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PROCEDURES SPECIALES DU
CONSEIL DES DROITS DE L'HOMME

Mandates of the Working Group on Enforced or Involuntary Disappearances and the Special Rapporteur on the independence of judges and lawyers

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Excellency,

We have the honour to address you in our capacity as Chair-Rapporteur of the Working Group on Enforced or Involuntary Disappearances and Special Rapporteur on the independence of judges and lawyers pursuant to Human Rights Council resolutions 16/16 and 17/2.

In this connection, we would like to draw the attention of your Excellency's Government to information we have received regarding **serious 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**. In particular, we would like to draw the attention of your Excellency's Government to information we have received regarding unfair trial and lack of due process allegations in cases being heard by the Tribunal against the eight following defendants (hereinafter the "Defendants"): Mr. **Delwar Hossain Sayedee**; Mr. **Salauddin Quader Chowdhury**; Mr. **Motiur Rahman Nizami**; Mr. **Ghulam Azam**; Mr. **Muhammad Kamaruzzaman**; Mr. **Ali Ahsan Mohammad Mujahid**; Mr. **Abdul Kader Molla**; and Mr. **Mir Quasem Ali**.

It is recalled that on 3 October 2012 an Urgent Appeal was sent to your Excellency's government regarding allegations of unfair trial and lack of due process in the Tribunal proceedings against the Defendants and one other person. This communication noted that the UN Working Group on Arbitrary Detention considered in its opinion No. 66/2011 (Bangladesh) that the deprivation of liberty of the Defendants, among others, is arbitrary, and constitutes a breach of article 9 of the Universal Declaration on Human Rights and article 9 of the International Covenant on Civil and Political Rights (ICCPR) on the ground of the gravity of total or partial non-observance of the international norms relating to the right to a fair trial. We await the reply of your Excellency's Government to this Urgent Appeal.

According to the information received, and further to the allegations described in the 3 October 2012 Urgent Appeal:

It is reported that on 16 October 2012 witnesses for the prosecution in Chief Prosecutor v. Kamaruzzaman were forcibly collected from their homes and unlawfully detained for several hours.

It is reported that actual and potential witnesses for the defence in Chief Prosecutor v. Sayadee have been harassed through visits by secret service officers, local Chattro and Jubo leagues, being called to police stations and being threatened and warned not to provide evidence for the defence, causing such witnesses to go into hiding. Further, it is alleged that the defendant in Chief Prosecutor v. Sayadee was prohibited from testifying in his own defence at trial.

It is reported that the Tribunal has arbitrarily discriminated against the defence in Chief Prosecutor v. Sayadee by limiting the defence to six weeks for evidentiary hearings when the prosecution was permitted nine months, and limiting the length of closing written submissions by the defence to ten pages without grounds.

It is reported that on 6 November 2012 the Tribunal threatened the defence counsels in Chief Prosecutor v. Sayadee 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 by 22 November 2012 why such proceedings should be dropped. The Tribunal also barred defence counsel Mr. Tajul Islam from appearing before the Tribunal before 22 November.

It is reported that in all cases against the Defendants, the Tribunal has refused to allow privileged communications with the Defendants, jeopardizing their right to a free and fair trial.

It is alleged that in Chief Prosecutor v. Sayedee and Chief Prosecutor v. Azam, the defence has been given only three weeks, reportedly insufficient time to prepare their opening statement and name their defendant witnesses, due in part to insufficient time to locate and interview witnesses, as well as provide for their travel and accommodations to attend the trial.

It is reported that in Chief Prosecutor v. Sayedee and in Chief Prosecutor v. Molla the Tribunal has refused to permit defence counsel to cross-examine prosecution witnesses on evidence, including exhibits, in contravention of the Tribunal rules of procedure.

In the cases of Chief Prosecutor v. Sayedee, Chief Prosecutor v. Azam and Chief Prosecutor v. Molla the number of defence witnesses has been limited to twenty, twelve and six respectively without legal grounds.

In Chief Prosecutor v. Azam, the Tribunal refused to issue summons for two defence witnesses without legal grounds.

It is reported that in the case of Chief Prosecutor v. Sayedee the Tribunal refused without cause or explanation a defence application to admit media reporting as evidence in accordance with Sections 19(1) and 19(2) of the ICTA, despite extending this discretion to the prosecution.

It is alleged that on 5 November 2012 defence witness Mr. Shukhoronjon Bali was abducted at a security checkpoint from within the Tribunal premises by plain-clothed security personnel allegedly from the 'Detective Branch' of the Police and who claimed to have instructions to take Mr. Bali to their 'head office' for interrogation. Despite protests from the defence counsel and in full view of uniformed police who did nothing to intervene, Mr. Bali was forced into a white pick-up marked with 'Police' on the sides, and was then driven away. Immediately thereafter, the Tribunal allegedly refused a defence counsel motion to requesting the issuance of a direction to the law enforcement agencies to produce Mr. Bali, and the Tribunal refused to authorize an attempt by the defence counsel to file a "general diary" to record the incident as required by the police. The fate and whereabouts of Mr. Bali remain unknown.

We would like to express serious concern about the independence and impartiality of both judges and prosecutorial services of the Bangladesh International Crimes Tribunal. We also wish to express our grave concern that the arrest, detention and trial of the Defendants do not comply with international human rights law provisions regarding fair trial and due process. We further express serious concern regarding the unexplained disappearance of defence witness Shukhoronjon Bali. Finally, we are concerned about the ability of the defence teams to discharge their professional functions adequately and following the international principle of equality of arms.

While we do not wish to prejudge the accuracy of these allegations, we wish to draw your Excellency's attention to article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) that the Government of Bangladesh acceded to on 6 September 2000, which states: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." Principle 5 of the Bangalore Principles of Judicial Conduct, adopted in The Hague in 2002 (E/CN.4/2003/65), further states: "Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office."

In addition, principle 6 of the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, states: "The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected."

Regarding allegations of lack of impartiality of the judges of the Bangladesh International Crimes Tribunal, including the allegedly discriminatory use of procedural decisions against the Defendants, we would like to refer your Excellency's Government to the Bangalore Principles of Judicial Conduct, adopted in The Hague in 2002 (E/CN.4/2003/65), and in particular the following principles regarding the impartiality and integrity of judges:

- Principle 2.1, which states: "A judge shall perform his or her judicial duties without favour, bias or prejudice.";

- Principle 2.2, which states: "A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary."; and

- Principle 3.1, which states: "A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer."

With reference to allegations of lack of respect for the principle of equality of arms for the defence teams representing defendants before the Bangladesh International Crimes Tribunal, we would like to refer your Excellency's Government to article 14(3) of the ICCPR, which states: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; ... (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him." According to the Human Rights Committee, "[T]he right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant." (General Comment No. 32, paragraph 13).

Concerning the reported atmosphere of hostility and intimidation in which the defence teams have to operate, including the threat of holding defence counsel in contempt of court, we would like to refer your Excellency's Government to the Basic Principles on the Role of Lawyers, adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Havana, Cuba, from 27 August to 7 September 1990, and in particular principle 16, which states: "Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics."; and principle 17, which states: "Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded

by the authorities.”; and principle 18, which states: “Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.”

Regarding the lack of privileged communication among the defence counsel and the Defendants, we would like to again refer your Excellency's Government to the Basic Principles on the Role of Lawyers, and in particular principle 22, which states: “Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.” We further refer to principle 8, which states: “All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.”

In relation to the allegations according to which the fate and whereabouts of Mr. Shukhoronjon Bali are unknown, we would like to bring to your Excellency's Government's attention the United Nations Declaration on the Protection of All Persons from Enforced Disappearance which sets out necessary protection by the State, and in particular:

- article 2 (no State shall practice, permit or tolerate enforced disappearances);
- article 3 (each State shall take effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance in any territory under its jurisdiction);
- article 5 (in addition to such criminal penalties as are applicable, enforced disappearances render their perpetrators and the State or State authorities which organize, acquiesce in or tolerate such disappearances liable under civil law, without prejudice to the international responsibility of the State concerned in accordance with the principles of international law);
- article 6 (no order or instruction of any public authority, civilian, military or other, may be invoked to justify an enforced disappearance);
- article 10 (right to access of competent national authorities to all places of detention; to be held in an officially recognized place of detention, in conformity with national law and to be brought before a judicial authority promptly after detention; to accurate information on the detention of persons and their place of detention being made available to their family, counsel or other persons with a legitimate interest); and

We therefore urge your Excellency's Government to take all necessary measures to guarantee that the rights and freedoms of the above mentioned persons are respected.

In view of the urgency of the matter, we would appreciate a response on the initial steps taken by your Excellency's Government to investigate the disappearance of defence

witness Mr. Shukhoronjon Bali and to ensure his safety, and what measures have been taken to safeguard the rights to a fair trial and due process of the Defendants, in compliance with the above-mentioned international instruments.

Moreover, it is our responsibility under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention. Since we are expected to report on these cases to the Human Rights Council, we would be grateful for your cooperation and your observations on the following matters, when relevant to the case under consideration:

1. Are the facts alleged in the above summary of the case accurate?
2. Please provide detailed information on the judicial proceedings initiated against the Defendants, and indicate how these proceedings, in light of the allegations described above, comply with the requirements and guarantees of a fair trial and due process as enshrined in articles 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 Lawyers.
3. Please provide detailed information on the measures taken to ensure that the defence teams can perform their functions without intimidation, hindrance, harassment or improper interference, and with equal access and equality of arms, as provided for, among others, in article 14 of the ICCPR and the Basic Principles on the Role of Lawyers.
4. Please provide information on the fate and whereabouts of Mr. Shukhoronjon Bali. If his fate and whereabouts are unknown, please provide the details on any investigation or other inquiries which may have been carried out. If no inquiries have taken place, or if they have been inconclusive, please explain why.

We undertake to ensure that your Excellency's Government's response to each of these questions is accurately reflected in the report we will submit to the Human Rights Council for its consideration.

We would like to bring to the attention of your Excellency's Government that should the sources submit the allegations concerning Mr. Shukhoronjon Bali as a case to the Working Group on Enforced or Involuntary Disappearances, it will be considered by the Working Group according to its methods of work, in which case your Excellency's Government will be informed by separate correspondence.

While waiting for your response, we urge your Excellency's Government to take all necessary measures to guarantee that the rights and freedoms of the above mentioned persons are respected and, in the event that your investigations support or suggest the above allegations to be correct, the accountability of any person responsible of the alleged violations should be ensured. We also request that your Excellency's Government adopt effective measures to prevent the recurrence of these acts.

Please accept, Excellency, the assurances of our highest consideration.

Olivier de Frouville
Chair-Rapporteur of the Working Group on Enforced or Involuntary
Disappearances

Gabriela Knaul
Special Rapporteur on the independence of judges and lawyers