

ICTB and violations of Right to Fair Trial a comparative study

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ABSTRACT

Right to a fair trial is recognized internationally as a fundamental human right and countries are bound to respect it. Therefore the war crime tribunals of former Yugoslavia (ICTY) and Rwanda (ICTR) fully accepted the fair trial right and with the mandate of United Nations, incorporated it in their statutes as a guarantee against the unlawful actions. While the domestic war crime tribunal of Bangladesh (ICTB) follows its own special procedures and rules, which is lacking the fair trial guarantees to ensure a free and fair trial. In terms of rights ensuring fair trial guarantees, procedure, statutes and working, there are huge differences found between the ICTB and the other two internationally recognized tribunals (ICTY & ICTR). The ICTY and ICTR appear more transparent and fair than the ICTB. The ICTB has repeatedly deviated from the recognized judicial norms and principal of fair trial. Moreover, non-compliance with the ICCPR, violations of the domestic laws of the country and the revealed Skype scandal makes the tribunal (ICTB) illegal.

INTRODUCTION

After the creation of Bangladesh, the first government of Bangladesh, headed by Sheikh MujiburRahman, issued a law to try war crimes¹, and accordingly a list of suspected war criminals was prepared.

The list contained 195 Pakistani soldiers and there were no civilians among those accused of war crimes. Another law was issued to try Bangladeshis who collaborated with the Pakistan army². Under this law, more than 100,000 people were arrested but were later released due to a public amnesty announced by Sheikh Mujibur Rahman³. Zulfikar Ali Bhutto⁴ who came to power in West Pakistan managed to secure the release of the Pakistani soldiers, taken as prisoners of war by India, following his negotiations with the Indian Prime Minister Indira Gandhi. There were some suspected war criminals among these soldiers. With this, the trials of war crimes suspects seemed to come to an end. However, 40 years after the creation of Bangladesh and the general amnesty declared by Sheikh MujiburRahman with his famous saying "I want the world to know that Bangladeshis can forgive and forget"⁵, his party, the Awami League, which came to into power by winning the second last elections⁶, had restored the law aimed at trial of those who were suspected of committing war crimes under the International Crimes Tribunal Bangladesh (ICTB). This was not done with the purpose of putting on trial the Pakistani troops suspected of committing war crimes, but rather was aimed at investigation of the political rivals of the Awami League and even those who were not earlier accused of war crimes.

First part of this research will compare the International crimes tribunal Bangladesh (ICTB) with the International crimes tribunal of former Yugoslavia (ICTY) and the International crimes tribunal Rwanda (ICTR) in terms of fair trial guarantees. Second part of the study will analyze the allegations imposed on ICTB regarding the adopted procedure and fair trial violations.

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THE ICTB

Thousands of people were killed during the India-Pakistan War of 1971, ninety thousand soldiers including civilians were captured by the Indian forces as prisoners of war (POW). A war tribunal was established under the Sheikh MujeeburReham regime in 1972 under the title of Bangladesh Collaborators (Special Tribunal) Order 1972, commonly known as Collaborators Act, 1972.⁷ Under the collaborators Act 1972, ten thousand people were arrested accusing war crimes, 752 of them were convicted but later on released by the general amnesty declared by the Prime Minister Sheikh MujeeburRehman on 30 November 1973.⁸

By the virtue of the Shimla agreement of 1972 and then the Dehli Agreement of 1974, which was a tripartite agreement between the three states; Pakistan, Bangladesh and India all the prisoners of war were also released from both sides, the said agreement was signed on April 9, 1974 by these stated parties in New Delhi⁹. All these above stated facts were also recognized and admitted by the tribunal in its verdict against Abdul Quader Molla¹⁰.

In 2009 after the silence of thirty-five years, the Awami League Government re-established the International Crime Tribunal (ICTB) as promised in its election campaign. The aim of this tribunal is to prosecute the war criminal of 1971 war¹¹ present at that time.

oThe International Crime Tribunal Act, 1973 enforced by the legislative body of Bangladesh to prosecute the war criminal that committed crimes against humanity and genocide against the innocent people of Bangladesh during the war of 1971. This war crime tribunal has the mandate to prosecute and punish any person or group of persons who has committed the defined war crimes under the said Act within the territory of Bangladesh.

On 22nd March 2012 Bangladesh Govt. established the second tribunal named International Crimes Tribunal-II, the Tribunal comprising of two Judges of the High Court Division and a retired District Judge. So, at present, there are two tribunals constituted under the ICTA (1973). Both the tribunals have the same jurisdiction. But, The ICT-I and the ICT-II have separate rules of procedures.

The tribunal is a domestic body, established and operating under the local laws of the country, but due to the nature of crimes committed against humanity, which is also recognized under the title of international crimes, this tribunal is also to be called as international crimes tribunal¹².

After a very brief above stated historical and legal background of the study it is easy to understand and compare the ICTB with the ICTY and the ICTR regarding fair trial right.

1. Comparison of the ICTB with the standards of the other International Tribunals (ICTY and ICTR)

Preliminary study of the statute of the ICTB shows that it is a domestic tribunal working under the local laws of the country established by the ruling government through legislation to prosecute the alleged war criminals. ICTB is also different

from the ICTY and ICTR in terms of its establishment, procedure and fair trial criteria. The study will further discuss each and every different aspect of the ICTB to find out the practices, which differentiate this tribunal from the others.

1.1 ESTABLISHMENT

As discussed earlier that ICTB was established by the ruling government of Sheikh HasinaWajid (daughter of Sheikh Mujeeb) through a legislation done by the parliament in 2009 and has not confirmed by the UN or any other international body. The basic aim of this tribunal was to prosecute war criminals of 1971 war.

On the other hand the ICTY and the ICTR were established through the UN Security council resolutions¹³.

Establishment through an internationally recognized body makes the tribunal more credible, transparent and accountable. It ensures the check on working and assures the guarantees given in law. However the basic aim of both the tribunals is the same as stated in the ICTB.

1.2 STATUTE

The statutes of both the ICTY and ICTR were approved and adopted by the UN Security Council resolutions¹⁴ and confirmed by the UN. While the ICTB statute is came into being via legation in the parliament of Bangladesh having no adoption and recognition at international level.

1.3 Compliance with the ICCPR and fair trial guarantees

Bangladesh is a party to the ICCPR. To comply with the international standards, International tribunals are bound to adopt the fair trial provisions of the ICCPR in their statutes. Therefore both the ICTY and ICTR fully adopted and followed the provisions of the ICCPR regarding fair trial guarantees.

Article 9(3) and 14 of the ICCPR provides the fair trial rights. So therefore those fair trial provisions, which were guaranteed in Article 9(3) and Article 14 of the ICCPR, were incorporated in both the tribunals. The Article 21 of the ICTY and Article 20 of the ICTR Statute provide fair trial rights to accused in trial, which is lacking in ICTAA.

The ICTB also recognize the fair trial rights in its Article 17 of the ICTAA. Although some of the rights have been provided in Article 17 but under the obligation of the Article 14 of the ICCPR the right to adequate time for preparation of the case, trial without undue delay, presence of accused, free of cost interpreter, right on self incrimination, right to be brought promptly before the court of law, right to public hearing and presumption of innocence unless proved guilty are not provided in statute of the ICTB. These rights must also be granted to the accused to fulfill the international obligations and to meet the criteria of fair trial as provided in the statutes of the ICTR and ICTY¹⁵.

1.4 Appointment of judges, chamber, prosecutors and seat of the tribunal

Another different aspect of the ICTB is its formation of chamber and location of the tribunal. The Government of Bangladesh appoints members of the tribunal

including its chairman and it is the discretionary power of the government to appoint any person as member or chairman of the tribunal. Moreover there is a complete bar on challenging the tribunal and its member on any ground at higher courts. Therefore HRW has shown its reservations on it. The criteria to appoint the chairman and others members of the tribunal set up by the ICTAA is weak as it says that “Any person who is a Judge, or is qualified to be a Judge, or has been a Judge, of the Supreme Court of Bangladesh, may be appointed as a Chairman or member of a Tribunal”.¹⁶

It is to be noted that there is no international judge appointed in the ICTB, all the judges are Bangladeshi nationals and former judges of Bangladeshi courts. Moreover the permanent seat of the tribunal is located in Dhaka in old high court building. The appointment of the international judges and a neutral venue abstain both the parties to use their influence on members of the tribunal and it also strengthens the impartiality of the court.

On the other hand the ICTY and the ICTR both have international judges and respective presidents to preside over the proceedings of the tribunal. There was an election formula and a very well defined criterion was adopted to appoint the judges of both the tribunals. The UN General assembly via voting appointed members of the ITCY and ICTR. With both of the tribunals seated at a neutral venue to ensure the influence free environment, the ICTY situated in The Hague, the Netherlands, which is a neutral country while the ICTR, situated **located in** Arusha, Tanzania which is also a neutral country.

In the ICTY and the ICTR the UN Security Council also appoints the prosecutors but in the ICTB the ruling government who is also a party in this tribunal appoints the prosecutors. Appointment of prosecutors and appointment of judges by the ruling government dangers the fair trial concept and raise serious questions on the impartiality of the tribunal.

1.5 PROTECTION OF WITNESSES

To ensure justice, Protection of Witnesses is a basic part of any judicial proceeding, as a threatened witness cannot provide a true testimony. But, there is no specific protection has been provided in the statute of the ICTB. On the other hand the ICTY in its Article 22 and the ICTR in its Article 21 provided the same protection to both victim and witness to ensure a free and fair testimony.

1.6 DEATH PENALTY

Both the ICTY and the ICTR are limited to imprisonment. But the ICTB empowered to pronounce death penalty to the accused. HRW and other International organizations were also criticized on the death penalty clause of the ICTAA.

2. Analysis of the allegations on ICTB

2.1 Skype Scandal and impartiality of the tribunal

On 8th December 2012, British magazine *The Economist* published the Skype scandal of the Chairman of the International Crimes Tribunal Justice NizamulHaqueNasim. The magazine revealed Chairman's e-mail conversation

with a Brussels based Bangladeshi lawyer named Ahmad Ziauddin. A 17 hour Skype conversation between the chairman of the tribunal and Mr. Ziauddin reveals that probably Govt. dictating the orders through Mr. Ziauddin¹⁷.

Another Bangladeshi newspaper *AmerDeshin* its 9th December 2012 publication also revealed this scandal. *AmerDesh* says from 14th October 2012 Skype conversation, we found the following conversation; “Let the verdict of QuaderMollah be a bit slow. Let the other cases be advanced in the meantime. That one who is absent...I guess what is his name...Oh! Bacchu (AbulKalam Azad), start the case of BacchuRazakar. Start giving verdicts with Bacchu. Later you can declare other three or four in a row. Then there would be no problem.”¹⁸

The Economist also said “The first part of that evidence raises questions about the government’s behavior. It suggests the tribunal came under political pressure to speed proceedings up, even though Bangladesh guarantees the independence of the judiciary. In a conversation of October 14th, between Mr. Nizamul and Mr. AhmedZiauddin, the Brussels-based lawyer of Bangladeshi origin, the judge refers to the government as “absolutely crazy for a judgment. The government has gone totally mad. They have gone completely mad, I am telling you. They want a judgment by 16th December...it’s as simple as that.” December 16th, known as Victory Day in Bangladesh, is the anniversary of the surrender by Pakistani forces in the war of independence.”¹⁹ Furthermore a more strange and surprising conversation revealed by *The Economist* in same story about the case of Mr. DilawarHussainSayeed (A Jamaat-i-Islami BD leader) it says, “in the case of Mr. Sayeedi, an e-mail from Mr. Ziauddin to Mr. Nizamul refers to a shared Google document called “Sayeedi Judgment”. This document says, “last edit was made on October 14”. At this time, Mr. Sayeedi’s lawyers were still presenting his defense to the court. The document consists of a series of subjects (“list of testimonies”, “procedural history”; “challenges”, etc). Presumably details were to be filled in later. The final headings, and the only two in capitals, read: “CONVICTION/BASIS” and “SENTENCING”.”²⁰

After the Skype Scandal the Chairman of the tribunal resigned from his seat but the application for a retrial filed by the accused party in this case was rejected. Skype conversation clearly shows that the government was using its influence on tribunal and also dictating the orders of the tribunal, which is a blatant violation of law. After all this controversy, impartiality of the tribunal, which is a basic and fundamental element of justice, was in questioned and doubted but the government did nothing to bring the justice. Moreover no inquiry was set up to find out the truth behind this controversy and no official explanation was provided regarding this anomaly.

2.2 RETROSPECTIVE APPLICATION OF LAW

In Abdul QadirMolla case, the Bangladeshi government was expecting the capital punishment but Molla was sentenced with life imprisonment. By amending the law right after the judgment of the ICTB a very strange example set up by the government to serve its political motives, earlier in case of conviction no right of appeal for prosecution was provided in ICTB statute. But, government made an

amendment in the law and provided a right of appeal for prosecution. After this, prosecution filed an appeal in Supreme Court of Bangladesh against the judgment of the ICTB to upgrade the punishment and asked for a death penalty. SC admitted the stance of the prosecution and altered the life imprisonment to death penalty on February 5, 2013. Moreover Molla was not given a right of appeal against the judgment of the SC. Retrospective application of the law and denial of right to appeal violates the International and National law of the country.

Therefore the International Court of Justice (ICJ) in its press release stated it as incompatible with international principles of fair trial. The ICJ said that the retrospective punishment in Mollah's case is totally incompatible with Bangladesh's obligations under the ICCPR. It is also a violation of Article 15 of the ICCPR which clearly prohibits the imposition of a heavier penalty than provided for at the time the criminal offence was committed²¹.

Human Rights Watch also criticized the death punishment of Abdul Quader Molla. Brad Adam Asia director of the Human Rights watch also criticized the retrospective application of law by saying that "The prohibition against retroactive application of laws is a universal protection for everyone against the abuse of laws, Without this protection, governments would simply keep amending laws whenever faced with a verdict they didn't like."²²

2.3 DENIAL OF RIGHT TO APPEAL

In Abdul Quader Molla case, no right of appeal was provided to him against the judgment. Right of appeal is a very important right for the accused to defense against the previous judgment against him. It also ensures the correct and error free course of justice. But, the revision application for seeking appeal was also unjustly denied by the SC which was also a blatant violation of ICCPR and Bangladeshi law also.

2.4 VICTIMIZATION OF THE POLITICAL OPPOSITION

Under the cover of the ICTB the ruling government of Shekh Hasina Wajid intends to eradicate its political opponents especially the leading opposition parties Jamaat-e-Islami Bangladesh and Bangladesh National Party. Jamaat-e-Islami was the only party who tried in ICTB as an organization. Moreover its participation in last elections was also banned under the secular regime of Shekh Hasina Wajid. Prominent leadership including its Ameer and assistant secretary-general of Jammata were convicted under war crimes tribunal. On 25th March 2014, the investigation agency for war crimes submitted a report to the ICTB in which the investigation agency put allegations on Jamaat as a political party during the 1971 war. To try an organization for war crimes, the case would be the first after the Nuremburg Trials. Earlier it was also beyond the jurisdiction of the ICTB but later on in 2013 through an amendment the government expended its jurisdiction to try an organization for war crimes. However the ICTB still lacks the authority to impose punishment on an organization for war crimes.²³

Information about the ICT on 'Save Bangladesh' website also exemplify the critiques on political motives of the government; The current Awami League government established the 'International Crimes Tribunal' to try people they

accused of committing crimes during 1971. No Pakistanis have come before the court, nor have any ruling Awami League leader who supported the Pakistan - side during the war, or even those who publically committed war crimes after the war. The only people in the dock are those belonging to the Jamaat-e-Islami and the Bangladesh National Party (Save Bangladesh 2013a).²⁴

CONCLUSION

The ICTB is a domestic tribunal, established and operating under the local laws of the Bangladesh, but due to the nature of crimes committed against humanity that is also recognized under the title of international crimes, the tribunal is also to be called as international crimes tribunal. The international war crime act, 1973 (ICTA) provides the working mechanism of the tribunal, later on an amended act was produced to take over the recent trial named as International Crimes (Tribunals) Amended Act, 2009 (ICTAA). This Act has been criticized by international organizations and severe flaws and problems have arisen during trial proceedings of the tribunal.

Tribunal follows its own special procedure and rules. Therefore the general rule of evidence (The Evidence Act) and the Criminal procedure code of Bangladesh become irrelevant. By virtue of its Act and special status this tribunal cannot be challenged in any court of law.

The ICTY and the ICTR were established through UN Security Council resolution. Establishment through an internationally recognized body makes the tribunal more credible and more accountable. It also ensures the check on working and assures the guarantees given in law. However the basic aim of both the tribunals is the same as stated in the ICTB.

In terms of rights ensuring fair trial guarantees, procedures, statutes and working there are huge differences found. Therefore the ICTY and the ICTR looks more uniformed, transparent and fair than the ICTB.

However, this research was carried out to establish the fact that the Right to Fair Trial is being violated by the Bangladesh Government in the form of International Crimes Tribunal Bangladesh by showing the facts and discussing the legal status of ICTB. By focusing only on the legal side of the issue it was attempted to establish that the whole process of ICTB was preplanned and strictly directed by the Government to suppress its political opponents.

In order to reach a verdict of conviction by any mean, the tribunal repeatedly deviated from recognized judicial norms and principles of fair trial. Despite the other allegations, the Skype scandal **makes the trial proceedings clearly illegal and unconstitutional. Therefore we can say that this tribunal even fails to comply with domestic Laws of the country.**

It is surprising that the whole world is playing the role of spectator on these violations occurring in Bangladesh in the name of ICT Bangladesh, which is to prosecute and suppress the political opposition of the ruling Government. It is

the duty of the United Nations and other International Human Rights organizations to implement the international conventions in which Bangladesh is a party, for the protection to fair trial and rights of the accused of Bangladeshi nationals to protect them from injustice.

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