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No: BMG/CHR-306/72

The Permanent Mission of the People's Republic of Bangladesh to the United Nations Offices 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 214 (3-3-16) G/SO 214 (33-27) BGD 3/2013 dated 5 February 2013, jointly addressed by the (1) Special Rapporteur on the independence of judges and lawyers; and (2) Special Rapporteur on extrajudicial, summary or arbitrary executions, regarding the death sentence pronounced in absentia by the Bangladesh International Crimes Tribunal against Mr. Abdul Kalam Azad, as well as the life imprisonment sentence pronounced against Mr. Abdul Kader Molla. In this respect, the Mission's communication of even number dated 21 February 2013 may also kindly be referred to. The competent authorities have provided a report in this regard which is enclosed herewith.

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.



Office of the High Commissioner for Human Rights  
Palais Wilson

52 rue des Paquis  
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(Attn: Ms. Jane Connors,  
Chief, Special Procedures Branch)

Fax No. 022-917.90.06

OHCHR REGISTER

15 APR 2013

Recipients: SPD.....

Copy to :

- (1) Ms. Gabriela Knaul, Special Rapporteur on the independence of judges and lawyers.
- (2) Mr. Christof Heyns, Special Rapporteur on extrajudicial, summary or arbitrary executions.

**Response from the government of Bangladesh to the communication  
no. UA G/SO 214 (3-3-16) G/SO 214 (33-27) BGD 3/2013 of 5 February, 2013**

***International Crimes Tribunal Bangladesh***

***Background:***

1.1 The people of Bangladesh waged armed struggle to free the country from military occupation and thus ensued the liberation war of 1971 that lasted was about nine months from on 26 March to 16 December 1971 eventually resulting in the emergence of a free and independent People's Republic of Bangladesh. The conflict broke out when the occupying forces launched a military operation called Operation Searchlight in East Pakistan against Bengali civilians, students, intelligentsia and ordinary people who demanded military regime, to adhere to the results of the first ever democratic election held in 1970. The Awami League received overwhelming endorsement and became the majority party but still, instead of following democratic norms and to handing over power to the elected majority, the occupying forces decided to launch massive armed attack on civilians and began committing crimes all over the country against unarmed civilians, not seen since the end of the second world war.

1.2 As a result of this long military operation with direct participation, support and collaboration of an ideologically motivated small minority, in the end succeeded in killing three million people were killed, around 300,000 rapes committed, and around 10 million people took refuge to neighboring India, and half of 75 million population were internally displaced. The crimes committed in 1971 in Bangladesh in terms of brutality, atrocity and heinousness has still regarded one of the major occurrences since Holocaust. In perpetrating these crimes, the occupying army forces and their auxiliary paramilitary forces (e.g., made of some local people known as Razakar, al-badar etc) did not regard the minimum norms and standards of international war laws (jus in bello).

1.3 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 in the territory of Bangladesh.

***The International Crimes (Tribunals) Act, 1973:***

2.1 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).

2.2 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.

2.3. 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.

2.4. The ICTA has been a unique piece of legislation as in 1973, hardly any country in the world had developed such a comprehensive legal framework 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**

2.5 The International Crimes Tribunal 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 internalized 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 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.

2.6 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 the same way as it 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."

2. 7 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, adopting the broader ambit of definition as per the UNGA Resolution which should always have been there.

2.8 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***

3.1. 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.

3.2. 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**

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

3.4. 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***

4.1 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*

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

5.2. 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., 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)].

5.3. 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*

6.1. 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.

6.2. 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.

6.3. 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*

6.4. 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. 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 ."

6.5. 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 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

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.

6.6. 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.

6.7. 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."

6.8. 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 is compatible with the ICCPR***

7.1. 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 especially when it comes to the rights of the accused and procedural fairness.

#### **Informing accused of the grounds of arrest**

7.2. 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 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."

72.1. Moreover, Rule 9(3) of Rules of Procedure further ensures 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.

7.2.2. 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**

7.3. 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)**

7.4. The Rules of Procedure authorizes 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 to 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."

7.4.1. 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**

7.5. 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.”

7.5.1. 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**

7.6. The Rules of Procedure of the Tribunals, which have been formulated by the Tribunal judges, specifically included the notion of presumption of innocence by emphasizing it under 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**

7.7. 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 authorized 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**

7.8. 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**

7.9. The Rules of Procedure and practice developed by the Tribunal offer adequate opportunity for both parties to petition the Tribunal and mount challenges. 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.

### **Public hearing in the presence of international observers and the media**

7.10. 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 for that of the limitation of seating arrangement.

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

7.11. The ICTA and its Rules of Procedure requires that when an accused is found guilty and convicted, 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**

7.12. 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**

7.13. 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.”

7.13.1. 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.

7.13.2. 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:***

8.1. 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.

8.2. 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.

8.3. 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.

### ***The ICCPR and other International norms:***

9.1. 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.

9.2. The Government of Bangladesh 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.

9.3. 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.

9.4. 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].

9.5. 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 recognizes 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 recognizes evolution of laws in this area.

#### ***Fair trial attributes of the ICT:***

10. 1 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:

- (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))
- (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.

### **Response regarding the first verdict against Abul Kalam Azad:**

11. On 21<sup>st</sup> of January the International Crimes Tribunal-2 issued its first verdict against absconded accused Abul Kalam Azad. On 4<sup>th</sup> of November 2012 charges including the charge of crime against humanity and genocide were framed, on 26<sup>th</sup> November 2012, the prosecution opened its case and examined the first witness. 22 witnesses were examined for the prosecution. Case was closed on 22<sup>nd</sup> December 2012. The defence couldn't produce any witness.

### **The circumstances of the verdict:**

12. It is true that the trial of accused Mr. Abul Kalam Azad started later than some of the pending cases in the same tribunal. But it is to be mentioned that this trial was held in absentia. The accused Abul Kalam Azad preferred to remain absconded and didn't represent himself in the tribunal through any counsel nor did he produce any witness for himself. In the other cases, in numerous occasions, the defense employs various tactics to delay the trial proceedings. They file unnecessary time petitions etc. to delay the trial. (For instances, in Delwar Hossain Sayedee case the tribunal had to disposed of as many as 200 petitions most of which the tribunal opines as vexatious and was a mere device to delay the trial). In one instance, the defense cross-examined a prosecution witness for more than 48 working days. In numerous occasions, the tribunal, in other cases, warned the defense sides not to waste time in unnecessary and irrelevant questioning or petitions. This was not case for Mr. Azad's case. That's why the tribunal could proceed with this case without any unnecessary delay or hindrance. There was no political pressure from the executive government to dispose of the case of Mr. Azad before the others. Mr. Azad's case came for verdict first as there was no dilatory tactics employed by the defense side. The 'state appointed defense counsel for Mr. Azad's case' performed his duty with utmost professionalism and care. Even the tribunal in its verdicts acknowledged and appreciated his role as defense counsel. The alleged conversation between the former chairman of the first tribunal and an expatriate Bangladeshi lawyer doesn't reveal anything of such political pressure that the government wishes the tribunal to dispose of Mr. Azad's case first. The so called informer perhaps referred some personal SKYPE conversation between the former chairman of ICT-1 and an expatriate lawyer which were hacked. The authenticity of those conversations couldn't be verified. Even if, for the sake of argument, the conversations were true, those indicate nothing to show that government had any desire or wishes to see Mr. Azad's case disposed of first than the others. The judges of the tribunal are all independent in their office. Government can not remove them or in other way twist their office. The members of the tribunal are the sitting judges of the Supreme Court of Bangladesh. They have certain tenure of office and constitutional safeguards regarding the terms of their office. So it is unconceivable that the tribunal would put any of its concern regarding the desire of the government. However, the government of Bangladesh would like to reiterate that it never pressured the tribunal regarding its function.

### **Response regarding trial in absentia.**

13. 1 At pre-trial stage, the Investigation Agency constituted under section 8(1) of the Act of 1973, through the Chief Prosecutor prayed for causing arrest of the accused Abul Kalam Azad @ Bachchu by filing an application on 25 March 2012, for effective and proper investigation [Rule 9(1) of the ROP]. The Tribunal directed to submit a progress report about the task of investigation and fixed 03 April 2012 for hearing and disposal of the application. On having the progress report as mentioned, the Tribunal, on hearing application issued warrant of arrest against the accused. But the enforcement agency of the Dhaka Metropolitan Police could not execute it as the accused Abul Kalam Azad @ Bachchu, on sensing the matter of issuance of warrant of arrest had absconded. However, finally, the Chief Prosecutor, on the basis of the report and documents submitted therewith by the Investigation Agency, after completion of investigation, submitted the 'Formal Charge' on 02.09.2012 under section 9(1) of the Act of 1973 before this Tribunal alleging that the accused as a potential member of the auxiliary force known as Razakar force in Faridpur, and also as an 'individual' had committed the offences of crimes against humanity, genocide including the offence of providing substantial contribution, assistance and moral support to the occupying forces.

13. 2 Horrific crimes in different places of Faridpur district were committed by the auxiliary forces members during the period of War of Liberation in 1971 and thereby the trial proceedings commenced. Thereafter, the Tribunal, under Rule 29(1) of the Rules of procedure, took cognizance of offences as mentioned in section 3(2) (a)(b)(g)(h) of the Act of 1973 and issued warrant of arrest for causing appearance of the accused as required under Rule 30 of the ROP. Dhaka Metropolitan Police (DMP) submitted the report before the Tribunal stating that the accused Abul Kalam Azad @ Bachchu could not be arrested as he has already absconded and he is learnt to have left the country instantly before the earlier warrant for arrest issued by the Tribunal. In this circumstance, the Tribunal, as required under Rule 31 of the ROP, ordered to publish a notice in two daily newspapers, one in Bangla and another in English asking the accused to appear before the Tribunal within ten (10) days from the date of publication of such notice. Accordingly, the notice was published on 25 October issue of 'The Daily Janakantha' (Bengali daily) and 'The Daily Star' (English daily). But despite publication of such notice the accused did not appear before the Tribunal. On 07<sup>th</sup> October, the Tribunal has observed in its order that there have been reasons to believe that the accused has absconded or has concealed himself so that he cannot be arrested and produced before the Tribunal and there is no immediate prospect for arresting him, and as such it ordered that the trial against the accused shall be held in his absence under section 10A(1) of the International Crimes (Tribunals) Act 1973 (as amended up-to-date) together with the Rule 32 of the ROP and accordingly it appointed Mr. Abdus Shukur Khan, Advocate, Bangladesh Supreme Court, as state defence counsel to defend the absconded accused who will have remuneration to be determined by the Tribunal [Section 10A(2) of the Act]. Tribunal also directed the prosecution to submit copy of formal charge and the documents which it intends to rely upon by 11 October for supplying the same to the appointed state defence counsel. On 11 October, the state defence counsel informed the Tribunal that he received the copy of formal charge, statement of witnesses and documents submitted therewith from the office of the Registrar. Thereafter, the Tribunal fixed 21 October for hearing the charge matter. After hearing both sides, the Tribunal framed eight (08) independent charges including the charge of crimes against humanity and genocide against the accused Abul Kalam Azad @ Bachchu by its order dated 04 November 2012.

13. 3 The Act of 1973 provides provision of holding trial in absentia, if the appearance of the accused could not be ensured for the reason of his hiding [Section 10A (1) of the Act]. In the international context, the issue of trials in absentia arose with the first modern international criminal tribunal, the International Military Tribunal (IMT) at Nuremberg, which was established to try war criminals operating under the European Axis Powers during World War II. Article 12 of the Charter of the International Military Tribunal allowed for trials in absentia whenever the Tribunal found it necessary to do so in the interest of justice. Famously, Martin Bormann, who served as the Nazi Party secretary, was indicted, tried, and sentenced to death, all in absentia, despite doubts as to whether he had even been informed of the proceedings. United Nations reversed its policy against trials in absentia with the Special Tribunal for Lebanon (STL or Lebanon Tribunal) in 2006. The STL allows trials "to commence and to end..... without an accused ever having showed up in court. The STL (Special Tribunal for Lebanon) expressly allows for trials in the absence of the accused in article 22 of the STL Statute, entitled "Trials in absentia." Article 22(1), lists the situations where the STL can hold trials in the accused absence. under section 22(1) (c) of the STL Statute, the accused may be tried in absentia when he refuses to appear after an initial appearance (absconded) or is otherwise unable to be found after all reasonable steps have been taken to inform him of the proceedings including media publication and communication with his known state of residence. Accused Abul Kalam Azad @ Bachchu could have due opportunity of being properly informed of the proceedings in advance if the warrant of arrest could have been executed. But by remaining absconded and leaving country the accused has willfully declined to exercise his right to be present for facing trial and as such under this

circumstance, trial in his absence would be permissible "in the interest of the proper administration of justice." In the instant case, at pre-trial stage, for the purpose of effective investigation the Tribunal ordered for his arrest by issuing warrant and as it appears from the execution report, the accused knowing it preferred to remain absconded, instead of facing proceedings and trial. The accused has not intended to take part in the trial, rather wished to escape prosecution. The jurisprudence of both the ICCPR and the ECHR confirms that a trial in absentia will not violate a person's right to be present when he has expressly declined to exercise this right. The circumstance and the time and way the accused had gone to hide and left country led the tribunal to draw a lawful inference that the accused has expressly declined to exercise his right to be present in trial. That is to say, despite all reasonable steps taken to inform him of the proceedings including media publication, the accused Abul Kalam Azad @ Bachchu seems to be unwilling to face the trial, as he remained absconded and fled away even from country. It is a patent indicium that the accused, by his conduct, has waived his right to be present, and as such on this score too trial in his absence is quite permissible. In light of the above it can be concluded that article 14(3) of the ICCPR was perfectly observed in Mr. Azad's trial. The tribunal in its verdict devoted a special paragraph to explain the circumstances on which trial was commenced and ended in his absence.

***Response regarding the qualification of the state appointed defence counsel for Mr. Azad:***

14. It is alleged that the state appointed defense lawyer was the co-chairman of khilkhet branch of the Bangladesh Awami league and an Awami league supporter and a strong supporter of crimes from the 1971 liberation war being tried before the tribunal. The report further alleges that the defence lawyer was unable to answer to question of the tribunal on points of law. It further claims that the defense lawyer made incorrect submissions in the case showing his lack of understanding and experience of international criminal law, and finally the defense lawyer's cross examinations of witness is said to have been too short and ineffective. All these above allegations are false and glaring example of distortion of facts. The state appointed lawyer, Mr. Abdus Shakur is not a member of Awami league. Indeed he is not a member of any political party. The state defense counsel Mr. Abdus Shakur never participated in any political activities. Whom does he support politically is unbeknown to anyone. He is a senior lawyer of the Supreme Court of Bangladesh having handy experiences of practicing criminal law. The tribunal itself appreciated his qualification and acknowledged his valuable submissions during the trial. He is a qualified lawyer of more than 20 years of experience. The tribunal itself appointed him as the state defence lawyer. The government of Bangladesh had no role in picking him as the state defence lawyer. In an interview with the journalists he claims that the family members or the relatives of the accused didn't cooperate with him regarding the trial nor did they helped him producing witness for the accused. So, the allegations made in the communication regarding the qualification of the state defense lawyer are not true.

***Response regarding the copy of the judgment:***

15.1 The alleged informer claims that neither the defense counsel nor the family of Mr. Azad received a copy of the full verdict and the tribunal allegedly stated that it was because Mr. Azad is in hiding. This is a clear misrepresentation of fact. The verdict is a public document. From the very first date of the pronouncement of the verdict, everyone has access to the verdict. Even all National Dailies in their online versions published the full text of the verdict in a special link/tab. The tribunal cannot send a copy of the verdict to the convicted accused as his whereabouts is unbeknown to the tribunal. There are specific provisions in the Rules of Procedures 20012 regarding the certified copies of the verdict (see rule 60(11) of the Rules of Procedure 2012, Tribunal 2.). It is stated in rule

60(11) that "Supply or cause supply a certified copy of the Judgment of the Tribunal, upon an application filed by the accused or prosecutor, prepared in offset whitepaper on payment of a fees of Taka Ten for each page of the copy, while a absconding accused shall not get the such a copy unless he surrenders before the Tribunal or he is arrested." It is mentionable that Mr Azad is still absconded . Mass people, in general, publicly welcomed the verdict as people sensed that justice was done long after 42 years of impunity. The recent mass movement in the shahbag square is an indication of how eagerly the people of Bangladesh awaiting justice.

15. 2 Accordingly, on 5<sup>th</sup> of February 2013, the tribunal passed a life imprisonment sentence against Abdul kader Molla. The trial of Abdul kader Molla was fair and impartial.

***Response regarding Capital Punishment/death sentence:***

16.1 The International Crimes Tribunal Act of 1973 provides provisions for appeal for both the prosecution and the defence. Appeal lies to the Appellate Division of the Supreme Court of Bangladesh, the apex constitutional court of the country. The Supreme Court of Bangladesh is absolutely independent of any kind of interference. Mr. Azad may prefer an appeal to the Appellate Division of the Supreme Court of Bangladesh. As Mr. Azad is fugitive now, his death sentence cannot be executed. If Mr. Azad surrenders then he may prefer a leave to appeal. The Appellate Division may vary or differ or reverse the verdict passed by the Tribunal. So the question of commuting the verdict of Mr. Azad doesn't arise at all.

The socio-politico-economic condition is different in different region. Capital punishment is quite in practice in many countries of the world in almost all regions including in North America. In those countries capital punishment continues to be a legitimate punishment for the most heinous and serious crimes under the national legal regime. Even in Bangladesh, through numerous verdict of the apex court of the country, it has been fairly established that death sentences are permissible for *the rarest of the rare* crimes. Number of serious crimes other than war crimes are punishable by death sentence in Bangladesh under domestic laws. Crimes that are so brutal, so heinous and so shocking to the people in general that no other punishment equals the gravity of it shall be punishable by death sentence.

16. 2 The International Crimes Tribunal Act of 1973 provides that,

***section 20 (1)*** the judgment of a tribunal as to the guilt or the innocence of any accused person shall give the reason on which it is based: provided that each member of the tribunal shall be competent to deliver a judgment of his own.

2) Upon conviction of an accused person, the tribunal shall award sentence of death or such other punishment ***PROPORTIONATE TO THE GRAVITY OF THE CRIME*** as appears to the tribunal to be just and proper.

16.3 Thus it is the mandate of the law that the punishment be proportionate to the gravity of the offence. The tribunal, being an impartial judicial entity, after examining evidences on record and weighing the gravity of the offences awarded death sentence and life imprisonment for Mr. Azad and Kader Molla respectively. However, the Appellate

Division of the Supreme Court of Bangladesh may reverse or alter or vary the verdict and the sentence. The government of Bangladesh has nothing to do with it.

### **Concluding remarks**

The judiciary in Bangladesh is independent and offers the victims avenue for seeking appropriate remedy without any influence from the Government. Moreover, public interest lawyers, by constantly holding the Government accountable for their actions or inactions, resist the infringement of citizen's fundamental rights as guaranteed by the law and the Constitution. The legal actions under the ICT-BD is being undertaken in this particular case mentioned, proved to be fair and just.

The Permanent Mission of the Government of Bangladesh reiterates its full support and cooperation to the human rights special procedures, and expresses the hope that taking into account the information shared and clarification given above on the matter, the case of the communication under reference would be considered clarified.

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