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JUSTICE FOR INTERNATIONAL CRIMES: THE HISTORY, CASES, AND CONTROVERSIES OF THE INTERNATIONAL CRIMES TRIBUNAL OF BANGLADESH

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“It is definitely one of the most shameful episodes in the history of the human race; and it happened in the enlightened 20th Century. And it will happen somewhere again, if the Nations of the World take no steps to prevent it.”

The events in East Pakistan, 1971, International Commission of Jurists (1972).

ABSTRACT

The International Crimes Tribunal of Bangladesh (ICT) was established in 2009 to prosecute suspects accused of war crimes during the 1971 Bangladesh Liberation War based on the International Crimes (Tribunal) Act 1973. While many in Bangladesh view the ICT as a step toward justice for atrocities committed, the tribunal has faced significant criticism. Despite its achievements in addressing impunity, the ICT's legacy remains controversial due to concerns about fairness and political manipulation. The following report discusses the history, status, challenges, and criticisms of the ICT from legal and political perspectives, as well as summarising some of the most noteworthy judgements to be issued by the tribunal.

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1. INTRODUCTION

The International Crimes Tribunal of Bangladesh (ICT) was established in 2009 with the aim of prosecuting individuals accused of committing war crimes, crimes against humanity, and other atrocities during the 1971 Bangladesh Liberation War. The tribunal operates under the framework of the *International Crimes (Tribunals) Act 1973*, a law passed shortly after Bangladesh's independence but left largely dormant for decades. Revived amidst growing demands for justice from survivors and victims' families, the ICT sought to address the impunity long enjoyed by those accused of collaborating with the Pakistani military in perpetrating widespread violence, including mass killings, sexual violence, and forced displacements.

While the ICT is widely regarded within Bangladesh as a long-overdue attempt to provide justice for the victims of 1971, it has also been the subject of significant domestic and international scrutiny. Supporters highlight its role in acknowledging historical atrocities and delivering some measure of accountability after decades of inaction. However, critics argue that the tribunal has been marred by procedural shortcomings, allegations of bias, and accusations of political interference, particularly in cases involving opposition political figures. Concerns about fair trial standards and the tribunal's adherence to international legal norms have further complicated its legacy.

This report examines the ICT's historical context, current status, and the challenges it has faced, both in its legal procedures and its broader political implications. It also evaluates some of the tribunal's most prominent judgements, analyzing their significance and the debates they have sparked. By exploring these facets, the report provides a comprehensive overview of the ICT's complex and contested role in Bangladesh's pursuit of justice and reconciliation.

2. HISTORICAL BACKGROUND

2.1. The Liberation War of 1971

The foundation for the Bangladesh International Crimes Tribunal was established in response to the atrocities of the 1971 Liberation War, which resulted from long standing historical and geopolitical tensions following British colonial rule.¹ Nationalist politics, which emerged in the 1930s, inspired support for the development of nationalist movements within the British Raj, dividing the historically amicable Hindu and Muslim groups into warring foes, with separate socio-political identities, aims and leaders. From the nationalist aspirations of the All-India Muslim League, grew a campaign for the establishment of a separate, Muslim-majority

¹ Geoffrey Robertson, *Report on the International Crimes Tribunal of Bangladesh* (International Forum for Democracy and Human Rights, 2015) 16
<<https://barhumanrights.org.uk/wp-content/uploads/2015/02/REPORT-ON-THE-INTERNATIONAL-CRIMES-TRIBUNAL-OF-BANGLADESH.pdf>> accessed 23 October 2024.

state. This campaign took shape in 1940 through the Lahore Resolution.² The Resolution called for the establishment of two autonomous, secular, Muslim states geographically separated by independent India: one state established in the North West Punjab region, and the other established in the North East Bengal region.³ Islamic fundamentalists, who opposed the creation of a secular Muslim confederation, ostensibly influenced by Western ideals, objected to the Lahore Resolution, which catalysed the formation of Jamaat-e-Islami, a political movement against the partitioning of India and for the establishment of a unified wholly-Islamic political system.⁴ Although at its inception, Jamaat-e-Islami represented only a minority of Muslims in the region, it would eventually grow to become one of the most politically dominant and influential Islamic organisations in the region.

In 1947, the British partitioned the Indian subcontinent into two independent states: the Republic of India, with a majority Hindu population, and Pakistan, with a majority Muslim population. Pakistan was composed of two factions, West Pakistan (present-day Pakistan) and East Pakistan (present-day Bangladesh), separated by approximately one thousand miles of Indian territory. Although both Pakistani regions were majority Muslim, they were culturally, ethnically, and linguistically distinct. East Pakistan's Bengali-speaking population found itself marginalised by the Urdu-speaking political and military elite concentrated in West Pakistan, leading to economic disparity and political disenfranchisement for East Pakistanis.

The push for autonomy in East Pakistan gained momentum throughout the 1960s and culminated with the 1970 national elections, where the Awami League, led by Sheikh Mujibur Rahman (“*Mujib*”)⁵, secured a majority of seats. Despite this electoral mandate, the ruling authorities in West Pakistan, including President Yahya Khan, refused to transfer power, fueling resentment and sparking demands for independence.⁶

In March 1971, a series of meetings were held between *Mujib* and President Khan in Dhaka in the hopes of reaching a political settlement. On March 25th, 1971, after failed negotiations, the Pakistani military launched Operation Searchlight, a brutal and violent offensive, in which Pakistani armed forces barbarically targeted political activists, students,

² Badiul Alam Hossain, *The Traumatic Birth of Bangladesh: War Crimes, Genocide and the Quest for Justice* (Doctoral thesis, University of Warwick, 2017) 25–26 <https://wrap.warwick.ac.uk/id/eprint/103875/1/WRAP_Theses_Hossain_2017.pdf> accessed 23 November 2024.

³ Robertson (n.1) 16.

⁴ European Foundation for South Asian Studies, *Jamaat-e-Islami in Bangladesh: Past, Present and Future* (2017) <<https://www.efsas.org/publications/study-papers/jamaat-e-islami-in-bangladesh-past-present-and-future/>> accessed 23 November 2024; Rafiq Ahmed, 'Jamaat-e-Islami Pakistan' (2018) 13(2) *Criterion Quarterly* <<https://criterion-quarterly.com/jamaat-e-islami-pakistan/>> accessed 23 November 2024.

⁵ “*Mujib*” is a name of affection and reverence for Sheik Mujibur Rahman in Bangladesh, and symbolises his role as the leader and “Father of the Nation” who guided the country to independence. Additionally, during the independence movement, his followers and supporters would call him “*Bangabandhu*”, meaning “Friend of Bengal”, to honour his dedication to the Bengali people and their rights. “*Mujib*” thus became both a simple and powerful way to reference him and has endured in the collective memory and identity of Bangladesh. ‘Sheikh Mujibur Rahman: The Father of the Nation of Bangladesh’ *Dhaka Tribune* (Dhaka, 29 June 2023) <<https://www.dhakatribune.com/bangladesh/322557/sheikh-mujibur-rahman-the-father-of-the-nation-of>> accessed 23 November 2024.

⁶ Robertson (n.1) 27.

intellectuals, and civilians in East Pakistan.⁷ In his book, *Statistics of Democide: Genocide and Mass Murder Since 1900*, R.J. Rummel discusses Operation Searchlight, stating the following:

*In 1971 the self-appointed President of Pakistan and Commander-in-Chief of the Army, General Agha Mohammed Yahya Khan and his top generals prepared a careful and systematic military, economic, and political operation in East Pakistan (now Bangladesh). They also planned to murder its Bengali intellectual, cultural, and political elite. They also planned to indiscriminately murder hundreds of thousands of its Hindus and drive the rest into India. And they planned to destroy its economic base to insure that it would be subordinate to West Pakistan for at least a generation to come. This despicable and cutthroat plan was outright genocide. After a well organised military buildup in East Pakistan the military launched its campaign.*⁸

Operation Searchlight marked the beginning of the nine-month Bangladesh Liberation War, characterized by widespread violence, including systematic killings and human rights abuses, which have since been recognised as acts of genocide.

During the war, Pakistani armed forces, aided by other paramilitary forces Razakars, Al-Badr, and Al-Shams,⁹ committed widespread atrocities, including mass killings, rape, torture, and forced displacement against the population of East Pakistan.¹⁰ Though these groups were formed in East Pakistan and consisted mostly of Bengali collaborators, they operated under the command and strategy of the West Pakistani (Pakistani) military, aligning them ideologically with Pakistan rather than the independence-seeking population of East Pakistan.

Collaborating closely with the Pakistani military, these groups engaged in heinous acts, including mass killings, rape, torture, and arson, particularly aimed at Bengali intellectuals,

⁷ Paul Mooney, 'The Genocide the US Can't Remember, but Bangladesh Can't Forget' *Smithsonian Magazine* (23 October 2017) <<https://www.smithsonianmag.com/history/genocide-us-cant-remember-bangladesh-cant-forget-180961490/>> accessed 23 November 2024.

⁸ RJ Rummel, *Statistics of Democide: Genocide and Mass Murder Since 1900* (Annotated edn, LIT Verlag 1998) 153.

⁹ The Razakars were one of the earliest and largest auxiliary forces, established in May 1971. They were primarily tasked with identifying independence supporters, assisting Pakistani forces in intelligence operations, and conducting raids. Razakars were involved in widespread acts of violence, including murder, rape, and arson, often targeting civilians. Their collaboration with Pakistani forces made them one of the most notorious groups associated with the 1971 atrocities. Al-Badr was a paramilitary force composed mainly of young activists from the Islamist student wing Jamaat-e-Islami. The group operated as an elite squad and was responsible for targeted assassinations of intellectuals, journalists, and academics during the closing days of the war. Al-Badr's participation in the systematic killings of Bangladesh's intellectuals in December 1971 is considered one of the most heinous acts of the war. These actions were intended to weaken Bangladesh's intellectual foundation in the aftermath of independence. Al-Shams was composed of volunteers aligned with Islamist political groups who opposed the independence movement. While not as widely known as Al-Badr or the Razakars, Al-Shams participated in similar operations, supporting Pakistani troops and targeting independence activists. They often collaborated with Razakars in carrying out attacks against villages and pro-independence groups. Bangladesh Genocide Archive, *Collaborators and War Criminals* (2024) <<https://www.genocidebangladesh.org/collaborators-and-war-criminals/>> accessed 23 November 2024; Md Shariful Hossain, 'Challenges of Long-Delayed Prosecutions in Fighting Impunity in Bangladesh' (2022) 35(4) *Leiden Journal of International Law* 59 <<https://doi.org/10.1017/S0922156522000346>> accessed 23 November 2024; *Criminal Appeal No 143 of 2014* (Supreme Court of Bangladesh, 2014) 2–3 <http://www.supremecourt.gov.bd/resources/documents/808562_Criminal_Appeal_No_143_Of_2014.pdf> accessed 23 November 2024.

¹⁰ International Commission of Jurists, *The Events in East Pakistan, 1971: A Legal Study* (1972) 15–24 <<https://www.icj.org/wp-content/uploads/1972/06/Bangladesh-events-East-Pakistan-1971-thematic-report-1972-eng.pdf>> accessed 23 November 2024.

freedom fighters, and minority communities. In its factual account, the International Commission of Jurists stated:

*The principle features of this ruthless oppression were the indiscriminate killing of civilians, including women and children and the poorest and weakest members of the community; the attempt to exterminate or drive out of the country a large part of the Hindu population; the arrest, torture and killing of Awami League activists, students, professional and businessmen and other potential leaders among the Bengalis; the raping of women; the destruction of villages and towns; and the looting of property. All this was done on a scale which is difficult to comprehend.*¹¹

It is estimated that between 200,000 and 450,000 women were raped or forced into sexual slavery, 70,000 of whom became pregnant as a result.¹² Estimates state that approximately 3 million people were killed, and as many as 10 million people fled to neighbouring India for refuge.¹³ The war ended on December 16th, 1971, when approximately 93,000 Pakistani forces surrendered to the Indian military and Bangladeshi forces, with Bangladesh emerging as an independent nation.¹⁴ All Pakistani prisoners-of-war were held in India, until an agreement reached between Pakistan and India allowed for all prisoners, save for 195 accused of war crimes, to be repatriated to Pakistan.

2.2. Preliminary Efforts: The Collaborators Act (1972)

The horrors and devastation witnessed in the aftermath of the war catalysed demands for justice amongst the newly liberated Bangladeshi people. In 1972, the government of newly independent Bangladesh, under the leadership of Rahman, passed *The Bangladesh Collaborators (Special Tribunals) Order*, also referred to informally as either the Collaborators Act or the Dalal Act, to prosecute “collaborators”, known locally as *dalals*, who had aided the Pakistani military in committing atrocities against Bengali civilians, freedom fighters, and independence supporters.¹⁵ *Dalals* were individuals who had belonged to the Jamaat-e-Islami thereby supporting Pakistani forces during the war and contributed significantly to the formation of the Razakars, Al-Badr, and Al-Shams.¹⁶

Collaborators, as they were defined under the Act, included any person who, either individually or as a member of a group: 1) participated with, aided, or abetted the Pakistani

¹¹ Ibid.

¹² Ali Riaz, *The Troubled History of Partition and Violence in South Asia* (2014) CORE 2131 <<https://core.ac.uk/download/pdf/42549865.pdf>> accessed 23 November 2024; Michael Safi, ‘The Past Has Yet to Leave the Present: Genocide in Bangladesh’ *Harvard International Review* (2023)

<<https://hir.harvard.edu/the-past-has-yet-to-leave-the-present-genocide-in-bangladesh/>> accessed 23 November 2024.

¹³ *Criminal Appeal No 143 of 2014* (n.9) 2–3.

¹⁴ *Criminal Appeal No 143 of 2014* (n.9) 2,

¹⁵ Government of Bangladesh, *The Bangladesh Collaborators (Special Tribunals) Order, 1972 (President’s Order No 8 of 1972)* (Ministry of Law, Justice and Parliamentary Affairs, 1972) <<http://bdlaws.minlaw.gov.bd/act-details-1310.html>> accessed 23 November 2024; Md Ziaul Haque Islam, ‘The Forgotten “Dalals” and Bangladesh’s 1972 Collaborators Act’ (2014) 16(4) *Journal of Genocide Research* 513–532.

¹⁶ M Rafiqul Islam, ‘Trials for International Crimes in Bangladesh: Prosecutorial Strategies, Defence Arguments and Judgments’ in K Sellars (ed), *Trials for International Crimes in Asia* (Cambridge University Press 2016) 301–317.

forces in sustaining or strengthening the illegal occupation of Bangladesh; 2) rendered material assistance by words or conduct to the occupation army; 3) waged war against the Bangladeshi liberation forces; or 4) actively resisted or sabotaged the efforts the Bangladeshi liberation forces in their struggle against the occupation.¹⁷

As many as 40,000 people were investigated, 20,000 arrested pursuant to the Act, and less than a thousand people were convicted,¹⁸ most of whom belonged to fundamentalist groups, with charges ranging from aiding and abetting, to rape, torture, and murder.¹⁹ However, numerous clemency orders and challenges arising from political interference, insufficient evidence collection, and procedural complications halted the progression of prosecution.

In February 1973, *Mujib* issued the Bangladesh National Liberation Struggle (Indemnity) Order, granting “freedom fighters” immunity from prosecution for any acts committed during the Liberation War. This immunity encompassed the same crimes—rape, arson, and murder—for which alleged collaborators arrested under the Collaborators Act would face punishment, with the key distinction being that “freedom fighters” were seen as having committed these acts in the course of a just liberation struggle.²⁰ This created a double standard of “victor’s justice”, whereby the war crimes of “freedom fighters” were pardoned, and those of traitors were punished.²¹ To mitigate these concerns, on May 16th, 1973, *Mujib* granted clemency to those convicted for minor offences under the Collaborators Act, and emphasised the need to refocus justice efforts to holding accountable Pakistani war criminals for the atrocities committed during the Liberation War.

2.3. The International Crimes (Tribunal) Act (1973)

On April 17th, 1973, the government of Bangladesh announced that it would proceed to try the 195 Pakistani soldiers imprisoned in India for genocide, war crimes, and crimes against humanity pursuant to Common Article 3 of the Geneva Convention. The government’s press release explained:

Trials shall be held in Dhaka before a Special Tribunal, consisting of judges having the status of judges of the Supreme Court. The trials will be held in accordance with universally recognised judicial norms. Eminent international jurists will be invited to observe the trials. The accused will be offered facilities to arrange for their defence and to engage counsel of their choice, including foreign counsel.

¹⁷ Government of Bangladesh (n.15).

¹⁸ UK Parliament, Written Evidence from Dr David Bergman (Bangladesh) (ICCA 16), *House of Commons Foreign Affairs Committee* (2012) <<https://publications.parliament.uk/pa/cm201213/cmselect/cmfaff/116/116we16.htm>> accessed 23 November 2024.

¹⁹ Banglapedia, *Collaborators Tribunal Order, 1972*, *National Encyclopedia of Bangladesh* (2024) <https://en.banglapedia.org/index.php?title=Collaborators_Tribunal_Order_1972> accessed 23 November 2024.

²⁰ Caitlin Reiger, *Impunity Watch: Bangladesh’s International Crimes Tribunal* (International Center for Transitional Justice, 2010) 3–4 <<https://www.ictj.org/sites/default/files/ICTJ-BGD-NationalTribunal-Briefing-2010-English.pdf>> accessed 23 November 2024.

²¹ Robertson (n.1) 46.

On July 20th, 1973, the Bangladeshi parliament passed the *International Crimes (Tribunals) Act* (ICTA) to authorise the establishment of a specialised, national criminal tribunal for “the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes, and other crimes under international law”.²² The statute drew heavily from the International Military Tribunal (IMT) Charter applied at Nuremberg as well as the resulting principles prepared by the International Law Commission, and was a groundbreaking step in the development and application of international criminal law.²³

Unlike the earlier Collaborators Act, which was limited to prosecuting Bangladeshi nationals under local criminal laws for murder, arson and rape,²⁴ the ICTA was designed with broader jurisdiction to prosecute foreign nationals, namely Pakistani military officers, for their role in the 1971 atrocities, in line with emerging international standards on war crimes and justice. However, enforcement of the ICTA faced challenges due to diplomatic complexities, such as Pakistan’s refusal to recognise its jurisdiction and to extradite accused officers.²⁵ Consequently, Pakistan submitted a legal claim to the International Court of Justice (ICJ) in an attempt to challenge the ICTA’s jurisdiction and derail attempts at prosecution.²⁶

On November 30th, 1973, the Bangladeshi government announced a general amnesty for all collaborators, except those accused of murder, rape, arson, or genocide.²⁷ The amnesty was granted in part due to the strain on the judicial system, but also to appeal to Pakistan to permit the repatriation of the 250,000 East Pakistanis, or “stranded Bangladeshis” as they were known colloquially, who were being held in internment camps in Pakistan (West Pakistan).²⁸ Approximately 26,000 people who had been arrested under the Collaborators Order were released; 11,000 lower-level local alleged collaborators went on to face trial, and approximately 750 were convicted.²⁹ The amnesty order laid the groundwork for the 1974 tripartite agreement between India, Pakistan, and Bangladesh, through which India agreed to repatriate Pakistani prisoners-of-wars, so long as Pakistan agreed to repatriate detained Bangladeshis, withdraw its application to the ICJ, and pursue prosecution of war crimes domestically.³⁰

²²*International Crimes (Tribunals) Act, 1973* (Bangladesh)

<<https://ictbdinvestigation.gov.bd/site/law/f8ae4190-c576-47b7-acc6-afb41df55420/>> accessed 23 November 2024.

²³ Reiger (n. 20) 3.

²⁴ Robertson (n.1) 46.

²⁵ Reiger (n. 20) 4.

²⁶ Robertson (n.1) 46.

²⁷ Reiger (n. 20) 4.

²⁸ Ibid n.6.

²⁹ Robertson (n.1) 46; A Zammit Borda and S Hosen, ‘Challenges of Long-Delayed Prosecutions in Fighting Impunity in Bangladesh’ (2022) 35(2) *Leiden Journal of International Law* 297–310 <<https://doi.org/10.1017/S0922156522000346>> accessed 23 November 2024.

³⁰ Robertson (n.1) 48.

2.4. 1974-1975: The Hamoodur Rahman Commission & the Coup D'état

The 195 alleged war criminals that had been held in India were repatriated to Pakistan, and despite making a public pledge to establish a war crimes tribunal, Pakistan never pursued prosecution. Instead, Pakistan's Prime Minister, Zulfikar Ali Bhutto established the Hamoodur Rahman Commission, a judicial commission to conduct a formal inquiry into Pakistan's involvement in the atrocities committed in East Pakistan in 1971.³¹ The Commission examined as many as 300 witnesses, and hundreds of classified military signals between East and West Pakistan.³² The final report was submitted on October 23rd, 1974, but remained classified by the Pakistani government until 2000, after being leaked by India's media.³³

In 1975, a military coup d'état overtook the government of Bangladesh and *Mujib* was assassinated. Thereafter the Act was repealed and many detainees were released without facing prosecution,³⁴ and subsequent governments did not prioritise the prosecution of war crimes. Over the following decades, the issue of justice for war crimes receded into the background, despite remaining a significant concern for many in Bangladesh.

2.5. Revival of the International Crimes Tribunal (2009-2010)

From 1975 until the early 1990s, little progress was made to revive the ICTA or to hold perpetrators of Liberation War atrocities accountable. However, in 2009, the demand for war crimes trials resurfaced, particularly targeting members of Jamaat-e-Islami, whose leaders were believed to have participated in atrocities. The return of the Awami League to power with Sheikh Hasina, daughter of *Mujib*, in the 2008 elections renewed efforts to establish an accountability mechanism for the crimes of 1971.³⁵ As part of its campaign pledge, the Awami League government revived the ICTA to prosecute alleged war criminals still residing in Bangladesh, focusing primarily on Jamaat-e-Islami members and others not previously tried under the Collaborators Act.³⁶ That year, the War Crimes Fact Finding Committee in Bangladesh published a list of 1,597 individuals, including the names of influential ministers, parliamentarians and political figures, accused of committing international crimes.³⁷

³¹ Robertson (n.1) 49.

³² Farhana Akter Shoovra, 'Perpetrations of 1971 – An Analysis in Light of Hamoodur Rahman Commission Report' (2010–2011) *The Arts Faculty Journal* 85–108.

³³ 'Bangladesh War: The Article That Changed History' *BBC News* (26 December 2000) <http://news.bbc.co.uk/1/hi/world/south_asia/1094788.stm> accessed 23 November 2024.

³⁴ Reiger (n. 20) 4; Nayanika Mookherjee, *The Spectral Wound: Sexual Violence, Public Memories, and the Bangladesh War of 1971* (Duke University Press 2011).

³⁵ Reiger (n. 20) 4.

³⁶ Robertson (n.1) 52-54.

³⁷ Mark Dummett, 'Bangladesh War Crimes Stirs Tension' *BBC News* (24 June 2008) <<http://news.bbc.co.uk/1/hi/7470000.stm>> accessed 23 November 2024; Zakia Afrin, 'The International War Crimes (Tribunal) Act, 1973 of Bangladesh' (2010) *Publications Paper* 183 <<http://digitalcommons.law.ggu.edu/pubs/183>> accessed 23 November 2024.

In 2009, the Bangladeshi government, led by the Awami League, established the International Crimes Tribunal (ICT) under the 1973 ICTA, tasked with investigating and prosecuting individuals accused of war crimes, genocide, and crimes against humanity during the 1971 Liberation War. This initiative marked a pivotal moment in Bangladesh's pursuit of justice for the victims and accountability for the atrocities committed, leading to high-profile trials and convictions. Nonetheless, the ICT faced both domestic and international scrutiny.

3. THE INTERNATIONAL CRIMES TRIBUNAL

3.1. Jurisdiction

The ICT was created as a domestic tribunal under Bangladeshi law, to prosecute individuals accused of international crimes, including those accused of planning, ordering, or participating in international crimes, or who provided logistical or material support to the perpetrators. International crimes under the ICTA include genocide, war crimes, crimes against humanity, crimes against peace, and other crimes under international law, including violations of any rules of international humanitarian law applicable in armed conflicts laid down in the Geneva Conventions.³⁸ Section 3 of the ICTA establishes the jurisdiction of the ICT, with provides the ICT with power to try any “individual or group of individuals, or any member of any armed, defence or auxiliary forces, irrespective of his nationality, who commits or has committed, in the territory of Bangladesh, whether before or after the commencement of [the ICTA], any of the crimes” provided in section 3.

Since section 3 extends the court's jurisdiction to cover crimes committed after the ICTA's enactment, recent efforts have aimed to bring perpetrators of contemporary international crimes within the ICT's purview.³⁹ In September 2024, the interim Bangladesh government announced that it would use the ICT to try former Prime Minister Hasina for crimes of genocide and crimes against humanity during the students led anti-discrimination mass uprising between 1st July and 5th August, along with all persons involved in these crimes. The announcement follows the decision by the ICT's Chief Prosecutor, Mohammad Tajul Islam, on 14th August to file a complaint with the investigation agency of the ICT against Hasina, her former ministers, members of law enforcement, and other party officials. Thereafter, on October 17th, 2024, the ICT issued an arrest warrant for Hasina, for alleged “massacres, killings and crimes against humanity in July to August 2024,” with an order to produce her in court on November 18th, 2024.⁴⁰ These recent events have sparked international debate on whether the ICT's jurisdiction

³⁸ *International Crimes (Tribunals) Act 1973*, s 3(2)(a)–(h).

³⁹ RaisuL Sourav, ‘The Necessity of Reforming the International Crimes Tribunals Law of Bangladesh for Fair Trial’ (International Law Blog, 23 September 2024)

<<https://internationallaw.blog/2024/09/23/the-necessity-of-reforming-the-international-crimes-tribunals-law-of-bangladesh-for-fair-trial/#:~:text=There%20were%20major%20criticisms%20both,compliance%20with%20international%20legal%20standards>> accessed 23 November 2024.

⁴⁰ Nick Marsh, ‘Bangladesh Issues Arrest Warrant for Ex-Leader Hasina’ *BBC News* (17 October 2024) <<https://www.bbc.co.uk/news/articles/c98y6g2nx79o>> accessed 23 November 2024.

or competence extends to offences committed beyond the 1971 Liberation War. As there is no explicit language in the ICTA prohibiting such prosecution, some jurists have stated that the ICT is acting within its powers, whereas others have advised going to the International Criminal Court (ICC) or forming a hybrid ad hoc international crimes tribunal under the United Nations.⁴¹ However, the ICTA's outdated framework, which has not kept pace with developments in modern international criminal law, particularly since the adoption of the Rome Statute, has raised doubts about the fairness and impartiality of the trial of Hasina and her allies. This has led to concerns that the ICTA might be leveraged as a tool for political retribution rather than a means of delivering genuine justice.⁴²

The provisions of the ICTA do not reflect present-day international law, but rather the standards of justice that existed during the time of its enactment in 1973 and the original, albeit limited, purpose of creating a judicial mechanism in Bangladesh by which the 195 Pakistani officers imprisoned in India could be prosecuted. Therefore, in crafting the text, the drafters of the original statute, who were largely scholars and practitioners of international law, drew heavily from the language used in the formative legal documents of the time, namely the International Military Tribunal (IMT) Charter used to prosecute Nazis at Nuremberg and the international legal principles prepared by the International Law Commission.⁴³ Over the following forty years, amidst political unrest and changes in government leadership, many of the key provisions of the ICTA remained largely unchanged. By the time efforts to establish an international crimes tribunal were revived, the definitions used in Nuremberg had become significantly outdated.⁴⁴

Before the establishment of the first tribunal under the ICTA, the statute was amended in 2009, and the Rules of Procedure formulated shortly after in 2010.⁴⁵ However, despite efforts to update the ICT's foundational framework, many of the ICTA's substantive and procedural provisions have remained that same as they were in 1973, which has caused concerns amongst international institutions, national governments, defence lawyers and human rights groups. To date, the ICTA has yet to be amended by the Bangladeshi government to ensure that it aligns completely with modern international standards. The lack of reform to effectively reconcile the ICTA with modern international law, has meant that the international law that Bangladesh has agreed to follow, for instance, as a party to the Rome Statute, and the legal standards it applies under the ICTA are concerningly different. For example, while the definition of crimes against humanity under the ICTA includes specific acts like murder, extermination, enslavement,

⁴¹ Ali Riaz, 'Sheikh Hasina's Trial: Judicial Process Mustn't Be Controversial' *Prothom Alo* (16 August 2024) <<https://en.prothomalo.com/opinion/op-ed/ax3riixcwr>> accessed 23 November 2024.

⁴² RaisuL Sourav (n. 39).

⁴³ Reiger (n. 20) 3.

⁴⁴ "A unanimous position is yet to be reached with regard to which set of standards should be reflected if the definitions were to be 'revised'. One argument stresses that ICTA crimes should mirror the crimes defined in the ICC Statute which reflect current international standards. The other argument lends weight to the idea that definitions of crimes in the ICTA should reflect crimes as they existed in customary international law when they were committed in 1971." Badiul Alam Hossain (n.2) 164.

⁴⁵ Surabhi Chopra, 'The International Crimes Tribunal in Bangladesh: Silencing Fair Comment' (2015) 17(2) *Journal of Genocide Research* 212 <<http://dx.doi.org/10.1080/14623528.2015.1027080>> accessed 23 November 2024.

deportation, and torture with general reference to political, racial, ethnic, or religious persecution, the Rome Statute expands the definition with additional acts like sexual slavery, enforced disappearance, and apartheid, which are all noticeably absent from the ICTA. Importantly, although Bangladesh is a member state of the ICC, the ICC cannot exercise its jurisdiction on crimes committed before the Rome Statute's entry into force in 2002.

The international crimes prosecuted under the ICTA remain definitionally distinct and unaligned with those adopted under modern international criminal law. This creates a conflict between how international law is recognised by Bangladesh under treaty law and custom, and how the law is defined, and thus applied, by the state at the ICT.

3.2. Structure

The ICT operates with two main divisions, Tribunal-1 and Tribunal-2, established in 2010 and 2012 respectively. Each tribunal consists of three judges: a chairman and two judicial members.⁴⁶ However, since September 15th, 2015, Tribunal-2 has been non-functioning.⁴⁷ Only persons who are qualified to be judges under the Supreme Court of Bangladesh or who are qualified members of a General Court Martial can be appointed as a judge for the ICT.⁴⁸ There is no provision for allowing international judges or independent foreign observers.⁴⁹ Historically, Supreme Court judges have been appointed by the Bangladeshi government from among members of the political party in power.⁵⁰ Though the judiciary is required to act independently, there is no explicit requirement under the ICTA that judges act with impartiality.

The ICT has its own investigation agency⁵¹ and prosecution team,⁵² which are responsible for gathering evidence and presenting cases before the court. Upon completing the investigation, the Investigation Agency submits a report to the Chief Prosecutor, who reviews it to prepare a formal charge.⁵³ There is no presumption of innocence for the accused, no right to defence counsel during the investigation, and no right to remain silent.⁵⁴ On the contrary, an accused remaining silent upon questioning by the Investigation Agency may result in a criminal charge, incurring a prison sentence of up to 6 months or a fine.⁵⁵

The charge, along with relevant materials, documents, and witness statements are submitted to the tribunal. The tribunal reviews the charges and if there are sufficient grounds, evidenced in the materials, documents, witness statements, on which the charge is founded, the

⁴⁶ International Crimes Tribunal Bangladesh, 'ICT-BD' <<https://www.ict-bd.org/ict1/>> accessed 23 November 2024; Surabhi Chopra (n.45) 212.

⁴⁷ International Crimes Tribunal Bangladesh (n. 46).

⁴⁸ International Crimes (Tribunals) Act 1973, s 6(2).

⁴⁹ Surabhi Chopra (n.45) 212 -213.

⁵⁰ Constitution of the People's Republic of Bangladesh, art 33(4).

⁵¹ International Crimes (Tribunals) Act 1973 (n. 48) s 8.

⁵² Ibid s 7.

⁵³ International Crimes Tribunal Bangladesh (n. 46).

⁵⁴ International Crimes (Tribunals) Act 1973 (n. 48) ss 8(5), 8(7), 18.

⁵⁵ International Crimes (Tribunals) Act 1973 (n. 48) s 8(7).

accused is granted an opportunity to mount a defence. At this point, the defence is entitled to copies of all materials, documents, witness statements, documentary and video evidence, and any other evidence relied upon by the prosecution to assist in preparing an effective defence. Any person convicted of a crime under section 3 of the ICTA, and sentenced by the tribunal, has the right to appeal to the Appellate Division of the Supreme Court of Bangladesh, the highest judicial forum of the country, against such conviction and sentence.⁵⁶ Under section 21(2) of the ICTA, the government or complainant also has a right to appeal an order, verdict of acquittal, or sentence.

The proceedings are governed by Bangladeshi law, however, the law regulating criminal proceedings in Bangladesh generally does not apply. For instance, section 23 of the ICT excludes the application of both the Evidence Act (1872) and the Criminal Procedure Code (1898) to the ICT, which means that Bangladesh's domestic jurisprudence on procedural fairness does not directly apply. In a recent interview, Asif Nazrul, adviser to the Ministry of Law, Justice, and Parliamentary Affairs for the current interim government, stated that the government plans to address concerns raised by foreign and UN agencies regarding the shortcomings in the ICTA, including statutory definitions, restrictions on recording evidence, and limitations on the rights of accused individuals to obtain legal relief.⁵⁷

3.3. Trials & Verdicts

Since its establishment, the ICT has prosecuted a number of high-profile cases involving senior leaders of the Jamaat-e-Islami and the Bangladesh Nationalist Party (BNP). Some of the most notable individuals convicted by the tribunal include Delwar Hossain Sayeedi, Ghulam Azam, and Motiur Rahman Nizami, all of whom were senior leaders of the Jamaat-e-Islami. These individuals were found guilty of a range of charges, including genocide, rape, and the abduction and murder of intellectuals. Several cases before the ICT have been pivotal in applying international principles in a domestic context, and in demonstrating the types of acts that amounted to crimes against humanity during the 1971 Liberation War or how to establish genocidal intent.

3.3.1. The Case of Delwar Hossain Sayeedi

In August 2009, Delwar Hossain Sayeedi, a senior leader of Jamaat-e-Islami, was charged with twenty counts of genocide and crimes against humanity, including murder, rape, and arson, during the 1971 Liberation War.⁵⁸ The prosecution focused its case on Sayeedi's collaboration with the Pakistani military in the Pirojpur district, where he was accused of orchestrating attacks against civilians, particularly targeting the Hindu community and

⁵⁶ *International Crimes (Tribunals) Act 1973* (n. 48) s 21(2).

⁵⁷ Prothom Alo, 'Interview: Asif Nazrul' *Prothom Alo* (8 September 2024)

<<https://en.prothomalo.com/opinion/interview/xdbtaiqlvg>> accessed 23 November 2024.

⁵⁸ BBC News, 'Bangladesh Delays Islamist Leader's War Crime Appeal Hearing' *BBC News* (28 February 2013) <<https://www.bbc.co.uk/news/world-asia-21611769>> accessed 23 November 2024.

pro-independence activists. The trial began in November 2011, with the prosecution alleging that Sayeedi had killed over 50 individuals, helped Pakistani soldiers abduct and rape three women, set fire to Hindus' houses, forced Hindus to convert to Islam, and forcibly expelled Hindus from the country.⁵⁹ Most of the evidence put forth was based on eye-witness accounts.⁶⁰

Sayeedi was convicted on February 28th, 2013, on eight of the twenty counts, including murder, rape, abduction, torture, religious persecution,⁶¹ but was declared not-guilty of genocide. Its judgement was the first decision issued by the tribunal. In its judgement, the tribunal emphasised the systematic, wide-spread, and targeted nature of the atrocities and explored how Sayeedi's active collaboration with the Pakistani military and Razakars demonstrated his intent to further these criminal acts. The tribunal ultimately concluded that these coordinated attacks exhibited a clear criminal intent to cause large scale devastation in the Hindu community and amongst the freedom fighters.⁶² However, the tribunal found that evidence was insufficient to establish genocidal intent because the evidence did not show that Sayeedi's acts were intended to systematically eliminate a group. For instance, in charge No. 12, where the prosecution alleged the abduction and subsequent murder of fourteen Hindus in an act constituting genocide, the tribunal found no witness testimony or concrete evidence directly linking Sayeedi to these specific acts with genocidal intent.⁶³ Similarly, in charge No. 15, the tribunal found that the evidence failed to support Sayeedi's participation in the alleged genocidal acts committed against the Hindu community.⁶⁴ The absence of conclusive evidence led to acquittals on the genocide-related charges, although Sayeedi was found guilty on several counts of crimes against humanity based on his proven involvement in widespread and systematic attacks targeting civilian populations.

Sayeedi was initially sentenced to death for crimes against humanity, however, on appeal in 2014, his death sentence was commuted to life imprisonment.⁶⁵ Sayeedi's conviction sparked protests by members of Jamaat-e-Islami across Bangladesh. The protests turned violent and left more than 100 individuals dead.⁶⁶

⁵⁹ The Guardian, 'Bangladesh Party Leader Accused of War Crimes' *The Guardian* (3 October 2011) <<https://www.theguardian.com/world/2011/oct/03/bangladesh-party-leader-accused-war-crimes>> accessed 23 November 2024.

⁶⁰ Robertson (n.1) 52-54.

⁶¹ *Chief Prosecutor v. Delwar Hossain Sayeedi* (Judgment) ICT-BD Case No. 01 of 2011 (International Crimes Tribunal Bangladesh, 28 February 2013) 194-196.

⁶² *Chief Prosecutor v. Delwar Hossain Sayeedi* (Judgment) ICT-BD Case No. 01 of 2011 (n. 61) 7, 66, 82.

⁶³ *Chief Prosecutor v. Delwar Hossain Sayeedi* (Judgment) ICT-BD Case No. 01 of 2011 (n. 61) 85-86.

⁶⁴ *Chief Prosecutor v. Delwar Hossain Sayeedi* (Judgment) ICT-BD Case No. 01 of 2011 (n. 61) 91-93.

⁶⁵ BBC News, 'Bangladesh Court Upholds Death Penalty for Islamist Leader' *BBC News* (17 September 2014) <<https://www.bbc.co.uk/news/world-asia-29233639>> accessed 23 November 2024.

⁶⁶ *Ibid.*

3.3.2. The Case of Abdul Quader Molla

Abdul Quader Molla was a senior leader of Bangladesh's Jamaat-e-Islami party. The media referred to as the “Butcher of Mirpur,” for his involvement in brutal atrocities during the 1971 Liberation War.⁶⁷ He was arrested on July 13th, 2010, and on December 18th, 2011, the prosecution filed formal charges against him. Molla was charged with six counts of crimes against humanity and war crimes, including the murder of 344 civilians in Mirpur, Dhaka, many of whom were members of the Hindu community.⁶⁸ The case gained attention due to the large-scale, cruel and inhuman nature of the killings. The tribunal found Molla’s active participation in the mass killings, particularly targeting civilians based on religious identity and the systematic nature of the violence.⁶⁹

On February 5th, 2013, Molla was convicted on five counts, including for offences of murder and rape, and was sentenced to life imprisonment.⁷⁰ This was only the second verdict to be issued by the ICT.⁷¹ Molla’s life sentence was met with widespread protests calling for the death penalty, which eventually led to a legislative amendment allowing the prosecution to appeal. On February 17th, 2013, the Bangladeshi government passed an amendment to the ICTA to enable prosecutors to appeal a life sentence and seek the death penalty. Prior to this amendment, the ICT’s prosecution was only allowed to appeal if the accused was acquitted. This amendment allowed the prosecution to appeal sentencing decisions retroactively, which led to Molla’s death sentence on appeal, and eventual execution on December 13th, 2013.⁷² Molla’s case sparked strong reactions within Bangladesh. The intense public involvement added pressure on the legal process, raised concerns about whether the judiciary’s decision was unduly influenced by public sentiment rather than strictly legal considerations. In the days following Molla’s execution, violent clashes between protestors and police took place across Bangladesh.⁷³

Many have argued that the retroactive change violated fundamental legal principles and due process rights under international law, as laws generally should not be applied retroactively. Human rights organisations, including Human Rights Watch and the International Commission of Jurists, raised concerns about the ICT’s adherence to fair trial standards.⁷⁴ They cited issues

⁶⁷ bdnews24.com, “‘Butcher of Mirpur’ Pays with Life’ *bdnews24.com* (12 December 2013) <<https://bdnews24.com/bangladesh/butcher-of-mirpur-pays-with-life>> accessed 23 November 2024.

⁶⁸ *Chief Prosecutor v Abdul Quader Molla* (Judgment) ICT-BD Case No 02 of 2012 (International Crimes Tribunal Bangladesh, 5 February 2013) 20.

⁶⁹ *Ibid* 111.

⁷⁰ International Commission of Jurists, ‘Bangladesh: Abdul Quader Mollah Death Sentence Violates International Law’ *ICJ* (11 December 2013) <<https://www.icj.org/bangladesh-abdul-quader-mollah-death-sentence-violates-international-law/>> accessed 23 November 2024.

⁷¹ Human Rights Watch, ‘Bangladesh: Post-Trial Amendments Taint War Crimes Process’ *Human Rights Watch* (14 February 2013) <<https://www.hrw.org/news/2013/02/14/bangladesh-post-trial-amendments-taint-war-crimes-process>> accessed 23 November 2024.

⁷² The Guardian, ‘Bangladesh: Execution of Islamist Leader Abdul Quader Mollah Sparks Violence’ *The Guardian* (13 December 2013) <<https://www.theguardian.com/world/2013/dec/13/bangladesh-execution-mollah-jamaat-islami-violence>> accessed 23 November 2024.

⁷³ *Ibid*.

⁷⁴ Human Rights Watch (n. 71).

such as limited defence rights, alleged political pressure, and procedural irregularities, arguing that these factors compromised Molla's right to a fair trial. The lack of international oversight and inconsistencies in the ICT process heightened these concerns, especially for cases involving the death penalty.

3.3.3. The Case of Motiur Rahman Nizami

Motiur Rahman Nizami, held leadership roles in the Islami Chhatra Sangha (ICS), which later formed Al-Badr, a paramilitary group that aided the Pakistani military. Al-Badr was known for its role in targeting intellectuals and civilians sympathetic to Bangladesh's independence. On August 2th, 2010, Nizami was arrested and nearly two years later on May 28th, 2012 charged with sixteen charges of crimes against humanity, including murder, rape, torture, persecution, and genocide.⁷⁵ The tribunal found substantial evidence proving Nizami's superior role in ICS and Al-Badr, implicating him in systematic attacks on civilians, particularly targeting Hindu communities and pro-independence intellectuals. The tribunal determined that Nizami held leadership roles within the ICS and his authority over Al-Badr forces, pointing to evidence that showed his role in transforming ICS into Al-Badr, knowing that his actions would substantially encourage support for members committing atrocities, and demonstrating a clear superior-subordinate link.⁷⁶

The tribunal emphasised that formal military command was not necessary to establish criminal responsibility, stating that "the crucial question is not the civilian status of the accused but the degree of authority he or she exercised over his or her subordinates."⁷⁷ The tribunal found that Nizami had effective control over Al-Badr members and did not take reasonable measures to prevent or punish their crimes. Drawing on principles from other international cases, including the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the tribunal concluded that civilian leaders like Nizami could incur liability for crimes committed by subordinates, provided they had authority and control over them, even informally. The Tribunal applied this reasoning in recognising Nizami's civilian superior responsibility under Section 4(2) of the ICTA. In its judgement, the tribunal stated the following:

*[Nizami's] superior power, a position and authenticative [sic] influence on Al-Badr is a fair indication to hold that he had causal [sic] relationship with the members of Al-Badr as his subordinates having effective control over them. Thus, he cannot be relieved from the responsibility for the planned crimes committed by the members of Al-Badr Bahini with whom he had defacto superior-subordinate relationship.*⁷⁸

⁷⁵ *Chief Prosecutor v Motiur Rahman Nizami* (Judgment) ICT-BD Case No 03 of 2011 (International Crimes Tribunal Bangladesh, 29 October 2014) 2.

⁷⁶ Ibid 51.

⁷⁷ Ibid 178.

⁷⁸ Ibid 51.

Testimonies from witnesses, many of whom were hearsay witnesses⁷⁹, and documents put forth by the prosecution connected him to the planning and execution of operations aimed at suppressing Bangladesh's independence movement. In its judgement, the tribunal found that these actions were aimed at crippling Bangladesh's intellectual and political leadership capacity post-independence. On October 29th, 2014, Nizami was convicted of eight counts of crimes against humanity, including murder, rape, torture, persecution, abduction, and extermination, and sentenced to death by hanging.⁸⁰ However, Nizami was not found guilty of genocide because the tribunal determined that the evidence did not meet the stringent requirements to prove genocidal intent.⁸¹ Although Nizami was involved in crimes targeting the Hindu community and pro-independence Bengalis, the tribunal found insufficient evidence that he specifically intended to destroy these groups. Instead, his actions were deemed to be part of broader attacks on civilians perceived as supporting Bangladesh's independence, rather than with the intent to eradicate the group. Nizami appealed his sentence to the Supreme Court of Bangladesh, but lost, and was executed by hanging on May 10th, 2016.⁸²

The case was a landmark in applying command responsibility to a civilian leader, reinforcing that leaders of paramilitary or auxiliary forces can be held accountable for the actions of their subordinates. As a high-ranking leader of Jamaat-e-Islami, Nizami's conviction underscored the party's involvement in 1971 atrocities, leading to broader social and political ramifications. It fueled debates within Bangladesh about the role of Jamaat-e-Islami in the nation's past and its place in Bangladesh's political future, contributing to legislative and political reactions to its influence.

3.3.4. The Case of Muhammad Kamaruzzaman

On December 18th, 2011, Muhammad Kamaruzzaman, a leader in the ICS, was charged with seven counts of genocide and crimes against humanity, including murder, indiscriminate sexual invasion, torture, and other inhuman acts relating to his involvement in organising and leading Al-Badr forces in assisting the Pakistani military.⁸³ Prosecutors alleged that he led attacks on pro-independence supporters and the Hindu community and directed violence at individuals based on their political allegiance or religious identity. The tribunal relied on witness testimonies and evidence indicating Kamaruzzaman's close association with military officials and his participation in mass atrocities. In its judgement, the tribunal found that his role included direct involvement in systematic attacks against pro-independence civilians, particularly in

⁷⁹ Ibid 121.

⁸⁰ BBC News, 'Bangladesh Hangs Islamist Party Leader Motiur Rahman Nizami' *BBC News* (11 May 2016) <<https://www.bbc.co.uk/news/world-asia-36210552>> accessed 23 November 2024.

⁸¹ *Chief Prosecutor v Motiur Rahman Nizami* (n.75) 122.

⁸² BBC News (n. 80).

⁸³ *Chief Prosecutor v Muhammad Kamaruzzaman* (Judgment) ICT-BD Case No 03 of 2012 (International Crimes Tribunal Bangladesh, 9 May 2013) 62–141.

Mymensingh.⁸⁴ The case reinforced the application of command responsibility, holding civilian leaders accountable for crimes committed by forces under their influence.⁸⁵

On May 9th, 2013, Kamaruzzaman was convicted of five counts of crimes against humanity and sentenced to death. The tribunal considered but did not convict Kamaruzzaman on charges of genocide, finding insufficient evidence to prove that these acts were carried out with genocidal intent, which specifically refers to the intent to destroy, in whole or in part, a protected group. The tribunal emphasised that simply demonstrating a large number of deaths does not fulfill the legal requirements for genocide, which necessitate clear evidence of intent to eradicate a particular group.⁸⁶ As such, Kamaruzzaman was instead convicted on five counts of crimes against humanity, where the threshold for intent focuses on systematic or widespread attacks against civilians rather than the intent to destroy a group. Kamaruzzaman appealed his death sentence to the Supreme Court, but the court upheld the sentence, and Kamaruzzaman was executed on April 11th, 2015.⁸⁷

4. CRITICISMS AND CONTROVERSIES

In all of the above cases, the perpetrators were often in positions of power or authority, allowing them to orchestrate genocidal campaigns through militias like Al-Badr and Razakars. The ICT analysed both direct evidence, such as orders, speeches, and participation in killings, and circumstantial evidence (e.g., patterns of violence) to demonstrate that the accused intended to partially or fully destroy the targeted groups. The ICT issued several death sentences, which have been the subject of both domestic and international debate.

While many in Bangladesh view the trials as a long-overdue step toward justice for the victims of 1971, critics have raised concerns about the fairness and transparency of the tribunal's proceedings. Some human rights organisations, such as Human Rights Watch and Amnesty International, have criticised the ICT for alleged due process violations, including the lack of adequate defence rights, the exclusion of key evidence, and the political motivations behind some of the prosecutions. In particular, the Jamaat-e-Islami and its supporters have claimed that the tribunal is politically motivated, aimed at weakening opposition parties rather than achieving justice. The government, however, has defended the tribunal, maintaining that it operates within the framework of Bangladeshi law and is subject to the oversight of judicial review.

⁸⁴ *Chief Prosecutor v Muhammad Kamaruzzaman* (n. 83) 62–141.

⁸⁵ *Ibid.* 27.

⁸⁶ *Ibid.* 117.

⁸⁷ BBC News, 'Bangladesh Hangs Islamist Leader Muhammad Kamaruzzaman for War Crimes' *BBC News* (11 April 2015) <<https://www.bbc.co.uk/news/world-asia-32263541>> accessed 23 November 2024.

4.1. Due Process and Fair Trial

Since its inception, ICT has been criticised by several national and international entities, such as the US government and Human Rights Watch.⁸⁸ The grounds for such criticism were the over-politicised, non-inclusive nature of the proceedings, barriers to participation for general people who want their testimonies heard, and, most importantly, a lack of due process.⁸⁹

According to the critics from Human Rights Watch and other international human rights organisations, the trial that resulted in Azam's conviction and sentencing was defective because of a lack of due process and vulnerability to the political manoeuvres of former Prime Minister Sheikh Hasina and her associates.⁹⁰ The rush with which the ICT pursued Azam's conviction and sentencing led to procedural shortcomings, resulting in delayed justice and compromised and manipulated justice. These legal failures reinforce the idea that the ICT operates as a partisan experiment in transitional justice.⁹¹ Nonetheless, the supporters of ICT, including Shahriar Kabir, Barrister Afroz, and Priyobhashinee, dismissed the criticisms, labelling them an international conspiracy against the genocide in Bangladesh and the country's sovereignty.⁹²

However, the ICT suspended specific domestic laws protecting accused persons' rights, including criminals. Although protections are afforded to all citizens, the Bangladesh government has chosen to selectively overlook these protections for specific defendants, such as Azam.⁹³ As a result, the ICT has implemented shortcuts that allow the Tribunal to pursue accused individuals with special rights and privileges while denying the same rights and privileges to the defendants. This undermines the fairness of the process.⁹⁴

Furthermore, section 17 of the ICTA outlines the rights of an accused person during the trial.⁹⁵ However, some essential rights are concerningly absent, including: the right to adequate time for case preparation, the right to a trial without undue delay, the right to the presence of the

⁸⁸ Human Rights Watch, 'Bangladesh: War Crimes Verdict Based on Flawed Trial' (Human Rights Watch, 23 March 2016) <<https://www.hrw.org/news/2016/03/23/bangladesh-war-crimes-verdict-based-flawed-trial>> accessed 23 November 2024;

Mayesha Alam, 'The International Crimes Tribunal for Bangladesh: A Delayed, Politicized, and Self-Limiting Experiment in Transitional Justice' in *Women and Transitional Justice: Progress and Persistent Challenges in Retributive and Restorative Processes* (Springer Nature 2014), 65.

⁸⁹ Mayesha Alam (n. 88) 65.

⁹⁰ Ibid 66.

⁹¹ Ibid.

⁹² Ibid 68.

⁹³ Maruf Billah, 'Non-retroactivity in prosecuting crimes against humanity and international crimes tribunal Bangladesh' (2020) 13(3) *Journal of Politics and Law* 180.

⁹⁴ Toby Cadman, Carl Buckley and Jack Sproson, 'The International Crimes Tribunal, Bangladesh: Courting Controversy' in Syed Serajul Islam and Md Saidul Islam (eds), *The Jamaat Question in Bangladesh: Islam, Politics and Society in a Post-Democratic Nation* (1st edn, Routledge 2023).

⁹⁵ *International Crimes (Tribunals) Act* (n. 48) s 17.

accused, and the right to a free interpreter.⁹⁶ These rights are mandated under Article 14 of the International Covenant on Civil and Political Rights (ICCPR).⁹⁷

The ICT has faced issues with unclear and nonspecific charges against the accused. Defendants have been denied the right to choose their own counsel and sufficient time to prepare their defence.⁹⁸ The prosecution often does not disclose exculpatory evidence, while the defence is barred from presenting vital evidence and calling essential witnesses. Communication between the accused and their defence is restricted.⁹⁹ There have been reports of witness perjury, evidence falsification, and the abduction of key witnesses just before testimony. Additionally, both witnesses and lawyers have experienced threats, intimidation, and physical assaults.¹⁰⁰ The partiality in Bangladesh regarding the liberation forces is so severe that discussing their potential criminality is seen as seditious. Journalist David Bergman faced contempt charges for questioning victim numbers and flaws in the ICT's proceedings, with judges stating he had "hurt the feelings of the nation."¹⁰¹

4.2. Ignorance of International Legal Standards

Md. Mostafa Hosain, Assistant Professor of BRAC University, opines,

Bangladesh has an unclear approach to international law as a state. Our courts have failed to establish a clear jurisprudential standing. While it has always been said that international treaties are not part of domestic law, those we ratify can be incorporated as an aid to domestic law. However, if domestic law is clear on a matter, we often struggle to apply international law effectively.

Such ambiguity concerning international law has impacted the ICT and its process as well. Former Prosecutor of ICT, Zead Al Malum, claims that the ICT is purely a domestic process, not an international tribunal, which is prosecuting crimes with an international nature.¹⁰²

The retroactive application of criminal law is strictly prohibited, as it safeguards individuals from arbitrary decisions made by authorities. This principle has significantly

⁹⁶ Muhammad Abdullah Fazi, Pardis Moslemzadeh Tehrani, Mian Waqar Ahmed and Sardar Ali Shah, 'Bangladesh's Approach towards International Criminal Law: A Case Study of International Crimes Tribunal Bangladesh' (2019) 12 (3) *Journal of Politics and Law*.

⁹⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 14.

⁹⁸ Toby Cadman (n. 94) 207.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Agence France-Presse, 'Bangladesh court convicts British journalist for doubting war death toll' *The Guardian* (2 December 2014) <<https://www.theguardian.com/world/2014/dec/02/bangladesh-convicts-british-journalist-david-bergman>> accessed 25 October 2024.

¹⁰² Mayesha Alam (n. 88), 68.

contributed to the evolution of international criminal law.¹⁰³ It is evident that both domestic and international legal frameworks establish the prohibition of retroactive prosecution for international crimes as a customary rule that has been recognised for a long time. In some instances, this prohibition is even considered a *jus cogens* norm in international criminal law.¹⁰⁴ However, the ICT is neglecting the principle of *nullum crimen sine lege* by prosecuting international crimes retroactively.

Moreover, despite being amended four times, the elements of the crimes under the ICTA still do not align with those under recognised international criminal law and customary international law. For instance, the definition of crimes against humanity stated in the ICTA does not include “widespread or systematic attack” as the *actus reus*, though it is the latest jurisdictional requirement of crimes against humanity.¹⁰⁵ Additionally, beyond rape, there are other variations of offences against women that are detailed in the Rome Statute. Still, the ICTA only addresses rape.¹⁰⁶

Furthermore, the ICT violated the principles of *res judicata* and double jeopardy by retrying individuals previously convicted or investigated under the 1972 Collaborators Order.¹⁰⁷ This order aimed to prosecute those who supported the Pakistani Army during the liberation struggle, leading to numerous arrests and trials. To promote national reconciliation, the Bangladeshi government later issued an amnesty with specific exceptions based on the nature of the crimes.¹⁰⁸

In addition, trials *in absentia* are generally prohibited under comparative and international law, as outlined in article 14(3)(d) of the ICCPR,¹⁰⁹ which states that defendants have the right to be tried in their presence. However, exceptions exist in certain jurisdictions, such as France and the Special Tribunal for Lebanon, where trials can occur *in absentia* with a requirement for retrial if the defendant is later found.¹¹⁰ Conversely, the ICT allows trials *in absentia* without a provision for retrial if the accused is apprehended.¹¹¹

¹⁰³ Valentina Spiga, ‘Non-retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga’ (2011) 9 (1) *Journal of International Criminal Justice* 5.

¹⁰⁴ Maruf Billah (n. 93) 180, 182.

¹⁰⁵ William A Schabas, *An Introduction to the International Criminal Court* (3rd edn, Cambridge University Press 2007).

¹⁰⁶ *International Crimes (Tribunals) Act* (n. 48) s 3(2)(a).

¹⁰⁷ Md Alamgir Jalil, ‘War Crimes Trial in Bangladesh: A Real Political Vendetta’ (2010) 3 (2) *Journal of Politics and Law* 110.

¹⁰⁸ Reiger (n. 20).

¹⁰⁹ International Covenant on Civil and Political Rights (n. 97) art 14(3)(d).

¹¹⁰ Human Rights Committee, ‘Ali Maleki v Italy’ Communication No 699/1996 (27 July 1999) UN Doc CCPR/C/66/D/699/1996.

¹¹¹ Toby Cadman (n. 94).

4.3. Prosecution of Gender-based and Sexual Violence

The limited engagement of women's voices and experiences in the ICT highlights significant gaps in addressing wartime sexual violence. While some acknowledgement of women as victims exists, the focus primarily on rape and abuse lacks accountability for perpetrators and fails to facilitate survivor healing.¹¹² Dr. Tureen Afroz emphasised in her EU Parliament address that the scale of these crimes affects countless women, yet many victims remain silent due to stigma and fear. Structural challenges hinder the ICT's ability to represent women's experiences adequately.¹¹³ Moreover, the Tribunal's reluctance to confront gender-based violence perpetuates unequal gender relations in Bangladesh and distorts historical narratives, as observed by Debnath, who notes the government's efforts to suppress women's wartime realities to maintain patriarchal norms.¹¹⁴

4.4. Constitution of the Tribunal

One notable feature of the Bangladeshi tribunal is its chamber and composition. According to Article 6 of the ICTA, the Government of Bangladesh is responsible for appointing the tribunal members.¹¹⁵ Furthermore, there is no mechanism to contest the tribunal's decisions or the appointments of its members,¹¹⁶ leading to concerns raised by Human Rights Watch regarding the legitimacy of the ICTA.¹¹⁷

The criteria for selecting the chairman and members of the tribunal, as outlined in the ICTA, appear to be quite lenient, stating 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, may be appointed as a Chairman or member of a Tribunal."¹¹⁸ Notably, the statute does not include provisions for the inclusion of international judges; thus, all tribunal members are local former judges from Bangladeshi courts. In contrast, both the ICTY and the ICTR feature judges from various countries, providing a level of neutrality. These tribunals employ an election process for appointing judges, with clearly defined qualification criteria, allowing members to be selected by the UN General Assembly through voting. This structure fosters an environment conducive to fairness, as both tribunals are situated in neutral locations.¹¹⁹

Moreover, while the prosecutors for the ICTY and ICTR are appointed by the UN Security Council, the prosecutors for the Bangladeshi tribunal are appointed by the ruling

¹¹² Mayesha Alam (n. 102).

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ *International Crimes (Tribunals) Act* (n. 48) s 6(1).

¹¹⁶ Ibid s 6(8).

¹¹⁷ Muhammad Abdullah Fazi (n. 96).

¹¹⁸ *International Crimes (Tribunals) Act* (n. 48) s 6(2).

¹¹⁹ Muhammad Abdullah Fazi (n. 96).

government. This process raises significant concerns about the concept of fair trial and the impartiality of the tribunal itself.¹²⁰

4.5. Safeguard of Victims and Witnesses

The protection of witnesses and victims is an essential aspect of any judicial proceeding. The ICTA lacks a comprehensive definition of ‘victim’, raising significant concerns about the framework for addressing victims’ rights.¹²¹ The subsequent amendment in the Rules of Procedure provides a narrow definition, excluding legal entities and indirect victims like family members, which diminishes the tribunal’s ability to deliver justice for all affected.¹²²

Moreover, the focus on protection rather than broader victim rights fails to align with international standards, such as those set by the UN and other tribunals. This limitation compromises the tribunal’s mandate and risks disenfranchising many victims, highlighting the need for a more inclusive definition to ensure that all impacted individuals can participate fully in the justice process.¹²³

Unfortunately, the ICTA does not provide specific protections for witnesses.¹²⁴ In contrast, the ICTY in Article 22¹²⁵ and the ICTR in Article 21¹²⁶ offer similar protections for both victims and witnesses, ensuring fair and unbiased testimony. In fact, many defence witnesses of ICT-BD have received threats and intimidation. Consequently, they were not willing to appear before the tribunal because of future reprisals.¹²⁷ Shockingly, the defence witness of the trial of Sayedee, Sukharanjan Bali was abducted on December 5th, 2012 outside the gates of the Tribunal who was about to testify that the Investigative Agency and Prosecution were providing false statements.¹²⁸ Such incidents reflected that law enforcement agencies in the country were associated with the kidnapping. Bali was a victim of torture and was then forced across the border into India.¹²⁹

4.6. Death Penalty

Some judges of ICT interpret Article 20 (2) of the ICTA¹³⁰ to suggest that a death sentence is the default option following a guilty verdict.¹³¹ Such an interpretation posits that,

¹²⁰ Ibid.

¹²¹ Khadiza Nasrin, ‘War Victim's Rights and Reparation within International Crimes Tribunal Bangladesh (ICT-BD): An Evaluation of Issues and Challenges’ (2019) 30 *Dhaka University Law Journal* 157.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Muhammad Abdullah Fazi (n. 96).

¹²⁵ *Statute of the International Criminal Tribunal for the Former Yugoslavia* (ICTY) 1993, art 22.

¹²⁶ *Statute of the International Criminal Tribunal for Rwanda* (ICTR) 1994, art 21.

¹²⁷ Toby Cadman (n. 94).

¹²⁸ ‘Bangladesh: Find Abducted Witness’ (*Human Rights Watch*, 16 January 2013)

<<https://www.hrw.org/news/2013/01/16/bangladesh-find-abducted-witness>> accessed 20 October 2024.

¹²⁹ Ibid.

¹³⁰ *International Crimes (Tribunals) Act* (n. 48) s 20(2).

¹³¹ Toby Cadman (n. 94).

unless specified otherwise, capital punishment should be the norm for serious offences driven by the perceived need for society's justice against crimes like crimes against humanity. This approach, however, opposes the principle of proportionality in sentencing. Proportionality dictates that penalties should be commensurate with the gravity of the offence, taking into account the offender's role and degree of culpability rather than succumbing to societal pressures. Such an interpretation also raises concerns regarding fundamental standards of justice and fairness, particularly given the global trend toward abolishing the death penalty.¹³²

Recently, on October 29th, 2024, the UN High Commissioner for Human Rights, Volker Turk, urged the interim government of Bangladesh to revoke the existing death penalty in Bangladesh, including in ICT.¹³³ However, the interim government responded negatively. Law Adviser Asif Nazrul states, "There is no question of abolishing the death sentence in connection with the trial of the fascist government (Sheikh Hasina regime) that killed thousands of students". However, Article 75 of the Rome Statute mentions three forms of reparations such as restitution, compensation, and rehabilitation,¹³⁴ and it does not include the death penalty. In fact, the death penalty is a profound violation of human dignity and fundamental human rights.¹³⁵ The Second Optional Protocol to the ICCPR (1989) requires the state parties to abolish the death penalty within their jurisdiction.¹³⁶ In addition, the UN Resolution adopted by the General Assembly on December 17th, 2018 focused on ensuring access to justice for the persons facing the death penalty without discrimination, including access to legal counsel, inherent dignity and their rights under international human rights law.¹³⁷ However, although Bangladesh is a party to the ICCPR, it is not a signatory to the Second Optional Protocol of the ICCPR.

5. CONCLUSION

The ICT represents a pivotal chapter in Bangladesh's history, marking a long-awaited effort to confront and provide justice for the atrocities committed during the 1971 Liberation War. Its establishment reflects a determined resolve to address the horrors of genocide, crimes against humanity, and other egregious violations that have scarred the nation's collective memory. The ICT has not only delivered landmark judgements that hold perpetrators accountable but has also fostered a sense of closure for many victims and survivors, affirming their right to justice after decades of impunity.

¹³² Ibid.

¹³³ 'No scope to revoke death penalty, Asif Nazrul says after meeting Volker Turk' *The Daily Star* (Dhaka, 29 October 2024) <<https://www.thedailystar.net/news/bangladesh/crime-justice/news/no-scope-revoke-death-penalty-asif-nazrul-says-after-meeting-volker-turk-3739691>> accessed 29 October 2024.

¹³⁴ *Rome Statute of the International Criminal Court* (last amended 2010), art 75.

¹³⁵ 'Death penalty incompatible with right to life' (OHCHR, 31 January 2024) <Office of the High Commissioner for Human Rights, 'Death Penalty Incompatible with the Right to Life' (OHCHR, January 2024) <<https://www.ohchr.org/en/stories/2024/01/death-penalty-incompatible-right-life>> accessed 30 October 2024.

¹³⁶ *Second Optional Protocol to the International Covenant on Civil and Political Rights* 1989, art 1(2).

¹³⁷ UNGA Res 73/175 (17 December 2018) UN Doc A/RES/73/175.

However, the tribunal's journey has not been without its challenges. Criticisms regarding procedural shortcomings, political interference, and adherence to international legal standards have cast a shadow over its legacy. These concerns underscore the complexity of pursuing justice for historical crimes within a politically charged environment. Yet, the ICT's achievements in prosecuting individuals responsible for heinous acts, including mass killings, sexual violence, and the systematic targeting of intellectuals, signify a significant step toward dismantling a culture of impunity.

More broadly, the ICT's work highlights the importance of addressing historical injustices as part of a nation's efforts toward reconciliation, healing, and building a democratic society rooted in accountability and the rule of law. It serves as a reminder of the enduring impact of justice on a nation's identity and its future trajectory. While the tribunal's imperfections cannot be overlooked, its establishment and operation reflect Bangladesh's commitment to confronting its painful past and laying the groundwork for a more just and inclusive society. As the nation continues to grapple with the legacies of 1971, the ICT stands as both a symbol of justice and a reminder of the ongoing struggle to achieve it fully.

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