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Justice Nizamul Huq Nasim
Chairman
International Crimes Tribunal
Old High Court Building
Ramna, Dhaka,
Bangladesh

**AMNESTY
INTERNATIONAL**



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Dear Justice Nizamul Huq Nasim

I am writing to convey some of Amnesty International's observations with regard to Bangladesh's International Crimes Tribunal. Amnesty International views the setting up of the Tribunal as a historic opportunity in Bangladesh with the potential to end 40 years of impunity for mass-scale human rights violations that occurred during the country's war of independence.

Bangladesh has a responsibility to ensure justice for more than one million civilians who were reportedly killed by the Pakistani forces and their allied groups, tens of thousands of women who were allegedly subjected to rape and sexual assault, and more than eight million people who fled the country into India in search of safety.

Our aim in sending these observations to you is to suggest the removal of shortcomings that might limit the Tribunal's ability to bring perpetrators of these crimes to justice in a fair trial. If convictions imposed by the Tribunal do not comply with internationally accepted fair trial standards, they will turn the alleged perpetrators into new victims of human rights violations. This will not be in the interest of justice.

We understand that the task of bringing to trial people accused of these crimes is enormous and complicated. However, we do believe that political will, learning from the experiences of other accountability mechanisms, and the necessary changes in law and procedures will enable the Tribunal to try the accused in a fair and impartial manner. We look forward to a thorough and successful application of fair trial standards in the Tribunal's proceedings.

In the following paragraphs, I will summarize some of our main concerns that need to be addressed immediately to ensure that the Tribunal's proceedings are based on fair trial standards. Please see the enclosed note for a fuller list of Amnesty International's concerns with regard to the legal provisions that are to be used by the Tribunal. In particular we focus on the International Crimes (Tribunal) Act (as amended), the Penal Code of 1860 (to the extent that it applies at all), the Rules of Procedure (Rules) issued by the International Crimes Tribunal (Tribunal) and the way the 1973 Act and the Rules are being implemented in practice.

You may recall that some of these concerns were brought to your attention by our Bangladesh Researcher, Abbas Faiz, when he met with you in Dhaka on 26 February 2011. And some of these concerns will also be known to you through the interactions you have had with other commentators including the United States Ambassador at Large for War Crimes Issues and the International Centre for Transitional Justice.

Impunity within impunity

As a preliminary matter, we have noted that all those detained so far have been from two opposition parties. Of the seven people accused, five belong to Jamaat-e-Islami and two to the Bangladesh Nationalist Party. This has created the impression that the Tribunal is dealing only with suspected perpetrators who are members of the current opposition parties. Even if there is no bias in the Tribunal's proceedings, the Tribunal has to avoid the appearance of bias. It cannot be automatically assumed that other parties have been closed to membership of persons suspected of such crimes. A more rigorous search must be conducted to ensure that no suspects are able to shield themselves from prosecution simply for being members of the ruling party or its allies.

Furthermore, you have no doubt come across reports that elements within the victorious Bangladeshi forces extrajudicially executed or attacked people labelled as collaborators after Bangladesh gained independence. In Amnesty International's view, no perpetrators of human rights violations during the 1971 war of independence should feel immune from prosecution, regardless of what party they supported or what political affiliation they had during the independence war. Otherwise the Tribunal will be seen as a vehicle for the ruling party to hunt its opponents.

Presumption of innocence

We are disturbed to note that neither the Constitution, nor the 1973 Act, as amended, nor the Rules, guarantee the right of every accused person to be presumed innocent until the prosecution has proved the person's guilt beyond a reasonable doubt. This omission is inconsistent with international human rights law binding upon Bangladesh. These laws need to be amended. Meanwhile, the Tribunal needs to ensure that presumption of innocence remains pivotal to any of its proceedings.

Protection of witnesses

For a successful trial of war crimes, survivors or anyone appearing as a witness to the commission or non-commission of these crimes by the accused must be protected against possible reprisal attacks. In addition, survivors or witnesses, particularly women and children, may need specialised support including psychological treatment. We hope that you, as the Chairman of the Tribunal, will urge the authorities to ensure that such surviving victims or witnesses are protected against attacks and receive the support they need.

The death penalty

You are aware of Amnesty International's opposition to the death penalty at all times. Even when national laws sanction capital punishment, it still remains a human rights violation. This punishment is irreversible when it leads to execution. It allows a severe and irreversible injustice to the persons executed if evidence later shows that they had not been guilty of the crimes for which they had been deprived of their lives. We appeal to you as the Chairman of the Tribunal to refrain from imposing the death penalty, no matter how heinous the crimes.

We call upon you to exercise your discretion, as the Chairman of the Tribunal, to amend some of the Rules and to issue new Rules along the lines we are suggesting in this letter and its enclosure.

We also have concerns that could be addressed by amending the Act and will bring these concerns to the attention of the government.

Please do not hesitate to contact us if you have any comments or questions. I look forward to hearing from you soon.

Yours sincerely,

A handwritten signature in black ink, appearing to read "M. Malhotra", written over two horizontal lines.

Madhu Malhotra
Deputy Director, Asia-Pacific

SUMMARY OF SOME OF AMNESTY INTERNATIONAL'S CONCERNS:

Death penalty

The Tribunal can apply the death penalty (Section 20 (2)) of the 1973 Act. We recommend that the death penalty should be removed from the 1973 Act. As you are no doubt aware, every international criminal court established since 1993 with jurisdiction over crimes under international law, including the International Criminal Tribunal for the former Yugoslavia, the International Tribunal for Rwanda, the Special Panels for Serious Crimes in Dili, Timor-Leste, the Kosovo international panels, Section I for War Crimes of the Court of Bosnia and Herzegovina (War Crimes Chamber) and the Special Court for Sierra Leone, have excluded the death penalty for the most horrific crimes imaginable: genocide, crimes against humanity and war crimes. The death penalty has also been excluded as an appropriate penalty for such crimes in the proposals for the Ad Hoc International Court for Senegal. Meanwhile, consistent with the moratorium on the death penalty requested by the UN General Assembly, we call upon you as the Chairman of the Tribunal to refrain from imposing the death penalty, no matter how heinous the crimes.

Impunity for many

Despite the broad language of Section 3 (1) of the 1973 Act making it applicable to anyone, as it has been modified by President's Order No. 16 of 1973, the 1973 Act limits accountability for war crimes, crimes against humanity and genocide only to Bangladeshis who were opposed to independence, and simply reinforces impunity for nationals of India and Pakistan and members of the Bangladesh independence movement.

A further provision that reinforces impunity is Section 15 (1) of the 1973 Act that permits the Tribunal to give pardons - as opposed to reduced sentences - to anyone who cooperates with the Tribunal.

These provisions are reinforced by Article 47 (3) of the Constitution.

Definitions of crimes, principles of criminal responsibility and defences

The definitions of war crimes (Section 3 (d)), crimes against humanity (Section 3 (2)) and genocide (Section 3 (2) (c)) are not fully consistent with international law. Not all forms of ancillary genocide appear to be covered.

It is not clear whether the Penal Code of 1860 applies to proceedings before the Tribunal with regard to principles of criminal responsibility and defences. If they were to apply we would be concerned because principles of responsibility and defences in the Penal Code may not be fully consistent with international law.

The definition of superior responsibility in Section 4 (2) of the 1973 Act is not fully consistent with this principle under international law, as recognized in particular in Articles 86 and 87 of Protocol I to the four Geneva Conventions of 1949.

Denial of guarantees of the right to fair trial as recognized in international law

The right to equality before the law, also recognized in Article 27 of the Bangladesh Constitution, is denied to persons before the Tribunal. Article 47A of the Constitution expressly denies persons before the Tribunal their constitutional rights to protection of law, against retroactive criminal legislation (admittedly not relevant to crimes under international law), and their right to a speedy and public trial by an independent and impartial court or tribunal established by law and certain other fundamental rights.

Article 47A (2) prohibits anyone before the Tribunal from using constitutional remedies to challenge in the Supreme Court any aspect of the proceedings, contrary to Article 9 of the International Covenant on Civil and Political Rights (ICCPR).

Section 3 (2) of the 1973 Act, contrary to Article 9 of the ICCPR, and the practice of most international criminal courts, contains a general rule that persons awaiting trial shall be detained in custody, without any possibility of bail. While we recognize that the Tribunal has used its discretionary powers to grant bail to at least one detainee, the presence of this bar in law may hinder the application of this power by the Tribunal in other cases.

Some of the rights of persons during an investigation, as recognized in Article 55 of the Rome Statute and many other international or internationalized courts, and an increasing number of national courts are not guaranteed in the 1973 Act.

Contrary to Article 9 (3) of the ICCPR, there is no requirement in the 1973 Act or the Rules that an arrested person be promptly tried or released.

There is no requirement in the 1973 Act, as amended, or the Rules requiring that the arrested person have prompt access to independent medical attention.

There is no procedure in the 1973 Act, as amended, or the Rules guaranteeing prompt access to a judge if an arrested person has been tortured while detained or for the Tribunal to order an investigation of the alleged torture. Furthermore, the Tribunal does not have effective safeguards to ensure that evidence obtained as a result of torture outside the Tribunal's jurisdiction is excluded. One detainee has alleged that he was tortured immediately after his arrest. There has been no indication that the Tribunal has ordered an investigation of his torture allegation, as it is required to do under Articles 12 and 13 of the Convention against Torture. If such torture was committed, the Tribunal would be obliged under Article 15 of that treaty to exclude any statement made as a result as evidence.

Contrary to Article 9 (4) of the ICCPR, there is no provision in the 1973 Act, as amended, or the Rules guaranteeing the right of an arrested person to challenge the lawfulness of his or her detention and to be released if that detention is unlawful.

There is no provision guaranteeing reparation for any detention by the Tribunal under the 1973 Act, as amended, or the Rules that is subsequently determined to be unlawful. The failure to include such a provision denies persons arrested by the Tribunal of their right, as recognized in Article 9 (5) of the ICCPR, to compensation for unlawful detention.

Section 23 of the 1974 Act, as amended, states that the Evidence Act, 1872 and the Code of Criminal Procedure, 1898, do not apply to proceedings in the Tribunal. This is not a minor technical point since those laws provide accused persons in other proceedings with considerable protection. Independent of the merit of such evidentiary rules in national law, the exclusion denies persons on trial in the Tribunal their right to equal treatment under the law, recognized in Articles 10 of the Universal Declaration of Human Rights and Article 14 (1) of the ICCPR.

The internationally recognized right to silence is infringed by Section 11 (2) of the 1973 Act, as amended, which permits the Tribunal to draw negative inferences from the exercise of this right when questioned without advance warning by the Tribunal, thus penalizing anyone who exercises this right.

Neither the Constitution, nor the 1973 Act, as amended, nor the Rules guarantee the right of every accused to be presumed innocent until the prosecution has proved the person's guilt beyond a reasonable doubt.

Rule 50 (1) provides that “[t]he burden of proving the charge shall lie upon the prosecution”, but it does not require that the charges be proved beyond a reasonable doubt. Moreover, instead of merely requiring that the accused raise particular defences, Rule 50 (2) actually *reverses* the burden of proof on certain issues. It states: “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.” This shifting of the burden of proof is contrary to the right to be presumed innocent until proved guilty beyond a reasonable doubt, as guaranteed by Article 14 (2) of the ICCPR and interpreted by the Human Rights Committee, and as recognized in other international law, including Article 66 (Presumption of innocence) of the Rome Statute, which expressly states in paragraph 2 that “[t]he onus is on the Prosecutor to prove the guilt of the accused.”

Neither the 1973 Act, as amended, nor the Rules provide for compensation for miscarriages of justice. The failure to do so is not only contrary to Article 14 (6) of the ICCPR, but also contrary to the practice of other courts with jurisdiction over genocide, crimes against humanity and war crimes.

Section 25 (Indemnity) of the 1973 Act, as amended, denies reparation from the government or any persons for breaches of human rights done in good faith under this act:

“No suit, prosecution or other legal proceeding shall lie against the Government or any person for anything, in good faith, done or purporting to have been done under this Act.”

Section 26 (Provisions of the Act over-riding all other laws) of the 1973 Act, as amended, states unequivocally: “The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.”

Reports suggest that decisions by the Tribunal are not reasoned. It is not possible to verify whether this is the case regarding all decisions since we are unable to obtain copies of those decisions from either the prosecutors or the Tribunal. Indeed, defence lawyers have told us that the Tribunal refuses to provide them with certified copies of its decisions or copies of submissions by the prosecutors. If true, this refusal denies the right of suspects and the accused to an effective defence.

Rights of victims

The rights of victims in proceedings before the Tribunal are not guaranteed by the Constitution, the 1973 Act, as amended, or the Rules.

There is no requirement in the 1973 Act, as amended, or the Rules that victims be informed by police, prosecutors and the Tribunal about their rights. Neither the amended Act nor the Rules guarantees the right of victims to notice about all developments in the investigation, prosecution and appeal. The amended Act and the Rules also fail to require the provision of psychological and other support for victims, particularly vulnerable victims, such as women and children. There appear to be no programs administered by the state which provide such support to victims. Neither the amended Act nor the Rules guarantee the right of victims to participate in pre-trial, trial and appellate proceedings. In contrast to the practice in the International Criminal Court, which permits victims to participate in criminal proceedings and to be represented by legal counsel, neither the amended Act nor the Rules guarantee the right of victims to legal representation.

The right of victims and their families to recover reparation for crimes under international law, whether during peace or armed conflict, has been recognized in a number of international instruments since 1907. Bangladesh should guarantee the right of victims to full reparation, including restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition.

As the above summary of some of our concerns demonstrates, there are changes that are required in the 1973 Act, the Rules and their implementation that must be made before proceedings before the Tribunal can be considered fair. Failure to correct these fundamental flaws will not merely deny suspects and accused their right to a fair trial and victims their rights, but will open the proceedings to attacks by revisionists that will undermine the credibility of any attempt by Bangladesh to come to terms with its past by ending impunity for all those responsible for crimes under international law.