

HUMAN RIGHTS WATCH

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May 18, 2011

Prime Minister Sheikh Hasina
Prime Minister's Office
Old Sangsad Bhaban
Tejagaon, Dhaka-1215
Bangladesh

Re: International Crimes (Tribunals) Act

Dear Prime Minister,

Human Rights Watch welcomes your government's commitment to bring to justice those responsible for serious human rights abuses in 1971. Human Rights Watch strongly supports a successful legal and judicial process that is fair and impartial in holding the perpetrators of crimes accountable. Justice for victims of these atrocities is long overdue. Those responsible have evaded justice for far too long.

We are therefore pleased that the government has decided to set up special courts with a special prosecution team to address these crimes. We also appreciate that at the government's request parliament in February 2010 adopted some amendments to the International Crimes (Tribunals) Act of 1973. These include changing the composition of the Tribunal to consist of civilian judges rather than military judges and mandating the independence of the Tribunal in the exercise of its judicial functions. A positive step was the adoption of Rules of Procedure on July 15, 2010, allowing the International Crimes Tribunal to begin its work in earnest.

However, we believe that additional amendments to the Act and Rules are necessary to ensure that trials are carried out in accordance with Bangladesh's international human rights obligations, international criminal law, and Bangladesh's constitution. While the International Crimes (Tribunals) Act 1973 may have been largely based on international standards at the time of its drafting, international criminal law and its practice have evolved significantly in the last two decades. Trials before a number of international courts, including the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone, and the International Criminal Court, to which Bangladesh is a state

party, have created important standards, yielded significant jurisprudence, and provided valuable experience in handling complex cases that should be taken into account to ensure that the ICT stages fair trials that are conducted in conformity with international standards.

It is also essential that all aspects of the ICT's work meet Bangladesh's obligations as a state party to the International Covenant on Civil and Political Rights (ICCPR), to which Bangladesh is a state party. The ICCPR contains key provisions on fair trials and the rights of accused persons.

We are concerned that without additional amendments to the Act and the Rules the process may not meet international fair trial standards. This could result in a lack of credibility for the process in Bangladesh and internationally, which would only benefit those responsible for the horrific crimes of this period. Human Rights Watch believes that these problems can be addressed easily with some simple amendments to the Act and Rules.

We therefore recommend that:

- The definition of crimes listed in Section 3(2) of the Act be amended to more clearly articulate 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.
- The government consider ways to equip the prosecutors and judges with the relevant technical expertise to handle cases under the ICT's jurisdiction in accordance with international practice.
- Section 6(8) of the Act, which prohibits any challenge to the constitution of the Tribunal and the appointment of its members, be amended in compliance with Article 14(1) of the ICCPR.
- The due process rights of the accused under the Act reflect those in Article 14 of the ICCPR and Articles 55 and 67 of the Rome Statute of the ICC.
- Article 47(A) of the Constitution of Bangladesh be repealed to allow the accused protection of their constitutional rights, including the right to enforce their fundamental rights under Article 44 of the Constitution.
- A Defense Office be established to ensure that the principle of "equality of arms" is recognized.
- An effective and well-thought out Victim and Witness Protection Plan is put into place well ahead of the trials to address protection and support needs before, during and after proceedings.

In the following pages we set out in more detail our concerns and recommendations. These are offered so that the Bangladeshi people have the greatest chance of holding those responsible for atrocities accountable through a fair trial process.

Thank you for your consideration. We look forward to discussing this further and assisting the Bangladeshi government to hold those responsible for serious crimes accountable in a manner consistent with Bangladesh's constitution and international human rights standards.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Brad Adams". The signature is written in a cursive, slightly slanted style.

Brad Adams
Executive Director
Asia Division

cc: Minister of Law, Justice & Parliamentary Affairs, Barrister Shafique Ahmed
Minister of Foreign Affairs, Dr. Dipu Moni
Minister of Home Affairs, Sahara Khatun
Chairman of the International Crimes Tribunal, Nizam ul Haq
Registrar of the International Crimes Tribunal, Mohammad Shahinur Islam

Specific Recommendations

1. Crimes

Section 3 of the Act says that a tribunal set up under the Act will have jurisdiction over crimes against humanity, crimes against peace, genocide, war crimes, violations of any humanitarian rules applicable in armed conflict laid down in the Geneva Conventions of 1949, and any other crimes under international law. However, these crimes are not clearly defined in the Act. We urge changes to the Act to more clearly articulate 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. The “Elements of Crimes” created by the Rome Statute of the ICC and which is based on, among other things, extensive research on case law of international and national war crimes trials and human rights instruments, offers valuable guidance to this end, provided it is done in accordance with Article 15 of the ICCPR.¹

2. Judges

We are pleased that the July 2010 amendment to Section 6 (2) of the Act removed the provision that a person who is qualified to be a member of a general court martial may be appointed as chairperson or member of a tribunal. The revised provision, which provides that any person who is a judge, qualified to be a judge, or has been a judge of the Supreme Court of Bangladesh may be appointed to the Tribunal, is an important improvement. It reflects the current practice in international law that such tribunals should be comprised exclusively of qualified civilian judges.

No judge should participate in a case in which his or her impartiality might reasonably be put in doubt. We are concerned about Section 6 (8) of the Act, which does not allow challenges to the composition of the tribunal, its chairperson or its members. This section should be amended to ensure compliance with Article 14(1) of the ICCPR, which provides that everyone is entitled to be tried by a “competent, independent and impartial tribunal.”²

As under the Rome statute, both the prosecutor and the accused should have the power to request the disqualification of a judge. Article 41 (2) of the Rome Statute grants the prosecutor and the accused the right to request the disqualification of a judge.

¹ Article 15 of the ICCPR states: “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. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. 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.”

² Article 14(1) of the ICCPR states that, “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.”

3. Due Process Rights of the Accused

To promote consistency with international fair trial standards, we urge your government to ensure the rights of defendants in criminal proceedings. This includes clearly articulating a defendant's rights before the ICT. Section 17 of the Act provides accused persons important rights to give explanations relevant to the charges against him or her, conduct his or her own defense or have the assistance of counsel, present evidence at trial, and cross-examine witnesses.

The Act or Rules should include additional protections at both the investigative and trial phases to ensure that Bangladesh lives up to its international obligations under article 14 of the ICCPR, including the right of an accused to:

- Not be compelled to testify or to confess guilt. Article 67 of the Rome Statute states that the accused has the right to remain silent “without such silence being a consideration in the determination of guilt or innocence.”
- Communicate with counsel in confidence. The Rome Statute (Article 67) states that the defense shall have the right to “communicate freely with counsel of the accused’s choosing in confidence.”
- Be tried without undue delay, as required under Article 14(1) of the ICCPR.
- Stage an effective defense. To do so, the prosecutor should be required to submit to the defense any evidence in the prosecutor’s possession or control which, as Article 67 of the Rome Statute says, “shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of the prosecution evidence.” This is crucial to determine truth and promote fairness in the proceedings. It is also an important safeguard against prosecutorial misconduct and should be incorporated by amendment to the Act or Rules. Requiring the prosecution to disclose exculpatory evidence is standard practice before the Yugoslav and Rwandan tribunals, the Special Court for Sierra Leone and the ICC.
- Have adequate time and facilities for the preparation of the defense. The three weeks allowed by the Act fall far short of normative practices in the various international tribunals, where the defense typically receives several months to prepare after detailed receipt of the prosecution’s witness statements and other evidence.
- Not have imposed on him or her any reversal of the burden of proof or any onus of rebuttal. Article 14(2) of the ICCPR explicitly states that defendants shall enjoy the right to be “presumed innocent until proven guilty according to law.” This requires the prosecution to prove its case. However, Rule 51 reverses the burden of proof to the accused in an alibi defense. Consistent with the established practice of the ICTY, ICTR, and ICC, the Act or Rules should be amended to require the defendant to provide notice of his or her alibi so as to provide the prosecution with an adequate opportunity to respond, but the burden of proof should remain with the prosecution.
- Include the principle of *ne bis in idem*, which ensures that no person will be tried with respect to conduct that formed the basis of a prior conviction or acquittal in another court.

4. Fundamental Rights and Article 47(A) of the Constitution

Human Rights Watch is very concerned about the application of Article 47(A) of the Constitution of Bangladesh. Article 47(A) states, “This Article further denies any accused

under the ICT Act from moving the Supreme Court for any remedies under the Constitution, including any challenges as to the unconstitutionality of Article 47(A).”

This provision denies an accused protections guaranteed to all other persons in Bangladesh, including provisions under Article 33 related to safeguards against arrest and detention; provisions under Article 35 related to protections in respect of trial and punishment; and provisions under Article 44 related to enforcement of fundamental rights, including applying to the High Court for protection of these rights.³ These are fundamental rights guaranteed in the constitution and international law, which are accorded to accused persons in all other criminal trials. There is no justification for withdrawing these rights to those accused of violations of international humanitarian law. This article should be repealed as it could form the basis for complaints that fair trial standards are not met under the ICT Act.

5. Setting-up a Defense Office

A fundamental component of a fair trial is "equality of arms." Equality of arms refers to the principle that every party must be afforded a reasonable opportunity to present his or her case under conditions that do not place the party at a substantial disadvantage vis-à-vis the opponent.

Cases involving allegations of war crimes, crimes against humanity and genocide are more complex than those involving ordinary murders or other serious domestic crimes. Even experienced attorneys may lack the expertise, including knowledge of the extensive and complicated body of international jurisprudence on these crimes, to effectively defend their clients. It is as yet unclear how many accused will be brought before the court. However, there are important lessons that can be learned from the experience of other courts handling these crimes that may well be applicable here.

Consideration should be given to establishing a “Defense Office” as recent international experience has shown the important role that it can play in protecting the rights of the accused. Such an office can help provide access to key jurisprudence and relevant developments in international criminal law. It can provide training on investigative techniques. At the Special Court for Sierra Leone, the head of the Defense Office makes submissions to the court administration and before the judges on issues relevant to defense representation and fair trials. The office further helps to ensure that defense counsel have adequate support to prepare and present cases. A Defense Office was also established to provide assistance to defense attorneys appearing before the War Crimes Chamber in Bosnia-Herzegovina (the “Odsjek krivicne odbrane,” generally known by its Bosnian acronym OKO).

The Defense Office in these institutions also plays the vital role of maintaining a list of qualified lawyers who can be assigned to the accused in the event that the accused cannot afford legal assistance of his or her own choosing.

6. Interpreter

English and Bengali are the official languages in the trial process. Section 10(3) of the Act states that the accused *may be* provided with an interpreter if he or she is unable to express

³ Article 47(A) of the Constitution of Bangladesh.

himself or herself in, or does not understand, English. This section should be amended to make it mandatory to provide the free assistance of an interpreter, in accordance with Article 14(3)(f) of the ICCPR, which states that the accused has the right “to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

7. Grounds for excluding criminal responsibility or jurisdiction

Consistent with international practice, we urge your government to incorporate recognized defenses to war crimes, crimes against humanity and genocide into the ICT. Taking into account Article 31 of the Rome Statute, grounds for excluding criminal responsibility should include mental capacity, reasonable and proportional self-defense, and actions taken under duress resulting from an imminent threat of death or serious bodily harm.

Article 26 of the Rome Statute says, "The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime." A similar provision should be added to the International Crimes (Tribunals) Act.

8. Witness and victim protection

The Act or Rules should be amended to require the protection of victims and witnesses appearing before the court, including ensuring their safety, dignity, privacy, and physical and psychological well-being. This obligation, which is also included in the Rome Statute, extends to all witnesses, without regard to their affiliation with either the prosecution or the defense, and to all victims.

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. Ensuring the attendance and safety of witnesses will depend on the ability to protect them and treat them with dignity. The experience of other tribunals for these types of crimes strongly suggests that the creation of an adequately resourced witness and victim protection unit within the court administration is an essential component of their successful functioning. At a minimum, such a unit should be able to protect witnesses, victims and their family members before, during and after court appearances, protect personal information, and provide secure transportation to and from the court. Such a unit should also have the expertise to determine when in-country or, in extreme cases, out of country relocation is appropriate and to make arrangements accordingly.

Witnesses should know what rights they have and the protections that are available to them, both inside and outside the courtroom. Clear amendments to the Act or Rules would encourage consistency in the treatment of witnesses, which can also encourage witnesses to step forward and provide testimony, thus strengthening cases.

At the same time, it is important to ensure the rights of accused persons. If witnesses are able to testify without disclosing their identities to defendants, then the criteria for making this determination should be clearly and carefully delineated so that an accused person's fair trial rights are not compromised.

9. Interlocutory Appeals

The Rules allow for appeal on matters of law to the Appellate Division of the Supreme Court only after the conviction of an accused. It is essential to fair trials for parties to be able to appeal key decisions during the trial process instead of waiting for a conviction.

International tribunals allow for the defense and prosecution to appeal on the proceedings in front of an appellate chamber. Being forced to raise these concerns only at the conclusion of the proceedings in front of an appellate court not familiar with the conduct of the trial will only serve to lengthen the final verdict and could cast a shadow on whether the trials were conducted fairly.

A dedicated appeals chamber should be established to hear interlocutory appeals from both defense and prosecution. Contrary to anxieties about slowing down the trials, such an appeals bench would expedite the entire process by avoiding later appeals and retrials if the trial court is later found to have erred.

10. Treatment of detainees

Rule 16(2) states that, “No person during investigation under the Act shall be subjected to any form of coercion, duress or threat of any kind.” This is a welcome statement of principle that is consistent with the Convention against Torture (CAT), to which Bangladesh is a state party. The CAT defines torture as any act by which “severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third party committed...intimidating or coercing him or third person, or for any reasons based on discrimination of any kind,” where such pain or suffering is carried out either with the consent or acquiescence of a public official.

As Bangladesh's law enforcement agencies have a long history of torture and using coercion and duress to force criminal suspects to confess to crimes, we urge you to amend the Rules to establish a process for the court to consider allegations of torture or mistreatment and to provide an appropriate remedy. It will be important for the credibility of the ICT for all allegations of torture or mistreatment to be impartially investigated promptly and transparently.

Human Rights Watch strongly supports the draft law on torture currently placed before Parliament. Passage of this bill and its application to the ICT would be a strong signal of the government's commitment to end torture.

11. Improving capacity to investigate, prosecute and adjudicate complex crimes

Ensuring that prosecutions and trials meet international standards requires considerable technical expertise so that the cases presented and verdicts delivered are based on sufficient, legally obtained evidence. We are concerned that Bangladesh's limited experience in trying grave international crimes means that prosecutors and judges are not sufficiently trained and experienced to effectively handle these complex cases. Indeed, experience of other international and domestic criminal tribunals has shown that building successful cases against senior leaders responsible for orchestrating mass human rights violations is significantly more complex than prosecuting and adjudicating ordinary crimes and demands specialized knowledge and skills. For instance, prosecutors and judges should possess substantive knowledge of the elements of the crimes in question, relevant

jurisprudence and the different modes of liability to ensure that the evidence addresses the alleged criminal conduct. Expertise in building and trying cases based on documentary evidence (including the capacity to analyze political and military structures) and witness testimony is also essential, particularly when it comes to trying senior officials.

The difficulties surrounding prosecuting and trying cases are compounded in the ICT because the crimes in question were committed four decades ago. We therefore urge your government to consider ways to bolster the capacity of the prosecutors and judges, such as employing technical experts to provide regular trainings and other ongoing substantive support so that the cases presented are as strong as possible and are tried in accordance with international standards and practice.

12. Death penalty

Human Rights Watch opposes the death penalty in all circumstances as an inherently cruel and unusual form of punishment and a violation of fundamental human rights and therefore recommends this penalty be removed.

Section 21 (2) of Act allows for the death penalty to be imposed. Life imprisonment is the maximum penalty that can be handed down by the International Criminal Court, the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia. The UN General Assembly adopted a resolution in December 2007 calling for a moratorium on executions with a view to abolishing the death penalty.