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The International Crimes Tribunal in Bangladesh

Critical Appraisal of Legal Framework
and Jurisprudence



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Part I: Introduction and outline of the investigation

1 Introduction and statement of the problem

Bangladesh is situated in South Asia and shares borders with Myanmar and India. The country ranks among the 10 most densely populated countries in the world: 159.1 million people¹ live within 144,000 km². The population in rural areas constitutes 66.5 % of the total.² Approximately 89.1 % of Bangladeshis are Muslims but there are several other religious minorities in the country, of which Hindus constitute the biggest group at approximately 10 %.³

The country came into existence after the Liberation War in 1971 when Bangladesh, at that time East Pakistan, seceded from West Pakistan. After independence, the perpetrators of the atrocities committed during the nine-month Liberation War were subjected to few if any legal procedures. International politics tolerated the impunity of the main perpetrators, whereas the domestic political situation after 1974 impeded any process of transitional justice. It was not until 2010, with the establishment of the International Crimes Tribunal (ICT), that the process of ending the impunity started.

International criminal tribunals have gained importance over the last few decades. Various tribunals and the underlying conflicts that they address have been discussed around the world and have attracted public attention. The case of Bangladesh has been absent from most of these discussions. The Tribunal in Bangladesh has hit the headlines primarily because of the violent protests in answer to the verdicts and the criticism from several human rights organisations. Unfortunately, detailed information on the Tribunal's work is poorly disseminated outside of the country.

The decision to set up the ICT was taken in 2009 after the Awami League came to power. The establishment of the Tribunal was part of the Awami League's election manifesto and was of great interest to the party since it was one of the main targets of Pakistani repression in the war of 1971. During the process of establishment, Bangladesh explicitly decided against the involvement of international stakeholders and so rejected the trials being conducted through an internationalised tribunal.

The legal framework of the ICT, the International Crimes (Tribunals) Act, 1973 (ICT Act), was drafted and enacted as domestic law in 1973 and was extensively amended in 2009, 2012 and 2013. In 2010, the ICT passed the International Crimes

- 1 *The World Bank*, data from 2014, <http://data.worldbank.org/country/bangladesh>, accessed 20 March 2016.
- 2 *The World Bank*, data from 2014, <http://data.un.org/CountryProfile.aspx?crName=Bangladesh#Social>, accessed 20 March 2016.
- 3 The World Fact Book of the Central Intelligence Agency of the USA, data from 2013, <https://www.cia.gov/library/publications/the-world-factbook/geos/bg.html>, accessed 22 December 2016.

Tribunal Rules of Procedure (RoP), as provided for in Section 22 of the Act. Hence, the ICT is a domestic court that applies domestic law for the prosecution of perpetrators of international crimes. At the same time, the general domestic criminal procedure regulations, the Criminal Procedure Code and the Evidence Act are declared inapplicable under the Act.

The Tribunal finally took up its work in 2011. To date, numerous judgments have been delivered, among them several death and life imprisonment sentences. The accused are Bangladeshi nationals who cooperated with the Pakistani military during the Liberation War. The ICT Act enjoys a special status under the Constitution of Bangladesh, which was amended for this purpose in 1973. The amendment repeals certain constitutional safeguards for those accused of international crimes. Article 47(3) of the Constitution determines that those charged with genocide, crimes against humanity or war crimes as well as other crimes under international law cannot challenge the relevant laws as being void or unlawful on the grounds that they are inconsistent with the Constitution. Beyond that, Article 47A denies those accused of international crimes several fundamental rights as guaranteed under the Constitution. Those rights include the right to a speedy and public trial by an independent and impartial court, the right to the protection of the law and the ability to enforce fundamental rights safeguarded under the Constitution.

Yet, at the same time, Bangladesh has acceded to several international treaties which stipulate important rights of the accused during criminal trials and also define international crimes. Although, under the domestic law of Bangladesh, international treaties cannot be applied directly but require implementation at the national level, this cannot be utilised as an excuse for non-compliance with international law.

As a domestic accountability mechanism, the ICT is also fraught with practical country-specific challenges. The judges appointed to the Tribunal are not experienced in dealing with cases of international criminal law, an area of law with significant challenges because of the complexity of the cases. Beyond that, the lack of financial resources engenders a poor infrastructure that certainly influences many aspects of the trials. Undoubtedly, the long lapse of time between the Liberation War and the initiation of the trials constitutes one of the major hurdles and has had a huge impact on the evidence. Many victims, witnesses and perpetrators have passed away since the war or are very old, and the journey from the rural areas to Dhaka to give testimony is a heavy burden.

The politically-tense environment in the country and the divided society also encumber the Tribunal's work. The trials led to mass protests in 2013, provoked by the verdict against Abdul Quader Molla who was sentenced to life imprisonment.⁴ The

4 ICT 2, *The Chief Prosecutor v. Molla*, case no. 02/2012, Judgment, 5 February 2013.

participants of the so-called Shahbag protests demanded capital punishment for the convict. The protests escalated when protesters were confronted by a countermovement led by Islamic groups. Several other verdicts have led to countrywide 'hartals' (general strikes), called out by opposition parties in protest against the convictions of their party leaders.

The political situation and the fact that the Liberation War as well as the trials before the ICT continue to be a very sensitive and politically-loaded issue also have a strong impact on the research environment. While one of the essential difficulties consists in accessing documents, and the Tribunal, challenges also arise from the restrictions on freedom of speech imposed on any criticism of the Tribunal's work. This has inevitably created a tense research environment that has impeded an open exchange of ideas on the issue. Since the ICT has been criticised strongly by foreign organisations, foreigners encounter particular distrust from within the Tribunal. Despite these difficulties, it must be highlighted that Bangladeshis are extremely friendly, open and extraordinarily hospitable, especially towards foreigners. None of the tensions surrounding the professional environment have influenced the incredible personal warmth with which I was received in all quarters during my stay at the Tribunal. Many Bangladeshis were also rather pleased by the idea of foreigners showing an interest in their ICT.

2 Objectives of the study and considered jurisprudence

The overall objective of the study is to examine the compliance of the ICT with rule of law standards. To this end, the applicable legal sources as well as jurisprudence are scrutinised by means of standards stipulated by international treaties in order to show the extent to which the Tribunal is able to deliver justice in compliance with these recognised human rights standards. Beyond that, the study aims to examine the interpretation of the internationally-recognised crimes by this domestic accountability mechanism despite restrictions in the applicability of international law. The study also evaluates the Tribunal's contribution to the process of transitional justice in Bangladesh.

For the analysis of jurisprudence, all cases that were completed with the delivery of a judgment⁵ in April 2015 have been considered. In total, 17 judgments were available at that point. Appeal judgments have been taken into account in those cases in which they were published until end of October 2015.⁶

- 5 With exception of the case ICT 2, *The Chief Prosecutor v. A. K. M. Yusuf*, case no. 02/2013, in which the accused died before the delivery of the judgment. This case was considered insofar as orders were available and relevant.
- 6 It has to be noted that in some cases the time span between the announcement of the verdict by the Appellate Division and the publication of the appeal judgment is extremely

Although judgments and charge framing orders are now publicly available, this is not the case with interlocutory appeals and orders. The latter are thus not available through official channels and could only be considered in some cases. The orders in contempt proceedings have been examined in cases of specific interest.

3 Outline of the investigation

The study is divided into six parts. Part I introduces the subject as well as the objectives of the study and outlines the framework of the investigation. Part II illustrates the historical background and provides an understanding of the circumstances that led to the Liberation War in 1971. Beyond that, the first attempts to deal with the war crimes are outlined, and the circumstances that finally favoured the establishment of the Tribunal more than 40 years after the war are highlighted.

Part III scrutinises the different accountability mechanisms applied in post-conflict situations from the angle of their possible implementation in Bangladesh. The decision-making process and the considerations that finally led to the choice of a domestic tribunal are outlined. The focus lies on the consequences for the structure and the applicable legal sources that arise from the domestic character of the ICT.

Part IV analyses the legal framework of the ICT as well as its jurisprudence and the findings of the Appellate Division by means of international standards. In order to determine the criteria of examination, the international obligations assumed by Bangladesh are outlined. This part provides a detailed analysis of the application of the material and procedural law by the Tribunal and identifies discrepancies between the domestic law and its interpretation on the one hand and the standards set by international criminal law on the other. The scrutiny focuses on the application of the elements of crimes as well as the modes of liability. With regard to procedural law, the study emphasises the procedural rights of the accused. At the same time, the application of the law in practice also sheds light on the extent to which the country complies with the obligations it assumed under several international instruments.

Part V and Part VI conclude the study. Part V locates the ICT in the context of transitional justice and examines the extent to which this accountability mechanism is able to contribute to the process of transitional justice in Bangladesh. It also sets out whether, and the extent to which, the Tribunal contributes to the reconciliation process. Part VI of the dissertation summarises the research results and discusses prospects for the future of the ICT.

long. For that reason, the appeal judgment in the case of *Sayeedi* could not be considered for this study. While the Appellate Division announced the verdict in September 2014, the judgment was only published in December 2015.