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## **INTERNATIONAL CRIMES TRIBUNAL IN BANGLADESH**

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## A. Introduction

### 1. Background

1 Within the spectrum of international criminal adjudication, little is known about the South Asian endeavour made by Bangladesh to end impunity. The post-colonial history of Bangladesh provides the context for the formation of its International Crimes Tribunal Bangladesh ('ICTB'), with its permanent seat in Dhaka. After the dissolution of the British Empire in South Asia, India was divided into the Hindu-majority India and the Muslim-majority Pakistan in 1947. Comprising West Pakistan and East Pakistan, the Muslim-majority nation suffered the backlash of the ethnic and linguistic differences of its two parts. Stemming from claims of inadequate political representation of Eastern Pakistan, the outrage spiralled downwards into the violence that led to the 1971 war of national liberation of East Pakistan and the birth of the State of Bangladesh.

2 The nine-month long Bangladesh War of Independence saw a military crackdown by West Pakistan forces, against the rising crisis in the east, which they codenamed Operation Searchlight. This led to a civil war, persecution and mass killings, causing a staggering number of deaths, displacements and acts of sexual violence (Sen, 2012, 34).

### 2. Establishment of the Tribunal

3 In the aftermath of the creation of the new State of Bangladesh in 1971, India and Pakistan entered into an agreement in 1972 in Simla. This pact sought to bring about peace and stability to the subcontinent, marred by the conflict of 1971. Although Bangladesh welcomed the agreement, the absence of recognition prevented its participation in tripartite talks. In 1973, India and Bangladesh, in an effort to move past the deadlock created by the lack of recognition, issued a declaration in which they proposed to resolve the problem of detained and stranded persons on humanitarian grounds; except for the Pakistani prisoners of war, who might be required by Bangladesh for trial, a simultaneous repatriation of all others was planned. Following this declaration, several talks between India and Pakistan and India and Bangladesh took place, which resulted in the agreement of 1973 between India and Pakistan, with the concurrence of Bangladesh. A three-way repatriation commenced on September 19, 1973, in pursuance of the 1973 agreement (Raghavan, 2013, 269). Despite the fragility of the new State, there was an earnest effort on behalf of Bangladesh to hold the perpetrators of the war of independence accountable, evidenced by the passing of the International Crimes Tribunal Act ('ICTB Act') in 1973.

4 However, in February 1974 Bangladesh was recognized, thereby enabling Bangladesh's participation in the 1974 agreement in Delhi. The agreement, concluded in 1974, was intended, *inter alia*, to allow for the repatriation of the Bengalis and non-Bengalis who ended up on the wrong side of the newly formed borders and also of the Pakistani prisoners of war and civilian internees held by India. The agreement provided for interim solutions, i.e., their repatriation, regarding the status of 195 Pakistani prisoners of war charged with war crimes by Bangladesh; the final solutions were left to the future, which have remained unachievable thus far owing to the continued denial by Pakistan of any role played by their troops in the 1971 war. Hence, though the Act entered into force, it remained dormant for approximately 40 years.

5 In the years leading up to Bangladesh gaining independence in 1971, the Islamic organization which later gained political momentum, the Jamaat-e-Islami, strongly opposed the division of the Islamic populace. Working with the Pakistani Army, it was alleged that members of the Jamaat carried out large scale atrocities against Bengali nationalists who were fighting for the independent State of Bangladesh. Upon the independence of Bangladesh, the Awami League, led by one of the founding fathers of Bangladesh, Sheikh Mujibur Rahman, banned the Jamaat. In 1975, after a military coup, Major General Rahman came to power in Bangladesh and the ban on Jamaat was lifted (Jamal, 2013, 93). Allying with Rahman's political party, Jamaat leaders went on to become ministers of the government in power. A succession of military governments followed until the elections of 2008, when the Awami League won by a two-thirds majority allowing them to change the Constitution. Bangladesh had shown little interest in reviving the effort to prosecute under the ICTB Act, but in 2009 there emerged a reactivation of the Act through the International Crimes (Tribunals) (Amendment) Act, 2009 ('ICTB Amendment Act'). The shift in the approach towards impunity around the world was also perhaps reflected in the move towards actualizing the ICTB Act in 2009. This contrasts with the 70s, which was marked more by its culture of impunity rather than an attempt to end it, from Khmer Rouge to General Pinochet's massacres. Yet, despite the effort to end impunity, the 40-year delay perhaps devalued what the ICTB Act attested to achieving.

6 The establishment of the ICTB as a domestic mechanism on March 25 2010, created under the authority of a sovereign Bangladesh government, even if entirely unrelated to Bangladesh's ratification of the Rome Statute of the International Criminal Court on March 23 2010, produced the required strategic demonstration of Bangladesh's will to end impunity. Although the ICTB Act came into force in the 1970s, prior to the ad hoc and hybrid tribunals and the International Criminal Court, signifying it as one of the first

measures to end impunity for international crimes since the International Military Tribunals of the 1940s, the 40-year delay dulled the impact it might have had. On 25 March 2010, on the anniversary of Operation Searchlight, the first tribunal was finally set up. In 2012, on the very same symbolic day, the government of Bangladesh established another tribunal, International Crimes Tribunal-2. The intention behind setting up the second tribunal was unclear, especially given the identical jurisdiction shared by both tribunals, along with their rules of procedure; and as if to prove the redundancy of the second tribunal, it was discontinued in September 2015 owing to a lack of cases.

7 Despite its subject-matter jurisdiction reflecting that of the Nuremberg tribunal, the tribunal(s) constituted under the ICTB Act is regularly deemed domestic in nature. Often touted to be a municipal court owing to the absence of non-Bangladeshi judges, the role played by the Appellate Division of the Supreme Court of Bangladesh—to which a person convicted of any crime specified in the Act and sentenced by the Tribunal has the right to appeal—also adds immensely to the domestic character of the court. Although its uniqueness hinders it from being categorized within the realm of the more widely known international criminal adjudication mechanisms, it can perhaps be categorized as an ‘internationalized-domestic tribunal’ much like the Iraqi Special Tribunal (‘IST’) and the Bosnian War Crimes Chamber (Scharf, 2007, 259). Bringing about a new breed of accountability mechanisms in international criminal law, the ICTB, like the other two, is often condemned for not measuring up to the standards set by international criminal tribunals, notwithstanding the criticism levied against the latter. The ICTB demonstrates an attempt to bring about a justice mechanism that treats international crimes with the gravity they deserve, albeit shrouded in the inescapable expectations of the community owing to its domestic character. International criminal law, through the absence of its engagement with such types of justice mechanisms, must be careful not to dismiss them as they could provide a viable model for international criminal justice if raised to the prescribed standards.

## B. Jurisdiction

8 The jurisdiction *ratione materiae*, *ratione personae* and *ratione temporis* of the Tribunal are set down in Section 3(1) the ICTB Act. This provides the Tribunal with the power to try and punish any individual or group of individuals, or any member of any armed, defense or auxiliary forces, irrespective of their nationality, who commits or committed a crime, as defined under the ICTB Act, in the territory of Bangladesh, whether before or after the commencement of the ICTB Act.

9 With regard to its jurisdiction *ratione personae*, although the ICTB Act specifies *irrespective of nationality*, the proceedings initiated thus far have only been against Bangladeshi nationals. The tripartite agreement signed by India, Pakistan and Bangladesh after the war in 1973 allowed alleged Pakistani war criminals, who included Lt Gen AAK Niazi, defeated Commander-in-Chief of the Pakistan's eastern Command, and many senior commanders, to go back to their country from Indian jails (ICTB, *Chief Prosecutor v. Delowar Hossain Saeedi*, 2011, para 46). In asserting its exclusive right to try its nationals, Pakistan initiated proceedings against India at the International Court of Justice (*Trial of Pakistani Prisoners of War, Pakistan v. India*, 1973). Even if Pakistan ultimately decided to discontinue the proceedings, in its application to the court Pakistan alleged that India illegally interned its Prisoners of War despite the cessation of hostilities, in contravention of the Geneva Convention. In requiring the repatriation of its soldiers, who had voluntarily placed themselves under Indian protection on the assurance of their earliest repatriation to West Pakistan, Pakistan accused India of illegally and improperly continuing their detention. Rejecting both Dhaka's right to try Pakistani criminals and of India's right to transfer its Pakistani detainees to Bangladesh, the Pakistan government expressed its readiness to constitute a tribunal to try the accused persons of Pakistani nationality. As Pakistan failed to make good on their promise, public opinion is forcing the ICTB to carry out an investigation into the 195 Pakistani war criminals.

10 The tribunal's jurisdiction *ratione materiae* extends to the crimes listed under Section 3 (2) the ICTB Act: crimes against humanity, crimes against peace, genocide, war crimes, including violations of humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949, attempt, abetment, conspiracy to commit any crimes and complicity in or failure to prevent the commission of any of those crimes. The definitions of the crimes listed are adaptations of the Charter of International Military Tribunal Nuremberg ('IMT Nuremberg'), and do not meet the same criteria as per their definitions under the Rome Statute. For example, the definition of war crimes under the ICTB Act does not bring within its ambit attacks against religious or cultural objects (Art 8 (2) (b) (ix) Rome Statute), which has occupied an important part of the current and growing jurisprudence on war crimes (ICC, *Prosecutor v. Al Mahdi*, 2016). Additionally, the inclusion of crimes of sexual violence in the definition of war crimes under the Rome Statute has not been reflected in the definition under the ICTB Act. Notwithstanding, in its first decision rendered, in *Chief Prosecutor v. Delowar Hossain Saeedi* (paras 18-32), at the very beginning of its judgment the court addressed the criticisms that the ICTB Act's definition of crimes against humanity failed to meet international standards. Holding the so-called *international standard* in itself fluidly without any consistency, the court went on to provide its own

detailed definition of the crime, in contradistinction to the definitions under the Rome Statute, the Statute of the International Crimes Tribunal for Yugoslavia ('ICTY Statute') and the Statute of the International Crimes Tribunal for Rwanda ('ICTR Statute') statutes (Article 7 Rome Statute; Article 3 ICTR Statute; Article 5 ICTY Statute). The main distinctions were stated to be, *inter alia*, the existence of an armed conflict being unnecessary (even if it was admitted that such a conflict existed in 1971); the discriminatory element being necessary only for acts of persecution; and the attack not needing to be widespread and systematic.

11 The ICTB was reproached for the unfairness of the 40-year delay in bringing about justice to the Bangladeshis. Moreover, this delay also resulted in the conflict of jurisdiction due to the absence of the protection of double jeopardy. For all those who were investigated and tried during the 40-year limbo of the tribunal under the Bangladeshi Penal Code, the unfairness of putting many of them on trial again has been severely criticized.

## C. Composition of the Tribunal

### 1. Office of the Prosecutor

12 The → *Office of the Prosecutor* comprises one Chief Prosecutor, appointed by the Government of Bangladesh and more persons, if deemed necessary, to conduct the prosecution, as stipulated under Section 7 ICTB Act.

13 The ICTB Act does not specify the qualifications or reasons for disqualification of the Prosecutor, unlike the statutes establishing the IST or the Special Court for Sierra Leone ('SCSL'), for example, which stipulate requirements of high competence or a lack of criminal record, while stressing on the need for independence of the office of the prosecutor (Article 8 Statute of the Iraqi Special Tribunal ['IST Statute']; Article 15 Statute of the Special Court for Sierra Leone ['SCSL Statute']) by distancing it from the government. That being said, the appointment of a veteran criminal lawyer, Golam Arif Tipu, as the Chief Prosecutor and the subsequent news of the suspension of a member of the team of prosecutors for professional misconduct silenced its detractors.

### 2. Investigation Agency

14 The Government nominates and assigns a member of the → *Investigations Agency* ('Agency') as Coordinator, to *inter alia*, supervise, control and monitor the investigative



process, even though any officer of the Agency has the right to assist the Prosecution during the trial (Section 8 ICTB Act). The ICTB Act also states that the Prosecutor is competent to also act as an Investigation Officer

15 The power granted to the Investigation Officer appears to be unfettered in dealing with the →*examination of witness(es)*. This is especially true insofar as being given the responsibility of transcribing their oral statements into writing (Section 8(6) ICTB Act), whilst binding a →*witness* to answer any questions that maybe posed, even if amounting to self-incrimination (Section 8(5) ICTB Act). The right to remain silent or the privilege against self-incrimination is a recognized international norm, found in the statutes of the ICTR, ICTY and the ICC. Contrary to international norms and practices, the ICTB Act stipulates under Rule 4 of its rules of procedure (International Crimes Tribunal Rules of Procedure in 2010 (Amendment, 2011) [‘ICTB Rules of Procedure’]), that the Investigation Officer works in accordance with the provisions of Section 8 (5) ICTB Act which, *inter alia*, binds the person being examined to answer questions from the Officer, with no excuse on the ground of self-incrimination. Moreover, Rule 4 also brings Section 8(7) ICTB Act into play, which further stipulates that any person who fails to answer questions by the Investigation Officer may be punished with imprisonment, fine or both. The same also applies to witnesses under Section 18 ICTB Act.

### 3. Registry

16 The Registrar is the Chief Administrative Officer of the Office of the Tribunal and receives cases submitted by the Prosecutor for the purpose of laying them before the tribunal. The Registrar may delegate certain powers to his Deputy Registrar, who shall also assume the powers and perform necessary functions in the absence of the Registrar.

17 The functions stipulated under Rule 60 ICTB Rules of Procedure include assisting the Tribunal in its performance under the authority of the Chairman, including maintaining the Duty Roster, the case register, responsibility for custody of the record of cases and for the issuing of summons and warrants of arrest.

18 The Registrar also acts as the Drawing and Disbursing Officer of the Tribunal, with the responsibility for the accounts of money allocated to the Tribunal and other financial matters with regard to the budget, as laid down in Rules 60 (8) and 60 (9) ICTB Rules of Procedure.

#### 4. Judicial Organs

19 Pursuant to Section 6 (1) ICTB Act, the government may, by notification in the Official Gazette of Bangladesh, appoint any member of higher judicial system as the judge of International Crimes Tribunal. Thus, the government of Bangladesh has the sole and exclusive authority in the →*election of adjudicators*. The bench comprises one Chairman and not less than two and not more than four members. One of the major changes made to the Act of 1973 via the Amendment Act of 2009 was in the composition of the tribunal to civilian judges instead of military judges.

20 The requirement under Section 6 (2) ICTB Act regarding the appointment of a Chairman or Member—someone who is qualified to be a judge at the Supreme Court of Bangladesh—diverges from other international criminal tribunals' qualification requirement by restricting the office to Bangladeshi nationals. Other tribunals, like the SCSL, demonstrated an effort for independence by allowing the composition of the bench to be that of judges selected by the Government of Sierra Leone and also foreign judges selected by the Secretary General (Article 13 Statute SCSL); similarly, the Extraordinary Chambers in the Courts of Cambodia ('ECCC') also stipulated four Cambodian judges and three foreign judges (Article 9 Law of Establishment of ECCC ['ECCC Law']). This particular characteristic of the tribunal may attract criticism, further exacerbated by the provision that disables the prosecution or the defense from challenging the appointments (Section 6 (8) ICTB Act). However, such challenges are permitted against the members constituting the Appellate Chambers of the Supreme Court of Bangladesh, evidenced by Abdul Quader Mollah's defense team's application for recusal of Justice Shamsuddin Choudhury Manik, on grounds of violation of the Code of Conduct of Judges under the Constitution of Bangladesh.

21 With respect to decisions made by the judges, the opinion of the majority is said to prevail, although there is no requirement for a specific quorum during trial. It is worth mentioning here that this has reduced the import that evidentiary hearings have had on the final outcome in the event of absent judges, as the ICTB Act mentions a clear prohibition on the re-hearing or recalling of witnesses for the benefit of the absentees (Sections 6 (5), 6 (6), 6 (7), 6 (8) ICTB Act). Cases have been decided and sentences of death have been given despite none of the judges of the bench having heard the evidence in its entirety (ICTB, *Chief Prosecutor v. Delowar Hossain Sayeedi*, 2011; ICTB, *Chief Prosecutor v. Motiur Rahman Nizami*, 2011).

22 With regard to the appointment of judges and the prosecutors, there has been much controversy surrounding the role of the government in such decisions. The fact that the sole and exclusive authority is in the hands of the government raises serious concerns regarding the principle of independence of the tribunal. Similarly, all members of the investigation agency and the prosecution are also appointed by the government.

## D. Procedure

### 1. Applicable Laws

23 The ICTB Rules of Procedure were formulated under the power conferred to it under Section 22 ICTB Act. Unlike the Extraordinary Chambers in the Courts of Cambodia ('ECCC'), the SCSL and the IST, all of which had their own rules of procedure, the ICTB's domestic character did not require a separate body of rules to govern its procedure. Yet, the evidentiary advantages of the ICTB's own rules of procedure have not only helped to differentiate the tribunal from the High Court of Bangladesh, governed by the Code of Criminal Procedure, 1898, but lowered the threshold required to sentence the alleged criminals responsible for the atrocities in 1971. Thus, the inapplicability of Bangladesh's domestic laws—the Evidence Act, 1872 and the abovementioned Code of Criminal Procedure, 1898—in a sense allowed for the preservation of its unique character even within the Bangladeshi context.

### 2. Investigation

24 The initiation of the process is carried out by the Agency. After the completion of investigation, the concerned investigation officer is required to submit an Investigation Report, together with all the documents, papers and other evidence collected, to the Chief Prosecutor (Rule 11 ICTB Rules of Procedure).

25 The investigation procedure is carried out by the officer, who can require the attendance before himself or herself of any person who appears to be acquainted with the circumstances of the case (Section 8 (3) ICTB Act). Neither the ICTB Act nor the ICTB Rules of Procedure provide for the rights of suspects during the investigation phase. The suspects are not entitled to the assistance of a counsel of their choosing or to free legal assistance if they are unable to afford it, unlike the procedures adopted by the ECCC, SCSL or the IST in which the right to counsel has been clearly stipulated not solely during trial (Article 24 ECCC Law; Article 18 (c) IST Statute; Rule 42 Rules of Procedure and Evidence SCSL).

26 Additionally, and unprecedentedly, the suspect may be orally examined and not be given the →*privilege against self-incrimination*. Section 11 (2) ICTB Act also addresses self-incrimination. It states that for the purposes of enabling any accused person to explain any circumstances appearing in the evidence against him, the Tribunal may, at any stage of the trial without previously warning the accused person, put such questions to him as the Tribunal considers necessary, provided that the accused person does not render himself liable to punishment by refusing to answer such questions or by giving false answers; but the Tribunal may draw such inference from such refusal or answers as it thinks just.

27 After the investigation, if the Officer believes that an offence has been committed, he shall proceed in person and take steps for the discovery and →*arrest* of the accused. Rule 9 ICTB Rules of Procedure lays down the steps to be followed: the Officer may obtain the warrant through the Prosecutor (Rule 9 (1) ICTB Rules of Procedure); the law enforcing agency of the area where the person to be arrested resides executes the warrant of arrest issued by the Tribunal (Rule 9 (2) ICTB Rules of Procedure).

28 If the person is already in custody in connection with another offence or case than under the Act, the Tribunal may issue a production warrant and direct the person to →*detention* in custody (Rule 9 (4) ICTB Rules of Procedure). Also, in the case of a person already in custody, the Rules of Procedure stipulate a time-limit of one year within which investigation must be completed, the failure of which may lead to the accused being released on bail. The time-limit is unique to the Act; although other tribunals specify the need to investigate or try without undue delays, none provides a clear timeline as the Act does.

29 The statements or →*confessions* of accused persons may be made in front of a Magistrate during the course of the investigation or any time before the commencement of the trial; such statement or confession may be recorded by the Magistrate and used as evidence against the accused (Section 14 ICTB Act).

### 3. Proceedings

#### *(a) Charge*

30 As laid down under Rule 18 ICTB Rules of Procedure, the Chief Prosecutor or any other Prosecutor authorized by him shall, upon receipt of the report of investigation, prepare a formal →*charge(s)* in the form of a petition based on the evidence collected.

Section 16 ICTB Act lays down the requirements of a charge and how they must be furnished. Both parties are also required to submit their list of witnesses along with the documents (Rules 18 (3), 18 (6) ICTB Rules of Procedure). Further, Rule 50 stipulates that the burden of proving the charge beyond reasonable doubt is upon the prosecution.

*(b) Trial*

31 When the case is ready for trial, Rule 35 ICTB Rules of Procedure states that the Tribunal shall proceed to hear the case in accordance with the trial procedure, which is stipulated under Section 10 ICTB Act. Section 10 requires that the charge be read out, a plea of guilty or not guilty be recorded, the witnesses be examined, before the Tribunal's judgment and pronounces its verdict.

32 The →*language of the proceedings* before the Tribunal were initially to be made in English alone, but Bangla was added through Section 5 Amendment Act. Nonetheless, for any accused person or witness who may be unable to express himself in, or does not understand, English, Section 10 (3) ICTB Act requires that the court provide the assistance of an interpreter.

33 Where an accused person does not have →*representation* by counsel, Section 12 ICTB Act provides that the Tribunal engages a counsel at the expense of the Government to defend the accused person.

34 If the accused, despite publication of notice in daily newspapers, fails to appear before the Tribunal on the date and time specified, and the Tribunal believes that the accused has absconded or is concealing himself so that he cannot be arrested or produced for trial and there is no immediate prospect for arresting him, the trial shall commence and be held in absentia (Rules 31, 32 ICTB Rules of Procedure) (ICTB, *Chief Prosecutor v. Maulana Abul Kalam Azad*, 2012).

35 The Special Tribunal for Lebanon ('STL'), established in 2007 is the only international tribunal whose statute permits trials in absentia. There are two conditions subject to which such trial is permitted: first, that the accused has expressly waived his or her right to be present; second, that the accused has not been handed over to the Tribunal by the State authorities concerned. The European Court of Human Rights and other international tribunals' jurisprudence provides certain safeguards that must be met before a →*trial in absentia* can be legitimate, amongst which are that the accused

must be informed of the proceedings and that it must be demonstrated that the accused had actual knowledge.

**36** In the ICTB trial of *Prosecutor v. Azad* (para 20), the judgement states that the Dhaka Metropolitan Police submitted the execution report before the Tribunal stating that the accused, Azad, could not be arrested as he had absconded and was believed to have left the country before the warrant was issued. As required by Rule 31 of the Rules of Procedure, the Tribunal ordered that a notice be published in the newspapers; despite such publication, the accused failed to appear before the Tribunal. There is a presumption here that the accused had already absconded, without any mention of the facts leading to such assessment. Neither can it be concluded, based on the Tribunal's reliance of the jurisprudence from the STL, that Mr. Azad had expressly waived his right to be present. The confusion with regard to trials in absentia is highlighted by this case of the ICTB. Clearer standards and conditions need to be stipulated before a trial in absentia can be incorporated into the statutes and rules of evidence and procedure of the Tribunal (Herath, 2016, 9).

### *(c) Evidence*

**37** The Criminal Procedure Code, 1989 and the Evidence Act, 1872 of the State of Bangladesh were clearly stipulated to not apply to the proceedings, under Section 23 ICTB Act. This was done to subvert the use of any technical rules of →(collection of) evidence or procedure (Section 19 ICTB Act).

**38** The Act states that the Tribunal shall not be bound by technical rules of evidence; it shall adopt and apply to the greatest possible extent that which is expeditious and non-technical and may admit any kind of evidence, including reports and photographs published in newspapers, magazines and even films, and other materials as may be tendered before it, which it deems to have probative value (Section 19 (1) ICTB Act). This provision is found to reduce the importance attached to evidentiary material, thus equally reducing the fairness of the trial whilst increasing the possible arbitrariness of judgments rendered.

**39** The applicable rules of evidence and procedure being entirely of the Tribunal's own making, leaves ample room for the reliance on hearsay evidence and establishing guilt by association, amongst others, demonstrated by the jurisprudence from the court. It could be said, on a liberal reading of Section 19 (1) ICTB Act, that hearsay evidence would not provide the 'probative value' the section speaks of; however, in *Chief Prosecutor v. Qader Mollah* (ICTB, *Chief Prosecutor v. Qader Mollah*, 2012, para 151) the

credibility of hearsay evidence was upheld by the tribunal. Qader Mollah was the president of the Islami Chhatra Sangha, a student body at the University of Dhaka, from which a group was formed that supported Pakistan in order to resist its division. When the group allegedly committed atrocities against Bengalis, it is believed that no member of the Bengali community was present to witness it. It was thus considered prudent by the court to rely on hearsay evidence gathered from the general public to demonstrate that Qader Mollah accompanied, encouraged, aided and provided moral support to the group in actually carrying out the atrocious acts. In many instances, regarding charges of murder against the defendant, the court reasoned that it relied on the hearsay evidence because the defense was found incapable of reducing its credibility, thus affirming the probative value of the evidence (para 172).

40 With regard to the treatment of alibi, unlike at the ICTR Appeals Chamber (ICTR, *Protais Zigiranyirazo v. The Prosecutor*, 2009, para 18) where it was established that 'where an alibi is properly raised, the Prosecution must establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true', Rule 51 ICTB Rules of Procedure states that the onus of proof as to the plea of alibi shall be upon the defense. Endorsed in *Prosecutor v. Qader Mollah*, the court demonstrated how the defendant failed to prove the alibi 'with certainty' (para 409). It is interesting to note here how Rule 51 contradicts Rule 50 (ICTB Rules of Procedure), which lays the burden of proving the charge beyond reasonable doubt upon the prosecution.

41 The failure to specify a specific quorum during trial implied that judgments could be rendered by judges even if none of them had been present during the evidentiary hearings. Moreover, the prohibition on the re-hearing or recalling of witnesses for the benefit of the absentee judges (Sections 6 (5), 6 (6), 6 (7), 6 (8) ICTB Act) further questions the role played by evidence regarding sentencing. For example, in *Chief Prosecutor v. Delowar Hossain Sayeedi*, the three judges of the initial bench either resigned or were transferred during the course of the trial; Judge Fazle Kabir, who was transferred after hearing the prosecution's evidence, returned to the bench only after the final speeches. Thus, not a single judge rendering the judgment in Sayeedi had sat through the full trial. Similarly, in *Chief Prosecutor v. Motiur Rahman Nizami*, (para 7) Judge Fazle Kabir withdrew before the end of the prosecution's evidence and was replaced by Judge Huque who was not privy to the previous testimonies (Robertson, 2015, 116).

#### *(d) Judgment and Sentencing*

42 The Tribunal is bound to give a reasoned →*judgment*, where the views of the majority prevail. The judgments of the tribunal do not contain a dissenting judgment; whether the option exists or has merely not been exercised by a judge thus far, is unclear from the ICTB Act and ICTB Rules of Procedure. Upon conviction of an accused person, the Tribunal shall award a sentence (→*Sentencing*) of death or such other punishment proportionate to the gravity of the crime, as seems appropriate to the Tribunal, in the interest of justice and propriety (Section 20 ICTB Act).

43 Between its inception in 2010 and 2016, the tribunal delivered 17 verdicts, 15 of which resulted in the imposition of the death penalty against members of the Jamaat-e-Islami and Bangladesh National Party, the democratically elected political party which defended the unity of Pakistan. The ICTB Act retains the death penalty as a sentence, despite the fact that all other international tribunals and courts have rejected its retention. The lavish pronouncement of the death penalty as sentence by the ICTB further increases the concerns that initially rose. In the cases where such a sentence was pronounced, international and domestic reactions accused the Tribunal of a trial flawed on various counts, including arbitrary limitation of witness evidence, limited ability to cross examine key witnesses and concerns relating to the impartiality of judges (ICTB, *Chief Prosecutor v. Muhammed Kamaruzzaman*, 2012; ICTB, *Chief Prosecutor v. Delowar Hossain Sayeedi*, 2011; ICTB, *Chief Prosecutor v. Saluddin Quader Chowdhury*, 2011). In certain cases, while the ICTB sentenced the accused to life imprisonment, the appellate chamber of the Supreme Court of Bangladesh overturned the tribunal and given the death sentence (ICTB, *Chief Prosecutor v. Qader Mollah*, 2012). Here, it must be contrasted with the only other instances where international tribunals gave the sentence of death penalty: the International Military Tribunal ('IMT') Nuremberg and the Tokyo tribunal ('the IMT tribunals'). Out of the 22 Nazi leaders the IMT Nuremberg tried, it gave the death sentence to 11 of them, and out of the 28 alleged war criminals at the Tokyo Tribunal, 7 were given the death sentence. The IMT tribunals, which provided the foundation upon which the ICTB was set up, perhaps also allowed for the emulation of its Victors' Justice Model in Bangladesh, whereby death sentences were handed down to settle wartime scores. Yet it is worth pointing out that although the lead IMT defendant, Martin Bormann, was sentenced to death in absentia, the Nuremberg Charter was adhered to by nineteen other nations and both Charter and Judgment of the IMT were unanimously affirmed by the first General Assembly of the United Nations. The wide acceptance enjoyed by the IMT Nuremberg, despite its shortcomings, demonstrates a type of double-standard that international criminal justice has long endured.



### *(e) Appeal*

44 A person convicted of any crime specified in the ICTB Act and sentenced by the Tribunal has the →*right of appeal* to the Appellate Division of the Supreme Court of Bangladesh, against such conviction and sentence, as has the Government against an order of acquittal (Section 21 ICTB Act). The time limitation set on the appeal is stated to be 'preferably' within sixty days of the date of the order of conviction and sentence or acquittal. Whether such →*time-limit(s)* is mandatory or advisory will undoubtedly remain a matter for judicial consideration. The Appellate Division of the Supreme Court of Bangladesh has no power to review the interim decisions or orders made by the ICTB. Under the ICTB Act, only the Tribunal has the right to review its own interim decisions or orders (ICTB, *Chief Prosecutor v. Muhammed Kamaruzzaman*, 2012) (→ *Review of Indictment*).

### **E. Conclusion**

45 The background of the war against which the Tribunal was set up, created an impression of Victors' Justice. 'The current government of Bangladesh, led by Prime Minister Sheikh Hasina and her Awami League party, is the heir to those who fought for Bangladeshi independence. Those on trial opposed independence'. These trials are therefore seen as the victors of the Liberation War attempting to crush those who lost the conflict. For such a process to be considered just, critics suggest that it must independently and impartially bring to justice all those who are individually criminally responsible, irrespective of nationality, ethnicity or association. The charging of only the leaders of the Jamaat and its allies validated the claims of the critics.

46 While the ICTB may be viewed as a judicious attempt on behalf of the government of Bangladesh to end impunity it has also been criticized and condemned owing to its schizophrenic approach towards criminal justice. On the one hand, the tribunal appears to be invested in complying with the international standards by trying international crimes, but on the other hand, it shows abandon in its procedures and practices by relying on the sovereignty of its domestic choices. Therefore, it belongs to the breed of criminal justice mechanisms within international criminal law that are domesticized international tribunals.

47 Much like the ECCC, the ICTB also suffers from the sobriquet 'delayed justice'. However, despite the delayed efforts and criticisms, the positive contributions made by

the tribunal in providing a mechanism for localized international justice has not gone unnoticed. The demonstration that historical crimes are not immune from prosecution adds greatly to the underlying ethos that criminal justice stands for. Yet the Victor's Justice Model that the ICTB has been strongly criticized for is not very different from most criminal tribunals that were found to abide by the international standards of justice and equity. In the interest of the symbolism that trials carry, even those that are touted to be successful suffer from the politics of the choices made with regard to who must be tried. Within such context, it is perhaps not an overstatement that the ICTB, much like the other tribunals, also internalizes the politics of criminal justice.

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