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Trial by Bangladesh international crimes tribunal: justice divulged or political agenda?

Julgamento pelo tribunal de crimes internacionais de Bangladesh: justiça divulgada ou agenda política?

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DIGITAL TRANSFORMATION OF MERCOSUR: INFLUENCE AND COOPERATION WITH THE EUROPEAN UNION

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Trial by Bangladesh international crimes tribunal: justice divulged or political agenda?*

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Abstract

The war crimes that happened in Bangladesh are known all over the globe and were considered massive violations of human rights; hence, there was a need to initiate trials in order to make the offenders accountable and hence impart justice. The International Crimes Tribunal of Bangladesh (hereinafter ICTB) was established in 1971 by the Bangladesh government during the war between Pakistan and East Pakistan (now Bangladesh). This was the turning point when a lot of debate surrounded the practices adopted by the tribunal in the administration of justice and a fair trial. The objective of this paper is to “make a comparison on the grounds of the International Criminal Tribunal of Yugoslavia (hereinafter ICTY) and the International Criminal Tribunal for Rwanda (hereinafter ICTR), which seem more transparent than the Bangladeshi Trial”. Further, this paper challenges the validity of the trial of Bangladesh in the International Criminal Tribunal on the basis of procedure and a fair trial. It explains the history and object of the establishment of the ICTB, as well as the difference between the ICTY and the ICTR, and the authors, criticize the decision of the ICTB on the grounds of a violation of the principles of International Criminal Law. The paper explains a pertinent research question here: should an ICTB be considered on par with the ICTR and ICTY? Further, it challenges the validity of the ICTB for not following the principles of “natural justice” and “fair trial,” which are essential elements in International law. ICT-BD was created under the International Crimes (Tribunals) Act of 1973. In general, an international crimes tribunal is a legal body that tries people indicted for war crimes or crimes against humanity as defined in Section 3 of the Act. 2 The aims of such tribunals are to achieve “justice, promote peace-building, encourage reconciliation, and take remedial action”. The authors of this paper aim to examine the structural and functional shortcomings of the International Criminal Tribunal for Bangladesh. They hypothesize that the ICTB’s operations are driven more by political considerations rather than the foundational principles of natural justice and fairness.

Keywords: Bangladesh; genocide; independence; tribunal; verdict; ICT; ICTR; ICTY.

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Resumo

Os crimes de guerra ocorridos no Bangladesh são conhecidos em todo o mundo e foram considerados violações massivas dos direitos humanos; portanto, houve necessidade de iniciar julgamentos a fim de responsabilizar os infratores e, portanto, fazer justiça. O Tribunal Internacional de Crimes de Bangladesh (doravante ICTB) foi criado em 1971 pelo governo de Bangladesh durante a guerra entre o Paquistão e o Paquistão Oriental (atual Bangladesh). Este foi o ponto de viragem quando muito debate cercou as práticas adoptadas pelo tribunal na administração da justiça e num julgamento justo. O objetivo deste artigo é “fazer uma comparação entre os fundamentos do Tribunal Penal Internacional da Iugoslávia (doravante ICTY) e do Tribunal Penal Internacional para Ruanda (doravante ICTR), que parecem mais transparentes do que o Julgamento de Bangladesh”. Além disso, este artigo desafia a validade do julgamento de Bangladesh no Tribunal Penal Internacional com base no procedimento e num julgamento justo. Explica a história e o objeto da criação do ICTB, bem como a diferença entre o ICTY e o ICTR, e os autores criticam a decisão do ICTB alegando uma violação dos princípios do Direito Penal Internacional. O artigo explica aqui uma questão de investigação pertinente: deverá um TPIR ser considerado em pé de igualdade com o ICTR e o ICTY? Além disso, desafia a validade do ICTB por não seguir os princípios da “justiça natural” e do “julgamento justo”, que são elementos essenciais do direito internacional.

O ICT-BD foi criado ao abrigo da Lei de Crimes Internacionais (Tribunais) de 1973. Em geral, um tribunal de crimes internacionais é um órgão legal que julga pessoas indiciadas por crimes de guerra ou crimes contra a humanidade, conforme definido na Secção 3 da Lei. 2 Os objectivos de tais tribunais são alcançar “justiça, promover a construção da paz, encorajar a reconciliação e tomar medidas correctivas”. Os autores deste artigo pretendem examinar as deficiências estruturais e funcionais do Tribunal Penal Internacional para Bangladesh. Eles levantam a hipótese de que as operações do ICTB são motivadas mais por considerações políticas do que pelos princípios fundamentais da justiça natural e da equidade.

Palavras chave: Bangladesh, Genocídio, Independência, Tribunal, veredito, ICT, ICTR, ICTY

1 Introduction

In the past, it has been witnessed by the world that criminal impunity is unacceptable, as for many decades, war criminals have been tried for war crimes by the ICTR and the ICTY¹. The ICTY and ICTR are the most important examples of the world community's commitment to cooperating and punishing war crimes². The International Crimes Tribunal of Bangladesh (hereinafter ICTB) was established in 1971. In this was the time when the office of the prosecutor of this Tribunal reported that out of 155 individuals accused of war crimes in Bangladesh during the Bangladesh Liberation War, the tribunal had rendered verdicts for 135 individuals. Among them, two were acquitted, whereas 18 passed away while in jail during their trial. However, the sentence included 95 accused receiving the death penalty, nine of them received life imprisonment, 25 sentenced to imprisonment until death, and six others given shorter jail terms. The reasons were many; however, those accused were recognized as war criminals who had worked in collaboration with the Pakistani army. It is appreciable to constitute an International criminal tribunal in any nation to prosecute the criminals. However, it must be a fairly constituted tribunal on the basis of international principles and human rights ethos.

However, it is pertinent to mention that the principles of rule of law and due process were followed in the ICTY and ICTR, however, the Bangladeshi trials had always been criticized by groups of global rights on the grounds of not following the fair trial standards. It is necessary to discuss the history of the independence of Bangladesh.

2 Historical background

On December 1971³, this phase of Bangladesh's independence has seen the extermination of around

¹ ROBERTS, Adam. 'NATO's 'Humanitarian War' over Kosovo'. *Survival*, v. 41, n. 3, p. 102-114, 1999. Available in: <https://www.tandfonline.com/doi/pdf/10.1080/00396339912331342943>. Access at: Jan. 5, 2021.

² GARIMELLA, Sai Ramani. The Bangladeshi war crime trials: strengthening normative structure. *Journal of Law, Policy and Globalization*, v. 13, 27-38, 2013. Available in: <https://core.ac.uk/download/pdf/234649645.pdf>. Access at: Jan. 15, 2021.

³ HOSSAIN, Mokerrom. Bangladesh war of independence: a moral issue. *Economic & Political Weekly*, v. 44, n. 5, Jan. 2009. Available in:

3 million people and rape and sexual violence against millions of others. Around 10 million people were displaced and forced to become asylum seekers⁴. The war of 1971 witnessed several war crimes, and these crimes are being recognised globally. The 1971 war in Bangladesh resulted in the most heinous forms of human rights violations and violations of the law related to armed conflict⁵. Bangladeshi people during that time were divided into two sets of political ideologies, the first being people who believed in and wanted an independent Bangladesh and the other being people who did not favor independence and separation of the state. The people in favor of independence were led by the Awami League party, whereas the anti-independence movement was led by the Jamaat-e-Islam party, which is made up of Pakistan supporters and sympathizers⁶.

The war in Bangladesh witnessed the rape of around 2,00,000 women, and around 25,000 women were forcefully impregnated by the military of Pakistan with the cooperation of collaborators from Bangladesh⁷ (of Bangladeshi origin). This war also witnessed the fleeing of around 10 million Bangladeshis to neighboring countries; India alone gave refuge to around 6 million Bangladeshis⁸. During this specific period, the most heinous crimes against humanity were committed specifically against women and young children.

During the hostilities, another heinous crime that unfolded was the targeted assassination of Bengali intellectuals (From Bangladesh). Among the victims were 991 academicians, 49 physicians, 42 lawyers, 16 writers, and a substantial number of engineers⁹. This was done with the intent to commit genocide by killing the intellectuals of particular political thought in Bangladesh¹⁰. The killing of intellectuals resulted in a period when intellectualism was deficient for a certain time frame. It has also seen a reduction in rebellious opinions and intellectual thoughts against oppression¹¹. Killing intellectuals is an old tool of genocide with which one can stop the cultural and scientific progress of any social or political group¹². The killing of Bengali intellectuals has created a void in the cultural and scientific exposure of Bangladeshi society and has been used as a tool for genocide¹³.

The Jamaat-e-Islami party committed the most war crimes during the Bangladesh independence war. Jamaat-e-Islami advocated for a unified Pakistan and was against the concept of Bangladesh as a separate state, and due to this, they supported Pakistan during the liberation war¹⁴.

<https://www.epw.in/journal/2009/05/commentary/bangladesh-war-independence-moral-issue.html>. Access at: Dec. 28, 2020.

⁴ MOLLAH, Awal Hossain. War crimes trials in Bangladesh: justice or politics? *Journal of Asian and African Studies*, v. 55, n. 5, 2020. Available in: <https://journals.sagepub.com/doi/epub/10.1177/0021909619890117>. Access at: Jan. 2, 2021.

⁵ BERGSMO, Morten; CHEAH WUI LING. Justice after decades in Bangladesh: national trials for international crimes. *Journal of Genocide Research*, v. 13, n. 503, 2011; See also HENSHER, Philip. The war Bangladesh can never forget. *Independent*, 2013. Available in: <http://www.independent.co.uk/news/world/asia/the-war-bangladesh-can-never-forget-8501636.html>. Access at: Jan. 2, 2021.

⁶ TRIPATHI, Salil. The colonel who would not repent: the Bangladesh war and its unquiet legacy. *Yale University Press*, n. 36, 2016; See also: LIFSCHULTZ, Lawrence. *Bangladesh: the unfinished revolution*. London: Zed Books, 1979.

⁷ AHMED, Anis. *Bangladesh 1971: war crimes, genocide and crimes against humanity open search light: the targets*. 2017. Available in: https://www.kean.edu/~bgs/Conference09/Papers_and_Presentations/Anis%20Ahmed_Paper_OperationSearchlight.pdf. Access at: Jan. 4, 2021.

⁸ BERGMAN, David. The politics of Bangladesh's genocide debate. *The New York Times*, 2016. Available in: <https://www.nytimes.com/2016/04/06/opinion/the-politics-of-bangladeshs-genocide-debate.html> Access at: Jan. 6, 2021.

⁹ BUTT, Ahsan I. Looking back at the geopolitics behind Pakistan's genocidal split of 1971. *The Wire*, 2017. Available in: <https://thewire.in/external-affairs/looking-back-geopolitics-behind-pakistan-genocide-1971>. Access at: Jan. 8, 2021.

¹⁰ MOOKHERJEE, Nayanika. The "Dead and their Double Duties": mourning, melancholia, and the martyred intellectual memorials in Bangladesh. *Space and Culture*, v. 10, n. 2, p. 271-291, May 2007. Available in: <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.878.3359&rep=rep1&type=pdf>. Access at: Jan. 10, 2021.

¹¹ WARA, Umme. The 1971 massacre of intellectuals in Bangladesh: genocide? *Bangladesh Journal of Law*, v. 2, 2017. Available in: <http://www.biliabd.org/article%20law/Vol-17/Umme%20Wara.pdf>. Access at: Jan. 5, 2021.

¹² SAKIB, A. B. M. Najmus. *Victimization during the Liberation War 1971 and transitional justice: the case of Bangladesh*. [s.d.]. Thesis (Master Victimology and Criminal Justice) – Tilburg University, Tilburg, [s.d.]. Available in: <http://arno.uvt.nl/show.cgi?fid=146808>. Access at: Jan. 8, 2021.

¹³ HOSSAIN, Pizaur. 1971: Another chapter in world history when intellectuals were targeted. *The Daily Star*, 2017. Available in: <https://www.thedailystar.net/supplements/martyred-intellectuals-day-2017/news/1971-another-chapter-world-history-when-intellectuals-were-targeted-1672981>. Access at: Jan. 10, 2021.

¹⁴ EUROPEAN FOUNDATION FOR SOUTH ASIAN STUDIES. *Jamaat-e-Islami in Bangladesh: past, present and future*. [s.d.]. Available in: <https://www.efsas.org/publications/study-papers/jamaat-e-islami-in-bangladesh-past-present-and-future/>. Access at: Jan. 2, 2021.

The International Criminal Tribunal was established in order to punish and execute the criminals in 2013¹⁵. Recently in the year 2022, Bangladesh's International Crimes Tribunal issued death sentences to six members of the notorious paramilitary force "Razakar Bahini" for collaborating with the Pakistani Army and committing "crimes against humanity" during the 1971 Liberation War. The Tribunal has predominantly punished accused people with death sentences and, in a few instances, sentenced them to life imprisonment for people who are of very advanced age¹⁶. In order to understand the working of ICTB it is necessary to explain the establishment in detail.

2.1 Inception and Formation of the ICTB: Tracing Its Establishment

ICTB, was created with the main aim of punishing the people who allegedly committed war crimes during the 1971 liberation war¹⁷. After receiving a recommendation from the law commission, the Bangladesh government took the initiative to amend the International Crimes Tribunals Act (ICTA), 1973, and rename it the International Crimes (Tribunals) Amendment Act (ICTAA) on July 9, 2009¹⁸.

Two pieces of legislation, namely the Bangladesh Collaborators (Special Tribunal) Order, 1972, and the International Crimes (Tribunal) Act, 1973, were enacted after the War of Independence in order to try and punish people involved in war crimes in 1971¹⁹. However, the Bangladesh Collaborators (Special Tribunal) Order,

1972, was repealed after the brutal assassination of family members and the father of the nation, Bangabandhu Sheikh Mujibur Rahman, as it was alleged that the government, which was backed by the military, did not want the trial of the local perpetrators²⁰. Rather, the local perpetrators, who were also the leaders and activists of the pro-Pakistan political parties, were rehabilitated by the subsequent government. Till 1996, there was not enough mandate with the government to initiate the trial of the 1971 perpetrators²¹.

In 2009, when the government got the absolute mandate from the people of Bangladesh, it was then decided to establish an international crimes tribunal under the International Crimes (Tribunals) Amendment Act (ICTAA) on July 9, 2009. This is when the International Crimes Tribunal started punishing the local perpetrators who committed war crimes during the 1971 Independence War²². but for around thirty-nine years, there was no trial of the principals (people who were members of the Pakistan Army and the policy makers) as well as the local perpetrators (*Chief Prosecutor v. A. T. M. Azhar*)²³. This very clearly shows that trials under this tribunal are only restricted to nationals of the country, and no perpetrators from Pakistan are punished by this international court²⁴. This very significant fact shows how the ICTB is different from other international tribunals, as they punished citizens of other countries who were accused of war crimes and crimes against humanity, i.e., the Nuremberg Trial and the Tokyo Trial. During the

¹⁵ AL-MAHMOOD, Syed Zain. Bangladesh war crimes court sentences islamist leader to life. *The Wall Street Journal*, 2013. Available in: <https://www.wsj.com/articles/SB10001424127887324445904578285253762636258>. Access at: Jan. 6, 2021.

¹⁶ PTI. Six members of Razakar Bahini sentenced to death in Bangladesh for crimes against humanity during the 1971 Liberation War. *The Hindu*, 2022. Available in: <https://www.thehindu.com/news/international/six-members-of-razakar-bahini-sentenced-to-death-in-bangladesh-for-crimes-against-humanity-during-the-1971-liberation-war/article65694544.ece>. Access at: Jan. 6, 2021.

¹⁷ BLOOD, Arthur K. US Government top secret report: conflict in East Pakistan: background and prospects. In: QUADERI, Fazlul Quader (ed.). *Bangladesh genocide and world press*. Dacca: Begum Dila-froz Quaderi, 1972.

¹⁸ REPUBLIC OF BANGLADESH. *The International Crimes (Tribunals) Act, 1973*. (ACT NO. XIX OF 1973). Available in: <http://bdlaws.minlaw.gov.bd/act-435.html>. Access at: Mar. 8, 2021.

¹⁹ BAUL, Tapas Kanti. The trial of 1971 genocide: reflection on ICTBD. *The Daily Star*, 2019. Available in: <https://www.thedailystar.net/law-our-rights/law-vision/news/the-trial-1971-genocide-reflection-ictbd-1720285>. Access at: Dec. 31, 2020.

²⁰ INTERNATIONAL CRIMES TRIBUNAL. *The Chief Prosecutor v. Abdul Quader Molla* (ICT-BD Case No. 02 of 2012). Available in: <https://www.thedailystar.net/news-detail-268072>. Access at: Jan. 5, 2021.

²¹ RAHMAN, Sayedur; ISLAM, Tanziul; ISLAM, Towfiqul. Evaluation of charismatic leader of Bangladesh Sheikh Mujibur Rahman. *International Journal of Scientific and Research Publications*, v. 4, n. 5, May 2014. Available in: https://www.researchgate.net/publication/271826594_Evaluation_of_Charismatic_Leader_of_Bangabandhu_Sheikh_Mujibur_Rahman. Access at: Jan. 19, 2021.

²² INTERNATIONAL CRISIS GROUP. Mapping Bangladesh's political crises. *Asia Report*, n. 264, Feb. 2015. Available in: <https://www.files.ethz.ch/isn/188009/264-mapping-bangladesh-s-political-crisis.pdf>. Access at: Jan. 19, 2021.

²³ HOSSAIN, M. Sanjeeb. *The search for justice in Bangladesh: an assessment of the legality and legitimacy of the International Crimes Tribunals of Bangladesh through the prism of the principle of complementarity*. 2017. Thesis (Doctor of Philosophy) – University of Warwick, United Kingdom, 2017. Available in: http://wrap.warwick.ac.uk/103875/1/WRAP_Theses_Hossain_2017.pdf. Access at: Jan. 5, 2021.

²⁴ BANGLADESH NATIONAL PORTAL. *Annual Reports*. Available in: http://ictbdinvestigation.gov.bd/site/view/annual_reports/-. Access at: Jan. 10, 2021.

research, we have come across various facts that relate to how this international criminal tribunal of Bangladesh is different from other international and regional criminal tribunals.

3 Comparing international criminal tribunals: unpacking distinctions between icty, ictr, and ictb

The first difference between ICTB and other international tribunals is that ICTB has no international judges or prosecutors, like the ICTY, ICTR, Tokyo, and Nuremberg Trial²⁵. The absence of international judges and prosecutors in this tribunal gives it the colour of a national tribunal, and calling it international criminal tribunal will be a misnomer²⁶. A close perusal will reveal that judgments of the ICTB can be appealed to the Supreme Court of Bangladesh, which further adds to the domestic character to ICTB (though it is not disputed that this power of appeal no doubt provides an extra opportunity to any person who is sentenced by the International Tribunal and fulfills the requirement of a fair trial, just, equity and the principle of natural justice)²⁷. Researcher has found out that no ICTB has an appeal process in which an accused can appeal to the domestic court, whereas an accused can in the ICTB; this way, the law related to the international court is subordinated to the domestic law. The argument of author Sumit Ganguly²⁸ that appeal provides an extra step to make the process fair and based on natural justice does not sound good, as subordinating an international

tribunal under a domestic court is contrary to the very notion of international civil law.

In the last decade, the ICTB has not only completed many trials but has also expedited the prosecution of individuals involved in Genocide, crimes against humanity and war crimes. There are two sets of notions about the workings of this International Criminal Tribunal. People are happy that war criminals are punished and justice is done, but on the other hand, many view this trial as a partial system of eliminating people from certain political groups, especially the Jamat-a-Islam party²⁹.

4 Scrutinising the ICTB: examining criticisms and controversies surrounding the tribunal

The trials against war criminals involved in the freedom struggle of Bangladesh received worldwide attention and wide support from the world community in the beginning, but later on, they received serious criticism as they were unfair and lacked international standards of trial. Many international organizations extended support to this international tribunal, but some organizations also protested against the death penalty (for instance, Amnesty International)³⁰.

The trials by the ICTB also attracted international attention because of the trials of war criminals. Many Muslim countries like Pakistan and Turkey protested the execution of war criminals by this tribunal, i.e., the Turkish group of the Anatolian Youth Association, which led to the withdrawal of **the Turkish Ambassador from the capital city of Dhaka** as a protest against this execution. This period also witnessed lobbying by Saudi Arabia against the executions of war criminals by the International Criminal Tribunal of Bangladesh³¹.

²⁵ ISLAM, Mohammad Rabiul. The International Criminal Court: its success and limitations for pursuing international justice. *Journal of Civil and Legal Sciences*, v. 5, 2016. Available in: <https://www.omicsonline.org/open-access/the-international-criminal-court-its-success-and-limitations-for-pursuing-international-justice-2169-0170-1000180.pdf>. Access at: Jan. 10, 2021.

²⁶ JALIL, Mohd Abdul. War crimes trial in Bangladesh: a real political Vendetta. *Journal of Politics and Law*, v. 3, n. 2, Sept. 2010. Available in: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.673.8627&rep=rep1&type=pdf>. Access at: Jan. 7, 2021.

²⁷ GANGULY, Sumit. Pakistan's forgotten Genocide. *International Security*, v. 39, n. 2, p. 169-180, 2014. Available in: https://www.mitpressjournals.org/doi/pdf/10.1162/ISEC_a_00175. Access at: Jan. 5, 2021.

²⁸ GANGULY, Sumit. Pakistan's forgotten Genocide. *International Security*, v. 39, n. 2, p. 169-180, 2014. Available in: https://www.mitpressjournals.org/doi/pdf/10.1162/ISEC_a_00175. Access at: Jan. 5, 2021.

²⁹ BANGLADESH war crimes trial: key accused. *BBC News*, 2016. Available in: <https://www.bbc.com/news/world-asia-20970123>. Access at: Jan. 19, 2021.

³⁰ MACDERMOT, Niall. Crimes Against Humanity in Bangladesh. *The International Lawyer*, v. 7, n. 2, Apr. 1973. Available in: <http://www.icj.org/wp-content/uploads/2013/05/Bangladesh-crimes-against-humanity-1973-eng.pdf>. Access at: Jan. 10, 2021.

³¹ D'COSTA, Bina. Women, war, and the making of Bangladesh. *Journal of Genocide Research*, v. 14, n. 1, 2012. Available in: <https://www.tandfonline.com/doi/abs/10.1080/14623528.2012.656994>. Access at: Jan. 7, 2021.

However, Saudi Arabia later stopped lobbying as they wanted a good relationship with Bangladesh, which would ultimately help them in their power struggle against Iran. Pakistan also warned Bangladesh not to initiate criminal trials if they wanted good relations with Pakistan. This criminal tribunal received full support from India to punish the war criminals, as India has since the beginning helped East Pakistan in the liberation war with weaponry and military support.

On 10 October 2022, H.E. Muhammad Abdul Muhith, Bangladesh's Ambassador to the UN, praised the Tribunal's efforts in trying internationally defined crimes against humanity using the national criminal justice system. However, we argue that the International Crimes Tribunal of Bangladesh has not adhered to the principles of natural justice, evidenced by biased proceedings and punishing absent accused, contrary to the fundamental principles of fairness and natural justice³².

5 Unveiling constitutional breaches: analysing violations of rights in the ICTB

The present statute of the ICTB (Bangladesh) is grossly incompetent on international standards of human rights and IHL, being unfair, unjust, and partial. These provisions reduce the credibility of the work of this international court, which is claimed to be politically motivated and only punishes people belonging to one political group³³.

The major criticism of the International Criminal Tribunal is that there are no international judges and prosecutors; hence, it is nothing more than a domestic tribunal, and hence fair trial and natural justice can only be checked by national law. No doubt Bangladesh signed and ratified the Rome Statute in 1998, in which Bangladesh pledged to follow and uphold legal proce-

dings of a certain standard³⁴. Further, the International Criminal Court does not work on the basis of supplementary jurisdiction rather it works on the principle of complementarity jurisdiction mentioned in Article 1 of the Rome Statute. Complementary Jurisdiction means that no case can be tried before the ICC if the National Courts are dealing with it in their domestic courts. Moreover, Articles 17 and 53 of the Rome Statute are basis on which the admissibility is considered. Admissibility is a separate issue as there is a possibility that a situation is falling under the jurisdiction of the Rome Statute due to its nature of Genocide, Crime Against Humanity and war crime, however, it still may not be taken by the ICC because it is not competing with the Admissibility clause. It means that the situation to be considered before the ICC under admissibility clause must reach to that level of intensity³⁵. It means that as per the principle of legality, the ICC can only have jurisdiction when a state is unwilling or unable to prosecute a person. Whereas, the trial by the International Criminal Tribunal of Bangladesh renders ICC justice less relevant and makes the ICTB supreme in terms of dealing with cases of war crimes and crimes against humanity in Bangladesh just like a Nuremberg trial.

It can be said that upholding the Rome Statute of 1998 is a distant dream, as this war tribunal even fails to acknowledge national law and constitutional values³⁶. The provisions of this tribunal include rules and procedures. The tribunal's withdrawal of constitutional rights has been a point of protest by many people, NGOs, and international organizations for being unfair, partial, and against the principle of natural justice³⁷. The Tribunal Statute provides rules regarding the procedures to be followed by the tribunal, which clearly states that under Articles 47(3) and 47A, constitutional guarantees and rights can be denied to people who are detained

³² HOSSAIN, Emran. Rights group decries Bangladesh's war crimes death penalty. *UCANews*, 2023. Available in: <https://www.ucanews.com/news/rights-group-decries-bangladeshs-war-crimes-death-penalty/101774>. Access at: Jul. 9, 2023.

³³ BERINGMEIER, Miriam. *The International Crimes Tribunal in Bangladesh: critical appraisal of legal framework and jurisprudence*. Germany: Berliner Wissenschafts-Verlag, 2018. Available in: http://www.ciando.com/img/books/extract/3830540302_lp.pdf. Access at: Jan. 9, 2021.

³⁴ BANGLADESH ratifies ICC Rome Statute. *The Hague*, 2010. Available in: <http://www.haguejusticeportal.net/index.php?id=11564>. Access at: Feb. 26, 2020.

³⁵ SCHABAS, Willian A. *An introduction to the International Criminal Court*. 6th. ed. New York: Cambridge University Press, 2020. p. 181-202.

³⁶ MANTOO, Shahnawaz. Sheikh Majibur Rehman: founder of Bangladesh. *African Journal of Political Science and International Relations*, v. 9, n. 5, p. 152-158, 2015. Available in: <https://academicjournals.org/journal/AJPSIR/article-full-text-pdf/D0DBCF452758>. Access at: Jan. 9, 2021.

³⁷ DUMMETI, Mark. Bangladesh war: the article that changes history. *BBC News*, 2011. Available in: <https://www.bbc.com/news/world-asia-16207201>. Access at: Jan. 19, 2021.

or prosecuted by this international crimes tribunal. For instance, Article 47(3) prohibits, in the trials of international tribunals, challenging any law, including any amendments to the Tribunal Statute³⁸. This always creates a fear that any new law may come at any point, which may be unfair and partial, but still, no one can file a case against it. Article 47A of this international criminal tribunal strips away an individual's constitutional rights and remedies³⁹.

This article demonstrates the violation of constitutional rights under various provisions of the Bangladesh Tribunal, including Article 31, which is the right to protection by the law, protection from the application of ex post facto laws, and also the very important right to a speedy trial⁴⁰. Further, article 47A also violates the right to a public trial given under Article 33 of the Bangladesh Constitution and also Article 44, which ensures the ability to enforce guaranteed rights⁴¹.

ICTB has also been criticized for being highly intolerant of any fair journalism. ICTB was hugely criticized by the international community and NGOs after the conviction of the journalist David Bergman for charges of contempt of court for writing about the proceedings of the trial of ICTB in his blog⁴². ICTB intolerance of this kind of blog falls below freedom of expression standards (international standards), and there is no doubt that hacking Skype chat is also not ethical on the part of the journalist. In David Bergman, we can see that the standards of freedom of speech and expression are very low in comparison to ICTB. These present instances fail to meet the standards of the Court of Contempt

national jurisprudence as well, which exempts fair criticism, information in good faith, public interest, and sharing correct information⁴³.

This way, the ICTB Act's unrestrained contempt power thrusts the border of cogent restrictions on freedom of speech, expression, and thought. The arguments in favor of this kind of strict contempt power are that such a wide power is necessary as this tribunal receives a lot of hostility from the powerful section of society, and any criticism may lead to unprecedented human life loss because of violence. Many experienced and influential politicians might resist tribunal proceedings, question their validity and reliability of them, and use them to settle scores with other political parties.⁴⁴ But no doubt, authors can say that the room for disagreement about the tribunal is fading in Bangladesh.

The ICTB has been constituted by ignoring the important principles of natural justice. The law related to criminal proceedings does not apply to ICTB and because of this procedural fairness according to national as well as international standards is not applicable to tribunal proceedings⁴⁵.

The Constitution of Bangladesh Article 47A prohibits anyone who has been accused under the ICTB Act from moving to the Supreme Court of Bangladesh to seek constitutional remedies. The above section assures that constitutional protections are not extended to people who are punished by the ICTB. The constitutional guarantees pertaining to arrest, examination, and trial, along with the capability to implement the constitutional guarantees, have been denied to the ICTB defendants⁴⁶.

³⁸ REPUBLIC OF BANGLADESH. *The International Crimes (Tribunals) Act, 1973*. (ACT NO. XIX OF 1973). Available in: <http://bdlaws.minlaw.gov.bd/act-435.html>. Access at: Mar. 8, 2021.

³⁹ POPOVSKI, Vesselin. Legality and legitimacy of International Criminal Tribunals. In: FALK, Richard; JUERGENSMEYER, Mark; POPOVSKI, Vesselin. (ed.). *Legality and legitimacy in global affairs*. Oxford: Oxford University Press, 2012.

⁴⁰ HUMAN RIGHTS WATCH. *Bangladesh: halt imminent war crimes executions impose immediate moratorium on the death penalty*. 2016. Available in: <https://www.hrw.org/news/2016/09/01/bangladesh-halt-imminent-war-crimes-executions>. Access at: Mar. 8, 2021.

⁴¹ HUMAN RIGHTS WATCH. *Bangladesh: halt imminent war crimes executions impose immediate moratorium on the death penalty*. 2016. Available in: <https://www.hrw.org/news/2016/09/01/bangladesh-halt-imminent-war-crimes-executions>. Access at: Mar. 8, 2021.

⁴² CHOPRA, Surabhi. The International Crimes Tribunal in Bangladesh: silencing fair comment. *Journal of Genocide Research*, v. 17, n. 2, 2015. Available in: <https://www.tandfonline.com/doi/full/10.1080/14623528.2015.1027080>. Access at: Jan. 5, 2021.

⁴³ SAKIB, A. B. M. Najmus. *Victimization during the Liberation War 1971 and transitional justice: the case of Bangladesh*. [s.d]. Thesis (Master Victimology and Criminal Justice) – Tilburg University, Tilburg, [s.d]. Available in: <http://arno.uvt.nl/show.cgi?fid=146808>. Access at: Jan. 8, 2021.

⁴⁴ For a brief discussion of civil society activism, see D'COSTA, Bina. Women, war, and the making of Bangladesh. *Journal of Genocide Research*, v. 14, n. 1, 2012. Available in: <https://www.tandfonline.com/doi/abs/10.1080/14623528.2012.656994>. Access at: Jan. 7, 2021.

⁴⁵ CHOPRA, Surabhi. The International Crimes Tribunal in Bangladesh: silencing fair comment. *Journal of Genocide Research*, v. 17, n. 2, 2015. Available in: <https://www.tandfonline.com/doi/full/10.1080/14623528.2015.1027080>. Access at: Jan. 5, 2021.

⁴⁶ ZEITLYN, Benjamin. Watching the international crimes tribunal from London. *South Asia Multidisciplinary Academic Journal*, n. 9, 2014. Available in: <https://journals.openedition.org/samaj/3711>. Access at: Jan. 19, 2021.

The Economist news magazine and a national daily newspaper, namely Amar Desh, in 2012 retrieved the scythed Skype and trial email had exposed the presiding judge of the ICTB, Justice Mohammed Nizamul Huq, who has been advised in various court-pending matters by Ahmed Ziauddin, a Bangladeshi lawyer based in Brussels⁴⁷. Ahmed Ziauddin played an extensive role, not just in the discussion of the case but also in the drafting of the judgements.⁴⁸ The outcome of these revelations was that Justice Hug resigned from his post⁴⁹. In the case of Delwar Hossain Sayeedi, who even did not get the chance to prove his innocence by substantial evidence, and finally got charged by the judges with death penalty. This case clearly reflects the intent of the ICTB to punish the accused without giving them a proper chance to defend themselves⁵⁰.

6 Comparative analysis of ICTY/ICTR and ICTB

International Criminal Law has basic principles of the right to a free trial as a basic norm, and it is also enshrined in Article 10 of the UDHR⁵¹ and also under Article 64 of the Rome Statute 1998⁵². Even the statutes of international criminal tribunals also mention it in various sections i.e Article 20 of the ICTY⁵³ and Article

19 of the ICTR and many other internationally recognized multilateral and bilateral treaties and various tribunals. According to international law jurists and legal experts, the right to a fair trial is a peremptory norm of international law (*Jus Cogens*), and hence any deviation from these norms is not allowed in any condition whatsoever. It is also very important to mention that the state of Bangladesh is a party to the ICCPR, and they ratified it in 2000 and are hence under obligation to make national laws in consonance with the international obligations mentioned under the ICCPR⁵⁴, Rome Statute,⁵⁵ etc. Any deviation from treaty obligations will be treated as a violation of the terms of the above-mentioned treaties⁵⁶. The national law of almost all countries essentially mentions the fair trial as the basic law of the land; hence, understanding this right should not be very complicated, whereas, in the case of ICTB, a fair trial is missing at the point of the investigation, evidence collection, and judgment delivery⁵⁷.

The International Criminal Tribunal of Bangladesh Act, on the other hand, under Sections 6 to 25, provides for the procedure of governance of the war tribunal, but it does not comply with the Rome Statute or laws laid down under the ICCPR, and therefore internationally it is not a well-recognized war crime statute. The statute of the ICTB is criticized by various countries, tribunals, and NGOs for being unjust, unfair, and discriminatory⁵⁸. The ICTY and ICTR laws were recognised, guided, and approved by the Security Council of United Nations and qualify as legitimately recognised war crime tribunals, whereas the ICTB does not have

⁴⁷ REZWAN. 'The Economist' accused of hacking by Bangladesh's war crimes tribunal. *Global Voices*, 2012. Available in: <https://global-voices.org/2012/12/10/bangladesh-war-crimes-tribunal-under-spotlight/>. Access at: Jan. 5, 2021.

⁴⁸ REZWAN. 'The Economist' accused of hacking by Bangladesh's war crimes tribunal. *Global Voices*, 2012. Available in: <https://global-voices.org/2012/12/10/bangladesh-war-crimes-tribunal-under-spotlight/>. Access at: Jan. 5, 2021.

⁴⁹ REZWAN. 'The Economist' accused of hacking by Bangladesh's war crimes tribunal. *Global Voices*, 2012. Available in: <https://global-voices.org/2012/12/10/bangladesh-war-crimes-tribunal-under-spotlight/>. Access at: Jan. 5, 2021.

⁵⁰ BANGLADESH WAR CRIMES TRIBUNAL. *Sayedee Skype retrial written application*. 2013. Available in: <http://bangladeshwar-crimes.blogspot.com/2013/03/sayedee-skype-retrial-written.html>. Access at: Jan. 10, 2021.

⁵¹ UNITED NATIONS. *Universal Declaration of Human Rights*. 1948. Available in: <https://www.un.org/en/universal-declaration-human-rights/>. Access at: Mar. 10, 2021.

⁵² INTERNATIONAL CRIMINAL COURT. *Rome Statute of the International Criminal Court*. Available in: <https://www.icc-cpi.int/resource-library/official-journal/rome-statute.aspx>. Access at: Jan. 10, 2021.

⁵³ UNITED NATIONS. *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*. 2009. Available in: https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf. Ac-

cess at: Jan. 10, 2021.

⁵⁴ UNITED NATIONS. *Ratification status of Bangladesh*. Available in: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=14&Lang=EN. Access at: Jan. 10, 2021.

⁵⁵ INTERNATIONAL CRIMINAL COURT. *The State Parties to the Rome Statute*. Available in: https://asp.icc-cpi.int/en_menus/asp/states%20parties/asian%20states/Pages/bangladesh.aspx. Access at: Jan. 9, 2021.

⁵⁶ SCHOMBURG, Wolfgang. The role of International Criminal Tribunals in promoting respect for fair trial rights. *Northwestern Journal of International Human Rights*, v. 8, n. 1, 2009. Available in: <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1091&context=njihr>. Access at: Jan. 5, 2021.

⁵⁷ BANGLADESH WAR CRIMES TRIBUNAL. *Sayedee Skype retrial written application*. 2013. Available in: <http://bangladeshwar-crimes.blogspot.com/2013/03/sayedee-skype-retrial-written.html>. Access at: Jan. 10, 2021.

⁵⁸ CHOPRA, Surabhi. The International Crimes Tribunal in Bangladesh: silencing fair comment. *Journal of Genocide Research*, v. 17, n. 2, 2015. Available in: <https://www.tandfonline.com/doi/full/10.1080/14623528.2015.1027080>. Access at: Jan. 5, 2021.

any such recognition as it is the outcome of legislation by Bangladesh's parliament without any adoption or recognition at the international level⁵⁹.

Special mention is required of Article 14 and Article 9(3) of the ICCPR 1976, which provide for a fair trial and also guarantee what are widely known as "minimum guarantees," and we can also see reflections of these provisions in the Statutes of the ICTY and ICTR. These minimum guarantees are not available in the statute of the ICTB, but in order to comply with universal standards, it is important that these rights are guaranteed to the accused⁶⁰.

ICTB, under Article 6, mentions that judicial members of the Tribunal will be appointed by the government of Bangladesh; furthermore, it also does not have any provision for challenging such appointments⁶¹. It is also to be noted, without missing out, that ICTA does not have provisions for the appointment of international judges in the Tribunal⁶² and hence all the judges are local.

In ICTY and ICTR, we have seen that there are neutral judges from different countries in both international criminal tribunals, and a unique election formula that has been adopted for the appointment of the judges, which has precise benchmarks of qualification. The members of these tribunals are appointed by the United Nations General Assembly through voting process. Also, ICTY and ICTR have a free and impartial

environment with seats at neutral venues, unlike ICTB, which has seats in Dhaka⁶³.

ICTB not only has local judges but also local prosecutors, unlike ICTY and ICTR. ICTR and ICTY prosecutors get appointed by the United Nations Security Council, but the prosecutors at ICTB are appointed by the ruling government, which endangers the impartiality and fairness of ICTB⁶⁴. ICTB also lacks a regime for witness protection and has no specific provision for the same, whereas ICTY, under Article 22, and ICTR, under Article 21, provide for victims and witness protection schemes. ICTB is also heavily criticized for giving the death penalty to the convicts under the statute, whereas ICTY, ICTR, and other regional war tribunals in the world only have the power to give life imprisonment and no punishment above it. Many death sentences have already been executed in the past by the ICTB, which has not gone well with the ethos of any war tribunal⁶⁵. This clearly violates various international norms related to international criminal tribunals. The United Nations, Human Rights Watch, and various other organizations have been criticizing the death penalty clause of the ICTB⁶⁶.

7 Validation of the research question

The research question was to find out whether ICTB is a real international court and whether ICTB followed

⁵⁹ BILLAH, Maruf. Non-retroactivity in prosecuting crimes against humanity and International Crimes Tribunal Bangladesh. *Journal of Politics and Law*, v. 13, n. 3, 2020. Available in: <http://www.ccsenet.org/journal/index.php/jpl/article/view/0/43598>. Access at: Jan. 14, 2021.

⁶⁰ AFRIN, Zakia. The International War Crimes (Tribunal) Act, 1973 of Bangladesh. In: CHATTERJEE, Deepaloke (col.). *Indian yearbook of international law and policy*. New Delhi: Satyam Law International, 2009. Available in: <https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1184&context=pubs>. Access at: Jan. 10, 2021.

⁶¹ VISHWANATH, Raghavi. *Sanjeeb Hossain on International Crimes (Tribunals) Act 1973 and the Principle of Legality*. 2019. Available in: <https://www.law.ox.ac.uk/current-students/graduate-discussion-groups/south-asian-law-discussion-group/blog/2019/07/sanjeeb>. Access at: Jan. 10, 2021.

⁶² FAZI, Muhammad Abdullah. International Crimes Tribunal Bangladesh (ICTB) and violations of right to fair trial: a comparative study. *Maarif Research Journal*, n. 9, p. 11-18, Jun. 2015. Available in: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2903696. Access at: Dec. 20, 2020.

⁶³ INTERNATIONAL CRIMINAL COURT. *Statement of the office of the prosecutor of the International Criminal Court as delivered at the press conference in Dhaka, Bangladesh*. 2020. Available in: <https://www.iccpi.int/Pages/item.aspx?name=20200204-otp-statement>. Access at: Jan. 10, 2021.

⁶⁴ MCDERMOTT, Y. Rights in reverse: a critical analysis of fair trial rights under International Criminal Law. In: SCHABAS, William A.; MCDERMOTT, Yvonne; HAYES, Niamh (ed.). *The ashgate research companion to international criminal law: critical perspectives*. Aldershot: Ashgate, 2012. Available in: https://www.researchgate.net/publication/228187902_Rights_in_Reverse_A_Critical_Analysis_of_Fair_Trial_Rights_Under_International_Criminal_Law. Access at: Jan. 13, 2021.

⁶⁵ RAHMAN, Shameema. *Bangladesh: first execution of war criminal convicted by International Crimes Tribunal*. 2014. Available in: <https://www.loc.gov/item/global-legal-monitor/2014-01-09/bangladesh-first-execution-of-war-criminal-convicted-by-international-crimes-tribunal/>. Access at: Jan. 15, 2021.

⁶⁶ NOVAK, Andrew. The abolition of the mandatory death penalty in Bangladesh: a comment on Bangladesh Legal Aid and Services Trust v Bangladesh. *Oxford University Commonwealth Law Journal*, v. 15, n. 2, 2015. Available in: <https://www.tandfonline.com/doi/abs/10.1080/14729342.2016.1191766>. Access at: Jan. 5, 2021.

the principles of “natural justice” and “fair trial,” which are essential elements in international law.

It can be said that the word “international” is a misnomer for the Criminal Tribunal of Bangladesh. As this tribunal, by its nature, is a national court that has been established to punish ‘genocide’, war crimes, and CAH committed against Bangladeshi people during the War of Independence in 1971, it failed to qualify as an International Court or tribunal in comparison to the ICTY and ICTR on the principles of International law. This court ordered the death penalty, which violated human rights law and did not give the accused a fair chance of representation. It did not appreciate the essential parameters of international criminal law. Moreover, the present court has been questioned since its inception on the basis of its detention, prosecution, punishment, and procedure. Thus, the author’s hypothesis proved correct

8 Conclusion

In conclusion it can be said that the ICTB is the International War Crime Tribunal for namesake, as it has the dark shade of a national court and has the intent to detain, prosecute, and punish the people who committed war crimes⁶⁷. ICTB has attracted criticism worldwide for being unfair and unjust and for not following the standards laid down by previous regional international war tribunals. It was very heavily criticized for holding proceedings in absentia, which is by far not the standard of an international court. It was seen in the case of *The Prosecutor v. Abul Kalam Azad that an accused was convicted of crimes of genocide and crime against humanity in absentia on January 21, 2013*.⁶⁸ Therefore, the provision of ICT for trial in absentia with even the likelihood of the death penalty is an extreme form of violation of human rights and is undoubtedly unfair⁶⁹.

⁶⁷ AMNESTY INTERNATIONAL. *ICT Act 1973*: Bangladesh: death penalty in war crimes tribunal “extremely regrettable”. 2013. Available in: <http://www.amnesty.org.au/news/comments/32289/>. Access at: Jan. 8, 2021.

⁶⁸ *Bangladesh Trial Observer* (Jan. 10, 2021, 10:30 A.M.), https://bangladeshtrialobserver.files.wordpress.com/2012/12/full_judgment_azad.pdf.

⁶⁹ INTERNATIONAL CRIMES (TRIBUNALS). *Chief Prosecutor v. Moulana Abdul Kalam Azad*. ICT-BD Case No. 05 of 2012, 21 January 2013. Available in: <http://www.ict-bd.org/ict2/judgments.php>. Access at: Jan. 7, 2021.

As discussed above, instances like the absence of any international judges or prosecutors and the option of appeal to the Supreme Court of Bangladesh against the order of the tribunal give a domestic color to the tribunal, and the tribunal has always acted at the instance of the government. The Tribunal has also attracted a lot of criticism for breaching the principles of natural justice and not following international rules. Hence, the tribunal has rightly been described as a case of “complementarity went bad”. It can be more considered as a political court constituted for political motive instead of an impartial international court.

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AKTURK, Sener. Religion and nationalism: contradictions of islamic origins and secular nation-building in Turkey, Algeria and Pakistan. *Social Science Quarterly*, v. 96, p. 778-781, 2015. Available in: https://www.belfercenter.org/sites/default/files/2017-04/Akturk_2015_Turkey_Algeria_Pakistan_Religion_Nationalism.pdf. Access at: Jan. 5, 2021.

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