

# The Legality of Trial of Genocide, Crimes against humanity or War crimes in Bangladesh

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**Abstract:** - The term Genocide is established as an international crime by the Convention on the Prevention and Punishment of the Crime of Genocide on December 9, 1948. The crimes committed in the Liberation war, 1971 by the perpetrators are no doubly Genocide. As a signatory state, Bangladesh has the obligation to try the offences. Bangladesh is also constitutionally bound to ensure the trial of war criminals. Bangladesh has already started the trial from 22 January, 2009 and already some of collaborators have got punishment facing the trial and the rest are going on process. So many legal questions are raised by the anti-trial supporters whether this trial is legally correct or not. They have tried to bar the trial process showing many legal defeats. Yes, there are so many problems ensuring this trial after forty years. But, as a Bangalee, as a Bangladeshi, everybody should be determined to complete this trial so that no question is raised in future.

**Key words:** Genocide, War Criminals, Constitutional guarantee, Tribunal, Constitutional Philosophy.

## I. INTRODUCTION

No crime should go unpunished. There is no time limitation in trial of criminal offences. Genocide, Crimes against humanity or War crimes are distinct types of crime that was committed in the liberation war, 1971. The Pakistan Armed Forces, Shanti committee, Razakar, Al-Badr, Al-Shams were the main perpetrators who committed the massacre over the Bangalee people. Atrocious and dreadful crimes were committed during the nine-month-long war of liberation in 1971, which resulted in the birth of Bangladesh, an independent state.<sup>1</sup> Bangladesh is bound to ensure the trial of these crimes constitutionally and internationally. As a signatory state of different international charters adopted by the United Nations, Bangladesh has started the trial of war criminals and has faced different legal barriers to precede the trial. The International Crimes (Tribunals) Act, 1973 was passed retroactively on the basis of the first amendment of the constitution of Bangladesh.

## II. METHODOLOGY

This Study is descriptive and suggestive in nature. This paper is based on secondary data collected from Constitution of the People's Republic Of Bangladesh, International Crimes (Tribunals) Act, 1972, Collaborators Act, 1972, Judgment of

the International Crimes Tribunal established under the International Crimes (Tribunals) Act, 1973, Observations and suggestions of Human Rights Watch, Books on history of Bangladesh's Liberation war, Journals, Periodicals, Newspaper, Websites. Some portions of this paper are the author's own observations and logical arguments.

## III. DEFINITION OF GENOCIDE, CRIMES AGAINST HUMANITY AND WAR CRIMES

### *Genocide*

The term 'Genocide' did not exist before 1944. This word was first coined by Polish lawyer Raphaël Lemkin in 1944 in his book *Axis Rule in Occupied Europe*. It consists of the Greek prefix *genos*, meaning race or tribe, and the Latin suffix *cide*, meaning killing. On December 9, 1948, the United Nations approved the Convention on the Prevention and Punishment of the Crime of Genocide and this convention establishes "genocide" as an international crime. It is defined in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG) of 1948 as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the groups conditions of life, calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; [and] forcibly transferring children of the group to another group." [1] In Bangladesh, the International Crimes (Tribunals) Act, 1973 has defined Genocide [2] as "Genocide: meaning and including any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

1. Killing members of the group;
2. Causing serious bodily or mental harm to members of the group;
3. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
4. Imposing measures intended to prevent births within the group;
5. Forcibly transferring children of the group to another group."

<sup>1</sup> <https://www.thedailystar.net/news-detail-268072>, Summary of verdict in Quader Mollah case, dated 06.02.2013

*Crimes against humanity*

Crimes against humanity are certain acts that are deliberately committed as part of a widespread or systematic attack or individual attack directed against any civilian or an identifiable part of a civilian population. Crimes against humanity can be committed during peace or war. [3] One of the most common crimes against humanity is genocide. Genocide is often either condoned, or carried out by the government. The International Crimes (Tribunals) Act, 1973 has defined as “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.”[4]

*War crimes*

War crimes are serious violations of the laws that govern war. These crimes are committed during wartime. The International Crimes (Tribunals) Act, 1973 has defined war crimes as “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.”[5]

## IV. VIOLATION OF INTERNATIONAL CHARTERS

Genocide, Crimes against humanity and War crimes commit serious violation of domestic laws as well as international laws. All Countries of the United Nations are very much eager to stop these distinct types of crimes after the Second World War. War crimes, genocide and crimes against humanity are offences against humankind because it denigrates human dignity. That is why every country has an obligation under international law to try individuals who allegedly perpetrated such crimes, irrespective of the fact whether such crimes were committed in that State or not. The United Nations passed the remarkable convention ‘Convention on the Prevention and Punishment of the Crime of Genocide’ in 1948. The reasons behind passing this convention is:

- I. Genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world.
- II. Recognizing that at all periods of history genocide has inflicted great losses on humanity.
- III. In order to liberate mankind from such an odious scourge.

And Genocide, Crimes against humanity and War crimes also violate the following international conventions at a time:

**Table 1:** List of International Conventions adopted by the United Nations<sup>2</sup>

Acronyms	Name of the Charters	Date of Passing
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination	21 Dec 1965
ICCPR	International Covenant on Civil and Political Rights	16 Dec 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights	16 Dec 1966
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women	18 Dec 1979
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	10 Dec 1984
CRC	Convention on the Rights of the Child	20 Nov 1989
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	18 Dec 1990
CPED	International Convention for the Protection of All Persons from Enforced Disappearance	20 Dec 2006
CRPD	Convention on the Rights of Persons with Disabilities	13 Dec 2006

## V. STATISTICS OF MASSACRE IN 1971

Two quotations are noteworthy to realize the massacre occurred in the liberation war, 1971. Yahya Khan said “Kill three million of them and the rest will eat out of our hands.”[6] And Pakistani General, Rao Farman Ali, who wrote in his desk diary that he, would “paint the green of East Pakistan red.” During the nine-month-long Bangladesh war for independence, members of the Pakistani military and supporting Islamist militias from Jamaat e-Islami killed up to 3,000,000 people and raped between 200,000 and 400,000 Bangladeshi women.[7] A large section of the intellectual community of Bangladesh likely an estimated 991 teachers, 13 journalists, 49 physicians, 42 lawyers, and 16 writers, artists and engineers were murdered, mostly by the Al-Shams and Al-Badr forces, at the instruction of the Pakistani Army.[8] The exact numbers are not known and are a subject of debate. Bangladeshi sources cite a figure of giving birth to thousands of war-babies. The Pakistan Army also kept numerous Bengali women as sex-slaves inside the Dhaka Cantonment. The international media and reference books in English have published casualty figures which vary greatly; 200,000–3,000,000 for Bangladesh as a whole while the Hamoodur Rahman Commission, an official Pakistan Government investigation, put the figure as low as 26,000 civilian casualties. [9] The Guinness Book of Records lists the Bangladesh Genocide as one of the top 5 genocides in the 20th century. [10]

<sup>2</sup> <https://matthewhanzel.com/2016/02/14/list-of-select-international-conventions-treaties-charters-and-declarations/>

## VI. CHUKNAGAR: THE LARGEST GENOCIDE DURING THE BANGLADESH LIBERATION WAR IN 1971

Chuknagar is a small business town located in the Dumuria Thana of Khulna district and very close to the India Bangladesh border. In 71 around ten thousand people were in Chuknagar waiting to cross the border for going to Kolkata. In the early morning of May 10, The Pakistani military carrying light machine guns (LMGs) and semi automatic rifles and opened fire on the public. Within a few minutes, a lively town turned into a city of death. The accounts of the two hundred interviewees were same. They differed only in details. "There were piled up dead bodies. Dead Kids' on dead mom's laps. Wives hugging their beloved husbands to protect them from killer bullets. Dads' hugging their daughters to shield them. Within a flash, they all were just dead bodies. Blood streamed into the Bhadra river, it became a river of corps. A few hours later when the Paki bastards ran out of bullets, they killed the rest of the people with a bayonet." [11]

## VII. THE COLLABORATORS ACT 1972

The process to try the collaborators during the first days of Bangladesh was not going through any legal process. People were angry and were killing the collaborators without any trail. Some were being killed because of personal issues. The Government was forced to create a law and begin a trial to pacify the agitation. The Bangladesh Collaborators (Special Tribunals) Order, 1972 was announced on 24 January, 1972 to try the local war criminals. The government assured that the collaborators will be tried for times and again and said that the criminals will not go unpunished under his government. Sheikh Mujibur Rahman on 14 January asked the Awami League activists not to take revenge and assured that legislative measures will be taken against the collaborators in time. But, this act was very much inadequate to try the serious offences- genocide, crimes against humanity or war crimes. About 37,471 cases were filed and about 2,884 cases were solved and the verdict was given under this law till October 1973 and only 752 of them were found guilty under this law at first instances. Later on 31 October 1975, the Collaborators Act was dismissed due to several reasons and irregularities found in the law. The law was amended three times in one year. Actually, the Collaborators Act 1972 was a safeguard to the collaborators and war criminals. [12]

## VIII. FIRST AMENDMENT

The first amendment of Bangladesh's Constitution was passed in 15<sup>th</sup> July, 1973. Basically, there was no special law to prosecute those who committed war crimes, crimes against humanity, genocide and other crimes under international law, during the liberation war in 1971. [13] Moreover, the provisions of fundamental rights of the constitution did not allow their separate trial. Because, it is said that, "No person shall be convicted of 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." [14] That is why; a new clause 3 was inserted in Article 47 and ordered the parliament to enact an act by giving retrospective effect for trying those criminals who committed offences in 1971 and also a new Article 47A was inserted in the Constitution. According to article 47A, the persons to whom a law specified in clause (3) of article 47 applies, they cannot enjoy the following rights:

1. Right to protection of law. [15]
2. Protection against trial under *ex post facto* law. [16]
3. Right to a speedy and public trial by an independent and impartial tribunal. [17]
4. Right to enforce fundamental rights. [18]

### ➤ *Doctrine of Retrospective effect*

A retrospective law is one that is to take effect, in point of time, before it was passed. This word is usually applied to those acts of the legislature, which are made to operate upon some subject, contract or crime which existed before the passage of the acts, and they are therefore called retrospective laws.<sup>3</sup>

### ➤ *Doctrine of Ex-post facto legislation*

A law that makes illegal an act that was legal when committed, increases the penalties for an infraction after it has been committed, or changes the rules of evidence to make conviction easier. The Constitution prohibits the making of ex post facto law.<sup>4</sup>

## IX. CONSTITUTIONAL GUARANTEE OF ENSURING THIS TRIAL

It is said in article 47(3) of the Constitution of the People's Republic of Bangladesh that, "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 defense or auxiliary forces [or any individual, group of individuals or organization] 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." On the basis of this provision, the parliament enacted the most historic act 'The International Crimes (Tribunals) Act, 1973.'

## X. THE INTERNATIONAL CRIMES (TRIBUNALS) ACT, 1973

This act came into force 20<sup>th</sup> July of 1973 shortly after being enacted by the then Government of Bangladesh for ensuring the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and other

<sup>3</sup> <https://legal-dictionary.thefreedictionary.com/retrospective>

<sup>4</sup> <https://www.quora.com/What-is-ex-post-facto-law>

crimes under international law. After a long disappearance from public eye, this Act reemerged in 2009 after a democratic election brought into power the incumbent Government. [19] The tribunal established under this act has the jurisdiction over ‘any person irrespective his nationality who, being a member of any armed, defense or auxiliary forces commits or has committed, in the territory of Bangladesh, whether before or after the commencement of this Act.....’[20] The tribunal has the power to try and pass any sentence authorized by law against anybody who is found guilty for the offences under this act.[21] It is not bound by technical rules of evidence; and it can 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.[22] The prosecutors appointed by the govt. are empowered to prosecute the cases before tribunal and the investigation officers belonging to the agency established by the govt. will assist the prosecution during trial.[23] Both the convicted and the govt. have the right to make an appeal the Appellate Division of the Supreme Court of Bangladesh against the verdict of the tribunal.[24]

#### XI. VERDICT OF A REMARKABLE CASE AND SOME LEGAL POINTS

##### *Verdict (On February 5, 2013)<sup>5</sup>*

The International Crimes Tribunal-2(ICT-2) declared that the accused Abdul Quader Molla son of late Sanaullah Molla of village Amirabad Police Station Sadarpur District-Faridpur is found guilty of the offences of 'crimes against humanity enumerated in section 3(2) of the International Crimes (Tribunals) Act, 1973 as listed in charge nos. 1, 2, 3, 5 and 6 and he be convicted and condemned to a single sentence of 'imprisonment for life for charge nos. 5 and 6 And also for the crimes as listed in charge nos. 1, 2 and 3 to a single sentence of 'imprisonment for fifteen (15) years under section 20(2) of the Act of 1973. The accused Abdul Quader Molla is however found not guilty of offence of crimes against humanity as listed in charge no.4 and he be acquitted thereof. However, as the convict Abdul Quader Molla is sentenced to 'imprisonment for life', the sentence of 'imprisonment for 15 years' will naturally get merged into the sentence of 'imprisonment for life'. This sentence shall be carried out under section 20(3) of the Act of 1973.

##### *Verdict (On September 17, 2013)<sup>6</sup>*

On appeal, the Appellate Division of the Supreme Court sentenced Molla to death on 17 September 2013 with 4:1

verdict. The highest court issued ‘Order of Execution’ on December 8, 2013 ordered him to be executed.

##### *Two Legal questions rose*

The Respondent raised questions that whether retrospective application of criminal law or ex-post facto legislation is valid or not in Bangladesh? [25] They said the death sentence against Mr. Mollah was handed down based on retroactively amended legislation. All national and international legal instruments including The International Covenant on Civil and Political Rights (ICCPR), to which Bangladesh is a state party, prohibit the retrospective application of criminal law; and as such ex-post facto legislation is not valid in Bangladesh itself and clearly violates international fair trial standards. The International Covenant on Civil and Political Rights (ICCPR), to which Bangladesh is a state party, prohibit the retrospective application of criminal law and as such ex-post facto legislation. They also argued that article 14 of the ICCPR states that “no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.”

The answer is given in their logic and that is ‘death sentence against Mr. Mollah’ was handed down based on retroactively amended legislation. The doctrine of retrospective effect is applied under The International Crimes (Tribunals) Act, 1973 not applied in other general offences committed after liberation war. Here, the peculiarity between the two offences-one is offences during liberation war and another is offences after the liberation war, in an independent country. The massacre done by the Pakistan army with the help of collaborators is more and more violation of human rights than the death penalty of Quader Mollah and so on. Here, the distinction and that is why, the retroactively amended legislation was passed. This is valid according to Article 47(3) of Bangladesh’s Constitution, Geneva Convention, Hague Convention, Convention on the Prevention and Punishment of the Crime of Genocide.

Another question is-No Appeal lies against the death penalty of Molla? [26]

They gave their logic in this way- Death is the highest punishment that can be awarded by a Bangladeshi court. However, this highest sentence is awarded and executed after maintaining all cautions and fulfilling every legal formalities and procedures. According to section 31 of the Criminal Procedure Code (CrPC), No court can sentence anyone to death unless it be a Court of Sessions or Additional Sessions or High Court Division. If any sentence of death is passed by the Court of Sessions or Court of Additional Sessions that shall be subjected to confirmation by the High Court Division (HCD). Under article 103 of the Constitution, where HCD has confirmed a sentence of death or sentenced a person to death, an appeal to the Appellate Division of the Supreme Court lies against that ‘as of right’. That means any person sentenced to death penalty shall have a right to appeal against that. Abdul

<sup>5</sup> <https://www.thedailystar.net/news-detail-268072>, Summary of verdict in Quader Mollah case, dated 06.02.2013

<sup>6</sup> <https://bdnews24.com/politics/2013/12/05/full-verdict-on-quader-molla-out>, dated 05.12.2013

Quader Molla has sentenced to death by the highest court of the country; and didn't get any chance to appeal against that sentence!

The answer is easy and simple. Article 103(4) clearly says that Parliament may by law declare that the provisions of this article shall apply in relation to any other court or tribunal as they apply in relation to the High Court Division. That's mean, the power and jurisdiction of International Crimes Tribunal-2 (ICT-2) is as equal as of the High Court Division. On appeal, the Appellate Division declared death penalty and it is very lawful. Because, Article 111 says that the law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division of the Supreme Court shall be binding on all courts subordinate to it.

So, it can be said that the verdict is lawful under domestic law and also under international law. Rather, they can raise questions of the intention of the incumbent government.

## XII. FINDINGS

Bangladesh got her independence from Pakistan in 1971 after a bloody nine months liberation war. During the war, the Pakistani military and its auxiliary forces committed huge massacre to the life and property of the people of Bangladesh.

All these heinous crimes committed during the 1971 liberation war including the crimes of genocide, crimes against humanity, crimes against peace and war crimes are subject to prosecution and punishment.

That is why, The Collaborators Act, 1972 was enacted by the government of Bangladesh to try those who did not side with the nationalist cause in the Bangladesh Liberation War, or politically opposed the liberation war or willingly cooperated with the Pakistan Army or committed criminal acts. But, this Act was dismissed due to several reasons and irregularities found in the law.

After that, the parliament passed the International Crimes (Tribunals) Act, 1973 in 1973 to meet the trial of perpetrators. But, Unfortunately, Bangladesh could not hold this trial within this long time. Defying objections from the probable suspects, Bangladesh has recently assumed jurisdiction over international crimes committed during 1971. It is one of the imperatives pertaining to international crimes that they must be prosecuted and punished under the international law even if the relevant law fails to criminalize them. At last, in 2009, The Government of Bangladesh set up the International Crimes Tribunals under this act to investigate and prosecute suspects for the genocide committed in 1971. The main perpetrators of the war crimes, the Pakistan soldiers, remained out of the reach of the courts. Abdul Quader Molla, assistant secretary of Jamaat-e-Islam, one of the perpetrators, was convicted and executed on 12 December 2013 at 22:01 in a Dhaka jail, the first person to be put to death for events in 1971.

One of pertinent questions is whether the International Crimes (Tribunals) Act adheres to general principles of criminal justice such as presumption of innocence and the rule against double jeopardy. There is at present no provision in the 1973 Act that markedly curtails the rights of the defendants. For example, there are provisions for independent prosecution and investigative agencies, which will exclusively function for the war crimes trials. Moreover, the defendants are given the right to appeal to the Supreme Court within 60 days of the convictions, although they are barred from challenging the legality of proceedings.

There is no denying that in order to be credible and legitimate the trial of war crimes in Bangladesh needs to be compatible with the international standards. Bangladesh has an obligation to that effect both as a member of the world community and as a party to the Rome Statute and the ICCPR.

A principal challenge for the war crimes trial is, however, to strike a right balance between protecting fair trial rights of those accused and the enactment of justice for the victims and martyrs of the war of independence.

## XIII. RECOMMENDATIONS

Bangladesh has an obligation under the International Covenant on Civil and Political Rights (ICCPR) and also the Universal Declaration of Human Rights (UDHR) to protect and preserve the accused person's right to fair trial. The demand of justice in criminal processes requires that the criminal trial must be just and fair, because, without the defendant's assent to the process, the legitimacy and moral authority of the conviction become eroded. Therefore, it is a challenging matter to ensure justice or protect the fundamental rights of the accused and at the same time to respect the concerned government's prerogative to punish the offenders. The following suggestions can be taken into consideration for a fair and impartial trial:

- Amending the definition of crimes to articulate more clearly the relevant definitions of war crimes, crimes against humanity, and genocide as they existed under domestic or international law at the time of the offense;
- Amending the act and rules to ensure that the due process rights of the accused are consistent with Bangladesh's international legal obligations;
- Repealing Article 47(A) of the Bangladesh Constitution to allow the accused full protection of their constitutional rights, including the right to enforce their fundamental rights under Article 44, which protects fundamental rights;
- Creating an effective and well thought out victim and witness protection plan well ahead of the trials, to address protection and support needs before, during, and after proceedings;
- Establishing a defense office to ensure that the principle of "equality of arms" between the prosecution and defense is recognized;

- Equipping prosecutors and judges with the relevant technical expertise to handle cases under the tribunal's jurisdiction in accordance with international practice.
- The Act should require the protection of victims and witnesses appearing before the court, including ensuring their safety, dignity, privacy, and physical and psychological well being. Effective protection and support for witnesses and others at risk due to testimony provided during these trials will be an essential aspect of the court's operations.

#### XIV. FULFILLMENT OF CONSTITUTIONAL PHILOSOPHY

Our brave martyrs sacrificed their lives for the establishment of four high ideals- nationalism, socialism democracy and secularism. [27] They wanted to make such a society where the rule of law would be ensured. [28] If we want to fulfill their desires, then our first and foremost duty will be ensuring the trial of war criminals who committed genocide, crimes against humanity in our liberation war. One of key fundamental state policy is that the state shall show respect for international law and the principles enunciated in the United Nations Charter. [29] Genocide, Crimes against humanity or War crimes are treated serious international crimes under the international law. So, the state has the obligatory to ensure the trial. That is why, the first amendment was passed and the International Crimes (Tribunals) Act, 1973 was also enacted to prosecute the war criminals. By ensuring this trial, it will be established that everybody is under law. Whoever commits criminal offences, he is to be tried must even after long time. There is no time limitation in trial of criminal offences.

#### XV. CONCLUSION

The International Crimes Tribunal of Bangladesh is one of the pioneer domestic tribunals set up for the trial of international crimes. [30] Already, some of collaborators had been convicted of war crimes and punishment had been ensured and the rest is going on process. By ensuring this trial, we will get such a Bangladesh where there will be no debate in favor of or against the liberation. Our one identity and that is we are Bangalee, we are Bangladeshi and the curse of our nation will be removed away. The unity and solidarity of Bangalee nation will become stronger and meaningful. It can also be hoped that the success of the domestic tribunal in Bangladesh May one day opportunity to have a domestic tribunal in Pakistan to try the persons responsible for genocide committed in Bangladesh in 1971. [31]

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