

International Crimes Tribunal Bangladesh Violating the International Guarantees of Right to Fair Trial

Muhammad Abdullah Fazi*

Abstract

The International Crimes Tribunal Bangladesh (ICTB), which has been established by the Bangladeshi Government to try the accused of the India-Pakistan War of 1971, violates the right to fair trial provisions as guaranteed by the Constitution, the International Covenant on Civil and Political Rights (ICCPR) and International Humanitarian Law (IHL). The standard of the ICT Bangladesh is far below the standard established by the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC). These irregularities imply the serious concerns over the proceedings of the said tribunal. This study seeks firstly, to describe international law about war crimes, particularly with respect to fair trial provisions, and, secondly, draw a comparison of the ICT Bangladesh with the other internationally recognized tribunals.

Background of the study

In 2009, after four decades, the Awami League Government re-established the International Crime Tribunal (ICTB) as promised in its election campaign. Sheikh Hasina's¹ government, upon its election, ratified the *Rome Statute* and afterward established two tribunals, in 2010 and 2012 respectively. The aim of these tribunals is to prosecute the war criminals of the 1971 war.² These tribunals, constituted under the old International Crimes Tribunal Act (ICTA) 1973, aimed to incorporate provisions on international war crimes into the domestic legal order of the country. The tribunals operate under the special rules of procedure and are not bound to the general Evidence Act of Bangladesh and Bangladeshi Code of Criminal Procedure.³

The historical background of the legal developments of the ICTB suggests that the war crime trial proceedings were initially initiated to put diplomatic and political pressure on the Pakistan government to accept Bangladesh. Therefore, by way of the foregoing trial of the Pakistani POWs, independence leader Sheikh Mujibur Rehman achieved recognition for Bangladesh as a sovereign state and a seat at the United Nations. It is a

* PhD Researcher, Faculty of Law, Universiti Malaya. Paper co-authored with Dr. Pardis Moslemzadeh Tehrani, Senior Lecturer and Associate Professor Dr Azmi Bin Sharom, both of Faculty of Law, University of Malaya

¹ Sheikh Hasina Wajed is a daughter of Sheikh Mujeebur Rehman and currently ruling the Government of Bangladesh as Prime Minister since 2009.

² The former tribunal operated during 1973-1975.

³ Muhammad Abdullah Fazi, 'ICTB and violations of right to fair trial a comparative study', (2015) Maarif Research Journal, 9, 12.

matter of great significance* that unlike the Collaborators Order, the ICTA was not repealed which is now being used by Sheikh Hasina's government. Although Sheikh Mujibur Rehman pronounced general amnesty, the Hasina regime is still using old sentiments for her political gains.

The ICTB

The International Crimes (Tribunals) Act, 1973 (Act No. XIX OF 1973), ICTA for short, was enforced by the Parliament of Bangladesh to provide for the prosecution, detention and punishment for war crimes accused of committing crimes against humanity, war crimes and genocide against the people of Bangladesh during the India-Pakistan War of 1971. This war crime tribunal has the mandate to prosecute and punish any person or group of persons who have committed the defined war crimes mentioned in section 3(2) of the ICTA within the territory of Bangladesh.⁴

The tribunal is a domestic body, established and operating under the local laws of the country, but due to the nature of crimes committed against humanity, is also recognised under the auspices of international crimes, and as such, this tribunal is also to be referred to as an international crimes tribunal.⁵

Right to fair trial in the ICTB

As the right to fair trial has been established as a fundamental norm of the international criminal justice system. The Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Criminal Court (ICC), International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and all the other internationally recognised treaties completely adopted the fair trial provisions in their respective statutes. Therefore, many international legal experts assert that "the fair trial right" has already gained the status of *jus cogens*. Therefore, no derogation is allowed to abrogate this right.⁶ In this context, it is also important to mention that Bangladesh is a party to the UDHR, ICCPR and the ICC. Consequently, by virtue of being a signatory of the aforesaid human rights treaties, Bangladesh has a duty to fulfil the requirements of these very treaties regarding the right to a fair trial accordingly.

Although, the ICTA⁷ from sections 6 to 25 provides for the rights, duties and procedure for the governance of the war trial proceeding, however, due to non-compliance of the ICCPR and the Rome Statute, the ICTA does not have any international recognition as a standard war crime statute. In comparison, the statutes of both the ICTY and ICTR were approved and adopted by the UN Security Council and therefore, are recognised as an internationally recognised standard legislation. While the ICTB statute came into being via legislation in the Parliament of Bangladesh, it has no recognition at the international level. To maintain international standards, most of the international tribunals adopted and constituted the fair trial provisions of the ICCPR in their respective statutes. Therefore,

⁴ International Crimes Tribunal-2, Bangladesh, official website of ICTB-1, Last modified December 2014 at <<http://www.ict-bd.org/ict1/>> accessed at September 2017.

⁵ *ibid*.

⁶ See, Rights of Accused, ICTY Article 21(4)(a-g), ICTR Article 20(4)(a-g) and ICCPR Article 14.

⁷ International Crimes Tribunal Act 2009.

both the ICTY and the ICTR have been fully adopted and have followed the ICCPR in the true sense. Articles 9(3) and 14 of the ICCPR provides fair trial rights. Therefore, those fair trial provisions which were guaranteed in Article 9(3) and Article 14 of the ICCPR are also available in both the tribunals. Article 21 of the ICTY and Article 20 of the ICTR Statute provide fair trial rights to the accused during trial.

The ICTB also recognises fair trial rights in Article 17 of its Act. However, under the obligation of Article 14 of the ICCPR, the right to adequate time for preparation of the case, trial without undue delay, presence of the accused, free of cost interpreter, right on self-incrimination, right to be brought promptly before the court of law, right to public hearing and presumption of innocence, are not provided. These rights must also be granted to the accused to fulfil the international obligations and to meet the criteria of a fair trial as provided in the statutes of the ICTR and ICTY.⁸

Right to a fair trial under the ICTY and ICTR.

After discussing the above-mentioned criteria of the right to a fair trial set up by international law, this paper will elaborate how the right to fair trial has been observed and promoted by the international tribunals of the ICTY and the ICTR.⁹ Both *ad hoc* tribunals were established by the United Nations to prosecute the war criminals in respective areas.¹⁰ It is pertinent to mention that on the establishment of the ICTY, the Secretary-General of the United Nation has emphasised that the ICTY must fully comply with the rights of the accused particularly contained in Article 14 of the ICCPR.¹¹ Therefore, the guarantees given in Article 14 of the ICCPR are almost repeated in verbatim in Article 21 of the ICTY Statute and Article 20 of the ICTR Statute.¹² This section will analyse how the fair trial provisions of international law relate to and are promoted by the statutes of both the tribunals. But, before going ahead, first, the paper will set out the structures and systems of both tribunals as to the procedures adopted in providing justice.

a. The ICTY

The main goal of this tribunal is to prosecute those persons involved for crimes such as genocide, inhuman treatment, rape of opponents, crimes against humanity and all other

⁸ See, Rights of Accused, ICTY Article 21(4)(a-g) and also ICTR Article 20(4)(a-g).

⁹ The full names of these tribunals are "The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991" and "The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Serious Violations Committed in the Territory of Neighboring States, between 1 January 1994 and 31 December 1994." See, Statute of the International Tribunal for the Former Yugoslavia, May 25, 1993, 32 I.L.M. 1192 [hereinafter ICTY Statute]; Statute of the International Tribunal for Rwanda, Nov. 8, 1994, 33 I.L.M. 1598 [hereinafter ICTR Statute], with its respective amendments until today's date.

¹⁰ The ICTY was established in 1993 through the UN Security Council resolution, 'Resolution 827', *unscr.com*, S/RES/827, 25 May 1993, and The ICTR was established in 1994 through the UN Security Council, 'Resolution 955', *unscr.com*, S/RES/955, 8 November 1994.

¹¹ The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, 106, delivered to the Security Council, U.N. Doc. S/25704 (May 3, 1993) (emphasis added).

¹² Wolfgang Schomburg, 'The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights', 8 *Nw. J. Int'l Hum. Rts.* 1 (2009).

<<http://scholarlycommons.law.northwestern.edu/njihr/vol8/iss1/1/>>

crimes mentioned in the statute of the tribunal.¹³ The ICTY located in The Hague, addresses the violations of human rights and the crime against humanity such as those committed during 1991 to 2001 Bosnia and Herzegovina, Serbia, Kosovo and the Former Yugoslav.

According to the statute of the ICTY, the judges of the tribunal come from different legal systems of the world. All judges are appointed by the UN Secretary General. This tribunal has three organs: the Chamber, Registry and the Office of the Prosecutor. Judges constitute the first organ of the tribunal which consists of three more trial chambers in addition to an Appeal Chamber.¹⁴ All these trial chambers have three permanent judges. With this maximum, six *ad litem* judges are also appointed by the UN Secretary-General if requested by the President of the tribunal for efficient working of the Chamber. At least three judges are appointed for a case, and a permanent judge must be appointed in each case¹⁵. The trial chamber ensures that the rule of procedure and the right to fair trial is fully observed in every case.¹⁶

There are in total seven judges appointed in the appeal chamber whereby five of them are from the ICTY and the other two are appointed from the ICTR. All these judges are permanent judges of their respective tribunals.¹⁷

The ICTY judges elect a President and Vice President. The President of the ICTY is elected for a two-year tenure. The President is responsible for presiding the appeal chamber and the annual reporting of the ICTY.¹⁸

Those interested in the Tribunal's proceedings can visit the ICTY and watch trials first-hand. Trials can also be viewed through the broadcast on the internet.¹⁹

b. The ICTR

The ICTR was established just after a year of the establishment of the ICTY, through the UN Security Council Resolution (UNSCR) 955. The ICTR aims to prosecute those individuals who committed genocide and war crimes in Rwanda.²⁰ The ICTR operates in accordance with its own statute. Like the ICTY, the ICTR also has three main organs.²¹ By virtue of UNSCR 977, the ICTR is located in the United Republic of Tanzania.

Like the ICTY, there are also three trial chambers and an appeal chamber is constituted for the functioning of the ICTR.²² The judges for the said chambers are elected by the

¹³ See ICTY Statute, Article 2 to Article 5.

¹⁴ See ICTY Statute, Article 11.

¹⁵ See ICTY Statute, Article 12.

¹⁶ See, *About ICTY, Chambers*, at the official website of the ICTY, Last modified October 13, 2014 at <<http://www.icty.org/sections/AbouttheICTY/Chambers>> accessed 22 October 2014.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ 'Virtual broadcasting', from court room 1, <<http://www.icty.org/sid/10915>>.

²⁰ see ICTR Statute, Article 2 to Article 4.

²¹ see, *About ICTR, Structure*, at the official website of the ICTR, Last modified, October 13, 2014 <<http://www.unictr.org/tabid/103/Default.aspx>> accessed 22 October 2014.

²² see ICTR Statute, Article 10.

General Assembly from the nominations of the Security Council. Initially, nominations would come from the member states of the UN. There are a total of sixteen judges for three trial chambers and appeal chamber from different countries of the world.²³

A trial chamber consists of three judges and there are five judges for the Appeal Chamber. The Appeal Chamber is shared with the ICTY for transparency purposes.²⁴

After discussing the above-mentioned formation and procedure of the ICTY and the ICTR, one can say that both of these tribunals are a good example of a competent, neutral and impartial judicial body as almost all the necessary measures for impartiality are rightly taken by the UN.

Reflections of the fair trial provisions of international law in the ICTY and ICTR

The discussion of the fair trial rights of the accused upon consideration of international statutes and their reflections on the ICTY and the ICTR will be undertaken.

a. Right to be brought promptly before the court of law, right to inform reason of arrest and equality of arms.

Prohibition of arbitrary arrest and detention is an essential element of the fair trial right concept. This right has been provided in the ICCPR under the same title.²⁵ This guarantee of prompt appearance before a judge is also protected in Article 19(2) of the ICTR and in Article 20(2) of the ICTY. Both the above-mentioned Articles are similar in providing that "A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal for Rwanda, be taken into custody, immediately informed of the charges against him or her and transferred to the International Tribunal for Rwanda".²⁶ With this, Rule 53 of the Rwanda Rules²⁷ and Rule 59 (B) of Yugoslavia Rule²⁸ ensure the right to be informed of the reason for arrest. Moreover, Rule 42 of both tribunals incorporate the right to legal counsel and its notification accordingly.

As discussed earlier, the principle of equality before the law is an essential element of criminal justice, the respective statutes of the ICTY and ICTR in the conformity of the ICCPR and ICC also guarantee it. Article 20(1) of the Rwanda Statute and Article 21(1) of the Yugoslavia Statute confirm the right to equality before the courts.

b. Fair hearing

Right to be heard by an impartial tribunal which is the most important part of the fair trial concept has also been incorporated in both statutes to ensure true justice.²⁹ Therefore, a separate article to provide the "fair hearing" right has been incorporated in ICTY and

²³ Ibid.

²⁴ Ibid.

²⁵ See, ICCPR Article 9(3).

²⁶ also, see the ICTY and ICTR Statutes.

²⁷ ICTR Rules of Procedure And Evidence. <<http://w.unictr.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf>>.

²⁸ Ibid.

²⁹ Article 15 of Rwanda Rules, Article 15 of Yugoslavia Rules.

ICTR statutes. Article 20(2) of the ICTR Statute and Articles 20(1) and 21(2) of the ICTY Statute exclusively guarantee a fair hearing right to the accused.

c. Right to a public hearing

The most significant right of the fair trial concept is a right to a fair and public hearing. This right is also being given under the ICCPR's Article 14(1).³⁰ The ICTR and the ICTY both also similarly state that "the hearing shall be public..."³¹

d. Presumption of innocence

The right to be presumed innocent until proved guilty is a basic principle of law and a very fundamental right available to the accused in a criminal trial in fair trial concept which is recognised by the ICCPR.³² Under the title of "Rights of Accused," the ICTR in its Article 20(3) states that "The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute" and ICTY also recognises the same right in a similar pattern.³³

e. Right to be informed, adequate time, undue delay, presence of accused, defense, examination of witness, interpreter and right on self-incrimination

The rights in the title of this section, as set out above, are known as "minimum guarantees". Therefore, these are very important and significant rights are available to the accused. These rights are particularly associated with the hearing phase of a trial. The ICCPR also covers and protects all these rights under its Article 14(3) a to Article 14 (3) g.³⁴

Both the ICTR and the ICTY categorically recognise all these rights under Article 20(4)(a) to (g) of the ICTR and under Article 21(4)(a) to (g) of the ICTY. Article 20(4)(b) of the ICTR Statute and Article 21(4)(b) of the ICTY Statute provide a right to adequate time and facilities to prepare for defence. Disclosure of the relevant documents is an important part of the right to adequate facilities. Rules 66 to 68 of Rwanda Rules and Rule 66, 67(b)(ii) and 68 of the Yugoslavia Rule provide the right to disclosure of relevant documents.

Similarly, Article 20(4)(g) of the ICTR Statute and Article 21(4)(g) of the ICTY Statute ensure the prohibition of self-incrimination. As an extension of the prohibition of self-incrimination, the right to remain silent is also given in the respective rules³⁵ of the ICTY and the ICTR. With this, rules³⁶ of the ICTR and ICTY provide a right of an interpreter to the accused during the trial. Both statutes cover and protect all the seven rights under the same title "Rights of Accused."³⁷

³⁰ See, ICC Statute, Article 67(1).

³¹ See, CTR Statute, Article 19(4) and Article 20(2), ICTY Statute, Article 21(4) and also Article 22(2).

³² 14 (2) of the ICCPR states "Every charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law".

³³ See, ICTY Statute, Article 21(3).

³⁴ See, ICCPR Article 14(3)(a-g).

³⁵ See, Rule 42 (a) (iii) of Rwanda Rules, Rule 42 (a) (iii) of the Yugoslavia Rules.

³⁶ See, Rule 42 (a) (ii) of Rwanda Rules, Rules 42 (a) (ii) of the Yugoslavia Rules.

³⁷ see Rights of Accused, ICTY Article 21(4)(a-g) and also ICTR Article 20(4)(a-g).

f. Right to Compensation

It is important to mention that the respective statutes of the ICTY and the ICTR does not provide explicitly an appropriate remedy. However, in the *Rwamakuba* case when a tribunal found that the accused was not guilty of any of the alleged charges, the ICTR trial chamber held that the tribunal must have the inherent power to compensate. The ICTR trial chamber awarded USD2000 to *Rwamakuba* and ordered the registrar to apologise for the violations of his rights.³⁸

Comparison of the ICTB with the standards of the other International Tribunals

To analyse the procedure and mechanism of prosecuting war crimes provided under the ICTB, it is pertinent to compare it with the other international tribunals i.e. the ICTY and the ICTR. A brief comparison also helps to scrutinise the standards adopted by the ICTB in terms of fair trial rights. A preliminary study of the statute of the ICTB reveals that it is a domestic tribunal governed by the local laws of the country, established by the ruling Government through parliamentary legislation. The ICTB is significantly different from the other tribunals in terms of its establishment, procedure and fair trial criteria.³⁹ The following discusses the important different aspects of the ICTB to find out the practices which differentiate this tribunal from the others.

a. Aim and Establishment

As discussed earlier, the ICTB was established by the ruling government of Sheikh Hasina Wajid (daughter of Sheikh Mujeeb) through a legislation enacted in 2009. The basic aim of this tribunal was to prosecute war criminals of the 1971 war. On the other hand, the establishment the ICTY and the ICTR were made through the UNSCR.⁴⁰ The establishment through an internationally recognised body makes the tribunal more credible, transparent and accountable. It also ensures a check on working and assures the guarantees given in law. However, the basic aim of both the tribunals is the same as stated in the ICTB.

b. Chamber and seat of the tribunal

Another different aspect of the ICTB is its formation of chamber and seat of the tribunal. As stated, members of the tribunal including its chairman are appointed by the government of Bangladesh and it is the discretionary power of the government to appoint any person as member or chairman of the tribunal. Moreover, there is a complete bar on challenging the tribunal and its members on any ground at the higher courts. The qualification of the chairman and other members of the tribunal set up by the ICTA is significantly weak as it says, "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".⁴¹

³⁸ Prosecutor v. *Rwamakuba*, Case No. ICTR 98-44C-T, Decision on Appeal Against Decision on Appropriate Remedy, 26. (Sept. 13, 2007).

³⁹ Muhammad Abdullah Fazi, 'ICTB and violations of right to fair trial a comparative study', (2015) *Maarif Research Journal*, 9, 12.

⁴⁰ The ICTY was established in 1993 through the UN Security Council resolution, 'Resolution 827', *unscr.com*, S/RES/827, 25 May 1993, and The ICTR was established in 1994 through the UN Security Council, 'Resolution 955', *unscr.com*, S/RES/955, 8 November 1994. While the ICTR was established just after a year through the UN Security Council Resolution 955.

⁴¹ See, ICTAA Art. 6(2).

It is also to be noted that there is no international judge appointed in the ICTB, as all the judges are Bangladeshi nationals and former judges of Bangladeshi courts. Moreover, the permanent seat of the tribunal is situated in Dhaka, in the old high court building. The appointment of the international judges and a neutral venue would inhibit both parties to use their influence on members of the tribunal and it also strengthen the impartiality of the court.

Contrary to this, the ICTY and the ICTR both have international neutral judges and respective presidents to preside over the proceedings of the tribunal. There is a fair election process and very well-defined criteria provided to appoint the judges. Members of the said tribunals are appointed by the UN General Assembly via voting and both tribunals are seated at a neutral venue to ensure an impartial and bias-free environment. The ICTY is situated in The Hague, the Netherlands which is a neutral country while the ICTR situated in Arusha, Tanzania which is also a neutral country.

In the ICTY and the ICTR, the prosecutors are also appointed by the UN Security Council, but in the ICTB the prosecutors have been appointed by the ruling government. Appointment of prosecutors and judges by the ruling government endangers the fair trial concept and raises questions on the impartiality of the tribunal.

c. Protection of witnesses and victims

As discussed earlier, the protection of witnesses and victims is a compulsory part of any judicial proceeding. Unfortunately, there is no specific protection provided to the witness in the statute of the ICTB. In contrast, the ICTY in its Article 22 and the ICTR in its Article 21 provided the same protection to both victim and witness to ensure a free and fair testimony.

d. Death penalty

Both the penalties of the ICTY and the ICTR are limited to imprisonment. However, the ICTB is empowered to pronounce the death penalty. The United Nations, Human Rights Watch and the International Bar Association, and other international organisations have also criticised the death penalty clause of the ICTA.

Conclusion

The right to fair trial is recognised by all the international human rights bodies and instruments including the UDHR, The Geneva Conventions, the ICCPR, the ICC Statute, African Charter, the European Convention of Human Rights, and by all the internationally recognised military tribunals. Apart from the inefficient compensation mechanism, the ICTY and the ICTR were fully accepted as a guarantee against the unlawful actions by the states and to ensure real justice. Consequently, in terms of fair trial guarantees, this study finds that the fair trial provisions of international law were fully incorporated and promoted by the statutes of these two tribunals.

In contrast, being a prototype of IMT Nuremberg Charter, the ICTA (Governing Act of the ICTB) has lost its relevance in 2009. The Nuremberg legacy had been superseded by the modern and more developed international tribunals i.e. the ICTY (1993), ICTR (1994), Sierra Leone (2002) and the ICC (2002). The modern tribunals have developed rules of evidence and provisions to ensure the rights of each party in a trial. Further, the constitutions of the modern tribunals include the mechanisms for objecting to judges in case of impartiality or incompetency, special provisions to protect witnesses, guarantees to ensure the right to a fair trial at every stage of the proceeding and so forth. These guarantees were little heard of in the ICTA 1973. This paper finds that the international crimes tribunal Bangladesh did not fully incorporate the fair trial standards set by the ICCPR, UDHR and the Rome Statute, to which Bangladesh is a state party. Due to non-compliance with the ICCPR, UDHR and the Rome Statute, this paper finds serious loopholes in the ICTB and its governing Act. Thus, to ensure a free and impartial trial, these irregularities need to be addressed immediately.