

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on the independence of judges and lawyers; and the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the situation of human rights defenders; Special Rapporteur on the independence of judges and lawyers; and Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence pursuant to Human Rights Council resolutions 25/2, 25/18, 26/7, and 27/3.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **the criminal prosecution on charges of contempt of court of the journalist, Mr. David Bergman, and a group of individuals in relation to their legitimate exercise of their right to freedom of opinion and expression.**

Mr. David Bergman is a British national, based in Bangladesh. He is an investigative journalist editor for the national newspaper New Age, and blogger. He is known for his human rights work, namely his reporting on war crimes committed during the Bangladesh Liberation War (1971) and for covering the proceedings of the International Crimes Tribunal (Bangladesh).

Mr Zafrullah Chowdhury is a Bangladeshi public health activist and founder of Gonoshasthaya Kendra, a rural healthcare organization.

According to the information received:

Mr. David Bergman was charged for contempt of court by the International Crimes Tribunal for the publication in 2011 and 2013 in his blog (<http://bangladeshwarcrimes.blogspot.com>) of three articles critical of the International Crimes Tribunal in Bangladesh, which is trying war crimes relating to the 1971 Liberation war. In these articles, Mr. Bergman presented and commented, citing several sources and researches, conflicting information that

challenge the ‘death figure’ of the 1971 Liberation War. He also made observations and criticisms relative to the procedures of the Tribunal alleging these did not reflect international standards, especially regarding trials *in absentia* and alleged shortcomings in due process guarantees.

On 2 December 2014, Mr. David Bergman was found guilty of contempt of court by the International Crimes Tribunal-2 (ICT-2) for “making the offending scandalous comments using derogatory and unfair ‘words’ and ‘phrases’ in second and third article that tended to attack and lowering the authority and majesty of the Tribunal” and sentenced to a fine of Taka five thousand [56 USD] under section 11(4) of the International Crimes (Tribunals) Act of 1973, or imprisonment for a period of seven days if he does not comply.

While the Tribunal indicated that it welcomed post-verdict criticism and acknowledged that “freedom of expression is one of the hallmarks of a democratic society” and a right guaranteed by the Constitution, it indicated that the Tribunal “cannot allow an individual or a journalist making such criticism on subjudice matter intending to derogate the institutional image and authority of the Tribunal”. The Tribunal indicated as part of the justification of the decision “to protect its image and authority in the mind of public”. The Tribunal found that the journalist intended “to lower down and demean Tribunal’s authority [...] that finally tends to shake the public confidence upon the judicial machinery of the Tribunal and its governing Statute”, and “to generate controversy and confusion on historically settled issue in the mind of public”.

Subsequently, on 20 December 2014, 49 individuals signed a letter, later made public through the media, expressing concern about the conviction of Mr. Bergman for the offence of contempt of court, as a restriction to his rights, and challenging the transparency of the judicial proceedings before the Tribunal and the justification for his sentence. On 14 January 2015, the International Crimes Tribunal reportedly ordered the signatories to explain their statement before the court by 27 January 2015. Over the following two months, 26 of the 49 signatories have tendered in writing their “unconditional apology” to the Tribunal. On 18 March 2015, these apologies were accepted by the Tribunal, which considered that these “upgraded the majesty of the Tribunal”, and the 26 signatories were exonerated from further proceedings.

The remaining 23 signatories, who had expressed their “regret” for any inadvertent impression the Tribunal may have received about its “authority and institutional dignity”, reportedly failed to satisfy the Tribunal, which stated that their explanation lacked “true remorse and repentance” and sought, on the contrary, to defend their statement by citing the rights and freedoms enshrined in the Constitution of Bangladesh. On 1 April 2015, the Tribunal initiated contempt proceedings against the remaining 23 signatories.

On 10 June 2015, the Tribunal exonerated 22 of the signatories, considering this was their first offence of contempt, but sentenced Mr Zafrullah Chowdhury to a fine of Taka five thousand [56 USD], or imprisonment for a period of a month if he does not comply.

It is reported that there are no provisions in the International Crime Tribunal Act allowing to appeal the judgment and/or the sentence of the ICT in cases of contempt of court. At a hearing before the court of appeals on 29 April 2015, those individuals charged with contempt of court filed a writ of petition with the High Court division of the Supreme Court of Bangladesh challenging the constitutionality of the lack of provision of appeal. In a decision of 30 April 2015, the High Court reportedly dismissed the petition on the ground that the ICT Act is a protected law under Article 47 of the Constitution. The Court indicated however that in such cases an individual can avail the facility provided for under Article 104 of the Constitution to make an Application for Complete Justice.

It is reported that on 16 June 2015, Mr Chowdhury made an Application for Complete Justice at the Appellate Division of the Supreme Court of Bangladesh against the conviction order of the ICT. The hearing on Mr Chowdhury's Application for Complete Justice at the Appellate Division was due to take place on 13 July 2015, but was adjourned to 26 July.

On 6 July 2015, another complaint was allegedly filed against Mr Chowdhury for contempt of court based on remarks he reportedly made to the media on 10 June 2015.

While we do not wish to prejudge the accuracy of these allegations, we express concern at the decision of the International Crimes Tribunal to open criminal proceedings against and sentence Mr. David Bergman for the publication in his blog of articles critical of the functioning of the International Crimes Tribunal. While we welcome the exoneration of 22 people on contempt of court charges brought by the ICT for a statement made in support of Mr. David Bergman, we express concern at the sentence of Mr Zafrullah Chowdhury on the same charges. We express further concern at the allegations that indicate that the judgments of the Tribunal in such cases on contempt cannot be appealed.

We express concern that these judicial proceedings impose undue restrictions on the right to freedom of expression and opinion of Mr. Bergman and Mr Chowdhury and could result in producing a deterrent effect on the legitimate exercise of the right to freedom of expression of others in Bangladesh.

In particular, we wish to recall that judicial proceedings under contempt of court should not serve, in practice, to stifle the right to freedom of expression. However unpleasant or inconvenient, the mere fact that forms of expression are considered to be insulting, including to the judiciary, is not sufficient to justify the imposition of criminal penalties. Any restriction to the right to freedom of expression should be consistent with

international human rights norms and standards, including in particular article 19(3) of the International Covenant on Civil and Political Rights (ICCPR), acceded to by Bangladesh on 6 September 2000, and must strictly conform to the necessity and proportionality tests.

We acknowledge that the ICT should be a very important means to tackle impunity for the mass atrocities committed in 1971 and to provide redress to the victims who have had a long and difficult road to justice. Judicial proceedings can contribute to the establishment of facts and the truth about serious human rights violations, along with other means, including truth-telling initiatives, historic, scientific or academic research, non-judicial investigations, including journalistic research. In this sense, restrictions to the publication of articles that promote debate and disseminate information and research on the serious violations committed during the 1971 Liberation War, including in relation to the ‘death figures’, could hinder the right to access information and deter initiatives, from academics, historians or journalists, among others, that aim at the promotion of the truth about past atrocities.

In this context, please refer to the **Reference to international law annex** attached to this letter, which cites international human rights instruments and standards relevant to these allegations.

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. We would therefore be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide detailed information on the judicial proceedings against Mr. Bergman and the group of 23 individuals, including their access to appeal procedures for contempt of court sentence, and explain how these measures are compatible with the international human rights norms and standards, in particular the right to freedom of opinion and expression and the right to have one’s sentence reviewed.
3. Please provide information on truth-seeking initiatives adopted in Bangladesh in relation to the serious human rights and humanitarian law violations committed during the 1971 armed conflict, as well as further information on measures adopted to promote debate, academic research and investigations (including non-judicial) in relation to these events.

We would appreciate receiving a response within 60 days.

While awaiting a reply, and without prejudging the accuracy of these allegations, we urge that all necessary interim measures are taken to guarantee the right of freedom of opinion and expression of Mr. David Bergman and the other concerned individuals, in accordance with international human rights obligations of the State of Bangladesh.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

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

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression

Michel Forst
Special Rapporteur on the situation of human rights defenders

Gabriela Knaul
Special Rapporteur on the independence of judges and lawyers

Pablo De Greiff
Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-
recurrence

Annex

Reference to international human rights law

In connection with the above alleged facts and concerns, we would like to draw the attention of your Excellency's Government to the relevant international norms and standards that are applicable to the issues brought forth by the situation described above.

We would like to refer to articles 14 and 19 of the International Covenant on Civil and Political Rights (ICCPR), acceded to by Bangladesh on 6 September 2000. It seems that the judicial proceedings for contempt of court initiated before the International Crimes Tribunal are in contravention of the right to a fair trial, in particular the right to have one's conviction and sentenced reviewed before a higher tribunal, as enshrined, *inter alia*, in article 14 of the ICCPR. Moreover, the judicial proceedings for contempt of court also seem to contravene article 19 of the ICCPR, which provides for the right to freedom of opinion and expression that includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his/her choice.

We would also like to refer to the Human Rights Committee's General Comment 34 (CCPR/C/GC/34) which provides that Article 19(3) of the ICCPR expressly states that "the exercise of the right to freedom of expression carries with it special duties and responsibilities. For this reason two limitative areas of restrictions on the right are permitted, which may relate either to respect of the rights or reputations of others or to the protection of national security or of public order (*ordre public*) or of public health or morals. However, when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. The Committee recalls that the relation between right and restriction and between norm and exception must not be reversed". It adds that Article 19(3) of the ICCPR lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: "the restrictions must be "provided by law"; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality. Restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated".

In relation to contempt of court claims, the Human Rights Committee further indicates that "On the basis of maintenance of public order (*ordre public*) it may, for instance, be permissible in certain circumstances to regulate speech-making in a particular public place. Contempt of court proceedings relating to forms of expression may be tested against the public order (*ordre public*) ground. In order to comply with paragraph 3 [of article 19 of the ICCPR], such proceedings and the penalty imposed must be shown to be warranted in the exercise of a court's power to maintain orderly proceedings" (CCPR/C/GC/34, para 31). The Committee has also noted that "in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is

particularly high. Thus, the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant. Moreover, all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition. Accordingly, the Committee expresses concern regarding laws on such matters as, lese majesty, *desacato*, disrespect for authority, disrespect for flags and symbols, defamation of the head of state and the protection of the honour of public officials, and laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned. States parties should not prohibit criticism of institutions, such as the army or the administration" (CCPR/C/GC/34, para 38).

We would further like to refer to Human Rights Council resolution 21/12 on safety of journalists (A/HRC/RES/21/12) adopted on 27 September 2012, which calls upon "States to promote a safe and enabling environment for journalists to perform their work independently and without undue interference" (paragraph 8).

Further, we would like to refer your Excellency's Government to the fundamental principles set forth in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, also known as the UN Declaration on Human Rights Defenders. In particular, we would like to refer to articles 1 and 2 of the Declaration which state that everyone has the right to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels and that each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms.

Moreover, we would like to bring to the attention of your Excellency's Government the following provisions of the UN Declaration on Human Rights Defenders: article 6 point a), which provides for the right to know, seek, obtain, receive and hold information about all human rights and fundamental freedoms; and article 6 points b) and c), which provides for the right to freely publish, impart or disseminate information and knowledge on all human rights and fundamental freedoms, and to study, discuss and hold opinions on the observance of these rights;

We further refer to the report presented in 2013 to the Human Rights Council by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, which specifies that the right to truth, which is enshrined in a number of international instruments, "entitles the victim, his or her relatives and the public at large to seek and obtain all relevant information concerning the commission of the alleged violation, the fate and whereabouts of the victims and, where appropriate, the process by which the alleged violation was officially authorized. With this legal framework in mind, in the aftermath of repression or conflict, the right to truth should be understood to require States to establish institutions, mechanisms and procedures that are enabled to lead to the revelation of the truth, which is seen as a process to seek information and facts

about what has actually taken place, to contribute to the fight against impunity, to the reinstatement of the rule of law, and ultimately to reconciliation”. (A/HRC/24/4)

Moreover, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression indicated in his report presented in 2013 to the General Assembly, recalls that “[t]he right to seek and receive information comprises the right of individuals to access general information and, more particularly, information of public interest that can contribute to public debate”. It adds that “the realization of the right to truth, at both the individual and the collective levels, requires access to and, often, also the dissemination of information on human rights violations”. While the Special Rapporteur acknowledges that the right to access information can in exceptional circumstances be subject to limitations so as to protect the rights of others and the effectiveness of some State initiatives, he recalls that “such limitations cannot override the public interest to know and to be informed” (A/68/362).