



NINE BEDFORD ROW INTERNATIONAL

Chambers of Anthony Berry QC
9 Bedford Row, London. WC1R 4AZ
United Kingdom

Tel: +44 207 489 2727

Fax: +44 207 489 2828

Mob: +44 7817 371 444

Skype: tobycadman

Twitter: <http://twitter.com/#!/tobycadman>

Http: <http://www.9bedfordrow.co.uk>

Http: <http://tobycadman.com>

European Parliament Committee on South East Asia: ICT Bangladesh

On 31 January 2012 I was invited to speak at the European Parliament in the South Asia Committee. The purpose of the meeting was to discuss developments at the International Crimes Tribunal, Bangladesh in advance of a parliamentary delegation visiting Bangladesh in mid-February 2012. The other speakers included Dr Peter Custers, President of International Committee for Democracy in Bangladesh, Bangladesh journalist Shahriar Kabir, Tureen Afroz of the Dhaka Law Faculty and member of the Bangladesh Supreme Court Bar Association, Zead al-Malum, Prosecutor at the Bangladesh International Crimes Tribunal, Bangladesh Ambassador to the European Union Ismat Jahan, and Dr. Genoveva Hernandez Uriz, Bangladesh Desk Officer at the European External Action Service.

I was invited to attend the meeting at the request of the European Parliament and speak on behalf of the defence and to set out the principle concerns. I provided an extensive written opinion that was distributed to those attending the meeting and gave a brief oral presentation. I had not intended to make any public remarks following the meeting and had intentionally avoided members of the media due to the fact that I was pleasantly surprised by the very amicable, if not over-zealous, reception I received from the Bangladesh delegation, and in particular from Prosecutor Zead al-Malum, and the fact that I was permitted to present my views without interference or interruption. The very sensitive and emotive nature of the topic and the fact that it is greatly politicised in Bangladesh, I was prepared, as always, to robustly defend my position in an atmosphere of hostility. That was what I had become accustomed to. However, I was grateful for the respectful reception I received from the European Parliament and members of the Bangladesh delegation. This may well have been a direct result of the respectful tone I adopted in my remarks.

However, notwithstanding the aforementioned, I must confess that I was extremely disappointed to read the article entitled "*Vote of Trust of War Trial*" that was published in the online edition of the Bangladesh Daily Star (<http://www.thedailystar.net/newDesign/news-details.php?nid=221052>) that is a gross misrepresentation of the views expressed during the meeting. I have now forwarded the offending article to the members present at the meeting.

The article cites the Chair of the Committee, Ms. Jean Lambert, as declaring that she welcomed Bangladesh's efforts to try war criminals and that "[she] expected that the trial would conform to the

highest standard possible”. The article then goes on to declare that Ms. Lambert “said she was aware of the open trial with the right to appeal by the accused and that Bangladesh had ratified the Rome Statute”.

Fortunately, as this kind of inaccurate media reporting is commonplace in Bangladesh, I took a verbatim note of what Ms. Lambert stated in her remarks and although she does indeed welcome the initiative to establish the Tribunal and also the ratification of the Rome Statute of the International Criminal Court the two points are not connected in her presentation. In fact, a contrary view could be taken that being as a signatory to the Rome Statute Bangladesh was obliged to comply with certain minimum standards. A number of matters that Ms. Lambert drew reference to were conveniently missed out of the Daily Star report entirely. She made particular reference to the death penalty, which she stated “...the EU’s complete opposition to this is both long standing and well known”. Ms. Lambert went on to declare that “the cases under the ICT’s jurisdiction are mostly from what I understand it are capital punishment cases and whilst we certainly welcome the Government’s [attempt] to do justice we want to make sure the trials meet the highest possible standards.” Ms. Lambert concluded by stating that “the purpose of the exchange of views this afternoon is for us to get a clearer grasp of the current events in Bangladesh, we are certainly not a court, we do not aspire to be one, so therefore what we want to do is to keep the emphasis on the process, background and context and not on the individuals and cases in trial.”

It is quite regrettable that Ms. Lambert’s statement has been distorted when it was quite clear that she had made no assessment of whether the proceedings met the high standards to which she referred. Her comments were clearly aimed at *ensuring* the proceedings met the highest standards; this is quite different to the way in which the Daily Star attributed her comments and the sub-headline declaring a member of the European Parliament “*hails Bangladesh efforts*”. The general tone of the article is quite misleading. It has to be emphasised that the purpose of the meeting was to exchange views and there certainly was no vote of trust as the headline would seem to suggest.

The only other member of the European Parliament to speak was from Poland. She made it quite clear that she applauded the initiative to bring an end to impunity and drew a parallel with her own country’s efforts. However, the parliamentarian focused much of her intervention on the opposition to the death penalty.

The misrepresentation of the remarks made are quite indicative of the confusion between applauding the initiative and applauding the process. One should not be confused with the other. It is quite obvious that the European Parliament will applaud the efforts in general to establish a Tribunal to address the crimes of the past, as will any sensible governmental or non-governmental body. To make such a statement does not extend to evaluating or assessing the process. The Bangladesh media would do well to remember this before embarking on statements that tend to mislead the Bangladesh public. The latter are quite capable of assessing the Tribunal’s compliance with international standards without the former issuing statements that misrepresent the truth. Fairness requires that we do not make judgments until all facts are known and not before hearing all sides to the argument. To declare any opposition to the process as an international conspiracy and to use the

threat of charges of sedition does not represent a balanced approach adopted by a Government based on principles of democracy and freedom of speech.

It is important to note that the delegation appearing on behalf of Bangladesh included one of the Tribunal's Prosecutors, Zead Al-Malum, who read out a pre-prepared speech on the Tribunal's rules and practice; declaring its full compliance with the highest standards. Prosecutor Al-Malum focused on the Tribunal as a national court; not an international judicial body. In making his remarks, however, he made a number of fundamental errors and notably one statement must be characterised as nothing short of misleading. The learned prosecutor made the point, when referring to the rights of the accused, that they were interrogated during the investigation in the presence of counsel. The learned prosecutor must know that this quite simply cannot be correct and therefore this statement must have been made in error. The defence have consistently and strenuously objected to the Tribunal's decision to refuse the right of counsel to be present during the interrogation of each of the accused. This is in clear contravention to the International Covenant on Civil and Political Rights; a treaty to which Bangladesh is a State Party, but a treaty that the Tribunal has declared is inapplicable.

Shahriar Kabir, a journalist and coincidentally, an expert witness for the prosecution, spoke of the gravity of the crimes and appealed to the EU to recognise the atrocities as genocide; something which the Committee Chair declined to advance at that time stating that this was a controversial subject in the EU; an obvious reference to the Armenian Genocide. Tureen Afroz then stated that the international community should not be swayed by a conspiracy from certain quarters aimed at discrediting the Tribunal and its legislative framework. She then focused on the lack of justice for victims of rape and gender violence.

The Bangladesh Ambassador to the EU at the end and gave a measured presentation and focused on a number of important areas. Interestingly, the Ambassador was forced to acknowledge my statement that I did not oppose the trials and I recognised that Bangladesh had an obligation under international law to bring an end to impunity. Of particular note, the Ambassador made two important revelations. First, that the trials would be open to international trial monitors; an important point that will undoubtedly encourage Ambassador Rapp who is particularly keen to pursue the subject. Secondly, the Ambassador addressed the concerns of the imposition of the death penalty. The Ambassador, addressing the concern diplomatically, although making the point that the ICC did not prohibit the death penalty within the national jurisdiction, stated that the issue should not be raised until the end of the trials as it may interfere with an impartial process. It would be more appropriate, in the words of the Ambassador, to address the issue at the end of the trial once the accused are sentenced. Clearly, the Ambassador meant *if* the accused are convicted and sentenced to the death penalty rather than *when*.

The Daily Star article states from my remarks that I do not oppose the trial nor was I part of any international conspiracy to obstruct the trial, but I felt that the 1974 Act, in parts, did not meet international standards and needed to be amended. That is of course an over simplification of what I actually said. I gave a full written presentation that was distributed to all Members of the European

Parliament. The full text is published on my website (http://tobycadman.com/files/ICT_BD_Memorandum2.pdf) and sets out the majority of my many concerns with the Tribunal and its procedures. It is not appropriate to say that I believe the Act should be amended in part. The fact of that matter is that the Act is defective in many respects and the Rules, despite the recent piecemeal amendments, have not impacted to a sufficient degree on rendering proceedings fair.

I began my brief address by stating that despite criticisms to the contrary I was not interested in disputing the nature of the conflict, the level of victimisation, nor was I interested in preventing the trials from taking place. I made it clear that Bangladesh has an obligation under international law to bring an end to impunity, but by the same token it has an obligation to do it in accordance with standards of fairness and due process. Responding to the unfounded statements that there is an international conspiracy aimed at thwarting the trials I stated that this was simply untrue; there is merely a concerted effort by the international community to ensure that the trials comply with international standards because at present they do not. I consider such statements to be irrational and solely aimed at silencing any form of criticism. I made it quite clear that the legislative framework do not meet international standards.

Responding to the question of whether the Tribunal is national or international I stated that the Tribunal can not sit on the fence; it needs to decide if it is national or international. I stated that at present it is a national court that applies neither national nor international law or norms. I made it clear that a national tribunal must apply the domestic procedural laws and constitution and it must comply with the international treaties to which it is a State party. I also made clear that the removal of rights under the First and Fifteenth Constitutional Amendments were unacceptable. I condensed all these points into a quick 10 minute presentation so as to ensure the point was properly made.

If members of the European Parliament enquire into the Tribunal and its procedures it will note the following:

1. The Tribunal has declared that domestic laws do not apply;
2. The Tribunal has ruled that it is not bound by international treaty law;
3. The interrogations were not conducted in the presence of counsel and are conducted without prior disclosure;
4. The Prosecution has no authority to investigate into crimes committed by all sides to the conflict as those who fought with the Liberation forces, irrespective of their conduct, are immune from prosecution;
5. Certain members of the Prosecution proclaim to be freedom fighters thereby calling their independence into question;

6. The Tribunal Chairman was a member of the People's Inquiry Commission that conducted investigations into these matters;
7. There are no clear definitions and elements of crimes;
8. There are no clear rules of evidence;
9. Those charged with crimes under the jurisdiction of the Tribunal are stripped of constitutional rights and fundamental freedoms;
10. There is no right of appeal or interlocutory challenge against any decision of the Tribunal other than having the same judges review their own decisions;
11. There is no right to challenge the jurisdiction of the Tribunal, the Act or the appointment of any individual judge;
12. An accused is required to enter a plea immediately upon being arraigned and without the prior assistance of counsel;
13. The defence is required to disclose its entire case before the Prosecution has even opened its case;
14. The defence is frequently denied privileged communication with counsel;
15. There is no right to appeal other than against conviction and sentence; and
16. These are all capital cases.

As a final note, I would state that it was clearly the intention of the Bangladesh delegation to obtain international support for the Tribunal. The Government has adopted a consistent rhetoric that the Tribunal will meet the highest standards of fairness and transparency, it is arguable that to date this has not been the case. Numerous statements have been made as to the compliance with fundamental rights and freedoms. It is clear that undertakings have been made to ensure that Bangladesh complies with its obligations under international law, but such representations are hollow and illusory if no practical effect is given. If the intention of the Government was to gain wider international acceptance for the Tribunal, misrepresenting the statements of parliamentarians is hardly likely to assist their cause. It should be recalled that in November 2011, during an official visit to the Tribunal by the United States Ambassador-at-large for War Crimes Issues, Stephen J. Rapp, a statement was carried by the Bangladesh Daily Star, the same online newspaper that published this report, quoting the Tribunal Deputy Registrar following an exchange between the Ambassador and the Tribunal Judges announcing that the United States, through Ambassador Rapp, had expressed satisfaction and praise for the Tribunal. It was then left to US Embassy in Dhaka to request the inaccurate media report to be removed.

It is repeatedly stated that the provision of appeal against conviction is sufficiently balanced to render the trial process fair. The Government rhetoric is that it provides a more equitable system than the International Military Tribunals in Nuremberg and Tokyo. One would hope that international justice has moved some distance from the Nuremberg and Tokyo trials. President John F. Kennedy said of the Nuremberg trials that “*[they] were a reversion to the ancient practice of the savage extermination of a defeated enemy and particularly of its leaders. The precedent set by these trials will continue to plague their authors.*” Bangladesh as a nation might wish to rethink how it wishes to associate itself with a process that has been labelled as victor’s justice, particularly in light of the same allegations being levelled against the current Awami League Government.

Toby M. Cadman

London, 3 February 2012