rule under the elected President Justice Abdus Sattar, Lt. General H.M. Ershad assumed power in a military coup in March 1982 and ruled until December 1990, when he resigned in the face of mounting opposition. By then, Bangladesh had been under military rule for sixteen out of almost twenty years of its existence. During these periods of military rule, the Parliament was dissolved, the Constitution suspended, martial law declared and political activities banned.<sup>13</sup>

The Bangladesh Nationalist Party<sup>14</sup> won the election of 27 February 1991 and formed a coalition Government with the Islamic political party Jamaat-e-Islami<sup>15</sup> under Prime Minister Begum Khaleda Zia. Following a prolonged political crisis beginning in late 1994, the Awami League<sup>16</sup> was voted into power in the elections of June 1996, and Sheikh Hasina Wazed

---

foreign relations and defence. It also provided for two separate currencies (or one currency with appropriate safeguards against money transfer from East to West Pakistan), the right for federal units to levy taxes, independent dealings with foreign countries, including trade and foreign exchange and the right for federal units to raise para-military forces for their own defences. This six-point demand can be found in Sisson/Rose, *War and Secession*, supra, p.20.

<sup>10</sup> See on the events in East Pakistan from 1-25 March 1971, International Commission of Jurists, *Events in East Pakistan*, supra, pp.15 et seq. and Sisson/Rose, *War and Secession*, supra, pp.91 et seq.

<sup>11</sup> See *ibid.*, in particular pp.54 et seq. for a comprehensive account of events largely based on interviews with the main actors at the time.

<sup>12</sup> See preamble and Article 8 of the present Constitution. The Constitution of the People's Republic of Bangladesh, adopted on 4 November 1972, available at <http://www.pmo.gov.bd/constitution/index.htm>.

<sup>13</sup> See the annual reports of Amnesty International for this period and *Torture in the Eighties*, AI Index: ACT 04/01/84, pp.182 et seq.

<sup>14</sup> <http://www.bnepbd.com>.

<sup>15</sup> <http://jamaat-e-islami.org>.

<sup>16</sup> <http://www.albd.org>.

became the new Prime Minister. In October 2001, a coalition of the Bangladesh National Party and three other parties formed a new Government under Prime Minister Begum Khaleda Zia. This Government is still in power at the time of writing.

The 1990s and the first years of the 2000's have been marked by serious political violence on all sides, with severe consequences for the enjoyment of civil and political as well as economic and social rights.<sup>17</sup> This took place against a background of extremely high levels of corruption<sup>18</sup> and considerable poverty, illiteracy as well as growing environmental problems.<sup>19</sup>

## B. Torture and other serious abuses committed in the course of the 1971 war

### i. Violations attributed to Pakistani forces and "collaborators"

Following the violent suppression of demonstrations on 3 March 1971, the army was deployed on 25 March to "crack-down" on the political opposition. The army targeted students and university professors. It also conducted a raid on the old town of Dhaka, home to the poorest segments of society, where it burnt down houses, property and killed many civilians.<sup>20</sup> After a brief lull in the violence, the army, together with auxiliary forces, reportedly engaged in repeated attacks against the civilian population. Many of these attacks were apparently in retaliation for attacks by Bengali fighters (Mukthi Bahini).<sup>21</sup> However, numerous civilians were also killed during raids and armed clashes with Bengali fighters. These attacks continued until the army surrendered on 16 December 1971.<sup>22</sup> In the final days of the war between 2-16 December, army and auxiliary forces, in particular the Al Badr group, reportedly tortured and killed hundreds of members of the Bengali intelligentsia, particularly university teachers and journalists.<sup>23</sup> There are huge variances in the estimates of the total number of persons killed from 25 March to 16 December 1971. The Pakistani Government has estimated that approximately 26,000 persons were killed<sup>24</sup> whereas other sources show the figures to be as high as 3,000,000.<sup>25</sup>

<sup>17</sup> See e.g. Human Rights Watch, *Bangladesh, Political Violence on all Sides*, 1 June 1996, HRW Index No.: C806, <http://www.hrw.org/reports/1996/BANGLA> and annual reports of domestic NGOs, such as Ain O Salish Kendro, partly available at <http://www.askbd.org>.

<sup>18</sup> Bangladesh appeared in last place in the Transparency International Global Corruption Perceptions Index 2003 that charts levels of corruption in 133 countries. See <http://www.transparency.org/cpi/2003/cpi2003.en.html>.

<sup>19</sup> See UNDP, *Human Development Report*, 2003, p.239, according to which Bangladesh has a Human Development Index rank of 139 out of a total of 175 countries, with the following statistical data for 2001: Life expectancy at birth (60.5 years); Adult literacy rate (40.6% age 15 and above); Combined primary, secondary and tertiary gross enrolment ratio (54%); GDP per capita (1,610 PPP US \$).

<sup>20</sup> The first target of the army was the university quarters, which were attacked with a large arsenal of weaponry. The army reportedly set out to arrest, or, in case of resistance, to kill, students and professors listed as Awami League activists or sympathisers. ICJ, *Events in East Pakistan*, supra, pp.27 et seq. See also Hamoodur Commission Supplementary Report, supra, Part V, Chapter II, paras.12 et seq. The Hamoodur Rahman Commission Main Report, July 1972, and Supplementary Report, November 1974 have not been officially published. However, most parts of the text of the report were declassified by the Pakistani Government in December 2000. This followed the leak of the text with extracts published in an Indian newspaper in August 2000. The text of the supplementary report, which will be subsequently referred to, can be found at [www.bangla2000.com/Bangladesh/Independence-War/Report-Hamoodur-Rahman/default.shtm](http://www.bangla2000.com/Bangladesh/Independence-War/Report-Hamoodur-Rahman/default.shtm).

<sup>21</sup> "Freedom Fighters", i.e. organised armed Bengali units supported by India who fought against the Pakistani army and ancillary forces.

<sup>22</sup> ICJ, *Events in East Pakistan*, supra, pp.36 et seq.

<sup>23</sup> Ibid., pp.44, 45. The Hamoodur Commission, after questioning "the three Generals who appear to be directly concerned in the matter" held that "it seems that...no practical action was taken..." It concluded that "...unless the Bangladesh authorities can produce some convincing evidence, it is not possible to record a finding that any intellectuals or professionals were indeed arrested and killed by the Pakistan Army during December 1971." See Hamoodur Commission Supplementary Report, supra, Part V, Chapter II, paras.24 et seq.

<sup>24</sup> See *ibid.*, para. 31 et seq., referring to a figure provided by the General Headquarters.

<sup>25</sup> This was the figure widely used by the Governments of Bangladesh and India at the time. See in this respect Ahmed Ziauddin, *The Case of Bangladesh: Bringing to Trial the Perpetrators of the 1971 Genocide*, in Albert J. Jongman (Ed.), 'Contemporary Genocides: Causes, Cases, Consequences', Leiden, PLOOM, 1996, pp.94-115, at 99.



The military campaign targeted the political opposition as well as Bengalis in general and Hindus in particular. Sources reveal that the Pakistani army, Razakars (auxiliary forces),<sup>26</sup> para-military forces of the army (al-Badr and al-Shams) and the Pakistani Special Police, carried out indiscriminate killings of civilians and attacked, killed and drove out of the country a large portion of the Hindu population.<sup>27</sup> Sources also state that they arrested, tortured and killed Awami League activists and other genuine and/or alleged supporters within the Bengali community; and that they were responsible for large-scale rape of women; as well as the destruction of villages and towns and the looting of property.<sup>28</sup>

The army and Special Police reportedly used a wide range of torture methods.<sup>29</sup> Victims' and eye-witness' accounts refer to both mental and physical torture including severe beatings, often with objects, such as bamboo sticks or iron rods; hanging from the ceiling upside down; electric shocks on all parts of the body including the genitals; piercing needles into the nail or uprooting nails; forcing victims to lie on slabs of ice and burning the skin with cigarettes.<sup>30</sup> In a number of cases, the torture was so severe that it resulted in the death of the victims.<sup>31</sup>

Many women were raped by Pakistani armed forces and auxiliary forces under cover of military operations,<sup>32</sup> and indeed, several high-ranking officers were accused of rape and other sexual crimes.<sup>33</sup> Despite the widespread practice, it appears that the army took no effective steps to stop it.<sup>34</sup>

## ii. Violations attributed to the Mukhti Bahini and Bengali civilians

Bengali civilians were also reportedly responsible for unlawful violence against Pakistani soldiers and those seen to be their collaborators. In early March 1971, Bengali mobs are alleged to have engaged in the killing of Biharis seen to be pro-Pakistani,<sup>35</sup> at the apparent

---

<sup>26</sup> These are Bengali non-military auxiliary forces, most of whom were Biharis loyal to Pakistan that were tasked with upholding control of central East Pakistan. See ICJ, Events in Pakistan, supra, pp.40, 41.

<sup>27</sup> While almost all Bengalis were targeted during the war, this was particularly the case with regard to Hindus, a large number of whom were killed, assaulted and/or forced to flee their homes, their settlements and property often having been destroyed. It is not known how many thousands of Hindus were killed, but an even greater number fled the country when Hindus were publicly declared "enemies of the State." ICJ, Events in East Pakistan, supra, pp.29, 30. It has been alleged that the practice of targeting Hindus was systematic. One example is the statements attributed to Pakistani army officials, referred to in the Hamoodur report, which indicated that there were official directions to this effect. However, the Hamoodur Commission found the available evidence inconclusive. See Hamoodur Commission Supplementary Report, supra, Part V, Chapter II, paras.15 et seq.

<sup>28</sup> See ICJ, Events in East Pakistan, supra, pp.26, 27. See a similar list in the Hamoodur Commission Supplementary Report, supra, Part V, Chapter II, entitled Alleged Atrocities by the Pakistan Army, in particular para.8.

<sup>29</sup> The Pakistani Special Police was reported to have been responsible for torture of political opponents who were transferred from East-Pakistan to West-Pakistan during the war. See e.g. eye-witness statements in Kabir, Tormenting Seventy One, An account of Pakistan army's atrocities during Bangladesh liberation war of 1971, Kazi Mukul, General Secretary, Nirmul Committee, Dhaka,1999, pp. 33 et seq.

<sup>30</sup> See eye-witness accounts in Kabir, Tormenting Seventy One, supra, and Dr. Hasan, War Crimes Genocide and Quest for Justice, Documents on '71 Genocide, War Crimes and Crimes against Humanity Including Violence against Women in Bangladesh, Dhaka, 2001.

<sup>31</sup> Ibid.

<sup>32</sup> Estimates of the exact numbers of women that suffered rape differ widely. The Bangladesh Government reportedly stated at the time that 70,000 women were pregnant as a result of rape [ICJ, Events in East Pakistan, supra, p.40] and other sources refer to a total of 300,000 rapes (Ziauddin, Case of Bangladesh, supra, p.100). The Hamoodur Commission [Part V, Chapter II, para.34 of its Supplementary report, supra] concluded that the allegations of the then Bengali Government were false by referring to the low number ("only a hundred or more") pregnancies that had been carried out by a British abortion team commissioned in early 1972.

<sup>33</sup> See Hamoodur Commission Supplementary Report, supra, "Glaring Cases of Moral Lapses Amongst Officers Posted in East Pakistan", para.14 et seq.

<sup>34</sup> See ICJ, Events in East Pakistan, supra, p.40.

<sup>35</sup> Ibid., pp.15 and 16: "Apart from some serious riots in Chittagong on and after the night of 3 March, and some less severe incidents on the same day at Jessore and Khulna, there was remarkably little communal violence during the hartal. The events at Chittagong on the night of 3/4 March are described as follows in the Pakistan White Paper [The Crisis in East Pakistan, Government of Pakistan, 5

behest or acquiescence of the Awami League. While it appears uncontroversial that acts of violence took place during clashes, there are conflicting reports as to whether these actions can be attributed to the Awami League.<sup>36</sup> Several reports indicate that members of the Mukthi Bahini and Bengali civilians were responsible for revenge killings against members of the Pakistani and auxiliary forces during the war.<sup>37</sup> This applies in particular to the revenge killings committed by members of the Bengali forces during the last days of the war and immediately thereafter, before the Awami League called a stop to it.<sup>38</sup>

## C. The Practice of Torture in Bangladesh from 1971-2004

Reports concerning torture by public officials date back to the period immediately following independence, and they have become a regular feature in Bangladesh since then.<sup>39</sup> It appears that torture has become institutionalised, a practice that is perpetrated regardless of the government in power; there are only fluctuations in the nature of the torture practices and in the scale. The prevalence of torture in Bangladesh has been highlighted repeatedly by various international monitoring bodies. The United Nations Special Rapporteur on Torture has on several occasions expressed his concern about the practice of torture in Bangladesh,<sup>40</sup> and in two instances, jointly with the Special Rapporteur on extrajudicial, summary or arbitrary executions.<sup>41</sup> The ratification of the UN Convention against Torture in 1998 has not ended the practice of torture, in fact recent reports indicate a substantial rise in torture cases.<sup>42</sup> In October 2002, the crackdown on criminals known as 'Operation Clean Heart' was characterised by excessive use of force, torture and beatings during interrogations.<sup>43</sup> Moreover, deaths in custody, apparently as a result of torture,<sup>44</sup> continue to be a frequent occurrence.

---

August, 1971], p. 31: 'At Chittagong, violent mobs led by Awami League storm troopers attacked the Wireless Colony and several other localities, committing wanton acts of loot, arson, killing and rape. In one locality (Ferozeshah Colony), 700 houses were set on fire and their inmates including men, women and children were burnt to death. Those who tried to flee, were either killed or seriously wounded. Apart from those burnt alive, whose bodies were found later, over 300 persons were killed or wounded on 3 and 4 March. [footnote omitted].' According to information received from foreign nationals in Chittagong, which is believed to be reliable, the incident began when Bengali demonstrators passed in procession through Bihari areas in order to make the Biharis keep to the hartal. The demonstrators were fired upon by Biharis, and a serious riot followed in which people were killed on both sides and a substantial number of Bihari houses were burnt. The number killed on both sides may have reached 200. It is to be noted that by giving a joint estimate of 300 for killed and wounded, the White Paper does not give any estimate of the number of deaths. The rioting continued sporadically for a number of days until order was restored by the Awami League on orders from Sheikh Mujibur Rahman." See on killings and acts of violence committed against non-Bengalis between 3rd and 25<sup>th</sup> March 1971, *ibid.*, pp.17 et seq.

<sup>36</sup> *Ibid.* and Hamoodur Commission Supplementary Report, Part V, Chapter II, paras.2 et seq.

<sup>37</sup> See *ibid.* See also ICJ, Events in East Pakistan, *supra*, pp.32 et seq. and pp.41 et seq.

<sup>38</sup> *Ibid.*

<sup>39</sup> See overview in Amnesty International, *Bangladesh: Torture and Impunity*, AI Index: ASA: 13/07/00, November 2000, pp. 1-2, available at [http://web.amnesty.org/aidoc/aidoc\\_pdf.nsf/Index/ASA130072000ENGLISH/\\$File/ASA1300700.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/ASA130072000ENGLISH/$File/ASA1300700.pdf).

<sup>40</sup> See UN Docs. E/CN.4/1999/61, 12 January 1999, paras.79 et seq.; E/CN.4/2000/9, 2 February 2000, paras.116 et seq.; E/CN.4/2000/1/66, 25 January 2001, paras.140 et seq. and E/CN.4/2003/68/Add.1, 27 February 2003, para.169.

<sup>41</sup> See UN Docs. E/CN.4/2002/74/Add.2, 9 January 2002, para.16 and E/CN.4.2003/Add.1, 12 February 2003, para.35. See also report by the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. E/CN.4/2001/9/Add.1, 17 January 2001, on a case of death in custody allegedly as a result of torture.

<sup>42</sup> Bangladesh Rehabilitation Centre for Trauma Victims (BRCT), *Annual Report 2002*, p.10. See also annual report on human rights violations of the NGO Odhikar, available at [www.odhikar.org](http://www.odhikar.org).

<sup>43</sup> Report of the Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, UN Doc. E/CN.4/2003/68/Add.1, 27 February 2003, para.169: "On 30 October 2002, the Special Rapporteur sent a joint urgent appeal with the Special Rapporteur on extrajudicial, summary or arbitrary executions regarding more than 3,000 people who were reportedly arrested in a joint operation code-named **Operation Clean Heart** to crack down on criminals, in which nearly 40,000 army troops were said to be taking part. This operation was reported to have begun on 17 October 2002. Checkpoints had been set up in many interdistrict routes where army personnel stopped, questioned and searched vehicles and performed body searches. In cities, house-to-house searches had reportedly been conducted in some areas, and occupants had been picked up for questioning. Some of them had returned home within hours, but others had allegedly not been seen for days. Some of those released had reportedly been sent to the hospital with severe injuries, in particular caused by beatings while in army custody. It was also believed that at least 10 people, whose bodies were allegedly bearing marks of torture, had died in unknown circumstances while in police custody. Fears were expressed that the armed forces used excessive force during the raids and subjected a number of people to ill-treatment during interrogation." See on Operation Clean Heart also the detailed documentation contained in BRCT, *Annual Report 2002*, *supra*, pp.17 et seq.

The main perpetrators of torture and other forms of ill-treatment appear to be law-enforcement agencies, and the police in particular.<sup>45</sup> The Army and paramilitaries, notably the Rifles (BDR), have also reportedly employed torture in the course of operations.<sup>46</sup> Armed groups associated with political parties have also been reported to be responsible for human rights violations, including torture, with political opponents and journalists being the main targets.<sup>47</sup> Dissident groups from the Chittagong Hill Tract are also reported to have used torture in some instances.<sup>48</sup>

Reported methods of torture include slapping and kicking with sticks, iron rods, rifle butts, and/or bottles with hot water; hanging by the hands; pushing needles under nails; crushing fingers with pliers; rape; electric shocks; and “water treatment” which consists of fixing hose pipes into each nostril and turning the taps on full force.<sup>49</sup> Mental torture has also been reported, including verbal abuse and playing audio tapes to detainees with the voices of persons crying in pain.<sup>50</sup>

A wide cross-section of persons has been subjected to torture. In the context of criminal proceedings, it is in particular suspects from poor or uneducated backgrounds that appear to be most at risk of torture.<sup>51</sup> Ill-treatment, which may amount to torture, is a routine feature of criminal investigations, and conditions of detention are said to be poor.<sup>52</sup> Torture is frequently resorted to as an investigation technique, seemingly because of the poor standards of investigation and the lack of adequate training.<sup>53</sup> Poorly remunerated police investigators are highly corrupted.<sup>54</sup> Torture is reportedly used also as a tool to extract money from detained suspects and their families.<sup>55</sup>

Political opponents have regularly been subjected to ill-treatment and torture. Consistent reports demonstrate that various governments have used the police to crack down on their opponents, sending the message that anybody who is challenging the government is

<sup>44</sup> AI Report, *Bangladesh: Torture and Impunity*, November 2000, pp.11-12 and country section on Bangladesh in Amnesty International Report 2004; Odhikar, *Breaking the cycle of impunity*, supra, p.2 ; BRCT, Annual report 2002, supra, pp. 11-12; Report of the Special Rapporteur on Disappearances and Summary Executions, UN Doc. E/CN.4/2000/3/Add.1, 2 February 2000, para. 46; Report of the Special Rapporteur on Disappearances and Summary Executions, UN Doc. E/CN.4/2001/9/Add.1, 17 January 2001, para.18 and Report of the Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, UN Doc. E/CN.4/2003/68/Add.1, 27 February 2003, para.159.

<sup>45</sup> BRCT, Annual Report 2002, supra, p.42, according to which, out of 493 persons, 82 % were tortured by the police, 13 % by BDR (paramilitary), 2% by the Army and 3% by others (not specified).

<sup>46</sup> See *ibid.*, p.9. See also Amnesty International Report, *Bangladesh: Human rights in the Chittagong Hill Tracts*, AI Index: ASA 13/001/2000, 1 February 2000, p.1 and Report of the Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, UN Doc. E/CN.4/1997/7/Add.1, 20 December 1996, para.17-18 and UN Doc. E/CN.4/1999/61, 12 January 1999.

<sup>47</sup> See e.g. Reporters without Borders, *More than 130 attacks against press freedom since the start of the year, “Impunity is still the rule in Bangladesh”*, 5 August 2003, [http://www.rsf.org/article.php3?id\\_article=7696](http://www.rsf.org/article.php3?id_article=7696).

<sup>48</sup> See AI, *Bangladesh: Human Rights in Chittagong Hill Tracts*, supra, p.8.

<sup>49</sup> See Reports of the Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, UN Doc. E/CN.4/2000/9, 2 February 2000, paras. 116-126 and UN Doc. E/CN.4/2002/76/Add.1, 14 March 2002, paras.117 et seq.; BRCT, Annual Report 2002, supra, pp.9 et seq.; AI, *Bangladesh: Torture and Impunity*, supra, pp. 2 et seq. and Amnesty International, *Bangladesh: Urgent need for legal and other reforms to protect human rights*, AI Index: ASA 13/012/2003, May 2003, pp.5 et seq.

<sup>50</sup> Report of the Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, UN Doc. E/CN.4/2002/76/Add.1, 14 March 2002, para.131 and AI, *Bangladesh: Torture and Impunity*, supra, p.11.

<sup>51</sup> Odhikar, *Abuse of section 54 of the Code of Criminal Procedure*, July 2001, p.1.

<sup>52</sup> Report of the Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, UN Doc. E/CN.4/2000/9, 2 February 2000, para.117.

<sup>53</sup> AI, *Bangladesh: Torture and Impunity*, supra, p. 19.

<sup>54</sup> *Ibid.*, pp. 18-19 and Transparency International, *Corruption in South Asia*, December 2002, p.12, [www.transparency.org/pressreleases\\_archive/2002/2002.12.17.south\\_asia\\_survey.html](http://www.transparency.org/pressreleases_archive/2002/2002.12.17.south_asia_survey.html).

<sup>55</sup> See Report of the Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, UN Doc. E/CN.4/2002/76/Add.1, 14 March 2002, para.119 and Odhikar, *Breaking the cycle of impunity*, supra, p.2.

exposing him/herself to the risk of torture.<sup>56</sup> It is in particular during times of public unrest that there has been a marked increase in institutional violence against journalists, strikers, students, and/or members of the political opposition.<sup>57</sup> Consistent and credible reports attest to the widespread, if not systematic practice of using torture and ill-treatment as a means of suppressing political opposition.<sup>58</sup>

In practice, members of minorities, such as Hindus, Christians and Buddhists have reportedly also been subjected to torture and ill-treatment and have been increasingly targeted by extremist groups.<sup>59</sup> A prominent example is the Chittagong Hill Tract region, which has been plagued by a conflict that pre-dates Bangladesh's independence.<sup>60</sup> The Army and paramilitaries, as well as Bengali settlers have reportedly been responsible for torture and other serious human rights violations, such as extrajudicial killings. Serious human rights abuses have also been attributed to the armed opposition.<sup>61</sup>

Torture is also a means of gender discrimination. The high level of violence against women in Bangladesh has been repeatedly highlighted over the last few years.<sup>62</sup> In 1997, the Committee on the Elimination of Discrimination against Women expressed serious concerns about: "the alarming levels of violence against women in all its forms and especially its most cruel forms, such as acid throwing, stoning and dowry death, and the inability of the Government to enforce existing laws effectively, or to provide immediate relief and justice to victims of such violence."<sup>63</sup> This violence is not confined to the private sphere but has also been reported at the hands of public officials.<sup>64</sup> Few cases of sexual violence against women in custody, including rape, have been reported,<sup>65</sup> possibly due to the social stigma attached

<sup>56</sup> Report of the Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, UN Doc. E/CN.4/2003/68/Add.1, 27 February 2003, paras.161 et seq. See also Amnesty International, *Bangladesh: politically-motivated detention of opponents must stop*, AI Index: ASA 13/012/2002, 6 September 2002.

<sup>57</sup> See BRCT, Annual Report 2002, supra, p.10; AI, Bangladesh: Torture and Impunity, supra, pp. 2 et seq. and reports of the Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, UN Doc. E/CN.4/2002/76/Add.1, 14 March 2002, paras.128 and 132 and UN Doc. E/CN.4/2003/68/Add.1, 27 February 2003, paras.159-168.

<sup>58</sup> BRCT, Annual Report 2002, supra, p.8; AI, Bangladesh: Torture and Impunity, supra, pp. 2 and 13 and Report of the Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment, UN Doc. E/CN.4/2003/68/Add.1, 27 February 2003, paras. 161 and 166-167.

<sup>59</sup> See on the situation of religious and ethnic minorities in general, Interim Report of the Special Rapporteur on Discrimination, UN Doc. A/55/280/Add.2, 9 August 2000, paras.62 et seq. See also Bangladesh Hindu Buddhist Christian Unity Council, *Violations of the Human Rights in Bangladesh*, March 2004.

<sup>60</sup> The source of the conflict is attributed to the policy of the then Pakistan Government in the early 1960s to promote economic development and immigration of Bengali settlers into the Hill Tracts which were historically largely inhabited by Sino-Tibetans and Buddhists. After independence, the intensification of internal colonisation and the refusal by respective governments to grant autonomy fuelled the conflict in the 1970s and 1980s. See on the origins and development of the conflict, Report of the Special Rapporteur on Discrimination, UN Doc. A/55/280/Add.2, 9 August 2000, para. 69, and Minorities in South Asia, UN Doc. E/CN.4/Sub.2/AC.5/2003/WP.13, 5 May 2003, p.17.

<sup>61</sup> A peace process was initiated in the early 1990s, resulting in a peace accord in December 1997, which appears to be fragile as incidents of serious human rights violations continue to be reported. AI, Bangladesh: Human rights in Chittagong Hill Tracts, supra, pp.1 and 8, and Interim Report of the Special Rapporteur on discrimination, UN Doc. A/55/280/Add.2, 9 August 2000, para. 72. See also Concluding Observations of the Committee on the Elimination of Racial Discrimination: Bangladesh, UN Doc. CERD/C/304/Add.118, 27 April 2001, para.9, where the Committee raised its concern "about reports of human rights violations by security forces present in the Chittagong Hill Tracts affecting the tribal population, including reports of arbitrary arrests and detentions, and ill-treatment. The Committee recommends that the State party implement effective measures to guarantee to all Bangladeshis, without distinction based on race, colour, descent, or national or ethnic origin, the right to security of person and protection by the State against violence or bodily harm."

<sup>62</sup> See Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Bangladesh, UN Doc. A/52/38/Rev.1, Part II, paras.409-464, 12 August 1997, para.436 and Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2002/52, Addendum 1, *International, regional and national developments in the area of violence against women 1994-2003*, UN Doc. E/CN.4/2003/75/Add.1, 27 February 2003, paras.921 et seq.

<sup>63</sup> See Concluding Observations of the Committee on the Elimination of Discrimination Against Women, Bangladesh, UN Doc. A/52/38/Rev.1, Part II paras.409-464, 12 August 1997, para.436. See also, Report of the Special Rapporteur on violence against women, UN Doc. E/CN.4/2003/75/Add.1, 27 February 2003, para. 927.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid., para.927; BRCT, Annual Report 2002, supra, p.13 and Odhikar, Breaking the cycle of impunity, supra, pp.1 et seq. See also, Human Rights Watch, *Ravaging the vulnerable: abuses against persons at high risk of HIV infection in Bangladesh*, August 2003, Vol. 15, No 6 (C), p.17.

to it. A practice that has attracted increasing criticism is the system of “safe custody”, i.e. taking women and children into custody for their own “protection”.<sup>66</sup> Contrary to its purported objective, women in such custody appear to be more exposed to sexual violence by their guards. Also, several reports indicate that police personnel have sexually abused illegal workers and sex workers.<sup>67</sup> Sexual violence has not been confined to women as a number of men have reportedly also been raped by police officers and ‘mastans’ (thugs who are often employed by political parties for purposes of political violence).<sup>68</sup>

Also, children in custody are reportedly subjected to various forms of institutional violence, including ill-treatment.<sup>69</sup> The Committee on the Rights of the Child recently expressed concerns about reports of ill-treatment and violence against children in State institutions such as orphanages and rehabilitation centres, including by law enforcement agents, as well as the solitary confinement of juvenile and child prisoners, reported inhuman and degrading punishment carried out by order of traditional village councils (“shalishes”) as well as the increasing incidents of acid attacks on women and girls.<sup>70</sup>

The prevalence of torture has been attributed to several factors, i.e., the long practice of using violence for political ends, the high levels of corruption, the poor training of police forces and almost complete impunity for the perpetrators.<sup>71</sup> The practice of torture is also facilitated by the lack of safeguards. Section 54 of the Code of Criminal Procedure allows for arrest and detention without a warrant or an order from a magistrate on nine different grounds for up to 24 hours.<sup>72</sup> This provision has been widely abused as a tool to arbitrarily arrest and often ill-treat and torture political opponents and others.<sup>73</sup> Also, the Special Power Act of 1974 allows for preventive detention<sup>74</sup> and the Public Safety Act, adopted in 2000 (only to be repealed in 2002), further enhanced the powers of the police to detain those suspected of having committed any of the crimes defined in the Act.<sup>75</sup> The denial of

<sup>66</sup> See Report of the Special Rapporteur on violence against women, UN Doc. E/CN.4/2003/75/Add.1, 27 February 2003, para.928.

<sup>67</sup> HRW, *Ravaging the vulnerable*, supra, pp.22 and 29.

<sup>68</sup> *Ibid.*, p.39.

<sup>69</sup> Odhikar, *Our children in jail, Violence against children: the scenario in Bangladesh*, 2001, p.4 and Odhikar Abuse of section 54 of the Code of Criminal Procedure, supra, p.10.

<sup>70</sup> See Concluding Observations of the Committee on the Rights of the Child on Bangladesh's State party report, UN Doc. CRC/C/15/Add.221, 27 October 2003, para.41.

<sup>71</sup> See AI, *Bangladesh: Torture and Impunity*, supra, pp.26 et seq. and Odhikar, *Breaking the cycle of impunity*, supra, pp.1 et seq.

<sup>72</sup> Section 54 (1) reads: “ Any police-officer may, without an order from a Magistrate and without a warrant, arrest - first, any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned; secondly, any person having in his possession without lawful excuses, the burden of proving which excuse shall lie on such person, any implement of house-breaking; thirdly, any person who has been proclaimed as an offender either under this Code or by order of the [Government]; fourthly, any person in whose possession anything is found which may reasonably be suspected to be stolen property [and] who may reasonably be suspected of having committed an offence with reference to such thing; fifthly, any person who obstructs a police-officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; sixthly, any person reasonably suspected of being a deserter from [the armed forces of Bangladesh]; seventhly, any person who has been concerned in, or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in, any act committed at any place out of Bangladesh, which, if committed in Bangladesh, would have been punishable as an offence, and for which he is, under any law relating to extradition or under the Fugitive Offenders Act, 1881, or otherwise, liable to be apprehended or detained in custody in Bangladesh; eighthly, any released convict committing a breach of any rule made under section 565, sub-section (3); ninthly, any person for whose arrest a requisition has been received from another police-officer, provided that the requisition specified the person to be arrested and the offence or other cause for which arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.”

<sup>73</sup> See Odhikar, Abuse of section 54 of the code of criminal procedure, supra, pp.2 et seq. and the judgment in *BLAST vs Bangladesh and others*, supra, in which the Court held, *inter alia*, that: “The power given to the police officer under this section [54 of the Code] [is], in our view, to a large extent inconsistent with the provisions of part III of the Constitution. In view of this position, according to us, such inconsistency is liable to be removed.”

<sup>74</sup> See Hassan Ariff, *The Prevention of Torture and Visiting Systems as an effective method of preventing torture*, in Association for the Prevention of Torture and Nepal Law Society, ‘South Asia-Seminar on the Prevention of Torture’, September 8-9, 2000, Kathmandu, Report, pp.52 et seq., who also refers to an article in the Daily Star: “SPA Mostly Misused”, 8 September 2000, according to which 69,010 people had been detained under the Act from 1974 to 1998, 68,195 of whom had to be released following High Court Division orders.

<sup>75</sup> See *ibid.*, also on the practice under The Suppression of Terrorist Activities Act 1992, which lapsed in 1994.

detainees' access to lawyers, relatives or doctors also facilitates torture and ill-treatment.<sup>76</sup> Magistrates are also seen as failing to adequately protect detainees by regularly authorising extensions of the periods of remand.<sup>77</sup>

### III. BANGLADESH'S OBLIGATIONS UNDER INTERNATIONAL LAW AND IMPLEMENTATION IN DOMESTIC LAW

#### A. International obligations

##### *Treaty obligations and individual complaints mechanisms*

Bangladesh has ratified or acceded to the following relevant international human rights or humanitarian law treaties:

- Four Geneva Conventions of 1949 (1971) and Additional Protocol I and II to the 1949 Geneva Conventions (8 September 1980)
- International Convention on the Elimination of All Forms of Racial Discrimination (11 June 1979)
- Convention on the Elimination of All Forms of Discrimination against Women (6 November 1984)
- Convention on the Rights of the Child (3 August 1990)
- Convention on the Prevention and Punishment of the Crime of Genocide (5 October 1998)
- International Covenant on Economic and Social Rights (5 October 1998)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (5 October 1998)<sup>78</sup>
- International Covenant on Civil and Political Rights (6 September 2000).

Bangladesh has yet to ratify the Optional Protocol to the Convention against Torture that provides for a visiting mechanism for the prevention of torture.<sup>79</sup> Furthermore, Bangladesh has signed but to date not ratified the Statute of the International Criminal Court.<sup>80</sup> The Statute provides the International Criminal Court with jurisdiction over "international crimes", namely genocide, crimes against humanity and war crimes, and establishes a reparation mechanism for the victims of such crimes, either through court orders against the responsible individuals under Article 75 of the Statute or through the Trust Fund under Article 79.<sup>81</sup>

<sup>76</sup> See Report of the Special Rapporteur on torture, UN Doc. E/CN.4/2002/76/Add.1, 14 March 2002, para.130 and AI, Bangladesh: Torture and Impunity, supra, pp.1, 10.

<sup>77</sup> Ibid., p.17 and AI, Urgent need for legal reforms, supra, p.8 as well as Odhikar, Breaking the Cycle of Impunity, supra, p.3.

<sup>78</sup> The Government issued a declaration according to which it "will apply article 14 para 1 in consonance with the existing laws and legislation in the country." See <http://www.unhcr.ch/tbs/doc.nsf/Statusfrset?OpenFrameSet>.

<sup>79</sup> The text of the Optional Protocol is available at <http://www.apt.ch/un/opcat/opcat.pdf>.

<sup>80</sup> See on the campaign for ratification *Ratify Rome Statute to fight Crimes against Humanity*, The Daily Star, 1 May 2004, <http://www.thedailystar.net/2004/05/01/d40501011414.htm>.

<sup>81</sup> See the website of the International Criminal Court <http://www.icc-cpi.int/> and the website of the Coalition for the International Criminal Court <http://www.iccnw.org/> for the text of the Statute and recent developments. See also Victims Rights Working Group, *Victim Participation at the International Criminal Court, Summary of Issues and Recommendations*, November 2003 and REDRESS and Forensic Risk Alliance, *The International Criminal Court's Trust Fund for Victims, Analysis and Options for the Development of Further Criteria for the Operation of the Trust Fund for Victims*, Discussion Document, December 2003, both available at <http://www.redress.org/reports.html>.

Bangladesh has not accepted the competence of either the Committee against Torture or the Human Rights Committee to receive individual complaints about torture.<sup>82</sup> In the absence of any regional mechanism,<sup>83</sup> individuals who have suffered torture only have recourse to national remedies, and there is only limited review by international bodies of the compatibility of Bangladesh's practice with its international obligations. The only existing institutionalised form of official external scrutiny is the examination of Bangladesh's reports to treaty bodies. Bangladesh has to date submitted ten reports: to the Committee on the Elimination of All Forms of Racial Discrimination, the Committee on the Elimination of All Forms of Discrimination against Women and the Committee on the Rights of the Child.<sup>84</sup> Bangladesh has not submitted its initial reports to the Committee against Torture, overdue since 4 November 1999, or to the Human Rights Committee, overdue since 6 December 2001.

### *Prohibition of torture in international law*

All States, including Bangladesh, are bound by the prohibition of torture and the obligations flowing from it not only as a matter of treaty law but also customary international law.

Both the International Covenant on Civil and Political Rights and the Convention against Torture obligate Bangladesh to prohibit torture in its domestic law.<sup>85</sup> This obligation is also part of international humanitarian law.<sup>86</sup> Article 2 (1) of the Convention against Torture obligates each State Party to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." According to Article 4 of the Convention against Torture, torture must be made a crime in domestic law, punishable with appropriate penalties. In the light of persistent shortcomings in the legal framework of several countries, the Committee against Torture has consistently urged States to make torture a specific offence in domestic criminal law,<sup>87</sup> and/or to ensure that the

<sup>82</sup> The Committee against Torture derives such a competence from a State party's declaration under Article 22 of the Convention against Torture and the Human Rights Committee from the State becoming party to the Optional Protocol to the International Covenant on Civil and Political Rights.

<sup>83</sup> See on such complaints mechanisms, REDRESS, *Reparation, A Sourcebook for Victims of Torture and other Violations of Human Rights and International Humanitarian Law*, March 2003, at <http://www.redress.org/publications/SourceBook.pdf>.

<sup>84</sup> See reports at <http://www.unhcr.ch/tbs/doc.nsf>.

<sup>85</sup> Articles 2 and 4 of the Convention against Torture and Article 7 of the ICCPR. Article 1 of the Convention against Torture defines torture as follows: "(1) For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. (2) This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application."

<sup>86</sup> See common Article 3 of the four Geneva Conventions of 1949: "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."

<sup>87</sup> See, for example, the Concluding Observations of the Committee against Torture in respect of: Denmark, UN Doc. CAT/C/CR/28/1, 28 May 2002; Russian Federation, UN Doc. CAT/C/CR/28/4, 28 May 2002; Saudi Arabia, UN Doc. CAT/C/CR/28/5, 28 May 2002; Sweden, UN Doc. CAT/C/CR/28/6, 28 May 2002; Zambia, UN Doc. CAT/C/XXVII/Concl.4, 23 November 2001; Kazakhstan, UN Doc. A/56/44, paras. 121-129, 17 May 2001; Costa Rica, UN Doc. A/56/44, paras.130-136, 17 May 2001; Belarus, UN Doc. A/56/44, 20 November 2000; Paraguay, UN Doc. A/55/44, 10 May 2000; Poland, UN Doc. A/55/44, 5 May 2000; Kyrgyzstan, UN Doc. A/55/44, 18 November 1999; Azerbaijan, UN Doc. A/55/44, 17 November 1999; Austria, UN Doc. A/55/44, 12 November 1999; Finland, UN Doc. A/55/44, 12 November 1999; Bulgaria, UN Doc. A/54/44, 7 May 1999 and Chris Ingelse, *The UN Committee against Torture: An Assessment*, Kluwer Law International, The Hague/London/Boston, 2001, p. 337.

offence of torture is in line with Article 1 of the Convention against Torture.<sup>88</sup> This definition, as well as the obligations outlined above, is considered to constitute customary international law, binding States irrespective of any treaty commitments.<sup>89</sup>

In addition to making torture a specific criminal offence in domestic law, Article 12 of the Convention against Torture provides that each State Party “shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.” Moreover, according to Article 13 of the Convention, “Each State Party shall ensure that any individual who alleges that he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.” A similar obligation arises from Article 7 of the International Covenant on Civil and Political Rights as held by the UN Human Rights Committee.<sup>90</sup> The Committee against Torture has interpreted the word “prompt” on a case-by-case basis, apparently giving the word its literal meaning.<sup>91</sup> “Impartial” means that an investigation has to be carried out following an appropriate procedure and without apparent bias.<sup>92</sup> Although independence of the investigating body is not an explicit or absolute requirement, it has been repeatedly held to be a key indication of impartiality.<sup>93</sup> It follows that an investigation cannot be deemed to be impartial if it is conducted by the same agency that is accused of torture, or by anyone having close professional links to such an agency.<sup>94</sup>

#### *The right to reparation for torture in international law*

The obligation to provide reparation for torture derives both from treaty law, such as Article 14 of the Convention against Torture<sup>95</sup> and Article 2 (3) in conjunction with Articles 7 and 10 of the International Covenant on Civil and Political Rights and customary international law.<sup>96</sup> The UN Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of [Gross] Violations of International Human Rights and [Serious] Humanitarian Law<sup>97</sup> identify the following forms of reparation: restitution,<sup>98</sup> compensation,<sup>99</sup> rehabilitation<sup>100</sup> as well as satisfaction<sup>101</sup> and guarantees of non-repetition.<sup>102</sup>

<sup>88</sup> See, for example, the Concluding Observations of the Committee against Torture in respect of: Israel, UN Doc. CAT/C/XXVII/Concl.5, 23 November 2001; Indonesia, UN Doc. CAT/C/XXVII/Concl.3, 22 November 2001; Slovakia, UN Doc. A/56/44, paras.99-105, 11 May 2001; Bolivia, UN Doc. A/56/44, paras. 89-98, 10 May 2001; Uzbekistan, UN Doc. A/55/44, 19 November 1999; Canada, UN Doc. A/56/44, paras.54-59, 6 December 2002; Armenia, UN Doc. A/56/44, 17 November 2000; Slovenia, UN Doc. A/55/44, 16 May 2000; USA, UN Doc. A/55/44, 15 May 2000; El Salvador, UN Doc. A/55/44, 12 May 2000; China, UN Doc. A/55/44, 9 May 2000; Morocco, UN Doc. A/54/44, 17 May 1999.

<sup>89</sup> International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Furundzija* (10 December 1998, case no.IT-95-17/I-T, (1999) 38 ILM 317), para.160.

<sup>90</sup> See Human Rights Committee, General Comment 20, 1992, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), para.14.

<sup>91</sup> See *Halim-Nedzibi v Austria*, complaint 8/1991, UN Doc. A/49/44, Annex V, p.40; *Encarnacion Blanco Abad v Spain*, complaint 59/1996, UN Doc. A/53/44 (1998) and *M'Barek v. Tunisia*, complaint 60/1996, UN Doc. CAT/C/23/D/60/1996.

<sup>92</sup> *Ibid.*

<sup>93</sup> See report of the Special Rapporteur on Torture, UN Doc. E/CN.4/2001/66, 25 January 2001, para.1310 and para.2 of the Istanbul Protocol, Principles on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment, UN Office for the High Commissioner for Human Rights, 2001.

<sup>94</sup> *Ibid.*

<sup>95</sup> Article 14 reads: “(1) Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation. (2) Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.”

<sup>96</sup> See for an overview REDRESS, *Reparation, A Sourcebook*, supra, in particular pp.14 et seq.

<sup>97</sup> See UN Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of [Gross] Violations of International Human Rights and [Serious] Humanitarian Law (Draft Principles on Reparation), Rev. 24 October 2003, UN Doc. E/CN.4/2004/57, 10 November 2003, Appendix 1.



## B. Incorporation of international obligations in Bangladeshi domestic law

### i. Ratification of treaties

In Bangladesh, international treaties are ratified by authorised State representatives but it is not fully clear whether approval by Parliament is required as the executive has in several cases ratified treaties without such an approval.<sup>103</sup> International treaties do not automatically become part of national law and consequently have to be incorporated by a legislative act.<sup>104</sup> Bangladesh has not yet adopted any specific implementing legislation incorporating the provisions of the UN Convention against Torture or the International Covenant for Civil and Political Rights, despite its ratification of these treaties. Nonetheless, it is possible for Bangladeshi courts to apply the aspects of these treaties that constitute customary international law.<sup>105</sup>

Treaties may have some persuasive value in the courts where no domestic law exists or where the law is unclear but according to national jurisprudence, they are ultimately

<sup>98</sup> "Restitution should, whenever possible, restore the victim to the original situation before the violations of international human rights or humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, legal rights, social status, identity, family life and citizenship; return to one's place of residence, restoration of employment and return of property." Ibid.

<sup>99</sup> "Compensation should be provided for any economically assessable damage, as appropriate and proportional to the violation and the circumstances of each case, resulting from gross violations of international human rights and serious violations of humanitarian law, such as: (a) Physical or mental harm, including pain, suffering and emotional distress; (b) Lost opportunities, including employment, education and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) Harm to reputation or dignity; and (e) Costs required for legal or expert assistance, medicines and medical services, and psychological and social services." Ibid.

<sup>100</sup> "Rehabilitation should include, as appropriate, medical and psychological care as well as legal and social services." Ibid.

<sup>101</sup> "Satisfaction should include, where applicable and as appropriate, any or all of the following: (a) Cessation of continuing violations; (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further unnecessary harm or threaten the safety of the victim, witnesses, or others; (c) The search for the whereabouts of the disappeared and the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the cultural practices of the families and communities; (d) An official declaration or a judicial decision restoring the dignity, reputation and legal and social rights of the victim and of persons closely connected with the victim; (e) Apology, including public acknowledgement of the facts and acceptance of responsibility; (f) Judicial or administrative sanctions against persons responsible for the violations; (g) Commemorations and tributes to the victims; (h) Inclusion of an accurate account of the violations that occurred in international human rights and humanitarian law training and in educational material at all levels." Ibid.

<sup>102</sup> "Within national legal systems, guarantees of non-repetition and prevention should include, where applicable and as appropriate, any or all of the following: (a) Ensuring effective civilian control of military and security forces; (b) Restricting the jurisdiction of military tribunals only to specifically military offences committed by members of the armed forces and ensuring that all military proceedings abide by international standards of due process, fairness and impartiality; (c) Strengthening the independence of the judiciary; (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders; (e) Conducting and strengthening, on a priority and continued basis, human rights and humanitarian law training to all sectors of society, including law enforcement officials, as well as military and security forces; (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as the staff of economic enterprises; (g) Promoting mechanisms for monitoring and preventing inter-social conflicts and their resolution; (h) Reviewing and reforming laws contributing to or allowing gross violations of human rights and serious violations of humanitarian law." Ibid.

<sup>103</sup> Article 145A of the Constitution, International treaties: "All treaties with foreign countries shall be submitted to the President, who shall cause them to be laid before Parliament." Article 145A does not prescribe a time frame within which the President is required to lay the treaty before Parliament, thus raising the spectre of indefinite deferral. It also fails to specify what parliament is required to do with the treaty presented, i.e. whether, and if so, what kind of approval is needed. See on this point L.A. Siddiqui, *Parliamentary participation in treaty making process: Implications for Bangladesh*, BISS Journal, 1999, Vol.20 (1), pp.31-67.

<sup>104</sup> Per Bimalendu Bikash Roy Choudhury, J., *Hussain Mohammad Ershad vs. Bangladesh & others*, 21 BLD (AD) (2001) 69, para.2: "True it is that the Universal Human Rights norms, whether given in the Universal Declaration [the case concerned, *inter alia*, the applicability of Article 13 of the Universal Declaration of Human Rights] or in the Covenants, are not directly enforceable in national courts. But if their provisions are incorporated in the domestic law, they are enforceable in national courts."

<sup>105</sup> As recognised in *Mohiuddin Farooque vs. Bangladesh* (FAP Case) 49 (1997) DLR (AD) 1 and *Mohiuddin Farooque vs. Bangladesh* (radioactive powdered milk case) 48 (1996) DLR, 438. See on this point also Abdullah Al Faruque, *Status of International Law under the Constitution of Bangladesh*, Bangladesh Journal of Law, Vol.3 (1), 1999, pp. 23-47.

subordinate to domestic law.<sup>106</sup> According to a recent judgment of the Appellate Division of the Supreme Court in the case of *Hussain Mohammad Ershad vs. Bangladesh and others*: "...[t]he local laws, both constitutional and statutory, are not always in consonance with the norms contained in the international human rights instruments. The national courts should not straightway ignore the international obligations, which a country undertakes. If the domestic laws are not clear enough or there is nothing therein, the national courts should draw upon the principles incorporated in the international instruments. But in the cases where the domestic laws are clear and inconsistent with the international obligations of the state concerned, the national courts will be obliged to respect the national laws, but shall draw the attention of the law-makers to such inconsistencies."<sup>107</sup> While the High Court and Appellate divisions of the Supreme Court have referred to international human rights standards in several judgments,<sup>108</sup> this is not a consistent judicial practice.

## ii. Legal Framework relating to the prohibition of torture

### **Overview: Constitution, the protection of fundamental rights and the judiciary**

The Constitution, adopted on 4 November 1972, is the highest law in Bangladesh and any law inconsistent with it is void.<sup>109</sup> Article 149 of the Constitution provides for the continuity of existing laws.<sup>110</sup> Accordingly, the laws of Pakistan in force at the time of independence, including numerous laws dating back to the 19<sup>th</sup> century as well as the common law inherited from England, remain valid unless superseded by subsequent legislation.

The Constitution lays down fundamental principles of State policy, such as democracy and human rights.<sup>111</sup> These principles guide law-making, the interpretation of the Constitution, State policy and the laws of Bangladesh, but they are not judicially enforceable.<sup>112</sup> A number of mainly civil and political rights are protected as fundamental rights in part III of the Constitution, including the right to life and personal liberty,<sup>113</sup> rights relating to the administration of criminal justice,<sup>114</sup> and the prohibition of torture.<sup>115</sup> Any person that claims a violation of fundamental rights has the right to judicial recourse to the High Court Division.<sup>116</sup> However, this right is not granted to prisoners of war or those prosecuted for international

<sup>106</sup> See Bangladesh's State Party Report to the Committee on the Right of the Child, UN Doc. CRC/C/65/Add.22, 14 March 2003, para.18: "The Constitution is the supreme law of Bangladesh and takes precedence over any other provisions of national or international law. In the event of a conflict between a provision of the Convention on the Rights of the Child and national law, any relevant constitutional provisions would take precedence, followed by constitutionally-derived national legislation and finally the Convention, as a part of international law. Thus, the Convention cannot override national law. In the courts, the provisions of the Convention have persuasive value and have, on occasion, been cited in child custody cases."

<sup>107</sup> Per Bimalendu Bikash Roy Chowdhury, *supra*.

<sup>108</sup> *Ibid.* See also *Bangladesh vs. Professor Golam Azam & Ors*, 46 DLR (AD) (1994) 192; [1996] 1 CHRLD 23, para.48 (reference to Convention on Reduction of Statelessness, 1961) and *Tayazuddin and another vs. The State*, 21 BLD (HCD) 2001, 503, (referring to Article 3 of the Universal Declaration of Human Rights). See more on this case below at IV, B, (i).

<sup>109</sup> Article 7 (2) of the Constitution. Article 26 provides that any law inconsistent with the fundamental rights of part III of the Constitution will be void to the extent of inconsistency.

<sup>110</sup> "Subject to the provisions of this Constitution all existing laws shall continue to have effect but may be amended or repealed by law made under this Constitution."

<sup>111</sup> Article 11 *ibid.*: "The Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed."

<sup>112</sup> Article 8 (2) *ibid.*

<sup>113</sup> Article 32 *ibid.*

<sup>114</sup> Article 33 *ibid.* on safeguards as to arrest and detention and Article 35 on protection in respect of trial and punishment.

<sup>115</sup> Article 35 (5) *ibid.*

<sup>116</sup> Article 44 (1) *ibid.*: "The right to move the High Court Division in accordance with clause (I) of article 102 for the enforcement of the rights conferred by this Part is guaranteed."

crimes.<sup>117</sup> Moreover, the right to apply to the High Court Division may be suspended during emergencies, as specified in an order by the President on the advice of the Prime Minister.<sup>118</sup>

The Supreme Court of Bangladesh, comprising the Appellate and the High Court Division,<sup>119</sup> is at the apex of the judicial system. The High Court Division has jurisdiction to hear fundamental rights applications and appeals from the lower judiciary and has the power to issue certain orders and directions.<sup>120</sup> The Appellate Division hears and determines appeals from judgments, decrees, orders or sentences of the High Court Division.<sup>121</sup> The Supreme Court has constitutional powers to review the constitutionality of laws.<sup>122</sup>

The Constitution guarantees the independence of the Chief Justice and other Judges of the Supreme Court.<sup>123</sup> However, the President appoints judges<sup>124</sup> and the district judges and magistrates fall under his or her administration. It is against this background that the Appellate Division of the Supreme Court issued, in December 1999, a 12-point directive ordering the Government to separate the judiciary from the executive.<sup>125</sup> To date, the Government has failed to implement this directive except for ensuring the financial autonomy of the Supreme Court. The Appellate Division of the Supreme Court has recently extended this directive for the 16<sup>th</sup> time.<sup>126</sup>

The lower levels of the judiciary consist of three-tier district courts that hear civil cases<sup>127</sup> and criminal courts, namely courts of sessions, assistant sessions and Magistrates Courts.<sup>128</sup>

<sup>117</sup> See Article 47 A (1) and (2) *ibid*.

<sup>118</sup> Article 141 C *ibid*. See on the proclamation of emergency, Article 141 A (1): "If the President is satisfied that a grave emergency exists in which the security or economic life of Bangladesh, or any part thereof, is threatened by war or external aggression or internal disturbance, he may issue a Proclamation of Emergency." ["Provided that such Proclamation shall require for its validity the prior countersignature of the Prime Minister."]

<sup>119</sup> Article 94 *et seq.*, *ibid*. See also description in UN Doc. CRC/C/65/Add.22, 14 March 2003, *supra*, para. 12: " **Judiciary**. At the top of the hierarchy of courts is the Supreme Court of Bangladesh comprising the Appellate Division and the High Court Division. The Appellate Division has both civil and criminal jurisdiction. The High Court Division enjoys a constitutional jurisdiction commonly known as writ jurisdiction. The functions of the two divisions are distinct and separate. Separate appointments are made for each division. The judges of each division sit exclusively in the division to which they are appointed. The Chief Justice of the Supreme Court is appointed to the Appellate Division and is constitutionally known as the Chief Justice of Bangladesh."

<sup>120</sup> Article 102 *ibid*: "(1) The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any the fundamental rights conferred by Part III of this Constitution." (2) The High Court Division may, if satisfied that no other equally efficacious remedy is provided by law- (a) on the application of any person aggrieved, make an order- (i) directing a person performing any functions in connection with the affairs of the Republic or of a local authority to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do; or (ii) declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority has been done or taken without lawful authority and is of no legal effect; or (b) on the application of any person, make an order- (i) directing that a person in custody be brought before it so that it may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or (ii) requiring a person holding or purporting to hold a public office to show under what authority he claims to hold that office. (3) Notwithstanding anything contained in the foregoing clauses, the High Court Division shall have no power under this article to pass any interim or other order in relation to any law to which article 47 applies. (4) Whereon an application made under clause (1) or sub-clause (a) of clause (2), an interim order is prayed for and such interim order is likely to have the effect of - (a) prejudicing or interfering with any measure designed to implement any development programme, or any development work; or (b) being otherwise harmful to the public interest, the High Court Division shall not make an interim order unless the Attorney-General has been given reasonable notice of the application and he (or an advocate authorised by him in that behalf) has been given an opportunity or being heard, and the High Court Division is satisfied that the interim order would not have the effect referred to in sub-clause (a) or sub-clause (b). (5) In this article, unless the context otherwise requires, "person" includes a statutory public authority and any court or tribunal, other than a court or tribunal established under a law relating to the defence services of Bangladesh or any disciplined force or a tribunal to which article 117 applies."

<sup>121</sup> Article 103 (1) *ibid*.

<sup>122</sup> See Articles 7, 26, 44 and 102 of the Constitution. This was recognised in the case of *Anwar Hossain Chowdhury vs. Bangladesh*, 1989 (BLD) (Spl.)1, 41 DLR (AD) 165, popularly known as the Constitution (8<sup>th</sup> Amendment) case. See on the judgment Justice Mustafa Kamal, *Bangladesh Constitution: Trends and Issues*, Kamini Kumar Dutta Memorial Law Lectures, University of Dhaka, 1994.

<sup>123</sup> Article 94 (4) of the Constitution. See also Article 22 which stipulates that "[t]he State shall ensure the separation of the judiciary from the executive organs of the State."

<sup>124</sup> Article 95 *ibid*.

<sup>125</sup> The directives were issued in the case of *Secretary, Ministry of Finance vs. Masdar Hossain* (1999) 52 DLR (AD) 82.

<sup>126</sup> See *Government seeks more time to separate judiciary*, Daily Star, Law Report, 3 April 2004.

<sup>127</sup> The District Judge and Additional District Judge, the Joint District Judge and the Assistant District Judge.

The appeal against judgments in civil and criminal cases lies with the High Court Division of the Supreme Court from which further appeals may be lodged to the Appellate Division of the Supreme Court.<sup>129</sup> There are also administrative tribunals competent to adjudicate certain administrative disputes.<sup>130</sup> Moreover, special tribunals, namely the “Suppression of Violence against Women and Children Tribunal” have been set up in every district headquarter to try offences under the Suppression of Violence against Women and Children Act, 2000.<sup>131</sup> Courts martial function as military courts competent to try persons subject to the Army Act.<sup>132</sup>

### ***Prohibition of Torture in Bangladeshi Law***

Torture is expressly prohibited in Article 35 (5) of the Constitution: “No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment,” however, there is no express prohibition of torture in statutory law. The Penal Code contains no specific offence of torture.<sup>133</sup> The Code of Criminal Procedure prohibits police officers from threatening suspects or any other persons but does not specifically refer to torture.<sup>134</sup> A confession given as a result of inducement, threat or promise cannot be used in criminal proceedings.<sup>135</sup> The High Court Division has confirmed in its jurisprudence that convictions based solely on the confession of an accused to a police officer are unsafe,<sup>136</sup> and other corroborative evidence is required.<sup>137</sup> However, under section 27 of the Evidence Act, a statement made by the accused in police custody, which leads to the recovery of incriminating information may be relied upon when it is found to be true and consequently, other corroborative evidence that is adduced as a result of a forced confession may be admissible in such cases.<sup>138</sup> While the High Court Division has emphasised that section 27 of the Evidence Act needs to be construed as far as possible in favour of the accused,<sup>139</sup> the provision enables law enforcement officials to use material evidence obtained through torture, a position that has been repeatedly criticised.<sup>140</sup>

The High Court Division has issued judgments pertaining to torture but has not yet defined torture in its jurisprudence,<sup>141</sup> nor are we aware of any instances in which subordinate courts have defined conduct amounting to torture.

<sup>128</sup> Criminal courts comprise Court of Sessions and Additional Courts of Sessions, Assistant Courts of Session and three classes of Magistrates Courts (in Metropolitan areas only 1<sup>st</sup> class), including their equivalents in Metropolitan areas.

<sup>129</sup> See for an overview Shadeen Malik, *Bangladesh Legal Aid and Services Trust: Activities, Strategy and Vision*, World Bank, 2003, p.5 at [http://www4.worldbank.org/legal/publications/Legal\\_Services\\_Poor/LSO\\_Bangladesh.pdf](http://www4.worldbank.org/legal/publications/Legal_Services_Poor/LSO_Bangladesh.pdf).

<sup>130</sup> See Article 117 of the Constitution and Administrative Tribunals Act, 1980.

<sup>131</sup> See section 26 of the Act.

<sup>132</sup> See sections 2 and 80 et seq. of the Army Act, Act No XXXIX of 1952.

<sup>133</sup> See infra in section on Criminal Accountability of Perpetrators of Torture.

<sup>134</sup> See section 163 (1) of the Criminal Procedure Code: “No police-officer or other person in authority shall offer or make, or cause to be offered or made, any such inducement, threat or promise as is mentioned in the Evidence Act, 1872, section 24.”

<sup>135</sup> See section 24 of the Evidence Act, 1872: “A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat for promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.”

<sup>136</sup> Section 25 Evidence Act: “No confession made to a police officer shall be proved as against a person accused of any offence”; Section 26 Evidence Act: “No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.”

<sup>137</sup> High Court Division, *The State vs. Hasen Ali*, Judgment of 24<sup>th</sup> of March 1999, 19 BLD (HCD) (1999) 418 and High Court Division, *Md. Akbar Ali vs. The State*, Judgment of 22<sup>nd</sup> of July 1998, 19 BLD (HCD) (1999) 268.

<sup>138</sup> See Article 27 of the Evidence Act, 1872 and High Court Division, *Zillur Rahman vs. The State*, 6 MLR (HCD) (2001) 99.

<sup>139</sup> Ibid.

<sup>140</sup> Also in India, Pakistan and Sri Lanka all of which apply the same laws in this respect. See written statement submitted by the Asian Legal Resource Centre, a non-governmental organisation in general consultative status, UN Doc. E/CN.4/2000/NGO/62, 8 February 2000, Commission on Human Rights, Fifty-sixth session, Item 11 (a) of the provisional agenda.

<sup>141</sup> See in particular *BLAST and others vs. Bangladesh and others*, supra.

## ***Criminal Accountability of Perpetrators of Torture***

### *Criminal Offences and Punishment*

The Bangladeshi Penal Code, as amended, came into force in 1860. There are a number of offences that penalise conduct that may amount to torture but there is no specific offence of torture in line with Article 1 of the Convention against Torture.

Conduct amounting to torture may be prosecuted under the following offences:

- Voluntarily causing hurt<sup>142</sup> to extort confession or to compel restoration of property (punishable by up to seven years imprisonment and liable to a fine,<sup>143</sup> and, if the hurt caused is grievous,<sup>144</sup> the maximum punishment is ten years imprisonment and liability to pay a fine<sup>145</sup>);
- Wrongful confinement to extort confession or compel restoration of property (maximum punishment of three years imprisonment and fine<sup>146</sup>);
- A public servant disobeying the law, with intent to cause injury<sup>147</sup> to any person (up to one year imprisonment and/or a fine<sup>148</sup>);
- A public servant concealing the design to commit an offence that it is his or her duty to prevent (punishment depends on the imprisonment or fine that is provided for the related offence<sup>149</sup>).

General offences against physical integrity, such as assault or use of criminal force incur up to three months imprisonment and/or a fine.<sup>150</sup> Culpable homicide carries, depending on the circumstances, a punishment ranging from a term of imprisonment up to imprisonment for life and a fine.<sup>151</sup> Murder, which includes the intentional causing of death or bodily injury or other acts sufficient or likely to cause death, is punishable with death or life imprisonment and a fine.<sup>152</sup> Culpable homicide does not constitute murder if the offender is a public servant or aiding a public servant acting for the advancement of public justice, and he or she exceeds the powers given to him by law, and causes death by committing an act which he or she, in good faith, believes to be lawful and necessary for the due discharge of his or her duty.<sup>153</sup>

A police officer belonging to the forces of the Metropolitan Dhaka area faces a punishment of up to one year and/or a fine of up to two thousand taka (approximately \$33) for personal

---

<sup>142</sup> Section 319 Penal Code: "Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt."

<sup>143</sup> Section 330 Penal Code: "Whosoever voluntarily causes hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any confession or any information which may lead to the detention of any offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

<sup>144</sup> Section 320 Penal Code.

<sup>145</sup> Section 331 Penal Code.

<sup>146</sup> Section 348 Penal Code.

<sup>147</sup> According to section 44 of the Penal Code, the word injury denotes "any harm whatever illegally caused to any person, in body, mind, reputation or property."

<sup>148</sup> Section 166 Penal Code.

<sup>149</sup> Section 119 Penal Code.

<sup>150</sup> Section 352 Penal Code.

<sup>151</sup> Sections 299 and 304 Penal Code.

<sup>152</sup> Sections 300 and 302 Penal Code.

<sup>153</sup> Section 300, Exception 3 Penal Code.

violence or threats against any person in his or her custody.<sup>154</sup> Furthermore, the Police Act 1861, Police Regulations of Bengal 1943 and the Dhaka Metropolitan Police Ordinance empower police authorities to impose disciplinary sanctions.

Punishment for sexual harassment and rape of women and children is governed by the Suppression of Violence against Women and Children Act, 2000.<sup>155</sup> Under the act, rape is punishable by rigorous imprisonment for life and a fine, and may incur capital punishment in cases of gang rape or where the rape results in the death of the victim.<sup>156</sup> In addition, failure to ensure the proper custody of those directly responsible carries a punishment of five to ten years' imprisonment and a fine if a woman is raped while in police custody.<sup>157</sup> Other sexual abuses are subject to a punishment of between two and ten years of rigorous imprisonment and a fine.<sup>158</sup> The provisions for rape are gender-specific; only women can be 'raped'. Rape of men would therefore be classified as assault.<sup>159</sup>

## Available Remedies for torture

### Judicial Remedies

#### Constitutional Law

Neither the Constitution nor any statute contains an express right to a remedy for injuries caused by public officials, or for torture in particular. However, as a matter of constitutional law, victims may seek relief through a writ application to the High Court Division of the Supreme Court.<sup>160</sup> The High Court Division has the power to provide appropriate relief for violations of fundamental rights, including a violation of the prohibition of torture under Article 35 (5) of the Constitution.<sup>161</sup> The High Court Division has affirmed that it is competent to award compensation for fundamental rights violations.<sup>162</sup> As "[t]he Constitution of Bangladesh does not provide for the defence of sovereign immunity ... there is no bar to awarding

<sup>154</sup> Section 53 of The Dhaka Metropolitan Police Ordinance, Ordinance No.III of 1976.

<sup>155</sup> Act No.VIII of 2000. See also sections 375 and 376 of the Penal Code which defines rape as sexual intercourse with a woman against or without her consent.

<sup>156</sup> Section 9 (1); (2) and (3) of Act No.VIII of 2000.

<sup>157</sup> Section 9 (5) *ibid*: "If any woman is raped while in police custody then that person or those persons under whose custody such rape was committed and who were directly responsible for the safe custody of the woman, unless otherwise proved, for failure of proper custody, be punishable with rigorous imprisonment for not exceeding ten years but no less than five years and shall also be liable to be fined.." [Unofficial translation]

<sup>158</sup> Section 10 *ibid*.

<sup>159</sup> See on this point HRW, *Ravaging the Vulnerable*, *supra*, pp.18 and 19.

<sup>160</sup> Articles 44 (1) and 102 (1) of the Constitution.

<sup>161</sup> Article 102 (1) of the Constitution: "The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution." See on the discretion of the High Court Division with regard to writ petitions under Article 102 (1) Mahmudul Islam, *Constitutional Law of Bangladesh*, Bangladesh Institute of Law and International Affairs, Dhaka, 1995, p.368.

<sup>162</sup> *Bilkis Akhter Hossain vs. Bangladesh & Others*, Supreme Court of Bangladesh (High Court Division), Judgment of 7 April 1997, 17 BLD (1997) (HCD) 395, (1997) 2 CHRLD 312: "There is no specific provision for awarding costs and compensation under Art 102 but it is a long-drawn tradition, custom or discretion of the High Court Division that in every writ case the court always passes judgment either with or without costs. In view of its special original jurisdiction and its extraordinary and inherent jurisdiction to pass any order as it deems fit and proper, the High Court Division has the power to award costs as well as monetary compensation according to the facts and circumstances of each case. Moreover, it would appear that the Appellate Division has approved the principle that the High Court Division is competent to award compensation in an appropriate case in its writ jurisdiction (*Habibullah Khan v S A Ahmed* 35 DLR (AD) 72 (Bang SC AD) considered). It follows, therefore, that the Supreme Court, in the exercise of its constitutional jurisdiction, can award monetary compensation in appropriate habeas corpus cases for illegal detention in violation of a person's fundamental rights (*Maharaj v Attorney General of Trinidad and Tobago* [1978] 2 All ER 670 (T&T PC), *Ruhul Sah v State of Bihar & Anor* AIR 1983 SC 1086 (Ind SC), *Bhim Singh MLA v State of Jammu and Kashmir* AIR 1986 SC 494 (Ind SC), *Paschim Banga Khet Mazdoor Samity v State of West Bengal* AIR 1996 SC 2426; (1996) 2 CHRLD 109 (Ind SC), *Government of East Pakistan v Rowshan Bijaya Shaukat Ali Khan* 18 DLR (SC) 214 (Bang SC), *Government of West Pakistan v Begum Agha Abdul Karim Shorish Kashmiri* (above) and *Amaratunge v Police Constables & Ors* [1993] SAARC Law Journal 88 (SL SC) applied)."

compensation to an aggrieved person under writ jurisdiction for a violation of his or her fundamental rights.<sup>163</sup> In the recent case of *BLAST vs. Bangladesh*, which is pending before the Appellate Division following an appeal by the Government, the High Court Division expressly confirmed, referring to the jurisprudence of the Indian Supreme Court,<sup>164</sup> that it is competent to award compensation to a victim of torture or to the relations of a person whose death is caused in police or jail custody.<sup>165</sup>

The High Court Division of the Supreme Court has the discretion to determine the appropriate form of reparation to award where it finds a violation of fundamental rights. Its powers are not confined to awarding compensation only. It may award other kinds of reparation in the form of directions, and it may direct the State to take measures of rehabilitation, satisfaction and guarantees of non-repetition, which may include recommendations to prosecute the public official responsible for the violation of a fundamental right if such conduct constitutes a criminal offence.<sup>166</sup> The High Court Division has on occasion awarded exemplary damages.<sup>167</sup> The Court decides on the quantum of compensation on the basis of the particular facts and circumstances, taking into account the severity of the violation.<sup>168</sup>

In addition to aggrieved persons, the High Court Division has recently recognised that members of the public may also be granted standing in cases of gross human rights violations, opening the way for public interest litigation.<sup>169</sup> There is no express time limit for bringing such an application but a petition may be deemed inadmissible if brought with a

<sup>163</sup> Ibid. Bilkis Hossain.

<sup>164</sup> See for an overview of the jurisprudence of the Indian Supreme Court and High Court on reparation for torture, REDRESS, *Responses to Human Rights Violations, The Implementation of the Right to Reparation for Torture in India, Nepal and Sri Lanka*, Report issued February 2003 in collaboration with the Commonwealth Human Rights Initiative, pp. 23 et seq., at <http://www.redress.org/publications/IndianSeminarReport.pdf>.

<sup>165</sup> *BLAST and others vs Bangladesh and others*, supra: "Now, a question is raised whether this court is competent to award compensation to a victim of torture or to the relation of a person whose death is caused in police custody or jail custody. We have considered the principle laid down in the case reported in AIR 1977 (SC) 610. According to us, this Court, in exercise of its power of judicial review when finds that that fundamental rights of an individual has been infringed by colourable exercise of power by the police under section 54 of the Code [Code of Criminal Procedure] or under section 167 of the Code, the Court is competent to award compensation for the wrong done to the person concerned. Indian Supreme Court held the view in the above case that compensatory relief under the public law jurisdiction may be given for the wrong done due to breach of public duty by the state of not protecting the fundamental right to the life of a citizen. So, we accept the argument of the learned Advocate for the petitioner that compensation may be given by this Court when it is found that confinement is not legal and death resulted due to failure of the state to protect the life. But at the same time we like to emphasise that it will depend upon the facts and circumstances of each case. If the question of custodial death becomes a disputed question of fact, in that case, under the writ jurisdiction it will not be possible to give compensation. But where it is found that the arrest was unlawful and that the person was subjected to torture while he was in police custody or in jail, in that case, there is scope for awarding compensation to the victim and in case of death of a person to his nearest relation."

<sup>166</sup> See *BLAST and others vs. Bangladesh and others*, supra.

<sup>167</sup> *Bilkis Akhter Hossain vs. Bangladesh & Others*, supra. Compare in this respect the Indian jurisprudence, in particular Justice Anand in *Nilabati Behera vs. State of Orissa*, (1993) 2 SCC 746 (Ind SC), para.33 "... when the court moulds the relief by granting "compensation" in proceedings under Article 32 and 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizens. The payment of compensation in such cases is not to be understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty of not protecting the fundamental rights of the citizen. The compensation is in the nature of 'exemplary damages' awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law."

<sup>168</sup> See *Bangladesh vs. Ahmed Nazir*, 27 DLR (AD) 41 and *Bilkis Akhter Hossain vs. Bangladesh & Others*, supra.

<sup>169</sup> See *Dr. Mohiuddin Faruque vs. Bangladesh*, supra, and *Ekushey Television Ltd & ors. vs. Dr. Chowdhury Mahmood Hasan & ors.*, 22 BLD (AD) 2002, 163: "This Court under constitutional mandate is duty bound to preserve and protect the rule of law. The cutting edge of law is remedial and the art of justice has to respond here so that transparency wins over opaqueness. In the instant case, the petitioners, though not personally affected in espousing a genuine cause, but have drawn the court's attention to the breach of constitutional obligations. Such gross violations of fundamental rights should shock the judicial conscience and force it to leave aside the transitional procedure which shackles the locus standi and gives standing to the petitioners. Unless this Court responds to it, governmental agencies would be left free to subvert the rule of law to the detriment of the public interest" and *Chowdhury Mahmood Hossain vs. Bangladesh & ors.*, 22 BLD (HCD) 2002, 459: "When an action concerns public wrong or injury or invasion of the fundamental rights of indeterminate number of people, any member of the public being a citizen suffering the common injury, has the right to invoke the jurisdiction under Article 102 of the Constitution."

delay that is deemed inordinate in the circumstances.<sup>170</sup> The petitioner is not required to exhaust all remedies for this type of application,<sup>171</sup> and has the burden to adduce evidence in support of the allegation, which must be affirmed on oath.<sup>172</sup> The Division has discretion in awarding costs, which must be exercised judicially according to the facts and circumstances of the case.<sup>173</sup> Finally, it may review its judgments and orders where considered necessary in the interests of justice.<sup>174</sup> Enforcement of judgments of the High Court and Appellate Divisions is automatic. There is no need to file a petition for execution and failure to enforce the judgment is subject to contempt of court proceedings governed by the Contempt of Court Act, 1926.

## Civil Law

Torture survivors may invoke common law remedies in civil courts, such as public nuisance or trespass to the person, or assault and battery.<sup>175</sup> The State is vicariously liable for damages caused by its officials, so that both may be held jointly liable. Victims are entitled to damages, which are to be awarded to the extent that the victims can be put in the position they would have been in had the tort not been committed. Damages encompass both actual pecuniary loss, i.e. any expenses reasonably incurred by the plaintiff and future loss of income, as well as non-pecuniary damages for pain and suffering and loss of enjoyment of life. The amount of compensation depends on the facts and circumstances of each case. Exemplary damages may be awarded where the damage has been caused by the oppressive, arbitrary, unconstitutional action of Government officials.<sup>176</sup>

Torture survivors may file a civil claim for damages at the court of first instance in the place where the tort occurred or where the defendant resides.<sup>177</sup> A suit must be filed within one year<sup>178</sup> and may be filed against the individual perpetrator or the State or both. The plaintiff who initiates a suit is required to pay an *ad valorem* (according to value) fee that may be waived.<sup>179</sup> An official legal aid scheme was set up in 2002.<sup>180</sup> The Civil Procedure Code and the Evidence Act govern the procedure. The plaintiff may give evidence in his other capacity as party to the suit<sup>181</sup> and the burden of proof is on the balance of probabilities.<sup>182</sup> The Court

<sup>170</sup> Islam, Constitutional Law, supra, pp.380 and 472, referring to *Ghulam Azam vs. Bangladesh*, 46 DLR (AD) 192.

<sup>171</sup> Ibid., p.381 with further references. See also general considerations in *Jabon Naheer & ors. vs. Bangladesh & ors.*, 18 BLD (1998) 141.

<sup>172</sup> Ibid., pp.380 and 494 et seq. See also the Rules of the High Court Judicature for East Pakistan, 1960, which have been adopted as the Rules of the High Court Division.

<sup>173</sup> *Bilkis Akhter Hossain vs. Bangladesh & Others*, supra.

<sup>174</sup> *Serajuddin Ahmed vs. AKM Saiful Alam*, 56 DLR (AD) 2004: "There is no provision in the constitution precluding the High Court Division to review its judgment and order. The Court's inherent power to do justice to the parties before it is an accepted one and for that purpose the form in which the Court shall dispense justice is a matter for the Court to resort to."

<sup>175</sup> See R.K. Bangia, *The Law of Torts (including compensation under the Motor Vehicles Act)*, 10th. Edn., Allhabad, 1991, pp. 410 et seq.

<sup>176</sup> Ibid.

<sup>177</sup> Sections 19 and 20 Civil Procedure Code. See for the institution of suits section 26 in conjunction with the First Schedule, Order IV.

<sup>178</sup> See Limitation Act (Act No.IX of 1908). See for notice, sections 79 and 80 Civil Procedure Code.

<sup>179</sup> See for details Court Fees Act, 1870, s.7 (I) & Schedule I. The maximum amount of court fees is Taka 42,500.00 (around \$702). For claims of less than Tk. 100,000.00 (around \$1,650), the fee is 10% of the claim.

<sup>180</sup> See Shadeen Malik, BLAST, supra, p.13 and Justice Sha Abu Nayeem Mominur Rahman, *Poverty and Access to Justice and the Role of the Higher Judiciary in Bangladesh*, Paper delivered at First South Asian Regional Judicial Colloquium on Access to Justice, New Delhi, 1-3 November 2002.

<sup>181</sup> Sections 118, 120 The Evidence Act, 1872.

<sup>182</sup> Sections 101, 102 ibid.



has discretion in awarding costs and they usually follow the event.<sup>183</sup> Judgments are enforced by way of decrees issued by courts and executed by competent officers.<sup>184</sup>

### Criminal Law

A victim of a crime cannot claim reparation as part of criminal proceedings. However, a court hearing a criminal case has the discretion to order compensation when imposing a fine as the sentence. Section 545 (1) (b) of the Criminal Procedure Code might be utilised by courts in torture cases to order a convicted perpetrator to compensate the victim.<sup>185</sup> If there is a subsequent civil suit, the Court will take into account any sum already paid or recovered by way of compensation under section 545.<sup>186</sup>

The Special Tribunals constituted to deal with offences under the Suppression of Violence against Women and Children Act, 2000, have been expressly vested with the power to award compensation to victims in cases of custodial rape by ordering the offender to pay the imposed fine as compensation.<sup>187</sup>

### Non-judicial remedies

There are no reparation schemes or other non-judicial remedies for victims of serious human rights violations.<sup>188</sup> Victims of torture can obtain specialist treatment through non-governmental rehabilitation centres only. Such centres, namely the Bangladesh Rehabilitation Centre for Trauma Victims (BRCT) and the Centre for Rehabilitation of Torture Survivors, Bangladesh (CRTS.B), provide torture victims with a range of services free of charge.<sup>189</sup>

## IV. ENFORCEMENT OF INTERNATIONAL OBLIGATIONS

### A. Responses to violations committed in the course of the 1971 war

#### i. Pakistan

Pakistan responded to the events of 1971 by setting up the Hamoodur Commission. This Commission was tasked to inquire into “the circumstances in which the Commander, Eastern command, surrendered and the members of the Armed Forces of Pakistan under

---

<sup>183</sup> Section 35 Civil Procedure Code. See clause (2) of the said paragraph, which indicates that the costs are usually to be borne by the losing side: “Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing.”

<sup>184</sup> Sections 38 et seq. Civil Procedure Code and Order XXI.

<sup>185</sup> Section 545 (1) Cr. PC reads: “Whenever under any law in force for the time being a Criminal Court imposes a fine or confirms in appeal, revision or otherwise a sentence of fine, or a sentence of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied- (a) in defraying expenses properly incurred in the prosecution; (b) in the payment to any person of compensation for any loss or injury caused by the offence, when substantial compensation is, in the opinion of the Court, recoverable by such person in a Civil Court.”

<sup>186</sup> Section 546 Cr. PC.

<sup>187</sup> Section 15 of Act No. VIII of 2000: “From section 4 to 14 [listing offences of rape and sexual abuse, see supra], the offences for which fine is imposed by the tribunal, such fines may be treated as compensation for the victims and if it is not possible to realize the fine from the existing wealth of the convicts, the fine shall be receivable from the future wealth to which the convict will be owner and in such cases realization of fine will have priority than that of other claims.”

<sup>188</sup> There has, however, been some assistance for victims of the 1971 war, infra, at IV, A (ii).

<sup>189</sup> See [www.brct.org](http://www.brct.org). CRTS.B. has no website. For contact details, see <http://www.irct.org/usr/irct/home.nsf/unid/JREW-5MSCPH>.

his command laid down their arms and a ceasefire was ordered along the borders of West Pakistan and India and along the ceasefire line in the State of Jammu and Kashmir.”<sup>190</sup>

In its supplementary report of 1974, the Commission, after having established that numerous violations had been committed by the army and auxiliary forces,<sup>191</sup> came to the following conclusions: “The direct responsibility of the alleged excesses and atrocities must, of course, rest on those officers and men who physically perpetuated them or knowingly and deliberately allowed them to be so perpetuated. These officers and men not only showed lack of discipline in disobeying the directives of the Eastern Command and Zonal Martial Law Administrator, but also indulged in criminal acts punishable under the Army Act as well as the ordinary law of the land ...<sup>192</sup> Irrespective, therefore, of the magnitude of the atrocities, we are of the considered opinion that it is necessary for the Government of Pakistan to take effective action to punish this [sic] who were responsible for the commission of these alleged excesses and atrocities.”<sup>193</sup> Accordingly, the Committee recommended that: “[o]n the basis of the evidence coming before the Commission, we have been able to indicate only in general terms the direct and indirect responsibility of certain senior commanders and others, but the question of fixing individual responsibility and awarding punishment appropriate thereto need to be determined according to the prescribed procedures available under the Pakistan Army Act and other applicable laws of the land. We would, accordingly, reiterate the recommendation made by us in Paragraph 7 of Chapter III of Para V of the main report that the Government of Pakistan should set up a high-powered Court or Commission of Inquiry to investigate these allegations, and to hold trials of those who indulged in these atrocities, brought a bad name to the Pakistan Army and alienated the sympathies of the local population by their acts of wanton cruelty and immorality against our own people. The composition of the Court of Inquiry, if not its proceedings, should be publicly announced so as to satisfy national conscience and international opinion.”<sup>194</sup>

Successive governments in Pakistan failed to heed the recommendations contained in the report, which is yet to be officially published. There has been no official investigation into the allegations with a view to holding transparent criminal trials, as appropriate. To this day, no trials of any of the alleged perpetrators are known to have taken place in Pakistan.

Pakistan has not officially accepted responsibility for any of the crimes reportedly committed by its forces. In Pakistan, responsibility for the 1971 atrocities is commonly attributed to both sides, or to India.<sup>195</sup> The crimes committed during 1971 appear to have been largely ignored in Pakistan. They do not merit due attention in portraits of its history or in public discourse in general, and are ostensibly seen as a shameful defeat of the Pakistani army often attributed to Indian interference in Pakistani affairs.<sup>196</sup> Those alleged to be responsible, i.e. the politicians and army officials at the time, have largely failed to acknowledge their crimes, apparently either accepting only shared responsibility, i.e. pointing the blame at Sheikh Mujibur Rahman and others, or claiming ignorance or lack of responsibility for the atrocities.<sup>197</sup>

---

<sup>190</sup> See Part 1, Introduction, of the Hamoodur Commission Supplementary Report, *supra*.

<sup>191</sup> *Ibid.*, Part V, Chapter II.

<sup>192</sup> *Ibid.*, para.37.

<sup>193</sup> *Ibid.*, para. 38.

<sup>194</sup> *Ibid.*, para. 39.

<sup>195</sup> *Ibid.*, paras.31 and 38.

<sup>196</sup> See Muntassir Mamoon, *The Vanquished Generals and the Liberation War of Bangladesh*, Somoy Prokhasan, 2000.

<sup>197</sup> *Ibid.*

More than thirty years later, Pakistan has not expressly apologised, even though the Hamoodur Commission, set up by the then Government, had concluded that members of the Pakistani army bore responsibility for various crimes. In a recent State visit to Bangladesh in July 2002, Pakistan's President Gen. Pervez Musharraf wrote in a visitors' book at the Savar War Memorial that "the excesses committed during the unfortunate period are regrettable."<sup>198</sup> This step drew mixed responses. While seen by some as a positive gesture in coming as close to an apology as possible, others viewed it as falling short of what they regard as overdue, namely an unconditional apology for war crimes.<sup>199</sup> To date, there has only been one explicit public apology issued to the people of Bangladesh and it was made by a coalition of 51 civil rights organisations of Pakistan.<sup>200</sup>

Pakistan is not known to have provided any form of compensation for the harm inflicted or for rehabilitation purposes, to the State of Bangladesh or to any of the victims.

## ii. Bangladesh

In Bangladesh, there was apparent political will to prosecute and punish those accused of perpetrating crimes relating to the 1971 events. The then Government of Sheikh Mujibur Rahman decided to try those members of the Pakistani army who had surrendered, reportedly more than 95,000 in total, on charges of international crimes. Following an investigation, a decision was made to put on trial 195 "major war criminals", against whom strong evidence was said to be available.<sup>201</sup> The First Amendment to the Constitution in 1973 provided legal backing for this course of action by envisaging the introduction of special laws allowing for the trial of persons charged with genocide, crimes against humanity, war crimes and other crimes under international law. Accordingly, Parliament adopted the International Crimes (Tribunals) Act, 1973.<sup>202</sup> However, the Act did not come into force as the official notification to set it into motion was never issued by the Government. The Act provided for the establishment of tribunals<sup>203</sup> which would "have the power to try and punish any person irrespective of his nationality, who, being a member of any armed, defence or auxiliary forces commits or has committed, in the territory of Bangladesh, whether before or after the commencement of this Act, any of the following crimes...."<sup>204</sup> namely crimes against humanity, crimes against peace, genocide, war crimes, violations of humanitarian rules applicable in armed conflicts laid down in the Geneva Convention of 1949 and any other crimes under international law.<sup>205</sup> Notably, the Act included the crime of genocide committed against a political group, broader than the definition of genocide recognised in international law.<sup>206</sup>

<sup>198</sup> See *Pakistan 'regrets' 1971 war excesses*, at [www.cnn.com/2002/WORLD/asiapcf/south/07/29/bangladesh.pakistan/](http://www.cnn.com/2002/WORLD/asiapcf/south/07/29/bangladesh.pakistan/).

<sup>199</sup> Ekram Kabir, *Musharraf is welcome but 'regrets' is not enough*, in South Asia Tribune, at [www.satribune.com/archives/Aug17\\_23\\_02/BD\\_piece.htm](http://www.satribune.com/archives/Aug17_23_02/BD_piece.htm).

<sup>200</sup> "We the citizens of Pakistan welcome the statement of regret by President Pervez Musharraf in Bangladesh on the atrocities of 1971 and would take this opportunity to make a public apology to the sisters and brothers of Bangladesh, for all the excesses and atrocities that were committed upon civilians. We feel sad and burdened by what we know was a violation of people's human rights. Though this apology should have come a long time ago, and some citizen groups did make attempts to do so, we deeply feel that a message from us is necessary to acknowledge historic wrongs, to express our sincere apology and to build a bond based on honest sentiments. We hope that we can build solidarity in future and move towards a peaceful South Asia, where people can find solutions to poverty and social injustice through a healthy political process and an empowered civil society rather than military force." The text can be found at [www.himalmag.com/2002/september/briefs.htm](http://www.himalmag.com/2002/september/briefs.htm).

<sup>201</sup> See Ziauddin, *Case of Bangladesh*, supra, p.103 and Kabir, *Tormenting Seventy One*, supra, Annex.

<sup>202</sup> Act No.XIX of 1973 (published in the Bangladesh Gazette, Extra, on July 20, 1973): An Act to provide for the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and other crimes under international law.

<sup>203</sup> Section 6 *ibid*.

<sup>204</sup> Section 3 (1) *ibid*.

<sup>205</sup> Section 3 (2) *ibid*.

<sup>206</sup> See Section 3 (2) (c): "Genocide: meaning and including any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group ..." Compare the definition of genocide in the Genocide Convention: "...Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately

While a legal framework for prosecuting the main war criminals had thus been developed, several political factors are commonly attributed to the subsequent failure to implement it: the threat that the Pakistani Government would prosecute Bengalis whom they had arrested and detained; the release of Pakistani troops held by India following the Simla Agreement between India and Pakistan;<sup>207</sup> and pressure by other Islamic countries which resulted in the mutual recognition of Bangladesh and Pakistan.<sup>208</sup> In light of these circumstances, Bangladesh decided to take no further steps to try the alleged war criminals who were eventually allowed to return to Pakistan. Hailed by commentators at the time as a generous step taken by Bangladesh towards lasting peace, the abandonment of trials and lack of accountability of perpetrators has divided Bangladesh ever since, leaving many of the victims of the war deeply frustrated.<sup>209</sup>

The other category of war criminals was the 'Bangladesh collaborators.' In 1972, the Bangladesh Government issued the Bangladesh Collaborators (Special Tribunals) Order, 1972.<sup>210</sup> Several special tribunals were established with exclusive jurisdiction over offences covered by the order.<sup>211</sup> The Schedule of the Act specified and divided several offences in four different parts according to their seriousness. Whereas homicide and murder carried the death penalty, most acts of torture were covered by offences listed in Part II of the Schedule that were punishable with rigorous imprisonment for a term not exceeding ten years and a fine.<sup>212</sup> A large number of persons were charged and some convicted under this Order. However, less than two years after the Order had come into force, the then Bangladeshi Government issued an amnesty and released the majority of persons held or convicted under this Order, approximately 35,000 in total. While the amnesty did not apply to those charged with murder, rape or arson, apparently a large number of persons falling into this category, including prominent collaborators, were also released.<sup>213</sup> The Order was finally revoked in 1975.

Since then, there have been several attempts by individuals and civil rights groups to hold to account those said to be responsible for war crimes.<sup>214</sup> Successive Bangladeshi

---

inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group."

<sup>207</sup> The text of the agreement can be found at <http://asiapeace.org/acha/kashmir109.htm>.

<sup>208</sup> Ziauddin, Case of Bangladesh, supra, p. 105.

<sup>209</sup> Ibid., pp. 105, 106.

<sup>210</sup> Bangladesh Collaborators (Special Tribunals) Order, 1972, President's Order No.8 of 1972, published in the Bangladesh Gazette, Extra, dated the 24<sup>th</sup> January, 1972. Collaborators were, according to the order, persons who had:

"1. participated with or aided or abetted the occupation army in maintaining, sustaining, strengthening, supporting or furthering the illegal occupation of Bangladesh by such army; 2. rendered material assistance in any way whatsoever to the occupation army by any act whether by words, signs or conduct; 3. waged war or abetted in waging war against the People's Republic of Bangladesh; 4. actively resisted or sabotaged the efforts of the people and the liberation forces of Bangladesh in their struggle against the occupation army; 5. by a public statement or by voluntary participation in propaganda within and outside Bangladesh or by association in any delegation or committee or by participation in purported by-elections attempted to aid or aided the occupation army in furthering its design of perpetrating its forcible occupation of Bangladesh."

<sup>211</sup> See on this and criticism of the features of the Order, such as its retroactive application and the powers vis-à-vis collaborators granted by it to Magistrates and the Government, Ziauddin, Case of Bangladesh, supra, p. 102.

<sup>212</sup> See Section 11 (a) and (b) of the Bangladesh Collaborators (Special Tribunals) Order, 1972.

<sup>213</sup> Ziauddin, Case of Bangladesh, supra, pp. 102, 103.

<sup>214</sup> One such attempt was to bring Golam Azam to trial. Azam, who was accused of having been a collaborator in the war, returned to Bangladesh from Pakistan in 1978 and was appointed leader of the Jamaat-e-Islam party in December 1991. This event triggered the establishment of the Committee for Resisting the Killers and Collaborators of '71 and Restoration of the Spirit of the Liberation War. After a detailed investigation, the Committee held a public trial in a People's Court which found Azam guilty and sentenced him to death. In a subsequent move, a National Coordinating Committee for Realisation of Bangladesh Liberation War Ideals and the Trials of Bangladesh War Criminals of 1971 set up the National People's Enquiry Commission in March 1993 to examine the role of eight alleged collaborators in the war. Having found, following an enquiry, that the suspects had collaborated in the war, the Commission urged the Government to charge them with international crimes as defined by the law of the land, including the International Crimes (Tribunal) Act of 1973. See Ziauddin, Case of Bangladesh, supra, pp. 107, 108.

governments have ignored these demands for justice<sup>215</sup> and not a single case against an individual suspected of war crimes or collaboration is known to have resulted in a thorough investigation, trial or punishment.

Although a report on the 1971 war was published as a result of the History of Bangladesh Independence War Project initiated in 1977, and numerous publications on the subject have been produced, there has not been any official commission tasked with providing a comprehensive account of events and determining responsibility of the various actors, nor has there been an adequate forum for victims to speak out. While some steps have been taken, such as building the National Martyrs Memorial in Savar, welfare legislation aimed at improving living conditions and the provision of some, rather limited, financial assistance to “freedom fighters”, as well as the setting up of a Ministry of Liberation War Affairs, approaches to dealing with the 1971 war have remained piecemeal, differing depending on the government in power.

The fact that the perpetrators of the crimes have not been held accountable and that Bangladesh as a nation has so far not provided satisfactory reparation has left many victims of the war resentful, as evidenced by the number of committees and movements devoted to this issue.<sup>216</sup> Attempts have been and continue to be made by civil society groups to provide alternative forms of reparation, such as by the Truth Commission for Genocide in Bangladesh. However, these efforts have failed to have a wide impact with limited resources at their disposal and without the support of the Government.

Most victims of the 1971 war crimes are still waiting for justice.

### iii. Third countries

No perpetrators of crimes committed in East Pakistan in 1971 have been brought to trial in third countries. India did not try any members of the Pakistani forces in 1972, ostensibly on the grounds of territorial sovereignty and lack of jurisdiction.<sup>217</sup> Instead, Pakistan and India concluded the Simla agreement on 3 July 1972 under which Pakistani forces were allowed to return to Pakistan.<sup>218</sup> Subsequently, no instances are known in which alleged perpetrators of the crimes committed in East Pakistan in 1971 have been subject to a criminal investigation or trial abroad.

Initial steps were taken by the Metropolitan Police in London to investigate alleged perpetrators of war crimes in Bangladesh resident in the United Kingdom whose alleged role in the 1971 war had been documented in a Channel 4 documentary but to date, these investigations have not resulted in any charges.<sup>219</sup>

---

<sup>215</sup> The question of criminal accountability has inevitably become a political one, concerning both the position and closeness of the individual in question to Pakistan in 1971 and now, and the potential repercussions in regard to Bangladesh's relations with Pakistan.

<sup>216</sup> See Ziauddin, *Case of Bangladesh*, supra, pp.106 et seq.

<sup>217</sup> See Kabir, *Tormenting Seventy-One*, supra, p.17.

<sup>218</sup> Supra, at IV, A, (ii).

<sup>219</sup> See Ziauddin, *Case of Bangladesh*, supra, pp.108, 109.

## B. Responses to allegations of torture and ill-treatment committed from 1971 to the present

### i. The procedural framework

#### *Immunities*

Bangladeshi laws provide that certain groups of public officials are immune from prosecution for offences committed in the discharge of their duties, unless specifically sanctioned by the Government. This applies to judges, magistrates, life-term public servants and members of the armed forces.<sup>220</sup>

There is also specific legislation that provides immunity for the human rights violations committed in the course of the 'Operation Clean Heart'.<sup>221</sup> The Joint Drive Indemnity Act, 2003, of 23 February 2003 provides that no civil or criminal proceedings can be instituted against "members of the joint forces and any person designated to carry out responsibilities in aid of civil administration during the period between 16 October 2002 and 9 January 2003". Such persons may however be prosecuted before "courts or tribunals constituted under laws governing security forces and their members".<sup>222</sup> This Act was challenged by a relative of a victim, who alleged that her brother was tortured to death in the Operation. On 13 April 2003, the High Court Division of the Supreme Court requested that the Government demonstrate why this Act should not be declared unlawful.<sup>223</sup> The legal determination of the issue is pending with the High Court Division.

#### *Statute of Limitations*

There is no statute of limitation for any criminal offence.

#### *Investigations into allegations of torture*

A victim of torture may lodge a complaint with the police<sup>224</sup> or a magistrate.<sup>225</sup> In the absence of an independent body responsible for investigating human rights violations, investigations are carried out by the police and the magistrate.

Complaints to the police may be made by any person in writing or they can be made orally and recorded.<sup>226</sup>

<sup>220</sup> Section 197 Cr. PC: "(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction." Section 197 only applies to those persons "who act as public servants at the time of commission of the offence and remain so when cognizance of the offence is taken." See *Mohor Ranjan Pal & Ors vs. The State*, 18 BLD (1998) Vol.XVIII, 86.

<sup>221</sup> *Supra*, II C.

<sup>222</sup> See on relevant developments, AI, Urgent need for legal reforms, *supra*, pp.8 and 9.

<sup>223</sup> See *Joint Drive Indemnity Act challenged*, Daily Star, Law & Our Rights, 20 April 2003.

<sup>224</sup> Section 154 Cr. PC.

<sup>225</sup> Section 200 Cr. PC.

<sup>226</sup> Section 154 Cr. PC.

There are procedural differences depending on whether the offence in question is cognisable, which applies to most offences that may be applied in the absence of a specific offence of torture, or non-cognisable.<sup>227</sup> In cases of non-cognisable offences, the police will record the information and refer the informant to a magistrate.<sup>228</sup> The police officer may only investigate the case by order of a magistrate.<sup>229</sup> When a magistrate has made such an order, the police officer has the same powers of investigation that a competent officer may exercise in respect of cognisable offences,<sup>230</sup> except for the power to arrest without a warrant.

Cognisable offences are investigated by the police.<sup>231</sup> As a general rule, upon receiving information about the commission of a criminal offence, the officer-in-charge draws up a First Information Report (FIR).<sup>232</sup> Where the officer believes that an offence has been committed, he or she sends a report to the magistrate, who will then hold a preliminary inquiry or otherwise dispose of the case.<sup>233</sup>

Any police officer can investigate a cognisable offence.<sup>234</sup> The officer-in-charge has some discretion, and can refuse to investigate if "it appears to [him or her] that there is no sufficient ground for entering on an investigation,"<sup>235</sup> but the officer must advise the informant about the reasons for not proceeding.<sup>236</sup> If the officer-in-charge of a police station refuses to record a complaint concerning a cognisable offence, the informant may send the substance of the information, in writing, to the relevant Superintendent of Police, who has the authority to investigate the case him/herself or direct that an investigation be opened.<sup>237</sup>

The police are prohibited from offering any inducement to make a statement.<sup>238</sup> In order for statements and confessions to be used as evidence, they must be recorded by a magistrate.<sup>239</sup> If there is an allegation of torture, it is not mandatory for there to be an immediate medical examination, though with rape allegations medical examinations must be performed as soon as possible.<sup>240</sup> However, a magistrate may order a medical examination, either on his or her own motion or upon application by a detainee.

Upon completion of the investigation,<sup>241</sup> the police officer-in-charge sends a report, either as a final report or charge sheet,<sup>242</sup> to the relevant magistrate<sup>243</sup> and informs "the person, if any,

---

<sup>227</sup> See Section 4 (f) Cr. PC and second schedule of the Cr. PC according to which, *inter alia*, sections 302, 304, 324, 325, 326, 330, 331 and 348 of the Penal Code are cognizable offences whereas sections 166, 323 and 352 are not. Section 19 (1) of Act No.VIII of 2000 stipulates that all offences punishable under the Act (such as rape in custody) be cognizable.

<sup>228</sup> Section 155 (1) Cr. PC.

<sup>229</sup> Section 155 (2) Cr. PC.

<sup>230</sup> Section 155 (3) Cr. PC.

<sup>231</sup> Section 156 Cr. PC.

<sup>232</sup> See on the obligation of the police officer-in-charge to draw up a first information report *Nure Alam vs State*, 54 DLR (2002) 242.

<sup>233</sup> Sections 157-159 Cr. PC.

<sup>234</sup> Sections 156 and 157 (1) Cr. PC.

<sup>235</sup> Section 157 (1) (b) Cr. PC.

<sup>236</sup> Section 157 (2) Cr. PC.

<sup>237</sup> Section 156 (1), (2) Cr. PC.

<sup>238</sup> Section 163 Cr. PC.

<sup>239</sup> Section 164 (1) Cr. PC.

<sup>240</sup> Section 32 of Act No. VIII of 2000. Section 32 (2) of the Act stipulates that: "Under sub-section (1) if the medical examination is not performed without delay then the tribunal may direct the Controlling Authority of the physician for taking necessary action against concerned physician for negligence in duty."

<sup>241</sup> Section 172 Cr. PC.

<sup>242</sup> The final report indicates that there is no evidence against the accused and includes a prayer to discharge him/her or them. A charge sheet will pray for the trial of the accused on the basis of evidence adduced. A report may also take the form of both partly final report and partly charge sheet where there are more than one accused.

by whom the information relating to the commission of the offence was first given”.<sup>244</sup> The complainant may raise an objection (*naraji* petition) to the charge sheet or the final report following which the petitioned Court may order a re-investigation or proceed against another person. The magistrate may either disagree with the conclusions of the report from the police officer-in-charge, in which case he or she will call for further investigations,<sup>245</sup> or the magistrate may accept it and, as the case may be, take cognisance of the offence.<sup>246</sup>

In cases of custodial deaths, an inquest, which is usually conducted by an executive magistrate, is mandatory.<sup>247</sup> Where the police receive information indicating that a person “has been killed by another...” or “has died under circumstances raising a reasonable suspicion that some other person has committed an offence”, they are obligated to investigate and send a report with the apparent causes of death to the competent magistrate. A post-mortem examination may be ordered by the police “when there is any doubt regarding the cause of death, or when for any other reason the police officer considers it expedient so to do...”<sup>248</sup> The competent magistrate “may hold an inquiry into the causes of death either instead of, or in addition to, the investigation held by the police-officer...”<sup>249</sup>

A criminal case may also be lodged by a victim of a crime filing a written complaint before the magistrate. The magistrate may either open an investigation or dismiss the complaint if there are insufficient grounds to proceed.<sup>250</sup> If it is dismissed, the complainant can petition the Session Judge or the High Court Division, which may direct a further inquiry.

Police officers are subject to disciplinary proceedings for a range of offences, irrespective of any criminal sanction.<sup>251</sup> A police officer against whom disciplinary measures might be taken for misconduct may be suspended by the Police Commissioner or any other superior officer authorised by the Police Commissioner during the investigation.<sup>252</sup>

### ***Trials***

Usually, trials take place in the Criminal Court of First Instance, before a magistrate, or in a Court of Session, depending on the crime.<sup>253</sup> Offences of rape and sexual harassment are tried by the Suppression of Violence against Woman and Children Tribunals.<sup>254</sup> Members of the armed forces accused of either military or civil offences while on duty are tried by court-martial composed of army officials.<sup>255</sup>

<sup>243</sup> Section 173 (1) Cr. PC.

<sup>244</sup> Section 173 (1) (b) Cr. PC.

<sup>245</sup> Section 173 (3) (b) Cr. PC.

<sup>246</sup> Section 190 Cr. PC.

<sup>247</sup> Sections 174 and 176 Cr. PC.

<sup>248</sup> Section 174 (3) Cr. PC.

<sup>249</sup> Section 176 (1) Cr. PC.

<sup>250</sup> Section 200 Cr. PC et seq.

<sup>251</sup> See Section 12 of The Dhaka Metropolitan Police Ordinance, 1976.

<sup>252</sup> *Ibid.*, Section 12 (2).

<sup>253</sup> Section 26 Cr. PC.

<sup>254</sup> Set up under section 26 of Act No. VIII of 2000. See Section 27 of the Act for the jurisdiction of the Tribunal.

<sup>255</sup> See Army Act, Act No XXXIX of 1952, Chapter IX, Court Martial, Sections 80 et seq. *ibid.*



Criminal proceedings are governed by the Criminal Procedure Code and the Evidence Act.<sup>256</sup> As confirmed by the High Court Division, the “law does not require [a] particular number of witnesses to prove a case and conviction may be well founded even on the testimony of a solitary witness provided his credibility is not shaken by any adverse circumstances appearing on the record against him and the court, at the same time, is convinced that he is a truthful witness”.<sup>257</sup>

The court has discretion in sentencing an accused found guilty and punishments range from a fine to simple or rigorous imprisonment, imprisonment for life or the death sentence, depending on the crime in question.<sup>258</sup> According to the High Court Division “sentence is essentially a matter of judicial discretion but it must be commensurate with the gravity of the offence.”<sup>259</sup>

### **Victims’ rights and victim and witness protection during criminal proceedings**

Victims may bring a *naraji* petition<sup>260</sup> relating to the charge sheet or the final report of the police and they also have the right to submit evidence and to make submissions to the magistrate. While there is no express right to private prosecution, a victim of a crime may lodge a complaint with the magistrate or file a petition for an order of mandamus to compel a judicial inquiry into cases of custodial deaths and to prosecute the police officials concerned.

There is no specific legislation granting victims procedural rights or rights of protection.<sup>261</sup> However, the Suppression of Violence against Women and Children Tribunals may order victims to be kept in ‘safe custody’.<sup>262</sup> The introduction of this proviso followed a judgment in 1998, in which the High Court Division held that victims of sexual violence should be accorded special protection.<sup>263</sup>

As recently recognised by the High Court Division in *Tayazuddin & another v. the State*, a case relating to the crime of acid burn, the State has a duty to ensure protection and to safeguard the rights of its citizens, including victims and witnesses, to ensure equality before the law, equal protection of law and the right to life and personal liberty.<sup>264</sup> The Court derived this duty not only from fundamental rights provisions in the Constitution, namely Articles 27, 31 and 32, but also from Article 3 of the Universal Declaration of Human Rights.<sup>265</sup> The Court

<sup>256</sup> See in particular chapters XX to XXVII of the Cr. PC.

<sup>257</sup> *Al Amin vs. The State*, High Court Division of Bangladesh, Judgment of 10 December 1998, 51 DLR (1999) 154, 19 BLD (HCD) (1999) 307, (1998) 2 CHRLD 453, para.74 referring to section 134 of the Evidence Act, 1872. The Court applied this general rule in a rape case whereby its considerations appear to apply in equal measure to cases of torture.

<sup>258</sup> See in this respect the pronouncement of the High Court Division in *Al Amin & Others v State*, supra, para.91: “The object of sentencing should be to see that the crime does not go unpunished and that the victim of crime as well as the society has the satisfaction that justice has been done. Courts must not only take into account the rights of the criminals but also the rights of the victims of crime and society at large while considering appropriate punishments.”

<sup>259</sup> *Abdur Rouf vs State*, 51 DLR (1999).

<sup>260</sup> Supra, Section on investigations into allegations of torture.

<sup>261</sup> *Al Amin & Others vs. The State*, supra, para.91: “Victim is a person who is subjected to misfortune by another. The criminal justice system today is basically concerned with criminals. Since the central object of legal process is to promote and maintain the public confidence in the administration of justice, therefore, there is an urgent need for giving a well defined status to defend the victim. The interest of the victim in getting the offender punished of the crime under the criminal law cannot be ignored or completely subordinated to the interest of the accused who is interested to have an order of acquittal on the principle of criminal jurisprudence of benefit of doubt.”

<sup>262</sup> Section 31 of Act No.VIII of 2000. A 2003 amendment to section 31 of the Act instructs the judges to consider the views and choices of the victims when remitting them to safe custody. The High Court Division has, in the case of *Jesmin Nahar vs. State* (Judgment of 27 March 2001, Daily Star, 26 August 2001), clarified that an order of safe custody in disregard of the victim’s consent under the 2000 Act is illegal. Section 28 of the Suppression of Acid Crimes Act, 2002 gives the Tribunal absolute power to decide the necessity of safe custody irrespective of the consent of the victims.

<sup>263</sup> See *Al Amin & Others vs. The State*, supra.

<sup>264</sup> *Tayazuddin and another vs. The State* 21 BLD (HCD) (2001) 503.

<sup>265</sup> Article 3 UDHR reads: “Everyone has the right to life, liberty and security of person.”

stressed the right of a victim to have a fair trial<sup>266</sup> and directed the responsible agencies (Secretary, Ministry of Home Affairs; Inspector General of Police, Dhaka; Deputy Inspector General of Police, Rajshahi Range, Rajshahi, and Superintendent of Police, Dinajpur) “to take all steps to secure the safety of the informant, victim..., ..., mother of victim and witnesses ... enabling them ... to give testimony in support of prosecution case [and] to apprehend accused ... immediately and send him to jail custody.”<sup>267</sup> These considerations would apply in equal measure to torture cases, imposing an obligation on the responsible authorities to ensure victim and witness protection throughout the course of criminal proceedings.

## ii. In practice

The domestic response to torture in Bangladesh has been poor, with the exception of recent judicial pronouncements by the High Court Division of the Supreme Court, such as in the BLAST case.<sup>268</sup> Successive governments have failed to adopt laws implementing international treaties, to bring existing laws in line with international obligations or to develop a comprehensive strategy to combat torture and ensure justice and reparation for survivors.

There are no effective mechanisms to protect and promote human rights in Bangladesh. In 1980, Parliament passed the Ombudsman Act (Act XV of 1980), vesting the Ombudsman with powers to investigate any action of a Ministry, a public officer or a statutory public authority that has caused injustice to any person or has resulted in undue favour being shown to any person or has resulted in accrual or undue personal benefit or gain to any person. More than twenty years after the adoption of this Act, the office of the Ombudsman has still not been established. However, the debate to establish such an office has gained new impetus against the background of recent efforts to combat corruption.<sup>269</sup>

In April 1999, the Bangladesh Cabinet approved a draft bill for the establishment of a National Human Rights Commission (hereinafter NHRC Bill), which envisages an independent commission to “inquire, *suo motu* or on a petition presented to it by a victim or any person on his behalf, into complaint of- violation of human rights or abetment thereof or negligence in the prevention of such violation, but a public servant.”<sup>270</sup> The Bill also envisages broad powers of investigation,<sup>271</sup> and enables the Commission to recommend the initiation of criminal proceedings or any other action as it deems fit,<sup>272</sup> including interim relief.<sup>273</sup> The Committee formed in December 2001 by the present Government to examine the prospect of establishing the Human Rights Commission decided that a separate law on the protection of human rights should be considered instead of legislating a statute for the establishment of the Commission. Consequently, the initial draft Bill has been scrapped and new legislation is now under consideration. The delays in putting into place a satisfactory

<sup>266</sup> “... In a democratic country governed by the Rule of Law, the Government is responsible for ensuring free and fair trial not only to the accused but also to the victim of crime. It is, also, emphasised that the Court is not only to see the right of the accused persons, but also to see the right of the victim of crime and society at large. The Court is to see that the victim of crime can have a trial free from all fear and insecurity.” *Tayazuddin and another vs. The State*, supra, 510, para.26.

<sup>267</sup> Ibid.

<sup>268</sup> The relevant judgments are dealt with in more detail supra at III B (ii).

<sup>269</sup> See Anti-Corruption Commission Act, 2004 (Act V of 2004).

<sup>270</sup> Article 10 NHRC Bill.

<sup>271</sup> Articles 11 and 12 *ibid.*

<sup>272</sup> Article 18 *ibid.*: “The Commission may take any of the following steps upon the completion of an inquiry held under this Act, namely (1) where the inquiry discloses, the Commission of violation of human rights or negligence in the prevention of violation of human rights by a public servant, it may recommend to the Government or authority the initiation of proceedings for prosecution or such other action as the Commission may deem fit against the concerned person or persons.”

<sup>273</sup> Article 18 *ibid.*

human rights framework has caused immense frustration in the human rights community in Bangladesh.<sup>274</sup>

### Complaints

There are no comprehensive publicly available official statistics about the number of torture-related complaints and the subsequent action taken in relation to such complaints, if any. Nongovernmental organisations have collected their own figures about torture cases, though these do not indicate the overall number of complaints.<sup>275</sup>

While some torture survivors have filed complaints about torture with magistrates,<sup>276</sup> a large number of cases of torture remain unreported.<sup>277</sup> As acknowledged by the High Court Division, this is often due to threats and intimidation of victims and their families by the police or security forces responsible for the violation.<sup>278</sup> This applies in particular to marginalised groups, such as the hill tribes in the Chittagong Hill Tracts, and detainees in police lock-ups.<sup>279</sup> The stigma attached to rape appears to inhibit many women from making complaints.<sup>280</sup> The small number of investigations and prosecutions in torture cases has been attributed to the withdrawal of complaints, often as a result of police pressure,<sup>281</sup> including offering money to victims to drop their claims.<sup>282</sup>

### Investigations

In the majority of cases, investigations into allegations of torture have been inconclusive. In several instances, investigations have not been opened either because the alleged perpetrator(s) enjoy immunity under special law, such as the Joint Indemnity Act, or because the prosecution of the alleged perpetrator(s) has not been authorised by the Government as required by law.<sup>283</sup> Other cases were closed without any charges being brought against the alleged perpetrator(s).<sup>284</sup>

<sup>274</sup> Abul Hasnat, *Human Rights Commission: Out of Agenda again*, The Daily Star, Law & Our Rights, 3 July 2003.

<sup>275</sup> The figures released by Odhikar are commonly published in the Bangladeshi press. For the year 2003, Odhikar reported, *inter alia*, that 2381 persons were arrested "in relation to politics", 436 killed and 6281 injured. In the Chittagong Hill Tracts, 21 persons were raped, 11 were missing, 154 kidnapped, 77 arrested, 43 killed and 99 injured in the same period. Furthermore, Odhikar recorded attacks on journalists, including 41 assaults and 90 threats. 6 persons were raped by law enforcement agencies in 2003 and 90 persons died in prisons. According to the Bangladesh Rehabilitation Center for Trauma Victims, 1209 persons were tortured in 387 incidents in 2002 and 69 persons died as a result of torture. See BRCT, Annual Report, 2002, *supra*, pp.10 et seq. The High Court Division of the Supreme Court expressed its dismay about the number of custodial deaths (38) in 2002, see *BLAST and others v. Bangladesh*, *supra*.

<sup>276</sup> See for example, the recent press reports, *Army men sued for torturing girl*, Daily Star, 9 September 2003; *Murder case against OC*, Ittefaq, 29 October 2003 and *9 policemen sued in Chittagong*, *ibid.*, 6 November 2003.

<sup>277</sup> See AI, Bangladesh: Torture and Impunity, *supra*, pp.27 and 29.

<sup>278</sup> See *BLAST and others v. Bangladesh*, *supra*.

<sup>279</sup> See Amnesty International, *Bangladesh Chittagong Hill Tracts: A Call for Justice at Mahalchari*, AI Index: ASA 13/003/2004, 1 March 2004 and on detainees, Justice Md. Ruhul Amin, *Access to Justice for Prisoners, Bangladesh Perspective*, First South Asian Regional Judicial Colloquium on Access to Justice, New Delhi, 1-3 November 2002.

<sup>280</sup> See *Al Amin vs. The State*, *supra*, para.32: "A girl in a tradition-bound non-permissive society in Bangladesh would be extremely reluctant even to admit that any incident which is likely to reflect upon her chastity had occurred being conscious of being ostracized by the society and or being looked down upon by the society. In the normal course of human conduct a unmarried girl would not like to give publicity to the traumatic experience she had under gone and would feel terribly embarrassed in relation to the incident to narrate to any other over powered by a feeling of shame and her natural inclination would be to avoid talking about it to any one least the family name and honour is brought to controversy."

<sup>281</sup> See case studies in AI, Bangladesh, Torture and Impunity, *supra*, pp.6 et seq.

<sup>282</sup> See Odhikar, *Breaking the cycle of impunity*, *supra*.

<sup>283</sup> See AI, Urgent need for legal reforms, *supra*, p.6.

<sup>284</sup> See exemplary case studies in AI, Bangladesh, Torture and Impunity, *supra*, pp.6 et seq.

The police, often the same institution allegedly responsible for the violations, are not independent and there appears to be little interest on their part to investigate torture allegations promptly and effectively. There are several reports of police officers shielding their colleagues and discouraging victims from pursuing their cases, or otherwise obstructing investigations.<sup>285</sup> It often appears that the only actions taken against the alleged perpetrator(s) are administrative measures such as temporary suspension and transferral to other police stations.<sup>286</sup>

In one case, the Attorney General was successful in his appeal to block a High Court Division Order, obliging the authorities to obtain a statement from the investigating police officer and to set up a new medical board to examine the prisoner who alleged torture, following concerns over the failure of the previous board to make records of the examination available to the court.<sup>287</sup> Several instances have been reported in which magistrates ignored torture marks, failed to conduct an autopsy in death in custody cases and/or did not institute criminal proceedings against the perpetrator(s).<sup>288</sup>

Prompt and thorough investigations into death in custody cases remain exceptional. It was only after public outcry that a probe committee was established to investigate the circumstances of death and possible criminal responsibility in the Rubel case, described in more detail below.<sup>289</sup> However, official inquiries are said to lack transparency and most inquiries have apparently not resulted in any subsequent criminal prosecutions of those responsible.<sup>290</sup>

One of the main reasons for the lack of charges being brought is the difficulty that victims face in obtaining evidence, especially medical evidence, and the paucity of other evidence in the absence of any witnesses other than the victim in those cases where he or she survived the torture. Where police officers remain silent or present a differing account of events, the prosecution will find it immensely difficult, if not impossible, to secure a conviction unless other compelling evidence is available. This constellation, resulting in widespread impunity, has been identified by the Law Commission<sup>291</sup> and the High Court Division,<sup>292</sup> both of which recommended that the burden should be on the police officer responsible for taking a person into custody to explain the reasons for injury or death and to prove the relevant facts to substantiate the explanation.

<sup>285</sup> See Odhikar, *Breaking the cycle of impunity*, supra.

<sup>286</sup> Ibid.

<sup>287</sup> The High Court Division order was suspended by means of a "stay order" by the Appellate Division of the Supreme Court on 8 April 2002. See for further details AI, Bangladesh, *Urgent need for legal reforms*, supra, p.7.

<sup>288</sup> See Abul Hasnat Monjurul Kabir, *Impunity of Law Enforcing Agencies*, in Odhikar, *Breaking the Cycle of Impunity*, supra.

<sup>289</sup> See AI, Bangladesh: *Torture and Impunity*, supra, p.25 and on the general practice, *ibid.*, p.18.

<sup>290</sup> See Odhikar, *Shumon murder by police torture at Khilgaon Thana*, *Law Week*, *Daily Star*, 16 November 2003; Kabir, *Impunity*, supra and case studies in AI, Bangladesh, *Torture and Impunity*, supra, pp.18, 19.

<sup>291</sup> The Law Commission, *Final Report on The Evidence Act, 1872 Relating to Burden of Proof In Cases of Torture on Persons in Police Custody*, Report No.17, 1998: "The reasons behind paucity of evidence in cases of torture and even death of person while in police custody are obvious. In a criminal case, the burden of proving the guilt of the accused is invariably on the prosecution according to the scheme and various provisions of the Evidence Act, 1872. In cases of torture on a person while in police custody one can rarely expect to get eye-witnesses to such incident, excepting police personnels [sic] some of whom themselves happen to be the perpetrators of torture. Bound by a sense of brotherhood these eye-witnesses often prefer to remain silent in such a situation and even if they speak, they put their own gloss upon the facts often perverting the truth. It is an extremely peculiar situation in which a police personnel alone, and none else, give evidence regarding the circumstances in which a person in police custody receives injuries. This results in paucity of evidence and probable escape of the culprits."

<sup>292</sup> *BLAST and others vs. Bangladesh and others*, supra, Recommendation F: "If death takes place in police custody or in jail it is difficult to prove by the relations of the victim as to who caused the death. In many cases, this court has decided that when a wife dies while in custody of the husband, the husband shall explain how the wife met her death. Similar principle may be applied when a person dies in police custody or in jail. To give a legal backing to the above principle, we like to recommend that a section in the Evidence Act (after section 106) or a clause may be added in section 114 of that Act incorporating the above principle. The new section in the Evidence Act shall provide that when a person dies in police custody or in jail, the police officer who arrested the person or the police officer who has taken him in his custody for the purpose of interrogation or the jail authority in which jail the death took place, shall explain the reasons for death and shall prove the relevant facts to substantiate the explanation."

### ***Trials: Indictments, Convictions, Punishment***

Inadequate investigations and the resulting insufficiency of evidence have meant that only a few prosecutions of perpetrators of torture have been successful.

In 1987, the District and Sessions Judge in Dhaka convicted five police officers in two cases relating to the beating of Shafiqul Islam (alias Arun). The Prosecution also alleged that the officers extorted money from Arun's father and threatened further beatings if more money was not paid.<sup>293</sup> Arun died from his injuries two days after the prison doctor had referred him to the prison hospital. The officers were sentenced to ten years rigorous imprisonment and a fine of Taka 5,000.00 (approximately \$ 82.5) each, in accordance with sections 304 and 34 of the Penal Code. However, on appeal to the High Court Division, one officer was acquitted and the sentence of the others was reduced to five years rigorous imprisonment, the Court holding that due to 'mitigating factors,' the case did not call for exemplary punishment.<sup>294</sup>

In 1988, a police officer from Babunganj was sentenced to two years imprisonment and a fine for the torture of a woman in custody. In 1989 a police officer in Jessore received a sentence of seven years rigorous imprisonment for torturing a prisoner to death.<sup>295</sup>

In August 1995, Yasmin Akhtar, a 14 year old girl, was raped and killed by three police officers. Following public outcry, the three policemen, two assistant sub-inspectors and a constable, were convicted in 1997 and the High Court Division upheld the death sentence upon appeal in 2001. A petition of the convicted policemen to review the death penalty was rejected by the Appellate Division of the Supreme Court in May 2004.<sup>296</sup>

Shamim Reza Rubel, a student, was beaten to death in police custody in July 1998 following his arrest for refusal to pay an extortion demand. The case attracted much publicity and played an important role in the case of *BLAST v. Bangladesh* which challenged section 54 of the Criminal Procedure Code.<sup>297</sup> In June 2002, 13 policemen were tried by the Metropolitan Sessions Court in Dhaka and sentenced to life imprisonment for torture and murder and a woman was sentenced to one year in prison for collaborating with the police officers.<sup>298</sup> An appeal against the decision is pending in the High Court Division. The principal accused, an Assistant Commissioner of Police, absconded after being granted bail on medical grounds, which attracted widespread criticism.<sup>299</sup>

---

<sup>293</sup> *Shaikh Baharul Islam vs. The State*, High Court Division of Bangladesh Supreme Court (Criminal Appellate Jurisdiction), 43 D.L.R 1991, 336.

<sup>294</sup> Ibid: "The cruel and atrocious act of the accused appellants has wrought out a tremendous shock to our conscience and considering the gravity of the offence and public policy, the learned Sessions Judge has awarded the maximum sentence under section 304, part II of the Penal Code by way of exemplary punishment. The rigor of punishment has now to a large extent been softened by sufferance by under going the term of sentence. The sting of punishment may further be sobered by the thought that no medical treatment could reach Arun, the deceased, from the time of his being dispatched to the court of the chief metropolitan magistrate and there from to the Dhaka Central Jail on wards to PG Hospital. It is sad, although true, that no proper medical treatment could be afforded to the victim during this long time. Had Arun been timely treated, possibly death could have been avoided. The convicts are suffering punishment and this is the time for penitence. Moreover, the injuries on Arun's body are on the non-vital parts of his body indicating that the accused appellant had not the intention even to cause grievous hurt but they atrociously and systematically inflicted serious painful injuries on the non-vital parts of the body which ultimately caused death. Accused definitely had the knowledge that such injuries as caused by them are likely to cause his death and ultimately Arun lost his life. But sometimes justice should blend with mercy. Considering all these aspects, in our view, justice shall receive its end if the sentence of the accused appellants be reduced, at this appellate stage, to a normally high degree, other than the peak which an exemplary punishment may call for."

<sup>295</sup> *Al*, Bangladesh, Torture and Impunity, supra, p.4.

<sup>296</sup> See *ibid.*, p.5 and *Yasmin Murder Case*, The News Today, 20 May 2004.

<sup>297</sup> Section 54 allows for arrest and detention without warrant and is widely seen as a key provision in facilitating torture. See supra at II, C.

<sup>298</sup> Alastair Lawson, *Bangladesh policemen get life*, BBC News, 17 June 2002.

<sup>299</sup> Shamim Ahsan, *When Laws are used unlawfully*, Star Magazine, 2 January 2004.

Police officers regularly face disciplinary punishment for corruption and other criminal activities, for example, 16,913 in total in 2002, including the dismissal of 156 police personnel and the forced retirement of 55. The figures that are available do not specify whether any of these disciplinary sanctions were imposed for ill-treatment or torture. Moreover, the sanctions were almost exclusively directed at low-level officers below the rank of Superintendent of Police.<sup>300</sup>

There is widespread recognition that impunity prevails, both in relation to recent torture cases and to torture committed over a long time period, such as in the Chittagong Hill Tracts.<sup>301</sup> This applies equally to armed groups affiliated to political parties who have been accused of beatings and to other forms of violence carried out by political opposition groups that might amount to torture.

### **Reparations**

There are no comprehensive statistics as to the number of reparation cases and their outcome but it is understood that the majority of torture victims refrain from pursuing legal remedies that may in theory be available to them.

The High Court Division has to date not awarded any reparation (or constitutional remedies) for torture.<sup>302</sup> It is too early to assess the impact of the recent judgment of the High Court Division in the *BLAST* case in which the Court expressly noted that it has jurisdiction to award compensation in torture cases brought before it.<sup>303</sup> The High Court Division might in future take a leading role in providing justice and reparation to victims of torture, as developments in India and Sri Lanka have shown.<sup>304</sup> However, this requires judicial independence and the willingness to develop a consistent jurisprudence.<sup>305</sup> The strategic use of public interest legislation might play a crucial role in furthering such a development.<sup>306</sup>

Victims of torture have had virtually no recourse to civil courts. This has been attributed to the fact that many victims come from marginalised groups in society and, aside from the fear of retribution provoked by reported incidents of harassment, the lack of access to justice is one of the main obstacles.<sup>307</sup> Victims are often unaware of their rights and of the steps they need to take to pursue existing remedies.<sup>308</sup> Equally, the entrenchment of impunity and perception of corruption<sup>309</sup> deter would-be claimants from initiating actions, as does the lack of reforms improving access to justice.<sup>310</sup> While there is a right to legal aid, it is not yet fully

<sup>300</sup> See Punishment of police increasing, Daily Star, 11 June 2003.

<sup>301</sup> Odhikar, Breaking the cycle of impunity, supra and AI, Chittagong, supra.

<sup>302</sup> It has however awarded compensation for illegal detention in *Bilkis Akhter Hossain vs. Bangladesh & Others*, supra, where it directed the respondents to pay 100,000 Taka (around \$ 1,650) as exemplary lump-sum compensation. (The judgment is under appeal).

<sup>303</sup> See *BLAST and others v. Bangladesh and others*, supra.

<sup>304</sup> See REDRESS, Responses, supra, pp.23 et seq. and pp.68 et seq.

<sup>305</sup> See on the role of the higher judiciary, Paper on Poverty and Access to Justice and the Role of the Higher Judiciary in Bangladesh, by Hon'ble Justice Shah Abu Nayeem Mominur Rahman, High Court Division, Supreme Court of Bangladesh, at First South Asian Regional Judicial Colloquium on Access to Justice, New Delhi 1-3 November 2002, in which he stresses the importance of public interest litigation and the role of the High Court Division of the Supreme Court, e.g. the possibility to act *suo moto*.

<sup>306</sup> See Shahdeen Malik, *Judgment on Sections 54 and 167, The onus is on civil society now*, Daily Star, Law & Our Rights, 4 May 2003 and 11 May 2003.

<sup>307</sup> See Rahman, Poverty and Access to Justice, supra.

<sup>308</sup> See *ibid.* and comments made by Chief Justice KM Hasan at workshop held on December 18, 2000, quoted in *Judiciary beyond poor's reach: CJ*, in The Daily Star, 19 December 2003.

<sup>309</sup> According to Transparency International, the police and the lower judiciary are considered to be the most corrupt institutions in Bangladesh, which has been ranked the most corrupt country in the world, supra.

<sup>310</sup> See Shahdeen Malik, *Access to Justice: A Truncated View from Bangladesh*, in R.V. van Puymbroeck, 'Comprehensive Legal and Judicial Development: Toward an Agenda for a Just Society in the 21<sup>st</sup> Century', World Bank, 2001.

ensured,<sup>311</sup> particularly not for civil proceedings.<sup>312</sup> In many cases, victims are only able to proceed with the assistance of human rights organisations or pro bono lawyers. There are several million pending civil cases, and suits often last more than five or even ten years. This acts as yet a further deterrent.<sup>313</sup> In addition, the lack of criminal accountability has meant that many torture victims face considerable if not insurmountable evidentiary hurdles.<sup>314</sup> It is largely against this background that tort law has so far not been utilised by lawyers in seeking reparation for torture.<sup>315</sup>

These obstacles may explain why many claims are resolved through mediation<sup>316</sup> or out-of-court settlements. In addition to resolving civil proceedings, settlements are often sought in return for non-pursuance of criminal or disciplinary complaints against the perpetrators. Furthermore, they are an attractive solution for many victims faced with harassment and the prospect of expending considerable time, energy and costs on a lawsuit with an uncertain outcome. Consequently, there have been several instances of such out-of-court settlements, comprising not only payment of money but in one instance also an apology.<sup>317</sup>

Victims of torture have not benefited from section 545 of the Criminal Procedure Code, which allows the judge to award a fine as compensation to the victim. In a recent case, a Court awarded a fine of Taka 10,000 (approximately \$165) to be paid as compensation to the complainant.<sup>318</sup> However, this was not a torture case. It related to a penalty for the second marriage without written permission of the Arbitrary Council under the Muslim Family Law Ordinance of 1961 and the compensation was to be paid to the first wife. This may be an isolated case or it might serve as a precedent for other criminal offences, including torture.

---

<sup>311</sup> See e.g. comments made by Chief Justice KM Hasan at workshop held on 18 December 2000, quoted in *Judiciary beyond poor's reach: CJ*, in *The Daily Star*, 19 December 2003. Justice Hasan mentioned that legal aid was, during the last year, provided in 8,208 cases in 61 districts (1,296 civil suits; 915 criminal cases; 886 family disputes and 111 miscellaneous cases).

<sup>312</sup> See Rahman, *Poverty and Access to Justice*, supra.

<sup>313</sup> See M.M. Yussouf, *Administration of Judicial System in Bangladesh*, *Daily Star News*, 1 January 2003.

<sup>314</sup> See the recommendations of the High Court Division and Law Commission, supra, as to how to overcome these hurdles.

<sup>315</sup> See Odhikar, *Breaking the cycle of impunity*, supra.

<sup>316</sup> See on the general trend to use mediation Malik, *BLAST*, supra, p. 7.

<sup>317</sup> See BRCT, *Annual Report 2002*, supra, p.33, according to which three cases were settled out of court (Taka 1,00,000 (around \$1,650); Taka 40,000 (around \$ 660) and unknown confidential amount). In a further case, the Assistant Police Commissioner issued an apology to the victim.

<sup>318</sup> *Dilruba Aktar vs. AHM Mosin*, 55 DLR (2003) 568, per J.A.K. Badrul Huq, at para.58 (c): "The fine if realised shall be paid to the complainant-appellant."

## V. CONCLUSION

The scourge of serious human rights violations such as torture not only characterised the violent struggle that led to Bangladesh's independence in 1971 but has since become a frequent occurrence, be it as a tool of political repression or law enforcement. As widely acknowledged, impunity for torture is one of the main factors that facilitates further violations in Bangladesh. It also perpetuates the injustice caused to the victims of torture, irrespective of whether they have been targeted as individuals or members of communities and/or political parties. For most, the right to reparation appears to exist in theory only.

The failure to deal with the crimes committed during the 1971 war in a comprehensive and transparent manner and to specifically acknowledge the many victims of the war has left many people resentful and this constitutes a problematic legacy. To this day, there is a culture of impunity for serious human rights violations. This impunity is now entrenched, as manifested in the disrespect for the rule of law and the separation of powers, the enactment of repressive laws and the abuse of the state apparatus for the achievement of party political and personal goals. In this context, the status and affiliation of the perpetrator(s) and victim(s) often seem to be more important than the fact of the crime of torture itself. Added to this, there are various shortcomings in the legal and institutional framework that inhibit accountability and effective recourse for torture survivors and relatives of torture victims to courts or other bodies. The failure of successive governments to set up an independent human rights body is particularly glaring in this context.

Nevertheless, there are certain encouraging developments that might provide an opportunity to quell the practice of torture, impunity and lack of justice and reparation for the victims. In particular, civil society groups have undertaken a number of initiatives that have created a greater awareness of the need for a drastic change of policy in combating torture. They continue to monitor human rights violations, challenge repressive laws, such as section 54 of the Criminal Procedure Code, or the Joint Drive Indemnity Act providing impunity for human rights violations committed in the course of 'Operation Clean Heart'. They persistently call for inquiries and investigations into allegations of torture, death in custody and other human rights violations, and continue to advocate for the creation of an independent national human rights commission and to campaign for the ratification of the International Criminal Court Statute. To date, the response of the present Government has been largely wanting, in particular in light of political instability and violence. Nonetheless, some of these civil society initiatives have been successful and this is bound to result over time in a change of the human rights culture in Bangladesh. However, this is dependant upon civil society groups maintaining the momentum in exposing flaws in the current system, strategically targeting shortcomings and using existing remedies, as well as offering constructive alternatives that transcend political affiliations and boundaries.

The judiciary has also demonstrated its potential to become an agent of change in the protection, promotion and implementation of the rights of torture survivors and in enforcing the corresponding duties of the State. It is in particular the High Court Division of the Supreme Court, which has passed several judgments that strengthen the rights of victims and recognise the right to reparation for serious human rights violations such as torture. This Court has also been proactive in directing the Government to amend legislation identified as facilitating torture. As these developments have gone hand in hand with the recognition of public interest litigation, they provide a unique opportunity for nongovernmental organisations to use these remedies with a view to instituting judicial safeguards for torture, ensuring prosecution and punishment of the perpetrators and reparation for victims. The higher judiciary is for its part called upon to use the means at its disposal to ensure the observance and enforcement of fundamental constitutional rights such as the prohibition of torture, both in law and in practice. In this context, the Convention against Torture and the



International Covenant on Civil and Political Rights, though not implemented as domestic laws, can be useful aids of interpretation for the High Court Division as it develops a jurisprudence that fully recognises torture survivors' right to reparation. These possibilities must however be viewed in the light of political interferences and the failure of the current Government to implement fully the court orders to separate the judiciary from the executive.

While taking full note of the encouraging developments, it is the political establishment that must be called upon to acknowledge, both in its policies and practices, the fundamental importance of human rights protections, including the absolute prohibition of torture. Against the background of Bangladesh's history, the ratification of the Rome Statute of the International Criminal Court would signal such a commitment to human rights, not only to the international community but to all Bangladeshis. While the International Criminal Court would not have jurisdiction to try international crimes committed in 1971, the ratification of the Rome Statute would express the determination of Bangladesh to combat impunity and to prevent the recurrence of international crimes on its territory. It would also provide an avenue for a comprehensive review of legislation, to ensure that all victims obtain justice and reparation. Equally, domestic implementation of the Convention against Torture and the International Covenant on Civil and Political Rights would help to seal the gaps in law and practice. Without these key steps, the scourge of torture is bound to be perpetuated, undermining the rule of law and shattering the lives of ever more victims.

## VI. RECOMMENDATIONS

### *A. Steps to provide justice and reparation for the victims of human rights violations amounting to crimes committed during the 1971 war*

#### **The Government of Bangladesh and Pakistan are urged, separately and/or jointly, to:**

Initiate a broad based consultative process, to be led by a broad cross-section of society, particularly those affected by the 1971 war, with a view to determining how best to provide justice and reparation for victims of human rights and humanitarian law committed in the course of the 1971 war, focusing on the issues of accountability, reparation, truth and reconciliation. The rights, wishes and needs of victims should be paramount and duly taken into account. The process should be given a clear mandate and time frame and the Government(s) should commit themselves to taking the necessary measures to implement the proposals emanating from this process.

### *B. Steps to combat torture and to provide justice and reparation to the victims of torture*

#### **The Government of Bangladesh is urged to:**

Combat impunity for torture and provide justice to the victims by developing a comprehensive anti-torture policy. In particular the Government is encouraged to make the eradication of torture and the punishment of all perpetrators of torture a specific policy goal. To this end, it should develop and pursue appropriate policies and programmes, in consultation and coordination with a wide cross-section of civil society groups working with and on behalf of victims of serious human rights violations such as torture.

#### **To this end, the Government of Bangladesh is urged to take the following steps:**

##### *I. Uphold and strengthen its commitment to international human rights standards in relation to reparation for torture:*

- Ratify or otherwise accede to international treaties aimed at ensuring justice and criminal accountability for international crimes as well as the prevention of torture, namely the Statute of the International Criminal Court and the Optional Protocol to the UN Convention against Torture;
- Enable victims of serious human rights violations, in particular torture victims, to invoke remedies at the international level through the individual complaints procedures of the Committee against Torture and the Human Rights Committee respectively by making a declaration under Article 22 of the Convention against Torture and ratifying or otherwise acceding to the Optional Protocol to the International Covenant on Civil and Political Rights.

##### *II. Ensure an adequate legal framework to implement the prohibition of torture and reparation for torture survivors*

- Adopt legislation making torture a specific criminal offence in line with Article 1 of the Convention against Torture that carries a punishment commensurate with the gravity of the crime;
- Eliminate or make inapplicable immunities, amnesties and defences in relation to torture, particularly those relating to security forces set out in emergency laws and the like. This includes section 197 of the Criminal Procedure Code and the Joint Drive Indemnity Act, 2003;
- Strengthen the rights of victims of serious human rights violations such as torture during criminal proceedings, particularly with regard to their right to participate in criminal proceedings and to challenge decisions of investigating and prosecuting bodies, and adopt legislation providing for the creation of an effective victim and witness protection programme;
- Adopt specific statutory instruments, such as a Reparation for Torture Act, prohibiting torture and ensuring that victims have access to effective and enforceable remedies and reparation, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. This includes enabling victims through adequate legislation to claim reparation in the course of criminal proceedings.

### ***III. Undertake institutional reforms: Independent investigating bodies and police reform***

- Create a National Human Rights Commission, Police Complaints Authority and/or other similar oversight bodies that enjoy personal and financial independence, are vested with sufficient powers and finances to carry out investigations promptly and effectively and to order appropriate action, both of a criminal and disciplinary nature. These bodies should have the mandate to recommend the necessary changes to the system in order to ensure that investigations may be carried out promptly, impartially, effectively, efficiently and transparently;
- Reform the police by enhancing accountability and transparency as well as professional capacity, facilities and salaries to remove the incentive for corruption. These steps should be accompanied by human rights training and codes of conduct. A new transparent disciplinary regime should be established to monitor compliance with codes of conduct and to discipline violations. Finally, new legislation replacing the colonial 1861 Police Act should be introduced with a view to ensuring the protection of human rights in the course of law-enforcement and strengthening the integrity of, and public confidence in, the police.

### ***IV. The practice: Reforming complaints and investigation mechanisms and providing access to justice and reparation***

#### **- Complaints procedure, investigations and accountability**

- Introduce an effective complaints procedure against law-enforcement personnel that allows torture survivors to make complaints to independent agencies in confidence and without fear, harassment or the need for bribes and ensures that such complaints are investigated promptly and impartially. To this end, ensure that those subjected to pre-trial detention or imprisonment are provided with written guidelines or are otherwise informed, by the agency in the criminal justice process they come into contact with, of their right to be free from torture and the steps they may take if this right is violated. Furthermore, ensure that they have prompt access to legal counsel and relatives following arrest;

- Set up an effective victim and witness protection scheme that includes measures to minimise inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses, from intimidation and retaliation;
- Ensure that all allegations of torture are investigated promptly and effectively, in particular by introducing mandatory medical examinations of detainees by independent doctors, upon entering and leaving detention facilities and during detention upon request, resulting in a medical report;
- Take required action during or following an investigation into allegations of torture, where there is sufficient evidence, such as suspending perpetrator(s) suspected of having perpetrated torture, imposing disciplinary punishment and charging the alleged perpetrator(s) with a crime taking into account the serious nature of the offence of torture;
- Carry out an annual review of the number of complaints and actions taken by the competent authorities, particularly the police, in relation to allegations of torture relating to their subordinates as well as the outcome of any commissions of inquiries and/or trials, and publish and widely disseminate the findings.

**- Access to justice, reparation and rehabilitation**

- Improve procedures for claiming reparation for torture by enhancing access to justice for survivors of torture. This may be accomplished by imparting knowledge about existing laws and procedures through suitable channels; ensuring affordability of procedures and providing access to legal aid for such processes, and simplifying and streamlining procedures for invoking and pursuing legal remedies. To this end, enable victims to have a more active role in civil, criminal and administrative proceedings;
- Ensure that adequately funded State reparation schemes for torture survivors are in place to provide accessible remedies in cases of mass crime or where individual perpetrators are judgment-proof. Such schemes should enable torture survivors to claim reparation in an affordable, simple and accessible manner;
- Provide rehabilitation to all torture survivors in the form of medical, social and psychological services.

***V. Strengthen Awareness of the Plight of Torture Survivors:***

- Highlight a culture of respect, tolerance and non-violence by including training modules in school curricula, civic education campaigns, and by using the mass media;
- Using 26 June, the International Day for Victims of Torture, to organise activities aimed at publicising the plight of torture survivors in different communities and to encourage local initiatives to improve their situation; and
- Undertake confidence-building exercises between the police and other law enforcement officials and civil society, such as using community liaison officers and holding open days or public meetings in which the public has the opportunity to highlight concerns, with the aim of encouraging victims of torture to speak out, to name alleged perpetrators and to seek reparation.

## **The Judiciary, in particular the High Court Division of the Supreme Court, is urged to:**

- **Develop a consistent jurisprudence on reparation for torture:**
- Strengthen the constitutional right to reparation for torture in its jurisprudence as recognised in the judgment of BLAST and others v. Bangladesh;
- Take into account both the gravity of torture as one of the worst violations of human rights and the severe impact it has on individual victims, their families and society at large when making determinations as to the appropriate nature and scope of reparation;
- Incorporate the wide array of comparative constitutional jurisprudence, and invoke international human rights law in judgments;
- Not to confine the scope of reparation to compensation but also to award measures of restitution, rehabilitation, satisfaction and guarantees of non-repetition when ruling on reparation for torture victims, taking into account the particular needs and circumstances of torture survivors; and
- Order and oversee the implementation of wide scale institutional reforms when systematic practices of torture are uncovered through judicial proceedings.

## **Civil Society, in particular NGOs, academics, lawyers, the media and others are urged to strengthen torture survivors right to reparation:**

- Increase public awareness by carrying out programmes, projects, studies and documentaries addressing the needs and rights of torture survivors and the families of torture victims to reparation as well as exploring strategies to further the realisation of such rights;
- Provide information and guidance through professional associations, directives and/or other actions to those most likely to come into contact with victims of torture (medical professionals, lawyers, prison officials, non-governmental organisations, citizen advice centres) on preliminary advice and assistance and specialist referral agencies;
- Take a proactive stance in demanding accountability of perpetrators by supporting victims in lodging complaints, initiating legal challenges and providing pro bono legal services to torture victims;
- Test the capacity of the existing legal system to provide reparation for the victims of torture by assisting torture victims to: (a) bring writ applications before the High Court Division of the Supreme Court; (b) invoke tort remedies before civil courts; and (c) urge criminal courts to apply section 545 of the Criminal Procedure Code to award a fine or part of a fine as compensation to torture victims; and
- Advocate for legal and institutional reform where the legal system fails to ensure accountability and provide reparation for the victims of torture, taking into account international standards and comparative experiences.