



Permanent Mission of Bangladesh
65 Rue de Lausanne, 1202 Geneva,
tel : 022-906-8020, fax : 022-738-4616
email : mission.bangladesh@ties.itu.int

URGENT

No: BMG/CHR-306 / 47

The Permanent Mission of the People's Republic of Bangladesh to the United Nations Office and other International Organizations in Geneva presents its compliments to the Office of the High Commissioner for Human Rights (OHCHR) and has the honour to refer to the communication No. UA G/SO 217/1 G/SO 214 (3-3-16) BGD 8/2012 dated 16 November 2012 addressed by the Chair-Rapporteur of the Working Group on Enforced or Involuntary Disappearances and the Special Rapporteur on the independence of judges and lawyers concerning alleged allegations of lack of impartiality of the judiciary of the Bangladesh International Crimes Tribunal, as well as the disappearance of defence witness Mr. Shukhoronjon Bali, and unfair trial and lack of due process allegations in cases of Messers. Delwar Hossain Sayedee; Salauddin Quader Chowdhury; Motiur Rahman Nizami; Ghulam Azam; Muhammad Kamaruzzaman; Ali Ahsan Mohammad Mujahid; Abdul Kader Molla; and Mir Quasem Ali. In this respect, the Mission's communication of even number dated 27 November 2012 may also be kindly referred to. The competent authorities have provided a report in this regard which is enclosed herewith.

The inconvenience caused for late submission of reply is regretted.

The Permanent Mission of the People's Republic of Bangladesh avails itself of this opportunity to renew to the Office of the High Commissioner for Human Rights the assurances of its highest consideration.

Encl: As above

Office of the High Commissioner for Human Rights
Palais Wilson
52 rue des Paquis
CH - 1201 Geneva
(Attn: Ms. Mara Bustelo,
Officer in charge, Special Procedures Branch)
Fax No. 022-917.90.06



OHCHR REGISTRY

-5 MARS 2013

Recipients : SPD
..... K. Hada
.....

Copy to :

- (1) Mr. Olivier de Frouville, Chair-Rapporteur of the Working Group on Enforced or Involuntary Disappearances.
- (2) Ms. Gabriela Knaul, Special Rapporteur on the independence of judges and lawyers.

Response of the Government of Bangladesh

The Government of the People's Republic of Bangladesh offers the following response to the Communication of the Working Group on Enforced and Involuntary Disappearances and Special Rapporteur on the Independence of Judges and Lawyers (WGEID) No. UA G/SO 217/1 G/SO 214 (3-3-16) BGD 8/2012 dated 16 November 2012:

The Government reiterates at the outset, its determination to effectively engage with all mechanisms of the United Nations Human Rights Council . The response briefly covers background of the ongoing judicial process, nature and extent of the crimes committed in Bangladesh in 1971, relevant provisions of the International Crimes (Tribunals) Act, 1973 (ICTA) and its Rules of Procedures, domestic nature of the Tribunal, brief comparative analysis of ICT vis-a-vis other international Tribunals, obligations of Bangladesh under various treaties and mechanisms to which Bangladesh is a party to, commitment of Bangladesh to international justice, rule of law and to end impunity, as well as responses to specific queries. .

General comments:

The Constitution of Bangladesh guarantees full enjoyment of human rights by all. It provides fundamental rights that guarantee *inter alia* equality before law and equal protection of law, protection of life and liberty and prohibits discriminatory treatment. The Constitution guarantees rights during arrest, detention, trial and punishment. Specific liberties of speech and expression, movement, association and assembly, trade and occupation, religion and property, security of home and privacy are equally ensured.

The Supreme Court of Bangladesh, comprising the High Court Division and the Appellate Division, has the jurisdiction both to interpret laws passed by the Parliament and to declare them null and void when found infringing the fundamental rights guaranteed by the Constitution. The High Court Division is vested with the power to hear appeals and revisions from subordinate courts and also to give orders and directives by way of writs to enforce fundamental rights envisaged in the Constitution. It is also entitled to grant other remedies available under the writ jurisdiction. In addition to its writ jurisdiction, the High Court Division enjoys inherent power that allows it to pass any order deemed necessary to prevent abuse of the process of any court or for the achievement of the ends of justice. The Appellate Division has the power to hear appeals

[Type text]

against decisions of the High Court Division or any other statutory body. The Government of Bangladesh does not condone any violation of human rights including by its law enforcing agencies. Adequate legal remedy is available for the victims in case of any such violation. Bangladesh is proud to have a free media and a vibrant civil society who remain ever vigilant as watchdogs for any wrongdoing of the Government or its agencies in the area of human rights in addition to the National Human Rights Commission. Moreover, public interest lawyers, by constantly holding the Government accountable for their actions or omissions, resist the violations of citizen's fundamental rights as guaranteed by law and the Constitution.

Bangladesh, as a state party to inter alia, the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Prevention and Punishment of the Crime of Genocide, recognizes its responsibility towards its citizens and is committed to fulfill its obligations to the citizens of Bangladesh.

Background:

The International Crimes (Tribunals) Act, 1973 (**ICT Act 1973**) of Bangladesh was enacted by the Bangladesh Parliament which is vested with the legislative powers of the Republic under the Constitution. The ICT Act provides for the detention, prosecution and punishment of persons for genocide, crimes against humanity and other crimes under international law and for matters connected therewith. Thus, the ICT Act provides for the detention, prosecution and punishment of persons liable for such crimes committed during the War of Liberation of Bangladesh from 25 March to 16 December 1971. The violations involved the indiscriminate killing of civilians, including women and children; the attempt to exterminate or drive out of the country a large part of population of approximately 10 million people; internal displacement of, at any one stage or another, of nearly half of the country's population of 75 million people; the arrest, torture and killing without trial of suspects; 300,000 cases of raping; the destruction of villages and towns; and the looting of property. In addition to criminal offences under domestic law, there is a strong prima facie case that criminal offences were committed in international law, namely war crimes and crimes against humanity and acts of genocide under the Genocide Convention 1948. Article VI of the 1948

[Type text]

Genocide Convention provides that persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed.

But the perpetrators of these unprecedented crimes enjoyed decades of impunity and remained unaccountable until now while victims suffered in agony and lack of justice. There was however nationwide campaign for justice over these years and in last general election in 2008, the Awami League-led 14-party alliance promised to end this culture of impunity and to initiate legal process to try those responsible for committing international crimes in 1971.

Thereafter, the government that formed after the election set-up the ICT on 25 March 2010. The Bangladesh government is pledge-bound to its people and to the world to end impunity to those who committed crimes such as genocide, crimes against humanity and other international crimes on the territory of Bangladesh.

The Tribunal has been created to prosecute the perpetrators of these crimes. The accused persons before the Tribunal are not suspects of ordinary crimes. They are alleged to have committed crimes against humanity, committed in violation of customary international law. But, the provisions of the International Crimes (Tribunals) Act, 1973 (ICT Act 1973) and the rules made thereunder are not inconsistent with the rights of the accused enshrined under article 14 of the ICCPR. The ICT Act ensures standards and safeguards needed universally to be provided to persons accused of war crimes. It has been categorically found that the rights of defense and procedure given in the ICT Act and the Rules of Procedure are manifestations of “due process of law” and “fair trial” which make the legislation of 1973 more humane, jurisprudentially sound and legally valid.

The International Crimes (Tribunals) Act, 1973:

The International Crimes (Tribunals) Act 1973 was enacted by the Bangladesh Parliament which is vested with the legislative powers of the Republic under the Constitution. After detailed deliberation and taking experts advise, the Parliament unanimously adopted the ICTA to “*provide for detention, prosecution and punishment of persons of genocide, crimes against humanity, war crimes and other crimes under international law, and for matters connected therewith*” (Preamble).

[Type text]

The Parliament enacted ICTA to provide for domestic mechanism to address large scale crimes committed in Bangladesh during the war of liberation of Bangladesh in 1971. The crimes included targeted killings of certain religious and national groups such as Bengalees and Hindus, widespread, systematic as well as indiscriminate killings of civilians including women and children. The women were particularly targeted for rapes and assaults. Hindus were killed and or forcibly converted to Muslim. Crimes also included wanton destruction of villages and towns, and looting of properties. As noted above, 10 million people were deported to India. In short, Crimes against humanity, Crimes against peace, Genocide, War Crimes and other crimes under international law were committed at an unprecedented scale.

These crimes caused serious concerns to the international community, and violated numerous provisions of international humanitarian laws, customary international laws, and civilized practices. The Government of Bangladesh decided to investigate and prosecute those involved and responsible and the ICTA created necessary legal framework for the justice process to begin. Moreover, the Government was mindful about its international obligations and of customary international law including its duty to investigate and prosecute all crimes as well as crimes of international concern and international crimes.

The ICTA has been an unique piece of legislation as in 1973, hardly any country in the world had developed such a comprehensive legal infrastructure to enable national jurisdiction to try international crimes committed by nationals of any country in the territory of Bangladesh (ICTA Section 3. 1). It created a complete legal order, considering gravity of crimes involved as well as limitations of ordinary criminal procedures, that provided no avenues to address international crimes and for the first time, and enabled establishment of the International Crimes Tribunals (ICT).

Nature of ICTA

It is important that the true nature of this ongoing process is understood. The Act itself is a domestic law, passed by the Parliament of Bangladesh. It needs to be clarified that this justice process was never part of any intervention by the international community, nor a result of any international compromise, unlike most justice initiatives of its kind that have taken place in the international arena. The justice process that this Act envisaged setting up is purely a domestic process. This means, the International Crimes Tribunals in Bangladesh is not 'international' in nature, but for all meaning and purposes they are 'domestic'. The only international element in the scheme of things is the nature of the offences, that is, the "international crimes". Although these crimes, due to their nature and trajectory of developments, have historically been a part of international criminal law, the Act internalised these crimes and thus made them a part of the jurisprudence of the Tribunal and of Bangladesh's legal system. It in fact should be seen as internalization of international law in domestic legal order of Bangladesh

[Type text]

which was done pursuant to international obligations of Bangladesh to deal with international crimes as well as to ensure justice to millions of victims of crimes committed in 1971.

The Crimes under the ICTA are all crimes under customary international law and regarded as international crimes. Although the Act has been enacted in 1973, the core crimes remained same until today and understood now exactly as was when the law was adopted. The Act however expanded the definition of Genocide to include “political group” as one more “group”. This was again based on prevailing notion of Genocide as reflected in the first UN General Assembly Resolution no 95(1) adopted on 11 December 1946 that reads as follows:

“ The Crime of Genocide

Genocide is denial of right of existence of entire human groups, as homicide is denial of right of existence shocks conscience of mankind, results in great loss of humanity in the form of cultural and other contributions represented by human groups, and is contrary to moral law and to the spirit and aims of the United Nations.

Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part.

The punishment of crime of genocide is a matter of international concern.

The General Assembly, therefore,

Affirms that the genocide is a crime under international law which the civilised world condemns, and for the commission of which principals and accomplices - whether private individuals, public officials, or statesmen, and whether the crime is committed on religious, racial, political or any other grounds - are punishable;

Invites the Member States to enact the necessary legislation for the prevention and punishment of this crime.”

However, the political group was left out in the final negotiations of the Genocide Convention adopted in 1948, largely because the States during negotiations failed to reach to a consensus but the demand for expanding the ambit of definition of genocide has always been there. Therefore, Bangladesh, having experienced the actual carnage of genocide, quite rightly included the ‘political group’ as part of definition of genocide,

[Type text]

adopting the broader ambit of definition as per the UNGA Resolution which should always have been there.

Apart from Crime of Genocide, the ICTA deals with Crimes against humanity, Crimes against peace, War Crimes, Violation of humanitarian rules applicable in armed conflicts laid down in Geneva Conventions of 1949; and attempt, abetment or conspiracy to commit such crimes, and complicity in or failure to prevent commission of such crimes [Section 3 (2) ICTA].

The Tribunals

In addition to defining norms of international crimes and other definitions, ICTA being a self-contained law, provided for setting up of Tribunals and determined its jurisdiction, powers and functions of investigation and prosecution agencies, procedure of trial, powers of the Tribunal, rights of the accused, judgment and sentence, rights of appeal, and power to formulate rules of procedure etc.

The first International Crimes Tribunal was set up by the Government on 25 March 2010, and the second Tribunal was set up in early 2012. The ICTA is very specific regarding the qualification of the appointee judges in order to ensure a high standard of trial. Section 6(2) of ICTA provides 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 shall be appointed as Chairman and Member of the Tribunal. Accordingly, two separate Tribunals have been constituted, each composed of one Chairman and two Members. Out of six members in both the Tribunals, five of them are sitting Justices of the Bangladesh Supreme Court and remaining Member is a senior District Judge having long standing judicial experience in the trial courts. Here it needs to be pointed out that although the Tribunals, by nature, are trial courts, they are like no other trial courts in Bangladesh. In the International Crimes Tribunals – hearing of motions and petitions, monitoring progress of investigations and the safety of the accused during interrogations, admission of evidence, ensuring protection of witnesses and victims for both the prosecution and defence, deciding on guilt and passing of sentences – are all determined and adjudicated by a panel of judges who are very high in rank and rich in experience, maturity, and judicial prudence which are unmatched to any other trial courts in Bangladesh.

Independence of the Tribunals and their fair trial obligations

The ICTA, through amendment in 2009, guaranteed independence of the Tribunal under Section 6.2A which reads as: “*The Tribunal shall be independent in exercise of its judicial functions and shall ensure fair trial.*” This provision was specifically introduced

[Type text]

to protect the Tribunals from potential political or other influences by imposition of this positive duty to act independently.

Section 6(2A) of the ICTA obliges the Tribunals to ensure fair trial in recognition of the obligation under the Constitution of Bangladesh as well as under international instruments to which Bangladesh is a party to, including the ICCPR. This is a positive legal obligation of the judges to ensure that every aspect of fair trial is ensured throughout the process, for the accused, as well as for the witnesses and victims.

Prosecution Team and Investigation Agency

Under the ICTA, on 25 March 2010, the Government set up the Prosecution Team [Section 7(1) ICTA] and the Investigation Agency [Section 8(1) ICTA] of the Tribunal and appointed Prosecutors and Investigators respectively. The Prosecutors of the International Crimes Tribunal are all experienced lawyers with a significant number of years of court experience. They are well versed in criminal law and possess considerable expertise at handling criminal trials. Over the years, these Prosecutors have also enhanced a great deal of understanding and knowledge over the theories and concepts surrounding international criminal law and how trials of persons alleged to have committed core international crimes, have been held across the globe. This has been made possible due to the varied exchanges and collaborations between the Prosecution Team as well as the Investigation Agency with many international and national bodies, civil society groups, governmental agencies etc. that are all concerned stakeholders in the process of bringing an end to impunity.

Investigation and interrogation

During investigation at the pretrial stage, the Act and its Rules put in a number of safeguards to protect the rights of the accused. For example, unlike many other international forums, the accused before the ICT cannot be kept in custody for a long period. The law specifies that the accused shall be tried without undue delay [Rule 43(5)], and in case of the detained accused, the investigation must be concluded within the specified period of one year which may be extended another six months under special circumstances [Rule 9(5)], or else the accused may be released on bail [Rule 9(5)]. Not only that, the Prosecutors are required to submit periodic reports on the progress of the case so that the judges are satisfied of continued detention of the accused [Rule 9(6)]. Usually the accused who are under investigation, are kept in custody, in order to prevent interference with the investigation, tampering with evidence, coercion

[Type text]

of witnesses etc. For instance, one of the accused has been enlarged on bail through the period of his investigation to his trial.

The ICTA provides that the accused who are under investigation could be interrogated by the investigators [Rule 16(1)] and prosecutors [Section 8(2) of the ICTA]. However, according to the law, any statements made or information given by the accused during such interrogations cannot be used against the accused or be adduced as evidence during the Trial [Rule 24(1)]. Through this, the law protects the accused from self-incrimination and effectively removes the incentives for coercive treatment of the accused [Rule 16(2)]. In granting permission to interrogate, the Tribunals have put in place extraordinary safeguards, that are – a) – not foreseen in the Act, b) not even practised or available for other accused in Bangladesh, and c) not even provided to the accused in any of the other South Asian countries. For example, during every interrogation, the Tribunals, as a matter of practice, have always ordered that the counsel of the accused and a doctor be present at the place of interrogation, and both be allowed to consult and examine the accused before, after and during mandatory intervals. It may be mentioned here that unlike other jurisdictions, statements made by an accused during such interrogations is not admissible in evidence [Rule 56(3)].

Even in granting interrogations, the judges of the Tribunal, as a practice, have been very restrictive. The Prosecutors and Investigators are only allowed to interrogate the accused usually only once, and that too for a limited hours during the day specifically set by the Tribunal. In case of one accused, the Tribunal allowed such an interrogation to take place at the comfort of the home of the accused where he was on bail, in the presence of a physician and his counsel. Such orders are unprecedented where a person accused of crimes as serious as international crimes has been allowed to be interrogated under such conditions. This is how the accused individuals are generally treated by the International Crimes Tribunals of Bangladesh.

Arrest and Detention

The regime for arrest and detention by the Tribunals has been clearly outlined in the ICTA and its Rules of Procedure, like in other jurisdictions. All arrests in relation to investigation and prosecution of crimes under the ICTA are made under the authority and Order of the Tribunal. No investigation officer can arrest any person without securing prior authorisation of the Tribunal. As such, arresting an accused, or detention under ICTA are not matters for the executive, as they are judicial decisions.

[Type text]

Rule 9(1) of the Rules of Procedure permits an Investigation Officer to secure through the Prosecution the arrest warrant from the Tribunal at any stage of the investigation *'if he can satisfy the Tribunal that such arrest is necessary for effective and proper investigation.'* Such requests for arrests are granted only if the Tribunal is satisfied of its necessity. While the primary objective of such arrest is to facilitate an effective and proper investigation, the continued detention of the accused is periodically reviewed by a judicial panel, which is the ICT, to assess the justification for such detention.

If a person is already in custody in relation to matters other than matters within the jurisdiction of the Tribunals, and if it transpires to the Tribunal that there may be a case against the person to investigate concerning crimes under the ICTA, the Tribunal may, issue a production warrant and take that person's detention within the Tribunal's jurisdiction [Rule 9(4)]. This decision is also a matter subject to the Tribunal judges' satisfaction.

Periodic review of detention

Under Rule 9(6), every detention is subject to a periodic review by the Tribunal judges. The Rule is very explicit that every detention of person under investigation shall be reviewed every three months, and if the Prosecution fails to satisfy the Tribunal that such detention is necessary, the person detained shall be enlarged on bail by the decision of the Tribunal. In ICT, the detention of the accused is periodically reviewed every three months by the Tribunal requiring the Prosecution to justify continued detention of the accused. As Rule 9(6) clearly states:

"After every three months of detention of the accused in custody the investigation officer through prosecutor shall submit a progress report of investigation before the Tribunal on perusal of which it may make a review of its order relating to the detention of the accused ."

A close reading of Rules 9(1), 9(4) and 9(6) of the Rules of procedure suggests that: (a) no person is arrested under the authority of ICTA without the Tribunal judges being judicially convinced and satisfied of the need of such arrest; (b) no person, who is already in custody in relation to matters outside the ICTA, is brought under the jurisdiction of the Tribunal by use of 'production warrant' without the Tribunal judges being satisfied of its necessity; and (c) no person is kept in detention without the the Tribunal judges reviewing the justification of their continued detention. In delivering Orders under any of the aforementioned circumstances, the Tribunal judges not only apply the letters of law, but also apply their judicial mind taking into account the overall

[Type text]

circumstances pertaining to individual cases, after hearing both the prosecution and the defence, and taking into account any or all documents that may be relevant.

From the explanation above, it is evident that two layers of protections are in place to prevent any kind of arbitrariness while dealing with arrests and detentions. On one hand, the arrest and detention regime is governed by clearly laid down legal provisions for the sake of transparency and predictability. On the other hand, every decision based on these legal provisions is taken by the judges only after having all information, views, arguments and documents at their disposal.

In our view, the arrest and detention regime that is currently in place in Bangladesh under the International Crimes Tribunal, is very much in consonance to the provision of ICCPR, wherein Article 9 has clearly stated that:

"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

While the Government of Bangladesh fully acknowledges the sanctity of liberty and security of a person and does not condone any arbitrariness with regard to arrest or detention as part of its commitment being a party to ICCPR, it is also recognised that deprivation of liberty has to be in accordance with procedures established by law. In our understanding, an arrest, or a detention, is not arbitrary, if it is carried out in accordance with established procedure of law, which is exactly the case of the ICT's legal regime as explained. Any arbitrary interpretation of "arbitrariness" other than the one clearly laid down by ICCPR (Art.9, paragraph 1) and recognised by Bangladesh, will defeat the scheme of the Covenant making it unpredictable for a State Party for the purpose of compliance.

Fair Trial Safeguards at the ICT:

The ICTA and its Rules of Procedure afford all the standard fair trial safeguards to the accused. In addition, the Judges have developed practice to progressively interpret the provisions specially when it comes to the rights of the accused and procedural fairness.

Informing accused of the grounds of arrest

[Type text]

At the time of arrest, the accused individuals are duly furnished copy of the Order of the Tribunal setting out reasons for such issuance of arrest-warrant. The prescribed form of the warrant of arrest (see: ICT-BD Form no.03) specifically specifically mentions that the person is charged with offence punishable under Section 3 of the Act which affirms the jurisdiction of the Tribunal and specifies the crimes. Therefore, at the time of arrest, the accused knows exactly under which provision of the ICTA he/she has been arrested. This is consistent to Article 9(2) of the ICCPR which reads - "*anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him*". The matching provision is set out in Rule 9(3) of the Tribunals which provides- "*at the time of executing the warrant of arrest under sub-rule (2) or later on, copy of allegations is to be served upon such person*". Further, Rule 18 (4) provides:

"The Chief prosecutor shall file extra copies of formal charge and copies of other documents for supplying the same to the accused(s) which the prosecution intends to rely upon in support of such charges so that the accused can prepare his defense."

Moreover, Rule 9(3) of Rules of Procedure further ensure full disclosure of accusations against the accused. It states that "*At the time of executing the warrant of arrest, under sub-rule 2 or later on, a copy of allegations is to be served upon such person*" This is consistent to Article 9(2) of the ICCPR that states that anyone who is arrested shall be informed, at the time of arrest, of reasons for his arrest and shall be promptly informed of any charges against him.

Therefore, it is evident that all accused arrested by the Order of the Tribunal are fully aware of the grounds of their arrest.

Accused promptly brought before the Tribunal

The ICTA and its Rules of Procedure mandates that a person ordered pursuant to an Order of the Tribunal is brought before the Tribunal promptly. Rule 34 (1) obligates that "*The Police shall produce the arrested accused direct before the Tribunal within 24 (twenty four) hours of arrest excluding the time needed for the journey.*" The Constitution of Bangladesh also provides similar provision. This provision is consistent to Article 9(3) of the ICCPR that states, amongst others, that anyone arrested or detained on a criminal charge shall be brought promptly before or other officer authorized by law to exercise judicial power.

Provisional release (bail)

[Type text]

The Rules of Procedure authorises the Tribunal to release an accused provisionally on bail. Under Rule 34 (2), when the accused is produced before the Tribunal following arrest, *“he shall be sent to prison if he is not enlarged on bail by the Tribunal.”* Rule 34(3) provides further power release the accused on bail, which reads as follows:

“At any stage of the proceedings, the Tribunal may release an accused on bail subject to fulfillment of some conditions as imposed by it, and in the interest of justice, may modify any such conditions on its own motion or on the prayer of either party. In case of violation of any such conditions the accused may be taken into custody cancelling his bail.”

Rule 34 (3) as such relevant part of Article 9 (3) of the ICCPR where it states that it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any stage of the judicial proceedings, and, should occasion arise, for execution of judgment.

Understanding charge and adequate opportunity to defend

The accused is provided adequate time and opportunity to prepare his defence, which is one of the key rights the accused enjoy. Section 16(2) of the ICTA 1973 that reads:

“A copy of the formal charge and a copy of each of the documents lodged with the formal charge shall be furnished to the accused person at a reasonable time before the trial; and in case of any difficulty in furnishing copies of the documents, reasonable opportunity for inspection shall be given to the accused person in such manner as the Tribunal may decide.”

The question of ‘adequacy of time’, obviously depends on the circumstances of the case. As such, the Tribunal is quite conscious about ensuring this key right of the accused and in recognition of this right the Tribunal has often granted additional time for preparation of defence. This provision of the ICTA and the practice of the Tribunal is very much consistent to Article 14(3)(b) of the ICCPR which states that an accused ‘to have adequate time and facilities for the preparation or his defense’.

Presumption of innocence and threshold of guilt

[Type text]

The Rules of Procedure of the Tribunals, which have been formulated by the Tribunal judges, specifically included the notion of presumption of innocence by emphasising it under the the corresponding Rule-43(2) as: “A person charged with crimes as described under section 3(2) of the Act shall be presumed innocent until he is found guilty”. At the same time, the Rules of Procedure clearly set the threshold of guilt by requiring that the Prosecution has the burden to prove the guilt of the accused ‘beyond reasonable doubt’ (Rule 50).

Right to be heard, to defend, protection from self-incrimination, and alibi

The ICTA and its Rules of Procedure provides number of other important safeguards. The law is very clear that an accused cannot be tried twice of the same offences [Rule 43(3)]. Every accused before the Tribunal, as of right, is entitled to a fair and public hearing [Section 6 (2A) , Section 10 (4) ICTA] where he is allowed to defend himself [Section 17 (2)]. Such hearing/defence can be conducted by an engaged lawyer of his choosing [Section 17 (2)] who is legally authorised to appear before the Tribunal. The bottom line is – the accused cannot be punished without being given an opportunity to be heard or, as already mentioned, shall not be compelled to testify against his will or confess his guilt. Even in cases where the plea of alibi of an accused fails, the law is very clear that such a failure cannot be used against the accused [Rule 51 (3)].

Standards of evidence

As far as admissibility of evidence is concerned, the Tribunal is required to adhere to the very high threshold of “probative value” which also happens to be the set benchmark in other international tribunals prosecuting international crimes. The burden of proof squarely rests on the Prosecution and “beyond reasonable doubt” [Rule 50].

Adequate opportunity for the parties to raise legal and other challenges

The Rules of Procedure and practice developed by the Tribunal offer adequate opportunity for both parties to petition the Tribunal and mount changes. Although opportunities apply both defence and prosecution, but in reality, so far, the defence has filed infinitely more petitions and raised multiple challenges before the tribunal, ranging from bail petitions, indictment order, charge orders, and challenges to the Act to even of recusal of the Tribunal-I Chairman. The Tribunals, patiently and meticulously heard every petition and application before deciding on them within the bounds of law. The point is, neither the defence (nor the prosecution) is restricted from putting their objections on record and every party is getting their day in the court.

[Type text]

Public hearing in the presence of international observers and the media

Trials before this Tribunal take place openly so that justice is not only delivered in public but it is also seen to be delivered. Anyone, including observers from international community and the media is free to attend the sessions of the Tribunal, observe its proceedings, and report. There is no restriction whatsoever as regards such attendance except that of the limitation of seating arrangement.

Finding of guilt, proportionality requirement of sentences, and provision of appeal

The ICTA and its Rules of Procedure requires that when an accused is found guilty and convicted, that the accused shall receive sentence that is proportionate to the gravity of his crimes as it may appear to the Tribunal to be just and proper. The accused can appeal the conviction and sentence before the highest judicial body in Bangladesh, the Appellate Division of the Supreme Court [Section 21 ICTA]..

Equality of arms

The ICTA and the Rules of Procedure framed thereunder, and the judicial practices adopted by the Tribunals guarantees one of the key aspects of fair trial and that is the 'equality of arms'. In the interest of justice, in many cases the balance of equality is often allowed to lean favourably to the accused. For example, in case of appeal, the Government can only appeal against an "order of acquittal" and not against the adequacy or nature of the "sentence" [Section 21(2)], whereas the accused can appeal against both "conviction and sentence" [Section 21(1)]. As such it is clear that the scheme of the law with regard to the issue as serious as appeal, the law favours the accused more than the Government.

Protection of Witness and Victims

For the first time in Bangladesh, the Tribunal, through its Rules of Procedures, introduced a witness and victim protection regime. Both prosecution and defence can avail this regime in strictest confidence by applying to the Tribunal. Rule 58A(1) states that -

"The Tribunal, on its own initiative or upon application of either party may issue necessary Orders directing the concerned authorities of the Government to ensure protection, privacy and well-being of the witnesses and/or victims."

[Type text]

It needs to be noted from the text of the above provision that the Tribunal has stretched the witness/victim protection regime beyond providing protection and privacy, but also “well-being” of victims and witnesses. Well-being has very broad ambit going beyond necessity of protection. The procedure of availing witness and victim protection is also stipulated in the Rules.

It should be noted here that the justice process led by this Tribunal, is also unique and path breaking in another in that no other victims and witnesses in Bangladesh before other courts get the kind of protection that this Tribunal affords.

The Constitution and laws of Bangladesh:

To put the ICTA and its ongoing process in context, a brief reference to the Constitution would be helpful. The Constitution of Bangladesh guarantees full enjoyment of human rights. It provides fundamental rights that guarantees, amongst others, equality before law and equal protection of law, protection of life and liberty, and prohibits discriminatory treatment. The constitution also guarantees rights during arrests, detention, trial and punishment. Specific liberties of speech and expression, association and assembly, trade and occupation, religion and property, security of home and privacy are also ensured.

The Constitution also provides provisions for Parliament, as Bangladesh has a parliamentary democracy directly elected by the people of Bangladesh. It also has in it details of judicial system, which is headed by the Supreme Court of Bangladesh comprising the High Court Division and Appellate Division. The Supreme Court has the jurisdiction both to interpret laws by the Parliament and declare them null and void when found infringing fundamental rights guaranteed by the constitution.

The High Court Division is vested with the powers to hear appeals and revisions from subordinate courts, and also to give orders and directives by way of writs to enforce fundamental rights envisioned in the Constitution. It is also entitled to grant other remedies available under the writ jurisdiction. In addition to its writ jurisdiction, the High Court Division enjoys inherent power that allows it to pass any order deemed necessary to prevent abuse of the process of any court, or for the achievement of the ends of justice. The Appellate Division has the power to hear appeals against decisions of the High Court Division or any other equivalent legal institution, including for example against the decisions of the International Crimes Tribunals.

International norms:

[Type text]

Unlike some other jurisdictions, provisions of international law are not directly applicable in legal order in Bangladesh. Such provisions are incorporated as domestic laws before it could be invoked. However, international legal provisions are fairly regularly raised in Courts in Bangladesh.

The Government of Bangladesh though takes its international obligations seriously. Bangladesh has been parties to number of international instruments, almost all core human rights treaties including the International Covenant on Civil and Political Rights (ICCPR), its First Optional Protocol, the Convention on Prevention and Punishment of Crime of Genocide, Convention against Torture, amongst many others.

Most notable and relevant here has been ratification by Bangladesh of the Rome Statute of the International Criminal Court. Bangladesh ratified and became 111th States Party to it on 24 March 2010 as it established the International Crimes Tribunal (ICT) to exercise jurisdiction over international crimes committed on the territory of Bangladesh in 1971. Through this, Bangladesh clearly manifested its commitment to end impunity for international crimes at home as well justice for such crimes globally.

The crimes committed in 1971 predate the Rome Statute as well the ICTA, the legislation that Bangladesh enacted in 1973. Therefore, although as States Party, the Rome Statute can only be looked for inspiration or guidance, where necessary. The Tribunal indeed has passed Order while framing Charges stating that “the Tribunal may take into account jurisprudential developments from other jurisdictions should it feel so required in the interest of justice” [*The Chief Prosecutor vs. Delwar Hossain Sayeedi, ICT-BD Case no 1, 2011*].

Besides, it is stated here that the Rome Statute for ICC never denied the primacy of national law (para 10 of the Preamble). Article 10 of the Statute explicitly recognises the existing rules of international law as well as evolving rules. Bangladesh regards ICTA as embodiment of “existing” rules of international criminal law in this regard but at the same time recognises evolution of laws in this area.

Fair trial attributes of the ICT:

There exists a number of provisions in the ICTA and its Rules that address elements of fair trial. The ICTA and the Rules explicitly stipulates all the standard elements of fair trial, including for example:

[Type text]

- (1) Trial to be held in a fair, impartial and independent tribunal [Section 6(2A) of the ICTA],
- (2) Expeditious [Section 11(3)(a)] and public hearing [Section 10(4) of the ICTA],
- (3) Accused to know of the charges [Section 16] against him,
- (4) Prohibition of prosecution on frivolous charges [Rule 29(1)]
- (5) Discharge an accused if the tribunal finds insufficient grounds to continue the trial [Rule 37]
- (6) Prohibition of arbitrary arrest, as one can only be arrested or be detained only by the Order of the Tribunal issued under the ICTA and Rules of Procedure [Rule 9]
- (7) Right to seek bail. [Rule 34(2)]
- (8) Right to bail if investigation is not completed within a specified period [Rule 9(5)]
- (9) Protection against self-incrimination [Rule 43(7)]
- (10) Safeguards related to confessional statements [Rule 25(2) & Section 14(2)],
- (11) Confessional statements must be voluntary and made before a judicial entity [Section 14(2)]
- (12) Safeguards against possibilities of torture or coercion, duress or threat of any kind. [Rule 16(2)]
- (13) Disclosure of evidence [Section 18(4)] and entitlement of having copy of formal charge together with documents collected during investigation,
- (14) Notice to the defence in case of inclusion of additional witnesses by the prosecution [Section 9(4)]
- (15) Adequate time for preparing defense [Rule 38(2)]
- (16) Right to inspect documents [section 16(2)]
- (17) Engaging legal counsel [Section 17(2)]
- (18) Appointing defense counsel at state's expense [Rule 43(1) and Section 12 of ICTA]
- (19) Right to conduct own defence [section 17(2)]
- (20) The tribunal may allow appearance of foreign counsel defence if Bangladesh Bar Council (ie, the regulatory authority for practising lawyers) permits so (Rule 42)
- (21) Right of the accused to explain charges [Section 17(1)]
- (22) Availing services of an interpreter [Section 10(3)],
- (23) Full opportunity to present the case of the defence including the right to cross examine prosecution witnesses [section 17(3)],
- (24) Right to call their own defence witnesses [Section 10(1)(f)]
- (25) Right of the accused to produce evidence in support of his defence [section 17(3)],
- (26) Review of the decisions of the Tribunal [Rule 26 (3)],
- (27) Right to appeal against both conviction and sentence [section 21(1)]

In addition to the above, there are a few more integral attributes to the justice process under the ICTA which are:

- (28) Presumption of innocence (Rule 43(2))

[Type text]

- (29) Burden of Proof on prosecution beyond reasonable doubt (Rule 50)
- (30) Right to speedy trial [Rule 43(5)]
- (31) Prohibition of self incrimination or making confession [Rule 43(7)]
- (32) Protection against double jeopardy [Rule 43(3)]
- (33) Provision of witness and victim protection [Rule 58A]
- (34) Provision for proceedings in camera [Rule 58A (3)]
- (35) Failure to prove the plea of *alibi* and or the documents and materials by the defence shall not render the accused guilty.

Are the facts mentioned in the communication as the summary of the case accurate?

Parawise response to WGEID Communication, dated 16th novembre 2012.

1. Accuracy of the facts alleged in the summary of the case in the Communication UA G/SO 217/1 G/SO 214 (-3-16) BGD 8/2012 :

- It has been found that the information the distinguished WGEID and the Special Rapporteur received from its sources are, in most instances, inaccurate , partial, misrepresented and misinterpreted the applicable legal provisions. The said individuals remained under custody of the ICT, a judicial entity duly established pursuant to ICTA “to try and punish any individual or group of individuals, or any member of any armed, defence or auxiliary forces, irrespective of his nationality, who commits or has committed, in the territory of Bangladesh, whether before or after the commencement of this Act, any of the crimes mentioned in sub-section (2)”¹. The ICTA proscribed what is considered as core international crimes such as Crimes against Humanity, Crimes against Peace, Genocide, War Crimes etc, and through it internalizes investigation and prosecution of international crimes committed on the territory of Bangladesh. Such a process is internationally recognized and preferred as a solemn obligation of Bangladesh.

2. Details on Judicial Proceedings and Defence team:

As noted above, the Tribunals were set up under duly enacted legislation named as International Crimes (Tribunals) Act, 1973, and after being established on 25 March 2010, the ICT Judges adopted detail Rules of Procedure in pursuant to the ICTA. The issue of adjudication of these individuals, therefore, should be considered in the context of the gravity of international crimes committed in Bangladesh in 1971, the Government’s initiative to end long-running impunity for such crimes, the legal framework of the ICTA and its Rules of Procedure, and practice of the ICT in applying these laws. It should also be seen in the backdrop of the well-developed and well-

¹ Section 3(1) of the International Crimes (Tribunals) Act 1973 (Act No. XIX of 1973)

functioning legal system of Bangladesh, which is a mature and time-tested legal system in the context of this part of the world.

In providing response to instant Communication of the WGEID, it is stated that the Government can only supply relevant context to help understand the decisions of the ICT, an independent judicial institution composed of independent and very senior Judges. Beyond that, the government is not in a position to explain the actions of the Tribunals in performing their duties under their judicial functions and cannot explain or make any comment on the orders passed by the Tribunals which is itself independent in disposing of any matter before it. With this caveat noted, the Government responds as regards individual defendants cases below:

In the Communication under referecne it is reported that on 16th october 2012, witness for the prosecution in *chief prosecutor vs kamaruzzaman* were forcibly collected from their homes and unlawfully detained for several hours. The government of Bangladesh would like to declare that no such witness was unlawfully detained. No statement from any witness, whatsoever, was forcibly collected. No petition to that effect was made in the tribunal by any parties nor any complain was filed to any court of law or to any authority claiming that the witness was unlawfully detained or statements were forcibly collected. In every cases, the defendants are allowed to cross examine the witness of the prosecution and the prosecution is allowed to cross examine the witness of the defendants. **No such claim of unlawful detention of the witnesses or forceful collection of statement were made to the tribunal yet.**

The alleged informer reported that the potential witnesses for the defence in *chief prosecutor vs sayedee* has been harassed and threatened by the secret service officers or by the *local chatro and jubo leauge*. These allegations are false and of no substance. No secret service officers threatened any witness of the defence. In case of any such misdemeanor, the provisions and the legal system allows the defence to apply for witness protection if they really apprehend any potential threats from any quarter to their witnesses. There are provisions in the rules of procedures of both the tribunals that any party can apply to the tribunal for their witness protection. The fact that the defence did not apply for any such witness protection to the tribunal proves the conclusion that there did not exist any suchthreat . The alleged informer further reported that the defendant in *chief prosecutor vs sayedee* was prohibited from testifying his own defence at trial. There has not been any bar for Mr Sayedee to testify in his own case. Mr. Sayedee himself did not prefer to give deposition on his behalf, rather he preferered his representative to speak on his behalf during the trial. Mr. Sayedee appointed a team of qualified lawyers to represent him in the trial. Any argument on his behalf can be submitted by his Attorneys and Counsels. Every party has to submit a list of their witnesses to the tribunal. **Mr. Sayedee did not prefer to be testified. It was his**

[Type text]

own choice to decide who testify on his behalf. He was never debarred to testify on his own behalf.

The informer further alleged that the tribunal has arbitrarily discriminated against the defence in *chief prosecutor vs sayedee* by limiting the defence to six weeks for evidentiary hearing when the prosecution was permitted nine months and limiting the length of closing written submissions by the defence to ten pages without grounds. Here, again , the facts and context of the case have been distorted.. **The legal provisions and application provides that the entire burden of proving the case lies upon the prosecution. The accused is presumed to be innocent unless proven guilty beyond reasonable doubt.** The defence has the right to remain silent or the defence can prove the alibi. So, naturally, the prosecution requires more time than the defence. The tribunal has the jurisdiction to limit the number of witness or time for either of the parties for the sake of expeditious justice. The tribunal never impose any strict jacket fetters on number or time of the witness. The tribunal allowed time generously whenever asked for by both the parties. So far closing written submission is concerned, there is no such provision in the Act or in the Rules of Procedure to file written closing submission by the parties. Yet, for convenience, the tribunal asked the parties to submit summary of their arguments. It was not discreminatory as both the parties were directed to do the same. The defence continued more than 12 days of submission of their closing arguments. So there was no discremination on part of the tribunal.

The alleged informer further reported that on 6th november the tribunal threatened the defence counsel in *chief prosecutor vs sayedee* with contempt of court proceedings under section 11(4) ICTA for conducting a press interview regarding the abduction of defence witness Mr Bali and directing them to show cause by 22 november as to why such proceedings should not be initiated and that the tribunal also barred defence counsel Mr Tajul islam from appearing before the tribunal before 22 november. The fact is, that there was a contempt proceeding pending against Mr. Tajul Islam and during the pendency of that contempt proceeding, Mr. Tajul Islam, again on 6th november 2012 made some contemptious comments and behave badly in the court room which the tribunal thought was contemptious. The show cause notice was not issued for the alleged press interview, it was issued because of his behaviour in the court room. Recently, Mr Tajul Islam has filed an unconditional mercy petition to the tribunal in which he admits that his behaviour was regretful and he regrets for his behaviour and beg unconditional apology for what he has done. He did not defend himself in the petition rather admitted that his behaviour was unacceptable.

The informer further claims that in all cases against the defendants the tribunal has refused to allow preveleged communications with the defendants, jeopardising their right to a free and fair trial. The tribunal has allowed prevelleged communication in

[Type text]

numerous occasions, whenever prayed for. The tribunal never refused any such petition. There is no substance of truth in this allegation.

The informer further reported that in *chief prosecutor vs sayedee* and in *chief prosecutor vs Azam*, the defence was given only three weeks, reportedly insufficient time to prepare their opening statement. This is a judicial decision. The government of Bangladesh is not in a position to question or evaluate the merit of the order of an independent tribunal. The tribunal is independent and must have applied their judicial discretion in allowing and allocating time for the parties. However, ICTA provisions allow that the defence, if aggrieved by any such decision can apply for a review of the decision. No such request for review of the decision was submitted.

The informant further reported that in *chief prosecutor vs sayedee* and in *chief prosecutor vs Molla*, the tribunal has refused to permit defence counsel to cross examine prosecution witness on evidence including exhibits in contravention of the tribunal's rules of procedure. The tribunal never refused to allow the defence to cross examine any of the prosecution witness or exhibits.

The informer further reported that in the case of *chief prosecutor vs sayedee*, *chief prosecutor vs Azam* and *chief prosecutor vs Molla*, the number of defence witness has been limited to twenty, twelve and six respectively without legal grounds. In every of the above mentioned cases, the order of limiting the number of witness is self explanatory and well reasoned. The tribunal, after considering the facts and circumstances of the case and considering the contents of the statement of the defence witnesses, ruled that the defence will produce 20 witnesses. The tribunal has the jurisdiction to limit the number of witnesses. This kind of limiting the number of witnesses is nothing new in international tribunals. There are numerous instances from ICTY and ICTR where the tribunal limited the number of witnesses for the parties. In *chief prosecutor vs Golam Azam*, the defence submitted a list of more than one thousand witnesses (this clearly shows the defence's motive to delay the trial). The tribunal, after considering the facts and circumstances of the cases, judiciously fixed the number of witnesses in every cases. Such is the case for *chief prosecutor vs molla*.

The informer further claims that in *chief prosecutor vs azam*, the tribunal refused to issue summons for two defence witnesses without legal grounds. This is again a misrepresentation of facts. The tribunal passed an elaborated speaking order on this issue. The order itself is self explanatory and well-reasoned. Those two witnesses are foreign witness and the defence claims them to be expert on International laws. Generally, experts are being called on question of facts. But these two witnesses are claim to be expert on question of laws. In question of laws the tribunal itself is considered to be the experts of all experts. It is not mandatory for a witness to get a summon from the court to appear in the court. The tribunal ordered that if the defence wants to produce those two witnesses to the tribunal, they are at liberty to produce

[Type text]

them. But the tribunal will not summon them. If anyone disregard the summon of the tribunal it is a crime under the ICTA. Now, the technical question involves here is that, if those two witnesses disregard the summon of the tribunal, the tribunal can not compel them to appear before it as they are not citizens of Bangladesh. Neither the tribunal can punish those two witnesses for their non-appearances nor it can execute its order. It is the established principle of jurisprudence that any court of law will not pass any order which is more likely to be not regarded duly and for which the court can not execute its order positively. The court ordered that the defence are at their liberty to produce them but the tribunal will not issue summon to them. It is relevant to mention here that it is not mandatory for a witness to get summon to appear in the tribunal under the ICTA.

The informer further reported that in the case of *prosecutor vs sayedee* the tribunal refused without cause or explanation a defence application to admit media reporting as evidence in accordance with section 19(1) and 19(2) of the ICTA, despite extending this discretion to prosecution. The communication doesn't reveal the exact date or exactly which documents was refused to be admitted in the trial of chief *prosecutor vs sayedee*, so the government of Bangladesh can not explain it categorically. But, as the law stands, the tribunal is not bound to admit every piece of documents produced by the parties. It is the jurisdiction of the tribunal to decide on the admissibility of evidences under section 19(1) and 19(2), the tribunal may admit a media reporting if it appears to the tribunal that it has probative value. The tribunal might have founded that the alleged document has no probative value or is not relevant.

3. Information on Mr. Shukhoronjon Bali

It is reported that on 5th november 2012, defence witness Mr Shukharanjan Bali was abducted at a security checkpoint from within the tribunal premises by plain clothed security personnel allegedly by the detective branch. In fact, 5th of November was fixed for the start of the prosecution's summing up / arguments in the case. This particular date was not fixed for defence witness. It is easily understandable that in a date fixed for argument no side is supposed to bring witness with them. Moreover, **Mr. Shukho Ranjan Bali was a listed prosecution witness** who didn't come to depose before the tribunal. Since he had given his testimony to the investigation agency he has been missing and his family did not know his whereabouts. His daughter lodged a general diary numbering 773 in 25/2/2012 to the concerned police station to the effect that Shukho Ranjan Bali was missing. The government of Bangladesh suspects that actually the defence side abducted Shukho Ranjan Bali prior to 25/2/2012, who was originally a listed prosecution's witness. At the event of what happened in 5th November, the defence counsel didn't submit any written application for remedy to the tribunal. Yet, the tribunal promptly asked the chief prosecutor and the chief coordinator of the investigation agency to inform the tribunal about what happened with Shukha Rranjan Bali. They immediately consulted with the concerned higher authority and informed the tribunal that no such occurrence took place within the tribunal premises. As no such

[Type text]

alleged abduction took place they informed the tribunal that no one was actually abducted from the gate of the tribunal. The defence did not file any formal complaint to any authority about the alleged abduction which actually never occurred at all. The concerned deputy registrar of the tribunal was physically present at the main gate of the tribunal who helped the defence lawyer Mr. Hasanul Banna Shohag entering the tribunal premises amid the tight security. At that moment, Mr Shohag or any other persons present at the gate did not report any such occurrence to the deputy registrar. Apart from that, the tribunal do not have jurisdiction to issue any writ of habeas corpus to bring anybody before it. Later on, the defence side filed a writ of habeas corpus petition in the High Court Division of the Supreme Court claiming forceful abduction of Shukha Ranjan Bali which was rejected as being not pressed as the defence side didn't proceed with the writ petition. Even the defence side didn't file any regular case in any competent court of law. It is to be mentioned here that to file a general diary about any abduction, no authorisation from the tribunal is required and no such authorisation was asked for by the defence side. The government of Bangladesh is seriously concerned about the whereabouts of Mr Bali and concerned authorities are in search of him.

Conclusion: In view of the incidents, procedures and facts presented, the government of Bangladesh submits that the issues and information raised in the Communication by the source is not accurate, and that the judicial proceedings initiated against the defendants are absolutely in compliance with the requirements and gurantees of a fair trial and due process as enshrined in article 9 and 14 of the ICCPR as well as the basic principles on the independence of the judiciary as well as the basic principles on the role of the lawyers, that the defence teams of lawyers are performing their functions without intimidation, hindrance, harrassments or improper interferences and with equal access and equality of arms as provided in article 14 of the ICCPR and that the concerned authority of the government is trying to find out the whereabouts of Mr Bali. the police department is constantly searching the recovery of Mr Bali. Government with its utmost effort trying to find out his whereabouts. In view of the above, it is requested that the esteemd Working Group and the Special Rapporteur consider the case resolved.