

Bangladesh War Crimes Tribunal

A Wolf in Sheep's Clothing?

By

Steven Kay QC¹

Background

Modern day Bangladesh was created by a war of independence fought in 1971, in which East Pakistan separated from West Pakistan and formed the modern day state of Bangladesh in 1972.

It is alleged by the government of Bangladesh that the forces of the Pakistan army killed 3,000,000 people in the conflict and caused 10,000,000 people to lose their homes. As a result in 1973 the Bangladesh Government passed the International Crimes (Tribunals) Act. This established a national Tribunal to try those responsible for serious crimes under international law. Until 2010 the act was not used in any form of proceedings until the arrest of four leading Jamaat-E-Islami politicians an opposition party to the ruling Awami League Government. In 1973, 175 members of the Pakistan armed forces had been detained but were released later in that year by the Bangladesh President at the time as a gesture of goodwill after a Presidential peace summit.

¹ Barrister of 9 Bedford Row, London www.9bedfordrow.co.uk and The International Criminal Law Bureau www.iclb.eu

The International Crimes (Tribunals) Amendment Act 1973/2009 & Rules of Procedure 2010²

The International Crimes (Tribunals) Act 1973 was amended to become the International Crimes (Tribunals) (Amendment) Act 2009. It created a Tribunal “*for the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and other crimes under international law*” and imported internationally recognized crimes into the laws of Bangladesh.

(a) Jurisdiction

Section 3 gives the Tribunal jurisdiction over crimes committed before or after the commencement of the Act.

By section 3(1) A tribunal shall have the power to try and punish any individual or group of individuals, or any member of any armed, defence or auxiliary forces, ***irrespective of his nationality***, who commits or has committed, in the territory of Bangladesh, *whether before of after the commencement of this Act*, any of the crimes mentioned in subsection (2).

Bangladesh First Constitutional Amendments 1973

Article 47 (3) was introduced into the Constitution in 1973 and provided that members of armed, defence or auxiliary forces or prisoners of war detained or charged under any law or provision with genocide, crimes

² Section 22 of the ICTA 1973 gave the power to court to regulate its own procedure

against humanity, war crimes or other crimes of international law which was **inconsistent or repugnant to the Constitution**, those laws or provisions could not be challenged as being void or unlawful.³ This amendment had the effect of withdrawing constitutional rights from a particular group of people within Bangladesh society who were not even convicted but at the most were only suspected of such crimes and who could have been detained without the requirement of suspicion.⁴ These crimes were international crimes which did not previously exist within the Bangladesh criminal laws and were being imported to deal with events arising from the war of independence as part of the doctrine of universality of such crimes.

Under newly introduced Constitution Article 47A(1)⁵ other guaranteed constitutional rights were also explicitly withdrawn from such people.⁶

³ Article 47.(3) Notwithstanding anything contained in this Constitution, no law nor any provision thereof providing for detention, prosecution or punishment of any person, who is a member of any armed or defence or auxiliary forces or who is a prisoner of war, for genocide, crimes against humanity or war crimes and other crimes under international law shall be deemed void or unlawful, or ever to have become void or unlawful, on the ground that such law or provision of any such law is inconsistent with, or repugnant to any of the provisions of this Constitution.

⁴ ICTAA 2009 Section 8.(3), (4), (5)

8.(3) Any Investigation Officer making an investigation under this Act may, by order in writing, require the attendance before himself of any person who appears to be acquainted with the circumstances of the case; and such person shall attend as so required.

8.(4) Any Investigation Officer making an investigation under this Act may examine orally any person who appears to be acquainted with the facts and circumstances of the case.

8.(5) Such person shall be bound to answer all questions put to him by an Investigation Officer and shall not be excused from answering any question on the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such person: Provided that no such answer, which a person shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding.

⁵ 47(A)(1) The rights guaranteed under article 31. clauses (1) and (3) of article 35 and article 44 shall not apply to any person to whom a law specified in clause (3) of article 47 applies.

⁶ **Article 31. Right to protection of law.**

To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in

These were the rights given to every citizen of the protection of the law; the universal right of *nullem crimen sine lege* (no crime without there being a law in force at the time); and the right to an expeditious trial by an independent and impartial court or tribunal. By new Article 47A(2)⁷ these persons detained or suspected or charged were also specifically denied the right to seek remedies available under the Constitution from the Supreme Court of Bangladesh.

The overall effect of these measures was to put persons questioned, detained, suspected of committing crimes or charged with crimes within the International Crimes (Tribunal) Act 1973 outside the norms of the national legal system. For the first time inequality had been introduced into the Bangladesh justice system by the Constitution that claimed to promote equality.

accordance with law.

Article 35. Protection in respect of trial and punishment.

(1) No person shall be convicted to any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than, or different from that which might have been inflicted under the law in force at the time of the commission of the offence.

(3) Every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law.

Article 44. Enforcement of fundamental rights.

(1) The right to move the High Court Division in accordance with clause (I) of article 102 for the enforcement of the rights conferred by this Part of guaranteed.

(2) Without prejudice to the powers of the High Court Division under article 102, Parliament may be law empower any other court, within the local limits of its jurisdiction, to exercise all or any of those powers.

⁷ 47(A)(2) Notwithstanding anything contained in this Constitution, no person to whom a law specified in clause (3) of article 47 applies shall have the right to move the Supreme Court for any of the remedies under this Constitution.

The Crimes in section 3(2)(a) these are defined as being:

Crimes against Humanity namely, murder, extermination, enslavement, deportation, imprisonment, abduction, confinement, torture, rape or other inhumane acts committed against any civilian population or persecutions on political, racial, ethnic or religious grounds, whether or not in violation of the domestic law of the country where perpetrated;

Crimes against Peace namely, planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

Genocide meaning and including any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, such as:

- (i) killing members of the group;
- (ii) causing serious bodily or mental harm to members of the group;
- (iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (iv) imposing measures intended to prevent births within the group;
- (v) forcibly transferring children of the group to another group;

War Crimes namely, violation of laws or customs of war which include but are not limited to murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population in the territory of Bangladesh; murder or ill-treatment of prisoners of war or persons on the seas, killing of

hostages and detainees, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

Violation of Geneva Conventions of 1949 of any humanitarian rules applicable in armed conflicts laid down in the Conventions;

Any other crimes under international law;

Attempt, abetment or conspiracy to commit any such crimes;

Complicity in or failure to prevent commission of any such crimes.

The crimes within Section 3 have been defined by many international courts since 1993 when the UN Security Council established the International Criminal Tribunal for the Former Yugoslavia⁸. This was the first of the many international criminal courts and tribunals that have now been established and the definitions of these crimes have been more carefully revised from the model of the Nuremberg Charter from which the ICTAA 2009 is derived.⁹

By **Presidential Order No.16 of 1973**, the liberating forces were given immunity from prosecution under the ICTA 1973. The objects of the prosecutions were thereby defined as being only those from the Pakistan forces. The amendments to the Act in 2009 did not incorporate the Presidential decree so as to show with transparency the full terms of this

⁸ UN SC/Res 827 of 1993

⁹ For Example: ICC Statute Article 7 - Crimes against humanity require the context of being “with the knowledge of a widespread or systematic attack against a civilian population”

statute. This is a clear attempt to hoodwink the international community into believing these are impartial laws. In fact, there can be no clearer indication of the intention to apply these legal procedures in a discriminatory way and in defiance of the constitutional duties to equality.¹⁰

(b) Liability for crimes

Section 4 sets out the definition of joint criminal liability and command responsibility.

As to joint liability it does not distinguish between offence and crime and so the extent of intended criminal liability is unclear:

4. (1) When any **crime** as specified in section 3 is committed by several persons, each of such person is liable for that crime in the same manner as if it were done by him alone.

In relation to command responsibility the level of knowledge when connected with “plans and activities involving the commission of such crimes” is also unclear.

4. (2) Any commander or superior officer who orders, permits, acquiesces or participates in the commission of any of the crimes specified in section 3 **or is connected with any plans and activities involving the commission of such crimes** or who fails or omits to discharge his duty to maintain discipline, or to control or supervise

¹⁰ Article 27

the actions of the persons under his command or his subordinates, whereby such persons or subordinates or any of them commit any such crimes, or who fails to take necessary measures to prevent the commission of such crimes, is guilty of such crimes.

(c) Official Position

5. (1) The official position, at any time, of an accused shall not be considered freeing him from responsibility or mitigating punishment.

(2) The fact that the accused acted pursuant to his domestic law or to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal deems that justice so requires.

(d) The Tribunal

6. (1) For the purpose of section 3, the Government may, by notification in the official Gazette, set up one or more Tribunals, each consisting of a Chairman and not less than two and not more than four other members.

(4) If any member of a Tribunal dies or is, due to illness or any other reason, unable to continue to perform his functions, the Government may, by notification in the official Gazette, declare the office of such member to be **vacant and appoint thereto another** person qualified to hold the office.

(5) If, in the course of a trial, any one of the members of a Tribunal is, for any reason, unable to attend any sitting thereof, the

trial may **continue** before the other members.

(6) A Tribunal shall not, merely by reason of any change in its membership or the absence of any member thereof from any sitting, be bound to recall and re-hear any witness who has already given any evidence and may act on the evidence already given or produced before it.

(8) Neither the constitution of a Tribunal nor the appointment of its Chairman or members shall be **challenged by the prosecution or by the accused persons or their counsel.**

Conflicts of interest or bias or prejudice or bad behavior of any Judge may not be raised by the parties in order to challenge the fairness and impartiality of the trial. The Bangladesh Constitution Article 35(3) which was in accordance with ICCPR Article 14.1 and UDHR Article 10 giving the right to be tried by an independent and impartial court or tribunal was amended in 1973 so that this right was withdrawn from these cases.¹¹ New Articles 47(3) or 47A(2) of the Constitution prevents challenge in the Supreme Court to enforce rights normally within the Constitution. These restrictions are also relevant to ICTAA 2009 sections 6(4), 6(5) and 6(6) which permits proceedings to continue notwithstanding the absence of a Judge as well as the substitution of a Judge in the event of indisposition due to death or illness.¹² It is very clear that such arrangements during an

¹¹ Article 47A(1) 1973 amendment to the Constitution. See also ICCPR Article 14.1 and UDHR Article 10

¹² 6(4) If any member of a Tribunal dies or is, due to illness or any other reason, unable to continue to perform his functions, the Government may, by notification in the official Gazette, declare the office of such member to be vacant and appoint thereto another person qualified to hold the office.
6(5) If, in the course of a trial, any one of the members of a Tribunal is, for any reason, unable to attend any sitting thereof, the trial may continue before the other members.

ongoing trial may raise genuine issues of capacity for a Judge to be able to try a case fairly in such circumstances. It would at least be in the interests of justice for the court to provide justification and be held accountable for any decisions it made under these provisions

The lack of right to challenge and inability to request the Tribunal to be accountable for its conduct at the time of the trial can also be seen in ICTAA 2009 section 10(h), which restricts the rights of parties to object or question a witness questioned by a Judge.¹³ A party may have good grounds for objection to the conduct or action of the Tribunal which may be unfair – for instance if a question contrary to rules of evidence, is unfair, wrong in fact, irrelevant to the issues or misleading to the witness or capable of misinterpretation.

(e) Investigation

8. (5) Such person shall be bound to answer all questions put to him by an Investigation Officer and shall not be excused from answering any question on the ground that the answer to such question **will criminate, or may tend directly or indirectly to criminate, such person:** Provided that no such answer, which a person shall be compelled to give, shall subject him to any arrest or prosecution, or be proved

6(6) A Tribunal shall not, merely by reason of any change in its membership or the absence of any member thereof from any sitting, be bound to recall and re-hear any witness who has already given any evidence and may act on the evidence already given or produced before it.

¹³ 10(h) the Tribunal may, in order to discover or obtain proof of relevant facts, ask any witness any question it pleases, in any form and at any time about any fact; and may order production of any document or thing or summon any witness, and neither the prosecution nor the defence shall be entitled either to make any objection to any such question or order or, without the leave of the Tribunal, to cross-examine any witness upon any answer given in reply to any such question.

against him in any criminal proceeding.

Although section 8.5¹⁴ restricts the effect of such questioning to the provision of information, as it is now 40 years since the events concerned there can be no justification based upon national emergency to support such a rule. The Bangladesh Code of Criminal Procedure section 161 (2), provides for protection against self-incrimination within the national criminal law of Bangladesh and this is an example of the divergent standards of justice.¹⁵

(f) Commencement of Proceedings

9. (3) The Chief Prosecutor shall, **at least three weeks** before the commencement of the trial, furnish to the Tribunal a list of witnesses intended to be produced along with the recorded statement of such witnesses or copies thereof and copies of documents which the prosecution intends to rely upon in support of such charges.

(5) A list of witnesses for the defence, if any, along with the documents or copies thereof, which the defence intends to rely upon, shall be furnished to the Tribunal and the prosecution at the time of the **commencement** of the trial.

¹⁴ 8(5) Such person shall be bound to answer all questions put to him by an Investigation Officer and shall not be excused from answering any question on the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such person. Provided that no such answer, which a person shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding.

¹⁵ 161.(1) Any police-officer making an investigation..., by general or special order, ... may examine orally any person supposed to be acquainted with the facts and circumstances of the case.
(2) Such person shall be bound to answer all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture...

(g) Procedure of Trial

Section 10:

(h) the Tribunal may, in order to discover or obtain proof of relevant facts, ask any witness any question it pleases, in any form and at any time about any fact; and may order production of any document or thing or summon any witness, and neither the prosecution nor the defence shall be entitled either to **make any objection** to any such question or order or, **without the leave of the Tribunal, to cross-examine** any witness upon any answer given in reply to any such question;

(i) the prosecution shall first sum up its case, and thereafter the defence shall sum up its case: Provided that if any witness is examined by the defence, **the prosecution shall have the right to sum up its case after the defence has done so;**

(h) Powers of Tribunal

Section 11:

(2) For the purpose of enabling any accused person to explain any circumstances appearing in the evidence against him, a Tribunal may, at any stage of the trial without previously warning the accused person, put such **questions** to him as the Tribunal considers necessary: Provided that the accused person shall not render himself liable to punishment by refusing to answer such questions or by giving false answers to them; but the **Tribunal may draw such inference** from such refusal or answers as it thinks just.

This offends against an accused's right of silence and can be considered as a measure to compel an accused to testify.

(I) Rules of Evidence

By Section 19 the ICT will adopt standards for the admission of evidence not recognised by the national courts.

19. (1) A Tribunal shall **not be bound by technical rules of evidence**; and it shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and may admit any evidence, including reports and photographs published in newspapers, periodicals and magazines, films and tape-recordings and other materials as may be tendered before it, which it deems to have probative value.

(2) A Tribunal may receive in evidence any statement recorded by a Magistrate or an Investigation Officer being a statement made by any person who, at the time of the trial, is dead or whose attendance cannot be procured without an amount of delay or expense which the Tribunal considers unreasonable.

(3) A Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof.

(4) A Tribunal shall take judicial notice of **official governmental** documents and reports of the **United Nations** and its subsidiary agencies or other **international bodies** including non-governmental organisations.

There is an additional evidence procedure relevant to the removal of national rules from these proceedings.

Section 23. The provisions of the **Criminal Procedure Code, 1898 (V of 1898), and the Evidence Act, 1872** (I of 1872), shall not apply in any proceedings under this Act.

The removal of the Criminal Procedure Code 1898 and the Evidence Act 1872, from the proceedings under the ICTAA 2009 emphasises the capacity for unfairness in these trials.

Normal rules for judicial notice under section 57 of the Evidence Act¹⁶ have been altered in section 19(3)¹⁷ but significantly under section 19(4):

“A Tribunal shall take judicial notice of official governmental documents and reports of the United Nations and its subsidiary agencies or other international bodies including non-governmental organizations”.

This equates such documents with the facts of common knowledge that give rise for judicial notice. Therefore **government documents** and reports are given the status of evidence automatically and without capacity for challenge and scrutiny of content. This becomes a powerful tool in the

¹⁶ i. The laws of Bangladesh; ii. Articles of War for the Armed Forces; iii. Course of proceedings of Parliament; iv. The seals of the Courts; v. The accession to office, names, titles, functions, and signatures persons in public office, if such appointment is notified in the official gazette. vi. Existence, title and national flag of every sovereign vii. division of time, geographical divisions and public festivals viii. The territories of Bangladesh ix. Commencement, continuance and termination of hostilities between Bangladesh and another State. x. Names of officers of the Courts xi. Rules of the road, land or sea

¹⁷ 19.3 A Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof.

hands of the Government which may well be intentioned to present its picture of events at the expense of the truth.

Also at section 26:

26. The provisions of this Act shall have effect notwithstanding anything **inconsistent** therewith contained in any other law for the time being in force.

At Section 22:

The Tribunal regulates its own procedure

(j) Judgment and Sentence

By Section 20 the Death penalty is retained.

20. (1) The Judgement of a Tribunal as to the guilt or the innocence of any accused person shall give the reasons on which it is based: Provided that each member of the Tribunal shall be competent to deliver a judgement of his own.

(2) Upon conviction of an accused person, the Tribunal shall award **sentence of death** or such other punishment proportionate to the gravity of the crime as appears to the Tribunal to be just and proper.

(3) The sentence awarded under this Act shall be carried out in accordance with the orders of the Government.

(k) Burden of Proof

The International Crimes Tribunal Rules of Procedure 2010, Rule 50 provides for the burden of proof to be on the Prosecution. However, this is not the case in all aspects of the trial. Rule 51(1)¹⁸ requires the Defence to prove alibi, if it is relied upon, and any particular fact or information which is in its possession or knowledge. This is in conflict with the presumption of innocence and the burden of proof being upon the prosecution as set out clearly in ICCPR at Article 14.2 as a universally recognized principle of law.¹⁹ If an Accused raises alibi the burden still remains upon the Prosecution to prove its case and disprove the alibi. This also applies to other facts or information raised by the Defence. If the Prosecution fails adequately to investigate a case and is concerned to prove only what it believes rather than to search for the truth, this Rule would cause the Defence to have the entire burden of proving innocence.

Of particular concern here is the delay in proceedings which will impose restrictions on the ability of the Defence to prove innocence arising from facts which were in existence nearly 40 years ago. The charges will be brought by an accuser and it is that party that has to prove the case beyond reasonable doubt.

¹⁸ 51. (1) The onus of proof as to the plea of 'alibi' or to any particular fact or information which is in the possession or knowledge of the defence shall be upon the defence.

¹⁹ 14.2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

(I) Trials in Absentia

There is a provision in the Rules for trials in absentia.

Rule 32: If the accused, despite publication of notice in daily news papers, fails to appear before the Tribunal on the date and time so specified therein, and the Tribunal has reason to believe that the accused has absconded or concealing himself so that he cannot be arrested and produced for trial and there is no immediate prospect for arresting him, the trial of such accused shall commence and be held in absentia.

However, no mechanism exists by which an accused who is subsequently apprehended may challenge such a verdict, other than an appeal to the Supreme Court of Bangladesh under Article 21 which has to be made within 60 days of conviction and sentence.

Bangladesh – International Treaties

Bangladesh ratified the Treaty of Rome on 23 March 2010 and thereby became a State party member of the International Criminal Court. The Statute and Rules of Procedure and Evidence for the ICC contain modern and internationally recognized principles that form the norms for the trial of the international crimes. On 6 September 2000 the Government of Bangladesh acceded to the International Covenant on Civil and Political

Rights by which it agreed to uphold universal principles for the fairness of criminal trials within its national jurisdiction.

By Article 14 of the ICCPR, Bangladesh affirmed, *inter alia*, that:

14.1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...

and

14.2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

and

14.3(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

and

14.3(g) Not to be compelled to testify against himself and confess his guilt;

By Article 15:

15.1 . No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed...

15.2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

By Article 26:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The Universal Declaration of Human Rights also contains Articles directly relevant to these issues. Articles 8²⁰, 9²¹, 10²² and 11²³ all provide for fairness, freedom from arbitrariness, impartiality, presumption of innocence and certainty for what amounts to criminal conduct. The 1968 United Nations International Conference on Human Rights agreed that the Declaration "*constitutes an obligation for the members of the international community*" to protect and preserve the rights of its citizens.²⁴ The Declaration provides a definition of the concepts of "fundamental freedoms" and "human rights"²⁵ introduced by the UN Charter²⁶, by which Bangladesh is legally bound.²⁷

²⁰ **Article 8:** Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

²¹ **Article 9:** No one shall be subjected to arbitrary arrest, detention or exile.

²² **Article 10:** Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

²³ **Article 11:**

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed

²⁴ <http://www.unac.org/rights/question.html>

²⁵ The Declaration provides a cross-reference to the UN Charter in paragraphs 5 and 6 of the preamble

²⁶ These concepts are introduced in Chapter 1, Article 1 of the UN Charter,
<http://www.un.org/en/documents/charter/chapter1.shtml>

²⁷ Bangladesh declared acceptance of the obligations contained in the UN Charter on 17 September 1974.

The amendments made to the Constitution in 1973 which apply only to international crimes not previously within the Bangladesh national jurisdiction are in contradiction to the internationally recognized fair trial principles adopted by the State of Bangladesh and normally found within its constitution. Bangladesh has imported crimes of universality into its jurisdiction but exported the fundamental human rights from its constitution which are also universal.

Steven Kay QC

9 Bedford Row

London

13 October 2010