U H U B

INTERNATIONAL JURISTS UNION

INTERNATIONAL CRIMES TRIBUNAL FOR BANGLADESH AND JUDICIAL PROBLEMS

İstanbul 2013

Phone: + 90 212 511 33 85 Fax: + 90 212 511 67 04
GSM: + 90 532 231 45 50 + 90 532 245 76 28 +90 532 447 58 93
Address: Edirnekapı Otakçılar Mh.
Savaklar Cad. No:1 34050 Eyüp/İstanbul/Turkey
www.uhub.org.tr ï info@uhub.org.tr

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TABLE OF CONTENTS

ABBREVIATIONS

ECtHR	: European Court of Human Rights
ECHR	: European Convention on Human Rights
BNP	: Bangladesh Nationalist Party
UHUB	: International Jurists Union
ICC	: International Criminal Court
ICT	: International Crimes Tribunal for Bangladesh
ICTA	: International Crimes Tribunals Act
ICTY	: International Criminal Tribunal for the former Yugoslavia
ICTR	: International Criminal Tribunal for Rwanda
v.	: Versus

I. PREAMBLE

A. INTERNATIONAL JURISTS UNION

Violation of human rights and lack of mechanisms to prevent them is one of the most important problems today. In cases of war and chaos, fundamental rights and freedoms are completely disregarded. ñDiscriminationò in areas where fundamental rights are exercised has become a common issue almost everywhere in the world. Many modern countries have experienced inequalities in terms of rights and justice and adopted power-oriented policies. Thus, people who are still sensitive have set off on a quest against the violation of rights.

International Jurists Union (UHUB) was founded with the participation of jurists from 32 different countries to operate at international level for the protection of human rights and dignity, and establishment of the rule of law principle. The Union makes efforts to identify human rights violations and illegalities, and announce them to the public by issuing reports.

It has been covered in the international media that an International Crimes Tribunal was formed in Bangladesh, the leaders of opposition political parties are being tried for death penalty because of allegedly committing war crimes, and more than 5 thousand administrators and members of non-governmental organizations were arrested.

In order to investigate this issue on-site, listen to the parties personally and identify any potential human rights violations, the Union visited Bangladesh between the dates 19.12.2012 ï 24.12.2012, held talks with related institutions, agencies and individuals and made necessary examinations.

B. HISTORICAL BACKGROUND OF THE CASE AND TRIAL PROCESS

B.1 FOUNDATION OF BANGLADESH

The Peopleôs Republic of Bangladesh is the worldôs 7th most populated country, with about 160 million people. Ethnic Bengalis make up 98% of the population and the remaining 2% is divided among small tribal groups. Muslims currently comprise 89.5% of the population, Hindus 9.6%, and others 0.9%. Bangladesh has the second-largest population of Muslims worldwide.

Until 1971, Bangladesh was called as East Pakistan, a state of Pakistan. Before that, it was Bengal, a state of the British India. Bangladesh had been under the rule of Muslims from 12th century to 1757, and of the British from 1757 to 1905. On August 14, 1947, Pakistan declared its independence, by separating from India.

B.2 SPLIT OF PAKISTAN AND INDEPENDENCE OF BANGLADESH

India was located between West and East Pakistan and that was causing disconnection between two parts of the country. The fact that the territories of East Pakistan were disregarded by British occupiers led to various problems in time. Also, whereas East Pakistan was constituted of a Bengali-speaking population, Urdu language was dominant in West Pakistan. The ban on Bengali language and the issue of sharing economic sources caused a civil war between two parts of Pakistan in 1971.

On November 28, 1969, Sheikh Mujibur Rahman and his Bangladesh Krishak Sramik Awami League built his electioneering programme during the elections for the formation of council members, on the promise of autonomy for East Pakistan. Led by Sheikh Mujibur Rahman, the Awami League got stronger day by day and started to demand autonomy. This increased the reaction of people to rule of Ayub Khan, who came to power in a coup. As a result of reactions, Sheikh Mujibur Rahman was released in February 1969, and the Awami League won 167 seats out of 313 during the elections held in December 1970. On March 1, 1971, the formation of national assembly was postponed and the assembly was shut down for an indefinite period of time.

On March 7, 1971, Mujibur Rahman initiated the independence movement, which then separated East Pakistan from West Pakistan on March 7, 1971. ñ*This time the struggle is for our freedom*ò proclaimed Sheikh Mujibur Rahman during his speech at the Ramna Race Course Maidan in Dhaka to over two million Bengalis. About three weeks later, on March 26, Sheikh Mujibur Rahman declared the independence of Bangladesh, and called people to the war against the Pakistan army. After this declaration, he was arrested, taken to Pakistan and court martialed.

Afterwards, he sparked the struggle for independence which lasted for 10 months. Meanwhile, India interfered in after some people took refuge in India, and then Indo-Pakistani War started. The war ended in December 1971, and India occupied majority of East Pakistan and took this region under its control for two weeks. On December 16, 1971, when the Pakistani troops surrendered to the Indian forces, the foundation of Republic of Bangladesh was officially declared. It was announced that during the war three million Bengalis were killed, 200 thousand women were raped, and especially intellectuals such as journalists and teachers were killed.

In December 22, 1971, the Peopleôs Republic of Bangladesh was founded under the leadership of Mujibur Rahman, and India left the country. The fact that Mujibur Rahman and the Awami League came into power did not cool down the chaos. During the coup organized on August 15, 1975, Mujibur Rahman, and his entire family were assassinated, except his daughter Hasina, current President of the Bangladesh Awami League, and his sister. Khondaker Mostaq Ahmad took charge, and then Brigadier General Khaled Mosharraf overthrew Mostaq Ahmad on November 3, 1975. They each ruled the country only for four days.

On November 7, 1975, Major General Ziaur Rahman staged a coup and overthrew Khaled Mosharraf. He then won the elections held in 1977. On May 30, 1981, a group of military officers and troops organized another coup, which resulted in failure. Although the troops of Ziaur Rahman quelled the coup, Ziaur Rahman was killed. On November 15, 1981, an election was held, and Abdus Sattar, leader of the Bangladesh Nationalist Party, and

assistant of Ziaur Rahman, became the new president by winning 66% of the vote. However, political stability was not ensured again and the country was still full of chaos. Muhammad Ershad, Chief of the General Staff, overthrew Abdus Sattar in a military coup, and declared that the military government will rule for two years. His presidency was also supported by a referendum held on March 21, 1985. After the resignation of Muhammad Ershad as a result of large-scaled protests, Shahabuddin Ahmed was appointed acting president on December 6, 1990. Afterwards, Khaleda Zia, the widow of Ziaur Rahman, was elected as president, winning the elections on September 19, 1991. After the political disturbances in the country, the government was lastly formed under the presidency of Sheikh Hasina, the President of Awami League, with a landslide victory in the 2008 elections.

B.3 INTERNATIONAL CRIMES TRIBUNAL FOR BANGLADESH AND TRIAL PROCESS

In 1972, a law was enacted for the trial of Pakistani soldiers and civilian Bengalis who allegedly helped them, and many people were arrested. In November 1973, an amnesty was declared except for serious crimes such as murder, rape and arson, and majority of prisoners and accused people were released. Those who were tried for serious crimes such as rape and arson were acquitted.

In April 1973, the Parliament of Bangladesh adopted the law called ñ1973 Actò, in order to judge 195 war criminals who were the members of Pakistan army. As stated by defence attorneys[1] and BNP[2], the main opposition party, this law was enacted particularly to judge only Pakistani soldiers who are not Bangladeshi citizens. Eventually, the government formed a court after the war and judges 195 Pakistani soldiers who were accused of said crimes. In 1974, Pakistan recognized Bangladesh, and the judged Pakistani soldiers were extradited to their country after the general amnesty.

The biggest election promise of Hasina Vecid, the President of Bangladesh, during the campaign in 2008 was to try the war criminals. In one year after Hasina Vecid won the elections, the legal process began.

The Bangladesh Liberation War, which was the reason to try opponents at the International Crimes Tribunal, occurred in 1971. In the meantime, no charges were pressed against the members of Bangladesh Jamaat-e-Islami and BNP, the opposition parties. Those prosecuted were the executives of BNP, main opposition party, and Jamaat-e-Islami, former ministers and members of the parliament. The accused people, other than Ghulam Azam, who is currently 91 years old, were students during that war.

The government of Bangladesh accuses those prosecuted at the International Crimes Tribunal, for ñcausing death of 3 million, rape of 200,000 women, and forcing millions of people leave their homes by collaborating with Pakistani soldiersò. The government also claims that Ghulam Azam led those suspects.

Ghulam Azam became the General Secretary of Jamaat-e-Islaami in East Pakistan in 1957. In 1964, the Ayub Khan, the President of Pakistan, banned Jamaat-i-Islaami and Azam

[1] Notes of Talks between International Jurists Union and Defence Attorneys of Jamaat-e-Islami, December, 2012
[2] Notes of Talks between International Jurists Union and Bangladesh Nationalist Party (BNP), main opposition party, December, 2012

was arrested once again. After he came out of prison, he led the resistance of all political parties against the military regime of Ayub Khan.

According to the statements of defence attorneys, Prof. Ghulam Azam did not give support to the Bangladesh Liberation War against Pakistan, which sparked in 1971. He pointed out the potential damages of separation of Muslim world one more time, by stating that the war will not solve the problems of East Pakistan. He was also concerned that gaining independence with the support of India, the neighbouring country, may indirectly put Bangladesh under Indiaôs control, and also maintained his campaign for ñUnited Pakistanò during the liberation war. He reacted to the violence committed by the Pakistan Army against the people of Bangladesh, and called the leaders of Pakistan Army, including the Chief of Army Staff Tikka Khan for ending the attacks.

C. INTERNATIONAL CRIMES TRIBUNAL FOR BANGLADESH

The Awami League, currently the governing party, promised during the general election campaign in 2008 to try the war criminals if they win the election. After coming to power, the government amended the International Crimes (Tribunals) Act of 1973[3]. The government assigned a *judge, prosecutor and members of investigation committee* to the International Crimes Tribunal for Bangladesh (ICT). On March 21, *2010*, ICT started trying the *leaders of two main opposition parties* forming alliance in the last election (Jamaat-e-Islami and Bangladesh Nationalist Party (BNP)), including former ministries and deputies, on the grounds that they collaborated with the Pakistan Army during the liberation war in *1971*.

In the process, more than 16,000 people, who were the members of the Jamaat-e-Islami, the opposition party in Bangladesh, were taken into custody. The media covered that the detainees were tortured and some died in detention[4]. According to the data of Dikyar, a human rights organization in Bangladesh, 40 died and about 7000 injured because of political disturbances in 2009. Until September of 2010, another 165 died and about 12,000 injured[5]. Many issues emerged regarding the trial process of International Crimes Tribunal. Recently, over 17 hours of Skype conversations and 230 e-mails about the case between the Chief Judge Nizamul Haq and Ahmed Ziauddin, a lawyer living in Belgium, were revealed by the newsmagazine *The Economist*[6].

At this point, we, as the International Jurists Union, felt the need to visit Bangladesh, to listen to all parties personally about the case-related issues. On December 20, 2012, the Union arrived in Dhaka, the capital of Bangladesh, and held talks with Golam Arif Tipu, Chief Prosecutor of ICT and Bangladesh Supreme Court, Quamrul Islam, Minister of Justice, Gowher Rizvi, adviser to the prime minister, representatives of Bangladesh Nationalist Party (BNP), the main opposition party, attorneys of Bangladesh Supreme Court, Sultana Kamal,

[3] The International Crimes (Tribunals) Act (Act XIX of 1973)
[4] 24.12.2012, Imposing Law in the Land of the Lawless, http://ireport.cnn.com/docs/DOC-901453, URL retrieved on 30.12.2012.
[5] Allegedly, 300 people injured and 50 people were arrested on 02.01.2013 alone. http://bdnews24.com/details.php?cid=3&id=239300&hb=3http://www.dailysangram.com/news_details.php?news_id=105578, http://www.dailysangram.com/news_details.php?news_id=105585
[6] http://www.economist.com/news/briefing/21568349-week-chairman-bangladeshs-international-crimes-tribunal-resigned-we-explain

one of the counsels for the prosecution, Defence Attorneys, and head of defence attorneys. After these talks, the Union obtained detailed information about the case.

During the conversation with the Minister of Justice, the Union asked him whether the international principles of fair trial are observed in the ongoing case, and he was informed of public concerns at international level. All conversations and talks were recorded by the unionôs committee in minutes. Since the trial ongoing at the International Crimes Tribunal is open to the public[7], the committee observed the trial at the court. Furthermore, the committee visited the Liberation War Museum and observed the traces of unjust treatments in the past.

The committee witnessed the trial on the spot at the International Crimes Tribunal and examined the documents presented by government representatives. The bills of indictment issued for each accused were reviewed. Afterwards, Skype conversations between the Chief Judge and the lawyer living in Belgium were evaluated. The reports developed by the Human Rights Watch, Amnesty International, International Centre of Transitional Justice, US Ambassador on War Crimes Issues, International Bar Association, The United Nations Working Group on Arbitrary, and Organization of Human Rights and Solidarity for Oppressed People (MAZLUMDER), which expressed that human rights have been violated in this case, were also reviewed. Also, the committee thoroughly evaluated the International Crimes Act, procedures regarding the criminal justice, and court notification on procedures or principles, reviewed the legislation and procedure on International Crimes and decisions of the European Court of Human Rights on fair trial, and consequently this report was developed on the trial which is ongoing at the International Crimes Tribunal for Bangladesh.

The purpose of this report is to identify whether a fair trial process is ensured at international standards at the International Crimes Tribunal for Bangladesh, which is a party to the Rome Status that established the International Criminal Court dated March 23, 2010, through the International Covenant on Civil and Political Rights in September 2010.

II. INTERNATIONAL CRIMINAL PROCEDURE PRINCIPLES OF INTERNATIONAL CRIMES TRIBUNALS

General basic principles of procedure in international crimes can be defined by looking at the general rules of procedure of International Military Tribunal for Major War Criminals (Nuremberg), International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and International Criminal Court (ICC), the respective case law and general principles of criminal procedure. General basic principles that establish fundamental human rights for the accused, witnesses or victims are set out in the European Convention on Human Rights (ECHR), International Covenant on Civil and Political Rights, American Convention on Human Rights, and African Charter on Human and Peoples' Rights. In the literature, there are two fundamental trial rights based on the basic principles.

[7] International main court conventions and human rights instruments already stipulate open and public prosecution as a fundamental right. Art. 21(2), ICTR (Art. 20(2), ICC (Art. 67(1), European Convention on Human Rights Art. 6(1), the UN Covenant on Civil and Political Rights Art. 14(1), American Convention on Human Rights Art. 8(5).

A. Fair Trial Principle

The fair trial principle is one of the most important and globally accepted principles of international law. Conventions on fundamental human rights regulate this principle. Articles 14/1 and 26 of the European Convention on Human Rights, and Article 6 of the International Covenant on Civil and Political Rights are some examples. Especially the European Court of Human Rights[8] and International Crimes Tribunals construct this principle in many judicial opinions. Also, conventions, and treaties that establish international crimes tribunals contains provisions on this principle. Two of the oldest examples are Article 16 of the Charter of the International Military Tribunal for Nuremberg Trials and Article 9 of the Charter for Tokyo War Crimes Tribunal. Furthermore, charters of current international crimes tribunals cover this principle. For instance, Article 21/1 of the Charter for International Criminal Tribunal for the former Yugoslavia, Article 20/2 of the Charter for International Criminal Tribunal for Rwanda, and Article 67 of International Criminal Court regulate these principles. Additionally, said courts took important decisions in regards to that principle.

Longstanding practices of governments have made the fair trial principle a customary rule of the international law.

The fair trial principle has three main criteria. The first one is the principle of equality of arms, which requires that the accused must be at the same or a better position with the authority of prosecution, because the prosecution authority is at a powerful position and collects evidence. In international crimes, evidences may spread in various countries, and accusations could be very serious and complex. For this reason, the defence party must be given the right to get prepared for the case in all aspects.

For the equality of parties, the accused party must be given various rights. Above all, the accused party has the right to have information in detail about all accusations against him. Accordingly, that party must have the right to access and review all evidences collected against. Rules of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda grant a period for the announcement of evidences and list of accused individuals. Besides, the accused has the right to free legal aid that must be provided by the court, in case that party cannot afford retaining a lawyer. Lastly, the accused party must be given the right to call the witnesses and cross-examine the witnesses brought by the claiming or defence party. If the accused person has any security concerns, then that party can ask for protection. If the witnesses reject attending the hearings for security reasons, other facilities, including video-conference, must be provided[9].

Secondly, trials and proceedings must be public in order to strengthen fair trial. Charters of international crime tribunals and conventions, treaties and national legislations on human rights contain this principle as a fundamental right[10]. This principle is ensured in the Statute of International Criminal Tribunal for the former Yugoslavia (Article 22), International Criminal Tribunal for Rwanda (Article 21), and International Criminal Court (Article 68).

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[8] For example judicial opinion of the European Court of Human Rights, see *Artico v. Italy*, May 13 1980, par. 32; *Barberà, Messegué and Jabardo v. Spain*, December 6, 1988, par. 67; *Edwards v. United Kingdom*, December 16, 1992.

[9] *International Criminal Law*, Antonio Cassese (New York, 2008), p. 386

[10] Art. 21(2), ICTR (Art. 20(2), ICC (Art. 67(1), European Convention on Human Rights Art. 6(1), the UN Covenant on Civil and Political Rights Art. 14(1), American Convention on Human Rights Art. 8(5).

A.1 Impartiality and Independence of Tribunal

Today, all legal systems include the principle on impartiality and independence of tribunals. In the *Furundžija*ôs appeal judgment, the International Criminal Tribunal for the former Yugoslavia addressed to the importance of this principle and its place in legal systems[11]. In the judgment, the court stated that the fundamental human right of an accused to be tried before an independent and impartial tribunal is generally recognised as being an integral component of the requirement that an accused should have a fair trial. Articles 13/1 and 21 of the Statute that establishes the Tribunal also include this principle. The Tribunal evaluated the decisions of courts of various countries and the European Court on Human Rights, and noted that there is a general rule that a judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. Accordingly, ICTY established the following criteria in interpreting and applying the impartiality requirement of the Statute;

A. A judge is not impartial if it is shown that actual bias exists.

B. There is an unacceptable appearance of bias if:

i) A judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the judgeôs decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a judgeôs disqualification from the case is automatic; or

ii) The circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.

The same principles must be adopted in interpreting and applying the Rule 15(A)[12].

In order to ensure the impartiality and independence of judges, a mechanism must be established first, which will enable the election of judges who have moral integrity, and are impartial, and independent from politics and government. ***Secondly, the judges must be prohibited from asking or receiving instructions from outer authorities, or being interested in the benefits or concerns of parties in any manner.*** Lastly, a control method must be adopted, which will prevent judges from showing partiality or being a party, and take them off the case, and even off the court in case it is identified that they are partial or biased[13].

The principle of independence and impartiality of judges must be observed both during and after their election. Judges are required to avoid all kinds of activities that may jeopardise their independence or adversely affect the trust on their independence. Article 40/1 of ICC Statute regulates this issue. Judges, as required by the principles of tenure of judges and judicial independence, are not and must not be under the influence and pressure of state. This privilege and immunity prevents irregular intervention of the state. Furthermore, court legislations include various methods that protect the independence of judges. These methods

[11] *Furundžija (Appeal)*, ICTY AC, 21 July 2000 (case no. IT-95/1-A).
[12] *Furundžija (Appeal)*, par. 177, 189 & 191.
[13] Cassese, p. 379.

are protected by legislations in international courts. ICTY Rule 15(A) and ICC Rule 34 are two examples in point.

A.2 Presumption of Innocence

The principle of presumption of innocence is as old as the history of humanity and a part of all legal systems. Under this principle, a person is innocent until proven guilty through evidences. He or she cannot be considered and treated as guilty. This principle is more important with regards to judges, because if the judge does not consider an accused person innocent under this principle at the beginning of proceedings, than such trial is not legitimate. All national legal systems contain the principle that the accused party is innocent unless proven otherwise. Statutes of ICTY (Article 21(3)), ICTR (Article 20(3)) and ICC (Article 66) covers this presumption as well. In general, the content of presumption of innocence is recognized as follows:

i) Suspects must be treated as innocent until the alleged crimes are proved;
ii) The prosecution has the burden of proof for the alleged crimes. The suspect may content himself/herself with rejecting the evidences presented against him/her. He/she is not obliged to prove his/her innocence[14].
iii) The court is obliged to obtain evidences at particular standards (clear and conclusive) in order to accept that the accused person is guilty.

There are three important problems regarding the treatment of accused person pursuant to this presumption. The first one is the question of *when* the accused is subject to the presumption of innocence: after being formally accused and called as suspect, or when an investigation is launched against him/her as a suspect, meaning before the formal accusation? The texts of respective documents support the first one since the term ñaccusedò is used. However, the presumption of innocence applies during the preliminary inquiry stage as well, because considering that the accused person has the right to presumption of innocence, someone who is even not considered as accused has much more entitlement to this presumption. Furthermore, investigating authorities are required to perform investigation also for the good of suspect, meaning they are obliged to collect not only unfavourable evidences, but also favourable ones.

Another problem is the coverage of suspectôs arrest and trial by media. The media does not hold off from reporting news about those who are accused of serious crimes such as war crimes, genocide and offences against humanity, just like they are proven guilty. Moreover, there are times media present the suspects by using various negative adjectives, such as monster and butcher. In domestic trials, courts may take decisions to prevent such news. The accused may file a libel suit against such. However, this is not possible in case of international accusations. Therefore, holding off from reporting such news is in the hands of media on one hand, and prosecutor on the other. Nevertheless, countries must develop legal solutions against the excessive involvement of media in investigation and trial processes and thus violation of presumption of innocence[15].

Lastly, this presumption must be observed in the trials. If the accused does not make any defence, in other words even state that he/she denies accusation, then the court must

[14] See. *Delali*ć *and others*, ICTY TJ, par. 599, 601.
[15] Cassese, p. 381.

continue the trial as if the accused denied the accusations. This is the direct practice of presumption of innocence. The accused has the right to not prove his/her innocence and above all to remain silent. The articles covering foregoing rights aims at protecting the accusedôs rights, such as leaving the questions unanswered. One last point is that the accused has no burden of presenting evidence to the prosecution. Also, no conclusion against the accused must be established on the grounds that he/she is exercising the right to remain silent.

With regards to the burden of proof, it is the duty of prosecutor to prove that the accused is guilty. If the prosecutor cannot prove the guilt with evidence at a sufficient level, then the court must order the verdict of not guilty. In the Natzweiler Trial in 1946 during the World War II, military judge of the British Military Court sitting at Wuppertal stressed in the case of *Wolfgang and others* that the Prosecution has the burden of proof and is required to convince the court with evidence other than a reasonable doubt[16]. As indicated in Article 67(1)(i) of the ICC Statute, the burden of proof cannot be reversed. This article is the legalized format of a general rule.

III. TRIAL PROCESS AT THE INTERNATIONAL CRIMES TRIBUNAL FOR BANGLADESH

A. ALLEGED NONOBSERVANCE OF FAIR TRIAL PRINCIPLES IN THE CASE ï STRUCTURE OF THE INTERNATIONAL CRIMES TRIBUNAL FOR BANGLADESH

According to universal, fundamental and unchangeable criminal procedure principles concerning all times, the criminal procedure arises out of criminal suspicion and aims at revealing material fact. The purpose of criminal procedure is to ensure justice by bringing out the material fact. In this regard, criminal evidences must be established first, and then the crime and suspect must be found through the evidence. The presumption of innocence must be observed at a maximum level throughout the trial process and the judgment must be established on strong and undoubted evidences in any case.

The norms to be predicated on in this regard are conceptualised in the international law as historical gains stipulating the defence of human rights in the reciprocity of human rights and criminal law. Among these norms, firstly, it should be acted on the assumption that the accused is innocent, and this is the way the process of criminal procedure becomes meaningful.

When examining the foundation and structure of International Crimes Tribunal for Bangladesh and trial process of the case regarding the trying of opponents, there are some concerns and doubts in this regard. The International Crimes Tribunals Act was adopted in 1973 after the independence of Bangladesh, by the Parliament of Bangladesh. The International Crimes Tribunal was established in 1973 for the trial of Pakistani soldiers, and in the last 38 years it has been extended to the citizens of Bangladesh (especially those with political backgrounds), not to the officers of Pakistan Army, who allegedly committed the

[16] *Wolfgang Zeus and others* (the *Natzweiler* trial), British Military Court sitting at Wuppertal, 29 May 1946, at 199.

violence. For this reason, these officers have not been charged and tried in the course of time. In 2009, the Parliament amended this act, taking its current form. One of the issues that attract notice in the said amendment was the introduction of provision which reads, ñ*The court is independent in the performance of its judicial functions and fair trial*.ò On January 25, 2010 and June 28, 2011, the court itself set out basic principles regarding the trial.

The international community has serious concerns regarding the foundation of court, other than the reference to fair trial in the act. Also, the facts that foreign jurists who are experts in the area of war crimes are not able to offer consultancy directly in this case, suspects are not able to defend themselves sufficiently due to the special regulation of court, these suspects are deprived of the rights granted to the suspects under the Bangladesh Criminal Procedure, and they will not be able to exercise such rights thereafter, have been criticized justifiably by many human rights institutions, including Human Rights Watch, Amnesty International and International Centre For Transitional Justice.

A.1 ALLEGED VIOLATION OF APPEARANCE OF IMPARTIALITY BY THE COURT

A.1.1. JURISDICTION PROBLEMS

A.1.1.1. OBJECTIONS REGARDING THE JURISDICTION

According to Article 3.1(A) of the International Crimes Tribunals Act, the court has jurisdiction with regards to the crimes committed under this law in the territory of Bangladesh whether before or after the commencement of this Act.

However, the jurisdiction and its period of time for operation become controversial, considering that the jurisdiction is limited in the territory of Bangladesh within that period, and there was no country called Bangladesh yet at the time when the crimes were allegedly committed, and it was universally recognized as East Pakistan.

Despite the fact that the Nuremberg Court was established after the World War II and the La Hague Court was given jurisdiction regarding the accused war criminals and war crimes against humanity in Rwanda as well, these both courts were established by the international community. Moreover, the International Criminal Court, which has an international nature, was granted jurisdiction regarding the mass murders committed during the formation of Federation of Bosnia and Herzegovina. For this reason, these courts were established free from all controversies and doubts with regards to their independence, and impartiality, expertise, and legal knowledge of judges.

Furthermore, all members of the International Criminal Tribunal are appointed by the government (ICTA, Article 6(1)), and prosecutors are designated by the government (Article 7(1, 2, 3)). Additionally, all members of ñinvestigation committeeò, which is authorized to collect evidence for the court, and the ñprosecutorò, who will chair this committee, are appointed by the government (Article 8(1, 2, 3)). No jury exists in the trial process. Therefore, although this court is named ñInternational Criminal Tribunalò, it is actually a national court which was formed completely through the appointments of government, as noted by the

Minister of Justice and key advisor of the Prime Ministry. As much as it does not have an international nature, there are serious doubts and concerns regarding its independence and impartiality due to the fact that all members are appointed by the government.

In this case, as indicated in the Statute of International Criminal Court, the most appropriate method for countries with no power of international criminal procedure is to transfer such jurisdiction to the ICC, and this reading applies to the present case as well, because it is not likely to ensure international standards in a trial where the judge, prosecutor and all members of investigation committee are appointed by the government and the suspects are the members of two different political parties which are completely opponent to the government.

Actually, establishment of an ñinternational courtò by a country for the trial of alleged crimes in its own territory has never been seen or generally accepted before. If this is a national court, then the procedure and principles observed and adopted in other courts should apply for this one as well. If it is an international court, then the judges must consists of individuals who are distinguished in the international community and experts in areas of legal knowledge and international criminal procedure. Otherwise, all countries which gained independence especially after the World War II would try the alleged crimes during the period of previously affiliated country, the suspects who allegedly committed crimes or people who allegedly collaborated with the criminals, at such ñspecial courtò. In this case, it is possible that an accused person, who would be acquitted if he/she was tried at a normal court, may be convicted due to the claims such as crimes against humanity or genocide in spite of no evidence at a special court where the rights are significantly limited and there is no period of limitation available, instead of through the criminal procedure of municipal law. Actually, it is likely that such courts use 40-year-old proofs with no evidential value since they do not have conclusive evidences. The news covered by papers is one of them. Such issues did not occur in other countries. However the fact that they occurred at the International Crimes Tribunal for Bangladesh leads to rightful criticisms.

A.1.1.2. CRIMES UNDER THE JURISDICTION OF THE COURT

The crimes under the jurisdiction of the International Criminal Court (ICC) are 32-page-old very comprehensive descriptions from Article 6 to Article 8 of the Rome Statute of ICC and identification of actions which can be termed as ñall and only the definedò. However, in the International Crimes Tribunals Act, this issue is defined with a general and round statement (Article 3(2)). For example, according to the provision of said article, even if members of a group kill 2 members of another group on the grounds of feud, the court will have the jurisdiction to try these offenders for various charges, such ñwar crimeò or ñgenocideò (Article 3(2/c)). In this case, determination of the jurisdiction of court in detail as stated in the Rome Statute of ICC and identification of criminal act are obligatory pursuant to the fundamental norms of Criminal Law.

As a matter of fact, the report issued by the Working Group on Arbitrary Detention, an UN-mandated body, on February 6, 2012, shows that the fair trial principle has been violated all along the case. Miguel de la Lama, Secretary of the Group, concluded in his Opinion no. 66/2011 (Bangladesh) that the detention of 7 suspects and acceleration of imprisonment of Prof. Ghulam Azam upon the order of International Crimes Tribunal were arbitrary and violated the international law. ñThe pre-trial detention of the six individuals brings up the

issue of compliance of the International Crimes Tribunal established under the domestic law of Bangladesh. Without addressing the relationship between the provisions contained in the International Crimes (Tribunals) Act and the guarantees and remedies available under the Constitution of Bangladesh, the Working Group notes that the procedure of this Tribunal must comply with the relevant obligations of Bangladesh under international law. Bangladesh has ratified the Rome Statute of the International Criminal Court that provides a model for resolving many such issues in national law, and further assistance may be found in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and other ad hoc tribunalsò, stated the UN-mandated Working Group in their report.

As stated by BNP, the main opposition party, three issues are highlighted in the report of the Working Group on Arbitrary Detention.

1) The fact that the court arrested 1 member of BNP and 5 members of Jamaat-e-Islami without any arrest warrant is arbitrary and unlawful.
2) Placing restrictions on defendants about some legal aspects, including the restriction on the defence counselsô participation in the sessions during which the defendants were interrogated, accusations without presenting the evidence and taking the statements of defendants even when their lawyers have not been informed of what they are accused of, are contrary to the law.
3) International obligations have not been observed in the trial process[17].

The response of Bangladesh Government to the report was that the arrests were compliant with the domestic law, and thus legal, and therefore, the Working Groupôs opinion is wrong. ñ*This tribunal is not an international war crimes tribunal, this is a domestic tribunal. Those who have been arrested are facing trial, so itôs not an illegal detention*ò, stated Shafique Ahmed, the Minister of Law, Justice and Parliamentary Affairs of Bangladesh Government, in an interview with Al Jazeera about the Working Groupôs opinion. The Minister of Law, Justice and Parliamentary Affairs expressed his similar opinions in his interview with our committee, and noted that the court is named as international tribunal but it is actually a domestic tribunal. In such case, domestic criminal procedure must be enforced in this tribunal as well. However, in an amendment to the ICT Act, it is clearly set out that the Domestic Criminal Procedure Act will not apply in this case, and the provision of said law on presentation of evidence will not apply as well.

As clearly accepted by the Working Group on Arbitrary Detention, the existing legislative framework does not effectively comply with the requirements of International Covenant on Civil and Political Rights (ICCPR) regarding the rights of access and defence during the investigation stage. Especially the following issues do not comply with the conditions of ICCPR.

(a) No sufficient information has been provided regarding the nature of charges after the detentions.
(b) Information about the investigation was presented to the tribunal, not to the defendant.
(c) Investigation report and case diaries had never been disclosed to the defendant.

[17] Notes of Talks between International Jurists Union and Bangladesh Nationalist Party (BNP), main opposition party, December, 2012

(d) The interrogations had been conducted effectively under the mask of confidentiality.
(e) The prosecutor had not been imposed the obligation to submit the unused case-related data to the accused.
(f) During the interrogations, the defendant party had not been given the right to establish private communication with the selected defence counsel.
(g) The defendant had not been provided the copies of court orders and decisions during the interrogations.
(h) The defendant had been interrogated in the absence of defence counsel.
(i) Members of the investigating authority announced to the media that the defendant admitted his guilt during the interrogations.

A.1.2. THE CLAIM THAT TRIBUNAL CONDUCTS TRIALS FOR POLITICAL REASONS

Two opposition leaders, who allied in the last elections, are being tried at the International Crimes Tribunal. The Awami League, currently the governing party, had formed alliance with BNP and Jamaat-e-Islami at different times after separation from Pakistan, and governed the country for various periods. During the 2008 elections, BNP and Jamaat-e-Islami formed alliance against the current government. Afterwards, Awami League amended the act and commenced the trials in 2010. *Therefore, this situation leads to the claims that this case was commenced by the government for political reasons to suppress the opposition*.

ñ*We wanted to be separated from Pakistan, not just because of we are against Pakistan, but also because of the fact that we differ in terms of ideas and mentality*ò, stated Sultana Kamal, a member of the judicial investigation committee. She also noted that Jamaat-e-Islami and other 6-7 opposition parties objected to the separation of Bangladesh from Pakistan because they did not have the same opinions. Also, defence attorneys claim that Jamaat-e-Islami had objected to the separation politically, but they were not involved in any activities of murder or rape and did not commit any crime against those supporting the separation[18]. Since the laws do not consider supporting ñUnited Pakistanò, the accused individuals are being tried on the accusation that ñ*you supported united Pakistan and therefore you were a part of the crimes committed by the Pakistan Army*.ò As a matter of fact, defence attorneys, BNP, the main opposition party, and Chairman of the Supreme Court Bar Association expressed that this case have been fictionalized and filed with the assistance of Government of India, in order to suppress the opposition and for political reasons. According to the comments, it is claimed that in this case, which allegedly aims at suppressing the opposition, the fundamental and minimum trial norms stipulated in the internationally recognized criminal procedure law have not been observed and the accused individuals have not been able to exercise their rights. Allegedly, this is a political case which aims at killing successful Islam instructors and politicians who are against Indiaôs pressure and suppression policy. A prosperous Bangladesh is a threat to the integrity of India. If Bangladesh reaches prosperity, then India will face dissolution, just like the former Soviet Union. Current Prime Minister of Bangladesh Sheikh Hasina is supported by the Indian community in Bangladesh. She remains in power with the

[18] Notes of Talks between International Jurists Union and Defence Attorneys of Jamaat-e-Islami, December, 2012

support of India. India supports this case. As a matter of fact, India supports this case in order to suppress the voices against Sheikh Hasina[19].

On the other hand, the government states that Jamaat-e-Islami and some Islamic groups had given the Pakistani all kinds of help, not only in a political way, the accused individuals had played a part in identifying and killing freedom fighters, and helped them in some activities of killing and rape. ñAlthough some people claim that the trials are due to political reasons, the tribunal was not established for political reasons. Those who are currently going to trial are before the court due to the crimes they committed. These people could be a member of any political party. However, currently there is no one before the court for any political reasonò, noted the Minister of Justice[20].

On the other hand, the opposition points out that this is clearly a political case, the government covers up the pressure on the opposition through this case, this is clearly stated by the secretary general of governing party, the government uses the case as an opportunity to dissolve the opposition, and so much so that someone from the government stated that this case is a blessing to dissolve the opposition[21]. Accordingly, the government, thanks to this case, covers up the problems arising out of deterioration of the country, such as perturbation, disruption of stability, and financial deficiency. By abusing the feelings of people who lost their relatives during the Liberation War, the government eliminates the opponents[22].

BNP, the main opposition party, states that the accused individuals are tried because they are the leaders of opposition, the detainees had been the allies or supporters of current governing party in the past, and the fact that such accusations had never been an issue at those times yet they are now suggests clearly that this case exists for political reasons.

The International Jurists Onion has determined the following based on the tangible data in the case;

- In 1972, an act was introduced in order to try the civilians due to the crimes committed during the war which then led to separation from Pakistan. If the current leaders of Jamaat-e-Islami would aid and abet in such crimes in the past, then they shouldôve been tried pursuant to the acts introduced for civilians in the course of time.

- Sheikh Mujibur Rahman, who is called as the Father of Bengal, is the person who liberalised Bangladesh by separating from Pakistan, and also the founder of Awami League. He had remained in power for 3.5 years, but never accused those who are currently tried in the court.

- Sheikh Hasina, current Prime Minister of Bangladesh and leader of the Awami League, came into power in 1996, and she has never accused the leaders of Jamaat-e-Islami.

[19] http://www.economist.com/news/briefing/21568349-week-chairman-bangladeshs-international-crimes-tribunal-resigned-we-explain
[20] Notes of Talks between International Jurists Union and Minister of Justice Mr. Shafique, December, 2012
[21] Notes of Talks between International Jurists Union and Bangladesh Nationalist Party (BNP), main opposition party, December, 2012
[22] Notes of Talks between International Jurists Union and Bangladesh Nationalist Party (BNP), main opposition party, December, 2012

- The Jamaat-e-Islami was a partner in the 2001-2006 coalition government. Motiur Rahman Nizami, current leader of Jamaat-e-Islami, served as the Minister of Agriculture (2001-2003), Minister of Industries (2003-2006), and Ali Ahsan Mohammad Mojaheed, Secretary General of Jamaat-e-Islami, served as Minister of Social Welfare (2001-2006).

- Salahuddin Quader Chowdhury, who is currently on trial, was elected as the Member of the Parliament from BNP, the opposition party, after the War of Liberation. Also, Abdul Alim was elected as the Member of the Parliament from the same party, and served as minister. Therefore, it is less likely for the people to elect a war criminal as the minister and member of the parliament.

- Sheikh Hasina, leader of the Awami League, lived in exile in India for a long time because almost her entire family was assassinated before, and promised this case as a part of her election campaign during the last elections.

- Although 41 years passed from the Liberation War, no accusation has been made against the accused today, and these cases were brought after the Awami League came to power alone.

- In the past, Awami League Party formed a coalition with Jamaat-e-Islami, but made no accusations.

- Although the International Crimes Tribunal was established and conducted various trials, no accusation has been made against those who are tried today.

The foregoing factors *support the assertions that the case is based on political reasons*.

A.1.3. PRESS COVERAGE OF CONVERSATIONS INDICATING CHIEF JUDGEõS BEING URGED BY OTHERS

Pursuant to the principles of international law, the judges are obliged to avoid all kinds of activities that may jeopardise their independence and affect the trust on their independence[23]. However, the weekly newsmagazine Economist published an article covering over 17 hours of recorded telephone conversations and more than 230 emails in 12 months between Nizamul Haq, the Chief Judge of International Crimes Tribunal and Belgian-based Bangladeshi lawyer Ahmed Ziaduddin[24]. According to the article, the judge and the lawyer had talked about the case almost 20 minutes every day, between August 28th and October 20th.

The Economist called the chief judge on August 5, 2012, and asked whether he has any contact with any Belgian. The judge said that they, as judges, do not take help and opinion from third parties. Asked whether they sometimes exchange e-mails about the tribunal, the judge replied that there is exchange of views regarding the judgment as well as proceedings. ñ*We do not talk even with our wife regarding the tribunal*,ò stated the Chief Judge of International Crimes Tribunal.

[23] Louise Doswald-Beck ñInternational Protection, Right to Fair Trialò in *Max Planck Encyclopaedia of Public International Law*,(online ed.), at 20.
[24] http://bangladeshwarcrimes.blogspot.com/2012/12/sayedee-trial-analysis-prosecution_6.html?spref=fb

When the Skype conversations were published in the Economist on December 6, 2012, Nizamul Haq, the Chief Judge, admitted in the court that he talked with Ahmed Ziaduddin regarding the proceedings. He explained his reason for making such conversations that the tribunal is based on a new law, he is new in the court and it is normal to take expert opinion[25]. Then he resigned. However, no investigation has been launched against the judge for the abuse of office. Moreover, we asked the Minister of Justice, ñWould you consider discharging the judge from the office if he did not resign? Because you have such authorityò, and he replied, ñActually, the judge did not have to leave, but he personally wanted to resign for continuance of proceedings without any doubtò[26]. Also, the chief judge stated ñresignation of a judge does not make this tribunal unfairò[27]. Furthermore, Sultana Kamal, advisor to the Prime Minister and one of the counsels for the prosecution, stated that exchange of views is legal and the judge did not have to resign. *At this point, main defence of the government is that since the tribunal is new, conversations lasting for months between a judge and an expert should be regarded as normal. As a matter of fact, the International Crimes Tribunal-1, from where the judge resigned, rejected on January 3, 2013, the appeals for retrial.*

- ***The reason for why a judge who needs to send 230 e-mails to conduct the case is appointed chief judge,***
- ***The reason for why the judge does not officially inform the tribunal before 17 hours of Skype conversations are covered by the media, but does inform after the media coverage.***

The foregoing issues do not match the governmentôs statements that the judge just benefited from an expert opinion.

- Before the conversations were leaked to the media, the judge personally stated that it is impossible for any member of Supreme Court to do something like that[28]. On which area the person from whom the judge took assistance has expertise, on what conditions

[25] Mr. Nizamul defended the same. The order of December 6th explains that the tribunal is based on ñnew lawò, so the judges needed to ñtake the assistance of researchers from inside and outside the countryò. It names Mr Ziauddin as just such an expert. ñDuring the proceedings of the trial and order the Chairman also took assistance from himò. Speaking to The Economist on December 4th, Mr Ziauddin said something similar. ñItôs up to judges to decide where they are going to get research support or other support they need. They are quite entitled to do it. The more so when they really donôt have that research backup [in Bangladesh]. [They ask for help] if they feel if there are people more informed about the issue, especially where [international law] is so new in Bangladesh...Iôm not really advising him, but if there is a question then I try to respond.ò (15.12.2012, Economist Weekly Newspaper)

[26] Notes of Talks between the Committee of International Jurists Union and Minister of Justice Mr. Safique, 24.12.2012

[27] Notes of Talks between the International Jurists Union and Chief Prosecutor Golam Arif Tipu 23.12.2012

[28] Yet the characterisation in the order and from Mr Ziauddin contradicts what the judge told us in an interview on December 5th. On the evening before issuing the order, Mr Nizamul admitted that he and Mr Ziauddin talk but denied that the expatriate had a part in preparing documents. ñAs judges, we cannot take help from third person and outsiders,ò he said. Asked whether they sometimes exchange e-mails about the tribunal, he says ñNo, no, no, regarding tribunal...no talks regarding the judgment or regarding the proceedings, no.ò Later he said, ñA Supreme Court judge, we do not talk even with our wife regarding the tribunal.ò
In his interview on the previous day, Mr Ziauddin also took the view that judges must be careful about speaking to third parties during a trial. He told us that he has ñNo official standing [with the court]. No relationship whatsoever.ò He can send the judge messages if he wantsð but ñgenerally though I donôt,ò he said, ñheôs a judge after all.ò (15.12.2012, Economist Weekly Newspaper)

he was selected, and why the court had not been informed about such issue beforeé These questions are left unanswered[29].

Besides, according to the claims of main opposition party, BNP, the leaked materials show that Ahmed Ziaduddin emerges as an important figure in the trialð offering advice, urging Nizamul Haq to do this or that, and supplying him with news and drafts of court documents. In general, judges are required to be extremely careful about discussing details of cases with third parties because that could lead to bias or the impression that they have come under the influence of someone who has nothing to do with the proceedings. This requirement is embodied in Bangladeshôs constitution, which says ñthe chief justice and other judges shall be independent in the exercise of their judicial functions.ò The judgesô code of conduct confirms that ñan independent judiciary is indispensable to the justice system in Bangladesh.ò[30] **Despite such legal arrangements, the fact that the records, news and claims which indicate the chief judgeôs conversations are not only for the purposes of information exchange has damaged the reliability of tribunal**.

According to the international law, judges can take advice. But any adviser is usually given an official role, known to prosecution and defence. Additionally, as a general rule, advisers tend to stick to their areas of expertiseð giving advice on knotty points of law, for example[31].

As noted by BNP, if the court needs specialized knowledge, then it can retain an expert and take advice within the court. However, getting written instructions from someone who is not even in Bangladesh and not registered with the bar association is nonprocedural as well as unlawful[32]. Such situation tarnishes the independence and impartiality of tribunal.

ñA judge resigned from office after the Skype conversations were leaked. However, this judge had held some contacts regarding the structure of tribunal since it was a new one. He did not communicate any information he received from any witnesses etc. As it can be seen in these conversations, no obtained findings and presented documents had been communicated. Therefore, the conversations do not affect essential nature of the tribunal. He only held some talks to clarify the method of procedureò, says the Minister of Justice[33].

Sultana Kamal, member of the judicial investigation committee, stated, ñThe Skype conversations are not directives. Since this is a special trial, the judge received information regarding the trial procedure. That was a private talk, the attorney did not give any instructions to the tribunal, and they discussed the case without receiving any instructions.ò[34]

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[29] Notes of Talks between International Jurists Union and Bangladesh Nationalist Party (BNP), main opposition party, December, 2012

[30] http://www.economist.com/news/briefing/21568349-week-chairman-bangladeshs-international-crimes-tribunal-resigned-we-explain, retrieved on 02.01.2013

[31] http://www.economist.com/news/briefing/21568349-week-chairman-bangladeshs-international-crimes-tribunal-resigned-we-explain, retrieved on 02.01.2013

[32] Notes of Talks between International Jurists Union and Bangladesh Nationalist Party (BNP), main opposition party, 22.12.2012

[33] Notes of Talks between International Jurists Union and Minister of Justice Mr. Shafique, 24.12.2012

[34] Notes of Talks between International Jurists Union and Sultana Kamal, Leader of Foundation of Human Rights and Freedom Fighter, December, 2012

ñThe talks between the judge and the lawyer may not be very important, and the fact that they talked very important issues about the elements of case is importantò, says the President of Supreme Court Bar Association[35]. On the other hand, the main opposition party, BNP, claims, in parallel with the Economist, ñThese conversations show that the Belgium-based lawyer directly influenced the judge about the proceedings, and they talked about how accusations will be drawn up, how the witnesses will be brought to the court, and how they will testify. Furthermore, these conversations reveal that the judge was not happy after Salahuddin Quader Chowdhury, member of BNP, former minister and current suspect, did not state anythingò.

As the defence counsels state[36], the judge and Belgium-based lawyer even talked about which case will be conducted first, and which decisions will be rendered in each case. Furthermore, they discussed the witnesses and all important decisions were drawn up in Brussels, and then sent to Dhaka in drafts. The conclusion of defence counsels based on the content of conversations is that many decisions had been urged with the order of that lawyer, the Belgium-based lawyer drawn up the decisions and sent them through e-mail and the same decisions written in the e-mails were rendered in the tribunal. The e-mail correspondences and conversations support this claim. Again, on November 26th 2011 the judge sent the lawyer an e-mail, reading ñSubject: Order. Not yet received. Very anxious. Please send by this night Bangladesh time, otherwise, I will follow my own one. Nasim.ò[37] Nizamul Haqôs e-mail suggests that he considered Ahmed Ziauddinôs arguments to have primacy over his own. As a matter of fact, on May 12th the Brussels-based lawyer sent Chief Judge Nizamul Haq a document called ñGhulamAzamChargesFinalDraftò; it was a slightly revised version of a charge sheet he had sent six days earlier. The next day, May 13th, the tribunal issued its indictment against Mr Azam. It was identical to Ahmed Ziauddinôs document.

Furthermore, the discussions between the Chief Judge Nizamul Haq and Ahmed Ziauddin ranged beyond the realm of technical advice. According to the content of conversations published by the Economist, on September 6th Nizamul Haq said: ñ**I am a bit afraid about Shahinur [Shahinur Islam, a tribunal judge]. Because he is too inclined to the international standard. It was in my mindð and prosecutors also complained to með that he brought the references of foreign tribunals in every order.ò Ahmed Ziauddin replied, ñhe has to be stopped from doing that or he has to be removed from there...If he does not stop he has to go as well, because it is so harmful to us.**ò[38] In this conversation, Ahmed Ziauddin advises the removal of tribunal judge on one hand, and expresses his discomfort with a judge who observes the requirements of law on the other. The judge is also not comfortable with a tribunal judge who conforms to the law.

Lastly, in the case of Sayeedi, an e-mail from Ahmed Ziauddin to Nizamul Haq refers to a shared Google document called ñSayeedi judgmentò. This document says ñlast edit was made on October 14ò. At this time, *Sayeediôs lawyers were still presenting his defence to the court*. The document consists of a series of subjects, such as ñlist of testimoniesò, ñprocedural historyò; ñchallengesò, etc. Presumably details were to be filled in later. The final headings,

[35] Notes of Talks between International Jurists Union and President of Supreme Court Bar Association, December, 2012

[36] Notes of Talks between International Jurists Union and Key Advisor of the Jamaat-e-Islami Cases, December, 2012

[37] http://www.economist.com/news/briefing/21568349-week-chairman-bangladeshs-international-crimes-tribunal-resigned-we-explain, retrieved on 02.01.2013

[38] http://www.economist.com/news/briefing/21568349-week-chairman-bangladeshs-international-crimes-tribunal-resigned-we-explain, retrieved on 02.01.2013

and the only two in capitals, read: ñCONVICTION/BASISò and ñSENTENCINGò. Courts often start work on long judgments before the end of a trial and Nizamul Haw could have amended his structure to replace ñconvictionò with ñacquittalò. However, on his own showing, that was not what was happening. He denied to us he had been working on the document in October. ñDelwar Hussainôs judgment has not been even started then,ò he said.[39]

These claims must be inquired and trust must be revealed. If these are correct, then the judgments to be rendered by the tribunal are actually are drawn up by other parties, not judges. This is really a desperate situation. If it is find out that such claims are true, then the chief judge and all respective parties must be tried for official misconduct.

The judgeôs resignation does not remove the contradiction to law. In fact, as stated by the main opposition party, the chief judge did not use the opinions he received alone, but he shared with two other members the opinions he obtained in the conversations almost 20 minutes every day. Moreover, the Skype conversations suggest that the chief judge, prosecutor and witnesses had a dinner together[40]. In another conversation, it seems there is a consensus between the chief judge and prosecutor on how the prosecutor will act, because some of the talks between them read, ñYouôll stand up, then Iôll say sit down, and this way it will be understood there is no consensus between usò.[41] ***This situation shows that the judgeôs registration alone was not enough, the proceedings must start over to eliminate doubts and concerns about fair trial, and the prosecutor and two other judges must be replaced. However, two other judges did not resign, and the tribunal defended that the Economist published the conversations illegally, and they can not be accepted as evidence, and there is not need to start over the proceedings and decided to resume on.***

A.1.4. PRESSURES ON THE MEDIA

In general, principles of the international law require the countries to create legal solutions against the mediaôs involvement in proceedings and trials in case of war crimes and thus causing the violation of presumption of innocence.[42] On the contrary, it was identified

[39] http://www.economist.com/news/briefing/21568349-week-chairman-bangladeshs-international-crimes-tribunal-resigned-we-explain, retrieved on 02.01.2013

[40] Third, material we have seen suggests that Mr Ziauddin was communicating with the prosecution and judge about the same issues at the same time. On November 8th 2011 he e-mailed Mr Nizamul a list of matters raised by a defence petition that the judge recuse himself from the trial. The first five items on the list are materials and documents that, the e-mail says, were to be supplied to Mr Nizamul by Zaed-al-Malum, the chief prosecutor at the tribunal. It was perfectly proper for the judge to receive such materials, which do not appear to concern matters that might be disputed in court. It is also possible that the prosecutor was the person best placed to supply them. Even so, it is curious that, on a matter of procedure, the chief prosecutor is being asked to help by someone who is also advising the judge. The connection between judge, prosecution and adviser seemed to have continued. On December 11th 2011 Mr Ziauddin sent an e-mail to two prosecutors, including Mr Malum, apparently giving help with the case against Mr Azam and tips on how to present their arguments. He forwarded this advice to Mr Nizamul the same day. Speaking to us, Mr Ziauddin acknowledged knowing Mr Malum, who is acting for his family in unrelated matters. But he denies improper contact about the cases before the tribunal, and Mr Malum has not replied to our inquiries. The material we have seen therefore suggests three things: that Mr Ziauddin had an influence over how the prosecution framed its case and how the court framed its indictment; that Mr Ziauddin told the judge in his December 2011 e-mail about how prosecutors might develop their case; and that after the prosecutors laid their charges, the judge accepted guidance about the formal accusations from Mr Ziauddin directly. (http://www.economist.com/news/briefing/21568349-week-chairman-bangladeshs-international-crimes-tribunal-resigned-we-explain, retrieved on 02.01.2013)

[41] Notes of Talks between International Jurists Union and BNP, main opposition party, December, 2012

[42] Cassese, p. 381.

that there was a pressure the other way around in Bangladesh. As the defence counsels state, the talks held between the judge and lawyer had wide press coverage in Bangladesh, but for days later, the tribunal rendered an injunction banning the publication of this news. 7 journalists, namely Waliullah Noman, Noman Khan, Sacaad Hossain, Abu Bakar Siddique, Yhaya, Ariful Islam, and Shahinur Rahman, who published the conversations between the judge and lawyer in Bangladeshi newspapers, were detained.[43] Furthermore, some pressures were applied on the Economist newsmagazine[44]. Moreover, the tribunal blocked YouTube and imposed restrictions on the publication of conversations. Also, people are not allowed to make any statement in this regard. Additionally, it was noted that the government attempted to enact a law prohibiting all kinds of criticisms regarding the tribunal, but failed to do so[45].

It was reflected in the press that Bangladeshôs International Crimes Tribunal lost its independence and impartiality by obtaining opinion from outsides in a nonprocedural and illegal manner. As the main opposition party, BNP, points out, the Skype conversations show that the tribunal has not been impartial from the very beginning. *Taking no action against the judge and respective parties who abolished the independence of tribunal and misused their authority, and exercising power over the press which reports such news, cause very serious questions regarding the violation of right to fair trial.*

A.2 THE CLAIM THAT THE TRIBUNAL IS NOT IMPARTIAL AND INDEPENDENT AS OF ITS FOUNDATION

A.2.1. PROCEDURE OF APPOINTMENT OF TRIBUNAL JUDGES

According to the provisions of international law, in order to ensure the impartiality and independence of judges, a mechanism must be established first, which will enable the election of judges who have moral integrity, and are impartial, and independent from politics and government. *Secondly, the judges must be prohibited from asking or receiving instructions from outer authorities, or being interested in the benefits or concerns of parties in any manner.* Lastly, various measures must be adopted, which will prevent judges from showing partiality or being a party, and take them off the case, and even off the court in case it is identified that they are partial or biased.

According to Bangladeshôs International Crimes Tribunals Act, the government appoints judges, prosecutors and members of investigation committee. Pursuant to Article 6(1) of the International Crimes Tribunals Act, the government may, by notification in the Official Gazette of Bangladesh, appoint any member of higher judicial system as the judge of International Crimes Tribunal. The government of Bangladesh has the sole and exclusive authority in the appointment of all judges. This situation causes serious concerns regarding the principle of independence of tribunal.

[43] Notes of Talks between International Jurists Union and BNP, main opposition party, December, 2012

[44] On 6th December 2012 the presiding judge of Bangladeshôs International Crimes Tribunal, Mohammed Nizamul Huq, passed an order requiring two members of The Economist to appear before the court, demanding that they explain how we have come by e-mails and conversations between himself and Ahmed Ziauddin, a lawyer of Bangladeshi origins based in Belgium. The tribunal was established in 2010 to consider accusations of war crimes committed in 1971, during Bangladeshôs war of independence from Pakistan. December 8, 2012. http://www.economist.com/blogs/banyan/2012/12/bangladesh, retrieved on 02.01.2013

[45] Notes of Talks between International Jurists Union and BNP, main opposition party, December, 2012

It will always be a controversy whether the judges appointed by the government fulfil the provision of Article 2(A), which reads, ñThe tribunals are independent in the exercise of judicial functions and establishment of fair trialò, because all judges are directly appointed by the government. This shows the scale of political effects on the tribunal.

The basic principle of fair trial is that the judges must be independent and impartial before all kinds of power. On the other hand, Golam Arif Tipu, the Chief Prosecutor, says, ñAll 3 judges are completely independent, they are under no pressure, and they have an act they are proud ofò[46]. However, defence counsels and non-governmental organizations stated[47] that appointment of judges at both chambers of International Crimes Tribunal has political grounds, and it is a common opinion that the appointments do not comply with legal procedures. Accordingly, Jahangir Hosen, one of the judges, was an attorney of Awami League, the governing party. Nizamul Haq, the chief judge who resigned, was an administrator of the governing party. Furthermore, Obaidul Islam, during his student days, was the student leader of Bangladesh Chhatra League, the Student Front of the Awami League.

Moreover, the defence counsels state that Nizamul Haq, before he was appointed chief judge, conducted a trial in 1994 against the members of Jamaat-e-Islami on behalf of ñGhatak Dalal Nirmul Committeeò, a non-governmental organization known for its close relationship with the Awami League. He stated an opinion that Ghulam Azam committed an offense. If a judge expresses an opinion before the trial, then he loses his impartiality.

The Peopleôs Court organized virtual trials where the names of real people are expressed, and their posters were burns after they are found guilty by the court, a sign of death sentence. Some of those convicted before the Peopleôs Court are now tried for death penalty as suspects at the International Crimes Tribunal. Furthermore, chief of the virtual court was assigned the chief judge of the International Crimes Tribunal. On top of that, the report of this commission was submitted to the tribunal as evidence. It is now used at the tribunal as evidence. For all these reasons, the defence counsels filed a motion for recusation on the grounds that the chief judge is not and cannot be impartial and independent. The request was rejected by the tribunal.

It is claimed that another document bearing the chief judgeôs signature indicated that the Peopleôs Court calls the suspects for trial. The defence counsels filed a motion for the removal of judge in October 2011, and other two members of the tribunal heard the request in November 2011. Other two judges stated that the decision on the removal of chief judge should be ñon the discretion of chief judgeò, and the chief judge rejected to resign from his office. Upon the pressure of defence counsels on presenting sufficient level of reasons for his decision to stay in power, the Tribunal ordered that they have no right to apply pressure on the election of court members according to the law. Without ordering any injunction, the Tribunal also rendered that the defence counselsô request for presentation of reasons for not resigning is the contempt of court. Despite all these grounds, the chief judge had remained in power until the conversations and e-mails between him and the Brussels-based lawyer of Bangladeshi origin were leaked to the media.

[46] Notes of Talks between the International Jurists Union and Chief Prosecutor Golam Arif Tipu, December, 2012

[47] Notes of Talks between International Jurists Union and Key Advisor of the Jamaat-e-Islami Cases, December, 2012

Also, Prof. Gowher Rizvi, adviser to the prime minister, says, ñupon the resignation of judge, the ministry of justice called a meeting of experts, and they decided that it is not necessary to start over the proceedingsò[48]. The tribunal has authority to decide whether the chief judgeôs act of exchanging 230 e-mails with a third party without the knowledge of tribunal puts the entire proceedings under suspicion, and whether it is necessary to start over the proceedings. However, the fact that the experts of the Ministry of Justice held a meeting and decided to whether start over the proceedings support the claims that the judges of this tribunal are not independent. Without any decision rendered by the tribunal on this issue, experts of the Ministry of Justice make a decision. This is a direct intervention in the tribunal. Such a trial and proceedings cannot be accepted in the law.

Furthermore, the Skype conversations published by the Economist suggest that the judge came under governmental pressure. In a conversation of October 14th, between Nizamul Haq and Ahmed Ziauddin, the judge refers to the government as ñ**absolutely crazy for a judgment. The government has gone totally mad. They have gone completely mad, I am telling you. They want a judgment by 16th December...itôs as simple as that**.ò All these conversations support the claims that the government applied pressure for a judgment on December 16th, known as Victory Day in Bangladesh[49].

A.2.2. PROCEDURE OF APPOINTMENT OF TRIBUNAL PROSECUTORS

Pursuant to Article 7(1) of the International Crimes Tribunals Act, the government may, by notification in the Official Gazette of Bangladesh, appoint one or more persons as the prosecutor of International Crimes Tribunal. The government also may designate one of such persons as the Chief Prosecutor. The government of Bangladesh has the sole and exclusive authority in the appointment of prosecutors and chief prosecutor, without any term and condition. This situation causes serious concerns regarding the influence and pressure of government over the prosecutors. On the other hand, it will always be a controversy whether the prosecutors appointed by the government fulfil the provision of Article 2(A), which reads, ñThe tribunal is independent in the exercise of judicial functions and establishment of fair trialò.

A.2.3. PROCEDURE OF APPOINTMENT OF INVESTIGATION COMMITTEE

Similarly, all members of the investigation committee are appointed by the government. President of this committee is a prosecutor who is again appointed by the government. It is not understandable why the government appoints this committee. It is already known that the government has the power to create an investigation committee for such accusations. However, claiming that a tribunal, where all prosecutors and judges are appointed by the government, is independent, impartial and neutral in its decisions and free from all kinds of suspicions is an extremely assertive statement. Furthermore, the investigation committee should collect the evidences and submit them to the tribunal. It would

[48] Notes of Talks between International Jurists Union and Gowher Rizvi, adviser to the Prime Minister, 23.12.2012

[49] http://www.economist.com/news/briefing/21568349-week-chairman-bangladeshs-international-crimes-tribunal-resigned-we-explain,

be more lawful for the tribunal to render an arrest warrant or an acquittal based on such evidences.

A.3 ALLEGED PARTIALITY OF TRIBUNAL IN THE TRIAL PROCEDURE

Prof. Gowher Rizvi, adviser to the Prime Minister, states that although the International Crimes Tribunal is not an international court, they have conducted some example practices in the application of international standards in criminal procedure[50]. However, when the example cases of Nuremberg and Rwanda Tribunals are examined, it can be seen that such tribunals did not have the problems that Bangladeshôs International Crimes Tribunal currently has, such as the appointment of all authorized individuals by the government and trial of opposition leaders.

As a matter of fact the Nuremberg Court was established after the World War II and the La Hague Court was given jurisdiction regarding the accused war criminals and war crimes against humanity in Rwanda as well. *However, these both courts were established by the ñinternational communityò*. On the other hand, the International Crimes Tribunal was established in 1973 by the government of Bangladesh for the trial of Pakistani soldiers without any international nature, and in the last 38 years it has become a tribunal trying the citizens of Bangladesh.

It is observed that amendment of procedural law in the process of proceedings brings about restrictions on the jurisdiction which is ensured through the domestic law, and thus causes heavy criticisms.

The principle of universal legal security (predictability) requires a person to be able to know the consequences when he/she does an act. The Minister of Justice does not think so. The Minister stated that the judge and court have the flexibility to amend these rules and adapt them todayôs conditions. He also noted that this Act provides both the defence and jurisdiction with the opportunity to submit evidence in any period and manner at international standards and there is no discrimination at any stage of proceedings[51].

On the contrary, the main opposition party, BNP, believes that the procedure has been changed against the accused. For example, the Act of 1973 defines the accused as, ñthe accused is the person against whom a formal accusation is made before the courtò. Therefore, one becomes ñaccusedò only when a formal accusation is made. *However, the accusation against Salahuddin Quader Chowdhury, member of the Parliament from the Bangladesh Nationalist Party, was made after 11 months of his detention*. When his lawyers reminded the contradiction to law, then the tribunal amended the definition of ñaccusedò, as ñsomeone against whom an accusation is made or an investigation is ongoingò. It is claimed that there are many more such provisions which have been amended after objections[52]. Although the universal principles of law requires making a legal arrangement first and then conducting the proceedings accordingly, Bangladeshôs International Crimes Tribunal performed an action first, and then amended the law to make the action comply with the law.

[50] Notes of Talks between International Jurists Union and Gowher Rizvi, adviser to the Prime Minister, 23.12.2012
[51] Notes of Talks between International Jurists Union and Minister of Justice Mr. Shafique, 24.12.2012
[52] Notes of Talks between International Jurists Union and BNP, main opposition party, December, 2012

A.3.1. TRIAL PROCEDURE

According to Article 10, titled ñprocedure of trialò, of the International Crimes Tribunals Act, both the prosecution and defence have the right and power to submit all kinds of evidence and counter evidence, summon any witnesses, cross-examine the witnesses of other party and make counter statement. However, considering the claims that defence counsels called the witnesses in a very limited manner and the words of Chief Prosecutor indicating that they are not able to listen to everyone as witness, it is understood that this right granted in the law to defence counsels and accused individuals has not been provided at a sufficient level.

A.3.2. AUTHORITY TO DETAIN DESPITE NOT INCLUDED IN THE INTERNATIONAL CRIMES TRIBUNALS ACT

It is also an interesting point that the International Crimes Tribunals Act does not have any provision on detention before conviction. In this regard, the defence raised objection to detentions and arrests. For this reason, the tribunal retroactively amended the Law of Criminal Procedure with another law in order to legitimate the pre-conviction detention of accused individuals who were detained in 2010. This practice indicates the approach of filling the gaps in any legislation against the accused people, when they object to the legitimacy of particular procedures or when they attempt to exercise their rights during the proceedings. It is a very important issue to consider that none of the individuals who are currently detained was arrested for war crimes. All of them were arrested for other minor accusations, but then the reason of arrest has become war crimes. This situation supports and strengthens the claims that the law and even the existing acts have not been observed during the proceedings.

The question of compliance of detention procedure with the laws should be deliberated in some aspects. Stephen J. Rapp, United States Ambassador-at-Large for War Crimes Issues, expressed his concerns about detention periods before long trials. The Minister of Justice was asked whether there is a possibility to try a 91-year-old accused person, who is brought to the hearing room on a wheelchair, without arrest through guarantee or legal control measure. The Minister replied with a general answer, ñ*Patients are treated*ò.

In examining the international conventions on detention, the International Covenant on Civil and Political Rights, Working Group on Arbitrary Detention (1998), Standard Minimum Rules for the Treatment of Prisoners (1977), and the Rules for the Protection of Juveniles Deprived of their Liberty (1990) all include provisions on arbitrary detention. According to the United Nations Working Group, deprivation of liberty is arbitrary if a case falls into various categories. The Working Group confirms that detention of the accused is falls into 3rd category, reading ñ*the total or partial non-observance of the international norms relating to the right to a fair trial*ò.

A.3.3. PROCEDURE FOR EVALUATING THE EVIDENCES AND WITNESSES PRESENTED TO TRIAL

To mention of a fair trial, the prosecution must submit the evidences, findings and witnesses related to the accusation, to the court in a healthy manner. To ensure this, as

required by the principle of equality of arms, prosecution and defence counsels must have the equal freedom and access in terms of evidences.

According to Article 10, titled ñprocedure of trialò, of the International Crimes Tribunals Act, both the prosecution and defence have the right and power to submit all kinds of evidence and counter evidence, summon any witnesses, cross-examine the witnesses of other party and make counter statement.

The same provision is regulated in Article 17 (1, 2, 3) under the heading ñ*Right of accused person during trial*ò. Accordingly, *the rights of accused person are as follows*:

- *to give any explanation relevant to the charge made against him,*
- *to have the assistance of his counsel before the International Crimes Tribunal,*
- *to present evidence at the trial in support of his defence, to present counter evidence and to cross-examine any witness called by the prosecution*

However, in the practice of International Crimes Tribunal, the accused people and defence counsels have been deprived of foregoing rights granted in the act.

A.3.4. LIMITATION OF NUMBER OF WITNESSES CALLED BY DEFENCE

International law adopts the principle of equality of arms under the right to a fair trial. Accordingly, the accused person must be granted the rights to call witnesses and cross-examine the witnesses called by the prosecution or defence. Bangladeshôs Minister of Justice said that necessary security has been provided for the witnesses and accused[53]. On the contrary, the main opposition party, BNP, stated that a restriction was imposed on the witnesses for defence and they were given 2 hours only.

Similarly, the Minister of Justice told the Committee of International Jurists Union, ñIf the prosecutor calls 10 witnesses, then the accused person can call 10 witnesses as well.ò[54] Furthermore, the Chief Prosecutor said, ñProsecution and defence are given the equal facilities, and the defence can call and summon witnesses, just like the prosecution does. However, no one has unlimited time, and therefore the number of witnesses can be limited. If we allow them, they could bring hundreds of witnesses. Then the trial will last forever. However, the number of witnesses can be limited both for prosecution and defence.ò[55]

According to the statements of defence counsels, the prosecution submitted the names of 150 witnesses, and they, as defence, wanted to present 200 names, ***but the tribunal limited the number of witnesses for defence to 6***. [56] **The defence counsels were asked why they felt the need to produce 200 witnesses, and they said that their clients are accused of killing 3 million people and raping 200.000 women, and 200 defence witnesses produced to prove that the accused people have no involvement in such heavy accusations is actually not enough, but the tribunal limited even this number to 6**.

[53] Notes of Talks between International Jurists Union and Minister of Justice Mr. Shafique, 24.12.2012
[54] Notes of Talks between International Jurists Union and Minister of Justice Mr. Shafique, 24.12.2012
[55] Notes of Talks between the International Jurists Union and Chief Prosecutor Golam Arif Tipu 23.12.2012
[56] Notes of Talks between International Jurists Union and Defence Attorneys of Jamaat-e-Islami, 21.12.2012

According to the international law, proceedings must be independent of government. However, the findings show exactly the opposite in the case of Bangladeshôs International Crimes Tribunal. In Bangladesh, general elections will be held in 2013. Since it is not certain whether the governing party will win the elections again, it is claimed that they applied pressure on the tribunal to limit the number of witnesses in order to accelerate the trials, and end quickly. As a matter of fact, the advisor to the Prime Minister stated that they are preparing a law in order to prevent the amnesty of the accused in case the case continues after their term of office expires[57]. This statement also supports the claims that there is an effort to conclude the case as soon as possible. Furthermore, the conversations between Chief Judge Nizamul Haq and Ahmed Ziauddin, published in the Economist, strengthen such claims. ñWe have to make them understand that the verdict is not a product that you just ask for it and it will be delivered from the machine,ò Ahmed Ziauddin said later in that same conversation. ñBut we are not in a position to make them understand. Even then we have to try, we have to speak to them.ò[58] In a conversation the next day, Nizamul Haq described how a member of the government ñcame to visit me this evening. **He asked me to pass this verdict fast.** I told him óhow can I do that?ô.. He said, óTry as quick as you can.ôò[59] In a conversation of October 14th, the Chief told Ziauddin, ñ**absolutely crazy for a judgment. The government has gone totally mad. They have gone completely mad, I am telling you. They want a judgment by 16th December...itôs as simple as that.**ò These conversations confirm the claims that the government applied pressure on respective parties to conclude the case fast.

A.3.5. THE PROBLEM OF USING NEWSPAPER ARTICLES AS EVIDENCE IN PROCEEDINGS

It is very difficulty to find witnesses because the Liberation War, where the accused allegedly committed crime, occurred 41 years ago. None of the witnesses for prosecution stated that they involved in activities of killing or rape by order of those who are tried today. Although it is claimed that they raped 200.000 women, no woman has testified for that. According to the claims of main opposition party, BNP, the prosecution uses old articles of newspapers which especially supported the separation back then, and the tribunal recognized these articles and pieces of newspapers as evidence. On the other hand, when a student with opposing view was killed by the youth branches of current governing party during the events on the second week of December, the Ministry of Internal Affairs stated that these videos are not adequate for investigation, although the television broadcasted by whom this student was killed[60]. This reveals the double standard.

A.3.6. THE PROBLEM OF NOT ENSURING THE SECURITY OF WITNESSES

According to the principles of international law, if any witness has concerns or fears about security, then the defendant may ask for their protection. If the witnesses reject attending the hearings, other facilities must be provided, such as video-conference. However,

[57] Notes of Talks between International Jurists Union and Gowher Rizvi, adviser to the Prime Minister, 24.12.2012

[58] http://www.economist.com/news/briefing/21568349-week-chairman-bangladeshs-international-crimes-tribunal-resigned-we-explain, retrieved on 31.12.2012

[59] http://www.economist.com/news/briefing/21568349-week-chairman-bangladeshs-international-crimes-tribunal-resigned-we-explain, retrieved on 31.12.2012

[60] Notes of Talks between International Jurists Union and BNP, main opposition party, 22.12.12

there are very serious claims regarding the security of witnesses at the Bangladeshôs International Crimes Tribunal.

As the defence counsels state, Shukho Ranjoun Bali is a Hindu witness. His family was killed by the Pakistani Army during the way in 1971. Firstly, his name was presented to the tribunal as the witness for prosecution. He was asked to state that his brother was killed by the leaders of Jamaat-e-Islami. However, the witness did not attend the hearing, believing that it would not be true to witness as they wanted. Then, he wanted to witness for the defence. So the defence counsels presented his name to the tribunal as witness. On November 5, 2012, he appeared before the tribunal to witness. However, he was taken into custody in front of the tribunal. Afterwards, the defence counsels asked the tribunal to take action, because the security camera was recording when he was detained. However, the tribunal did not examine the security footage, and launched an investigation against Mohammed Tajul Islam and two other defence counsels on the grounds of raising their voice in their objections.

On the other hand, the Minister of Justice claims that this person was a witness for the prosecution, abducted by the defence, his daughter filed a criminal complaint in this regard, he was reported missing on February 25, 2012, then the defence counsels stated that he will be present at the tribunal as witness on November 5, 2012, but the tribunal had no agenda on hearing the witnesses on that date[61]. Sultana Kamal, member of the investigation committee, stated that this witness was abducted by the defence counsels or the relatives of accused individuals within their knowledge.

In fact, considering that the witness was abducted in front of the tribunal, then the act of abduction and offenders can be identified in the security footage. Also, if the tribunal would have a record of trial, then it could reveal the requests filed by the defence counsels. Ultimately, it is the duty of government to ensure the security of all witnesses.

A.3.7. THE REQUEST FOR BROADCASTING THE HEARINGS ON TV

According to Article 10(4) of the International Crimes Tribunals Act, the proceedings and trials may be in public. However, this never happened in practice. On the other hand, although the publicity of proceedings is stated both by the law and authorities, the proceedings are actually restricted at times for security and similar reasons. For instance, although all official bodies stated that the proceedings is public and only Toby Cadman, an English lawyer, is banned, contrary to the request of Stephen J. Rapp, United States Ambassador-at-Large for War Crimes Issues[62], the Ministry of Foreign Affairs attempted to make our committeeôs request to attend the hearing look like a false behaviour, by staring that it is not possible to attend the hearing without obtaining their permission, and also various allegations were made against our committee out of nothing. Afterwards, it was stated that the hearings are closed to foreign observers. This situation hinders the transparency of proceedings.

[61] Notes of Talks between International Jurists Union and Minister of Justice Mr. Shafique, 24.12.2012
[62] Notes of Talks between International Jurists Union and Minister of Justice Mr. Shafique, 24.12.2012

B. CONDUCT OF PROCEEDINGS PURSUANT TO SOME SPECIAL PROVISIONS, NOT UNIVERSAL PRINCIPLES OF LAW

All of 12 people who are tried at the International Crimes Tribunal are civilians. They are the members or administrators of Jamaat-e-Islami or BNP. However, they are tried according to an act enacted in 1973 particularly for soldiers. The defence counsels state that trial of the accused people pursuant to this act is not lawful by itself, and such trial causes violation of various rights, such as appealing to the interlocutory decisions. As a matter of fact, International Crimes Tribunal, as of its foundation alone, is not only extraordinary and private, but also enforces special provisions in the proceedings.

Although those who are tried in this case are all citizens of Bangladesh, they are not able to benefit from their minimum rights because of the present act. Since this law has a special nature, those being tried in the case are not able to exercise even the minimum rights granted to all citizens. Accordingly, with this special court established under the act introduced in 1973, it is aimed to try the Pakistani soldiers, especially who allegedly committed crimes, not the citizens of Bangladesh. However, the citizens of Bangladesh are on trial today.

B.2 NO MEANS OF APPEAL TO THE INTERLOCUTORY DECISIONS AT THE ICT

In Bangladesh, common law exists and interlocutory decisions can be appealed under this judicial system. People can apply to superior courts for appealing to interlocutory decisions. However, those who are tried at the Bangladeshôs International Crimes Tribunal are precluded to file an appeal.

Furthermore, Allama Delawar Hossain Sayedee, Deputy President of Jammat-e-Islami, who is a detainee, had an open-heart surgery. His lawyers had filed motions for 7 times for trial without arrest, and all rejected. Ghulam Azam, another arrested suspect, is 91 years old. He is receiving a treatment and attends the trials on a wheelchair[63]. It was possible to try him without any detention, but the tribunal rejected the motions in this regard. Under legal principles, the motion for disqualification can be appealed, but this right is taken away because the procedural law and proceedings have a special nature.

IV. EVALUATION OF TRIAL PROCESS IN THE LIGHT OF UNIVERSAL NORMS

A. INDEPENDENCE AND IMPARTIALITY OF JUDGES

The judge must be independent and impartial to render a fair judgment. This principle of law is as old as human history. Non-observance of this principle destroys the legitimacy of a court and a judgment rendered by that court. Referring to its importance, all international conventions and constitutions contain this principle.

[63] Defence counsels also state that their motions for providing special food for Ghulam Azam considering he is sick were rejected, and they couldnôt give him any book, notebook and even the Quran.

Furthermore, Article 6/1 1.c of the European Convention on Human Rights regulates, ñentitlement to a fair and public hearing by an independent and impartial tribunalò. Also, domestic legislator may set out the details of this principle. Article 6 defines the fundamental principles for trial especially in Article 6/3.[64] It is important to render a judgment after the trial is completed in a fair manner (Frowein/eukoert kn.66).[65]

The first sentence of Article 6/1 of ECHR regulates the requirement that the tribunal must be independent and impartial. Tribunals must be independent of executive powers and political parties. Judges may not act by order and have any accountability to any authority or body. Judges may not be withdrawn from their office. Procedure of appointment and term of office of judges are a guarantee against potential external influences. Tribunals must appear as impartial. Therefore, it should not be in the status of any party, military judge or public officer.[66]

At the same time, tribunals must be independent. In its decisions, the European Court on Human Rights gives due importance to the impartiality and independence of judges.[67] First of all, the European Court on Human Rights examines whether the judge is in a subjective and partial tendency in his/her opinions.[68]

The role of Government Commissioner, who expressed his legal opinion in the oral hearing before the Council of State of France (Conseil d'État) and then attended the deliberations without right to vote, was examined. The European Court on Human Rights by held ten votes to six that there has been a violation of Article 6/1 of the Convention on account of the Government Commissionerôs participation in the Conseil dôEtatôs deliberations. The court stated that impartiality must exist in appearance as well. In this case, if the commissioner would withdraw his negative opinion on the plaintiff at the deliberations, then such situation did not occur. When such individuals, government commissioners, serve as consultant in international tribunals, then Article 6/1 c.1 is violated.[69]

Moreover, in the *Furundǵijaôs* appeal judgment, the International Criminal Tribunal for the former Yugoslavia stated that trial of the accused at an impartial and independent tribunal is an inseparable part of fair trial. The Tribunal evaluated the decisions of courts of various countries and the European Court on Human Rights, and noted that there is a general rule that a judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias.[70]

In this context, it can be established that Bangladeshôs International Crimes Tribunal is not capable to ensure the right to fair trial, when evaluated pursuant to Article 6 of the European Convention on Human Rights. Likewise, the Chief Judge asks a lawyer living in Belgium how to act on long Skype conversations and e-mails, and then acts

[64] ECtHR, IV. Section, v. 05.10.1999, NJW 2001, 1989- Grams/Germany; Article 2 kn. 13; Article 3 kn. 4.
[65] Hans-Meyer Ladewig, Right to Fair Trial-I, Trans. by Özlem Yenerer Çakmut, Kş: Right to Fair Trial and Criminal Law, Nurullah Kunterôe Armaĵan Karkdaktēmalē Güncel Ceza Hukuku Serisi 3, Seçkin Yay., Ankara, 2004, p. 254.
[66] ECtHR v. 29.04.1988, Series A, Bd. 132, S. 29 Nr. 64 ff.- Belios/Switzerland; ECtHR v. 28.06.1984, Eu GRZ 1985, 336 Nr. 41 f. ï Sramek /Australia case.
[67] ECtHR v. 22.04.1994, Series A, Bd. 286, S. 38 Nr. 35-38- Saraiva de Carval/Portugal case.
[68] ECtHR v. 29.03.2001, Sig. 2001- III Nr. 45- D.N./Switzerland case.
[69] ECtHR v. 07.06.2001, Slg. 2001-VI- Nr. 77 ff.- Kress/France case.
[70] *Furundǵija* (*Appeal*), ICTY AC, 21 July 2000 (case no. IT-95/1-A).

and makes judgments upon the instructions of that lawyer. Furthermore, the details that the judge obtained from such person regarding the criminal procedure are enforced at the tribunal. More desperately, the Chief Judge expresses his discomfort with a court member who he thinks will stick to the principles of international law.[71] Even after these Skype conversations were leaked to the media, it was stated that the minutes of proceedings which were shaped based on such conversations when he was the chief judge are valid after the appointment of new chief judge without the need to start over in any manner, and it was implied in various ways that the summary judgement is close. This situation causes very serious concerns and doubts about the violation of the right to fair trial.

B. VIOLATION OF PRESUMPTION OF INNOCENCE BY AUTHORITIES

All legal systems adopt the fundamental principle that the accused party is innocent unless proven otherwise. The suspect must be treated as innocent until all alleged accusations are proved.[72] Therefore, violation of presumption of innocence abolishes the legitimacy of any judgment rendered by the tribunal. Referring to its importance, all international conventions and constitutions contain this principle. Likewise, Article 6/2 of the European Convention on Human Rights regulates this principle. Accordingly, everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. Unless the suspect is treated as innocent until the trial is concluded with a final judgment, other rights granted to that suspect will lose their meaning and they will not be exercised effectively even if they exists in appearance. The presumption of innocence requires that the trial must be conducted by independent and impartial tribunals established by law and concluded fairly within a reasonable time and in public. The European Court on Human Rights stated in the Barbera, Messegue and Jabardo vs. Spain cases, ñwhen carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence chargedò.[73] In a television interview, two high level officers referred to the applicant unhesitatingly as the instigator of a murder in the presence of French Minister of Internal Affairs, and the court rendered that this was a violation of presumption of innocence.[74]

In the case at Bangladeshôs International Crimes Tribunal, government authorities stated many times that the accused people ñinvolved in genocide, committed war crimes and therefore they are not tried at the International Crimes Tribunalò. Furthermore, even before the accused people are tried at the said tribunal, there are conversations that the government wants a judgment by the Victory Day in Bangladesh.

In this situation, in line with the principles of international law and decisions of international courts, it is established that the presumption of innocence and the right to fair trial of the accused have been violated.

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[71] According to the content of conversations published by the Economist, on September 6th Nizamul Haq said: ñI am a bit afraid about Shahinur [Shahinur Islam, a tribunal judge]. Because he is too inclined to the international standard. It was in my mindð and prosecutors also complained to með that he brought the references of foreign tribunals in every order.ò Ahmed Ziauddin replied, ñhe [the tribunal judge] has to be stopped from doing that or he has to be removed from there...If he does not stop he has to go as well, because it is so harmful to us.ò http://www.economist.com/news/briefing/21568349-week-chairman-bangladeshs-international-crimes-tribunal-resigned-we-explain, retrieved on 02.01.2013

[72] See. *Delalić and others*, ICTY TJ, par. 599, 601.

[73] Barbera, Messegue and Jabardo-Spain, 6 December 1988, A 146, par. 77, www.echr.coe.int.

[74] Allenet de Ribemont/France Series A 308 (1995), kn. 11, 41.

III. CONCLUSION

In consequence of making comprehensive works by holding talks with the related parties and government authorities in Bangladesh, the International Jurists Union has serious concerns and worries that the following problems still exists at the Bangladeshôs International Crimes Tribunal and the judgment to be rendered after the proceedings will not be fair.

A. IDENTIFICATION OF THE VIOLATION OF RIGHT TO FAIR TRIAL AT BANGLADESHôS INTERNATIONAL CRIMES TRIBUNAL

a) The structure and operation of Bangladeshôs International Crimes Tribunal have problems. With regards to the trial promised by the governing party during an election campaign, the act was amended in 2009. After 41 years, this tribunal started to try the opponents of governing party, who served as minister and member of parliament in the past, on the grounds that they collaborated during the war of liberation. At this point, it can always be suggested that the International Crimes Tribunal, which tries the leaders and members of two opponent parties that formed alliance in the last elections, is a special and biased tribunal.

b) Human rights organizations such as the Human Rights Watch Organization, Amnesty International, and International Centre of Transitional Justice, and international experts on war crimes, such as Stephen Rapp, the US Ambassador on War Crimes Issues, have warned the government of Bangladesh about irregularities in present proceedings, but they have never been corrected.

c) All judges and prosecutors of the tribunal and all members of the investigation committee were appointed by the decision of government. Moreover, there is no requirement for judges to be jurists. This situation constitutes the breach of the principle of fair trial.

d) While the trials are ongoing, the International Crimes Tribunals Act was amended, against the accused.

e) All authorities accept that the tribunal does not have an international nature. However, by naming a domestic tribunal as ñinternationalò, the period of limitation is removed as well as the rights that the accused people have pursuant to the domestic law, such as unappealability of interlocutory decisions, are restricted.

f) The crimes that are set out in the International Crimes Tribunal Act and War Crimes Law are not defined pursuant to the principle of clarity and definiteness and the element of legality is not observed.

g) The Working Group on Arbitrary Detention noted that the existing legislative framework does not effectively comply with the requirements of International Covenant on Civil and Political Rights (ICCPR) regarding the rights of access and defence during the investigation stage, but no correction has been made in this regard.

h) The detentions made by violating the law in force look like arbitrary treatments. Ghulam Azam was arrested when he went to the court for another case. It has never been announced that whether his statement was taken during the investigation stage, and whether he was hauled up before the investigating judge at the criminal court of peace or war crimes tribunal.

i) Although the Chief Judge, Nizamul Haq, issued a report and declared his opinion against the suspects in 1994, his appointment as the chief judge by the decision of government violates the principles of presumption of innocence, and impartiality and independence of judges and thus the international law.

j) The fact that Nizamul Haw, the Chief Judge, held over 17 hours of Skype conversations and 230 e-mails about the case, with an outsider lawyer, shows that the judge is not impartial.[75] Also, the statements against the other judge who sticks to international law are going out of the law. Moreover, the conversations show that the government wanted the tribunal to make a judgment until 16th December, known as Victory Day in Bangladesh, and therefore it can be suggested that the government applied pressure on the tribunal and gave instructions. All these factors require starting over the proceedings. Additionally, the decisions and actions taken by the chief judge before his resignation were preserved, the motion for new trial was rejected, two other judges and also the prosecutor are still in chargeé As a result of these, the tribunal has lost its reliability.

k) The non-observance of principle of access to evidence between prosecution and defence and also the equality of arms, and restrictions on the number of witnesses for the defence have caused the limitation of right of self-defence.

l) The principle of fair trial has been clearly violated as the security of witnesses was not ensured and the witness for defence and prosecution was lost in a suspicious way.

m) Although the imputed crime is defined as war crime, the Rome Statute recognized by the Government of Bangladesh is against sentencing death penalty in such cases. This issue is not taken into consideration by the tribunal.

B. RECOMMENDATIONS

As the International Jurists Union, we are of the opinion just like all international institutions and agencies interested in the subject that the worries and doubts about the said case and proceedings must be removed.

[75] The discussions between the Chief Judge Nizamul Haq and Ahmed Ziauddin ranged beyond the realm of technical advice. On September 6th Nizamul Haq said: ñI am a bit afraid about Shahinur [Shahinur Islam, a tribunal judge]. Because he is too inclined to the international standard. It was in my mindð and **prosecutors also complained to me**ð that he brought the references of foreign tribunals in every order.ò Ahmed Ziauddin replied, ñhe [tribunal judge] has to be stopped from doing that or he has to be removed from there...I**f he does not stop he has to go as well**, because it is so harmful to us.ò Similarly, in a conversation of October 14th, between Nizamul Haq and Ahmed Ziauddin, the judge refers to the government as ñ**absolutely crazy for a judgment. The government has gone totally mad. They have gone completely mad, I am telling you. They want a judgment by 16th December...itôs as simple as that.**ò http://www.economist.com/news/briefing/21568349-week-chairman-bangladeshs-international-crimes-tribunal-resigned-we-explain,

As indicated in the Statute of International Criminal Court, the most appropriate method for countries with no power of international criminal procedure is to transfer such jurisdiction to the International Criminal Court. Because it is not likely to ensure international standards in a trial where the judge, prosecutor and all members of investigation committee are appointed by the government and all of the accused people are the members of two different political parties which are opponent to the government.

At this point, we are of the opinion that the proceedings must be held by the International Criminal Court and the case must be transferred to the International Criminal Court, pursuant to the Rome Statute, to which the Government of Bangladesh is a party. If such transfer is not made, then the United Nations should create an independent and impartial commission and monitor all stages of proceedings.

The case must be built on a legal ground, not on political grounds. To this end, the crimes against humanity must be clearly defined by laws. It is essential to invalidate the actions of former chief judge based on said conversations, and to start over the proceedings. The officers who abused their power and authority must be discharged from office, and legal proceedings must start against them. The hearings must be public and broadcasted. The accused people must be given the same rights as the Bangladeshi citizens who are accused of heavy penalties. Actions must be taken against those who have applied pressure on the jurisdiction up to this time. Otherwise, both national law of Bangladesh and international law will be breached.