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THE INTERNATIONAL WAR CRIMES (TRIBUNAL) ACT, 1973 OF BANGLADESH

*Zakia Afrin**

This commentary discusses the International Crimes (Tribunals) Act of 1973 and its inadequacies to address war crimes committed against the people of Bangladesh in 1971.

I. INTRODUCTION

Bangladesh earned her independence from Pakistan in 1971 after a bloody war that continued for nine months. By December 16 of 1971, the day Bangladesh declared victory, an estimated 30 million people died and 200,000 women reported sexual violence by the Pakistani Army and their Bengali accomplices. Known as one of the worst genocide in history, the systematic killing of Bengalis included a chilling attempt to exterminate the intellectuals from within Bangladeshi society. A published report claims that by 19 April, 1975 individuals were arrested for war crimes and 752 were convicted¹. The episode after that is a bit hasty and the punishment for war criminals never took off. After the assassination of the country's first Prime Minister and leader of the independence movement Sheikh Mujibur Rahman in August, 1975 the issue of war crimes against Pakistanis and their Bengali accomplices took a back seat. Military dictatorships tortured the soul of the nation and created a financial elite class whose only motivation was to reach for the riches. As people's revolution toppled the worst of the lot, General Ershad in 1990 democracy flourished and so did the free will of the people. With the exception of 2006, the topic of war crimes Tribunal returned in the nation's memory and preparation began to form such platform. By 2008, the War Crimes Fact Finding Committee published a list of 1,597 criminals which included names of influential ministers, parliamentarians and political figures from two major political parties². In 2009

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the Government led by the Awami League, the same political party that led Bangladesh to independence announced its plan to hold a war crimes Tribunal for the 1971 criminals under the International War Crimes (Tribunal) Act, 1973.³ I plan to discuss and comment on the Act in the light of recent developments in international criminal law.

II. INTERNATIONAL CRIMINAL LAW AND THE IWCT ACT

After the cold war era ended, international criminal law has developed through multiple forums. The formations of International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) demonstrated a consensus among international community that impunity is unacceptable. At the same time provisions like compensation and security arrangements for the victims, abolition of death penalty for the most heinous crime and improved measures for the protection of the rights of the accused encompassed previously ignored human rights measures into these UN measures. Though these tribunals were limited in scope in terms of specific conflicts, they paved the way for a permanent international criminal court. The International Criminal Court (ICC) came into force 1 July 2002 as an independent organization after being ratified by 60 countries. The United Nations and all 120 state parties have participated in drafting this document and there is little doubt that this is the most advanced and timely framework for any international criminal tribunals set up to address the worst criminal acts against mankind. In recent times, war crimes tribunals taking place within the UN framework or strictly within local jurisdictions have followed the ICC standards in most instances.⁴ Consistent with the modern trend, a choice had to be made in relation to whether Bangladesh should decide to deal with her war criminals in an international forum, a hybrid one or in a purely domestic setting. International criminal tribunals have come under criticism for excessive emphasis on the international nature of the crimes committed, lengthy procedure and skyrocketing expenses. In case of Bangladesh, the issue could have been one posed beautifully by Frederic Megret, “*Is there not a risk that an international trial will partly ignore ..'majority interest' that a certain society has in an episode of historical and often traumatic suffering.*”⁵

Many scholars have argued in favor of Hybrid tribunals that incorporate both international and domestic elements of international criminal justice.⁶ However, The Bangladesh case at present seems to lack international character since she is only pursuing trials of local collaborators of Pakistani war criminals without

going after the leading perpetrators of a different nation and ethnicity. Considering the existing scenarios, a domestic tribunal as proposed by the IWCT Act offers promise of meaningful justice for the crimes committed during the liberation war of Bangladesh in 1971. This promise, however, is far from reality at the current form of the tribunal framework.

The IWCT Act, 1973 came into force 20th July of 1973 shortly after being enacted by the then Government of Bangladesh. Little public knowledge exists about the drafting phase of the Act. It never gained momentum as general amnesty was offered to all involved in wrongdoings during the impendence war. After a long disappearance from public eye, this Act reemerged in 2009 after a democratic election brought into power the party that claims to be the leader of the independence movement. With minimal amendments and inclusion of norms that developed in the interim 36 years, the Government is about to begin trials of individuals responsible for war crimes and crimes against humanity in 1971. The law proposed, except for few ancillary provisions adopted from international humanitarian and human rights law – is predominantly domestic law of Bangladesh without any hint of international law.

The IWCT Act has jurisdiction over ‘any person irrespective of his nationality who, being a member of any armed, defence or auxiliary forces commits or has committed, in the territory of Bangladesh, whether before or after the commencement of this Act.....’⁷ This provision signals a distinct departure from the international trend of setting up tribunals for war crimes committed during a specific time against a nation.⁸ On one side this can be a deterrent for political forces inside the country to go after ethnic groups with specific malice,⁹ on the other it may become a tool for political aggression among rival forces in the country.¹⁰

The Tribunal holds each person liable for a crime committed jointly by many¹¹ and does not grant immunity for official positions.¹² Few rights guaranteed to accused found in different war crimes tribunal charters are available in this tribunal as well: right to a public trial,¹³ right to an interpreter for assisting with English proceedings,¹⁴ right to a defence counsel through the Govt,¹⁵ right to present evidence as defence and cross examine witnesses¹⁶ etc.

The Tribunal is required to write a reasoned opinion for its decision¹⁷ and there is a right to appeal to the Appellate Division of the Supreme Court of Bangladesh within sixty days of the verdict.¹⁸

III. SHORTCOMINGS OF THE FRAMEWORK

The Tribunal set up under the IWCT Act has jurisdiction over crimes against humanity, crimes against peace, genocide, war crimes, violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949, any other crimes under international law, attempt, abetment or conspiracy to commit any such crimes and complicity in or failure to prevent commission of any such crimes.¹⁹ The definitions of each of these crimes leave a lot for the imagination and do not include latest versions available in the ICC. The most striking example of these is the definition of crimes against humanity which do not include sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity that are specifically mentioned in the ICC treaty. Bangladesh has never dealt with dignity with its rape victims and the popular course is to talk about them in the abstract without having to address their issues. Any war crimes trial that leaves out punishment for committing or abetting sexual violence against Bangladeshi women will not meet the threshold for justice people long for.

The Act makes it possible for ‘any person who is or is qualified to be a judge of the Supreme Court of Bangladesh or has been a judge of any High Court or Supreme Court which at any time was in existence in the territory of Bangladesh or who is qualified to be a member of General Court Martial under any service law of Bangladesh’ to be appointed as a Chairman or member of a Tribunal.²⁰ It is nowhere mentioned in the Act that the judges must act independently and not merely at the direction of the Government. Historically, Supreme Court Judges have been appointed by the Government from among the sympathizer of the political party in power. The guarantee that the Tribunal can act free of influence from the Government is missing from this piece of legislation. Even more worrisome is the fact that the Act bars any challenges to the constitution or appointment of members thereof both by the prosecution and by the accused or their counsel.²¹ Even an order, judgment or sentence can be called into question in any legal forum existent in the country.²²

The investigation provisions are problematic. The right to remain silent is nonexistent and right to have an attorney present during investigation is not included in the Act. Remaining silent is punishable by six months at the most or with punitive punishment.²³

Perhaps the most troublesome area of this Act is the evidentiary rules. The Act states outright that it ‘shall not be bound by technical rules of evidence’, lean

towards expeditious and non-technical procedure and ‘may include any evidence, including reports and photographs published in newspapers, periodicals and magazines, films and tape recordings and other materials as may be tendered before it, which it deems to have probative value’.²⁴ Whatever protection to the accused is available under the existing domestic laws have been made inapplicable in any proceedings under this Act.²⁵

The Tribunal is empowered to award death sentences upon conviction.²⁶ International community has moved away from death penalty²⁷ and likewise the ICC provides for ‘imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the individual’.²⁸ Bangladesh has regularly used death penalty since its birth and continues to prescribe and execute the capital punishment for terrorism, drug dealing and violence against women related crimes. In 2009, 185 convicted persons were sentenced to death and 5 men were executed.²⁹ Unfortunately there seems to be unanimous support for death penalty among the political parties in Bangladesh. Opposition to death penalty rises only from a few sources³⁰ and do not offer any active campaign to end death penalty in Bangladesh. With many of its provisions adopted from international legislation like the ICC, the Iraqi Tribunal was still criticized for its retention and execution of the death penalty.³¹ Any international evaluation of Bangladeshi trial of war criminals is likely to suffer from the same point of view.

IV. THE OMISSIONS

The present IWCT Act not only falls short in adopting updated versions of definitions and procedures as developed in international criminal law over the last decade, but also fails in including important aspects of similar Tribunals. This Act does not reiterate the basic norms of criminal law as maintained in the ICC such as ‘exclusion of jurisdiction over persons under the age of eighteen’;³² ‘presence of mental element’;³³ ‘grounds for excluding criminal responsibility’³⁴ etc.

The Act omits the presumption of innocence for the accused,³⁵ protection of the victims and witnesses and their participation in the proceedings³⁶ and reparation to victims.³⁷ Perhaps the most alarming omission is with regards to safeguard against torture and inhuman treatment for the accused. Bangladesh has a disturbing record of custody death³⁸ and ill treatment imprison, the absence of special protection for the accused under this Act is likely to have a negative effect on the legitimacy of the trial.

Other than the name and mentioning of the crimes under Geneva Convention, the Act has kept international influence distant from this Tribunal. Though trying crimes under international law, the judges or any other personnel are not required to have special training on international criminal law. There are no opportunities for consulting with experts in the area of war crimes Tribunals or otherwise.

V. THE WAY FORWARD

Bangladesh is moving towards an important milestone in its history. Holding the perpetrators liable for their heinous roles in her independence movement will not only heal wounds of the nation, but also inspire the new generation to foster a society where the rule of law is respected. However, the loopholes within the framework of reaching that goal demand attention before the Tribunal begins its trials.

First, the shortcomings of the provisions regarding definition of crimes, selection of judges, evidentiary rules, and death sentence must be revisited and revised according to the ICC standard.

Second, the omitted provisions regarding compensation for the victims, protection of victims and witnesses, exclusion of jurisdiction over minors, safeguard against torture and inhuman treatment and consulting with international experts must be considered and added in the present Act.

Last but not the least; a conversation must begin as to whether a Truth and Reconciliation commission is more likely to address the grievances of Bangladeshi people after 39 years of the war than a criminal Tribunal.³⁹ In its current form, the war crimes Tribunal will have legitimacy concern in the international community. At the same time, a truth commission could provide the most accurate record of the atrocities that took place during the nine month long war allowing victims and relatives to tell their stories as a way to deal with the past.

Bangladesh has won over military dictatorships many times over after the independence laying a strong foundation of democracy. It has overcome financial hurdles as well as natural calamities with determination. When it comes to the rule of law, however, Bangladesh can not claim to be on the right path. British period laws, legalized discrimination against minorities, extrajudicial killings by government forces and a malfunctioning judicial system together with widespread corruption has tainted its reputation in the international community. A domestic war crimes Tribunal without any expertise from relevant international sources will only attract criticism rather than giving her the much deserved credit.

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1. DAILY SHAMOKAL, 27 January (2008) cross posted from Ain O Salish Kendra (ASK) publication *Human Rights in Bangladesh, 2008* 56 (2009) .
2. SANGBAD, January 25, 2008 issue cross posted from *id.*
3. Referred to as IWCT Act.
4. The Special Court of Sierra Leone, Iraqi Special Tribunal and Cambodia tribunals for example.
5. Megret, Frederic, *In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice*, 38 CORNELL INT'L L. J. 7 (2005) available at <http://ssrn.com/abstract=1285471>
6. For a detailed discussion of Kosovo, East Timor, and Sierra Leone hybrid criminal tribunals see Dickinson, Laura, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 2003.
7. Article 3(1) of the ICT Act 1973.
8. With the exception of ICC, the recent development international criminal law includes Tribunals set up to address violent crimes of the past in Iraq, Cambodia, Sierra Leone, Yugoslavia and Rwanda among others.
9. As an example the attack on the Hindu minority groups after 2001 election by elected Bangladesh Nationalist Party members or ongoing systematic violence against tribal people in the Chittagong Hill Tracts could theoretically be prosecuted under this Act.
10. Bangladesh has suffered from military dictatorship for over 20 years in its 39 years' of existence. Each military takeover either preceded or followed by aggression towards democratic forces in the country. The latest in this trend was the military takeover of the country veiled by civil society intervention in 2007 after which leaders of most significant political parties faced imprisonment and persecution. The ICT Act can be misinterpreted by any such undemocratic force in Bangladesh resulting in irreparable damage to her democratic politics.
11. Article 4(1) of ICT Act.
12. Article 5 of the ICT Act.
13. Article 10 (4) of the ICT Act.
14. Article 10 (3) of the ICT Act.
15. Article 12 of the ICT Act.
16. Article 17 (3) of the ICT Act.
17. Article 20 (1) of the ICT Act.
18. Article 21 of the ICT Act.
19. Article 3 of the ICT Act.
20. Article 6 (2) of the Act.
21. Article 6 (8) of the Act states, " Neither the constitution of a Tribunal nor the appointment of its Chairman or members shall be challenged by the prosecution or by the accused persons or their counsel".
22. Article 24 of the ICT Act.
23. Article 8 (5) and 8 (7) of the Act.
24. Article 19 (1) of the Act.

25. Article 23 of the Act provides, 'The Provisions of the Criminal Procedure Code, 1898 (V of 1898), and the Evidence Code, 1872 (I of 1872), shall not apply in any proceedings under this Act.
26. Article 20 (2) of the ICT Act.
27. 139 countries in the world have abolished death penalty and only a handful of countries maintain this cruel punishment.
28. Article 77 of the ICC Statute available at <http://www.un.org/icc/part7.htm> (Last visited on 18th January, 2010).
29. Amnesty International, *Annual Report for Bangladesh*, (2009) available at <http://www.amnestyusa.org/annualreport.php?id=ar&yr=2009&c=BGD>
30. Ain O Salish Kendra (ASK) is a leading Organization in Bangladesh that continues to raise its objection to death penalty through its annual publications and occasional press releases.
31. For more on the Iraqi Tribunal, see Zakia Afrin, *Post-Conflict Justice in Iraq*, XIV ANNUAL SURVEY OF INT'L & COMP. LAW (23-37) 2008.
32. Article 26 of the ICC.
33. Article 30 of the ICC.
34. Article 31 of the ICC.
35. Article 66 of the ICC.
36. Article 68 of the ICC.
37. Article 75 of the ICC.
38. In its 2008 Annual Human Rights Report, Ain o Salish Kendra published that in 2008 there were 72 deaths in police custody and information was unavailable about the deaths. The Annual report is available at http://www.askbd.org/web/?page_id=430 (Last visited on 18th January, 2010).
39. There is a growing trend in the international community in accepting the importance of Truth and Reconciliation mechanisms in the aftermath of a violent conflict. As it serves the dual purpose of documenting accurate record of past atrocities and help the affected community heal their wounds, Truth commissions in El Salvador and Chile have received positive reviews. For more on Truth Commissions, see Ben-Josef Hirsch, Michal, *Changing the Logic of Appropriateness: The Emergence of the International Norm of Truth Commissions* (August 1, 2009). APSA 2009 Toronto Meeting Paper, available at <http://ssrn.com/abstract=1451515>; Laplante, Lisa J, *On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development*, 10 YALE HUM. RTS & DEV. L.J. 141, 2007.