

Muhammad Abdullah Fazi*
Pardis Moslemzadeh Tehrani**
Azmi Bin Sharom***
Maryam Khan****

Historical Background of the International Crimes Tribunal Bangladesh, Unveiling the Truth

Abstract

After forty years of the 1971 Indo-Pak war, the government of Bangladesh established a special tribunal to prosecute war crimes allegedly committed in 1971 that led to the creation of a new country. Therefore, in 2009, the International Crimes (Tribunals) Act, 1973, was enacted by the Bangladeshi parliament to prosecute the alleged executors of genocide, crimes against humanity and other war crimes under the international law by a domestic tribunal. In context to the on-going war crimes tribunal, study seeks to explore the historical roots of the tribunal. The critical analysis of the historical developments suggest that the said tribunal is falling short of international standards and also lacking the jurisdiction in present scenario which has been initiated with political motives in violation of international treaties and agreements between the parties.

Keywords: War trial, Bangladesh, International law

On 16th December 1971, after a nine-month war the People's Republic of Bangladesh, formerly East Pakistan, came into being. Despite of contradicting propaganda claims of both parties about the mass killings, the actual number of dead were still unknown (Mark Dummett, 2017). However, according to the independent researchers approximately 250,000 people were killed during the India-Pakistan war of 1971 from both sides (Obermeyer, J L Murray & Gakidou 2008, p.1-9). After the surrender of Pakistan Army, almost ninety thousand soldiers including civilians were captured by the Indian forces as prisoners of war (POW). In context of the war crime trials and recognition of Bangladesh as new state, the POWs became a bargain point for all parties. An analysis of the post war politics involving the prisoners of war will be discussed later.

* Muhammad Abdullah Fazi is a PhD (International Law) Fellow at Faculty of Law, University of Malaya Kuala Lumpur Malaysia. Email: abdullah.fazi@siswa.um.edu.my

** Dr. Pardis Moslemzadeh Tehrani is a Senior Lecturer at Faculty of Law University of Malaya Kuala Lumpur Malaysia. Email: pardismoslemzadeh@um.edu.my

*** Dr. Azmi Bin Sharom is an Associate Professor at Faculty of Law, University of Malaya Kuala Lumpur Malaysia. Email: asharom@um.edu.my

**** Maryam Khan is researcher at Institute of Policy Studies, Islamabad maryam@ips.net.pk

Soon after the surrender, Sheikh Mujibur Rahman the provisional President of the separated part announced two sets of trials: one for the local collaborators and the other for the Pakistani accused. In context to the proposed war trials, on 24th January 1972 in the absence of parliament, Sheikh Mujibur Rahman issued a Presidential order (President's Order No. VIII, 1972), entitled Bangladesh Collaborators (Special Tribunals) Order 1972¹. Later, the same was approved by the first parliament formed in 1973. It was solely designed to charge those who abated or aided Pakistan Army during the war. Therefore, by virtue of Article 5 (1) of the Collaborators order 1972, seventy-three special tribunals were established to try the local collaborators who supported Pakistani authorities during the 1971 war². These special tribunals were presided by the Session judges having exclusive jurisdiction. While senior judges were deputed to deal with the more serious cases. Tribunals were assigned to try the cases only brought by the Public Prosecutor. While Officer in Charge of local police station were assigned to do the inquiry part of the proceedings. Although there are no significant studies available on the very initial trials occurred in 1972, Suzannah Linton describes that contrary to the ongoing trials under ICTB, according to Article 43 of the Collaborators Order, the then applicable domestic laws including the identified sections of the Code of Criminal Procedure 1898 and the Penal Code of 1860 were applied on these tribunals working under the Collaborates Order. Moreover, in the absence of special rule, the Evidence Act of 1872 was applied. Under the Collaborators Order, right of bail was denied but right of appeal in High Court was available. With this right of pardon and special powers to Government were also available. While for the most serious crimes, tribunals were assigned powers to pronounce death penalties³.

As mentioned earlier there are not many significant studies available on 1972 trials, Suzannah Linton further describes that accounts of trials occurred under the Collaborators Order are contradicting. However, resulting the general amnesty majority of prisoners and convicted were released. Later December 31, 1975, General Ziaur Rehman repealed the 1972 Collaborators Order⁴.

Under the Collaborators Order, only in 1972 more than 40 thousand people were arrested accusing of war crimes, around 20 thousand were charged and taken into custody and only 752 of them were convicted but later released by the general amnesty⁵ declared by the Prime Minister Sheikh Mujeebur Rehman. On 30 November 1973, by the proclamation of general amnesty, thousands of people were released. Presumably, the Bangladeshi Government was lacking expertise and fearing of the international pressure in case of miscarriage of justice while trying thousands of so-called collaborators. Particularly, when their status as a sovereign state was not confirmed by majority of the states and by the UN. In context of Triparty agreement⁶, apparently, on that time Sheikh Mujib was using the war crimes tribunal card for diplomatic negotiations with Pakistani Government.

Prior to the general amnesty, the Government of Bangladesh also granted immunity to Bengali freedom fighters (*Mukti Bahini*)⁷ for war crimes committed against Pakistan Army and *Behari*⁸ community by their side. According to the

Article 2 of the Bangladesh National Liberation Struggle (Indemnity) Order, 1973, all the acts of violence and acts of war crimes committed in course of "Liberation Struggle" by the *Mukti Bahini* and other militias were given absolute indemnity. Ironically, after forty years of general amnesty and Indemnity Order now only Jamaat-i-Islami has been charged for war crimes.

Interestingly, the amnesty given in Indemnity Order, 1973, covered the same categories of crime for which those who collaborated with the army would still face punishment. Geoffrey Robertson rightly criticized that "it laid a dubious legal basis, very apparent in the current trials, for "victor's justice": those on the right side of history would be forgiven their war crimes, whilst those who fought for a united Pakistan would always be treated as traitors". In this regard, it is also a matter of immense importance that among all those alleged "collaborators" no Jamaat-i-Islami leader was accused or arrested under the Collaborators Order who are now being charged as primary accused of war crimes in the ICTB latest proceedings⁹.

Apart from local collaborators, efforts were afoot to prosecute 195 Pakistani soldiers held in the custody of India as POWs. According to K. Sellars, in reference to crimes against humanity, the Collaborates Order and later the War Crimes Tribunal Order, 1972 were inspired by the Nuremberg Charter. Therefore, to try 195 Army personnel, War Crime Tribunal Order was drawn up. Alike Nuremberg, War Crime Tribunal Order also covered war crimes, crimes against peace, plan to conspiracy and crimes against humanity. War Crimes Tribunal Order, 1972 also allowed death penalty and trial *in absentia*. With this other clause denied the superior order and state immunity in defense¹⁰.

Following the War Crimes Tribunal Order, 1972, to provide legal framework for the prosecution of 195 Pakistani soldiers, on 20 July 1973, Bangladeshi parliament passed the International Crimes Tribunal Act, 1973¹¹. The ICTA, 1973 was adopted to provide for detention, punishment and prosecution of crimes done by any person being a member of any armed or defence forces during the period of 1971 war. The ICTA, 1973 also provided for a tribunal having complete jurisdiction over crimes against humanity, crimes against peace, war crimes and any other crime under international law. Unlike the Collaborators Act, the ICTA, 1973 did not bound by the Code of Criminal Procedure and Rule of Evidence under Evidence Act. The tribunal established under the ICTA, 1973 was empowered to adopt its own procedure¹². Despite of passing the ICTA, 1973, on that time no tribunal was established to try those 195 Pakistani soldiers accusing of war crimes¹³. As mentioned earlier, establishment of war crimes tribunal was considered as an effort to put diplomatic pressure on Pakistan to recognize Bangladesh. Therefore, resulting the Tri-Party agreement of 1974, Bangladesh agreed to repatriate 195 suspects back to Pakistan without any trial¹⁴.

Following the general amnesties given by the Bangladeshi government, the 1974 tri-party agreement (Shimla Agreement) was considered as the most significant politico-legal compromise¹⁵. By the virtue of tri-party agreement of 1974, all the prisoners of war were released from both sides, the said agreement was signed on

April 9, 1974¹⁶. Tri-Party agreement helped Bangladesh to resolve its diplomatic ties with Pakistan resulting the recognition of Bangladesh as a sovereign state. Therefore, Levie has argued that the actual reason for the prolonged detention of POWs was to force Pakistan to recognize Bangladesh¹⁷. In return Bangladesh dropped all the war crime charges against POWs. Contrary to Bangladeshi claims, there was no legal obligation imposed on Pakistan to take action against 195 suspects. The words "reconciliation" and "forget the past", were used in that agreement. These stated facts were also recognized and admitted by the tribunal in its verdict against Abdul Quader Molla¹⁸.

In 2009, after four decades the Awami league Government re-established the International Crime Tribunal (ICTB) as promised in its election campaign. Sheikh Hasina's¹⁹ government after being elected ratified *The Rome Statute* and afterwards established two tribunals, in 2010 and 2012 respectively. The aim of these tribunals is to prosecute the war criminal of 1971 war²⁰ present at that time. These tribunals were constituted under the old ICTA 1973 aimed to manifest the international crimes into the domestic legal order of the country. The ICT-1 and the ICT-2 works under the special rules of procedure and not bound to general Evidence Act of Bangladesh and Bangladeshi Code of Criminal Procedure.²¹

The historical background of the legal developments of the ICTB suggest that the war crime trial proceedings were initially initiated to put a diplomatic and political pressure on Pakistan government to accept Bangladesh. Therefore, by forgoing the trial planned for the Pakistani POWs, Sheikh Mujibur Rehman achieved recognition for Bangladesh as a sovereign state and a seat at the United Nations. It is 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's regime still using the old sentiments for her political gains.

Conclusion

In 2010, the Bangladesh govt. established International Crimes Tribunal by an Act of parliament. Despite what the name suggests, it is not an international court in the sense of being founded on international law. Rather it is a national court, based on a Bangladeshi statute passed in 1973 and amended in 2009 and 2012. The government had promised to meet international standards in these trials, but it has been far away from meeting this commitment. Unfortunately, the present trial of war crime has been severely criticized by various institutions as biased and targeted to have political vengeance rather than securing justice. While, in terms of rights ensuring fair trial guarantees, procedures, statutes and working there are huge differences found. To evaluate the jurisdiction of the tribunal, study discussed the historical background of the legal developments on controversial war crimes issue. Critical evaluation of the Tri-Party agreement and other international treaties suggest that the ongoing trial is an act of violation of international law and a violation of tri-party (India, Pakistan, Bangladesh) agreement according to that Bangladesh promised to drop all the war crimes accusations against Pakistan. Therefore, study concludes that the ongoing trial is

an attempt of suppressing political opponents of Sheik Hasina regime by exploiting the historical and national sentiments of the people of Bangladesh. With this, study recommends that the UNO and other international organizations should come forward and play their role to stop the ongoing trial immediately.

Notes & References

-
- ¹ Bangladesh Collaborators (Special Tribunal) Order 1972, commonly known as Collaborators Act, 1972. (repealed in 1975)
- ² K. Sellars. (2015). *Trials for international crimes in Asia*. Cambridge: Cambridge University Press
- ³ Suzannah Linton. (2010). Completing the circle: Accountability for the crimes of the 1971 Bangladesh war of liberation. *Criminal Law Forum*, 21(2), 191.
- ⁴ Fayazuddin Ahmad. (2009, 01, 27). Unfinished Justice for the crimes of 1971. *The Daily Star*. Retrieved from <http://archive.thedailystar.net/law/2009/01/03/index.htm>
- ⁵ Sheikh Mujib declared general amnesty to collaborators (earlier the Bangladesh Collaborators Special Tribunal Order of 24 January 1972 decided to try them) on 16 December 1973. Official Presidential Website of Bangladesh Government, "Former Presidents", Last accessed on August 23, 2013, <http://www.bangabhaban.gov.bd/mujibur.html>
- ⁶ Tri-Party agreement between India, Pakistan And Bangladesh also known as Delhi agreement, Text of the tri-patry agreement of Bangladesh-Pakistan-India', Bangladesh Genocide Archive, 2 March 2008, <http://www.genocidebangladesh.org/?p=196>.
- ⁷ The Mukti Bahini is a popular Bengali term which refers to the guerrilla resistance movement formed by the Bangladeshi military, paramilitary and civilians during the War of Liberation that transformed East Pakistan into Bangladesh in 1971
- ⁸ The Bihari ethnic minority in Bangladesh were subject to persecution during and after the 1971
- ⁹ Md. Abdul Jalil. (2013). War crimes in Bangladesh: A real political vendetta. *Journal of Politics and Law*, 3(2), 113.
- ¹⁰ K. Sellars. (2015). *Trials for international crimes in Asia*. Cambridge: Cambridge University Press
- ¹¹ The International Crimes (Tribunals) Act, Act No XIX of 1973 (1973) (Bangladesh.) [hereinafter International Crimes (Tribunals) Act 1973].
- ¹² *ibid*
- ¹³ *Ibid* n.11
- ¹⁴ *ibid*
- ¹⁵ Kashpee Wahid. (2014). *Sentencing under the International Crimes Tribunals in Bangladesh: A critical analysis*. Master Thesis, Australian National University: Canberra
- ¹⁶ Agreement on the Repatriation of Prisoners of War and Civilian Internees, April 9, 1974.
- ¹⁷ Howard S. Levie. (1973). Legal Aspects of the Continued Detention of the Pakistani Prisoners of War by India, *AM. J. INT'L L.*, 67, 512, 514.
- ¹⁸ Chief prosecutor v. Abdul Quader Molla, no 02. ICT-BD. 34. (2012)
- ¹⁹ Sheik Hasina Wajed is a daughter of Sheikh Mujeebur Rehman and currently ruling the Government of Bangladesh as Prime Minister since 2009.
- ²⁰ The former tribunal operated during 1973-1975.
- ²¹ Muhammad Abdullah Fazi. (2015). ICTB and violations of right to fair trial a comparative study, *Maarif Research Journal*, 9, 12.