

24 June, 2009

**Opinion of the Law Commission on the technical aspects of the International  
Crimes (Tribunals) Act, 1973 (Act No. XIX of 1973)**

Crimes against humanity, war crimes, genocide etc are serious offences against the mankind under the international laws. Commission of such offences not only concerns a nation state where they are committed but also the international community, and none can avoid the obligation to investigate, prosecute and punish the perpetrators. The judgments of the Nuremberg Trial and the Tokyo Trial, and various treaties and conventions made thereafter and the decisions of different tribunals helped develop the jurisprudence for investigation, prosecution and trial of such offences. The statute of limitation has got no application in the investigation, prosecution and trial of such offences. The objective of such prosecution is not only to punish offenders but also to do justice by putting an end to impunity for the perpetrators and contribute to the prevention of such offences. In order to achieve such objective, what is most required is to ensure fair trial by an impartial and independent tribunal, national or international on the basis of internationally accepted standard rules of procedure and evidence.

The International Crimes (Tribunals) Act, 1973 (Act XIX of 1973) was enacted for investigation, prosecution and punishment of the perpetrators of such offences in Bangladesh. The Act was unique in the sense that in Bangladesh for the first time in human history such offences were adopted in national jurisprudence and the procedure was laid down for trial of the offenders.

Upon receipt of the reference dated 21 May, 2009 for review of the Act and recommendation, if any, for amendment of the Act, we sought opinion of learned senior members of the legal profession, jurists, academicians and other persons, who are 1. Justice Kemal Uddin Hossain, 2. Justice A.T.M. Afzal, 3. Justice Mohammad Habibur Rahman, 4. Justice Mustafa kamal, 5. Justice Mohammad Golam Rabbani, 6. Justice Kazi Ebadul Hoque, 7. Chairman, Department of law, University of Dhaka, 8. Chairman, Department of law, University of Rajshahi, 9. Chairman, Department of law, University of Chittagong, 10. Chairman, Department of law, Islamic University, Kustia, 11. Chairman, Department of law, BRAC University, Dhaka, 12. President, Supreme Court Bar Association, Dhaka, 13. Secretary, Supreme Court Bar Association, Dhaka, 14. President, Dhaka Bar Association, Dhaka, 15. Secretary, Dhaka Bar Association, Dhaka, 16. Mr. Waliur Rahman, Director, BILIA, 17. Mr. Mohammad T.H. Khan, 18. Mr. Rafique Ul-Haq, 19. Dr. M.Zahir, 20. Mr. Khandker Mahbubuddin Ahmed, 21. Dr.Kamal Hossain, 22. Mr. M.Amir-ul-Islam, 23. Mr.Mahmudul Islam, 24. Mr.Rokanuddin Mahmud, 25. Mr.Abdul Baset Majumder, 26. Mr. Ajmalul Hassain, 27. Mr. Mainul Hosein, 28. Mr. Akter Imam, 29. Mr.Sheik Rajjak

Ali, 30. Mr. Abdur Razzaq, 31. Mr. Tawfique Nawaz, 32. Mr. Abdul Razzak Khan and 33. Mr. Khan Saifur Rahman.

Of them, Mr. Justice Kazi Ebadul Hoque and Dr. Abdullah Al Faruque only sent their opinions. Dr. Kamal Hossain and Mr. Ajmalul Hossain requested for time but ultimately did not file any opinion. Mr. Harun ur Rashid, former ambassador and Mr. David Bergman, a human rights activist volunteered submitting their opinions. We have examined their valued opinions.

We have also examined the relevant laws, namely, (1) the Convention on the Prevention and Punishment of the Crimes of Genocide 1948, (2) the Geneva Convention, 1949 (also Additional Protocols 1977 and 2005), (3) the Convention for Protection of Cultural Property, 1954 at the Hague, (4) the Vienna Convention on the Diplomatic Relations 1961, (5) the International Covenant on Economic, Social and Cultural Rights, 1966, (6) the Universal Declaration of Human Rights, 1949, (7) the Rome Statute of International Criminal Court, 2002 and the rules of procedure and evidence, the elements of offences etc adopted thereunder, (8) the Statute of the International Criminal Tribunal for Rwanda and (9) the Law for prosecution of crimes committed during the period of Democratic Kampuchia.

After deliberation, the Law Commission finds certain amendment of the Act necessary. Our main focus was on the individual responsibility in the commission of the crimes and holding of the trial by an independent, impartial and comprehensive tribunal on the basis of internationally accepted rules of procedure and evidence. The prosecution should be entrusted with the responsibility of investigation and made answerable to the tribunal only. We have also suggested provisions for the registry of the tribunal.

The attached bill contains the proposed amendments. The draft bill may be made in order by qualified and experienced draftsmen before placing it in the Parliament for consideration.

(Sunil Chandra Paul)  
Member  
Law Commission

(Dr. Shah Alam)  
Member  
Law Commission

(Justice Md. Abdur Rashid)  
Chairman  
Law Commission

## **The International Crimes (Tribunal) (Amendment) Bill, 2009 (Draft)**

1. This Bill may be called The International Crimes (Tribunal) (Amendment) Bill, 2009.

2. In the title of the International Crimes (Tribunals) Act, 1973 delete 's' from the word 'Tribunals'.

3. After the semi colon in clause (a) of section 2 of the Act, insert the following:

'Explanation: the Rajakar, the Al-Badar, the Al-Shams or any other armed group or groups shall be deemed to have been placed under the control of the Armed Forces.'

Insert the following clause after clause (a) of said section 2 of the Act:

“(aa) Armed Forces include the forces raised and maintained under the [Army Act](#), 1952 (XXXIX of 1952), the [Air Force Act](#), 1953 (VI of 1953) and/or the [Navy Ordinance](#), 1961 (XXXV of 1961;”

Omit clause (d) of said section 2.

In clause (f) of said section 2, substitute 'a' with 'the'.

4. In subsection (1) of section 3 of the Act, substitute 'A' with 'The', insert the words 'or any individual' after the words 'auxiliary forces' and delete the words 'commits or has' and substitute the clause 'whether before or after the commencement of this Act' with the clause 'during the period between 25th of March to 16th December, 1971'.

In subsection (2) of said section 3 substitute 'a' with 'the' and delete the words 'whether or not in violation of the domestic law of the country where perpetrated';

5. In subsection (2) of section 4 of the Act, insert the words, 'or individual' after the words 'any commander or superior officer.'

6. In subsection (1) of section 6 of the Act, after the words 'set up' insert the words 'the Tribunal composing of the Court, the Office of the Prosecutor and the Registry. The Court may have more than one bench of three Judges for the trial of the offences specified in section 3(2) of the Act and one of them shall be the Chairman of the Tribunal. The Chairman shall be responsible for overall administration of the Registry and the proceedings of the trial of cases' and delete the words appearing thereafter 'one or more ... four other members'.

In subsection (2) of said section 6, after words 'or has been' insert the words 'a former Judge of the said Court may be appointed as Chairman or member of the Tribunal.' and delete the rest of the words following. Then, insert the words, 'Judges of the Tribunal shall be persons of high moral character, impartiality and integrity. Terms and conditions of service of the Judge shall be equivalent to those of a Judge of the High Court Division of the Supreme Court of Bangladesh. They would be independent of

the Government in the performance of their duties and functions'.

In subsection (3) of said section 6, substitute 'a' with 'the' and 'Dacca' with 'Dhaka'.

In subsection (4) of said section 6, substitute 'a' with 'the'.

In subsection (5) of said section 6, substitute 'a' with 'the' and before the full stop, insert the words "and decision may be given in the absence of such member. No act, proceedings or decision of the Tribunal shall be invalid or be called in question merely on the ground of such absence."

In subsection (6) of said section 6, substitute 'a' with 'the'.

In subsection (7) of said section 6, substitute 'a' with 'the'.

In subsection (8) of said section 6, substitute 'a' with 'the'.

7. In subsection (1) of the Act, substitute 'a' with 'the'.

In subsection (2) of section 7 of the Act, after the full stop insert the words 'Office of the Prosecutor shall act independently of the Government as a separate organ of the Tribunal.'

8. For subsection (1) of section 8 of the Act, insert the following:

'Office of the Prosecutor shall be responsible for investigation and prosecution of the offences within the jurisdiction of the Tribunal. The Chief Prosecutor shall have full authority over the management and administration of the office including the staff, facilities and the resources.'

For subsection (2) of section 8 of the Act, insert the following:

'Any person appointed as an Investigation Officer shall investigate under the direct supervision and control of the Chief Prosecutor.'

In subsection (8) of said section 8 of the Act, substitute the words 'Any Magistrate of the first class' with the words 'The Tribunal'.

8. After section 8 of the Act, add the following new section:

Section 8A.

(1) The registry shall be responsible for the non-judicial part of the administration and servicing of the tribunal and keeping of the records.

(2) The Registry shall consist of a Registrar and such other staff as may be necessary.

(3) The Registrar and other staff of the registry shall be appointed by the Government. The terms and conditions of service of the Registrar shall be those of a District Judge.

10. In subsection (1) of section 9 of the Act, substitute 'a' with 'the'.

11. In subsection (1) of section 10 of the Act, substitute 'a' with 'the' and insert the words 'and in following the procedure the Tribunal shall ensure that a trial is fair and is conducted with full respect for the rights of the accused and due regard for protection of the victims and witnesses' after the words 'before a Tribunal,'.

In clause (e) and (f) of subsection (1) of said section 10, after the words 'witnesses and' insert the words 'with permission of the Tribunal'.

In subsection (2) of said section 10 of the Act, insert the words 'Bengali and/or' before the word 'English'.

Delete subsection (3) and (5) of said section 10 of the Act.

12. In section 11 of the Act, substitute 'a' wherever it appears with 'the'.

13. In section 13 of the Act, substitute 'a' with 'the'.

14. Delete section 14 of the Act.

15. In section 15 of the Act, substitute 'a' with 'the'.

16. In section 19 of the Act, substitute 'A' wherever it appears with 'The'; and in subsection (1) insert the words 'forensic evidence' after the words 'films and tape-recordings' and in subsection (4) the words 'Government, national or foreign' in place of the words 'official governmental'.

Add the following subsection after subsection (4) of said section 19:

'(5) The accused shall be presumed to be innocent unless proved Guilty and the burden shall be on the prosecution to prove him guilty.'

17. In subsection of section 20 of the Act, substitute 'a' with 'the'.

For subsection (2) of said section 20, insert the following:

"(2) Upon conviction of a person of an offence specified in section 3(2) of the Act, the Tribunal may impose any of the following penalties proportionate to the gravity of offences(s) as appears to be just and proper:

(a) Sentence of death or imprisonment for life not exceeding a maximum of thirty years;

(b) Imprisonment for a specified number of years;

(c) A fine; and

(d) A forfeiture of the property and assets derived directly or indirectly from such crimes subject to the rights of the bona fide third parties.

Explanation: All imprisonments shall be rigorous.”

In subsection (3) of said section 20, insert the word ‘the Tribunal’ for the word ‘Government’.

Add the following new subsections after subsection (3):

(4) “In determining the sentence, the Tribunal shall take into consideration such factors as the gravity of the crime and the individual circumstances of the convict. In imposing a sentence of imprisonment, the Tribunal shall deduct the time, if any, previously spent in detention. When a person is convicted of more than one offence, the Tribunal shall impose sentence for each crime and the total period of imprisonment shall not exceed the period of imprisonment for life.

(5) The Tribunal may make an order in a fit case and after hearing the convicted person for reparation to the victim(s) including restitution, compensation and rehabilitation and in exceptional circumstances, upon an application or on its own motion, may also determine the extent of damage, loss and injury to, or in respect of, the victim(s). “

18. In section 21 of the Act, substitute ‘a’ with ‘the’ and add the words ‘and the Chief Prosecutor may also present an appeal against an order of acquittal both on law as well as on facts’ after the words ‘conviction and sentence’.

Insert (1) after said section 21 and the following subsection after the above proviso:

“(2) Any party at the trial may also present an appeal before the Appellate Division against an interlocutory order of the Tribunal within sixty days only on the ground of miscarriage or failure of justice.

Provided that pending disposal of such limited appeal the Court of appeal shall not grant stay of any proceeding of the Tribunal.”

19. In section 22 of the Act, substitute ‘a’ with ‘the’.

20. In section 24 of the Act, substitute ‘a’ with ‘the’ and insert the words ‘including the Supreme Court of Bangladesh’ after the words ‘before any Court’.

