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International Crimes Tribunal of Bangladesh: A Unique Step towards the Development of International Criminal Justice System

Dr. Mohammad Nazmuzzaman Bhuian[*] and Nahid Rabbi[†]

1. Introduction

There lie some common denominators of behavior, even in the extreme circumstances of brutal armed conflict, and those who breached them were subject to trial and punishment since the time of the ancient Greeks, and probably well before that.[1] The history dictates that the war crime prosecutions have been generally restricted to the vanquished or the isolated cases of rogue combatants in the victor's army.[2] The Nuremberg and Tokyo International Military Tribunals created after World War II in order to try and punish the Nazi and Japanese leaders for their roles in launching aggressive wars and ordering or authorising war crimes and crimes against humanity played the pioneering role in establishing individual criminal responsibility of perpetrators.[3] In course of time, the establishment of ad hoc tribunals and hybrid tribunals can be considered as a response to individual states' reluctance to prosecute perpetrators of international crimes in cases in which they had no strong interest or will.[4] The creation of new international criminal tribunals from the 1990s, culminating in the creation of the permanent International Criminal Court in 1998, marked an extraordinary step forward in the development of international law.[5] However, justice in the Hague has transpired from a one-way street to a dialogue among international institutions as well as jurisdictions and, most of all, with domestic jurisdictions.[6] The ICC is based on the principle of complementarity — that the primary responsibility for exercising jurisdiction over international crimes rests

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1 William Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 2017) 1.

2 Ibid.

3 Yves Beigbeder 'The Pioneers: The Nuremberg and Tokyo Military Trials', In: *International Criminal Tribunals* (Palgrave Macmillan, 2011) 1.

4 Cenap Çakmak, *A Brief History of International Criminal Law and International Criminal Court* (Palgrave Macmillan, 2017) 2.

5 Yves Beigbeder, *International Criminal Tribunals: Justice and Politics* (Palgrave Macmillan, 2011) 1.

6 Carsten Stahn, 'The Future of International Criminal Justice', Commentary <http://www.haguejusticeportal.net/Docs/Commentaries%20PDF/Stahn_The_Future%20of%20International%20Justice_EN.pdf, p. 10> accessed 27 October 2019.

with domestic jurisdictions. In addition, one of the most important elements of national implementation of IHL obligations is the enactment of a comprehensive legal framework for effective prosecution and punishment of serious violations of IHL.[7] States must repress all violations and, in particular adopt criminal legislation for the punishment of those who commit grave breaches of the Conventions.[8] With that objective, the International Crimes Tribunal (ICT) of Bangladesh had its genesis in the International Crimes (Tribunals) Act of 1973[9] (herein after referred to as ICT Act of 1973), which proposed the establishment of a pure national tribunal to try war crimes for the first time in the history of International Criminal Law.[10] The Act was promulgated especially for trying the criminals who committed war crimes during the liberation War of Bangladesh in 1971 against the then West Pakistan. Using Nuremberg as a template, the Act cited genocide, crimes against humanity and war crimes, amongst others, as the basis for bringing anti-liberation military personnel and their auxiliary forces to justice for crimes committed against civilians and pro-liberation freedom fighters alike in 1971.[11] It is only with the adoption of the Protocol I of 1977 additional to the Geneva Conventions of 1949 (AP I) that the concept of liberation war or struggle of people in the exercise of their right to self-determination was included in the realm of international armed conflict.[12] In that scenario, even before the AP I came into effect, the adoption of the ICT Act of 1973 on the basis of the Nuremburg Charter to try international crimes by a national tribunal was a bold and unique step on the part of a newly independent state like Bangladesh. Although hybrid tribunals, as mentioned above, are often thought to avoid the drawbacks of

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7 International Committee of the Red Cross, *The Domestic Implementation of International Law: A manual* (ICRC, 2011) 29.

8 Common Articles 50, 51, 130 and 147 of the Geneva Conventions; Additional Protocol I, Articles 11, 85 and 86; Lauri Hannikainen, RaijaHanski, and Allen Rosas, *Implementing Humanitarian Law Applicable in Armed Conflicts: The Case of Finland* (Martinus Nijhoff, 1992) 114.

9 Act No. XIX of 1973 of the People's Republic of Bangladesh.

10 Though earlier the 'Leipzig Trials' were held to try German soldiers accused of war crimes in World War I, the trials barely had the recognition of true trials and in the Allied discussions during World War II the fiasco of the Leipzig Trials was regarded as an ideal example of how not to proceed. The trials were critiqued to be more like disciplinary proceedings of the German army than any international reckoning. Only a dozen men, prison camp commandants and U-boat officers rather than the generals and admirals in Berlin, were brought to justice by the German Supreme Court (Reichsgericht) rather than those of the victors. See for details *Claud Mullins, The Leipzig Trials: An Account of the War Criminals' Trials and a Study of German Mentality* (H. F. & G. Witherby, 1921); James F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (Greenwood Press, 1982).

11 John Cammegh, "The Bangladesh War Crimes Tribunal: Reconciliation or Revenge?" <http://www.internationallawbureau.com/blog/wp-content/uploads/2011/11/John-Cammegh-The-Bangladesh-War-Crimes-Tribunal-Reconciliation-or-Revenge_.pdf, (2011)> accessed 17 October 2019.

12 See for details, Frits Kalshoven and Liesbeth Zegveld, *Constraints On the Waging of War : An Introduction to International Humanitarian Law* (ICRC, 2001) 85.

domestic trials and proceedings by purely national tribunals, the successful resurrection of ICT in 2010 are indicative of its effective and unique contribution to the international criminal justice system. It has challenged the notion that in cases of international crimes, national courts are not often the appropriate for a to judge the perpetrators. Therefore, ICT, being an important milestone in the history of the development of international criminal justice system, is under an obligation to prove its efficacy in doing domestic justice while upholding international law and complying with international fair trial standards.

2. Punishing War Crimes: Historical Evolution till Nuremburg and Tokyo

The trial of Peter von Hagenbach can be regarded as the first international case for the perpetration of atrocities. In 1474, he was tried for atrocities committed during the occupation of Breisach. Von Hagenbach was charged with war crimes when the town was retaken; subsequently convicted and beheaded thereafter.[13] With the development of the law of armed conflict in the mid-nineteenth century, concepts of international prosecution for humanitarian abuses slowly began to emerge.[14] One of the founders of the Red Cross movement, which grew up in Geneva in the 1860s, urged a draft statute for an international criminal court with the task of prosecuting breaches of the Geneva Convention of 1864 and other humanitarian norms; but Gustav Monnier's innovative proposal was much too radical for its time.[15] In fact, such pursuit faced with two challenges: first, in classical international law, states, not individuals, were the exclusive subjects. Therefore, recognition of the individual as a subject of international law was required; second, it was necessary to overcome states' defensive attitude towards outside interference, which was rooted in the concept of sovereignty. Even the International Court of Justice, which was established as the principal judicial organ of the United Nations (UN), had no jurisdiction over individuals.[16] It is argued that the 1948 Genocide Convention and 1949 Geneva Conventions provided the foundations of i*ndividual criminal responsibility,* and envisaged that such responsibility be evidenced by an international criminal court. However, long before these treaties, the attempt was taken to establish individual criminal responsibility under the Versailles Peace Treaty of 28 June 1919 following World War I.[17], But actual prosecution for violations of the Hague

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[13] Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals: The Law of Armed Conflict, Vol. II*, (London: Stevens & Sons Limited, 1968), p. 463; Mahmoud Cherif Bassiouni, 'From Versailles to Rwanda in 75 Years: The Need to Establish a Permanent International Court' (1997) 10 *Harvard Human Rights Journal* 11.

[14] William Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 2017) 1.

[15] Christopher KeithHall, 'The First Proposal for a Permanent International Criminal Court' (1998) 322 *International Review of the Red Cross* 57.

[16] Article 36 of the Statute of the International Court of Justice.

[17] Articles 227-230 of the Versailles Peace Treaty, 1919.

Conventions would have to wait until Nuremberg after World War II.[18] Although largely regarded as a failure at the time, the Leipzig trials were the first attempt to devise a comprehensive system for prosecution of violations of international law.

2.1 Nuremberg International Military Tribunal (Nuremberg Tribunal)

After World War II, leaders of the Allied nations — United States, France, Great Britain, and the USSR — drafted the Nuremberg Charter creating the International Military Tribunal for the "just and prompt trial and punishment of the major war criminals of the European Axis" powers.[19] The Tribunal had jurisdiction or authority to adjudicate crimes against peace, war crimes, and crimes against humanity.[20] The Nuremberg Tribunal established *in personam* jurisdiction or jurisdiction over the person leading to the indictment of twenty-four individuals held between 20 November 1945 and 1 October 1946 and the sentences ranged from imprisonment to death by hanging.[21] The Nuremberg Trials earned both appreciations and criticisms. Richard J. Goldstone, Chief Prosecutor of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda (1994-1996), called the Nuremberg judgment 'one of the beacons to shine out of the 20th century'.[22] US Chief Justice Stone once referred to the Nuremberg trial as a 'high- grade lynching party'.[23] However, the Nuremberg Tribunal remains an important part of international criminal law because it established limits to State sovereignty and established the principle of individual responsibility for barbaric military acts during wartime:

> [C]rimes under international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced[…] individuals have international duties which transcend the national obligations of obedience imposed by the individual state.[24]

Nuremberg may have its criticisms for being imperfect victors' justice, the application of *ex post facto* legislation and the *tuquoque* arguments, but it remains the defining war crimes trial of the twentieth century, and is used later as a symbol, a

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[18] 'Violations of the Laws and Customs of War', Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919 (Clarendon Press, 1919).

[19] Howard Ball, *Prosecuting War Crimes and Genocide: The Twentieth Century Experience*, (University of Kansas Press, 1999) 288.

[20] Ellen Podgor & Roger Clark, *Understanding International Criminal Law* (LexisNexis, 2008).

[21] See for details, Geoffrey Best, *War and Law: Since 1945*, (New York: Oxford University Press, 2002).

[22] Robert Koenig, '50 Years Later, Nuremberg Ghosts Walk' *St. Louis Post-Dispatch* (Newspaper Article), 29 September 1996.

[23] American Law Institute Annual Meeting, 'Remarks of the Chief Justice', 17 May 2004 <https://www.supremecourt.gov/publicinfo/speeches/sp_05-17-04a.html> accessed 27 October 2019.

[24] International Military Tribunal (Nuremberg), Judgment and Sentences, October 1, 1946, reprinted in *American Journal of International Law, 1947*, Vol. 41, pp. 172, 216.

model and a blueprint for the international criminal tribunals created in the 1990s and for the creation of permanent International Criminal Court.[25]

2.2 International Military Tribunal for the Far East (Tokyo Tribunal)

Also in the aftermath of World War II, in 1946, the Tokyo Tribunal was created for the "just and prompt trial and punishment of the major war criminal in the Far East".[26] The wartime terror campaigns of Japan imposed a "kill all, burn all, destroy all," ideology upon the soldiers and it was implicated with the brutal murder of civilians, torture of prisoners, and accused of utilizing the bubonic plague against Chinese cities.[27] The Tokyo Trial is not seen on an equal footing as the Nuremberg Trial, since it was a US- created and dominated tribunal marred with the same criticisms as Nuremberg i.e. victors' justice, retroactive legislation, double standards.[28] Its proceedings were faulty, the immunity granted to the Emperor of Japan was questioned and there was substantial dissension among the 11 judges in their debates and judgments.[29] The perfunctory or even dismissive way in which the Tribunal dealt with the defence's challenges was highly criticized.[30] The indictment process was poorly managed. Apart from being inexpertly undertaken, the process was not free from political influence, and was an overambitious one.[31] While the trial was formally fair in terms of the rights and obligations in the Charter and Rules, it was not substantively fair in terms of application of those rules and hence it really was victors' justice'.[32] The Tokyo Trial was not perceived as legitimate not only among many ordinary Japanese people but also to international community.[33]

3. Recent Developments in the Field of International Criminal Justice

The international criminal courts ("ICCs") — the ad hoc International Criminal Tribunals for the Former Yugoslavia and for Rwanda, the recently-established permanent International Criminal Court, and hybrid "internationalized" tribunals such as the Special Court for Sierra Leone—are the international community's attempts to address the worst of the criminal manifestations of racism, nationalism,

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[25] Yves Beigbeder, *Judging War Crimes and Torture, French Justice and International Criminal Tribunals and Commissions (1940-2005)*, (Leiden/Boston: Martinus Nijhoff Publishers, 2006), pp. 255-256.

[26] Geoffrey Best, *War and Law: Since 1945*, (New York: Oxford University Press, 2002).

[27] Gloria Browne-Marshall, 'International Criminal Tribunals and Hybrid Courts', in Mangai Natarajan (ed.), *International Crime and Justice*, (Cambridge: Cambridge University Press, 2011), p. 351.

[28] Yves Beigbeder, *International Criminal Tribunals: Justice and Politics*, (New York: Palgrave Macmillan, 2011), p. 36.

[29] Ibid.

[30] Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal, A Reappraisal* (Oxford/New York: Oxford University Press, 2008), p. 48.

[31] Ibid, pp. 73, 328.

[32] Ibid, pp. 102, 114.

[33] Ibid, pp. 316, 321.

and large-scale xenophobia, mostly in the form of war crimes, crimes against humanity and genocide.[34] The following sections will focus on those recent developments in details.

3.1 Two Ad Hoc Tribunals

It took almost half a century after the Nuremberg and Tokyo International Military Tribunals for the revival of the concept and practice of international criminal courts. Triggered by grave violations of international humanitarian law such as war crimes, crimes against humanity and genocide, the United Nations Security Council, under its Chapter VII powers,[35] created Two *ad hoc* Tribunals, namely, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in 1993 and in 1994 respectively.[36] They were not military courts like the Nuremberg and Tokyo Tribunals; they were 'real' international courts, with judges representing the main legal systems of the world.[37]

3.1.1 International Criminal Tribunal for the former Yugoslavia (ICTY)

Responding to umpteen incidents of international criminal law violations during the conflicts concerning the breakup of the Socialist Federal Republic of Yugoslavia, the UN Security Council initiated investigation on the alleged crimes (through a UN Commission of Experts) and began to consider the persecution of those crimes.[38] The ICTY was established in Resolution 827 (1993), with the goals of putting "an end to such crimes and tak[ing] effective measures to bring to justice the persons who are responsible for them" and "contribut[ing] to the restoration and maintenance of peace".[39] The Tribunal possesses jurisdiction over war crimes, crimes against humanity and genocide committed after 1 January 1991, in the territory of the former

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[34] Maya Steinitz, 'The International Criminal Tribunal for Rwanda as Theater', *Journal of International Law and Policy* (2007), Vol. V, No. 1, p. 1.

[35] The UN Charter sets out in Chapter VII the UN's power to ensure the "maintenance of international peace and security". To ensure the "maintenance of international peace and security", after securing Security Council approval, the UN may take military and/or non-military action. Since these tribunals were established pursuant to Chapter VII of the UN Charter, all Member States of the UN are obliged to cooperate with the tribunals. This includes cooperation in relation to the arrest and transfer of accused persons, as the tribunals have no police force of their own.

[36] International Criminal Law Services (ICLS), 'International Criminal Law and Practice: Training Materials', Module 4, p. 3.

[37] Yves Beigbeder, *International Criminal Tribunals: Justice and Politics* (New York: Palgrave Macmillan, 2011), p. 49.

[38] Establishing a Commission of Experts to Examine and Analyze Information Submitted Pursuant to Resolution 771, S.C. Res. 780, U.N. DOC. S/RES/780 (1992); Mahmoud Cherif Bassiouni, 'The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780', *American Journal of International Law* (1994), Vol. 88, p. 784.

[39] Security Council Resolution 827, Preamble, U.N. DOC. S/RES/827 (Oct. 6, 1993).

Yugoslavia.[40] Furthermore, it has primacy over domestic courts which enables the Tribunal to require the states to accede to its jurisdiction.[41]

The ICTY has jurisdiction over crimes committed during international armed conflicts[42] as well as non-international armed conflicts according to Article 3 of the Statute.[43] A "completion strategy" for ensuring a time befitted completion of its mandate was adopted by the Tribunal in 2003; it also aimed at the coordination of future trials with jurisdictions in the former Yugoslavia.[44] The investigations were all concluded by 31 December 2004. As per the strategy, the ICTY focused its work on "the most senior persons suspected of being most responsible for crimes" within its jurisdiction,[45] whereas the lower level offenders could be tried for their crimes under national jurisdictions.[46] The UNSC Resolution 1966, under Chapter VII of the UN Charter, assures that the tribunal's mandate will be realized through the creation of the International Residual Mechanism for Criminal Tribunals (IRMCT)—an ad hoc mechanism to carry out residual essential functions of both the ICTY and ICTR.[47] The essential function of the IRMCT is, *inter alia*, conducting the trials of individuals suspected of being most responsible for crimes after the tribunals' mandate ends.[48] The IRMCT has a four-year mandate with the possibility for extensions.[49] ICTY has held its final program on December 21, 2017 and has ceased to exist formally from December 31, 2017. International humanitarian law as well as international criminal law have, indeed, been expanded by the work of the ICTY.[50] During its mandate (1993-2017), ICTY, has irreversibly contributed to a change of scenario in the international humanitarian law, provided victims an opportunity to voice the horrors they had experienced, and proved that those suspected of bearing the utmost responsibility for atrocities committed during armed conflicts cannot escape accountability.[51]

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40 Statute of the International Tribunal for the Former Yugoslavia, Articles. 4, 5 (1993).

41 Ibid, Article 9(1).

42 Ibid., Article 2 (providing jurisdiction over grave breaches of the Geneva Conventions).

43 Ibid., Article 3 (providing jurisdiction over violations of certain laws or customs of war, and interpreted in the Tadić decision to apply to non-international conflicts); Duško Tadić, Case No. IT-94-I-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October, 1995, para 79-80.

44 Security Council Resolution 1503, U.N. DOC. S/RES/1503 (Aug. 28, 2003), and S.C. Res. 1534, U.N. DOC. S/RES/827 (March 26, 2004).

45 Security Council Resolution 1534, U.N. DOC. S/RES/1534 (March 26, 2004).

46 Annual Report of ICTY 2002, S/2002/985, para 7, 218.

47 Security Council Resolution 1966, U.N. DOC. S/RES/1966 (December 22, 2010).

48 Ibid.

49 Ibid.

50 William Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, (Cambridge: Cambridge University Press, 2006).

51 United Nations, 'About the ICTY', available <https://www.icty.org/en/about> accessed 31 October 2019.

3.1.2 International Criminal Tribunal for Rwanda (ICTR)

In November 1994, the Security Council voted in favour of creating a second ad hoc tribunal pursuant to a request from Rwanda, charged with the prosecution of genocide and other violations of international humanitarian law committed in the country and surrounding states during the same year.[52] Adopting similar procedures as with the establishment of the ICTY, an investigative commission was established[53], followed by the creation of the Tribunal.[54] The Statute of the ICTR closely resembles the ICTY Statute, and the Tribunals shared a similar structure. The ICTR shared its appeals chamber with the ICTY, which was based in the Hague, to ensure consistent jurisprudence between the two tribunals.[55] The ICTR, located in Arusha, Tanzania, had jurisdiction over war crimes, crimes against humanity, and genocide.[56] However, the ICTR defines crimes against humanity differently from the ICTY. Moreover, the ICTR only had jurisdiction over war crimes in non-international conflicts, and is further limited to crimes committed in Rwanda or by Rwandans in neighboring states between 1 January and 31 December 1994.[57] The ICTR had primary jurisdiction over national courts, but had also transferred cases to domestic courts.[58] It adopted a completion strategy in 2003, along similar lines to the ICTY.[59] Under its completion strategy, it considered applications to transfer least fifty-five cases over to Rwanda, and concluded its own cases by the end of 2013.[60] As with the ICTY, UNSC Resolution 1966 also served to ensure the ICTR's essential functions were realized at the termination of the ICTR's mandate.[61] ICTR formally ceased to exist on December 31, 2015 and the remaining of its functions like ICTY have been vested with the IRMCT.[62] Despite the complaints of mismanagement,

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52 U.N. Doc. S/RES/955 (1994).

53 Security Council Resolution 935, U.N. DOC. S/RES/935 (March 26, 1994).

54 Security Council Resolution 955, U.N. DOC. S/RES/955 (November 8, 1994).

55 ICTR Statute, Article 12(2).

56 Ibid., Articles 2-4.

57 ICTR Statute, Article 1.

58 Laurent Bucyibaruta, Case No. ICTR-2005-85-I, Decision on Prosecutor's Requests for Referral of Laurent Bucyibaruta's indictment to France Rule 11bis of the Rule of Procedure & Evidence; Michel Bagaragaza, Case No. ICTR-05-86-AR11bis, Decision on Rule 11bis Appeal, 30 Aug. 2006; Ildephonse Hategekimana, Case No. ICTR-00-55B-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral under Rule 11bis, 4 Dec. 2008; Yussuf Munyakazi, Case No. ICTR-97-36-R11bis, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11bis, AC, 8 Oct. 2008.

59 Security Council Res. 1503, U.N. DOC. S/RES/1503 (Aug. 28, 2003).

60 Report on the completion strategy of the International Criminal Tribunal for Rwanda, 25 May 2010, S/2010/259; Statement by Justice Hassan B. Jallow, Prosecutor of the ICTR, to the United National Security Council, 18 June 2010 <http://www.unictr.org/Portals/0/.ictr.un.org/tabid/155/Default.aspx?id=1144> accessed 16 June 2011.

61 S.C. Res. 1966, U.N. DOC. S/RES/1966 (Dec. 22, 2010).

62 S.C. Res. 1966, U.N. DOC. S/RES/1966 (Dec. 22, 2010).

corruption, inefficiency and political influence from Rwanda Government, among the most basic and most important of the Tribunal's achievements have been the accumulation of an indisputable historical record, including testimony of witnesses, testimony of victims, testimony of accused, documentary evidence, video recordings and audio recordings.[63] Besides, for the first time, the Genocide Convention of 1948 was interpreted by an international tribunal.[64]

3.2 Hybrid Tribunals

After the ICTY and ICTR were established, international community felt a need to address serious crimes committed in other parts of the world. While these "purely" international courts have been successful in their own way, especially by prosecuting some of the major offenders in the various conflicts, they nonetheless have displayed some significant weaknesses over the course of their existence.[65] They have been extremely expensive endeavors, requiring large numbers of highly paid legal personnel as well as support staff, logistical expenses, and facilities.[66] Moreover, they were located far from the countries they served. Therefore, despite the considerable achievements of these institutions, they were not designed to provide a definitive model for the implementation of international criminal justice.[67] In addition to being massively over budget, the two ad hoc courts which were envisioned as short-term institutions have long outlived their expected life-spans.[68] Thus, the UN was actually experiencing "tribunal fatigue" after creating those ad hoc tribunals for the Former Yugoslavia and Rwanda.[69] Therefore, prior to the creation of the ICC, as the Security Council and the international community became aware of such various features of the ad hoc tribunals that militated against using them as a model for future ad hoc international criminal courts, the U.N. began to search for alternatives.[70] Nonetheless,

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63 Yves Beigbeder, *International Criminal Tribunals: Justice and Politics* (New York: Palgrave Macmillan, 2011), pp. 91 and 104.

64 Ibid, p. 92.

65 Aaron Fichtelberg, *Hybrid Tribunals: A Comparative Examination*, (New York: Springer, 2015), p. viii.

66 Ibid.

67 David Cohen, '"Hybrid" Justice in East Timor, Sierra Leone, and Cambodia: "Lessons Learned" and Prospects for the Future', 43 Stanford Journal of International Law, 2007, Vol. 1, p. 1.

68 Aaron Fichtelberg, *Hybrid Tribunals: A Comparative Examination*, (New York: Springer, 2015), p. viii.

69 Eileen Skinnider, "Experience and Lessons from Hybrid Tribunals: Sierra Leone, East Timor and Cambodia", A paper prepared for the Symposium on the International Criminal Court <http://dspace.africaportal.org/jspui/bitstream/123456789/25560/1/Experiences%20And%20Lessons%20From%20Hybrid%20Tribunals%20-%20Sierra%20Leone,%20East%20Timor%20And%20Cambodia.pdf?1 p. 18> accessed 10 July 2019.

70 David Cohen, '"Hybrid" Justice in East Timor, Sierra Leone, and Cambodia: "Lessons Learned" and Prospects for the Future', *Stanford Journal of International Law*, 2007, Vol. 43, p. 1.

in each of the cases studied here, using a conventional domestic court was not a viable option either.[71] The reasons were manifold. First if all, the defendants in these cases were not ordinary criminals accused of minor crimes; rather they were more often high-profile individuals who played a central role in mass atrocities.[72] Secondly, the states involved in these tribunals were uniquely bad candidates for conducting domestic trials, especially, in some cases, where the domestic system literally did not exist.[73] Where even such system existed, there was little confidence in the ability of the local government to conduct fair, impartial trials for defendants in such high-profile cases.[74] These considerations actually led to the birth of a new form of international criminal justice institution-the hybrid tribunal. Hybrid tribunals and courts, with national and international elements, thus were expected to help create efficient, locally based courts to address serious international crimes. These tribunals are referred to as "hybrid" or "internationalized" because both the institutional apparatus and the applicable law consist of a blend of the international and the domestic, resulting in a mixed form of justice.[75] Each of these tribunals was created in particular circumstances with the need to operate also in different circumstances and therefore there is not a uniform "hybrid" model.[76] These tribunals were established to investigate and prosecute crimes that occurred in a time prior to the existence of the permanent international court.[77] Six such tribunals were created in the first half of the decade. The Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Panels of East Timor, Kosovo's Regulation 64 panels, Bosnia's War Crimes Chambers (BWCC) and a special Tribunal for Lebanon are examples of hybrid tribunals.

3.2.1 Special Court for Sierra Leone (SCSL)

In an attempt to promote justice and end impunity for the atrocities committed by warring factions in Sierra Leone during its 11 year civil war, the UN and the Sierra

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71 Aaron Fichtelberg, 2015, *Hybrid Tribunals: A Comparative Examination*, New York: Springer, p. viii.

72 Ibid.

73 See, for example, the case of Sierra Leone, in David Crane, "Hybrid Tribunals - Internationalized National Prosecutions", *Penn State International Law Review*, 2007, Vol. 25, p. 807.

74 Aaron Fichtelberg, *Hybrid Tribunals: A Comparative Examination*, (New York: Springer, 2015), p. ix.

75 Lindsey Raub, "Positioning Hybrid Tribunals in International Criminal Justice", *New York University Journal of International Law and Politics*, 2009, Vol. 41, p. 1016.

76 Eileen Skinnider, "Experience and Lessons from Hybrid Tribunals: Sierra Leone, East Timor and Cambodia", A paper prepared for the Symposium on the International Criminal Court <http://dspace.africaportal.org/jspui/bitstream/123456789/25560/1/Experiences%20And%20Lessons%20From%20Hybrid%20Tribunals%20-%20Sierra%20Leone,%20East%20Timor%20And%20Cambodia.pdf?> accessed 10 July 2019.

77 Ibid.

Leone government jointly established the Special Court for Sierra Leone in 2002.[78] Its mandate was to try 'persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law' committed in the territory of Sierra Leone since 30 November 1996.[79] The SCSL represents an early example of a "hybrid" tribunal. The SCSL was not a part of the Sierra Leonean judiciary, but did include some aspects of Sierra Leonean law (although none of these laws have been used by the SCSL). The SCSL also employed Sierra Leoneans as staff members and had its permanent seat in Freetown, Sierra Leone. At the same time, while it was not a UN body, it had jurisdiction over international crimes, and employed international staff, including a majority of international judges.[80] The structure of the SCSL was similar to the structure of the ICTY and ICTR, with the exception that it was the first tribunal for international crimes to include a Defence Office as part of the Registry. The Defence Office was an independent body providing assistance to defence counsel and ensuring the protection of the rights to a fair trial of accused persons. The SCSL had jurisdiction over crimes against humanity,[81] violations of Article 3 common to the Geneva Conventions and of Additional Protocol II[82], other serious violations of IHL[83], and certain crimes under Sierra Leonean law.[84] Its jurisdiction was limited to prosecuting only those persons who bear the "greatest responsibility" for the crimes, a phrase which, rather than having formal effects, guided the prosecution policy of investigating and prosecuting a limited number of individuals. The SCSL has completed three trials of nine individuals representing all warring factions from its civil war.[85] Eight persons were convicted (one accused died before the conclusion of his trial).[86] The Residual Special Court of Sierra Leone (RSCSL) was established pursuant to an agreement signed between the United Nations and the Government of Sierra Leone on 11 August 2010 after its closure in 2013. As per the information available on the website of the Residual Special Court, it was ratified by Parliament on 15

78 Security Council Resolution 1315, U.N. DOC. S/RES/1315 (Aug. 14, 2000).

79 Statute of the Special Court for Sierra Leone, Article 1 (2000).

80 It should be noted that the SCSL Statute does not require that a majority of judges be international, only that some be appointed by the Government of Sierra Leone and others by the UN Secretary-General. Statute of the Special Court for Sierra Leone, 2002, Article 2.

81 Ibid, p. Article 2.

82 Ibid. p. Article 3.

83 Ibid.

84 Ibid.

85 Moinina Fofana et al., Case No. SCSL-04-14-T, Trial Judgement, 2 Aug. 2007; Alex T. Brima et al., Trial Judgement, Case No. SCSL-04-16-T, 20 June 2007; Issa Hassan Sesay et al., Trial Judgement, Case No. SCSL- 04-15-T, 25 Feb. 2009.

86 Moinina Fofana et al., Case No.SCSL-04-14-A, Appeal Judgement, 28 May 2008; Alex T. Brima et al., Case No. SCSL-2004-16-A, Appeal Judgement, 22 Feb. 2008; Issa Hassan Sesay et al., Case No. SCSL-04-15-A, Appeal Judgement, 29 Oct. 2009.

December 2011 and signed into law on 1 February 2012. The agreement stipulates that the RSCSL shall have its principal seat in Freetown, but shall carry out its functions at an interim seat in the Netherlands with a sub-office in Freetown for witness and victim protection and support.[87]

3.2.2 Extraordinary Chambers in the Courts of Cambodia (ECCC)

Another example of a hybrid tribunal is the Extraordinary Chambers in the Courts of Cambodia (ECCC), established to try persons responsible for crimes committed under the Khmer Rouge regime from 1975 to 1979.[88] Cambodia requested assistance from the UN in bringing perpetrators to justice, and the ECCC was established after lengthy negotiations by an international agreement between the UN and Cambodia in 2004.[89] The ECCC is distinct from the SCSL in many ways. It forms part of the Cambodian judiciary—although as an independent entity[90]—and applies national and international law. There are co-prosecutors, one national and one international. There is a majority of national judges in all of the chambers. It also applies a structure more related to civil law systems than other international or hybrid tribunals, reflecting Cambodia's legal system. Thus at the ECCC, investigating judges are responsible for investigations, not the prosecutor. Notably, at the ECCC, victims have a right to participate in proceedings. The ECCC has jurisdiction to try "senior leaders of (the Khmer Rouge) and those most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia".[91] This includes genocide under the 1948 Genocide Convention, crimes against humanity as defined by the Rome Statute, grave breaches of the Geneva Conventions, and crimes under Cambodian law committed between 17 April 1975 and 6 January 1979.[92] There is no jurisdiction over war crimes in non-international conflicts.[93]

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87 For details, visit <http://www.rscsl.org/> accessed 17 December 2017.

88 When the Cambodian civil war ended in 1998, the Cambodian government asked the UN for assistance in establishing a trial to prosecute the Khmer Rouge's senior leaders. Because of the Cambodian weak legal system, the international nature of the crimes, and the necessary assistance in meeting international standards of justice, the Cambodian government and the UN reached an agreement in June 2003 outlining the logistics of the new hybrid tribunal. Extraordinary Chambers in the Courts of Cambodia, Introduction to the ECCC <http://www.eccc.gov.kh/en/about-eccc/introduction > accessed 20 June 2011; See also Kaing Guek Eav, Case No. 001/18-07-2007/ECCC/TC, Trial Judgement, 26 July 2010, para 413-415 (holding that the conflict in Cambodia was an international conflict).

89 UN-Cambodia, for the Establishment of the Extraordinary Chamber in the Courts of Cambodia, attached to GA Res. 57/228B of 13.5.2003; See also CRYER, above n 1, at p. 185.

90 Kaing Guek Eav, Case No. 001/18-07-2007/ECCC/TC, Trial Judgement, 26 July 2010, pp. 17-20.

91 UN-Cambodia Agreement, Article 1.

92 Ibid., Article 9.

93 Robert Cryer, et. al., *An Introduction to International Criminal Law and Procedure*, (Cambridge: Cambridge University Press, 2019), p. 186.

The ECCC, now in its final days or months, finds its legacy and achievements hotly disputed between international lawyers, journalists, academics, and human rights organizations.[94] Those who seek to belittle the credibility of tribunal frequently cite statistics **c**omparing the Cambodian ECCC and its total of five indictments with 61 indictments from the former Yugoslavia and 95 from Rwanda as well as 22 indictments from the Sierra Leone Special Court known as the Sierra Leone Tribunal.[95] However, Youk Chhang, the founder of DC-Cam (Documentation Center of Cambodia, focused on preserving records of the Khmer Rouge era) strongly argues that, despite the tribunal's flaws, there is overall a very positive legacy: "Without the Khmer Rouge Tribunal, Cambodia would not be able to record and preserve the history of the Khmer Rouge regime for future generations and establish a critical foundation for the rule of law, which is very vital for national reconciliation in Cambodia."[96]

3.2.3 Special Panels for Serious Crimes in East Timor

The 'Serious Crimes Process' in East Timor (now Timor-Leste), consisting of Special Panels and a Serious Crimes Unit, was established in 2000.[97] Three Special Panels, each composed of two international judges and one East Timorese judge, were granted exclusive jurisdiction over allegations of genocide, war crimes, crimes against humanity, torture, murder, and sexual offenses committed between January 1 and October 25, 1999.[98] The Serious Crimes Unit of the prosecution service under the Prosecutor General of East Timor was responsible for prosecution.[99] From 2000 through 2005, the SPSC completed fifty-five trials involving eighty-seven defendants.[100] The Security Council's decision to set the closure date of the SPSC for May 20, 2005, cut short the work of the Panels, resulting in 514 investigative files remaining open.

3.2.4 Kosovo's Regulation 64 Panels

In June 1999, six years after the creation of the ICTY, the United Nations Interim Administration Mission in Kosovo (UNMIK) passed several regulations permitting

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94 Tom Fawthrop, "Cambodia's Khmer Rouge Tribunal: Mission Accomplished?" a feature in *the Diplomat* <https://thediplomat.com/2017/07/cambodias-khmer-rouge-tribunal-mission-accomplished /(2017)> accessed 19 December 2018.

95 Ibid.

96 Ibid.

97 Padraig Mcauliffe, 'Hybrid Tribunals at Ten: How International Criminal Justice's Golden Child Became an Orphan', *Journal of International Law and International Relations*, 2011, Vol. 7, p. 1.

98 Suzanne Katzenstein, 'Hybrid Tribunals: Searching for Justice in East Timor' *Harvard Human Rights Journal*, 2003, Vol. 16, p. 249.

99 David Cohen, '"Hybrid" Justice in East Timor, Sierra Leone, and Cambodia: "Lessons Learned" and Prospects for the Future', *Stanford Journal of International Law*, 2007, Vol. 43, p. 9.

100 Ibid.

foreign judges to sit alongside domestic judges on existing Kosovar courts and allowing foreign lawyers to partner with domestic lawyers to prosecute and defend the cases.[101] Thus unlike other hybrid tribunals, Kosovo's Panels derived its authority from UNMIK regulations.[102] Under UNMIK Regulation 2000/64, the Special Representative of the Secretary-General (SRSG) had the authority, upon the request of a prosecutor, an accused, or defense counsel, to appoint an international prosecutor, judge, or a panel of three judges, at least two of whom were international, resulting in the creation of the so-called Regulation 64 Panels.[103] Though the participation of international judges created an air of impartiality, according to John Cerone and Clive Baldwin these judges failed to increase the capacity of the domestic court system and were unable to achieve sufficient independence from the UNMIK executive.[104] Nevertheless, the Regulation 64 panels did succeed in trying several perpetrators who were unable to be tried by the ICTY due to its mandate to prosecute only those most responsible for crimes within the ICTY's jurisdiction.[105]

3.2.5 War Crimes Chamber of the Court of Bosnia and Herzegovina (BWCC)

The War Crimes Chamber of the Court of Bosnia and Herzegovina (BWCC), which began its work 9 March 2005, has been the most significant national effort in Bosnia and Herzegovina (BiH) to investigate and prosecute persons allegedly involved in serious violations of international law during the 1992–1995 conflict. [106] It also gave the legal community useful experience with a "hybrid" court in which international and national judges served together.[107] The War Crimes Chamber was intended to give the national judiciary the capacity to conduct war crimes trials

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[101] Laura Dickinson, 'The Promise of Hybrid Courts' (2003) 97 *American Journal of International Law* 295.

[102] See, for example, UNMIK/REG/2000/34 (May 27, 2000) (amending UNMIK/REG/2000/6 (February 15, 2000).

[103] Daphna Shraga, 'The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions', in Cesare Romano et. el. (ed.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia*, (Oxford: Oxford University Press, 2004).

[104] John Cerone and Clive Baldwin, "Explaining and Evaluating the UNMIK Court System", in Cesare Romano et. el. (ed.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia*, (Oxford: Oxford University Press, 2004).

[105] See Security Council Resolution 1503, U.N. Doc. S/RES/1503 (Aug. 28, 2003) (reaffirming the ICTY's strategy of "concentrating on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY's jurisdiction and transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions, as appropriate .... ").

[106] Bogdan Ivanišević, 'The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court' (2008), International Center for Transitional Justice <https://www.ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Domestic-Court-2008-English.pdf> accessed 19 December 2018.

[107] Padraig Mcauliffe, 'Hybrid Tribunals at Ten: How International Criminal Justice's Golden Child Became an Orphan', *Journal of International Law and International Relations*, 2011, Vol. 7, p. 1.

according to international standards.[108] Created with strong international support, the War Crimes Chamber envisaged gradually phasing out international judges.[109]

3.2.6 The Special Tribunal for Lebanon

The Security Council established the Special Tribunal for Lebanon (STL) in 2007 to try persons alleged to have assassinated or attempted to assassinate prominent Lebanese political and media figures beginning in 2004.[110] The most prominent such crime was the assassination of former Prime Minister Rafiq Hariri. The indictment was confirmed on 28 June 2011 and the trial opened on 16 January 2014.[111] The STL is the first international body to prosecute the crime of "terrorism."[112] Whereas the hybrid tribunals discussed above were established to try crimes resulting from particular conflicts during a defined time period, the jurisdiction of the STL revolves around the assassination of former Prime Minister Hariri.[113] It is comprised of both Lebanese and international judges and staff and will apply Lebanese law.[114] The Tribunal's statute provides for a pre-trial judge, up to two Trial Chambers each composed of three judges, and an Appeals Chamber composed of five judges, as well as separate prosecutorial and defense organs.[115] The Trial Chamber judges have now withdrawn to deliberate whether the Prosecution has proved its case beyond reasonable doubt in the Ayyash et al. case and will issue a judgement in due course.[116]

3.2.7 The Iraqi Special Tribunal (IST)

The Iraqi Special Tribunal (IST) was created on 12 December 2003 by the Iraqi Governing Council. [117] In August 2005, the Statute of the Tribunal was revoked by Iraq's Transitional National Assembly and replaced by an amended Statute that renamed the Special Tribunal as the Iraqi High Tribunal (IHT), and was promulgated

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[108] Ibid.

[109] Bogdan Ivanišević, 'The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court (2008)', International Center for Transitional Justice <https://www.ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Domestic-Court-2008-English.pdf> accessed 10 July 2019.

[110] Security Council Resolution 1757, U.N. Doc. S/RES/1757 (May 30, 2007).

[111] Visit for details, <https://www.stl-tsl.org/en/the-cases> accessed 19 December 2018.

[112] Lindsey Raub, "Positioning Hybrid Tribunals in International Criminal Justice", *New York University Journal of International Law and Politics*, 2009, Vol. 41, p. 1038.

[113] Ibid.

[114] Article 2 of the Statute of the Special Tribunal for Lebanon.

[115] Ibid, Articles 7, 8.

[116] Visit for details, <https://www.stl-tsl.org/en/the-cases> accessed 19 December 2018.

[117] Yves Beigbeder, *International Criminal Tribunals: Justice and Politics*, (New York: Palgrave Macmillan, 2011), p. 247.

as Law No. 10 on 18 October 2005.[118] The Tribunal had jurisdiction over Iraqis and non- Iraqi residents in Iraq accused of the crime of genocide, crimes against humanity, war crimes or violations of certain Iraqi laws.[119] It is argued that the Tribunal was an Iraqi court, not an international or a hybrid national/international tribunal. However, this Article is of the opinion that the Iraqi Special Tribunal was not a pure national tribunal in true sense. The reasons are manifold. First of all, it was created by a statute from the Interim Governing Council, which itself was appointed by the Coalition Provisional Authority in Iraq, controlled by the US-led multinational forces.[120] Secondly, according to Article 4(d) of the Statute, the Governing Council...if it deems necessary, can appoint [experienced] non-Iraqi [trial and appellate] judges. Thirdly, there were requirements that non-Iraqis be appointed "to act in advisory capacities or as observers to the Trial Chambers and to the Appeals Chamber."[121] Similar provisions mandated the appointment of non-Iraqi advisors or observers of investigative judges and prosecutors.[122] Moreover, it applied both domestic and international law, and included international fair trial standards. Therefore, though not hybrid tribunal, Iraqi Special Tribunal cannot be put under the category of pure domestic tribunal also.

3.3 International Criminal Court (ICC)

ICC is a permanent institution which was created by a treaty, the Rome Statute, in 1998. The Rome Statute came into force on 1 July 2002, after 66 states ratified it. Many features of the ICC are distinct from the ICTY and ICTR, including its role as a complementary, as opposed to the primary, judicial institution concerning national courts. The ICC is a court of "last resort" and is based on the principle of complementarity - that the primary responsibility for exercising jurisdiction over international crimes rests with domestic jurisdictions and that the ICC cannot act unless the country with jurisdiction over the case is not investigating and prosecuting or is "unwilling or unable genuinely" to do so.[123] The ICC has a structure similar to

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[118] Ibid.

[119] Ibid.

[120] In fact, Lewis Paul Bremer, the top U.S. administrator in Iraq, signed the Statute into law on behalf of the Coalition Provisional Authority. Visit for details <http://www.hrcr.org/hottopics/iraqitribunal.html> accessed 19 December 2018.

[121] Article 6(b) of the Statute of the Iraqi Special Tribunal.

[122] Ibid, Articles 7(n) and 8(j).

[123] Rome Statute, Preamble. See also Rome Statute, Article 17 (stating 'the Court shall find a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court').

the ICTY and ICTR but includes some important differences. The Judicial Division includes pre-trial chambers in addition to trial and appeals chambers; the ICTY, ICTR and SCSL do not have pre-trial chambers. In addition to the Registry, Office of the Prosecutor and Judicial Division, it also includes the semi-autonomous Office of Public Counsel for the Defence and the Office of Public Counsel for Victims, which both fall under the Registry. The court is also subject to administrative oversight by the Assembly of States Parties (ASP). Another notable difference between the ICC and other tribunals is that victims have the right to participate in proceedings, as they do at the ECCC. The ICC has jurisdiction over "the most serious crimes of international concern", namely, genocide, crimes against humanity, war crimes and aggression committed after the Statute entered into force (1 July 2002).[124]In order to provide certainty and avoid issues with the principle of legality, the ICC Statute defines the crimes within its jurisdiction in great detail. The ICC Elements of Crimes, which can be used by the court in interpreting and applying the law, provides further definition of crimes.[125] Currently, the crime of aggression forms part of the basis for the jurisdiction of the ICC, but the court is currently unable to exercise jurisdiction over this crime. The ICC's personal and territorial jurisdictions are also limited. A case can be heard if the crime is committed on the territory of a State Party to the Rome Statute, if the accused is a national of a State Party or if a non-State Party has accepted the jurisdiction of the ICC with respect to the crime at issue.[126] However, if the UN Security Council refers the case to the ICC, these limitations do not apply and the ICC can hear cases about crimes originating in or committed by nationals of states that are not parties to the Rome Statute. The UN Security Council, under its Chapter VII powers (which apply only when there is a threat to peace, a breach of the peace or an act of aggression), can also ask the ICC to defer an investigation or prosecution for renewable periods of up to twelve months.[127]

4. ICT: An Overview with Historical Background

Bangladesh earned her independence from Pakistan in 1971 after a bloody war that continued for nine months wherein an estimated 3 million people died and 200,000

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[124] Rome Statute, Articles 5(1), 11(1)-(2). States that become parties to the Rome Statute after it entered into force, the Court has jurisdiction over crimes committed after the Rome Statute entered into force for that state, unless the state declares otherwise.

[125] Ibid., Articles 9, 21.

[126] Ibid., Article 12(2). See also Rome Statute, Art. 124 (stating 'notwithstanding Article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in Article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this Article may be withdrawn at any time. The provisions of this Article shall be reviewed at the Review Conference convened in accordance with Article 123, paragraph 1').

[127] Ibid., Article 16.

women reported sexual violence by the Pakistani Army and their local collaborators.[128] The Pakistani military and their local allies specifically targeted Bengali intellectuals and Hindus and rape was used as a weapon of war.[129] After the independence of Bangladesh the demand emerged for prosecution of the war criminals and Bangabandhu Sheikh Mujibur Rahman sought for international cooperation for establishment of a judicial forum for such prosecution but the efforts went in vain.[130] Due to a then-existing voice in the world of international machinery to prosecute perpetrators of international crimes, Bangladesh, in consultation with international jurists and experts, enacted the ICT Act, 1973.[131] After the assassination of the country's first Prime Minister and leader of the independence movement Sheikh Mujibur Rahman in August, 1975 the issue of war crimes against Pakistanis and their Bengali accomplices took a back seat.[132]The issue of prosecution was a page left intentionally blank in the history of Bangladesh until 2008 when the newly elected government assumed the responsively to prosecute the war criminals as promised in their election manifesto. By that time the old law, that was at its time of adoption the World's only such legislation and that it was progressive and cutting-edge, was faced with far greater demands on a process of accountability as imposed by the international human rights law.[133] In light of those demands, some significant changes were brought in the Act by way of amendment in 2009, International Crimes (Tribunals) Rules of Procedure, 2010 (amended later in June 2011 and October 2012)

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[128] Zakia Afrin, 'The International War Crimes (Tribunal) Act, 1973 of Bangladesh' in Deepaloke Chatterjee et al (eds), *Indian Yearbook of International Law and Policy* (Satyam Law International, 2009) 341.

[129] Mahmud Ali, *Understanding Bangladesh*, (London: Hurst, 2010), p. 51.

[130] Bangabondhu Sheikh Mujibur Rahman urged to the international community that an international tribunal should be sent to Bangladesh to try war criminals. Unfortunately, there was no one able and willing to set up such a tribunal. The efforts within the United Nations to promote the establishment of an international criminal court had, for the time being at least, foundered. Even more modest proposals, such as that of the United Nations High Commissioner for Human Rights, so sturdily promoted by Ambassador Rita Hauser, had been blocked. There were, it seems, too many governments with too many skeletons for them to agree to any effective enforcement machinery for human rights. The Commission's purpose in Bangladesh was to try to persuade the government that, if they did hold such a trial, they should themselves constitute an international court for the purpose, much in the way that the victorious allies did at Nuremberg and Tokyo after World War II. See for details Niall MacDermot, Q.C., "Crimes against Humanity in Bangladesh", in International Lawyer, 1973, vol. 7, no. 2, pp. 483-484.

[131] M. Amir-Ul Islam, 'Towards the Prosecution of Core International Crimes before the International Crimes Tribunal', in Morten Bergsmo and CHEAH Wui Ling (eds.), *Old Evidence in Core International Crimes*, (Beijing: Torkel Opsahl Academic EPublisher, 2012).

[132] See above n 128.

[133] Suzannah Linton, 'Completing the Circle: Accountability for the Crimes of the 1971 Bangladesh War of Liberation', *Criminal Law Forum* (2010) Vol. 21, pp. 207 and 209.

were framed. Thereafter, to come out from the culture of impunity, the government by notification in official gazette has set up the 'Tribunal' on 25 March 2010.[134]

4.1 Formation of the Tribunal

The number and formation of the Tribunals have not been fixed by the ICT Act. The Government may, by notification in the official Gazette, set up one or more Tribunals, each consisting of a Chairman and not less than two and not more than four other members.[135]Any person who is a Judge, or is qualified to be a Judge, or has been a Judge, of the Supreme Court of Bangladesh, may be appointed as a Chairman or member of a Tribunal.[136] Presently only one Tribunal is functioning and that is composed of one Chairman and two Members.[137]Through the amendment of the ICT Act in 2009, it has been stipulated that the Tribunal shall be independent in the exercise of its judicial functions and shall ensure fair trial.[138]This guarantee of judicial independence reflects international standards and in practice, the Tribunal has been sensitive to the need to protect the interests of the defendant.[139]Though the Act provides for the Tribunal's permanent seat to be in Dhaka, a Tribunal may hold its sittings at such other place or places as it deems fit.[140]Any change in its membership or the absence of any member thereof from any sitting does not make a Tribunal bound to recall and re-hear any witness who has already given any evidence and a Tribunal may act on the evidence already given or produced before it.[141] Regarding judgment if, upon any matter requiring the decision of a Tribunal, there is a difference of opinion among its members, the opinion of the majority shall prevail and the decision of the Tribunal shall be expressed in terms of the views of the majority.[142]

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134 Shafique Ahmed, 'The Importance of Prosecuting Core International Crimes: The International Criminal Tribunal's Objectives and Experience', in Morten Bergsmo and CHEAH Wui Ling (eds.), *Old Evidence in Core International Crimes*, (Beijing: Torkel Opsahl Academic EPublisher, 2012), pp. 240-241. Later for the speedy disposal of the cases in queue, on 22 March 2012 the government by official gazette notification established another tribunal namely International Crimes Tribunal-

135 Section 6 (1) of the ICT Act.

136 Section 6(2) of the ICT Act.

137 Md. Shahinur Islam, 'The International Crimes (Tribunals) Act of 1973 and the Rules: Substantive and Procedural Laws', in Morten Bergsmo and CHEAH Wui Ling (eds.), *Old Evidence in Core International Crimes*, (Beijing: Torkel Opsahl Academic EPublisher, 2012), p. 244.

138 Section 6(2A) of the ICT Act.

139 Md. Shahinur Islam, 'The International Crimes (Tribunals) Act of 1973 and the Rules: Substantive and Procedural Laws', in Morten Bergsmo and CHEAH Wui Ling (eds.), *Old Evidence in Core International Crimes*, (Beijing: Torkel Opsahl Academic EPublisher, 2012), p. 245.

140 Section 6(3) of the ICT Act.

141 Section 6(6) of the ICT Act.

142 Section 6(7) of the ICT Act.

4.2 Mandate

The ICT has the mandate to try and punish any individual or group of individuals, or organisation, or any member of any armed, defence or auxiliary forces, irrespective of his nationality, who commits or has committed, in the territory of Bangladesh, whether before or after the commencement of this Act, any of the following crimes: a) crimes against humanity,[143] b) crimes against peace,[144] c) genocide,[145] d) war crimes,[146] e) violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949, f) any other crimes under international law, g) attempt, abetment or conspiracy to commit any such crimes, h) complicity in or failure to prevent commission of any such crimes.[147] ICT Act has vested ICT with the power a) to summon witnesses to the trial and to require their attendance and testimony and to put questions to them, b) to administer oaths to witnesses, c) to require the production of document and other evidentiary material, and d) to appoint persons for carrying out any task designated by the Tribunal.[148] ICT has a statutory obligation to confine the trial to an expeditious hearing of the issues raised by the charges and to take measures to prevent any action which may cause unreasonable delay, and rule out irrelevant issues and statements.[149] ICT is further authorized to punish any person, who obstructs or abuses its process or disobeys any of its orders or directions, or does anything which tends to prejudice the case of a party before it, or tends to bring it or any of its members into hatred or contempt, or

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[143] For the purposes of the Act, crimes against humanity mean and include 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. See for details section 3(2)(a) of the ICT Act.

[144] For the purposes of the Act, crimes against peace mean and include planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances. See for details section 3(2)(b) of the ICT Act.

[145] For the purposes of the Act, genocide mean and include any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, such as: (i) killing members of the group; (ii) causing serious bodily or mental harm to members of the group; (iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (iv) imposing measures intended to prevent Births within the group; (v) forcibly transferring children of the group to another group. See for details section 3(2)(c) of the ICT Act.

[146] For the purposes of the Act, war crimes mean and include 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 detenues, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity. See for details section 3(2)(d) of the ICT Act.

[147] Section 3 of the ICT Act.

[148] Section 11(1) of the ICT Act.

[149] Section 11(3) of the ICT Act.

does anything which constitutes contempt of the Tribunal.[150] In addition any member of a Tribunal has the power to direct, or issue a warrant for, the arrest of, and to commit to custody, and to authorize the continued detention in custody of, any person charged with any crime specified in section 3 of the ICT Act as mentioned.[151] By an amendment in 2012 ICT is authorized to transfer a case to another Tribunal, whenever it considers such transfer to be just, expedient and convenient for the proper dispensation of justice and expeditious disposal of such cases.[152]

4.3 Applicable Laws

ICT operates primarily on the provisions of the ICT and the Rules of Procedure, 2010 made under section 22 of the ICT Act. Unlike general criminal trials, the provisions of the Criminal Procedure Code, 1898 (V of 1898), and the Evidence Act, 1872 (I of 1872), shall not apply in any proceedings under the ICT Act.[153]

4.4 Rules of Procedure

The International Crimes Tribunal Rules of Procedure, 2010 (with later amendments) provides for the detailed procedural issues of the ICT. Initially the Rules of Procedure consisted of ten chapters until 2011 when a new Chapter VI A was inserted turning the number of total chapters into 11.[154] General provisions and related definition are illustrated in Chapter I. Chapter II and Chapter III provide for the Powers and Functions of the Investigation Agency and the Prosecution respectively. Chapter IV deals with the procedural provisions for taking cognizance and trial of the offences. In supplement of the Tribunal's powers and functions as enumerated in section 11 of the ICT Act, Chapter V provides for further powers and functions of the Tribunal. The provisions regarding evidence are laid in Chapter VI. The lately added Chapter VI A renders the provisions for the protection of witness and victim. The composition and administrative affairs of the office of the Tribunal have been specified in Chapter VII and Chapter VIII describes the powers and functions of the Registrar and Deputy Registrar, the key personnel in that office. Chapter IX stipulates the rules for Representation in the Tribunal and fees in that regard. Chapter X deals in brief with the issues of Amendment.

5. Contribution towards the Development of International Criminal Justice System

It is evident from the above discussion that the institutions that recently commanded the most attention for international prosecutions of war crimes are the International

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150 Section 11(4) of the ICT Act.

151 Section 11(5) of the ICT Act.

152 Section 11A of the ICT Act.

153 Section 24 of the ICT Act.

154 See for details the International Crimes Tribunal Rules of Procedure (Amendment) Act, 2011.

Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). However, only in 2004, these ad hoc tribunals were identified by the UN Assistant Secretary General Ralph Zacklin as neither politically nor financially viable.[155] Apart from costing 10% of the UN's annual budget, a few other criticisms that the tribunals face includes: they deliver too little and they are removed from the scene of the crime.[156] In fact, a high priority demand on international criminal courts should be to establish effective lines of communication with local audiences.[157] As Mirjan observes:

> In this regard, the record of ad hoc criminal courts for Rwanda and former Yugoslavia is unsatisfactory. For many years, little effort was made to explain to the local public and legal profession the unfamiliar aspects of international criminal procedure, most of them of common law pedigree. Even less effort has been spent in dispelling unrealistic local expectation that all episodes of atrocity will be prosecuted, which then became a source of widespread and often unfounded perceptions of prosecutorial bias toward one or another ethnic group.

However, the creation of the ad hoc tribunals greatly intensified pressures for the establishment of a permanent court to administer international criminal justice, a notion that had little previous success.[158] However, within a few years, only in 1998, Rome Statute was adopted. But its establishment was also followed by the basic shortcomings of the ad hoc tribunals. As Wippman noted that the staggering expense of the ad hoc tribunals argued both for an integrated approach but also suggested that the ICC will be on a tight financial lash.[159] Interestingly, the budget is increasing day by day and the Committee on Budget and Finance approves appropriations totaling €149,205.6 for the year 2020.[160] Moreover, there is much debate whether ICC prosecutions are compatible with the objective of national reconciliation.[161] Therefore, ICC Prosecutor *Moreno-Ocampo* outlined in 2003 when taking office,

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[155] Ralph Zacklin, 'The Failings of the Ad Hoc Tribunals' (2004) 2 *Journal of International Criminal Justice* 641.

[156] Carsten Stahn, 'The Future of International Criminal Justice', Commentary <http://www.haguejusticeportal.net/Docs/Commentaries%20PDF/Stahn_The_Future%20of%20International%20Justice_EN.pdf> accessed 27 October 2019.

[157] Mirjan R. Damaska, "What is the Point of International Criminal Justice?", *Faculty Scholarship Series.* Paper 1573, (2008), Yale Law School Faculty Scholarship <http://digitalcommons.law.yale.edu/fss_papers/1573> accessed 16 December 2019.

[158] David Melone, 'International Criminal Justice on the Move' (2008) 50(4) *Journal of the Indian Law Institute* 579.

[159] David Wippman, 'Exaggerating the ICC: The Prospects of the International Criminal Court', in Joanna Harrington, Michael Milde, & Richard Vernon (eds.), *Bringing Power to Justice?: The Prospects of the International Criminal Court* **(**Queen's University Press, 2006) 99-140.

[160] Resolution ICC-ASP/18/Res.1 <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-Res1-ENG-budget-resolution-10Dec19-1130.pdf> accessed 16 December 2019.

[161] David Melone, 'International Criminal Justice on the Move' (2008) 50(4) *Journal of the Indian Law Institute* 580.

namely: 'the dream of an International Criminal Court that has to deal with no cases because of the effective functioning of domestic judiciaries'.[162] In fact, the international criminal justice appears to be in transition. As predicted by International Relations scholar *Anne-Marie Slaughter*, who argued almost a decade ago, that the entire 'Future of International Law is domestic'.[163] In the wake of war or gross human rights' violations, the choice of either the International Criminal Court or totally domestic trials as the primary avenues for criminal accountability have been cemented with the emergence of the complementarity regime as illustrated in Article 17 of the 1998 Rome Statute.[164] Hence, the willing and able States are delegated with the responsibility for investigation and prosecution of breaches of international humanitarian law on the rebuttable presumption of the efforts being genuine.[165] The ICC will step in only as a last resort only if it is found that the domestic mechanism has failed. In other words, where domestic prosecutions are impossible, the ICC has become the 'definitive model' for the implementation of international criminal justice.[166] Accordingly, ICT of Bangladesh is the pure national tribunal established for the first time in the history of the international criminal justice system.

However, as evident from section 3.2 above, in the interregnum between the adoption of Rome Statute in 1998 and its entry into force in 2002, the innovation of the 'hybrid tribunal model' as a preferable option to purely domestic or purely international jurisdiction emerged.[167] Former Judge of ICTY Patricia Wald even termed such innovation as a 'phenomenal development' toward which international tribunals for trying war crimes and crimes against humanity were likely to evolve.[168] It was indeed widely believed that the hybrid tribunals could leave a legacy of holistic rule of law reform in the subject State above and beyond the broad sociological impact of trials.[169] Therefore many argued that hybridized tribunals and

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[162] Quoted in Carsten Stahn, 'The Future of International Criminal Justice', Commentary <http://www.haguejusticeportal.net/Docs/Commentaries%20PDF/Stahn_The_Future%20of%20International%20Justice_EN.pdf> accessed 27 October 2019.

[163] See Anne-Marie Slaughter & William Burke-White, 'The Future of International Law is Domestic or, The European Way of Law' (2006) 47 *Harvard Journal of International Law* 327.

[164] Padraig Mcauliffe, 'Hybrid Tribunals at Ten: How International Criminal Justice's Golden Child Became an Orphan' (2011) 7 *Journal of International Law and International Relations* 3.

[165] Ibid.

[166] Lindsey Raub, 'Positioning Hybrid Tribunals in International Criminal Justice' (2009) 41 *New York University Journal of International Law and Politics* 1015.

[167] Padraig Mcauliffe, 'Hybrid Tribunals at Ten: How International Criminal Justice's Golden Child Became an Orphan' (2011) 7 *Journal of International Law and International Relations* 3.

[168] Quoted in Padraig Mcauliffe, 'Hybrid Tribunals at Ten: How International Criminal Justice's Golden Child Became an Orphan (2011) 7 *Journal of International Law and International Relations* 3.

[169] Ibid, 4.

the ICC should operate in a complementary fashion. However, experience from the abovementioned hybrid tribunals makes it evident that a future proliferation of the model could create damaging overlaps of jurisdiction and duplication of work to the detriment of the ICC.[170] As per the overall assessment made by Padraig, the hybrid tribunal structure has slipped from the parity of esteem with international tribunals it briefly enjoyed because of the gap between the early theory and the disappointing practice.[171] For example, assessment of the Tribunal for Sierra Leone is mixed, particularly with respect to value for money and to the local perceptions of the equality of justice rendered.[172] In case of ECCC, three crucial shortcomings that have hindered the success of the tribunal in properly applying the rule of law to prosecute criminals have been identified as the lack of judicial independence, a limited jurisdiction, and insufficient legal protections.[173] To demonstrate the inadequacies of IHT, Newton observes:

> Political interference undermined the independence and impartiality of the court, causing the first presiding judge to resign and blocking the appointment of another. The court failed to take adequate measures to ensure protection of witnesses and defense lawyers, three of whom were assassinated during the course of the trial

Against such backdrops of hybridized tribunals, Bangladesh has successfully established a purely domestic tribunal for trying the breaches of international humanitarian law, especially, war crimes, crimes against humanity and genocide. Although the tribunal has been specifically established to punish the perpetrators, who committed atrocities during the liberation war in 1971, it has the jurisdiction of trying any such crime irrespective of the time of commission and the nationality of the perpetrator. Thus, the ICT Act, being promulgated in 1973 had declared the crimes committed during the liberation war of Bangladesh as international crimes even before the international community accepted the liberation war as an international armed conflict under the Additional Protocol I of 1977. Moreover, ICT is the glaring example of the only pure national tribunal in the world, which has been established to try the perpetrators who committed war crimes and crimes against humanity in an international armed conflict. Therefore, the establishment of ICT is a

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[170] Carsten Stahn, 'The Geometry of Transitional Justice: Choices of Institutional Design' (2005) 18 *Leiden Journal of International Law* 465.

[171] Padraig Mcauliffe, 2011, 'Hybrid Tribunals at Ten: How International Criminal Justice's Golden Child Became an Orphan' (2011) 7 *Journal of International Law and International Relations* 7.

[172] John Hirsch, 'Peace and Justice: Mozambique and Sierra Leone Compared' in Chandra Sriram and Suren Pillay (eds.), *Peace versus Justice: The Dilemmas of Transitional Justice in Africa* (James Curray, 2010).

[173] Paulo Casaca and Susan Guarda, 'Crimes against humanity: An assessment of Bangladesh's response in a comparative perspective; the cases of Cambodia and Iraq', *SADF Working Paper*, Issue No. 11, 2018 <https://www.sadf.eu/wp-content/uploads/2018/09/11-Working-Paper-final-version-20190520.SMG.pdf> accessed 16 December 2019.

unique step towards the development of international criminal justice system and it can be a 'model' for future endeavors in the administration of international criminal justice.

6. Concluding Remarks

Unlike traditional standing courts such as domestic criminal courts or the International Criminal Court (ICC), each hybrid tribunal that we have discussed in this paper was created as a response to a conflict or set of conflicts that took place in a particular place over a defined period of time. ICT of Bangladesh is also no exception. It was also established as a response to the liberation war that continued for nine months wherein an estimated 3 million people died and 200,000 women reported sexual violence by the Pakistani Army and their local collaborators. Under the circumstances prevailed soon after the independence, all the negative factors conducive towards choosing an international tribunal, or at least a hybrid tribunal were present in the socio-legal context of Bangladesh. Accordingly, Bangladesh also asked for international assistance but it appears that such effort did not work out properly, Therefore, Bangladesh promulgated ICT Act of 1973, declaring the crimes committed during the liberation war as international crimes, with a vision and willingness to try them before a national tribunal. However, it took almost 37 years for Bangladesh to be able to create an environment conducive towards the establishment of such a national tribunal practically.

This article has tried to establish the significance of the mere establishment of this tribunal in the history of international criminal justice system. Having drawn the pictures of various *ad hoc* and hybrid tribunals, this article argues that the ICT of Bangladesh has significantly contributed towards the emergence of the complementarity regime as illustrated in Article 17 of the 1998 Rome Statute. Undoubtedly, all the negative apprehensions that so far persuaded the international community to choose hybrid tribunals may still be applicable in case of ICT of Bangladesh.[174] Often, ICT has been criticised for being a model of victor's justice.[175] Especially, it often has to deal with high-profile politically-sensitive individuals who are accused of crimes against humanity. However, such political elements and motives are very well present behind the creation of those international tribunals. As Melone observes:[176]

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[174] See for details, section 3.2 above.

[175] Parvathi Menon, 'International Crimes Tribunal in Bangladesh', *EiPro Sample Entry*, (2016), Max Planck Institute Luxembourg, Department of International Law and Dispute Resolution, para 47 <https://www.mpi.lu/fileadmin/mpi/medien/research/MPEiPro/3092_International_Crimes_Tribunal_ in_Bangladesh.pdf> accessed 16 December 2019.

[176] David Melone, 'International Criminal Justice on the Move' (2008) 50(4) *Journal of the Indian Law Institute* 569.

While the administration of the international criminal justice should be impartial, one can easily notice the political drivers behind the creation of international tribunals and courts. So, nothing is actually free from politics and even decisions on whom to prosecute or for what crimes can be influenced by political caution and opportunism.

Therefore, what is important is to ensure impartial and proper justice. It is indeed a big challenge for the tribunal to establish itself as a model in the international criminal justice system by ensuring fair and impartial trials for defendants in high profile cases in a highly-sensitive political environment of Bangladesh. Whether ICT of Bangladesh has been or will be successful in meeting those challenges is beyond the scope of this Article and is left for further research.

Does Fair and Equitable Treatment (FET) Standard in International Investment Treaties Create a Customary Rule of International Law?

Dr. Rumana Islam*

1. Introduction

The 'fair and equitable treatment' (FET) standard is perhaps the most common investment protection standard that can be found in the international investment treaties. Apart from few isolated expectations, it is present in almost three thousand existent bilateral investment treaties (BITs). The standard is also the most common tool invoked by the foreign investors for bringing a claim against the host state in investment arbitration.[1] Therefore FET standard has almost a 'ubiquitous presence' in the investment litigation[2] and has perhaps the most far reaching investor protection standards in the international investment treaties.[3] Accordingly it has been considered as a 'catch-all' provision in the investment treaties with a considerable amount of success in the investment disputes by the foreign investors against the host states,[4] and hence it is has been considered as the most important clause for investor protection in the international investment treaties.

The fast growth of the FET standard in international investment law and investment disputes over last decade has been a captivating one. The standard has become almost an indispensable element for the international investment treaties both at the bilateral and multilateral levels and consequently in investment arbitration, since adding the standard in the treaties indicate that the investors desires to have an additional safety net of 'fairness' in addition to other investment protection standards. Despite its dominant presence, the standard also has been the most controversial investment protection standards in international investment law due to its indeterminacy of the language which sometimes have been termed as a 'mystifying'

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1 See generally, Rumana Islam, *The Fair and Equitable Treatment (FET) Standard in International Investment Arbitration: Developing Countries in Context* (Springer, 2018) ch 1.

2 See e.g. Rudolf Dolzer, 'Fair and Equitable Treatment: A Key Standard in Investment Treaties' (2005) 39(1) *The International Lawyer* 87.

3 See Surya P. Suvedi, *International Investment Law: Reconciling Policy and Principle* (Oxford University Press, 2nd ed, 2012) 168; M Sornarajah, 'The Retreat of Neo-Liberalism in International Investment Treaty Arbitration' in Catherine A Rogers and Roger P Alford (eds), *The Future of Investment Arbitration* (Oxford University Press, 2009) 287; Christoph Schreur, 'Fair and Equitable Treatment in Arbitral Practice' (2005) 6 *Journal of World Investment and Trade* 357; Gus Van Harten, *International Treaty Arbitration and Public Law* (Oxford University Press, 2007) 87.

4 See Suvedi, above n 3, 63-67.

legal term.[5] This indeterminate linguistic approach to articulate the standard has also lead to a major cause of action brought by different foreign investors against the host countries. The concept of FET has appeared in various international investment treaties over half a century, nevertheless its meaning has remained elusive until recent time when the tribunals started to interpret the term systematically.[6] The standard remained most controversial in international investment law also due to the fact that, in various investment treaties the drafters have mingled the FET standard in conjunction with other international law standards for the foreigners/aliens in the same clause, while some others stipulate it in distinct clause.[7]

Construction of the FET standard in numerous numbers of BITs has been much of debatable issue for the tribunals while deciding the scope and extent of the standard[8]. With the increasing variety of treaty language the debate has been much controversial one. If we make an overall study of the treaty language of BITs and other investment treaties which includes a clause on FET, we will not find a homogenous text for the FET standard.[9] Despite this linguistic difference the most controversial discussion has been made when the standard has been equated with a reference to '*minimum standard under customary international law'*, yet another controversial standard of international law since its origin. The most debated issues has been whether the FET standard as evolved into a customary rule of international law due to its omnipotent presence in investment treaties and investment arbitration invoked by the foreign investors.

This article will examine whether the ubiquitous presence of the FET standard in different international investment treaties creates any customary rule of international law? Thereby this article will investigate whether host states are obliged to treat the foreign investors 'fairly and equitably' in absence of such treaty obligation? This article will also consider the fact whether the states are already bound by the ever evolving minimum standard under customary international norm which is sometimes considered as equivalent to the FET standard in different BITs and multilateral investment treaties. Therefore the discussion made throughout this article will examine whether the FET standard has crystalized the evolution of the international minimum standard under customary international law or it could also have produced a new customary rule of international law exceeding beyond the line of international minimum standard. Before going into the main discussion it is also necessary to shed

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5 Katia Yannaca-Small, 'Fair and Equitable Treatment Standard: Recent Development' in August Reinisch (ed), *Standards of Investment Protection* (Oxford University Press, 2008) 211.

6 See Schreur, above n 3, 385.

7 See e.g., Rumana Islam, Interplay between Fair and Equitable Treatment (FET) Standard and other Investment Protection Standards (2014) 14 (1&2) *Bangladesh Journal of Law* 117.

8 See generally Islam, above n 1, ch 3.

9 Ibid.

some light on the notion of the 'minimum standard' under international law generally or under customary international law.

2. Minimum Standard under International Law or Customary International Law

The idea of 'international minimum standard' was envisaged by the colonial powers once they lost their former colonies in twentieth.[10] Later this notion invented by the former colonial powers evolved into international law and customary international law[11] within the canopy of treatment of aliens in foreign land which also included foreign investors.[12]

> Roth provided the classical definition of the international minimum standard:
>
> the international standard is nothing else but a set of rules, correlated to each other and deriving from one particular norm of general international law namely, that the treatment of an alien is regulated by the law of nations.[13]

The *Neer Claim* is the landmark case of international law which defines the concept of international minimum standard. The claim was addressed before the US-Mexico Claims Commission by the United States on behalf of the family of aggrieved Paul Neer who had been killed in Mexico under obscure circumstances by some armed men. In addressing the issue whether Mexico was liable for culpable lack of diligence in prosecuting the culprits, the concept expressed by the Commission has become a classic *dictum* of what is now known as customary international law. The Commission expressed the concept as follows:

> […] the propriety of governmental acts should be put to the rest of international standards…the treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that

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[10] See generally, Martins Paparinski, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press, 2013). For further discussion on the minimum standard as developed under international law as a response to protect property of the investors from a post-colonial perspective; see generally, Sundhya Pahuja, *Decolonising International Law* (Cambridge University Press, 2011) 95-171; see also, M. Sornarajah, *International Law on Foreign Investment* (Cambridge University Press, 3rd ed, 2010) 8-20, 27-37.

[11] The 'general and consistent practice of states' that they follow out a sense of legal obligation (*opinion juris)* forms customary international law. See e.g. Continental Shelf Case (Libya *v* Malta) ICJ, Judgment dated 3 June 1985, Para 27.

[12] See e.g. Elihu Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4(3) *American Journal of International Law* 517; Edwin Borchard, *The Diplomatic Protection of the Citizens Abroad* (The Banks Law Publishing Company, 1915) 177; The American Law Institute's Restatement (Second) of Foreign Relations Law of the United States (1965) American Law Institute Publishers, St. Paul, Minnesota, Para 165.2; See e.g. Daniel Wilkes, 'Foreign Relation Laws of the United States' (1966) 18 Restatement (second) *Western Reserve law Review* 355.

[13] See Andreas H Roth, *The Minimum Standard of International Law Applied to Aliens* (AW Sijthoff, 1949), 127.

> every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from the deficient execution of a reasonable law or from the fact that the laws of host country do not empower the authorities to measure up to international standards in immaterial.[14]

The understanding is that a standing body of customary rules as agreed by the nations protecting an alien in another country,[15] which a host country must fulfil.[16] It envisages that, a host country may be held responsible under international law[17] and the violation of this norm may give rise to a cause of action under international law on behalf of the injured alien against the host country, provided that the alien has exhausted local remedies.[18]

The scope and acceptability of customary international law has been debated by different countries from its very inception, despite the fact that, it aims to reflect a common standard of conduct which the majority of the nations have accepted. Even during its inception scholars like Roth questioned whether such standard exists at all in and states, 'The law of treatment of aliens, as part of international law, lacks uniformity, not only with regard to rules of positive law but still to a greater extent as regards the fundamental concepts underlying its structure.'[19] Different countries continued to debate the concept of this 'minimum standard' in international law.[20] After the horrific experience of the WWII, the focus of international law was more on universal human rights law rather than protection of aliens in foreign lands. Thus there was a drastic shift in the discourse from the rights of a particular group like 'foreigners' or 'aliens' (which included foreign investors) in international law to the rights of 'all' as human beings.[21] The notion of customary international law was challenged by the *Calvo* doctrine[22] invented in Latin America, which suggested for

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14 *Neer v Mexico*, 15 October 1926, 4 UNRIAA 60.

15 See e.g. Marcos Orellana (2004) 1(3), *International Law on Investment: The minimum standard of treatment'* Transnational Dispute Management, 1.

16 Malcolm N Shaw, *'International Law'* (6th Edn, Cambridge University Press 2008) 824.

17 Over time, treaties began to tie the minimum standard to the doctrine of state responsibility in international law for injuries to aliens. See generally e.g. Mavrommatis Palestine Concessions Case (Greece *v* UK) (1924) PCIJ, Judgment dated 30 August 1924; Panevexys-Saldututiskis Railway Case (Estonia *v* Lithuania) (1938) PCIJ, Judgment dated 28 February 1938; Charzow Factory Case (Germany *v* Poland) (1928) PCIJ, Judgment dated 17 September 1928.

18 Ian Brownlie, *'Principles of Public International Law'* (Oxford University Press, 2003) 502.

19 See Roth, above n 13, 61 and 87.

20 See Sornarajah, above n 10, 140-141 and 328; AO Adede, *The Minimum Standards in a World of Disparities'* in RSJ MacDonald and DM Johnston eds. 'The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory (Kluwer, The Hague1983); MC Porterfield (2006) 27, *'An International Common Law of Investor Rights'* University of Pennsylvania International Journal of Economic Law, 79, 81-84.

21 Tolga Yalkin (2009) The International Minimum Standard and Investment Law: The Proof is in the Pudding' EJIL: Talk! (Blog of European Journal of International Law) webpage <https://www.ejiltalk. org/international-minimum-standard/> accessed 15 November 2019.

22 For discussion on *Calvo* doctrine see .e.g. Islam, above n 1, 40-41.

equal rights for locals and foreigners, and the applicability of domestic legislation and local courts for the settlement of investment disputes.

Therefore though the customary international law standard developed under international law as one of the main standards in international law to protect aliens under international law, nevertheless the scope of the standard remained uncertain and very much contested due to its lack of universal acceptability. The various investment treaties, the drafters have opted the construction of the FET standard with customary international law and the implications of such construction are discussed below.

3. FET standard in Conjunction with Customary International Law

There is numerous numbers of treaties where treaty framers have defined and limited the standard with customary international law. These examples are drawn largely by capital exporting countries,[23] where has been considered as most controversial formulation of the standard. The minimum standard here refers to what is accorded to the treatment of aliens under international law. Thereby the standard then simply refers to an investment protection standard which is based on customary international law standard for treatment of aliens. Treaties that have combined FET with the minimum standard of treatment under customary international law invoke the most controversy since this limits the standard, to the extent of protection accorded to aliens under customary international law. The controversial issues surrounding such treaty language both at multilateral and bilateral levels are considered in the following sections.

3.1 FET Standard in Multilateral Treaties

Since the majority of the attempts to come up with multilateral investment treaties have failed, the only celebrated example of multilateral treaty that includes the FET standard in conjunction with minimum standard under customary international law is the North American Free Trade Agreement (NAFTA) Article 1105[24] which also sparked the most controversial discussion in the existing scholarship on the issue.[25] The centre of controversy has been the NAFTA parties'

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[23] See e.g. Pamela B Gann (1985) 21 '*The US Bilateral Investment Treaty Program'* Stanford Journal of International Law 373; Peter T Muchlinski (2007) *Multinational Enterprises and the Law* (2nd Edn Oxford University Press) 636-639.

[24] See e.g. Islam, above n 1, Ch 2, 44-45.

[25] See e.g. Patrick Dumberry (2002)3 '*The Quest to define "Fair and Equitable Treatment" for Investors under National Law-the Case of the NAFTA Chapter 11 Pope and Talbot Award'* Journal of World Investment, 657; PG Foy and RJC Deane, (2001) 21 *'Foreign Investment Protection under Investment Treaties: Recent Developments Under Chapter 11 Of North American Free Trade Agreement'* ICSID Review- FILJ, 299; JC Thomas, (2002) 17(1) *'Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators'* ICSID Review-FILJ 21.

attempt to redraft the provision through the mechanism of an all-party interpretation.[26] Article 1105 of NAFTA references FET under the rubric, 'Minimum Standard of Treatment' which has been considered by Schreur 'conspicuous'.[27] The heading is certainly a manifest reference to customary international law. Schreur argues that the inclusion of the FET standard in the reference to international law makes FET part of international law, and particularly incorporates its rules on the minimum standard of treatment.[28]

Even having a clear articulation of Article 1105, some NAFTA tribunals went far ahead not to limit the standard only to customary international law. Laird thinks that, all the NAFTA parties employed a strained and torturous strategy in the early NAFTA Chapter 11 cases to limit NAFTA Article 1105 and the FET standard to the minimum standard of treatment as construed in the *Neer* Claim case.[29] Therefore not surprisingly, the NAFTA parties have consistently opposed the plain meaning approach as an overly expansive interpretation of Article 1105. Accordingly Laird further opines that the NAFTA parties have relied upon the *Neer* case as the 'seminal' case on the international minimum standard since it carried a low threshold standard of conduct easily reached by any government.[30] The example of Partial Award in *S.D. Myers vs. Canada*[31] is pertinent here, where the tribunal stated that a breach of a rule of international law may not be decisive in determining whether a denial of FET had occurred.[32] Also in *Pope and Talbot vs. Canada*[33] the tribunal even more explicitly, and controversially, attempted a shift away from strictly attaching the FET clause to customary international law. The tribunal adopted an idiosyncratic concept of FET that could have far reaching impact. The Tribunal in its second award in *Pope and Talbot* concluded that both the 'language and the evident intention' of the BITs supported the 'additive character' interpretation under which the 'fairness elements' are distinct from customary international law standards.[34] It followed that 'compliance with fairness elements must be ascertained free of any threshold that might be applicable to the evaluation of measures under the minimum standard of

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[26] See e.g. Fourth Opinion of Sir Robert Jennings, 'The Meaning of Article 1105(1) of the NAFTA Agreement', 6 September 2001, pp. 4-5 in Methanex Corporation *v* United States of America, Preliminary Award on Jurisdiction and Admissibility, 7 August 2002.

[27] Schreur, above n 3, 362.

[28] Ibid.

[29] Ian A Laird IA (2004) 'Betrayal, Shock and Outrage—Recent Developments in NAFTA Article 1105' in Todd Weiler (ed), *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects*. (Transnational Publisher Inc, New York) 49-76, 57.

[30] See e.g. Ibid, 57.

[31] *S. D. Myers v Government of Canada*, Partial Awards, 12 November 2000, (2001) 40 International Legal Materials 1408.

[32] Ibid, Para 264.

[33] *Pope & Talbot v Canada*, Award 10 April 2001, 7 ICSID Reports 102, Paras 105-118.

[34] Ibid, Para 113.

international law.'[35] Reflecting an analogy with the language of the BITs, the tribunal found that the fairness elements were 'additive' to the requirements of international law[36] and therefore the investor was 'entitled to the international law minimum plus the fairness elements'.[37]

Therefore on the basis of presumed intentions of the NAFTA parties, the tribunal stated that the NAFTA parties would not have provided investors of NAFTA states with a lower level of protection than it offered to third parties.[38] In its conclusion the tribunal considered the strong relationship between the NAFTA parties in comparison to other third party states, and argued that any other construction would assign Article 1105 a lower level of protection than the BIT provisions and would therefore violate NAFTA's national treatment and most favoured nation (MFN) obligations.[39]

Laird criticizes this decision as a 'controversial' one since it not only adopted a subjective plain meaning interpretative approach in complete denial of the submissions of NAFTA parties, but also attempted to reinterpret Article 1105 as providing obligations equivalent to an additive provision based on an application of the MFN principle.[40] No wonder that the NAFTA parties reacted forcefully to this outcome, arguing that the award rendered by the tribunal was poorly reasoned and unpersuasive.[41]

This extensive interpretation made the NFTA parties fear that FET would threaten economically related regulative measures in their national laws, even if they otherwise complied fully with NAFTA.[42] Kläger argues this why the NAFTA member states immediately went to seek a political move to put an embargo on future NAFTA arbitration proceedings so as to prevent them from becoming incontrollable.[43] The NAFTA Free Trade Commission (FTC)[44] therefore in a very unprecedented manner issued a Note of Interpretation,[45] which clearly stated that the

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35 Ibid, Para 111.

36 Ronald Kläger (2011) *'Fair and Equitable Treatment in International Investment Law'* (Cambridge University Press, Cambridge), 68.

37 Pope & Talbot, above n 33, Para 110.

38 Ibid, Para 115.

39 Ibid, Para 117.

40 See e.g. Laird, above n 29, 64–65.

41 See e.g. Thomas, above n 25, 80; David A Gantz (2003) 97 'Pope & Talbot, Inc *v* Government of Canada – Case Report' American Journal of International Law, 937 at p. 944; Kläger, above n 36, 69-70.

42 Kläger, above n 36, 70.

43 Ibid.

44 As per Article 1131 (2) of NAFTA, a body composed of representatives of the three state parties with the power to adopt binding interpretations.

45 The NAFTA Free Trade Commission (FTC) issued its Note of Interpretation dated 31 July 2001, see webpage <http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp> accessed 17 November 2019.

concept of FET does not require treatment in 'addition to or beyond that which is required by the customary international law minimum standard of treatment to aliens.'[46] No public consultation was done ahead of the announcement of the Note of Interpretation, and in fact no one expect the members of the NAFTA FTC had the knowledge of the deliberations. Laird thinks that the sardonicism of the FTC Note of Interpretation is that, in addition to the interpretation of NAFTA Article 1105, it sought to provide more transparency to the NAFTA Chapter 11 process. He further argues that following frequent citation by Canada in its NAFTA arbitration submissions, this standard 'minimum standard of treatment' has become known as the 'egregious' standard of treatment and that these arguments foreshadowed the FTC Note of Interpretation which subsequently clarified the meaning of NAFTA Article 1105.[47] Therefore this note rendered by NAFTA FTC effectively ended the debate surrounding the relationship between FET and customary international law in the context of NAFTA, making it clear that the member states intended to adopt an FET standard that is as narrow as possible, by considering only the customary international law sources pertaining to the classical minimum standard of treatment of aliens.[48] Nonetheless, the articulation devised in *Neer* case in 1920s will likely fail to serve the purpose of a modern day complicated investor–state relationship.[49]

The tribunal's award, in dealing with the issue of damages in *Pope & Talbot vs. Canada*[50] reflected this tension, expressing considerable reservations concerning the FTC's power to issue the Note of Interpretation[51] as well as a critique of the soundness of the interpretation itself,[52] but reluctantly accepted the interpretation in its award.[53] Laird opines that by adopting this plain meaning approach the tribunal was inviting controversy since the tribunal in *Pope and Talbot* (Merits Award) had no need to conflate the additive provision with a plain meaning interpretive approach, particularly in the context of a fairly flexible inclusive construction of NAFTA Article 1105. The Note of Interpretation likely reflects a reaction to this, as does the Canadian authorities' decision to demand the Pope Tribunal reconsider the merits rather than leaving the matter for future cases. Thus the issue of retroactivity was

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46 See Laird, above n 29, 55-57.

47 See Ibid.

48 Kläger, above n 36, 71.

49 Kläger, above n 36, 71-72; M Sornarajha (2010) *'International Law on Foreign Investment',* (3rd edn. Cambridge University Press, New York), 329-330.

50 *Pope & Talbot v Canada*, Award in Respect of Damages, 31 May 2002, (2002) 41 International Legal Materials 1347.

51 The Tribunal in its *obiter dicta* stated that, the FTC Note of Interpretation was in form and substance an amendment of Article 1105, rather than a proper interpretation. Ibid, Paras 17-24.

52 Ibid, Paras 25-47.

53 Ibid, Paras 48-69.

clearly on the stage when the tribunal on damages hearing was rendered.[54] Subsequent NAFTA Tribunals dealing with the issue have accepted the FTC's interpretation without objection; in fact none of the subsequent Tribunals have followed the lead of the *Pope & Talbot* tribunal in questioning the legitimacy of the FTC Note of Interpretation. Since the announcement of the FTC Note of Interpretation, NAFTA Chapter 11 Tribunals have adjusted to the shifting of NAFTA Article 1105 from an inclusive provision to one explicitly based on the customary international minimum standard of treatment.[55]Whether future NAFTA tribunals will accept the Note or not only time will say,[56] but at present the equivalence of FET articulated in the context of NAFTA Article 1105 to the minimum standard of treatment under customary international law is established fact.[57]

In this discussion it is very important to cite, Schreur who has opined that the FTC note does not mean that other investment treaties, particularly in BITs, should incur the same consequence, despite the fact that international standard of treatment clauses in other BITs use similar wording to NAFTA Article 1105. He argues that the special features of NAFTA Article 1105—the heading's reference to the 'Minimum Standard of Treatment', the wording 'international law including fair and equitable treatment', and the use of a binding interpretation by an authorised treaty body, which other BITs do not establish — differentiate NAFTA.[58] Tribunals operating outside NAFTA have employed individualized interpretations of the respective BITs rather than adopting any fixed approach on the issue.[59]

An UNCTAD (2012) study concluded that the treaties which limit FET to customary international law indicate that FET cannot go beyond what customary international law declares to be the content of the minimum standard of treatment of

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54 See Laird, above n 29, 55.

55 See e.g. *Mondev International Ltd v United States of America*, ICSID Case No. ARB (AF)/99/2, Award 11 October 2002, 6 ICSID Reports 192, Para 100; *ADF Group, Inc v United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, 18 ICSID Review—Foreign Investment Law Journal (2003) 195 Paras 175-178*; Lowen Group Inc, and Raymond L. Lowen v United States of America*, Award, 26 June 2003, 7 ICSID Reports 442 Paras 124-128; *Waste Management Inc. v United Mexican States* (No.2) ICSID Case No. ARB(AF)/00/3, Award April 30 2004, 43 International Legal Materials (2004) 967 Paras 90-91.

56 See e.g. Kläger, above n 36, 72-74.

57 Laird, above n 29, 56.

58 See e.g. Schreur, above n 3; Laird, above n 29, 49-75.

59 See e.g. *Tecnicas Medioambientales Tecmed SA v The United Mexican States*, ICSID Case No. ARB (AF)/00/02, Award, 29 May 2003, 43 International Legal Materials (2004) 133, Paras 155 and 156; MTD Equity Sdn Bhd *v* Republic of Chile, ICSID Case No. ARB/01/07, Decision on Annulment, 21 March 2007, Paras 110-112; Occidental Exploration and Production Co. *v* Ecuador, Final Award in the matter of UNCITRAL Arbitration, London Court of International Arbitration Case No. UN3467, Award 1 July 2004, Paras 188-190. Also see e.g. Schreur, above n 3, 368-385.

aliens.[60] The study further, it argues that from the host country's perspective, combining FET with customary international law may be a progressive step, given that the tribunals will likely interpret the standard as a higher threshold for finding a breach of the standard as compared to unqualified FET clauses.[61] However, this view fails to reflect the drawback of such a construction, which is that no clear set of principles constitutes the minimum standard under customary international law. Given that customary international law is itself highly indeterminate[62] and its evolutionary nature contentious,[63] and that establishing the precise obligations to which it gives rise, tribunals will be unlikely to adhere to this view. Accordingly the UNCTAD study's (2012) argument is therefore unconvincing.

Coming back to the main focus of this article− in respect to multilateral treaties, the criteria for identifying whether a treaty rule has become a rule of customary law authoritatively stated by the ICJ in the *North Sea Continental Shelf* cases[64] which do not apparently satisfy the FET standard.[65] In addition to that the ICJ concluded that the standard is of a 'fundamentally norm-creating character'[66] and there has been enough time for the rule to assume customary status.[67]

Since a good number of multilateral treaties having a provision on the FET standard have failed to come into force,[68] it can be argued that their norm creating potential is to some extend constrained. Though such un-ratified instruments may

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60 UNCTAD (2012), Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II (UN, Geneva, New York), <http://unctad.org/en/Docs/unctaddiaeia 2011d5_en.pdf> accessed 15 November, 2019. p. 28.

61 Ibid, 29.

62 MC Porterfield, An International Common Law of Investor Rights? (2006) 27 *University of Pennsylvania International Journal of Economic Law* 79, 88.

63 Also see e.g. Kläger, above n 36, 74-76.

64 North Sea Continental Shelf Cases (*Denmark, Netherlands v Federal Republic of Germany*), ICJ Reports, 1969, p.3 at Paras 60-69.

65 In North Sea Continental Shelf case, the ICJ has traditionally identified three situations in which multilateral treaties may be relevant in the determination of rules of customary law. Such situations are when a treaty may (a) codify the *lex lata* and not a *de lege ferenda* (b) crystallize the custom, as States gives support to the rule in the course of treaty negotiation and drafting and (c) initiate State actions, subsequent to the adoption of the treaty which indicate that the States accept a particular treaty rule as custom (at Paras 60-62).

66 North Sea Continental Shelf Cases (*Denmark, Netherlands v Federal Republic of Germany*), ICJ Reports, 1969, p.3 at Para 72.

67 North Sea Continental Shelf Cases (*Denmark, Netherlands v Federal Republic of Germany*), ICJ Reports, 1969, p.3 at Paras 73-74. The ICJ adopted a slow approach to the role of time in the formation of customary norms, in the determination of whether a rule exists in customary law, there is no precise period of time during which the State practice must exist, but the practice must exist sufficiently long for the other elements of a custom to be established.

68 For example, The Havana Charter, 1948, the Abs-Shawcross Draft, 1959, the Draft OECD Convention, 1967.

contain provisions which might reflect the status of customary international law; but such presumption does not derive from the treaty itself, but from the *North Sea Continental Shelf* construction[69] which suggests that, the very fact that the States by their acts, practice or pronouncement and *opinion juris*, provides sufficient evidence to conclude that they have accepted the norm as custom whether independently or in conjunction with other standards contained in the treaty.[70] The decision in the *Fisheries Jurisdiction* cases (Merits)[71] is a sharp contrast with *North Sea Continental Shelf* cases, wherein the ICJ seemed more open to accept that a resolution and a proposal supported by a large majorities at the First and Second United Nations Conferences on the Law of the Sea, respectively demonstrated overwhelming support for a particular rule in customary law.[72] Taking this relaxed approach construed in *Fisheries Jurisdiction* the multilateral treaties containing the FET standard still lacks competence for creating a customary international law. For example, since the Havana Charter, 1948, in which the standard appeared for the first time, did not seek to create a binding obligation on FET standard, it would be in appropriate to suggest that the Havana Charter intended to reach an agreement that could form the basis of a binding customary rule.[73] The same fate applies to the Draft Abs-Shawcross Convention 1959, not only because it reflected only the investors' perspective, but also because that it received no formal support from States[74] and therefore it cannot generate a customary rule on FET standard. The OECD Draft Convention of the Protection of Foreign Property, of 1963 and 1967 also fails to achieve the result. Firstly, the OECD Draft Convention did not represent the substantial cross-section of State interests on the issue rather it only represented the State interests of the developed and capital exporting States. Secondly it lacked the support from developing countries at the multilateral level and there is no evidence that the

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69 North Sea Continental Shelf Cases (*Denmark, Netherlands v Federal Republic of Germany*), ICJ Reports, 1969, p.3 at Para 63.

70 For example, the OECD Draft Convention, 1967 though not ratified is significant in this discussion, since it provides an evidence of *opinion juris* of several OECD members on this point. To be more particular the Notes and Comments to the Article I of the OECD Draft Convention which stipulates 'fair and equitable treatment', the Committee responsible for the Draft indicates that the concept of fair and equitable treatment flowed from the 'well-established principle of international law' that a State is bound to respect and protect the property of nationals of another State. See Stephen Vasciannie, (1999) 70 *'The Fair and Equitable Treatment Standard in International Investment Law and Practice'*, The British Year Book of International Law, 99, 139 citing International Legal Materials 7 (1968).

71 Fisheries Jurisdiction Case (*United Kingdom of Great Britain and Northern Ireland v Iceland*) ICJ Reports, 1974 at p. 3.

72 Ibid, Para 58.

73 On FET in Havana Charter see e.g. Islam, above n. 1, 32-33.

74 Vasciannie, above n 70, 155.

developing countries have expressed any support to consider the standard as rule of customary international law, rather they have traditionally rejected such connotation. Finally and most importantly the Draft OECD failed to come into force.[75]

In *Glamis Gold vs. US* the tribunal having explained that establishment of a rule of customary international law requires both 'a concordant practice of a number of States acquiesced in by others"[76] and 'a conception that the practice is required by or consistent with the prevailing law (*opinio juris*)[77] held, "The evidence of such 'concordant practice' undertaken out of a sense of a legal obligation is exhibited in very few authoritative sources: treaty ratification language, statements of governments, treaty practice (e.g. Model BITs) and sometimes pleadings. Although one can readily identify the practices of States, it is usually very difficult to determine the intent behind those actions. Looking to a claimant to ascertain custom requires it to ascertain such intent, a complicated and particularly difficult task. In the context of arbitration, however, it is necessarily Claimant's place to establish a change in custom.[78]

It is to be noted from the discussion made above that, in some multilateral instruments the standard has gained to some degree a political acceptance, for example the World Bank Guidelines, the NAFTA Agreement or the Multilateral Agreement on Investment (MAI). At the same time it should also be noted that, the multilateral treaties like NAFTA or MAI, while demonstrating some degree of political acceptance of the standard do not reflect any unanimous consensus of all countries, especially among developing countries that FET standard has become a customary norm.[79] Therefore even with these few examples of multilateral treaties, it is clear that these treaties do not represent any consensus of wide acceptance of the standard as part of customary norm of investment protection standards, notably due to the reluctance of the developing countries in general. The World Bank Development Committee notes in its report on the Guidelines that,

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75 Though Vasciannie opines that, this does not mean that un-ratified treaties may never play a role in the creation of customary rules. To quote him "This makes it difficult, though not impossible, to argue that the fair and equitable standard in the OECD text is part of customary international law", see Vasciannie, above n 70, 156.

76 *Glamis Gold v United States* UNCITRAL (NAFTA) Award, 8 June 2009 at Para 602.

77 Ibid, Para 602.

78 Ibid, Para 603. For a further discussion on the issue see Hussein Haer, (2011) 27 (1) '*A Tale of Two Standards: 'Fair and Equitable Treatment' and the Minimum Standard in International Law'* Arbitration International, 27, 40-41.

79 The World Bank Guidelines on Treatment of Foreign Direct Investment, 1992 appear to be based on this position, for the World Bank Development Committee notes in its report to on the Guidelines that, "...does not aim at representing a codification of what are necessarily agreed upon, binding rules of international law. Rather it attempts to reflect at this stage generally acceptable international standards which meet the objective stated in the Development Committee's request, i.e., the promotion of foreign direct investment" ILM 31 (1992) 1366 at p. 1369.

> ...does not aim at representing a codification of what are necessarily agreed upon, binding rules of international law. Rather it attempts to reflect at this stage generally acceptable international standards which meet the objective stated in the Development Committee's request, i.e., the promotion of foreign direct investment.[80]

It is also to be noted that the Development Committee in fact does not identify any such particular norms of investment protection standards which can be construed as binding rules of customary law.

Vasciannie thinks that, from the reading of the report of the Development Committee of the World Bank, it appears that the FET standard is included in investment protection standard not least because that the Committee had the opportunity to in its report to indicate otherwise.[81] Accordingly in fact the report on the Guidelines in 1992 did not attempt to make any declaration of the customary law on the standard of foreign investors. In case of NAFTA since it lacks the broad base of membership as it is only limited to three countries, also suggest that, the widespread and cross sectional support to claim that the FET standard has passed into customary law in the context of NAFTA does not finding any strong standing. The debate surrounding the articulation of NAFTA Article 1105 discussed above both in the academia and arbitral awards clarifies that, we cannot conclude that the standard has evolved as part of customary rule of international law even within the NAFTA context. The failure of MAI also reflects the argument that, the standard has not become part of customary law.

3.2 FET standard in BITs

There are good numbers of BITs which have included FET standard in combination with the minimum standard under customary international law. One such example is the US Model BIT 2012 which in its Article 5 (1) states that, 'Each party shall accord to covered investments treatments in accordance with customary international law, including fair and equitable treatment and full protection and security.'[82] As a further clarification, the next paragraph states,

> For greater certainty…the customary international law minimum standard of treatment of aliens [is] the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.

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[80] World Bank Development Committee Report on the Guidelines, International Legal Materials 31 (1992) at p. 1369.

[81] Vasciannie, above n 70, 156.

[82] See e.g. Article 5 of US model BIT 2012, for text of the treaty see <https://www.state.gov/documents/organization/188371.pdf> accessed 12 October 2019.

Similarly Article 5(2) of Canada Model BIT 2004 states that the concepts of FET do not require treatment in addition to or beyond that which the customary international law minimum standard of treatment of aliens requires.[83] Although only the US Model BIT prescribes in detailed terms the customary rules that apply, both of these examples show the clear intention of the drafters to limit FET to the rules of the customary international law minimum standard of treatment.[84]

The inclusion of FET standard in the vast majority of BITs could lead the way for the argument that States accept the standard as legally binding obligation irrespective of treaty obligations. This proposition is also supported by the similarity of approach adopted in the numerous BITs which would provide an evidence of both requisite of State practice and *opinio juris* in favour of the rule in customary law.[85] On the issue of States that includes the FET standard in their BITs irrespective of the fact of their denials of the standard; Mann suggests that this reinforces the customary law arguments and that when formulating binding treaties, States forgo their rhetoric and expresses a genuine view on the requirements of law.[86]

Albeit appreciating this approach Vascianni advocates for counter arguments and opines that, "...reliance on bilateral treaties to prove the customary status of fair and equitable rule is somewhat ahistorical".[87] Given the fact that prior to developing countries efforts to achieve a New International Economic Order, the BIT movement was mainly advocated by the developed courtiers due to their suspicion on the treatment accorded to foreign investors. It would be difficult to suggest that there is any consensus of opinion between the developing countries and the developed countries that the standard had passed into customary law. Even the increased growth of BITs in the last decade does not suggest that the standard have evolved into customary law, since there is no evidence that these States are motivated to incorporate the standard in their BITs by a sense of legal obligation which is a prerequisite to form a customary international law. For these developing States it is sensible and understandable to offer the standard in BITs in political and economic terms.

Secondly and more importantly the issue of unequal bargaining power between these two sets of countries cannot be ignored. The developing countries do accept the terms in the BITs largely determined by the developed countries not because they

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83 See e.g. Article 5 of Canada Model BIT 2004, for text see <https://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf> accessed 12 October 2019.

84 Kläger, above n 36, 20.

85 Vasciannie, above n 70, 157.

86 Francis Mann, (1999) 52 *'British Treaties for the Promotion and Protection of Investments'* 241, 245-250.

87 Vasciannie, above n 70, 157.

have happily consented to it, but rather to the fact that they have no other option but then to accept it as out of their perceived necessity[88] and to attract foreign investment in their territory as a means of economic growth. Therefore Vasciannie has rightly opined that,

> As the number of bilateral investment treaties between developing States increases, however, the point concerning inequality of bargaining power may lose some of its vigour, for developing country support for the fair and equitable standard in their relations *inter se* could prompt the perception that the developing countries concerned regard the standard as having acquired customary status. Even here, however, strict positivism would require some indication from the developing countries that the standard has been incorporated not out of convenience or prudence, but because it is deemed to be required by the prevailing law. By the same token, although States in transition have recently entered into numerous bilateral investment treaties containing the standard, this by itself, does not provide unequivocal evidence that these States ascribe normative weight to the fair and equitable standard in customary law.[89]

Finally the few examples some capital importing countries provides assurance of the treatment in their national legislation[90] cannot be considered for regarding the FET as part of *lex specialis* created by BITs.[91] However the absence of any piece of legislation is not decisive in itself, as for some States even in absence of any such law, may well practise fairness and equity as inherent part of their legal fabric and may not simply rely on any explicit obligation in international treaties. To counter this line of argument, it is also to be mentioned that, considering the preference of capital exporting developed countries for the express provision of the FET standard and the history of deliberation on different treatment standards, it is arguable that the developing countries which consider themselves obliged by customary law to grant fair and equitable treatment would have been willing to include this standard in their national legislation. The silence of developing countries on this particular point speaks loudly their reluctance to include the standard into customary law.

4. Does FET standard in international investment law create a customary rule of international law?

There has been abundant debate about the status of FET standard in customary international law. It is well established principle from various scholarly commentaries as well as judicial observation that, in certain circumstances, the rules

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88 See e.g., Kenneth J Vandevelde, (1993) 14 *'US Bilateral Investment Treaties: The Second Wave'* Michigan Journal of International Law, 628, 633-636.

89 Vasciannie, above n *70*,159-160 [footnote in the original text omitted].

90 For example, Vietnam, Angola, Bangladesh and Cape Verde provide such guarantee of fair and equitable treatment to foreign investors in their national legislation.

91 Vasciannie, above n 70, 160.

in a multilateral treaty may pass into the *corpus* of customary international law.[92] From this view point, the rule in the treaty then becomes binding upon the States which even have not accepted it expressly. Even a considerable volume of judicial observation supports that, when a rule is set out in a series of bilateral treaties, this may provide evidence that the particular rules had become part of customary international law.[93] Given this background and considering the prevalence of the standard in various treaties and other instruments Vascinnie questions whether it is appropriate to enquire that "States are now required, as a matter of law, to provide foreign investors with fair and equitable treatment, even where they do not have a treaty obligation to this effect."[94] Also the tribunal in *Mondev* seemed to hit this possibility when it held that,

> The vast number of bilateral and regional investment treaties (more than 2000) almost uniformly provide for fair and equitable treatment of foreign investment....In the Tribunal's view, such a body of concordant practice will necessarily have influenced the content the rules governing the treatment of foreign investment in current international law[95]

The arbitral tribunal in *Enron vs. Argentina*[96] examined the FET standard in the evolutionary context of international law and stated that,

> The evolution that has taken place is for the most part the outcome of a case by case determination by courts and tribunals, [partly hinging] on the gradual formulation of 'general principles of law' …in some circumstances, where the international minimum standard is sufficiently elaborate and clear, fair and equitable treatment might be equated with it. But in other vague circumstances, *fair and equitable treatment may be more precise than its customary international law forefathers*'[97] [emphasis added]

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92 See, e.g., North Sea Continental Shelf Cases (*Denmark, Netherlands v Federal Republic of Germany*), ICJ Reports, 1969, p.3; Article 38 of the Vienna Convention on the Law of Treaties, United Nations Treaty Series, vol. 1155, p.331; Jennings and Watts, *Oppenheim's International Law,* vol. I, (9th Edition, 1992) pp. 33-36; Ian Brownlie (1990) *Principles of Public International Law* (4th Edition, Claredon Press, Oxford) 11-13; RR Baxter, (1965-66) 41 *'Multilateral Treaties as Evidence of Customary International Law'* British Year Book of International Law, 275-300; JI Charney, (1986) 61 *'International Agreements and the Development of Customary International Law'*, Washington Law Review, 971-996; Vasciannie, above n 70, 153-156.

93 See, e.g., RR Baxter, (1970-71) 129 *'Treaties and Custom',* Recueil des cours, 27-104, especially see pp. 75-91; The Wimbledon, PCIJ, Series A, No. I(1923), p.25; Panevezys-Saldutiskis Railways case, PCIJ, Series A/B No. 76, pp.51-52, *per* Judge Ehrlich; Nottebohm Case, ICJ Reports, 1955 at pp. 22-23; Brownlie, above n 92, 13; Robert Jennings and Arthur Watts (1992) *Oppenheim's International Law,* (9th Edition, Vol. I Harlow, Longman) 33.

94 Vasciannie, above n 70, 102. Also see e.g. Haer, above n 77, 43-45.

95 Mondev, above n 55, Para 117.

96 *Enron Corporation and Pnderos Assets, L.P v Argentine Republic*, ICSID Case No. Arb/97/3, Award 20 August 2007.

97 Ibid, Para 258.

The tribunal in *ADF vs. USA* expressed the view that,

> […] what customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the Award in the *Neer* case was rendered. For both customary international law and the minimum standard of treatment of aliens it incorporates, *are constantly in a process of development*.[98] [emphasis original]

In addition to this, the recent tribunal in *Cargill vs. Mexico* held incisively,

> The Tribunal observes that the requirement to provide 'fair and equitable treatment' is included in may bilateral investment treaties (BITs). The Tribunal notes first hat some of these clauses involve a reference to customary international law, while others apparently involve autonomous treaty language. It is the Tribunal's view that significant evidentiary weight should not be afforded to autonomous clauses inasmuch as it could be assumed that such clauses were adopted precisely because they set a standard other than that required by custom.[99]

There are very few examples of arbitral awards which have retained that, the international law mentioned in the particular BIT should be considered as customary international law. One such example is the award rendered by the tribunal in *M.C.I Power Group L.C vs. Ecuador*[100] which held that,

> […] the international law mentioned in Article II of the BIT refers to customary international law, i.e., the repeated, general and constant practice of States, which they observe because they are aware that it is obligatory.[101]

Having referred to the arbitral awards above it is also important to pin point that, the international minimum standard does not encompass any particular focus on 'investor'; it only refers to aliens and their property. This restrictive approach of international law today no longer suffices to address the complex issues surrounding foreign investment disputes. Accordingly investment tribunals have not addressed the standard in relation with an investor's investment. Therefore considering the established components of the *international minimum standard*, which offers little in terms of substantive investor protection, most investor protections cannot constitute a violation of customary international law even in the absence of a treaty obligation.[102]

Interpretation in the context of investment treaties suffers from confusion as to whether the *Neer* claim and ensuing contexts have created the *minimum standard* or whether evolving customary law, which the extensive network of BITs has

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98 ADF, above n 55, Para 179.

99 *Cargill v United Mexican States*, ICSID Case No. ARB(AF)/05/02 (NAFTA), Award 18 September 2009 at Para 276.

100 *MCI Power Group L.C and New Turbine, Inc. v Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007.

101 Ibid, Para 369.

102 See e.g. Yalkin, above n 22.

influenced, provides the standard. Also important to note in this context that the developing countries and especially the Latin American countries have always questioned the existence of a minimum standard of treatment and its inclusion in customary international law.[103] Since the numerous numbers of BITs have not provided a comprehensive definition of such a standard, an ironic result is that States enter into these treaties to clarify the vagueness on customary international law as it applies to investment protection.

In this discussion it is also pertinent to mention the presumption forwarded by Vascinnie who thinks that there is a room or the view that customary rule of particular application has developed among the developed countries in terms of the FET standard. This argument is based on the premises that, with reference to both State practice and *opinio juris* the developed countries have fully evinced their support for the notion that, the standard is binding as a matter of customary law.[104] Especially considering the practice of developed countries in terms of multilateral instruments and BITs which reflects a strong support for the standard by these countries, while the same countries have consistently sought to convince their developing counterparts that the FET standard should be part of *lex generalis.* However in reality there is little ground to argue that, such rule of custom has developed even among the developed capital exporting countries. The reason is that, since applicability of the standard between two developed countries would be binding on both States by virtue of acquiescence or estopple and therefore it would be unnecessary to ascertain whether a custom as actually evolved among the developed countries as a group.[105] It would also be far-fetched to conclude that the developed countries as a group belong to the same region and that the customary rule as contemplated here would be a regional custom, in *stricto sensu.*[106]

Thus no body of minimum standard of international law or customary international law that directly speaks to rapidly evolving standards like FET, and the present modern, highly intricate, and complicated investor–state relationship therefore exists without such a standard. Therefore combining the FET standard with the minimum standard whether in multilateral treaties or BITs does not create any secure guarantee for host countries that the ambit of the FET obligation will be significantly restricted. As a result, it is clear that, in the vast majority of investment treaties, the host countries need to assume that a tribunal will interpret the FET standard as an independent and autonomous standard.[107]

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[103] Vasciannie, above n 70, 144.

[104] Ibid, 161.

[105] Ibid, 162.

[106] On regional customary rule see e.g. *Asylum Case (Colombia v Peru)* ICJ Reports 1950, 266 at pp. 276-7.

[107] Generally see e.g. Islam, above n 1, ch 3.

5. Conclusion

From the discussion made throughout this article it is clear that, the FET standard has not gained part of customary law even in terms of BITs, despite its wide presences in majority number of BITs. It is also to be noted that much of the practice of the BITs originates in earlier multilateral attempts by capital exporting countries to influence the standard of the treatment available to foreign investors in developing countries. All these multilateral efforts forwarded by developed countries, have introduced a range of investment protection standards appreciated by State practice but they have not gained the widespread support to enter into force as treaties. From the practice of the BIT regime at least some rules have become legally binding rules, for particular number of States. However that does not indicate that, the rules binding in the BITs automatically also oblige the non-parties to such treaties. In the context of FET standard, for it to be fully incorporated as part of customary law, there is a need of unequivocal evidence of the requisite of *opinion juris* among a significant cross section of countries, having special regard to different perspectives historically expressed by developed and developing countries as well as countries in economic transitions on different investment protection standards, specially their diametrically opposite position on FET standard.

Therefore based on the discussion made above it is submitted that, for the FET standard to be fully part of customary international law, there would need to be unequivocal evidence of the requisite of *opinion juris* among a significant cross-section of States having special regard to the different perspectives which have been traditionally presented by both capital exporting and importing States, which has clearly not been the case. Therefore the better view is that the despite its ubiquitous presence in different multilateral investment treaties and BITs the FET standard has not passed into the corpus of customary international law and therefore does not create any rule of customary rule of international law in international investment law context.

Between Secularism and Islamism: Understanding the Human Rights Issues of Bangladesh Minorities Since 1975

Gobinda Chandra Mandal*

1. Introduction

Today's Bangladesh was a part of Pakistan until the latter's dismemberment in 1971. Based on the 'two-nation' theory, India got partitioned in 1947, and Pakistan came into existence as a Muslim state. The newly founded Islamic Republic of Pakistan was left with a sizeable non-Muslim minority, particularly in its eastern wing, which later came to be known as Bangladesh. After partition, the non-Muslims made up nearly one-fourth of the total population of East Bengal and accounted for approximately fourteen percent of the entire population of Pakistan. Before 1947 the minorities, especially the Hindus, were politically, financially, and socially dominant in East Bengal. The establishment of Pakistan reversed that dominance. The religious minorities in East Bengal began its life in the new political system in an atmosphere of communal hatred, distrust, and disgrace.[1]

Both the creation of Pakistan and the creation of Bangladesh equally witnessed a series of massacres, rapes, abductions, conversions, looting, and arson of properties of the minority populations. During the war of independence in 1971, each minority community had to go through immense suffering and loss of life and property, and collectively they made the highest level of sacrifice for this nation. In return, the State made them the 'second-class' citizens, imposing constitutional inequality and systematic discriminations after 1975. Analyzing the state actions in the last few decades, one could easily conclude that the ideas of equality and justice have been elusive and contradictory for both religious and ethnic minority communities in the country. The state's inherent culture of denial and deprivation to its minority citizens are aggravating their feelings of frustration and emptiness.[2]

The emergence of secular Bangladesh in 1971 signified a victory for the secular values and practices as the minority communities regarded it as an end to the reign of terror, humiliation, discrimination, and constant communal tension they faced till the last day of Pakistan.[3]

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1 Muhammad G. Kabir,, *Minority politics in Bangladesh* (MA Thesis, The University of British Columbia, 1978). See also, Gobinda Chandra Mandal, 'Rights of the Minorities: The case of Bangladesh' in Mizanur Rahman (ed), *Human Rights and Good Governance* (ELCOP, 2004) 154.

2 Gobinda C. Mandal, 'The Trajectories of Hindu Existence in Bangladesh: A Politico-Legal Exploration' in ELCOP, *Yearbook of Human Rights* (2019) 102-103.

3 See Mandal, above n 1, 154.

Unfortunately, in the post-liberation period also, the persuasion of anti-secular beliefs by our political elites, alteration to the basic norms of State, unusual intervention to the law and policy, destruction of secular democratic practices in the name of Islam, and Constitutional amendments targeting Islam in the center of politics again hosted the invocation of Islamic Pakistan's political ideology in the newly independent secular State of Bangladesh. Minority populations did not expect the continuance or reappearance of the very unfair laws and policies, and biased actions from the State's part. Regular State-sponsored acts of human rights violations, including abduction, torture, land grabbing, eviction, destruction, and desecration of religious institutions, conversion, and violence against women and girls, chased them to the age-old Pak nightmares.[4]

Minority communities firmly believed that once in power, the daughter of the Father of the Nation Prime Minister Sheikh Hasina will remove the humiliating and insulting provisions from the Constitution and will restore a real secular democratic Bangladesh in line with the spirit of the Liberation War of 1971. Unfortunately, the so-called 'secular' Awami League proved to be no less 'Islamic' than their predecessors evident in terms of Constitutional amendments and self-contradictory political practices.

Theoretically, Bangladesh is still a secular country, not an Islamic Republic, like Pakistan or Iran. However, the growing dominance of Islamism in the Bangladesh polity raises risks of becoming like them. Islamists here are increasingly demanding the introduction of Islamic Sharia law in all State affairs. The government is silent on the issue and has not demonstrated a clear stand against the violence committed by the Islamic extremists in the name of religion. The State administration, politicians, religious leaders, and different extreme groups are consciously paving the way for communal aggression on the non-Muslim minority populations. Increasing Islamic approaches in the politics and State affairs have developed impediments to a proper understanding of the human rights issues of Bangladesh minorities.

It is in this context an attempt has been made to unfold the human rights issues of the religious and ethnic minorities in Bangladesh. The legal and political journey of secular Bangladesh towards Islamism, political tuning in line with extremist agenda, the death of secularism in the hands of the so-called secularists and how all these created challenges to the survival and existence of the minority population in the country- is the central focus of this work. Of course, due to different limitations, it cannot be claimed as a complete work, rather an introduction to the issue.

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[4] Ibid.

2. Between Secularism and Islamism

Bangladesh has been undergoing a conservative Islamization process over the last five decades, and the rise of the Islamists, in general, is a part of this process.[5] The method includes "the deletion of 'secularism' from the Constitution, declaring 'Islam' as the state religion, and finally imposing an Islamic character upon the secular state of Bangladesh."[6] The growing use of Islamic idioms in political discourse and the close liaisons between secularist and Islamist political forces sped up the process towards a permanent shape.[7]

The founding fathers of Bangladesh promised to build a genuinely secular nation. They enshrined the principle of secularism in the first Constitution of 1972 as one of the founding tenets of the newly independent Bangladesh. Unfortunately, the conflict between Islamists and secular forces has plagued the country since its formation.[8] Soon after independence, the pro-Pakistan Islamic forces increasingly started propagating secularism as being synonymous with dishonoring Islam and tantamount to dependence upon "secular and anti-Muslim" India. "The Islamic religious and educational institutions, media, and the ubiquity of Islam in family and social life contributed to a growing embrace of Islam at the expense of support for secularism."[9] With the assassination of the Father of the Nation Bangabandhu Sheikh Mujibur Rahman in 1975, the brief secular interlude ended unceremoniously. Over time, Muslim religious identities regained salience, challenging Bangabandhu's political will to remain committed to secularism.[10]

The major invasions came during the two military regimes.[11] After the killing of Bangabandhu in 1975, military dictators changed the fundamental character of the Constitution. In 1977, General Ziaur Rahman incorporated "Bismillah-ar-Rahman-ar-Rahim" at the beginning of the Constitution[12], and replaced secularism with the principle of "absolute trust and faith in the Almighty Allah."[13] An additional clause

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5 Ali Riaz, '"God Willing": The Politics and Ideology of Islamism in Bangladesh' (2003) 23(1&2) *Comparative Studies of South Asia, Africa and the Middle East* 301.

6 Ibid.

7 Ibid.

8 South Asia Journal, *Bangladesh- Dawn of Islamism* (17 April 2018) <southasiajournal.net/ bangladesh-dawn-of-islamism-dw-documentary/> accessed 12 October 2019.

Carol Christine Fair and Parina Patel, 'Bangladesh' Rational Islamists: A Study of Islamism and Regime Preferences' in SSRN, *An Under-studied South Asian Country* (17 July 2019) <https://ssrn.com/ abstract=3421566> accessed 25 September 2019.

10 Ibid.

11 Regime of General Zia (1975-1981), and the regime of General Ershad (1982-1990).

12 *Proclamations (Amendment) Order 1977* (Proclamations Order No. I of 1977).

13 The Constitution of the People's Republic of Bangladesh: Clause 1 of article 8 was substituted by the Proclamation Order No. I of 1977.

declared that "absolute trust and faith in the Almighty Allah shall be the basis of all actions."[14]

Also, Zia changed the national identity of the people of Bangladesh from 'Bangalee' to 'Bangladeshi.'[15] Zia's brand of nationalism intertwined the ethnic and religious characters with a clear emphasis on the latter. Thus, the pendulum returned to its original Pakistani position, and 'Islam' resumed preeminence in the Bangladesh polity.[16]

General Zia led a major political shift by rehabilitating the Jamaat-e-Islami, a party disgraced for collaborating with the armed forces of Pakistan during the liberation war in 1971, and faced a Constitutional ban after independence.[17] Then, in 1988, another military dictator Hussain Mohammed Ershad announced 'Islam' as the state religion of the Republic.[18] The original Constitution of Bangladesh did not refer to Islam and emphasized secularism along with nationalism, socialism, and democracy as the founding principles of the Bangladesh polity. State initiatives incorporating Islam in politics in both the military regimes had far-reaching undeniable consequences on the minority population of this country.

2.1. Secularism Explained in Our Context

The term 'secularism' adopted in Bangladesh was markedly different from its Western model. While the Western notion of secularism insists upon complete separation of religion from the state, the South Asian model implies the role of the State in religious affairs. Ideally, secularism is supposed to be intrinsically linked to the secularization process, i.e., "relative decline in religious influence and the importance of religious identity."[19] In our context, secularism does not denote irreligion. Instead, it signifies that people of all faiths are free to practice their religion. Nobody would hurt anybody's personal beliefs.[20] Tazeen Murshid, the author of "The Sacred and the Secular," rightly identified the character of the South Asian model of secularism: "'Secular' came to be defined as the binary opposite of 'communal' implying a tolerance of other religious communities."[21]

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[14] Ibid. clauses (1) and (1A) of article 8 substituted for clause (1) by the Proclamations Order No. I of 1977.

[15] Ibid. substituted by the Proclamations Order No. I of 1977, for article 6.

[16] Ali Riaz, *God Willing: The Politics of Islamism in Bangladesh* (Rowman & Littlefield, 2004) 17, 20.

[17] Raj Sharma, 'Rise of Islamic Radicalism In Bangladesh Implications For The Security Of North-East India' (2015) 9(1/2) *Himalayan and Central Asian Studies* 67.

[18] See above n 13, Article 2A was inserted by the Act XXX of 1988, s 2.

[19] Achin Vanaik, *The Furies of Indian Communalism: Religion, Modernity and Secularization* (Verso, 1997) 5.

[20] Sun Online Desk, Bangabandhu contributes a lot for spreading Islam: Hanif, The Daily Sun,15th August 2015 <https://www.daily-sun.com/post/67253/2015/08/15/Bangabandhu-contributes-a-lot-for-spreading-Islam> accessed 25 October 2019.

[21] Tazeen Murshid, *The Sacred and the Secular* (Oxford University Press, 1995) 5.

2.2. Towards Islamic Secularism(?)

The Fifteenth Amendment to the Constitution established a new version of secularism in Bangladesh. Prime Minister Sheikh Hasina reinstated secularism in the Constitution but did not eliminate 'Islam'— as the state religion. It was, in fact, a substantial compromise with the Islamists. The 1972 version of secularism did not deny the importance of personal faith and allowed Muslim citizens to distinguish their identities both as Banglalees and as Muslims.[22]By the Fifteenth Amendment, Islam overtook secularism officially and permanently. Awami League, the major propounder of secularism in 1972, proved itself a patron of Islamization by keeping the Islamic features of the Constitution untouched in 2011. Dr. Ali Riaz, a distinguished professor of Politics and Government in the Illinois State University, rightly identified the politics behind this attitude of the so-called secular forces:

> The notion of secularism as propagated in Bangladesh has been instead an endogenous construct. The interests of the dominant classes and their quest for power made such a construction necessary.[23]

2.3. Political Tuning in Line with Growing Extremism

In the past decades, political parties and leaders "competed with one another to be in tune with the growing Islamism and its rulers, thus strengthening Islam as a factor in the power struggle in Bangladesh."[24] This skepticism towards secularism grew, and Islamists in Bangladesh took advantage of this political atmosphere. They are now claiming that secularism was not an issue before or during the war of independence in 1971. In their view, it was only a later addition.[25]

Whom should we blame for this consistent process of 'Islamization' of our precious secular motherland? Is it only the military dictators, the opportunistic power mongers, who used Islam as a political tool to occupy State power, or the entire corrupt political forces, including the so-called secularists who unanimously promoted the process, undermining democracy and secularism? Undoubtedly, history will remark General Zia and General Ershad as the two most wicked players of Bangladeshi polity. Their naked invasions on the secularism and other principles of state policy upon which the new State of Bangladesh got established have been highly criticized and to a certain extent, rejected by the higher Judiciary. The Supreme Court of Bangladesh declared the whole military regime of General Zia illegal. In 2005, the High Court Division of the Supreme Court declared the Constitution (Fifth Amendment) Act, 1979 unconstitutional which validated all

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22 See above n 9.

23 See above n 6, 303.

24 See above n 9.

25 DW Documentary, *Bangladesh: Dawn of Islamism* (17 April 2018) <https://www.youtube.com/watch?v=J6DxXI6wD8U> accessed 22 October 2019.

amendments, additions, modifications, substitutions, and omissions made in the Constitution during the period between 15 August 1975 and 9 April 1979 by the Martial Law Authorities.[26] Subsequently, the decision was upheld by the Appellate Division of the Supreme Court.[27]

Under the Constitution (Eighth Amendment) Act, 1988 (Act XXX of 1988), military dictator HM Ershad inserted Article 2A declaring "Islam" as the state religion.[28] Fifteen distinguished citizens[29] under the banner of Swairachar O Samprodaikota Protirodh Committee filed a writ petition in 1988 challenging the legality of Article 2A of the Constitution, which declared Islam as the state religion. After long twenty-three years, a High Court Division Bench on June 11, 2011, issued a rule upon the government to explain why Article 2A should not be declared illegal. Prime Minister Hasina, on June 30, 2011, passed the Constitution (Fifteenth Amendment) Act, 2011 (Act XIV of 2011), retaining Islam as the state religion. The High Court Division on December 01, 2011, issued a supplementary rule, asking the government to explain why the provision of the Fifteenth Amendment to the Constitution retaining Islam as the state religion, should not be declared illegal. The government, however, did not respond to the rule.

On March 28, 2016, without reaching the merits, the Court summarily dismissed the writ for lacking locus standi and discharged the rule issued earlier over the legality of Article 2A.[30]

Undoubtedly Zia and Ershad were not the sole players in the nationalization of Islamism. It has been a continuing process since the inception of Pakistan with a short break after independence. Awami League leaders often claim that Bangabandhu included secularism in the four basic state principles following the Constitution of Medina.[31] Several times in the last few years, Prime Minister Sheikh Hasina announced that Bangladesh would be governed as per the Madinah Charter and the

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[26] *Bangladesh Italian Marble Works Ltd v Bangladesh* (2006) BLT (Special) (HCD) 1.

[27] *Khondhker Delwar Hossain v Bangladesh Italian Marble Works Ltd and Others* (2010) 62 DLR (AD) 298.

[28] Article 2A was inserted to the Constitution by Act XXX of 1988, section 2.

[29] The writ petitioners were Begum Sufia Kamal, former chief justice Kemal Uddin Hossain, Khan Sarwar Murshid, Prof Kabir Chowdhury, Prof Mosharraf Hossain, Maj Gen (retd) Chitta Ranjan Datta (Bir Uttam), Prof Serajul Islam Choudhury, Badaruddin Umar, journalist Faiz Ahmed, Dr Borhan Uddin Khan Jahangir, Prof Anisuzzaman, Justice Devesh Chandra Bhattacharjee, Justice KM Sobhan, Syed Istiaq Ahmed and Kalim Sharafi.

[30] Staff Correspondent, HC rejects writ over Islam as state religion, The Daily Star, March 29, 2016, <https://www.thedailystar.net/frontpage/writ-challenging-islam-state-religion-rejected-1201132> accessed 05 December 2019.

[31] Sun Online Desk, Bangabandhu contributes a lot for spreading Islam: Hanif, The Daily Sun,15th August, 2015 <https://www.daily-sun.com/post/67253/2015/08/15/Bangabandhu-contributes-a-lot-for-spreading-Islam> accessed 25 October 2019.

last sermon and directives of Prophet Muhammad.[32] In line with the extreme Islamists, she declared that "there will be no law against the Holy Quran and Sunnah here ever."[33] During election days 'secular' Awami League propagates the contributions of Bangabandhu in spreading Islam; which in essence supports the claims of his critics:

> …in response to intense domestic pressures and without changing the constitutional emphasis on secularism, Mujib eventually reversed himself and made Bangladesh more Islamic than before...[34]

When military strongman Zia dropped secularism from the Constitution, Sheikh Hasina campaigned to restore it. Many years later, she did it but kept the Islamic elements ('Bismillah' at the beginning and 'Islam'-as State religion) untouched. Today, Awami League has typically been more sympathetic to religious causes than many other Islamic parties.[35] "Awami League is still theoretically secular, but the government has abandoned its principle of secularism. It has made an awkward compromise with the extreme Islamists." Comments came from Sandra Petersmann and Hans Christian Ostermann- two foreign journalists working on the rise of Islamism in Bangladesh.[36] The government was supposed to be devoted to secularism, but the ground reality they observed tells a different story:

> A father expresses his frustrations over the refusal of authorities to seek justice in his child's murder. The Advisor to the Prime Minister places blames on the secularist bloggers who instigate their demise by freely sharing their views. [37]

H. T. Imam, the political advisor to the Prime Minister, in an interview with the foreign media said that by distorting Holy Quran and commenting upon the life of Prophet Mohammad, the blogger invited attacks upon themselves.[38] He reiterated:

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[32] The Daily Star, Country to be run as per Madinah Charter: PM, March 08, 2015, <https://www.thedailystar.net/country-to-be-run-as-per-madinah-charter-pm-16759> Unb, Dhaka, The Daily Star, PM rejects all new formulas, April 14, 2013 <https://www.thedailystar.net/news/pm-rejects-all-new-formulas> accessed 22 October 2019.

[33] The Daily Star, Country to be run as per Madinah Charter: PM, March 08, 2015, <https://www.thedailystar.net/country-to-be-run-as-per-madinah-charter-pm-16759> accessed 22 October 2019.

[34] Zillur R. Khan, "Islam and Bengali Nationalism," Asian Survey, 25, 8 (1985): 845-46

[35] The Economist, print edition | Asia, Bangladesh's government is pandering to Islamist zealots, Jun 1st 2017 <https://www.economist.com/asia/2017/06/01/bangladeshs-government-is-pandering-to-islamist-zealots> accessed 20 October 2019.

[36] Sandra Petersmann and Hans Christian Ostermann, Director of the Film "Bangladesh: Dawn of Islamism".

[37] Minority Watch, Bangladesh: The Dawn of Islamism <https://www.minoritywatch.com/bangladesh-the-dawn-of-islamism/> accessed 12 October 2019.

[38] Interview available in the YouTube video <https://www.youtube.com/watch?v=J6DxXI6wD8U > accessed 12 October 2019.

> We practice secularism, and the enemies of secularism are those bloggers and those who killed them, the extremists. We will have to bring them to justice. The government must extend hands to the Islamists to maintain social cohesion.[39]

The Islamists see themselves as the victims of anti-Islamic propaganda in the country. In the past, when one of the cabinet ministers of the last Awami League Government, Mr. Latif Siddiqui, commented on the pilgrimage to Macca, the Islamic zealots termed him as an atheist and demanded his open execution following Islamic law. Finally, Mr. Siddiqui lost his position and was sent to jail.

Islamists in the post-'75 Bangladesh fully succeeded in marking secularism as a threat to Islam and got general acceptance in the society and politics.[40] All political parties, irrespective of their background and ideology, are witnessing the dangerous compromise of secularism with the extreme Islamism with no major reaction.

3. Minority Rights and the State Obligations under International Law

In its Advisory Opinion on the Minority Schools in the Albania Case[41] the Permanent Court of International Justice remarked that the system for International Protection of the Minorities was primarily designed to attain two objectives: first, to ensure complete equality between nationals of the state belonging to racial, religious or linguistic minorities and other nationals (related to the majority) and second, "to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics."[42]

With the birth of the United Nations, the concept of minorities came to be covered by the idea of human rights and fundamental freedoms. Primary UN documents, including the Charter of the United Nations and the Universal Declaration of Human Rights, 1948 did not mention specifically the issue of minorities. No attempt was made to define these groups in any appropriate manner.[43] Even the Commission on Human Rights did not consider it necessary to define the term "minority" before setting up the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

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[39] Interview with Sandra Petersmann, Hans Christian Ostermann, available in the YouTube video: <https://www.youtube.com/watch?v=J6DxXI6wD8U> accessed 12 October 2019.

[40] Anis Ahmed, Bangladesh's Creeping Islamism, The New York Times, Feb. 3, 2017, https://www.nytimes.com/2017/02/03/opinion/bangladeshs-creeping-islamism.html> accessed 26 October 2019.

[41] *Greece v Albania*. Advisory Opinion, 26. PCIJ, Ser. A./B., No. 64, 1935.

[42] Ibid.

[43] Satish Chandra, The term "Minority" and its Concept in International Law, in Minorities in National and International Laws (ed.) Satish Chandra, Delhi, 1985 in Mandal, Gobinda Chandra; Rights of the Minorities: The case of Bangladesh in Mizanur Rahman (ed), Human Rights and Good Governance, ELCOP, Dhaka, 2004, p. 156.

United Nations Fact Sheet on Minority Rights explained the reason behind this UN approach: "The view was that if the non-discrimination provisions were effectively implemented, special provisions for the rights of minorities would not be necessary."[44] It was very soon the international community came to realize that further measures were needed to protect persons belonging to minorities. To this end, non-discrimination provisions against minorities were adopted in international human rights instruments.[45]

However, new momentum was gained when, in 1976, the International Covenant on Civil and Political Rights (ICCPR) came into force. Article 27 of the ICCPR is specifically concerned with the situation of persons belonging to the minorities:

> In those States in which ethnic, religious and linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

ICCPR grants minorities "the right to national, ethnic, religious or linguistic identity, or a combination thereof, and to preserve the characteristics which they wish to maintain and develop."[46]

Based on a logical and literal interpretation of the Article, the following rights could be conferred upon the members of any minority group: Freedom to enjoy their own culture, freedom to profess and practice their religion, or freedom to use their language.

International law accords rights — on a collective basis –to ethnic, religious, and linguistic minorities. It must be emphasized at the outset that the interest protected by international law belongs solely to these three types of minorities in the world.

Apart from specific provisions relating to particular minorities, two collective human rights are accorded by general international law to every minority anywhere: the right to physical existence, and the right to preserve a separate identity.

To promote and protect the rights of minorities worldwide, the United Nations took a clear stand prohibiting discrimination against minorities. Under the UN framework discrimination has been interpreted to "imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, ..., language, religion, ..., national or social origin, ..., birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms".[47]

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[44] UN Fact Sheet No.18 (Rev.1), Minority Rights <https://www.ohchr.org/Documents/Publications/Fact Sheet18rev.1en.pdf> accessed 22 December 2019.

[45] Ibid.

[46] Ibid.

[47] General Comment 18 of the Human Rights Committee on non-discrimination under the Covenant on Civil and Political Rights, United Nations document HRI/GEN/1/Rev.2 of 29 March 1996.t]

In any state, discrimination may be caused politically, socially, culturally or economically. To prevent such discrimination States must avert "any action which denies to individuals or groups of people equality of treatment which they may wish".[48]

Most of the international human rights instruments contain provisions prohibiting discrimination.[49] Several international instruments deal with situations in which minority groups and their individual members may be denied equality of treatment because of their racial, linguistic, religious or social status. These instruments provide important safeguards to the individual members of minorities, i.e., right to be recognized as a person, right to equality before the law and equal protection of the law, right to a fair trial, freedom of belief, freedom expression, freedom of association etc.

International law also granted some special rights for minorities, enabling them to preserve their self-identity, traditions and characteristics. Several international human rights instruments refer to special rights for minorities, including the Convention on the Prevention and Punishment of the Crime of Genocide (art. II); the Convention on the Elimination of All Forms of Racial Discrimination (arts. 2 and 4); the International Covenant on Economic, Social and Cultural Rights (art. 13); the International Covenant on Civil and Political Rights (art. 27); the Convention on the Rights of the Child (art. 30); the UNESCO Convention against Discrimination in Education (art. 5); the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; and the UNESCO Declaration on Race and Racial Prejudice (art. 5).[50]

United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities[51] addresses the special rights of minorities. It ensures a balance between the rights of minority people and the obligations of States. The Declaration grants to the protection of identity by States; enjoyment of their own culture, religion and language; participation in public life and decision making; establishment and maintenance of associations and peaceful contacts with other members of their group within and across the borders. The

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48 United Nations document E/CN.4/52, Section V.

49 Non-discrimination provisions are contained in the United Nations Charter of 1945 (arts. 1 and 55), the Universal Declaration of Human Rights of 1948 (art. 2) and the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights of 1966 (art. 2). Such provisions also appear in a number of specialized international instruments, including: ILO Convention concerning Discrimination in Respect of Employment and Occupation No. 111 of 1958 (art. 1); International Convention on the Elimination of All Forms of Racial Discrimination of 1965 (art. 1); UNESCO Convention against Discrimination in Education of 1960 (art. 1); UNESCO Declaration on Race and Racial Prejudice of 1978 (arts. 1, 2 and 3); Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief of 1981 (art. 2); and the Convention on the Rights of the Child of 1989 (art. 2).

50 See above n 44.

51 Adopted by the UN General Assembly on 18 December 1992, by resolution No. 47/135.

Declaration promotes individual and collective exercise of rights with other members of their group, without discrimination.

The Declaration dictates States to take measures creating favourable conditions enabling minorities to develop their language, culture, religion, customs, and traditions; allowing adequate opportunities to learn their mother tongue; encouraging knowledge of their history, traditions, language and culture; allowing participation in economic progress and development; considering legitimate interests of minorities in developing national policies and programs; promoting respect for the rights outlined in the Declaration; and fulfilling the obligations and commitments States have assumed under international treaties and agreements.

4. Challenges Before the Bangladesh Minorities

4.1. Constitutional Protection: Equality in Question

In 1972, Bangladesh got one of the most modern, balanced, and impressive constitutions in the world. Unfortunately, shortly after the independence, the Father of the Nation Bangabandhu Sheikh Mujibur Rahman was killed, and the anti-liberation forces recaptured the state Power. The first aggression came with the destruction of the secular-democratic character of the Constitution, for which three million martyrs gave blood in 1971.[52]

The Military rulers started imposing Islamic character on the State in line with Pakistan and made necessary abrogation, insertion, and amendments to the Constitution. Two military regimes of General Ziaur Rahman and General Hussain Muhammad Ershad successively continued the process of Islamization, which the secular Awami Lague, later, tried to curb, but with limited success. In 2011, Prime Minister Sheikh Hasina introduced the Fifteenth Amendment to the Constitution with the intent to get back the original character of the Constitution. She did her most, but what she left was no less.[53] A brief analysis is attempted here to explore the constitutional challenges faced by the numerical minorities in the country under the new Constitutional order.

Constitutionally Bangladesh does not recognize any minority in the country. It is only in the Fifteenth Amendment the Constitution of Bangladesh indirectly recognized the existence of some 'tribes, minor races, ethnic sects and communities' in the country.[54] It needs to be mentioned, however, that the members of these tribes, races, and sects predominantly belong to different indigenous groups, popularly known as 'Adivasis' in the South Asia region. The Government of Bangladesh is highly reluctant to recognize

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52 See above n 2, 113.

53 Ibid, 114.

54 Article 23A was inserted by the Constitution (Fifteenth Amendment) Act, 2011 (Act XIV of 2011), section 14 which reads: "The State shall take steps to protect and develop the unique local culture and tradition of the tribes, minor races, ethnic sects and communities."

their 'indigenous' character which is ultimately hampering their sense of belonging, belief systems, and values. Their strong cultural identities, the crucial components of their social and emotional wellbeing, which could build resilience and positive coping mechanisms protecting against the continuous adversity, have been going unfastened since 1976 when the State-sponsored Bangalee settlement in the CHT region began. Several decades of military presence, unbound human rights violations and non-responses to their stigmas, discriminations, and the ongoing Bangalee colonization have been disrupting their lives putting the whole Adivasi community in the CHT region in the risk of non-existence. Recognition of their indigenous identities could afford better legal protection, which the Government of Bangladesh avoids consciously.

Bangladesh vows for the democracy in which "fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed".[55] Constitutionally Bangladesh is committed to following the 'principle of equality' and "not to discriminate on the grounds of religion, race, caste, sex, or place of birth or any of them."[56] Constitutional equality is one of the most notable features of modern democracy. Persons similarly situated should be treated alike- is the spirit of the doctrine of equality. While interpreting the doctrine, the Supreme Court of Bangladesh expressed its opinion that the same laws must govern persons in similar circumstances.[57] Therefore, the non-Muslim minority population is supposed to get at least equal treatment as per the majority Muslim population.

The Government is to adopt effective measures to remove social and economic inequality and ensure equality of opportunity for all citizens.[58] Women's participation in national life has been especially encouraged.[59] Also, the Constitution guarantees equal opportunity in public employment.[60]

In the post '75 days, employment in many public offices by religious minorities, particularly Hindus, had unofficially gone restricted.

Protection of life, liberty, body, reputation, or property following the law is an inalienable right of every citizen.[61] The Constitution of Bangladesh offers freedom of speech and expression and press subject to the issues of security, public order, decency or morality, etc. Any incitement to an offense is also prohibited under this

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55 See above n 13, Article 11.

56 Ibid, Article 27 & 28.

57 Dr. Nurul Islam vs. Bangladesh, 33 DLR 201, Para-87

58 See above n 13, Article 19(1-2).

59 Ibid, Article 19 (3), added by the Constitution (Fifteenth Amendment) Act, 2011 (Act XIV of 2011), s 13.

60 Ibid, Article 29.

61 Ibid, Article 31, 32.

article.[62] If the governments were willing to check this kind of 'incitements' by the extreme Islamists/ political groups instigating mob violence against the minorities, the majority acts of violence in the recent years would not have taken place.[63]

Government/s are supposed to make no adverse distinction regarding minorities or distinguishing them unfavorably from the majority Muslims. The 'equality clauses' as have been inserted in the Constitution of the Republic sounds nice, but hardly any minority gets benefitted out of this Constitutional guarantee.[64]

The 'Bangalee nation' and 'Bangalee nationalism' as it appears in the present Constitution, is based on the rule of exclusion. By excluding 'others,' the State practically denies the existence and contribution of the thirty-nine ethnic indigenous groups and their vibrant culture and language. Also, many of their unique struggles and sacrifice for Bangladesh during the war of independence have not been evaluated.[65] By saying that "the people of Bangladesh shall be known as Bangalees as a nation,"[66] we are merely declining the Chakmas, Marmas, or any other indigenous communities' right to be identified by their choice, which is a universally accepted right of every indigenous people. Besides these legal and Constitutional denials, the ongoing state-sponsored Bangalee (Muslim) settlements since 1976 have put their cultural and physical existence in question.

After the Fifteenth Amendment, at least theoretically, the principle of 'secularism' has been one of the fundamental principles to the governance of Bangladesh once again. It should be a prime concern in making and interpreting laws and the Constitution. 'Secularism,' though not judicially enforceable, as a fundamental principle of state policy should be the basis of all State actions.[67] General Zia had omitted article 12 from the Constitution.[68] Article 12 also has been restored in the Constitution, which speaks on how to realize the principle of secularism by eliminating communalism. This Article has also addressed the issues of state-patronization for any particular religion in politics and discrimination or persecution for religious identity.

Minorities, along with other secular forces, had a firm faith towards Awami League and Sheikh Hasina that once in power, they will remove all these humiliating

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62 Ibid, Article 39.

63 See above n 2, 115.

64 Ibid, 114.

65 See above n 13, Article- 9: "The unity and solidarity of the Bangalee nation, which, deriving its identity from its language and culture, attained sovereign and independent Bangladesh through a united and determined struggle in the war of independence, shall be the basis of Bangalee nationalism."

66 Ibid, Article- 6(2).

67 See above n 2, 115.

68 See above n 13, Article 12 was omitted from the Constitution by the Proclamation Order no. I of 1977.

and insulting provisions from the national Constitution. Highly regrettable to note that the 'secular' Awami League became no lesser 'Islamic' than Zia and Ershad while making the later constitutional amendments.

4.2. 'Islam'-the State Religion and the Religion of 'Others'

4.2.1. Dichotomy over the Status of Religions

Military Dictator General Ershad inserted Article 2A in the Constitution, declaring Islam as the State religion. Sheikh Hasina drastically changed the Constitution in 2011, aiming the restoration of the original 1972 Constitution, but she kept the provision for state religion almost untouched as shown below:

*"*The state religion of the Republic is Islam, but other religions may be practiced in peace and harmony in the Republic."[69] [Article 2A in Ersahd Regime]

*"*The state religion of the Republic is Islam, but the State shall ensure equal status and equal right in the practice of the Hindu, Buddhist, Christian and other religions."[70] [Article 2A in Hasina Regime]

It is noteworthy that in both the regimes, the primary texts for 'State Religion' remained the same though the language assuring non-Muslims of equality in rights and status in practicing their religions slightly changes. It creates an apparent dichotomy on State's part- how would it ensure equal status for religious minorities when Islam is given a seemingly superior status in the Constitution. Or, if Islam is indeed considered equivalent to other religions, then what is the use of declaring it as the 'state religion' in a secular country?[71]

4.2.2. Freedom of Religion: Theory and Practice

Maintenance of non-discrimination and equality between citizens is the basis of religious freedom, and it directly prohibits the promotion of any religion over others.[72] When the state is neutral on matters of faith, no one's religious freedom gets restricted. Everyone will, therefore, enjoy the right to freedom of religion and liberty of conscience. Everyone will, as a result, be free to pursue their own religious goals, whatever those may be, at par with others.[73] Similarly, the right to religious liberty prevents the state from restricting spiritual practices on the ground that the majority finds them objectionable, but does not preclude restrictions which are necessary to

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69 Article 2A was inserted in the Constitution by Act XXX of 1988, s 2.

70 Article 2A was substituted by the Constitution (Fifteenth Amendment) Act, 2011 (Act XIV of 2011) s 4.

71 See above n 2, 117.

72 Peter Cane et al (ed), *Law and Religion in Theoretical and Historical Context* (Cambridge University Press, 2008) 4.

73 Ibid, 47.

protect the safety of other people.[74] Religious freedom protects the belief itself and protects the elements of practice.[75]

The Constitution of Bangladesh has provisions ensuring the religious liberty of citizens. It allows every citizen to profess, practice, or propagate any religion of his/her choice. Also, the communities can establish, maintain, and manage their religious institutions.[76] Unfortunately, the increasing Islamic approaches of the State actors have turned these almost the 'Muslim only' freedoms.

Practically, since 1975, the term 'religion' has been analogous to 'Islam,' only and non-Muslims, though exist, can take a little benefit out of these constitutional guarantees.

Contrary to equal treatment as promised, the state mechanisms work to promote conversion to 'Islam.' The government allocates a huge budget each year to the Islamic Foundation of Bangladesh to support the neo-converts. Think of a secular democracy where State is directly promoting conversion to Islam and using State machinery for this- it is Bangladesh.[77] If the contrary were to happen, the experience would be similar to that of a public university teacher who left Islam for Christianity:

> Completing higher studies from Saudi Arabia, Anil Gomes (not real name) came back to Bangladesh and began teaching Arabic literature as an assistant professor at the Islamic University of Bangladesh. He said that one day, someone saw him reading the Bible in Arabic, and his colleagues started suspecting him.
>
> Alerted by his colleagues, the Vice-Chancellor summoned him to his office and asked if he had been converted to Christianity. Anil responded with utmost sincerity: "Yes, I am a follower of Jesus." Then the Vice-Chancellor replied that "a kaffir cannot teach in any Islamic university." The University administration then fired him.
>
> A few days later, the members of Chattra Shibir took him from the University. They cut the veins in his legs, hurt his body at various points in front of his family and local Muslim fanatics. He was knocked unconscious and woke up four days later at Bangabandhu Sheikh Mujib Medical University Hospital in Dhaka. He had been taken there by a Hindu uncle. The hospital treatment lasted three months and 21 days. When he returned home, he was beaten again by Muslims from the local mosque. A few days he became expelled from the family.
>
> After losing his job first time, he lost it again and again for the same reason. He got rejected by an NGO, an Islamic bank, and a financial institution. The last job was in a sales office in Dhaka, where, however, the chief warned him: "Give up Christianity. If you say the prayers and read the Quran all day, you will get the salary."
>
> Anil declined.

Source: AsiaNews.it 08/29/2016[78]

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74 See above n 72, 52.

75 Ibid, 29.

76 See above n 13, Article 41(1).

77 See above n 2, 117-118.

78 <http://www.asianews.it/news-en/I,-a-Muslim-who-converted-to-Christianity,-rejected-by-family-and-society-38425.html> accessed 23 October 2019.

4.2.3. Discrimination in Budgetary Allocation

Minority leaders often claim that the budget allocation for religious minorities is highly discriminatory. In 2018-2019, the Ministry of Religious Affairs spent approximately Tk. 11-12 for each Muslim citizen, whereas the per capita allocation for the minority citizens was Tk. three only.[79]

Last year Prime Minister Hasina announced the building of 560 model mosques in district and Upazila towns across the country, spending Tk 8,722 crore.[80] Also, for the first time in the history of Bangladesh, the government announced a project to renovate 1,812 Hindu temples and religious establishments across the country for Tk 228.69 crore but did not allocate any money in the 2018-19 national budget for this.[81] Even if the Government had implemented the project, it would be a temporary sticking plaster on the long-deprived Hindus in Bangladesh.[82]

4.2.4. Communal Politics under the Secular Framework

Under the Constitution, the Government is not supposed to allow any association creating discrimination on the ground of religion or destroying the religious, social, and communal harmony, or organizing terrorist acts or militant activities.[83] Then the obvious question arises as to how dozens of extreme Islamist organizations under different religious, political, and social banners are propagating radical fundamentalism in this 'secular' country. The 1972 Constitution altogether prohibited the communal associations with political purposes. The relevant portion of Article 38 of the 1972 Constitution was like this:

> …no person shall have the right to form, or be a member or otherwise take part in the activities of, any communal or other association or union which in the name or on the basis of any religion has for its object, or purposes, a political purpose.

Military dictator General Ziaur Rahman omitted this part from article 38 of the Constitution.[84] While restoring it in 2011, the proviso to Article 38 consciously avoided the provisions for restrictions on communal politics. Legal and political analysts consider it a step toward facilitating the extreme communal forces to carry

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[79] Alleged Budget Discrimination Against the Minorities, (সংখ্যালঘুদের প্রতি বাজেটে বৈষম্যের অভিযোগ), The Daily Samakal, 24 June, 2019 <https://samakal.com/todays-print-edition/tp-khobor/article/19063654> accessed 11 November 2019.

[80] Rejaul K. Byron, 560 Model Mosques: Govt. to build them with its own finances, The Daily Star, June 26, 2018 <https://www.thedailystar.net/backpage/360-model-mosques-govt-build-them-its-own-finances-1595410> accessed 11 November 2019.

[81] <https://www.thedailystar.net/city/news/govt-develop-1812-hindu-establishments-1710754> accessed 25 November 2019.

[82] See above n 2, 119.

[83] See above n 13, Article 38.

[84] Ibid, [Omitted by the Second Proclamation] Order No. III of 1976.

on their partisan missionaries.[85] In any case, it is now beyond question that Islam exerts a profound influence on the society and politics of Bangladesh.

The American Foreign Policy Council (AFPC)'s World Almanac of Islamism placed the Islamist activity in Bangladesh in three general categories: the traditional revivalism of grassroots movements, the incremental political Islam of the country's Islamic political parties, and the more radical, subversive activism of jihadist organizations.[86]

AFPC identifies Hefazat-e-Islam (Hefazat), Ahl-i-Hadith Bangladesh (AHAB), and Tablighi Jama'at as the three primary movements in Islamic revivalism.[87] All the mainstream political parties, including Bangladesh Awami League, either implicitly or explicitly try to maintain links with these groups just to exploit their support to help win future elections.

The whole politics of Jamaat and other Islamic political parties[88] are full of Islamic propaganda. They aim to rejuvenate Islamic values in every sphere of public life which are almost common to all Islamist groups: educating people with Islamic knowledge; developing Islamic values among them; providing social services based on Islamic values; and improving the system of governance by replacing secular leadership through God-fearing leadership at all levels.[89]

Since the 1990s, al-Qaeda based violent Islamist groups made a considerable presence in Bangladesh, represented by underground organizations such as Harkatul Jihad al-Islam (HUJIB), Jamaat-ul-Mujahideen Bangladesh (JMB), and Ansarullah Bangla Team (ABT). These groups were founded in Bangladesh with the goal of establishing Islamic hukumat (rule) via jihad. The ISIS jihadists in recent years brought Bangladesh in the limelight again. Dozens of Bangladeshi people crossed the border to take part in the Islamic war in Syria and Iraq. The Holey Artisan attack in July 2016 became the world news exposing Bangladesh as a hub of intense Islamic militancy, which the Government denied so far.

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85 See above n 2, 119.

86 The American Foreign Policy Council (AFPC), World Almanac of Islamism: Bangladesh, p.1 Available in <http://almanac.afpc.org/Bangladesh> accessed 25 October 2019.

87 Ibid.

88 There are more than 100 Islamic parties exist in one form or another in the country, though the number of registered Islamic parties in the Election Commission stands at just 14 out of the total 41 registered political parties. They are: 1. Bangladesh Tarikat Federation; 2. Jaker Party; 3. Kelafat Majlis; 4. Bangladesh Muslim League-BML; 5. Bangladesh Islami Front; 6. Islami Andolon Bangladesh; 7. Bangladesh Khelafat Majlis; 8. Islami Oikkojote; 9. Islamic Front Bangladesh; 10. Jamiate Ulamaye Islam Bangladesh; 11. Bangladesh Khelafat Andolon; 12. Bangladesh Muslim League; 13. Islamic Front Bangladesh; and 14. Bangladesh Islami Front.

89 Porichity, Jamaati-Islami Bangladesh (Dhaka: 1981) p, 5, p.10. in The American Foreign Policy Council (AFPC), World Almanac of Islamism: Bangladesh, p.3 Available in <http://almanac.afpc.org/Bangladesh> accessed 25 October 2019.

4.3. The Threat of Cultural Extinction

Constitutionally the Government is obliged to adopt measures for the protection against disfigurement, damage, or removal of monuments, objects, or places of exceptionally artistic or historical importance.[90] Bangladesh never took minimal steps protecting Hindu heritages or any indigenous traditions. Due to serious negligence by the State, hundreds of artistic and architecturally enriched buildings, temples, and sacred places are being damaged, occupied, and lost day by day. This country is consciously adopting measures to conserve the cultural traditions and heritage of 'Muslims' only. Today's 'national culture' means to them the 'Islamic culture,' which is almost alien and never had any connection to the traditional Bengali culture arising from this land.

In this challenging environment, the religious and ethnic minority communities in Bangladesh are continually struggling to preserve their traditional lifestyle, knowledge, culture and languages. The highly enriched traditional local literature, language, and arts are facing severe challenges and need immediate State protection.[91] The government should step forward to provide platforms mobilizing and asserting their distinct identity against the pressures of assimilation and cultural extinction.

4.4. Enemy/Vested Property Law: An Unending Legacy of Denial and Deprivation

The notorious Enemy/Vested Property Law can be taken as an example to understand the level of injustice a State can cause to its citizens by using a piece of legislation. When the law takes precedence over justice, nobody can escape prejudice. As the Constitution of Bangladesh guarantees any law inconsistent with the provisions of fundamental rights to be automatically void, there was no question of Enemy Property law to continue under the guise of the Vested Property Act till 2001. Researcher and author Professor Abul Barkat rightly described the evil nature of this Law:

> The Vested Property Act, as the continuation of the Enemy Property Act promulgated in 1965 against the interest of the Hindu minority -is contradictory to the spirit of freedom and liberty. The implementation of the Enemy/Vested Property Act caused all sorts of deep-rooted discrimination against the Hindu minority in Bangladesh.[92]

The Pakistan Government made the Enemy Property Act in 1965, using the India-Pakistan war as a pretext. It continued to be enforced in independent Bangladesh in the name of the Vested Property Act. The level of pain, suffering, and loss the Hindu

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90 See above n 13, Article 24.

91 See above n 2, 120.

92 Barkat, et.al., Deprivation of Hindu Minority in Bangladesh: Living with Vested Property, 2008, Dhaka, pp. 29-30.

community experienced as a result of this law is incomparable. Again, quoting from Professor Barkat, the impact, in his language, of the barbarous Act on the Hindu minorities of Bangladesh was that it:

> (The Act) denied all five types of freedom and created an environment of endemic deprivation among the Hindu minority. The Act is anti-constitutional, anti-humanitarian, and anti-civilization. It provoked communalism and served as a powerful instrument towards gradual marginalization and pauperization of the Hindu community members through eviction and dispossession of their lands and homesteads, breaking of family ties, loss of human potentials, and formation of a parasitic vested interest groups- and all these have acted as a barriers to human capital formation in the country. [93]

The degree and extent of deprivation throughout the Enemy/Vested Property Act are high. 1.2 million or 43% of the total Hindu households were affected by this Act. The process started in 1965 and continued till 2015.[94] This is the only law that remained active after so many years of its death in 2001.[95]

Consistent communal persecution and the long-term deprivation have deep-rooted psychological consequences with irreversible effects. Since the inception of the law, the whole Hindu community has been experiencing psychological trauma. They are probably the largest depressed community with fright, despair, and separation. The Hindu minority lives in Bangladesh have been confined within the cycle of powerlessness, vulnerability, physical weakness, poverty, and isolation.[96] The rising discrimination, exclusion from participation in nation-building, obstruction in exercising voting rights, non-cooperation from the power structure, the constant threat from land grabbers and their allies make the minority people powerless. Powerlessness ultimately pushes them towards vulnerability which contributes to aggravate the forced out-migration, "look down" status, permanent threat, communal disharmony, the object of plundering-extortion-loading-harassment, obstruction in performing religious practices, violence against women, eve-teasing, and obstruction in harvesting crops. Once in vulnerability, minority people become physically and mentally weak causing their ill health, mental breakdown, agony and anxiety, and experience physical assaults. Vulnerability and weakness push them down to poverty facing economic hardship, consumption poverty, landlessness, shelterlessness, low price of Hindu land, and declining financial strength. Poverty makes them isolated. Breaking of family ties, losing interest in participation in socio-cultural activities, declining social standing, rising mistrust arise from social isolation.

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93 Ibid.

94 Ibid, 20.

95 See above n 2, 123.

96 See above n 92, 40.

This is, however, a pervasive bad cycle that applies to any minority community in the country. Prof. Barkat calls it an "extended model of deprivation trap," which the Pakistani rulers introduced more than five decades ago and is equally active until today.

4.5. Humiliation in Educational Institutions: Another Dimension of Persecution

Theoretically, in educational institutions, students are not subject to any religious instruction or activity other than their own.[97] However, there are reports that many institutions are imposing Islamic recitations and Islamic religious attires on non-Muslim students, including Hindus. A positive attitude from the Higher Judiciary certainly helped to curb the crisis. A few years back, the Bengali Daily Kaler Kantha reported that Mozammel Haque, the newly appointed Principal of Natore Rani Bhabani Govt. Girls College ordered an injunction on the female students from taking part in any sports and cultural activities and made burqa compulsory for all female students. Students who were not willing to follow his instructions were barred from the College. Two hundred fifty aggrieved students sent written complaints to the Education Secretary against him. Two Supreme Court Lawyers brought the matter to the notice of a High Court Division Bench. The Court issued a suo-motu rule declaring that people cannot be forced to wear skull caps, veils or other religious clothing in workplaces, schools, and colleges.[98] The Court said that wearing any form of religious clothing, for students and employees, should be a personal choice.[99] On August 25, 2010, the Ministry of Education issued a circular on this.[100]

Earlier in April 2010, another Bench of the High Court Division in a separate writ ordered schools and colleges not to force women to wear the burqa. Supreme Court lawyer Advocate Salauddin Dolon filed the Writ[101] on the news that one Education Officer at Kurigram made lewd comments on the Headmistress of a Primary school for not wearing the veil.[102] Before this, in 2007, one college authority in the District of Pirojpur presented the 'burqa' to all female students at the freshers' reception ostensibly to protect them from the wicked boys(!).[103]

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97 See above n 13, Article 41(2).

98 <http://www.askbd.org/Bulletin_Sept_10/Ain_Adalot.php> accessed 1 August 2019, in Gobinda C. Mandal, The Trajectories of Hindu Existence in Bangladesh: A Politico-Legal Exploration, Human Rights and Rebellious Lawyering, ELCOP Yearbook of Human Rights 2019, Dhaka, pp.120-1.21.

99 Ibid.

100 'টুপি স্কুল ড্রেসের অংশ', BanglaNews24.com, 25.08.2010 <https://www.banglanews24.com/national/news/bd/6455.details> accessed 30 November 2019.

101 Writ Petition No. 4495 of 2009 (Advocate Md. Salahuddin Dolon vs Government of Bangladesh and others).

102 <https://www.bbc.com/news/world-asia-pacific-11054231> accessed 11 November 2019.

103 Ibid.

There are media reports that some educational institutions in Dhaka city including Motijheel Ideal School and College, Khilgoan National School and College, Motijheel Model High School and College, Faizur Rahman Ideal Institute etc. are avoiding the Court's order and Government circular on the religious attire. These institutions are forcing scurf and Islamic religious hats for their students.[104]

The Story of Shyamal Kanti Bhakta

On May 13, 2016, locals in the presence of the local MP punished Shyamal Kanti Bhakta, the Headmaster of Piyar Sattar Latif High School of Narayanganj Bandar area for allegedly making offensive comments about Islam while meting out corporal punishment to a student on May 8.[105] Mr. Bhakta claimed that people in the school management with grievances against him had used the incident to take revenge.[106]

Visiting the ailing teacher at Dhaka Medical College Hospital on May 23, Health and Family Welfare Minister Mohammad Nasim said the humiliation of a teacher by a lawmaker is an unforgivable crime. Days later in a views-exchange meeting at Narayanganj club, MP Selim Osman said, "I don't feel any necessity to apologize to the headmaster who was punished as a nonbeliever, not as Hindu. I am ready to walk the gallows for punishing such a person who demeans Allah."[107]

Mr. Bhakta, however, was reinstated, while Education Minister said a government inquiry had not found any truth in the allegations leveled against the teacher.[108]

A case was lodged against MP Salim over the public humiliation of the schoolteacher. The court said it did not find "any element" in the case to run the trial.[109]

On July 14, 2016, an English teacher at the same school filed a bribery case against Syamal Kanti, and he was sent to jail.

Advocate Rana Dasgupta, Secretary-General of Bangladesh Hindu-Bouddha-Christian Oikya Parishad, described his experiences of some cases of public humiliation of the Hindu teacher in different schools:

> In 2010, we started to receive reports from different parts of Bangladesh that Hindu schoolteachers were sacked and publicly humiliated for insulting Prophet Muhammad (PBUH). As far as I can remember, I received more than 20 such reports

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104 See above n 100.

105 Staff Correspondent, The Daily Star, Hindu teacher punished for 'anti-religion' remarks, May 15, 2016 <https://www.thedailystar.net/backpage/hindu-teacher-punished-anti-religion-remarks-1224139> accessed 11 November 2019.

106 Ibid.

107 Star Online Report, The Daily Star, Salim Osman won't apologise to Narayanganj teacher, May 26, 2016 <https://www.thedailystar.net/country/salim-osman-apologise-minister-if-needed-1229881> accessed 11 October 2019.

108 Court Correspondent, bdnews24.com, Court relieves Salim Osman of charges in a case over public humiliation of Narayanganj teacher, 23 Oct 2018 <https://bdnews24.com/bangladesh/2018/10/23/court-relieves-salim-osman-of-charges-in-a-case-over-public-humiliation-of-narayanganj-teacher> accessed 10 November 2019.

109 Ibid.

> just within two years. Then we decided to investigate this matter, and in one such case, our investigation revealed that the alleged schoolteacher never did such a thing and became a victim of rivalry among teachers of that school. The incident was as follows: the alleged teacher had the responsibility to develop the school's annual exam routine. When he finalized the routine, several teachers opposed it as it collided with the schedule of their illegal private tuition. However, he did not pay heed to their demands. One day, when he was walking towards his school, he suddenly saw posters demanding his death penalty for insulting the Prophet of Islam. He was then publicly harassed by the goons employed by his rival teachers and ultimately banished from the school. We also found that pro-government and anti-government teachers joined against the Hindu teacher. At one point, we went to the local MP to save his job, but we did not get any positive reply. This incident was just an example of numerous similar incidents. [110]

4.5.1. Bullying and Bias Against Minority Students

Minority students in primary and high school levels continue to be bullied and feel socially isolated for their religious beliefs and ethnic identities. They can be singled out, bullied, and ostracized by their peers. Textbook contents or classroom discussions often exacerbate teasing or the feeling of being singled out. Sometimes teachers made sarcastic remarks about indigenous traditions of the religious and ethnic minority students in front of class and singles out the minority students.

Hindu children sometimes report being targets of conversion. In conversation with some school kids in Dhaka, the author got informed that classmates-and sometimes even teachers-often encouraged them to convert out of a desire to "go to heaven."

Muslim privileges in the educational institutions have created environments in which religious minorities are forced to adjust their ways of life to accommodate a sense of Muslim normalcy. Non-Muslim students can be singled out if they do not adapt to practices or attend events that uphold Muslim normalcy.

The parents feel helpless, worrying that the school authorities might make the situation worse if the bullying incident is reported.

These bullying incidents and making fun of their traditions mark deep emotional scars on the minority children. They start feeling a sense of alienation for being a different religion.

The government must proactively work-out to make sure the educational institutions and school texts accurate, up-to-date, and culturally competent to minimize instances of minority students feeling singled out, isolated, and targeted for their religious identity.

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[110] Rana D. Gupta, 'After Bhola: Five takes on the proliferation of fake news to instigate communal unrest and its larger political implications', *The Daily Star* (Online), 25 October 2019 <https://www.thedailystar.net/star-weekend/opinion/news/five-takes-the-proliferation-fake-news-instigate-communal-unrest-and-its-larger-political-1818028> accessed 11 October 2019.

4.6. Mayhem over Facebook Posts: The Consistent Fear of Persecution

Instigating mob violence against the minority people over the use of Facebook posts is nothing new in Bangladesh. In the past years, Bangladesh has witnessed a series of instances of abusing Facebook to incite hatred among the majority Muslim community.

In recent years Bangladesh is witnessing a familiar pattern of instigating communal violence and mayhem against religious minorities over Facebook posts. Blaming any member of a minority community for demeaning Islam, creating a frenzy and then mobilizing the angry people on the street, etc. are the typical manifestation of such kind of attacks. The incidence of Bhola preceded by Nasir Nagar, Gangachara, or Ramu saw the planned events of hacking the Facebook account, mass-circulation overnight, and organizing the demonstration, attacking the minority households, temples, and business institutions, looting, killing and destruction of property, etc.

The State of Bangladesh has introduced draconian laws, policies, and attitudes against anyone who allegedly "hurt religious sentiments." According to Dr. Ali Riaz, this has become a license to all who want to muzzle what they consider "objectionable." Intolerance, on the other hand, has permeated the entire society; extremists of all shades are in the driver's seat. Frequent and disproportionate use of force has become the hallmark of governance. This has normalized violence and created an environment for others to use violence to achieve their objectives.[111]

Recently in the Southern district of Bhola, the local people turned furious over offensive remarks about Prophet Muhammad from the Facebook ID of Biplab Chandra Shuvo. Biplab filed a general diary to the Borhanuddin Police Station, stating that his Facebook ID had been hacked. Police also confirmed the fact of hacking and immediately arrested the two alleged hackers. To calm down the situation, the police and local administration held meetings with the local Imam, religious leaders, people's representatives, and local personalities but the local people were not convinced and launched targeted attacks on police and local Hindu households.[112] All levels of administration, including Prime Minister, confirmed the fact that Biplab's Facebook was actually hacked- notwithstanding, he is now in jail.

On November 10, 2017, Muslim zealots burned down and vandalized at least 30 Hindu houses in Horkoli Thakurpara village of Rangpur district in a targeted attack

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[111] Ali Riaz, After Bhola: Five takes on the proliferation of fake news to instigate communal unrest and its larger political implications, The Daily Star, October 25, 2019 <https://www.thedailystar.net/star-weekend/opinion/news/five-takes-the-proliferation-fake-news-instigate-communal-unrest-and-its-larger-political-1818028> accessed 10 October 2019.

[112] 'Hate Crime in Bhola', *The Daily Star* (Online), 20 October 2019 <https://www.thedailystar.net/country/ mayhem-over-facebook-post-in-bhola-1816327> accessed 1 November 2019.

over an alleged Facebook post "demeaning Islam."[113] Tito Chandra Roy, the alleged offender, was later arrested. The police found that he is illiterate and confirmed that there was nothing on his Facebook that insulted Islam. It was Md. Titu, who made the alleged defamatory post over Facebook.[114] In October 2016, Islamic zealots carried out a synchronized attack on the Hindus in Nasirnagar, Brahmanbaria. They destroyed around 100 homes and at least five temples and looted valuables. The violence was sparked by a Facebook post allegedly from the account of one Rasraj Das for "hurting religious sentiments of Muslims."[115] On November 3, 2013, A Muslim mob went on a rampage in a Hindu neighborhood in Bonogram, Pabna following reports that Rajib Saha, a Hindu schoolboy had made blasphemous comments on Facebook. More than 25 Hindu households and several temples were vandalized, and about 150 families were forced to flee the area. It was later found that Rajib had no link with the Facebook page in question.[116] On September 29, 2012, Muslim fanatics attacked the Buddhist and Hindu communities at Ramu and Patia in Cox's Bazar and Chittagong districts claiming that a Buddhist youth Uttam "insulted Islam" on social media.[117] They burnt down at least eighteen Buddhist temples, and about 50 houses. The later investigation found that it was all fake. Fanatics used a fake, photoshopped Facebook page to run the rampage.[118]

These are not the simple cases of taking revenge against any man responsible for the hate conversation on Facebook; these are the targeted attacks and gross violations of human rights against the minority population in the country.

No one tried to find out the root causes of similar incidents that occurred repeatedly, in Ramu, Sathiya, Comilla, Brahmanbaria, Rangpur, Jessore, Malopara. Islamic extremists have been successful in creating such an atmosphere that a large segment of people is always ready to commit large scale communal violence at any time. They have been so intoxicated by hatred that just a tiny spark can cause great communal violence.

There are two deliberate campaigns over this kind of mass violence on the minority communities: blaming the social media, particularly Facebook as the source of the mayhem, and the claim that the entire episode of violence was a spontaneous

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[113] 'Mayhem over Facebook post', *The Daily Star* (Online), 11 November 2017 <https://www.thedailystar.net/frontpage/mayhem-over-facebook-post-1489402> accessed 11 November 2019.

[114] Matiur R. Minar and Jibon Naher, Violence originated from Facebook: A case study in Bangladesh <https://www.researchgate.net/publication/324121985_Violence_originated_from_Facebook_A_case_study_in_Bangladesh> accessed 10 October 2019.

[115] See above n 113.

[116] See above n 114.

[117] See above n 113.

[118] A devil's design, The Daily Star, October 14, 2012 <https://www.thedailystar.net/news-detail-253751> accessed 08 November 2019

act of a specific group of people.[119] Undoubtedly, the violence in Bhola, like all other previous incidents, is an organized crime. "Always there are entrepreneurs of violence, with specific objectives. That's why it is imperative to ask "who benefits" from unleashing the violence and whether it serves to reinforce preconceived ideas about the victims and the perpetrators."[120]

5. Vanishing Population: The Supreme Challenge(!)

The minority communities, particularly the Hindus are shrinking in size, wealth, and talent. Hindus comprised 28 percent of the total population in Bangladesh in 1941. After the mass out-migration following the partition of India in 1947, the Hindu population went down to about 22percent by 1951. Due to unabated persecution, intimidation, and forcible conversion to Islam, the Hindu community kept on dwindling and now stands at a meager 8.5 percent of the total population in Bangladesh.[121] Other religious minorities remained constant during the period.

The demographic decline of the Hindu minorities may well be understood from the National Population Census Reports.[122]

Population by Religious Groups in Bangladesh			
Year	Muslims	Hindus	Others
1941	70.3%	28%	1.8%
1951	76.9%	22%	1.1%
1961	80.4%	18.5%	1.1%
1974	85.4%	13.5%	1.1%
1981	86.7%	12.1%	1.2%
1991	88.3%	10.5%	1.2%
2001	89.7%	9.2%	1.1%
2011	90.4%	8.5%	1%

In 2012, the leading Bengali daily Prothom Alo published an investigation report indicating a significant decline of the Hindu population in Bangladesh during 2001-2011.[123] Based on the 2011 population census report, the report marked that the

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[119] See above n 111.

[120] Ibid.

[121] See above n 4, 170.

[122] The National Population Census Reports, in Mandal, Gobinda Chandra, The Trajectories of Hindu Existence in Bangladesh: A Politico-Legal Exploration, ELCOP Yearbook of Human Rights 2019, Dhaka, p.125.

[123] Shishir Morol, 'Dash Bachare Hindu Komeche Noy Lakh' (Hindu Population Declines by Nine Lacs in Ten Years), *The Daily Prothom Alo* (Online), 22 September 2012 <http://archive.prothom-alo.com/detail/date/ 2012-09-22/news/291536> accessed 5 November 2019.

Hindu population in 15 districts of Bangladesh has declined by 9,00,000 compared to 2001. The officials termed it as "missing population" or "lost people. [124] The Hindu population has not increased in any district of the Barishal division. In the districts of Barishal, Bhola, Jhalkathi, Pirojpur, Patuakhali, and Barguna, the Hindu population was 8, 16,051 in 2001. In 2011 this number reduced to 7,62,479. Hindu population has also reduced in the districts of Khulna, Bagerhat, and Satkhira in the Khulna division. The same trend is seen in the districts of Kushtia and Narail. In the Dhaka division, the Hindu community has shrunk in the districts of Gopalganj, Madaripur, and Kishoreganj.

In Char Annadaprashad and three other neighboring villages of Lord Hardinge Union of Bhola, the total number of Hindu voters was 4,600 in 1991. After the communal violence in 1992 and 2001, most of the Hindu families left the country, leaving behind only 600 voters.[125]

The population census reports before and after the independence show that the total number and percentage of the Hindu population in Bangladesh have not increased compared to the national growth rate.[126]

Any person of ordinary prudence could raise the question of this declining trend of the Hindu population in Bangladesh. Political analysts, civil society, and the community members claimed that consistent communal violence and insecurity compel them to leave the country, thereby reducing the Hindu population in Bangladesh. [127]

Famous human rights activist Sultana Kamal once said minorities do not leave their homeland by will. When someone's life and the property are under threat, his human dignity is severely hampered, he is forced to leave the country.[128] There are several factors responsible for this alarming situation. Several severe communal riots between the 1940s and 1950s caused enormous sufferings and unprecedented forced-out migration of Hindus from this part of the land. Also, the India-Pakistan War, Enemy Property Act, etc. left the mass-out movement of the Hindu population to India during the 1960s and onwards. Prof. Barkat attempted to quantify the amount:

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[124] Ibid.

[125] Ibid.

[126] Ibid.

[127] Ibid.

[128] Prothom Alo, (27 April 2019) <https://www.prothomalo.com/bangladesh/article/1590961/%E0%A6%B8%E0%A6%BE%E0%A6%A7-%E0%A6%95%E0%A6%B0%E0%A7%87-%E0%A6%95%E0%A7%87%E0%A6%89-%E0%A6%A6%E0%A7%87%E0%A6%B6-%E0%A6%A4%E0%A7%8D%E0%A6%AF%E0% A6%BE%E0%A6%97-%E0%A6%95%E0%A6%B0%E0%A7%87-%E0%A6%A8%E0%A6%BE-%E0%A6%B8%E0%A7%81%E0%A6%B2%E0%A6%A4%E0% A6%BE%E0% A6%A8%E0% A6%BE-%E0%A6%95%E0%A6%BE%E0%A6%AE%E0%A6%BE%E0%A6%B2,> accessed 5 November 2019.

> …had there been no out-migration, the Hindu population in 1971 would have been 11.4 million instead of 9.6 million reported to the official documents. The Hindu population would have been 14.3 million in 1981 instead of 10.06 million, 16.5 million in 1991 instead of 11.2 million, and 19.5 million in 2001 instead of 11.4 million. Thus, the estimated total "missing" Hindu population during 1964-2001 was 8.1 million, i.e., 2,18,919 Hindus "missing" every year from 1964 up to 2001. In other words, if the out-migration of the Hindu population had been caused mainly by communal disharmony resulting from the Enemy /Vested Property Acts, the approximate size of the missing Hindu population would be 600 persons each day since 1964.

The decline of the Hindu population is now getting international attention. Richard Benkin, an international human rights activist, terms the phenomenon as ethnic butchery and genocidal massacre:

> Bangladesh's Hindu population is dying. That is an irrefutable fact, supported by decades of data. A consistent torrent of reports documenting anti-Hindu incidents in Bangladesh including murder, gang rape, assault, forced conversion (to Islam), child abduction, land grabs, and religious desecration. And while Bangladeshi officials might assert — with only some justification — that the perpetrators were non-state actors, government culpability rests, at the very least, in the fact that it pursues very few of these cases and punishes even fewer perpetrators of these atrocities. Successive Bangladeshi governments appear to have been passive bystanders, failing to exercise their sovereign responsibility to protect the life and security of all their citizens, and thus they have sent radical Islamists and common citizens alike a clear message that these acts can be undertaken with impunity.[129]

Indigenous demography in the Chittagong Hill Tracts region is also declining. Information from the earlier population census reports depict the changing mode at CHT:

Population by Ethnicity in the CHT		
Year	Indigenous	Non-indigenous
1872	98.26 %	1.74 %
1901	92.63 %	7.37 %
1951	90.92 %	9.08 %
1974	73.71 %	26.29 %
1981	59.16 %	40.93 %
1991	51.42 %	48.67 %
2001	Not available	
2011	Not available	

It is essential to take into consideration that in 1947 when the Indian subcontinent was partitioned, indigenous people constituted over 92% of the total population; in 1971 when Bangladesh was created they made up nearly 75%; whereas in 1991 their

[129] Richard Benkin, Ethnic Butchery and Genocidal Massacres: Perpetrators and Bystanders to the Islamist campaign to Get Rid of Bangladesh's Hindus, GPN-Genocide Prevention Now <http://www.ihgjlm.com/wp-content/uploads/2016/01/Bangladesh.pdf> accessed 03 October 2019.

share was only 51.4% of the total population in their homeland.[130] There is no reliable information available as to the demographic changes of indigenous communities in the plains. It can be presumed that comparatively in more hostile surroundings, it has been tough for the plainland Adivasis to survive.

Despite political disagreements between parties, there are not many countervailing forces to support the minority causes. The State-sponsored ethnic cleansing started in the early sixties. It was a planned provocation to the local Muslim hooligans who developed the dream of grabbing minority land and properties by force and intimidation. At that time, their goal was an easy success and not a difficult one today. In the face of consistent fear of persecution and danger to life and dignity, Bangladesh minorities are leaving the country. [131] If this process of erosion continues, minorities have a bleak prospect of survival in Bangladesh.

6. Conclusion

Until the introduction of the 'two-nation' theory in the 1930s, there was little evidence of communal bitterness in Bengal. Our Hindus and Muslims were living side by side for centuries without any significant sectarian strife. The colonial masters to make their space promoted communal politics dividing people along religious lines. Communal tensions between Hindus and Muslims grew up during the Pakistan movement at the end of the '30s, and that did not die even after the emergence of Bangladesh. The misdeeds minorities fought in the Pakistani regime still reign. The emergence of Bangladesh had brought hope to its minority people, which, soon after the killing of Bangabandhu in 1975, faded away. The communal political forces reappeared with a double impact on the survival and existence of Bangladesh minorities. The fundamentalists have no respect for human rights, secularism, equality, and justice. Making with them over secular forces means that the government is playing with fire.

Primarily, the non-recognition of the minorities in the Constitution projects Bangladesh as a Bengali Muslim-dominated entity; this essentially shrinks the space for the minorities to exist as distinct communities with their customary rights, beliefs, culture and way of life. On the other hand, the laws and policies privileging the majority, has increased the vulnerabilities of minorities manifold, particularly in the wake of Islamist extremism in recent years.

For years, random attacks on the person and property and incessant propaganda and hate-crimes targeting minority communities pierced the social fabric. The

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[130] Rajkumari C. Roy, Land Rights of The Indigenous Peoples of the Chittagong Hill Tracts, Bangladesh, IWGIA Document No. 99 Copenhagen 2000 p. 113.

[131] Ibid.

frequency, callousness, and darings of these incidents all over the country have made minorities very panicky. Most of the time government has remained blind to the human misery of the minority people.[132]

In the wake of Islamist extremism, the present political culture is not favorable to disentangle rationality from madness. There is an urgent necessity to give rock-solid reassurances to guarantee equality and non-discrimination in citizenship, property, and security rights for all minority people across the country. Notwithstanding the increasingly adverse environment, the minority community has faith in the State's ability to protect them. However, incessant communal persecutions during the current regime have eroded their confidence in the government. This government ostensibly showed off a little reverence and concern for minorities but never took any actual attempt to stop communal persecutions against them.[133] Under the current situation, minority people do not dare to claim their rights and freedoms equally with others. They find themselves conditioned by the existing fearful political atmosphere. We want to see an end to this legacy of the insensate outburst of communal frenzy generated by the Islamic fanaticism and culture of hatred.

Minority rights can only be ensured through the annulment of discrimination in all State affairs. For a healthy democracy, Constitution and other laws and policies must reflect secularism, neutrality, and complete equality against the ongoing process of Islamization. The State of Bangladesh must ensure representative democracy through the genuine participation of the minority people in all state affairs. The Government must recognize and empathize with the vulnerability of its minority population, show respect to their dignity and human rights, and make justice.[134]

[132] See above n 2, 128.
[133] Ibid.
[134] Ibid, 133.

Examining the Scope of Legal Aid Clients : Bangladesh Perspective

Dr. Farzana Akter[*]

1. Introduction

The main focus of the legal aid programme is its clients or beneficiaries because the programme is conducted to protect their rights and entitlements. However, it is not easy to define the clients of legal aid. The definition and scope of such programme depend on variant factors as they determine who is going to be offered the assistance and who is not.[1] Yet it is quite common to define the clientele of legal aid based on specific criteria assuming that they have some common attributes; such as they are labelled as 'the have-nots' or 'disadvantaged' and suffer from similar kind of barriers to access to justice.[2] According to Abel, legal aid programmes seek to remove the barriers to access to justice for those living in poverty and define the potential beneficiaries in economic terms.[3] Therefore, it can be said that the poor are the beneficiaries of legal aid, and as such, they are considered clients in most countries.[4]

In Bangladesh, Article 27 of the constitution provides the basis of the legal aid mechanism. This Article ensures all citizens a fundamental right of equality before the law and equal protection of the law. Moreover, the constitution has guaranteed the right to a fair trial.[5] However, the poor suffer from various barriers to access the formal legal system of Bangladesh. The barriers include the exorbitant costs of lawyers, the complexity of the law and legal institutions, disinclination to use law and legal institutions and corruptive practices on the part of court officials and staffs.[6] The inability in accessing the legal system constitutes a justice gap between the affluent and poor in the society. In consequence, the need for a national legal aid system becomes apparent in Bangladesh.[7] In 2000, the government enacted the Legal Aid Services Act[8] as the

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1 Richard L. Abel, 'Law without Politics: Legal Aid under Advanced Capitalism' (1985) 32 *UCLA Law Review* 474, 492.

2 Ibid.

3 Ibid, 494.

4 FRA European Union Agency for Fundamental Rights, *Access to Justice in Europe: An Overview of Challenges and Opportunities* (2010) <http://fra.europa.eu/fraWebsite/attachments/report-access-to-justice_EN.pdf> accessed 8 August 2019.

5 *Constitution of Bangladesh 1972*, Art. 33.

6 Sumaiya Khair, *Legal Empowerment for the Poor and the Disadvantaged: Strategies Achievements and Challenges. Experiences from Bangladesh* (Department of Justice Canada's CIDA Legal Reform Project in Bangladesh, 2008) 41-52.

7 Ibid, 212.

foundation of its national legal aid system. The government adopted the Legal Aid Services Policies, 2001[9] that are applicable to determine the eligibility of legal aid recipients. The Policies were amended in 2014 to incorporate new eligibility rules for the legal aid applicants.[10] At present, the Policies are called the Legal Aid Services Policies, 2014. Along with the Policies, the government also adopted the Legal Aid Services Regulation 2001. The Regulation provides the rules for processing legal aid applications and the procedure to assign a lawyer for the legal aid recipient. It also provides the structure of lawyers' fees and other related matters. In 2015, the government amended the Regulation and therefore it is called the Legal Aid Services Regulation 2015.[11]In this context, the purpose of the article is to analyse the scope of legal aid beneficiaries of Bangladesh. In so doing, it analyses the factors that determine the eligibility standard of the recipients and other issues concerning the service delivery. It should be noted that this article limits its focus within the government-operated system. Also, the article has taken the term 'poor' in general and has not categorised it into other specialised groups like women, juveniles.

2. Factors Affecting the Characterization of Legal Aid Clients

The concept of eligibility has been an accepted practice in determining the recipients of legal aid. However, the concept varies widely in its requirement and application across the countries.[12] According to Flood and Whyte, a state's approach towards legal aid determines such concept of eligibility and the state might grant the service to small groups or allow it to relatively larger groups.[13] Yet one might find it problematic to specifically identify a single factor that determines such an approach towards legal aid since various factors are responsible for it. In other words, the characterization of the prospective legal aid recipients depends on different factors, and thus variation is found in states' practices. Below, I discuss the various factors that affect the characterization of legal aid clients.

In discussing the factors, different principles applicable in criminal and civil proceedings can be named first since they have considerable influence on the scope of legal aid beneficiaries. The state uses its coercive power[14] to provide legal aid in

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8 Act No. VI of 2000.

9 S. R. O. No. 130-Law/2001.

10 S. R. O. No. 194-Law/2014.

11 S.R.O.No.166-Law/2015.

12 John Flood and Avis Whyte (2004) *Report on Costs of Legal Aid in Other Countries* (University of Westminster, 2004) 2 <http://www.johnflood.com/pdfs/Costs_of_Legal_Aid_in_Other_Countries_2004.pdf> accessed 1 March 2012.

13 Ibid, 2-3, 10.

14 Daniel S. Manning, 'Development of a Civil Legal Aid System: Issues for Consideration', in Public Interest Law Institute, *Making Legal Aid a Reality, A Resource Book for Policy Makers and Civil Society* (2009) 61; See also Abel, above n 1, 592.

criminal matters.[15] When the state accuses in criminal cases, it is regarded as a violation of liberty. Legal aid is granted to redress this imbalance and thus to ensure justice.[16] Moreover, the complicated procedures used in criminal proceedings makes legal assistance an essential element of a fair trial.

On the other hand, it is not easy to define civil legal aid and the obligation of states to fund this is not widely recognised.[17] It is even noted that when the programme has a joint budget for civil and criminal legal aid matters, the latter is dealt with priority.[18] According to McBride, the right to free legal assistance in civil proceedings is essential for matters which are highly complex and emotional.[19] Furthermore, *civil jurisdiction has been complemented by the use of alternative and informal dispute resolution mechanisms because such mechanisms are able to reduce the procedural complexities of the formal legal system.*[20] Legal aid for civil and criminal proceedings, thus, varies in their administration[21] and it substantially influences the clientele of the programme.

The distinctive social and legal environment of states also has considerable influence on the client's dynamics as well as the effectiveness of the service.[22]This suggests that differences in the social and legal families are relevant and, therefore, they determine the clientele of the legal aid programme as well as the range of services of particular societies.[23] The number of the poor and causes of their poverty

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15 See Manning, above n 14, 61.

16 Richard Young and David Wall, 'Access to Criminal Justice, Legal Aid, and the Defence of Liberty', in Richard Young and David Wall (eds.) *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press Ltd. 1996) 7; See also Manning, above n 14, 6; Mary Jane Mossman, 'Toward a Comprehensive Legal Aid Program in Canada: Exploring the Issues' (1993) 4 *Windsor Review of Legal and Social Issues* 1, 64; Roger Bowles and Amanda Perry, *Report, International Comparison of Publicly Funded Legal Services and Justice Systems (*Ministry of Justice Research Series 14/09, 2009) 6 <http://webarchive.nationalarchives.gov.uk/ 20110201125714/http://www.justice.gov.uk/publications/docs/comparison-public-fund-legal-services-justice-systems.pdf> accessed 8 August 2019.

17 See Manning, above n 14, 61-2.

18 Ibid, 68.

19 Jeremy McBride, *International Standards on Access to Justice in Access to Justice in Central and Eastern Europe- Forum Report* (Interights/ Public Interest Law Initiative, 2003) 23.

20 See Khair, above n 6, 213.

21 Mel Cousins, 'At the Heart of the Legal: The Role of Legal Aid in Legitimating Criminal Justice' in Richard Young and David Wall (eds.), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press Ltd., 1996) 101.

22 Alan Paterson and Avrom Sherr, 'Quality Legal Services: The Dog That Did Not Bark' in Francis Regan, Alan Paterson, Tamara Goriely and Don Fleming (eds.), *The Transformation of Legal Aid, Comparative and Historical Studies* (Oxford University Press, 1999) 233.

23 Francis Regan, 'Why Do Legal Aid Services Vary Between Societies? Re-examining the Impact of Welfare States and Legal Families' in Francis Regan, Alan Paterson, Tamara Goriely and Don Fleming (eds.), *The Transformation of Legal Aid, Comparative and Historical Studies* (Oxford University Press, 1999) 179, 193-9.

have a significant role in defining eligible legal aid recipients.[24] For instance, most people in Northern Europe generally have the right to legal aid whereas it is not the case in the English-speaking societies, in that it is granted mainly to the poor people of the society.[25] In addition, distinctive features of legal families, namely the common law and civil law, or adversarial and inquisitorial, determine the scope of legal aid beneficiaries. According to Regan, the governments in North Europe approve highly developed welfare programmes and emphasise the implementation of government policy due to civil law traditions.[26] As a result, citizens become more dependent on government-provided services including legal aid for resolving their disputes through litigation before the courts of law.[27] On the other hand, the common law family focuses mainly on individual rights, and the implementation of government policy gets less priority.[28] Due to the less developed welfare programmes coupled with the common law traditions, the English-speaking societies emphasise on self-reliance of the citizens and tend to resolve their disputes outside the courts.[29]

Moreover, various local factors, including the form of legal institutions and processes, litigation trend, lawyer's service delivery can influence a legal aid system and its beneficiaries.[30] It is argued that the society wherein getting involved in the litigation is common, is likely to get involved more in the same by the provision of legal aid service.[31] Besides, whether the service will be granted only to the plaintiff or the party claiming right or to both parties involved in the proceedings is critical in the scheme. As Katz says, legal aid was awarded to a considerable number of plaintiffs in the early days of the service, but the situation started to be reversing later on.[32]

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[24] Elizabeth Lyons, 'The Cost of Legal Aid' (2010) 4 *Global Tides*, 1, 3; See also: Vittorio Denti, 'An International Overview on Legal Aid' in Frederick H. Zemans (ed.), *Perspectives on Legal Aid, An International Survey* (Frances Pinter Ltd., 1979) 356.

[25] See Regan, above n 23,179, 193-9.

[26] Ibid, 181.

[27] Ibid.

[28] Ibid.

[29] Ibid, 181, 193.

[30] Ibid**,** 179, 193-9; See also Jennie Abell, 'Ideology and the Emergence of Legal Aid in Saskatchewan' (1993) 16 *Dalhousie Law Journal* 125; Charles J. Ogletree, Jr., 'The Challenge of Providing "Legal Representation" in the United States, South Africa and China' (2001) 7 *Washington University Journal of Law and Policy* 47; Simon Rice, 'A Human Right to Legal Aid' Paper presented at the Conference on the Protection and Promotion of Human Rights through Provision of Legal Services: Best Practices from Africa, Asia and Eastern Europe (Kyiv, Ukraine, 2007) 6 <http://ssrn.com/abstract=1061541> accessed 10 August 2019.

[31] Hedieh Nasheri, and David L. Rudolph 'Equal Protection under the Law: Improving Access to Civil Justice' (1996-1997) 20 *American Journal of Trial Advocacy*, 331, 340; Robert Egerton and Dr. Karl Mannheim (eds.) "Barrister": Justice in England (1938)" *Legal Aid*, (London, Kegan Paul, Trench, Trubner & Co., Ltd., 1945) 5.

[32] Jack Katz, *Poor People's Lawyers in Transition* (New Brunswick/New Jersey, Rutgers University Press, 1982) 40.

Furthermore, along with the poor section, countries allowed legal aid for civil matters to different categories of people in different contexts. The practice of racial discrimination induced many countries to provide legal services to racial or ethnic minorities.[33] Immigration factor also provoked the growth of legal aid systems in countries. For instance, the problem of European immigrants at the end of the eighteenth century was responsible for the development of legal aid programmes in the US.[34] Similarly, immigration was a dominant factor for the introduction of legal aid systems in Western European countries, like-Britain, Netherlands and France in the 1950s and the 1960s.[35] Belgium has further widened the scope of legal assistance in non-criminal matters as it grants the service to asylum seekers and to those foreigners who wish to regularise their residency status.[36]

The government takes various decisions for the establishment and operation of the legal aid programme that further affect the scope of legal aid beneficiaries. For instance, the classification of clients into 'deserving' and 'undeserving' involves funding decision by the government resource limitation and very often adopts harsh eligibility criteria for the recipients.[37] It is found that impractical income eligibility ceilings very often expel many individuals just over the poverty line but who cannot afford lawyers of their own.[38]For instance, through the government's legal services reform policy of 1997, most Swedish become ineligible for legal aid for most civil and family court cases. Legal aid was targeted only for the deserving poor who were at the bottom of 20 percent of incomes rather than covering most of the population.[39] More so, the imposition of various restrictions on the target groups limits the scope of the programme and thus builds the foundation of justice gap for the low-income people.[40] In the US, some categories of people were spelt out to be ineligible for legal

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33 See Abel above n 1, 492.

34 Bryant Garth, *Neighborhood Law Firms for the Poor*, (The Netherlands/USA, Sijthoff and Noordhof, 1980) 17; Philip L Merkel, 'At the Crossroads of Reform: The First Fifty Years of American Legal Aid, 1876-1926'(1990) 27 *Houston Law Review* 1, 6,8; Reginald Heber Smith, *Justice and the Poor*(New York, Arno Press and The New York Times, 1919) 134-5; Susan E. Lawrence, *The Poor in Court, The Legal Services Program and Supreme Court Decision Making (*Princeton University Press, 1990) 18.

35 See Abel,above n1, 493.

36 <http://ec.europa.eu/civiljustice/legal_aid/legal_aid_bel_en.htm> accessed 8 August 2019.

37 Deborah M. Weissman, 'Law as Largess: Shifting Paradigms of Law for the Poor' (2002) 44 *William and Mary Law Review* 737, 795.

38 Deborah L. Rhode, 'Whatever Happened to Access to Justice?'(2009) 42 *Loyola of Los Angeles Law Review* 869, 889; See also Deborah L. Rhode, *Access to Justice* (Oxford University Press, 2004) 13.

39 Francis Regan, 'The Swedish Legal Services Policy Remix: The Shift from Public Legal Aid to Private Legal Expense Insurance' (2003) 30 *Journal of Law and Society*, 49, 54-5.

40 Rhode (2004), see above n 39, 104; See also Rhode (2009), above n 39, 880-1; Michael Givel, 'Legal Aid to the Poor: What the National Delivery System Has and Has Not Been Doing' (1997) 17 *Saint Louis University Public Law Review* 369, 375.

services representation; all undocumented immigrants, certain categories of lawfully documented immigrants even for concerns unrelated to their immigration status and people in prison also cannot qualify.[41] Congress also restricted Legal Services Corporation-funded programmes to bring litigation against abortion-related issues.[42] The extent of the potential legal aid recipients, thus, encounters a political atmosphere either in the form of severe budget cut or the imposition of sanctions[43] in different forms.

As regards lawyers' office, they historically have had a determinative role for legal aid beneficiaries. The benevolent practices of lawyers paved the way in establishing the system in an organized manner.[44] As Blakenburg says, legal aid services have been shaped by the capacities and interests of the legal profession;[45] the services, as a result, are supply-oriented rather than demand-led on behalf of the recipients.[46] However, economic considerations, later on, gained dominance among the legal aid lawyers that affect the system considerably.[47] Many clashes occur between the legal profession and governments about the amount of legal aid lawyers' remuneration. Requests of higher rates by the legal profession are often not considered, rather recent trends in countries show that governments are more

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41 *Omnibus Consolidated Rescissions and Appropriations Act 1996*, Pub. L. 104-134, 110 Stat. 1321, 1321-53-1321-56 (1996) <http://www.lsc.gov/sites/default/files/LSC/pdfs/LSC Appropriations 1996-2011.pdf> accessed 27 July 2019; See also Rebekah Diller and Emily Savner, *A Call to End Federal Restrictions on Legal Aid for the Poor* (Brennan Center for Justice, 2009) 1 <https://www.brennancenter.org/sites/default/files/legacy/Justice/LSCRestrictionsWhitePaper.pdf> accessed 8 August 2019; Rebekah Diller and Emily Savner, 'Restoring Legal Aid to the Poor: A Call to End Draconian and Wasteful Restrictions' (2008) 36 *Fordham Urban Law Journal* 687, 689; Kenneth F. Boehm, 'The Legal Services Program: Unaccountable, Political, Anti-Poor, Beyond Reform and Unnecessary' (1998) 17 *Saint Louis University Public Law Review* 321, 348.

42 Omnibus Consolidated Rescissions and Appropriations Act 1996, Pub. L. 104-134, 110 Stat. 1321, Sec. 504. (a) <http://www.lsc.gov/sites/default/files/LSC/pdfs/LSCAppropriations1996-2011.pdf> accessed 10 August 2019; See also Valerie Uribe, 'Congressional Restrictions on Legal Aid Attorneys: Burdensome or Necessary?' (2009) 15 Public Interest Law Reporter 79, 80.

43 Gary Bellow, *Turning Solutions into Problems: The Legal Aid Experience* (1977) 34 *NLADA (National Legal Aid and Defender Association) Briefcase* <http://marylandlegalaid.pbworks.com/f/Bellow%20Classic%2077.doc> accessed 10 August 2019; See also Clifford M. Greene, David RKeyser and John A. Nadas, 'Depoliticizing Legal Aid: A Constitutional Analysis of the Legal Services Corporation Act' (1976) 61 *Cornell Law Review*734, 776.

44 Erhard Blakenburg, 'The Lawyers' Lobby and the Welfare State: The Political Economy of Legal Aid', in Francis Regan, Alan Paterson, Tamara Goriely and Don Fleming (eds.), *The Transformation of Legal Aid, Comparative and Historical Studies* (Oxford University Press, 1999) 113-114.

45 Ibid.

46 Ibid.

47 Peter C. Alcock, 'Legal Aid: Whose Problem?' (1976) 3 *British Journal of Law and Society* 151, 166; See also Garth, above n 34, 33; Earl Johnson, Jr., *Justice and Reform, The Formative Years of the American Legal Services Program* (Transaction Books, 1978) 9, 83; Richard L. Abel, 'Introduction' in *American Lawyers* (Oxford University Press, 1989) 7.

interested to cut the legal aid expenses.[48] Such reduced levels of funding affect the quality and scope of legal aid. The Legal Services Commission[49] report of 2001/02, for example, reveals that the English lawyers have warned the government about the possibility of their full or partial termination from the legal aid work: "…up to 50 per cent of firms are seriously considering stopping or significantly reducing publicly funded work."[50]

All these factors, as noted, create a complex legal aid regime in a given country and accordingly, States are found to apply different arrangements in the operation of the system. Clients' eligibility issue follows similar approaches, though some of them have been accepted widely for different legal aid schemes.[51] The most two common tests that are applied across countries to limit the beneficiaries of legal aid are the 'means test' and 'merit test'. 'Means test' both in criminal and civil legal aid schemes particularly refers to the financial ability of the applicant. The concerned authority looks at the applicant's income level and then determines his eligibility under this test. It does vary from state to state and is very much dependent on the socio-economic conditions of the particular country. On the other side, 'merit test' involves some points- the applicant has a good claim or defence and also his chance of winning in the court is probable. In criminal matters, this test particularly suggests the seriousness of the offence charged with and also whether it satisfies the interests of justice.[52]As such, in states' practice, these tests are applied jointly or individually depending on the nature of the matter, gravity and in some cases including the consideration of special circumstances like mental illness or other kinds of difficulty.[53]

In sum, it can be said that the extent of legal aid recipients is intently subject to the socio-economic, political and institutional contexts of respective states. Rosters of the programme as well as the scope of legal aid beneficiaries, therefore, are varied in

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48 Elena Burmitskaya, *World's Models of Legal Aid for Criminal Cases: What Can Russia Borrow?* (Lambert Academy Publishing, uploaded 2012) 42 <http://www.pilnet.org/public-interest-law-resources/58-worlds-models-of-legal-aid-for-criminal-cases-what-can.html> accessed 8 August 2019.

49 The Commission is replaced by the Legal Aid Agency under the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act (2012) <http://www.justice.gov.uk/about/laa> accessed 8 August 2019.

50 Para.2.7 <http://webarchive.nationalarchives.gov.uk/20111222184934/http://www.legalservices.gov.uk/docs/archive/lsc_annual_report_2001-02.pdf> accessed 8 August 2019.

51 See Abel, above n 1, 492.

52 See Young and Wall, above n 16, 2.

53 Country like New Zealand, for granting criminal legal aid, tests whether the applicant has the means to afford a lawyer for his or her legal assistance coupled with other issues in merit test, such as, whether the grant of aid is in the interests of justice, the seriousness of the offence and also of any special circumstances, like mental illness <https://www.justice.govt.nz/courts/going-to-court/legal-aid/get-legal-aid/can-i-get-criminal-legal-aid/> accessed 8 August 2019.

societies. The similarity is also possible in some cases, but each state has its particular understandings and features regarding the legal aid programme.[54]

3. Examining the Scope of the Legal Aid Recipients of Bangladesh

3.1 Recipients under the Legal Provisions

Organised state intervention in the area of legal aid does not have a long history in Bangladesh.[55] The government took the first initiative in 1994. The government establishes a National Legal Aid Committee in pursuance of a Resolution. The Committee is chaired by the Minister of the Ministry of Law, Justice and Parliamentary Affairs. Furthermore, the Resolution involves District Committees that are chaired by the District and Sessions Judges. The government also granted an amount to cover the costs of legal representation under the authority of the District Judge.[56] These committees were not able to function effectively and therefore, another Resolution of 1997 repealed the Resolution above.[57] In 1998, the government proposed a Legal Aid Bill and organised a series of consultations with leaders of legal aid movements, representatives of the NGOs, members of Law Commission and bar associations about the provisions of the proposed law.[58] The present Legal Aid Services Act (hereinafter LASA) was enacted in 2000, and it became effective on 28 April of the same year.[59] The National Legal Aid Services Organization (hereinafter NLASO) is the central organisation to implement government legal aid services following section 3(1) of the LASA.[60] Moreover, the government adopted Legal Aid Services Policies in 2001[61] to determine the eligibility of legal aid recipients in specific terms. As mentioned earlier, the Policies were amended in 2014. Therefore, legal aid applicants are required to meet the new eligibility standard to

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54 David Miller, 'Introduction' in David Miller and Michael Walzer (eds.), *Pluralism, Justice and Equality* (Oxford University Press, 1995) 5.

55 See Khair, above n 6, 221; See also S. Muralidhar, *Law, Poverty and Legal Aid: Access to Criminal Justice* (Lexisnexis/Butterworth, 2004) 357.

56 Md. Akhtaruzzaman, *Concept and Laws on Alternative Dispute Resolution and Legal Aid* (Sobdhokoli Printers, 2008) 279-80; See also Nusrat Ameen, 'The Legal Aid Act, 2000: Implementation of Government Legal Aid versus NGO Legal Aid' (2004) 15 *The Dhaka University Studies, Part F* 59, 63; Nazmul Ahsan Chowdhury and Dr. Shadeen Malik, 'Awareness on Rights and Legal Aid Facilities: The First Step to Ensuring Human Security' in United Nations Development Programme, Bangladesh, *Human Security in Bangladesh: In Search of Justice and Dignity* (2002) 42; Kazi Abadul Haque, *Evolution of the Legal System/ Bichar Bebosthar Biborton* (Bangla Academy, 1998) 312.

57 S.R.O. No. 74-Law/1997.

58 See Khair, above n 6, 221.

59 S.R.O. No. 119/Law/2000.

60 S.R.O. No.146-Law/2000.

61 S.R.O. No. 130-Law/2001.

enjoy the service.[62] The government also adopted the Legal Aid Services Regulation 2001 that covers various issues, such as, rules for processing legal aid applications, the procedure to appoint a lawyer for the legal aid recipient and lawyers' payment structure. In 2015, the government amended the Regulation under the name of the Legal Aid Services Regulation 2015.[63]

The LASA has provided a clear definition of legal aid. It says that legal aid is an assistance that includes legal advice, lawyers' fees, litigation costs, and other incidental expenses provided to economically disadvantaged populations and to those who for various socio-economic considerations are not able to access justice.[64] Thus legal aid under the LASA includes lawyers' fees as well as other ancillary expenses of litigation. Moreover, the LASA has included the service of a mediator or arbitrator as legal aid service if he is appointed for the parties seeking legal aid to mediate or arbitrate the proceedings. Such service of mediation or arbitration is possible under any applicable law of the country.[65]

The LASA has been silent as to the eligibility of legal aid recipients. However, as mentioned earlier, the Legal Aid Services Policies of 2001 state who are eligible for legal aid following Section 7(a) of the Act. It provides legal aid to the litigants who are unable to seek justice due to financial insolvency, destitution, helplessness and for various socio-economic conditions for both civil and criminal matters. However, if a person accused of death penalty case gets legal assistance under the Legal Remembrance Manual (LR Manual) 1960, he is not eligible under this Act.[66] Put simply, financially insolvent persons are eligible for legal aid in Bangladesh and such insolvency is determined by the annual average income limit that is below 1000,000 taka.[67] The Legal Aid Services Policies hence outline that persons who are not able to establish their right or to defend themselves in a court of law due to financial crisis, persons who are detained without trial and are not capable to defend himself due to financial crisis, persons who are considered by the court as poor or helpless, persons who are recommended by the jail authority as financially helpless or poor and any

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62 S.R.O. No. 194-Law/2014.

63 S.R.O.No.166-Law/2015.

64 S. 2(a).

65 S. 2 (a); Amended by Bangladesh National Parliament Bill No. 59/2013; passed on 10 November 2013.

66 LR Manual, Chapter VII, s 3.

67 As the Legal Services Policies state, the financial eligibility standard for the legal aid applicants is below 150,000 taka for matters filed before the Supreme Court and this ceiling is below 100,000 taka for matters placed before the courts of first instance and other courts. However, this ceiling is different for freedom fighters (150,000 taka) and labourers (100,000 taka). During the Bangladesh War of Independence in 1971, the freedom Fighters belonged to a guerrilla force and fought against the Pakistan Army. Bangladesh Genocide Archieve, *Genocide 3 Million* <http://www.genocidebangladesh.org/?page_id=24> accessed 5 August 2019.

other person who is considered by the Legal Aid Board[68] from time to time due to financial crisis or any other socio-economic reasons or disaster are qualified for legal aid under the government-sponsored system in Bangladesh. Bangladesh has been experiencing various natural disasters since long. A report shows that between 1980 and 2008, 219 natural disasters attacked the country causing enormous financial and other damage.[69] Therefore, the LASA takes into account the financial vulnerability of an applicant caused by natural disaster.

There are also some particular categories of persons who are not required to pass an eligibility test to enjoy the service. They are- freedom fighters who are incapable of earning or partially incapable of earning or who have no employment or whose annual income is below 150,000 taka; persons who are awarded with the old age honorarium (the means-tested non-contributory pension scheme provided to older people who are living below the national poverty line as a part of the government-operated social pension schemes[70]); poor women who are holders of the VGD (Vulnerable Group Development) card[71]; women and children who are victims of human trafficking; women and children who are acid-burnt by miscreants; persons who have been allocated land or housing in an 'ideal/model' village[72]; poor widows, women deserted by their husband and destitute women and physically or mentally disadvantaged persons who are incapable of earning and have no means of subsistence. The list suggests that since the groups who are under various social schemes like VGD card holders, receive old age honorarium or those allotted land in the ideal village belong to the poor and disadvantaged groups in society, the LASA provides them with an automatic right to legal aid. It also indicates that the Policies give special attention to women and children in providing legal aid. This is because these groups have a vulnerable position in society, for instance, acid violence has

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[68] The management authority of the NLASO is vested in a National Legal Aid Board that performs at the national level while district legal aid committees work to give the service at district level.

[69] UNDP, <https://www.undp.org/content/undp/en/home/librarypage/poverty-reduction/supporting_transformationalchange/Bangladesh-drr-casestudy-transformational-change.html> accessed 5 August 2019.

[70] Helpage International, *Age Demands Action in Bangladesh Progress on implementation of the Madrid International Plan of Action on Ageing/MIPAA,* (2007) <http://www. globalaging.org/ aging watch/Madrid.pdf> accessed 22 February 2015.

[71] The Vulnerable Group Development (VGD) is one of the largest safety net programmes of Bangladesh. Under this programme, poor disadvantaged women in rural areas are provided with monthly food transfers as well as various development services in order to bring sustainable development in their lives. FPMU Ministry of Food, GOB, *Vulnarable Group Development* <http://fpmu.gov.bd/agridrupal/content/vulnerable-group-development-vgd> accessed 5 August 2019.

[72] The objective of the model village approach is to improve the livelihoods of the poor and to establish one community that becomes a role model for neighbouring villages. It seeks to improve key issues in the area, such as health and hygiene, access to water, livelihoods, agriculture and youth leadership.

become a burning issue in Bangladesh, and mostly women and children are the victims of it.[73] The LASA has guaranteed these victims of acid violence the right to legal aid. The problem of human trafficking is also a serious concern in Bangladesh.[74] Like acid violence, women and children constitute the largest share in human trafficking[75], and therefore, they are entitled to legal aid under the LASA.

The Legal Aid Services Policies recognise the vulnerable condition of widows and husbands' deserted women of the country and grant them the right to legal aid. In Bangladesh, commonly the husband functions as the key-provider in all spheres of family life. After his death, family members, especially widows, particularly in the rural areas, embark in poverty and greatest social insecurity.[76] Even sometimes, they are deprived of their rightful share of the inheritance and their husband's belongings.[77] The government of Bangladesh began to provide an allowance for widows and husbands' deserted destitute women under its social security programme in 1998.[78] In this context, the Policies grant poor widows and husbands' deserted destitute women an automatic right to legal aid. Furthermore, freedom fighters, subject to the annual income limit, due to their particular role in the independence war and physically or mentally handicapped persons enjoy the automatic right to legal aid under the Act. However, the present study analyses the provisions concerning legal aid recipients who belong to the general category in the present socio-economic context of Bangladesh.

3.2 Analysing the Factors Affecting the Scope of the Legal Aid Clients of Bangladesh

In Bangladesh, legal aid applicants in all civil and criminal matters are required to face only the 'means test' or the financial eligibility test. The eligibility threshold of the annual income limit (below 100,000 taka annually and 8,300 taka monthly) only concentrate on the income of the applicants; other factors involving the inflation rate, cost of living and other financial liabilities of the applications are not considered

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73 Acid Survivors Foundation, *What is Acid Violence?* <http://www.acidsurvivors.org/Acid-Violence> accessed 5 August 2019.

74 *Memorandum of Understanding between the Government of the Republic of India and the Government of the People's Republic of Bangladesh on Bilateral Cooperation for Prevention of Human Trafficking, Especially Trafficking in Women and Children: Rescue, Recovery, Repatriation and Re-Integration of Victims of Trafficking, Dhaka* (30 May 2015) <https://hcidhaka.gov.in/pdf/bi_doc/MoU_between_India_and_Bangladesh_on_Bilateral_Cooperation_for_Prevention_of_Human_Trafficking.pdf> accessed 5 August 2019.

75 Ibid.

76 Ministry of Social Welfare, Bangladesh, *Allowances for Widow and Husband's Deserted Destitute Women* <http://www.dss.gov.bd/index.php?option=com_content&view=article&id=62:allowances-for-widow-and-husbands-deserted-destitute-women&catid=39:social-cash-transfer&Itemid=71> accessed 23 February 2015.

77 Ibid.

78 Ibid.

for determining the eligibility of the applicants.[79] One study indicates that the gap between the national average annual income level (137,800 taka annually approx. and 11,479 taka monthly approx.) and cost of living (134,500 taka annually approx. and 11,200 taka monthly approx.)[80] is too low and the living expenses are on the rise in Bangladesh.[81] Moreover, it is common that only one member earns for the household and the earning member faces enormous financial burdens.[82] Therefore, as Akter says, the eligibility standard of the legal aid applicants does not reflect the current socio-economic conditions of the country, and it is impractical and excludes many people who might appear before the court should they need to.[83] In other words, the present financial eligibility limit cannot function objectively to determine potential clients. This further shows the lack of commitment on the part of the government to serve the disadvantaged sections of the society. Legal aid, thus, is not able to find its place in the list of government priorities. The Bangladeshi legal aid system also suffers from infrastructural and logistic supports. The LASA requires the government to establish a separate permanent legal aid office[84] in all districts (an administrative unit) of the country. However, such office does not exist in all districts[85]; and where the establishment of an office is declared, such office does not have adequate furniture and logistics support including computer, printers and others.[86] This also obstructs the prospective beneficiaries in accessing the service.

Another factor that affects the potential applicants relates to insufficient payment made to panel lawyers.[87] It is said that senior and experienced lawyers are reluctant to represent legal aid clients due to low payment.[88] Again allegations are made that lawyers do not meet their clients on a regular basis; even worse, they are found to be absent on the date of the hearing.[89] According to Akter, senior and experienced

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79 Farzana Akter 'Legal Aid for Ensuring Access to Justice in Bangladesh: A Paradox?'(2017) 4 *Asian Journal of Law and Society* 257, 261; Farzana Akter, *Legal Aid for Ensuring Access to Justice in Bangladesh: A Study of Standard and Practice* (PhD Thesis, Vrije Universiteit Brussel and Universiteit Gent, 2015) 231.

80 The statistics was collected on the basis of the Household Income and Expenditure Survey 2010 of Bangladesh.

81 See Akter (2017), above n 79, 261-2; See also: Akter (2015), above n 79, 232-3.

82 See Akter (2017), above n 79, 262; See also: Akter (2015), above n 79, 233-4.

83 See Akter (2017), above n 79, 262.

84 LASA, s 9.

85 See Akter (2017), above n 79, 267; See also Akter (2015), above n 79, 261-2.

86 Ibid.

87 Jamila A. Chowdhury, 'Legal Aid and Women's Access to Justice in Bangladesh: A Drizzling in the Desert' (2012) 1 *International Research Journal of Social Sciences* 8, 11.

88 See Khair, above n 6, 235.

89 Legal and Judicial Capacity Building Project, Ministry of Law, Justice and Parliamentary Affairs, 'Final Report: Improving Mechanism for Delivering Legal Aid' (Unpublished report, Dhaka, 2004) 42 cited in Chowdhury, see above n 88.

lawyers are not engaged in delivering the legal aid service in Bangladesh[90] and the appointed lawyers do not meet the recognized professional standards and handle the matters inappropriately.[91] This discourages the prospective beneficiaries to ask for the service on the assumption that they would not get quality service.[92]

The lack of publicity about the legal aid services is also responsible for limiting the scope of legal aid beneficiaries of Bangladesh.[93] A functional legal aid system is required to make extensive publicity about the nature, kind and availability of legal aid services along with the procedure to apply for the same so that potential applicants become aware of and claim the service according to their need. However, it is reported that 97% of respondents are not aware of the government legal aid service and those who have some knowledge about the programme are not confident about its service and activities.[94] More specifically, as Akter says, the government legal aid has not received adequate publicity at the grass-roots level of the country; and in some cases, when such publicity is done, it is not done in an organised manner.[95] This lack of publicity indicates the lack of determination of the government on the one hand, and limits the scope of legal aid beneficiaries on the other. It should be noted that the government has imposed a ceiling of the alloted budget which can be used for the purpose of publicity of the programme. Legal aid committees at the district level are authorized to spend ten percent of the amount granted for publicity along with other activities.[96] This percentage was previously equal to 7% and conceded unreasonable for effectively conducting required activities and arrangements of publicity.[97] The present amount does not indicate a substantial increase from the previous limit and cannot be able to make the programme well publicized and thus to be functional. In other words, the lack of adequate publicity restricts potential recipients to apply for the service in order to protect their rights and entitlements under the law and the constitution.

4. Conclusion

The government sponsored legal aid system of Bangladesh has considered the vulnerable condition of particular segments of society involving the old people,

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90 See Akter (2017), above n 79, 269-70; See also: Akter (2015), above n 79, 296-7.

91 See Akter (2017), above n 79, 13-5; See also: Akter (2015), above n 79, 298-9.

92 See Khair, above n 6, 235.

93 Ibid, 224.

94 Greg Moran, *Access to Justice in Bangladesh: Situation Analysis (Summary Report, Justice Sector Facility* Project, 2015) 25 <http://www.bd.undp.org/content/bangladesh/en/home/library/democratic_governance/access-to-justice-in-bangladesh-situation-analysis.html> accessed 9 August 2019.

95 See Akter (2017), above n 79, 264; See also Akter (2015), above n 79, 247-8.

96 Legal Aid Services Policy 2001, s 7.

97 See Akter (2017), above n 79, 264; See also Akter (2015), see above n 80, 248.

victims of acid violence, women, children, physically or mentally disadvantaged people and the others. These groups are guaranteed an automatic right to legal aid as per the provisions of the relevant laws. This is a positive attitude of the government and demonstrates its willingness to ensure fairer access to justice. However, the scope of legal aid clients for the general category is limited due to the combination of different factors, such as, impractical eligibility threshold, inadequate publicity and lawyers' ineffective performance. Potential clients who might benefit from the service are, therefore, prevented from enjoying the benefit. The government should take appropriate measures to remedy this and allow deserving beneficiaries to apply for the service. Firstly, the financial eligibility standard needs restructuring; this should be done taking into account the actual financial realities of the country. Particularly the eligibility threshold should reflect the average living standard and expenses. However, this standard needs regular review with the change of the economic conditions of the country. The government should adequately compensate legal aid lawyers to ensure quality service as well as to protect the interest of the clients. At the same time, a strong monitoring mechanism for evaluating the lawyers' performance should be put into practice. The government should introduce some kinds of incentives to attract lawyers in legal aid service delivery. The incentives include tax exemption and offering different fellowships, particularly for legal aid lawyers.[98] Finally, people should be made aware of the service through extensive publicity; print, electronic media and other suitable means should be employed to notify the prospective legal aid clients about the nature of the service and the procedure to avail it. The government should allocate adequate budget and also take an efficient strategy to do widespread publicity of the programme.

[98] The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems A/RES/67/187 (28 March 2013), Guideline 11.

Reflections on Crimea Crisis : Political Utility of Legal Uncertainty Reexamined

Syed Masud Reza*

1. Introduction

Crimea crisis has become an abode of international politics in recent times, for which a complex set of legal and political apologias are being produced from parties involved. The dominant arguments that come out of the conflict as inevitable part of the discourse almost unambiguously and sometimes precisely represent interdependence and inclusiveness of political decisions and their legal defenses. Political actions, as any general reading of the narrative would suggest, are defended by laws and legal arguments themselves serve to reinforce political legitimacy. This utility of international legal norms, especially those with uncertainty is seemingly higher, as they allow enough leeway for the political spearheads to decide and often to enforce a preferred meaning of a rule which is otherwise ambivalent.

The Russian project in and about Crimea apart from the statements of Ukraine unravels the utility of legal uncertainty in the sense that it invokes an implied yet inevitable 'power' element to settle down. In more precise terms, such a situation provides a space for the mightier State to successfully compete and thus to engineer the game and the end results. Even if we regard, as many observers suggest that, the so called 'annexation of Crimea' is illegal[1] *per se*, it is implausible to denounce that relevant legal norms by design hold keys of making such invasion somewhat (if not exhaustibly) defensible. This makes the inbuilt uncertainty in international legal norms problematic, as they arguably are more likely to incite crises than solving them.

It may be argued that elasticity of international legal norms is necessary especially in a world that is diverse, ideologically differing and politically heterogeneous. A degree of flexibility of norms allows more space to accommodate diverse (or, often contradictory) statements in the implementation narratives of international law. This makes sense to the extent it contributes to global peace; but, it also bears the risk of being counterproductive, especially if the dispute takes place between unequal parties. Understandably, a major part of the problem is the question of right to self-determination of the Crimean people vis-à-vis the Ukrainian people. The right being

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1 For details see, Roy Allison, *Russian Deniable Intervention in Ukraine: how and why Russia Broke the Rules* (24 December 2018) <http://commonweb.unifr.ch/artsdean/pub/gestens/f/as/files/ 4760/ 39349202339.pdf> accessed 19 January 2019.

partly political and partly legal, its normative contours are still uncertain. This makes its *jus cogens* status unstable and useful for manipulations. The paper argues that Crimea crisis may be regarded as an example of such manipulations.

The situations clearly gave rise to a number of issues some are old and some are new (and unique to the problem in hand). The *de facto* annexation of Crimea by Russian authority, through a series of prompt, consistent and often violent political procedure backed by a (presumably) premeditated legal project is undeniably a resourceful and unique story in the self-determination narrative of international law. It may not be an exaggeration to submit that following the fall of Berlin wall and the end of cold war, the Crimea crisis adds significance to Russia's global display of hegemony and its intention to retain control over the former Soviet territories. Nonetheless, the narrative creates questions as to the efficacy of international law along with its highflying claims (of non-intervention, sovereign equality, territorial integrity and global peace) to be able to counter the hegemonic plans against the weaker States.

In the stated context the present article contains three major interconnected parts. Firstly, it will provide a brief background of the Crimean problem. Secondly, it will estimate the facts and arguments that arose from the crisis in the light of modern international law and finally, it will discuss how uncertainty of international legal norms (especially the right to self-determination) along with others, is useful in gaining political objectives and thus facilitated the crisis.

2. Brief Background of the Crisis

For better comprehension, before analyzing the legal vernacular an epigrammatic statement of the relevant facts and issues is required. It is widely published in the global media that in February and March 2014 a series of events occur in Ukraine that eventually led to the incorporation of Crimea into Russian Territory.

Ukraine became an apple of discord in the Eastern Europe with end of cold war due to its location and geo-strategic interest of its bordering neighbours. The State is located between the EU on one side and Russia on the other. Both of these bordering powers are influential in the internal politics of Ukraine. In this connection it is worth mentioning that Eastern Ukraine is predominantly Russian oriented with Russian being native language to a big number of population, and the population of the Western part is more oriented towards the European Union.[2]EU considered Ukraine as a potential candidate for future accession and there was negotiation between the parties to sign an association agreement. Russia on the other hand, opposes the

[2] Christian Marxsen, *The Crimea Crisis An International Law Perspective*, <http://www.mpil.de/files/pdf4/Marxsen_2014_-_The_crimea_crisis_-_an_international_law_perspective.pdf> accessed 2 January 2019, 368.

development as it does not want to lose another East European (former Soviet) State under its influence to EU. Further, the territory of Ukraine, especially Crimea is more crucial for Russian interest, as it is observed that Russia relies on access to Crimea for its black sea fleet.[3]

In November 2013, Mr. Yanukowych then President of Ukraine, decided to refrain from signing the association agreement with the EU and instead chose closer ties with Russia. This gave rise to widespread protests against Mr. Yanukowych and his government. Eventually the protests became violent in which hundreds injured and killed throughout the State. During the turmoil, the EU showed clear sympathy to the protesters and their leaders. In February 2014, the Ukranian parliament (Verkhovna Rada) voted to remove Mr. Yanukowych from office (who later left the country) and established an interim government. The Interim government rejected closer economic and political integration with Russia and preferred a more Western orientation. In the same wavelength, the Ukranian parliament adopted a legislation restricting the use of Russian Language.[4] The much awaited association agreement was signed in March 2014 between Ukraine and EU for closer economic and political cooperation.

On the other hand, the sudden removal of Mr. Yanukowych from office, followed by the association agreement initiated a considerate and comprehensive response from the Russians. The Russian perception as understood by a commentator is:

> ...Putin and other senior figures in the Russian security elite convinced themselves that this critical political transformation in the strategically core state of Russia's CIS neighbourhood must have been fomented by western leaders. The purpose, they suspected, was to empower a hostile government on Russia's western borders in order to block Russian integration plans and even open the way for a renewed effort by western states and NATO to achieve a security alignment with Ukraine. This would permanently constrain Russian potential as a European regional power and, beyond this, could be used to challenge the legitimacy of the Russian political system. This reasoning may underlie the Russian decision to flout Ukrainian sovereignty in a way that would open out fundamentally new opportunities for it in Crimea and potentially eastern Ukraine.[5]

Mr. Yanukowych's removal is followed a number of grey incidents especially in Crimea. In this area of Ukraine, Russia keeps substantial number of troops under a different arrangement.[6] But, following the termination of the President, public

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3 Ibid.

4 This episode became central to the Russian case that the new authorities were engaged in active repression of the Russian-speaking minority in Ukraine. See, Peter M. Olson, 'The Lawfulness of Russian Use of Force in Crimea' (2014) 53 *Military Law and Law of War Review* 19.

5 See above n 1, 1257.

6 In this regard, it should be mentioned that a Status of Forces Arrangements Treaty was signed between Ukraine and Russia in 1997 (which was extended in 2010) to allow the latter to maintain troops in Crimea until 2042.

buildings in Crimea were taken over by members of local civilians. By 26 February, armed troops identifying themselves as indigenous Crimean self-defense forces, wearing green uniforms without official emblems (but using Russian military equipments and vehicles) began to appear in growing numbers ll over Crimea. Russia repeatedly denied that they were Russian forces. In the following weeks, Russian forces seized, attacked or, took over many Ukarinian military and other facilities and forced to surrender many naval units. On 27 February, the Crimean legislature announced a referendum for the independence of Crimea. On the 1st day of March, Sergey Valeryevich Aksyonov, who under disputable circumstances became the Premier of Crimea, requested for Russian intervention.[7] On the same day, the Russian Council authorized the use of armed forces in the territory of Ukraine.[8] On March 11 the Crimean parliament adopted a declaration of independence and a referendum (allowing the Crimean people a choice to secede from Ukraine) took place on 16th March.[9] In the referendum 95% of the voters consented for independence. The following day (17 March) Russia recognized Crimean statehood. The Crimean legislature following the referendum requested Russian annexation; on 18 March Putin signed the accession treaty with the leaders of Crimea and Sevastopol, which effectively annexed this Ukrainian territory into Russia. The following day, Russian Constitutional court ruled that the annexation complied with the constitution. This annexation was however widely rejected by the international community and on 27 March 2014, the UN General Assembly passed a resolution[10] invalidating 16th March referendum and thus "…alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum…"

3. Reflections on Obligations, Legal Issues, and Arguments

Internationally well settled legal principles like: territorial integrity and prohibition of use of force are central to a number of treaties (alongside UN charter) to which both Ukraine and Russia are members. Importantly Article 2(4) of the UN charter clearly says:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

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7 See, *Ukraine crisis: Crimea leader appeals to Putin for help* <https://www.bbc.com/ news/world-europe-26397323> accessed 7 January 2019.

8 See, *Putin's Letter on Use of Russian Army in Ukraine Goes to Upper House* <http://tass.com/ russia/721586> accessed 7 January 2019.

9 President Putin described this as an expression of the will of Crimean people to secede from Ukraine and also mentioned that he would respect their choice. See: 'Putin Defiant as Crimea Votes to Return to Russia', *Guardian*, 17 March 2014, 1.

10 UNGA Resolution 68/262, Territorial Integrity of Ukraine, 27 March 2014.

The main theme of the Article was further extended and rationalized by two later instruments, namely, a. the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations[11], 1970, which accepted the mandates of the Article verbatim and provides a number of context specific elaborations; b. the Helsinki Final Act of 1975, which states in Principle III (Inviolability of frontiers):

> The participating States regard as inviolable all one another's frontiers as well as the frontiers of all States in Europe and therefore they will refrain now and in the future from assaulting these frontiers. Accordingly, they will also refrain from any demand for, or act of, seizure and usurpation of part or all of the territory of any participating State.

In Principle IV (Territorial integrity of States) it reads:

> The participating States will respect the territorial integrity of each of the participating States. Accordingly, they will refrain from any action inconsistent with the purposes and principles of the Charter of the United Nations against the territorial integrity, political independence or the unity of any participating State, and in particular from any such action constituting a threat or use of force. The participating States will likewise refrain from making each other's territory the object of military occupation or other direct or indirect measures of force in contravention of international law, or the object of acquisition by means of such measures or the threat of them. No such occupation or acquisition will be recognized as legal.

Besides, Russia and Ukraine entered into a bilateral agreement[12] in 1997, which in Article 3 reaffirmed the same spirit by providing that both the parties-

> shall build their mutual relations on the basis of the principles of mutual respect for their sovereign equality, territorial integrity, inviolability of borders, peaceful resolution of disputes, non-use of force or the threat of force, including economic and other means of pressure, the right of peoples to freely determine their fate, non-interference in internal affairs, observance of human rights and fundamental freedoms, cooperation among states, the conscientious performance of international obligations undertaken, and other generally recognized norms of international law.

Another agreement was signed between the states in the same year, i.e. the Black Sea Fleet Status of Forces Agreement (SOFA). In this agreement, it is reported that, the Ukraine government consented to lease the Crimean naval facilities to Russia for twenty years.[13] However, the SOFA restricts operations to a confined agreed upon scale and does not allow a general presence of Russian troops in Crimea.[14]The Russian President however, opined that the bilateral agreements are no longer

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[11] UNGA Resolution 2625 (XXV) 1970.

[12] Title of the agreement is: Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation, 1997.

[13] See above n 2, 371. In 2010 by a separate agreement the lease was prolonged until 2042.

[14] Ibid.

binding, as in his opinion, the regime change in Ukraine was a revolution, through which a new state had emerged with which Russia had not concluded any treaty.[15] The argument is seemingly rhetorical than legal for two accounts. Firstly, there is no acceptable principle in international law that holds that revolutionary regime change also changes statehood.[16]Secondly, the opinion may also imply that a State succession took place. But, legally State succession occurs when there is a definitive replacement of one state by another in respect of sovereignty over a given territory,[17] regime change in this case cannot be counted as replacement of the State (by the first argument) and hence, its sovereignty remains unaffected.

Despite the multilateral and bilateral treaty obligations, the Crimean question arose and it understandably gave birth to a number of legal issues. Aforementioned background of the problem clearly tells that there had been continuous efforts to make the whole annexation narrative legally defensible (and thus make it politically legitimate to the domestic audience). These issues require analyses from international legal perspective.

3.1 Russian Intervention in Crimea

On 1st March Russian Council authorized the use of armed forces in Ukraine. In fact under Article 61 (2) of the Russian Constitution it is an obligation of Russian Federation to guarantee its citizens defence beyond its borders.[18]In this regard, the Chair of the Council, Valentina Matviyenko, stated:

> a real threat to the life and security of Russian citizens living in Ukraine. There is a threat to our military in Sevastopol and the Black Sea Fleet, and I think that Russia should not be a bystander.[19]

It means Russia wanted to protect its nationals and interests abroad. However, this constitutional obligation of Russia, logically in any way cannot be used to trump its obligations under international treaties. It must therefore be used within the legal framework; such an exemption to Article 2 (4) of the UN Charter, which permits the use of self-defence is Article 51 of the UN Charter, which says:

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[15] Kremlin Press Conference. *Vladimir Putin Answered Journalists' Questions on the Situation in Ukraine* (4 March 2014) <http://en.kremlin.ru/events/president/news/20366> accessed 01 February 2019.

[16] Such instances are factually prevalent all over the world. Revolutions took place, during the Arab spring, in a number of Arab countries and ended up in changing regime, often more violently than in Ukraine. But, this does not in any way effected their statehoods.

[17] James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 2012) 423.

[18] *Constitution of the Russian Federation 1993*, Article 61(2). The Russian Federation shall guarantee to its citizens protection and patronage abroad.

[19] See above n 8.

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the united Nations, until the security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the security Council and shall not in any way affect the authority and responsibility of the security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The Article contains three features, a. that self defence can be used if an armed attack occurs and b. that self defenceis a temporary right and as such can continue until the Security Council has taken necessary measures and finally c. measures taken in exercise of the right to self defence shall be immediately reported to the Security Council. In interpreting these mandates of Article 51 of the UN charter, there is a clear division among scholars.[20] Some takes a limited restrictive approach in interpreting the mandates. Their point is: a State can exercise the right to self defence only against an actual armed attack. Another interpretation says that the right can be used not only against an actual armed attack, but also against an immediate threat of armed attack (which is yet to take place).[21] In the statement of Ms. Matviyenko, the chair of Russian Council authorizing the use of armed forces in Ukraine, it was not a 'real attack', rather a 'real threat' against Russian nationals and facilities in Ukraine that inspires Russian intervention. Clearly of the two available interpretations (which makes the principle indeterminate), Russia chose the favourable one.

Again, if we combine both the perspectives, an armed attack (or, threat of armed attack) on the territories of a State, or, on its military units, or, on any other installments outside the border, activates the right to self defence. But, if nationals of one State face armed attack in another State, there is no established and undisputed principle of international law that justifies an armed attack in such case. Though, there are precedents in State practice to use self defence as a justification for use of force to rescue nationals.[22] The Russian intervention in Crimea however was factually not aimed to rescue nationals.

However, the intervention case is defended by another strong argument, that the ousted President Mr. Yanukowych, before leaving the country had issued a letter in which he invited Russia to intervene on Ukraine territory as a countermeasure of so-called revolution.[23] The removal of Mr. Yanukowych from office did not meet the

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[20] Rebaz Khdir, 'The Right to Self Defence in International Laws as a Justification for Crossing Borders: The Turkey-PKK Case within the Borders of Iraq' (2016) IV(4) *Russian Law Journal* 62.

[21] The second type of self defence is known as preemptive attack, which was a justification of US invasion in Iraq in 2003.

[22] See above n 2, 373.

[23] See above n 15.

legal requirements.[24] After removal from office he left the country and did not in fact retain any control over the State. Russia claims that since Mr. Yanukowych's removal from office was unconstitutional, he by the same token remained the legitimate President of Ukraine and thus was able to invite Russia for intervention. In this regard, in the Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua V. USA) 1986, it was submitted and impliedly accepted by the ICJ (in para-126) that States can invite for intervention and not any opposition.[25] Now, the question that comes forward that if a President (arguably *de jure*) loses his effective control over his State (which happened due to his tacit acceptance of the removal, followed by leaving his country), can he be considered to legitimately represent the State adequately, to invite intervention? This is presumably a question for which law does not have a plain and straightforward answer. In practice, this provides more space for politics to play a role.

Other questions, which are deducible from the facts, can be traced in the motive and end results of Russian intervention. The questions are for example, Can a President invite foreign intervention to unsettle the territorial integrity of his/her State? It may be argued that the President did not have any such intention and all happened due to situations beyond his control. However, any conclusion on this cannot be made, until the letter of invitation is made accessible, which is in fact not. Another point is that, even if the President did not want the territorial disintegration of Ukraine (as the letter of invitation might suggest), can it be denied, given the facts, he had prior knowledge or, could logically have presumed, the possible consequences of such actions? If he had any knowledge, or, it was possible for him to know or, presume, the ultimate consequences of such action, is not that, then forms a crime *per se* against Ukraine? These are some of the unresolved issues regarding the crisis.

3.2 Issues Regarding the Right to Self Determination of Crimean People

The Crimean self-determination story stands unique in the sense that unlike most other such narratives, it continued for comparatively for a very short period of time yet

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[24] Articles 108 and 111 of the Ukrainian Constitution, *inter alia*, mention several steps to remove the President (against treason or, any offence committed by the President), they are: a. the majority of the constitutional membership of Verkhovna Rada, initiates the impeachment procedure, b. an investigation commission is established, c. the parliament considers the results of the investigation, d. two third of the constitutional members vote to bring charges against the President and e. the decision of removal has to be taken by three quarters of members of parliament and confirmed by Ukraine's Constitutional Court. During the removal proceedings of Mr. Yanukowych, none of the requirement were met. His removal was decided by 328 members of parliament present during the voting whether the constitution requires at least 450 members to vote for the cause in such case. See for details: Legal Office FAOLEX, *Constitution of Ukraine 1996* (official translation) <http://extwprlegs1.fao.org/docs/pdf/ukr127467E.pdf > accessed 2 February 2019.

[25] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America)* [1986] ICJ Reports, 14 <https://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf> accessed 2 February 2019.

was able to produce decisive results. There was in fact, no strong, persistent and recognized movement from among the Crimean people against Ukraine, for right to self-determination or, secession. Claims for Crimean peoples' right predominantly started to emerge, simultaneously with the 2014 incidents. Within a few months, it produced history by creating an independent Crimea and finally by its annexation of it with Russia.

Any reflective reading the history of the Crisis, creates doubts especially as to the normalcy of speed of events. From November 2013 to March 2014, especially in the last two months (February and March), events happen so fast, that are highly unlikely, in a normal political process, especially when it involves a highly disputed question of right to self-determination, which in effect produced a space for annexation. It is doable, may be this fast, only with adequate (legal and political) preparations and long premeditation.

The Right to self-determination is the sole right to be present in (Article 1 of both) ICCPR and ICESCR. Its language says in Article1 (1):

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Before starting the rights' exegesis, the facts themselves require legal reflection. As mentioned, on 11 March (2014) the Crimean Parliament adopted a unilateral declaration of independence (UDI). Regarding this, in an advisory opinion, the International Court of Justice held that there is no general prohibition in international law on declaration of independence.[26]However, its utility and legality in international law is highly contentious, as understandably, for its political nature that poses a threat against territorial integrity of modern states. Despite its frequent use as an instrument by different secessionist movement, its legality remains uncertain which spawned debates and created further uncertainties.[27] In different contexts, the UN Security Council declared UDIs as invalid.[28] In current scholarship, there is also a trend to regard international law as neutral in respect of UDI.[29] Legal uncertainty *per se* does

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[26] International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*<https://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-00-EN.pdf > accessed 3 February 2019.

[27] This was more exposed during the global debates on Kosovo case. See for details: Alexander Orakhelashvili, 'Statehood, Recognition and the United nations System: A Unilateral Declaration of Independence in Kosovo. Max Planck Yearbook of United Nations Law' (2008) 12 *Max Planck Yearbook of United Nations Law* 1-2. < http://www.mpil.de/files/pdf2/mpunyb_01_orakhel_12.pdf > accessed 3 February 2019.

[28] See, UN Security Council Resolution 541 (of 1983), Resolution 787 (of 1992).

[29] See for example, Dr Eva Kassoti, *Unilateral Declarations of Independence and the Creation of States under International Law: Re-visiting the Question of the Juridical Nature of Unilateral Declarations of Independence* <https://www.eui.eu/Documents/DepartmentsCentres/Academyof EuropeanLaw/Projects/2015/ESILResearchForum/EvaKassoti.pdf> accessed 5 February 2019.

not exhaust the utility and political character of UDI. The facts of the current context suggests that despite its normative elasticity Crimean declaration of independence clearly served as an efficient instrument in the later developments of the story.

The Crimean referendum, being an internal affair did not directly violate any principle of international law. There is also no binding standard in international law regarding the procedure of a referendum. Referendum itself being more a practical incident requires a factual evaluation of the situations around it. It is mentioned above that by 26 February, masked troops (identifying themselves as Crimean Self Defence force) started occupying different parts of Crimea. These troops have been identified by many observers as pro-Russian soldiers, who carried arms openly to guard different installments. Their presence continued full-fledged throughout the referendum process and beyond. This created, by all means, an atmosphere of fear and tension, which by no means can be said to have offered a free and fair environment for the voters. This also disturbed the neutrality of authorities that conducted the referendum.[30]

The Referendum in Crimea was followed by its secession from Ukraine and declaration of independent statehood. The total project in general was being justified by both the Russian and Crimean authorities under the rubric of right to self-determination of Crimean people.[31]Though the internal contents of the right to self-determination are still indeterminate, there are some aspects on which States have a general or, growing consensus. For example, self-determination has been considered as a right of peoples under colonial, foreign and alien domination.[32] There is also a growing consensus among States to consider the majority people of a country for the purpose of 'peoples' as mentioned in Article 1 of ICCPR.

On the other hand, State practice does not support the use of the right to self-determination as a principle conferring the right to secede within already independent States.[33] Also, self-determination cannot be used to further larger territorial claims in defiance of internationally accepted boundaries of sovereign States.[34] The existence of a right to secede is therefore a highly (if not exhaustively) contentious issue. Again, there is no duty in international law that prohibits (any group/people) to secede. In a very strict sense, secession is allowed as an *ultima ratio* where internal self-determination has no chance of realization.[35] This makes the existence of

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30 See above n 2, 381.

31 See above n 15.

32 See above n 17, 646. See also: *Declaration on the Granting of Independence to Colonial Countries and Peoples* UNGA resolution 1514 (XV).

33 Malcolm N Shaw, *International Law* (Cambridge University Press, 2016) 378.

34 Ibid, 379.

35 See above n 2, 386.

secession very uncertain; as legally, it is difficult to say it exists and it is also difficult to assert that it does not exist.

It is suggested that secession is a matter of domestic law of a State.[36] Thus the Crimean referendum and the following secession from Ukraine become illegitimate as Article 73 of Ukrainian Constitution requires an all Ukrainian referendum to alter the territory of Ukraine. As aforementioned, referendum on Crimea's independence occurred only in Crimea and not all over Ukraine. The invalidation of referendum, together with the mandates on territorial integrity of Article 2(4) of UN Charter, Principles III and IV of Helsinki Final Act and other bilateral obligations (with Ukraine) invalidates the Crimean annexation of Russia.

Being itself full of uncertain and unsettled issues and contents, the right to self-determination, thus cannot offer a precise and indisputable legitimacy of Russian actions in Crimea. But, it is undeniable that the right is politically useful and can be successfully employed to create political legitimacy of actions.

4. Conclusion

With annexation, it can be imagined that, the Crimean Crisis did not end. For the same reason, it may also be assumed as the beginning of a prolonged and difficult crisis. International law in this regard is functional through production of arguments on both sides; but these arguments, as it has been shown, are legally less decisive, though politically more useful. What makes it even worse is that in any duel between two unequal State parties, the stronger party might find the legal vernacular with indeterminate meaning very useful to employ them to gain a political outcome. Though it is true that normative uncertainty is somewhat a strength of international law, as it can accommodate innovation and diversity of legal arguments. But this indeterminacy, it is argued, makes the interests of small and weak States potentially unguarded vis-à-vis a strong and big counterparts. Especially where the Strong State party invests to develop an efficient counter-narrative that justifies each of its actions, as far as practicable. The recent engagements of Russia and Ukraine on Crimea and other issues stand as a glaring example of this inbuilt bias.

The Crimean narrative undoubtedly enriches the legal scholarship by serving a number of unique features. These issues are now being regularly studied and reflected worldwide. This experience of international community, it is expected may eventually bring more efficient alternatives, or, doctrines or, mechanisms that may be able to entrench at least a degree of certainty in legal issues that are vital for the political existence of comparatively weak States.

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[36] See above n 33.

Determining the Standard of Proof Required to Remove an Arbitrator on the Ground of Bias

Mohammad Golam Sarwar*

1. Introduction

The issue of claims of bias against an arbitrator is crucial because removal of an arbitrator only on the basis of suspicion, without having concrete evidence, would obviously disqualify almost everyone except a few of the saints.[1] In general, all rues of arbitration oblige an arbitrator to remain unbiased as long as he is working as an arbitrator in order to settle a dispute.[2] Accordingly, arbitrators are required to maintain neutrality and impartiality during an arbitration process. The burden of proving neutrality and impartiality on the part of an arbitrator is significant and complex because conflicts of interest between the parties and arbitrators may arise[3] on the basis that the nomination or appointment and remuneration of arbitrators are provided by the parties.[4] This paper aims to argue that in order to effect the removal of an arbitrator, evidence of actual bias instead of an allegation of suspicion of bias would be required. In developing arguments in favour of actual bias, this paper, while referring to decided cases, will discuss about real danger test that includes the objective test to establish bias.

2. Conceptual framework of Bias in Arbitration

The word 'bias' refers to the status of a decision-maker who is (either actually or apparently) not impartial and independent with respect to the parties as well as the subject matter of the dispute.[5] The meaning of bias indicates predisposition or prejudice that may be made evident by direct or indirect means.[6] While direct prejudice may be inferred from bias expressions or conduct inspired with prejudice, indirect bias can be described as the procedural failure in administering justice

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1 Martin Gallin, 'Bias and Prejudice as Disqualifications of arbitrators' (1951), 2 *Labour Law Journal*, 763.

2 Charles Chatterjee, 'Bias in Arbitrators and Bias against arbitrators?' (2002) 3 *Journal of World Investment* 369.

3 Catherine A. Rogers, *Ethics in International Arbitration*, (Oxford University Press, 2014) 74.

4 See Chatterjee, above n 2, 369.

5 Sam Luttrell, *Bias Challenges in International Commercial Arbitration: The Need for a "Real Danger" Test* (Wolters Kluwer, 2009) 1-28.

6 Charles Chatterjee, 'The Effect of Apparent Bias or Suspicion of Bias or Unconscious Bias may not necessarily be different from that of Actual Bias - An English Perspective' (2012) 13 *The Journal of World Investment & Trade*, 997-1013.

equally for both the parties in the court or arbitral proceedings.[7] In order to remain unbiased, an arbitrator though acting in a quasi-judicial capacity should possess the judicial qualifications of fairness for both the parties while delivering a faithful, honest and disinterested opinion.[8] Though responsible and experienced arbitrators do not intentionally show their bias, suspicion of bias may be inferred from their failure to fulfil certain formalities or inadvertent mistakes, or from the prediction that the award may be rendered against the party who brings the allegation.[9]

The majority of national arbitration laws, including all UNCITRAL Model Law States, recognize the ground of lack of impartiality to challenge an arbitrator.[10] Section 24 of the English Arbitration Act 1996 empowers the court to remove an arbitrator on the ground that gives rise to justifiable doubts as to his impartiality. Article 12 of the UNCITRAL Model Law also provides similar provisions that states 'any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence'. General Standard 2 (c) of the IBA Guidelines elaborates the test for 'justifiable doubts' which explains that doubts are justifiable when a reasonable and informed party would get the possible impression that arbitrator is influenced by factors other than the merit of the case while reaching his or her decision.[11] The question of 'independence' of an arbitrator usually arises when the arbitrator has a relationship with the party or with an entity linked to a party or with the counsel[12] and the issue of impartiality arises when an arbitrator favours one of the parties, or he is prejudiced relating to the subject matter of the dispute.[13] In addition to the obligations of arbitrators to be 'impartial 'or 'independent', some other sources also refer to an obligation of arbitrators to be 'neutral'.[14]

Under the New York Convention parties seeking to challenge an award, based on alleged arbitrator misconduct, have to argue that the misconduct of alleged arbitrator violates the public policy of enforcement jurisdiction.[15] While there is no indication of what constitutes a violation of public policy, Courts, in practice, interprets 'public policy exception' looking into the definitions of impartiality and independence referred under domestic arbitration laws as described above.[16]

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7 Ibid, 999.

8 See Gallin, above n 1, 764.

9 See Chatterjee, above n 6, 998.

10 See Luttrell, above n 5, 14.

11 Ibid, 14.

12 Ibid, 19.

13 Ibid, 21.

14 See Rogers, above n 3, 91.

15 Article V 2 (b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

16 See Rogers, above n 3, 87.

3. Standard of proof required for effecting removal of an arbitrator: Responding through Case laws

The following part of this paper will analyse a few case laws where the courts came up with guidelines regarding what any kind of bias could be confirmed against a judge or an arbitrator.[17]

A and Others v B and Another[18]

The underlying dispute between the claimants and the first defendant under a share sale and purchase agreement (the SPA) made in 2006. In 2009 (31 March), the first defendant commenced arbitration, in accordance with the Rules of the London Court of International Arbitration (LCIA), alleging breaches of the SPA. Both the claimants' solicitors (then SJ Berwin, subsequently, White & Case) and the first defendant's solicitors (Dewey & LeBoeuf) agreed that 'X' to be appointed as the sole arbitrator in settling the dispute. The Arbitrator on May 8, 2009 signed a statement, as required by the Rules of the LCIA, declaring his impartiality and independence.

During the time of his appointment, the arbitrator had in the past received instructions as counsel from both firms of solicitors, in particular by the defendant's solicitors in litigation in 2004 (the other litigation). Neither the clients nor the latest dispute had any connection with either of the parties to the instant arbitration. In late 2009 the settlement in the other litigation broke down, and the case revived and was relisted. In late 2010, before handing his award to the parties, the arbitrator wrote to both the parties informing about the other litigation. After that, the award was forwarded to the parties by the LCIA. The following day, the present claimants applied to the LCIA Court of Arbitration to remove the arbitrator on the ground of lack of impartiality and independence. The issue, in this case, was whether the arbitrator would be removed on the ground of bias as well as failure to disclose his relationship with B's solicitors?

The High Court of Justice while applying an objective test concluded that there was no unconscious bias on the part of X (the arbitrator) and the application of bias and removal of the arbitrator would not be sustained. The Court also observed that merely because there had been a failure to disclose that could not amount to a real possibility of apparent bias if the fair-minded and informed observer would not have thought there was anything that needed to be disclosed.[19] Consequently, the failure of the arbitrator to disclose his involvement as counsel in the other litigation did not give rise to a real possibility of apparent or unconscious bias.

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17 See Chatterjee, above n 6, 1003.

18 [2011] 2 Lloyd's Law Reports 591. Cited in Chatterjee, above n 6, 999.

19 Ibid, 1001.

Porter and Weeks v Magill[20]

The local councillors (the defendant) were accused of having sold rather than let council houses with a view to securing supports and vote banks in favour of their political party in the election. The auditor, appointed by the councillors, after having inquiry advised them the policy (a policy of building stable communities) would be unlawful, and it would cause a financial loss in consequences of the wilful misconduct of the councillors. He also advised that the policy would leave the authority unable to meet its statutory duties. The councillors alleged that the auditor was biased.

Lord Hope of Craighead, in this case, said: 'It was suggested that the auditor's mode of appointment gave rise to bias. The test is whether the circumstances were such that a fair-minded and informed observer might think there was a real possibility that the tribunal was biased. That did not apply here.'[21] Lord Hope also observed that 'if on examination of all the relevant facts, there was no unfairness or any appearance of unfairness, there was no good reason for the imaginary observer to be used to reach a different conclusion'.[22] The Court applied here the 'real possibility test' which implies that 'a fair-minded and informed observer' would say that there was a 'real possibility' that the arbitrator was biased.[23]

Davidson v Scottish Ministers[24]

The claimant had sought damages for the conditions in which he had been held in prison in Scotland violating Article 3 of the European Convention on Human Rights. He alleged against a judge on the ground of apparent bias when he discovered later that one of the judges who had sat on his first appeal had also held an advisory position as Lord Advocate in the House of Lords during the debates concerning the promotion and effect of certain legislation which was relevant in the present case.

It was held that a fair-minded and informed observer after considering the facts would conclude that there was a real possibility that the tribunal was biased. Lord Bingham of Cornhill observed that a judge will be disqualified if he or she has personal interest or relation with a party, or is influenced by some factor that would prevent the bringing of an objective judgment to bear on the case in question. If these kinds of features are present, it is usually categorised as a case of actual bias.[25]

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[20] [2001], UKHL 67, (2002), 2 AC 357, 1 All ER 465. Cited in <http://swarb.co.uk/porter-and-weeks-v-magill-hl-13-dec-2001/> accessed September 25 2019.

[21] Para 97 in UKHL 67 2001 <http://www.bailii.org/uk/cases/UKHL/2001/67.html> accessed September 25 2019.

[22] Ibid.

[23] See Luttrell, above n 5, 8.

[24] [2004], UKHL 34, Cited in <http://www.bailii.org/uk/cases/UKHL/2004/34.html> accessed 25 September 2019.

[25] <http://swarb.co.uk/davidson-v-scottish-ministers-hl-15-jul-2004/> accessed September 25, 2019.

Rustal Trading Ltd. v Gill & Duffus S. A[26]

The respondents (Gill & Duffus SA) entered into a contract in July 1996 for the sale of a cargo of sugar to the Applicant (Ruslan Trading Ltd) cost &freight free out Karachi or Port Qasim. The vessel did not complete discharging within the laytime and the respondents claimed against the applicant for demurrage. The applicant disputed liability for demurrage. The case was referred to arbitration under the rules of the Refined Sugar Association (the RSA).

On 26 January 1999, the RSA informed the parties of the names of the arbitrators who included Mr. Robin Shaw, a director of CR Sugar Trading Ltd. On 16 February the applicant wrote to the RSA questioning the role of Mr. Shaw in a previous dispute in which he had been involved. The court without considering the matter proceeded to an award in favour of respondents in April 1999. After that, the applicant applied under Section 68 of the Arbitration Act 1996 to set aside the award on the grounds of serious irregularity particularly the dispute in which Mr. Shaw was involved personally raised justifiable doubts as to his ability to act impartially.

The Court observed that in order to justify genuine doubts as to the arbitrator's impartiality circumstances had to be judged objectively. In this case, the dispute in which the arbitrator was previously involved was more than two years prior to the current dispute. It would be unusual to maintain that after the lapse of such a long period, Mr Shaw could have been left with a sense of animosity or mistrust against the employee of Rustal. Considering the facts, Rustal failed to establish any substantial grounds for doubting the impartiality of Mr. Shaw. The Court also referred Section 73(1) of the Arbitration Act 1996 which states that in the event of a party wishing to challenge the effectiveness of the proceedings, it must do so promptly. In this case, any grounds for irregularity would have arisen when the arbitrator was appointed, not upon his failing to resign subsequently. In addition, Rustal continued to participate in the proceedings after the appointment of Mr. Shaw without raising any objection. Thus there was no reason to allow the application for setting aside the award because an award would be vitiated in the same way if it was influenced by bias, or by irregularity.[27]

AT&T Corporation and another v Saudi Cable Co[28]

In this case, an arbitrator was alleged to be biased on the ground that he was a non-executive director of a competitor company which was not successful in the bid for a project (Saudi Kingdom's sixth telecommunication expansion project) where

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[26] [2000] 1 Lloyd's Law Reports 14. Cited in above n 2, 369.

[27] Ibid, 373; see Also in [1999] All ER (D) 1099.

[28] [2000], 1 Lloyd's Law Reports 22 and [2000] 2 Lloyd's Law Reports 27. Cited in C. Chatterjee, Suspicion of Bias versus Actual Bias in Arbitration: The Gallo Arbitration, (2010) 11 *Journal of World Investment & Trade* 1109. See also Chatterjee, above n 6, 1005.

the Saudi Cable Company (SCC) was also a bidder along with AT&T. In course of time, it became clear that AT&T would be awarded the contract which disappointed the Canadian Company (the Co-bidder) where the arbitrator was a non-executive director. In accordance with the pre-bid agreement, negotiation for concluding the main contract started and failing to lead any result, the pre-bid agreement was terminated. AT&T claimed that it was not correctly terminated while SCC disputed the claim of AT&T. While The Tribunal rendered two awards in favour of SCC, AT&T appealed, and the dispute was referred to the Court of Appeal.

The Court of Appeal observed that in order to establish the existence or non-existence of bias in both cases of judges and arbitrators, 'real danger test' should be applied. While referring to the instant case, the Court preferred not to apply "real danger test" but only the "reasonable suspicion" or "reasonable apprehension" test because there was no allegation of 'actual bias' rather the allegation was based on 'apparent bias' against the arbitrator.[29] However, the Court didn't clarify what criteria need to be applied in order to determine "real suspicion" or "reasonable apprehension" test' which, presumably, will be done in accordance with the reference of circumstantial and direct evidence, if any.[30]

Vito G. Gallo v Canada[31]

In this case, the claimant challenged the continuing appointment of an arbitrator in the subsequent part of the arbitration based on the ground that the arbitrator was involved in the defendant's activities and for that reason, he should be disqualified to act as an arbitrator. The claimant complained that Mr. Thomas (the arbitrator) had remained a counsel despite his indication to the contrary in his CV of 2007. The Claimant also denied the receipts of the CV of Mr Thomas which disclosed that he continued providing advice to the Government of Mexico on a case by case basis. The claimant stressed that because of his involvement in the work of Government of Mexico (that raised doubts about his engagements with the defendants' activities) there might be a possibility that he might not remain independent or impartial during the arbitration process. It is to be noted that the dispute was connected with the North America Free Trade Agreement (NAFTA) to which both Mexico and Canada are parties and the parties to the dispute was agreed to refer it to an arbitral tribunal where Mr. Thomas was one of the arbitrators.

The considerable issue, in this case, was not that Mr. Thomas was 'actually biased' against Gallo or in favour of the Government of Mexico rather his connection with the

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29 See Chatterjee, above n 6, 1005.

30 Ibid, 1006.

31 49 International Legal Materials 2010, 23. Cited in Above n 28, 1103. Also in Jeremy K. Sharpe, Vito G. Gallo *v* Canada — Challenge of Arbitrator (ICSID), Introductory Note, (2010), 49 *International Legal Materials*, 23-31.

latter gave rise to 'suspicion' that while judging the case impartiality may not be sustained by him. It is to be noted that while 'suspicion of bias' indicates a continuing threat to arbitrators, 'actual bias' is more definite and this allegation must be based on actual facts and evidence.[32] But the consequences of both allegations of biases led to the same direction that the arbitrator should resign. Accordingly in the present case, the Deputy Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID) requested Mr. Thomas to inform within seven days of his choice between continuing to advice Mexico and serving as an arbitrator in this case.[33]

In addition to the abovementioned cases, English Courts have developed judicial guidelines relating to the issue of bias over the years in many cases and out of these, few important cases are discussed below.[34] It is to be noted that since all the cases involved a common ground of allegation that was either actual or presumed bias of judges or arbitrators, this paper without going into details into the facts will focus mainly on the important principles emphasized by the English Courts.[35]

In the Sussex Justices[36], It was found that the justices decided to convict the applicant and thereafter the applicant's solicitor drew the attention of the justices to the fact that the deputy clerk was a brother of the solicitor who had conduct of the case. He also said that he had only become aware of this information after the justices retired. Lord Hewart CJ observed that:

> ... it is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done. The question, therefore, is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered; the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done but upon what might appear to be done.[37]

It can be said that suspicion of bias against an individual assigned with judicial activities raises questions about the validity of his judgments as well as affects the credibility of the institution concerned.[38]

In *R v Gough*[39] the House of Lords while referring to the concept of 'real danger of bias' observed that after having regard to the relevant circumstances of the case it

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32 See Chatterjee, above n 28, 1114.

33 Ibid, 1114.

34 See Chatterjee, above n 6, 1002.

35 Ibid, 1002.

36 *The King v Sussex Justices,* ex parte McCarthy (Sussex Justices) [1924] 1 K.B. 256. Cited in Above n 2, 375. Also in above n 6, 1003.

37 *Sussex Justice*, at 259, Cited in Chatterjee, above n 6, 1003.

38 Ibid, 1003.

39 [1993] 2 ALL E.R. 724. Cited in Chatterjee, above n 6, 1004.

should be determined whether any member of a tribunal had any interest of any nature in the result of the proceedings and if any interest was possessed, the member of the tribunal would be disqualified to proceed in the functioning of tribunal.[40] This case also emphasized about the real likelihood of bias and the guideline as to how to determine the real likelihood of bias was found in the case of *R. v Barnsley County Borough Licensing Justices, ex parte Barnsley & District Licensed Victuallers' Association*[41] where Devlin, LJ stated that:

> ... in considering whether there was a real likelihood of bias, the court does not look at the mind of justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact, favour one side at the expense of the other. The court looks at the impression which would be given to other people.[42]

Alongside 'the real likelihood test' there was another concept like 'the reasonable suspicion test' that indicated that it would be enough if there was a reasonable suspicion of bias on the part of member/s of the adjudicating body. But what criteria would determine the reasonable suspicion test still remains to be unclear.[43]

On the other hand, actual bias is much more concrete that is usually determined by referring to the conduct, words spoken or written, or even by conscious or unconscious gestures.[44] In this regard, the relevant example is *Exparte Dallaglio,* [45] where the coroner described the mother of a deceased as "unhinged" in addition to making reference to a number of "mentally unwell" relatives. Here, there was evidence of unconscious bias on the part of the coroner that was demonstrated by the choice of expression ("unhinged"). In addition, he regarded the applicants and others involved in the action group as an unrepresentative, "mentally unwell" faction. Based on these considerations, Sir Thomas Bingham, MR concluded that:

> …there was here real danger that the coroner might have unfairly regarded with disfavour the cases of the applicants as parties to an issue under consideration by him.[46]

In order to determine 'bias' either actual or apparent, the Court also provided guidelines in the case of *Locabail*[47] which are: whether a judge (presumably including an arbitrator) had a direct personal interest of any nature in the result of the

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40 Ibid, 1004.

41 [1960] 3 W.L.R 305. Cited in Above n 2, 380.

42 Ibid, 309-310.

43 See Chatterjee, above n 2, 380.

44 See Chatterjee, above n 6, 1004.

45 *R v Inner West London Coroner, ex parte Dallaglio and* Another *(ex parte Dallagilo),* [1994] 4 ALL.E.R. 139. Cited in Above n 2, 382.

46 Ibid, 163. *(ex parte Dallagilo).*

47 *Locabail (U.K.) Ltd. v Bayfield Properties Ltd. (Locabail)* [2000] 2 WL.LR. 870. Cited in Above n 6, 1005.

proceedings; or whether he knew of the matter relied on as undermining his impartiality; or whether in any other case where he was or became aware of a matter that could arguably give rise to a real danger of bias, but failed to disclose it to the parties before any hearing.[48] The Court also pointed out that if a judge has any direct pecuniary or propitiatory interest in the outcome of the trial then he would be disqualified to proceed with the trial.[49] The issue of the economic or financial interest was also extended in the case of *ex parte Pinochet*[50] where the promotion of cause was also considered as a financial interest. Lord Brwone-Wilkinson stated that:

> …the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties.[51]

In the case of *Locabail* since the judge was not aware of the conflicting interests of a client of his firm and one of the parties before him at the time of the hearing, so it was observed that there was no real possibility of bias.[52] But contrarily, in the case of *Save and Prosper Pensions Ltd v Homebase Ltd*[53], an arbitrator was removed on the ground that the arbitrator was aware of the association between a current client of his firm and one of the parties to the arbitration.[54] The Court observed that where a relationship with a party to the dispute was such that gave rise to a real possibility of bias, same kind of relationship with an associated company (depending on the degree of association between the companies) was likely to give rise the same risk.

4. Conclusion

The removal of an arbitrator on the allegation of apparent bias based on suspicion rather than actual bias would raise serious complexities in the administration of arbitration proceedings because justice must not only be done but must be seen to be done. While actual bias of arbitrators is easier to determine since it is determined by referring to conduct, words spoken or written or even by gestures, at the same time it is difficult to prove because arbitrators do not openly show their favouritism or antipathy towards one of the parties. For this reason, cases on the bias are brought mostly based on suspicion of bias. However, decisions of the cases mentioned above

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48 See Chatterjee, above n 6, 1005.

49 See Chatterjee, above n 2, 384.

50 *R. v Bow Street Metropolitan Stipendiary Magistrate and Others*, ex Parte Pinochet Ugarte (No.2) (ex Parte Pinochet) [1999] 2 W.L.R. 272. Cited in Above n 2, 375.

51 Ibid 135. (ex Parte Pinochet) Referred in Above n 2, 384.

52 Bobby Macaulay and Ghazi Zafar, The Approach of the English Court to Arbitrator Bias (Where the Arbitrator Has Acted for or Against One of the Parties), (2008) 5 *Transnational Dispute Management (Journal),* 4.

53 [2001] L. & T.R. 11. Cited in Above n 52.

54 Ibid, 4.

confirmed that mere suspicion without actual evidence would not be enough for effecting the removal of an arbitrator. Though there are no fixed criteria to determine the allegation of apparent bias, the court in many of the cases[55] applied the 'real possibility test' which implies that considering relevant facts and circumstances if the fair-minded and informed observer would conclude that there was a real possibility of bias that would cause substantive injustice to the applicant who makes the allegation of bias, then it would be deemed that the tribunal was biased.[56]

While it is undeniable that allegation of apparent bias based on assumptions should not be used as a sword against arbitrators, it is equally true that if the allegation of apparent bias is rejected, the party making the allegation may lose confidence in the proceedings of the tribunal. To come out from this dilemma, arbitrators should also be cautious about the disclosure of such information and interest that may affect the outcome of the proceedings in the one hand and on the other hand, the appointing authority will need to consider carefully the position of an arbitrator who has previously acted for or against one of the parties.

Mere non-disclosure of information by an arbitrator may not be treated as an act of bias, though it may be treated as misconduct. However, if there is a deliberate non-disclosure of information by an arbitrator prior to the commencement of the arbitration proceedings, or if there is proof of pecuniary interest of an arbitrator in the outcome of proceedings then the concerned arbitrator must be avoided. There is another crucial issue relating to bias that is: the party intending to lodge an allegation of bias waits until the last minute of the proceedings with the expectation that if the decision/award is rendered in their favour, they will drop the allegation. This type of approach by parties to the proceedings leads us to believe that allegation of bias (particularly speculative bias) may be used as a tool to exploit the credibility of an arbitrator or even as a shield in arbitrations.

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[55] Cases include: *ASM Shipping Ltd of India v TTMI ltd of England* [2006] 7 Lloyd's Law Reports 375, *Director General of Fair Trading* v *Proprietary Association of Great* Britain [2001] 1 WLR 700, *R v Gough*, Above n 39, Rustal Trading Ltdv Gill& Duffus, Above n 26, *Laker Airways* v *FLS Aerospace & Burnton* 2 Lloyd's Law Reports (1999) 45. *Locabail (UK) Ltd v Bayfield Properties Ltd*, Above n 47, *Porter v Magill*, Above n 24 and *Lawal* v *Northern Spirit* [2003] UKHL, 35. Cited in Above n 6, 1008.

[56] See Chatterjee, above n 6, 1008; see also, Macaulay and Zafar, above n 52, 2.

International Criminal Law and Domestic Courts: Context of International Crimes Tribunals of Bangladesh

Priyanka Bose Kanta*

1. Introduction

International community is unanimously at consensus that international crimes should be tried irrespective of the place of occurrence and the background of the perpetrators. However, the dilemma is about the perfect forum for trying the perpetrators as one group supports domestic tribunals, whereas another group strongly proposes for international tribunals.[1] Rome Statute, on the other hand, proposed that the International Criminal Court will prefer domestic tribunal if the domestic tribunal has been conducted in a bona fide manner.[2] One of the ways to understand that domestic tribunals are acting in a bona fide manner is to see whether the judges of the tribunals are drawing their judicial conclusions from the established principles of international law, more specifically speaking, from the judgments of different international tribunals. In short, whether those tribunals are maintaining the due process, conducting fair trial and following precedents or not – are the indicators of their bona fide attitude. In this context, Bangladesh's endeavor to prosecute the war criminals and end the culture of impunity was one of the earliest systematic attempts to seek justice for genocide. The International Crimes Tribunal of Bangladesh (ICTBD) and its governing law, the International Crimes Tribunals Act, 1973 (ICTA) have significantly adapted the international norms, both procedural and substantive law, for prosecuting the criminals. This adaptation of international law in a domestic tribunal reassures their supportive status and helps shaping the jurisprudence of the tribunal. Our purpose in this article is to analyze the international norms that are being applied in the ICTBD and find common patterns in their application. This article has been primarily divided in four parts, part one discusses the history and evaluation of the ICTBD, the second part assesses the international laws, both substantive and procedural, that are being applied in the ICTBD, the third part attempts to search for pattern in application of international law and the fourth part tries to establish the interlink between international law and domestic court. This comparative study altogether will showcase the mutual status of international law and domestic law and how it helps to articulate the evolution of both.

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1 Jonathan I. Charney, 'International Criminal Law and the Role of Domestic Courts' (2001) 95 *American Journal of International Law* 120.

2 Second last paragraph of the Rome Statute on the International Criminal Court, 2000.

2. International Crimes Tribunal of Bangladesh

2.1. History of Bangladesh

Given how little is known internationally about the history today and how criticized Bangladesh's initiative of prosecuting second line perpetrator has been, I must begin the article with some context. Bangladesh's War of Liberation was the culmination of a series of events, situations and issues contributing to the progressively deteriorating relations between the then East and West Pakistan.[3] The Awami League, led by Bangabandhu Sheikh Mujibur Rahman, won a landslide victory with 167 out of 169 seats and a majority in the national elections in 1970 and demanded autonomy for East Pakistan.[4] This victory also gave it the right to form a government, but President Yahya Khan cancelled the parliamentary session and the Chairman of the Pakistan People's Party, Zulfikar Ali Bhutto, refused to let the Awami League to take over the power.[5] This fueled the existing unrest. Bngabandhu gave a speech on March 7, 1971 when he urged the people to turn all their homes into a fort of fight and be prepared to fight for an independent country.[6] On March 26, the Pakistani forces arrested Bangabandhu.[7] On the same day, he signed an official declaration for the independence of Bangladesh ''in due fulfillment of the legitimate right of self-determination of the people of Bangladesh'' and urged Bangladeshis to ''defend the honour and integrity of Bangladesh''[8] The genocide began with the Pakistan army's crackdown on innocent civilians on the midnight of March 25, 1971.[9] Following the declaration of independence on March 26, 1971 there were spontaneous uprisings throughout Bangladesh.

The war between the Pakistan Army and the Bengali freedom fighters, the *Mukti Bahini* (Freedom Fighters), began during the training period of the *Mukti Bahini*.[10] The Pakistani Army needed an armed para military force made up of locals that would provide it the local knowledge and guide it through the unknown land.[11] Jamat-E-Islami (JEI) and some other pro-Pakistan political organizations

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3 Inam Ahmed and Shakhwat Liton, *Genocide They Wrote* (Daily Star Books, 1st ed, 2016) 4.

4 Abdullah K. Niazi, *The Betrayal of Pakistan* (Oxford University Press, 1st ed, 1998); see also, Salil Tripathi, *The Colonel Who Would Not Repent: the Bangladesh War and Its Unique Legacy* (Aleph Book Company, 1st ed, 2014) 62.

5 Gary J. Bass, *The Blood Telegram: India's Secret War in East Pakistan* (Penguin Random House India, 1st ed, 2013) 28.

6 See Niazi, above n 4, 66-71.

7 See Ahmed & Liton, above n 3, 43.

8 Bangladesh Proclamation of Independence (Apr. 17, 1971), 11 I.L.M. 119 (1972).

9 See Niazi, above n 4, 76-82; see also, above n 5, 50-53.

10 Government of Bangladesh, 'Interview, Maj. Gen (Retd.) Shafiullah' *Bangladesher Swadhinota Juddho: Dalilpatra*, (Hakkani Publishers, Vol. 9, 1984) 253.

11 See Ahmed & Liton, above n 3, 55.

substantially contributed in creating these para-military forces (auxiliary force) for combating the unarmed *Bangalee* civilians, in the name of protecting Pakistan. In addition to the Pakistan Armed forces, the local collaborator militias, such as, Razakar, Al-Badar, Al-Shams and Jamat-E-Islami (JEI) and other elements of pro-Pakistani political parties united together to wipe out Bangalee national liberation movement.[12] By November 1971, the liberation forces controlled more than 10 liberated areas along the Indian border.[13] India assumed an active role on December 3, 1971 with preemptive aerial strikes on Inidan air stations by the Pakistan Army.[14] The genocide carried out by Pakistan army and their collaborators in Bangladesh in 1971 ranks as one of the most brutal genocides of the twentieth century. The brutal war resulted in the killing of about three million innocent civilians and more than two hundred thousand victims of rape and sexual violence.[15] On December 16th, 1971, an "Instrument of Surrender" was signed by the defeated Pakistani General Niazi and by the *Mitro Bahiini*, the elite forces of the *Mukti Bahini* and the Indian army, led by Indian commander General Aurora. [16]

2.2. Context of Constitutional Mandate

The Constitution of the People's Republic of Bangladesh recognizes and thus upholds the spirit of liberation war stating the following words, "We, the people of Bangladesh, having proclaimed our independence on the 26th day of March, 1971 and through a historic struggle for national liberation], established the independent, sovereign People's Republic of Bangladesh." Even though nowhere in the Constitution the trial of the perpetrators of 1971 has been mandated, I argue that this insertion in the preamble itself signifies the intention of the drafter that the glory of liberation war should always be preserved which in other word can be construed as the obligation of trying the perpetrators. The underlying philosophy of conducting trial of the perpetrators essentially roots back to the Proclamation of Independence which states:

> Whereas in the conduct of a ruthless and savage war the Pakistani authorities committed and are still continuously committing numerous acts of genocide and unprecedented tortures, amongst others on the civilian and unarmed people of Bangladesh, AND

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12 Hossain Haqqani, *Pakistan Between Mosque and Military* (Carnegie Endowment for International Peace, 1st ed, 2005) 79; see also *The Chief Prosecutor v. Professor Ghulam Azam* [2011] ICT-BD 358.

13 William Van Schendel, *A History of Bangladesh* (Cambridge University Press, 1st ed, 2009) 167.

14 Rchard Sisson & Leo E. Rose, *War and Secession: Pakistan, India and the Creation of Bangladesh* (University of California Press, 1st ed, 1991) 182.

15 Susan Brownmiller, *Against Our Will: Men, Women and Rape* (Ballantine Books, reprinted edition, 1993) 81; see also, Suzannah Lintion, 'Completing the Circle: Accountability for the Crimes of the 1971 Bangladesh War of Liberation*'* (2010) 21(2) *Criminal Law Forum* 4.

16 James P. Sterba, 'In Dacca, the Killings Persist Amid Revelry', *The New York Times*, 17 December 1971, 1.

> Whereas the Pakistan Government by levying an unjust war and committing genocide and by other repressive measures made it impossible for the elected representatives of the people of Bangladesh to meet and frame a Constitution, and give to themselves a Government,

The reason why I am arguing that these positive insertions are indication of the intention that all along the perpetrators were meant to be tried is because 'crimes under international law' or 'international crimes' are such crimes because of their very nature, gravity, magnitude and horrendousness that those should be tried irrespective of the place of occurrence and the perpetrators who have committed it.[17] Every state and thus the international community as a whole bear the responsibility of bringing those perpetrators to justice.[18] The perpetrators are viewed as *hostis humani generis***,** enemies of humankind, and any state which obtains custody over them has a legitimate ground to prosecute in the interest of all states, even if the state itself has no direct connection with the actual crime.[19]

The Constitution further acknowledges the obligation of trying the offenders through protecting any post-facto legislation which might be drafted to try them. As a result of such constitutional protection the International Crimes Tribunal Act, 1973 Act was enacted (Article 47A of Bangladesh Constitution). A plain reading of Articles 47 and 47A together makes it clear that the safeguard against *post-facto* legislation is not applicable for law which is designed to prosecute and punish the international crimes.[20] Moreover, this justification for a different approach with respect to war crimes is reflected in Article 15(1) of the International Covenant on Civil and Political Rights to which Bangladesh is a signatory.

2.3 The International Crimes (Tribunals) Act and Rules of Procedures

Bangladesh felt it necessary for the post-independence reconciliation and nation building to deal with its 1971 traumatic experience.[21] To transit from its violent past to a peaceful future Bangladesh opted for a transitional justice process and enacted the Collaborators Ordinance, 1972 and the International Crimes (Tribunals) Act, 1973 (ICTA) to try the principle perpetrators and local collaborators. The ICTA was enacted in 1973 by the then Parliament of Bangladesh to provide for the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and other crimes under international law. The ICTA was one of the earliest systematic attempts to seek justice for genocide- the first major one since the Nuremberg Trials

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17 Mizanur Rahman & S.M. Masum Billah, *Prosecuting* 'War Crimes' in Domestic Level: the Case of Bangladesh' (2010) 1 The Northern University Journal of Law 3.

18 Ibid.

19 Ibid.

20 Rafiqul Islam, *National Trials of International Crimes in Bangladesh: Transitional Justice as Reflected in Judgments* (University Press Limited, 1st ed, 2019) 37.

21 Ibid, Preface.

and the Bangladeshi case precedes similar national attempts at prosecution in Cambodia and it also precedes the ad-hoc international tribunals established for Yugoslavia, Rwanda, Sierra Leone- not just by years, but by decades.[22]

During the drafting of the Act, the then government of Bangladesh consulted Professor Otto Triefftterer and Professor Hans-Heinrich Jescheck,[23] who were the authority in International Criminal Law in the 1970s[24] and they suggested to draft the law for a trial under domestic laws following the principles of Nuremberg Trial, Genocide Convention and Geneva Conventions[25]. In 1973, it was enacted to try the principal perpetrators of the War of Liberation of 1971, i.e., the members of Pakistan Army, since another piece of legislation, the Bangladesh Collaborators (Special Tribunal) Order, 1972 was promulgated to try the local perpetrators who either individually committed or aided, abetted, conspired and complicited with the Pakistan Army in killing, raping, torturing, abducting etc. of the innocent people.[26] Later local perpetrators responsible for killing, rape, arson and plunder were only made triable under the Collaborators Order and all others were awarded general amnesty by the then government.[27] However, the total process for the trial of the local perpetrators came to a halt when Bangabandhu was brutally murdered along with his family members in August 1975.

Till June 2010, the ICTA stood alone as the primary substantive legislation to prosecute international crimes in Bangladesh under a domestic court and a detailed Rules of Procedure was a demand of scholars from around the world. Linton highlights that,

> There will obviously have to be detailed rules of procedure and evidence that are developed, setting out also the interplay with other domestic laws in Bangladesh and requiring the support of the underlying system, including over matters such as detention, subpoenas, witness summons, seizure of evidence, exhumations, forensics, international warrants of arrest, etc.[28] There will obviously have to be extensive rules of procedure and evidence adopted in order to regulate the proceedings to ensure fair trial with due process.[29]

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22 Adam Jones, *Bangladesh Genocide* (Liberation War Museum, 2014) 14.

23 Suzannah Lintion, 'Completing the Circle: Accountability for the Crimes of the 1971 Bangladesh War of Liberation' (2010) 21(2) *Criminal Law Forum* 17; see also, Otto Triefftterer, *Bangladesh's Attempts to Achieve Post-war (or Transitional?) Justice in Accordance with International Legal Standards*, 259.

24 Ibid; see also, In Memoriam of Otto Triefftterer accessed 23 May 2019.

25 See Charney, above n 1.

26 Collaborators Tribunal Order 1972, accessed 23 May 2019.

27 Ibid.

28 See Linton, above n 23, 21.

29 See e.g., ECCC Internal Rules; Rules of Procedure and Evidence (Amended) (10 June 2009), Special Trib. For Lebanon, STL/BD/2009/01/Rev. 1 (2009); Rules of Procedure and Evidence (Amended on 27 May 2008), Special Ct. for Sierra Leone (2008); Transitional Code of Criminal Procedure, U.N.Doc. UNTAET/REG/2000/30 (E. Timor) [hereinafter East Timor Transitional Code of Criminal Procedure]. See also, above n 23, 100.

The ICTA, however, anticipates that rules of procedure and evidence will be adopted by the judges.[30] In furtherance of the power given in section 22 of the Act, the Rules of Procedure, 2010 (ROP) was framed by the Tribunal.[31] The ROP was amended on 25th October 2010 and 28th June 2011. I will be discussing more about the ROP in later part of the article and attempt to explain how the ROP cut all processes of accountability to facilitate a fair trial as required to uphold international standard.

3. Application of International Law in the International Crimes Tribunal of Bangladesh

The laws governing the trial of war criminals in Bangladesh have been introduced in the previous discussion. However, how these laws together shape the application of international law, both substantive and procedural, in the ICTBD will be analyzed with particular reference to international standard of fair trial. The first part of the discussion will be dedicated to the adaptation of procedural international norms in the ICTBD while the second part will focus on the substantive international norms mostly through judicial precedents.

3.1 Adaptation of International Law Norms in The International Crimes (Tribunals) Act

The ICTA and its supporting procedural law which is the ROP contain international norms regarding fair trial and due process. The ICTBD thus ensures that the ICTA and ROP, which were framed following the international norm are being imparted duly while trying a case. Through this discussion I will try to explain how the ICTA along with the ROP incorporate international norms and how ICTBD is maintaining the international standard of procedural fairness by applying those norms. Given how the ICTBD has had to deal with extensive amount of criticism internationally, before going to the elaboration regarding fair trial I will assess one of the major criticisms regarding the political motivation of the tribunal[32] and try to establish that the ICTA did not compromise with international standard of fairness in trial.

The International Crimes Tribunal, Bangladesh since the beginning of its journey is being accused of political motivation as most of the local collaborators who are being tried by it are members of Jammat-E-Islami (JEI). As discussed earlier, JEI is one of the political parties which facilitated the horrific violence during the liberation war of Bangladesh in 1971 and as the perpetrators remained powerful, the initiation

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30 See Liton, above n 23, 99.

31 *The Chief Prosecutor v Abdul Quader Molla*, [2012] ICT-BD, 12.

32 Paulo Casca and Susan Guarda, 'An assessment of Bangladesh's response in A Comparative Perspective; the Cases of Cambodia and Iraq, (Working Paper No 11, South Asia Democratic Forum, 2018).

of tribunal to prosecute them has been seen as political oppression against opposition. Moreover, Casaca explains the reasoning that why ICT is called politically motivated is unique. He narrates:

> The difference in arguments is the result of the difference between situations. In the case of the Holocaust, its perpetrators were denied a return to power, whereas in Bangladesh, not only did the perpetrators return to power, but they also founded a vast economic, social and financial empire, including banks, universities, companies and hospitals.[33]

The ICTA and the Rules of Procedure (ROP) were framed in a way which is explicitly compatible with the fair trial concept that has been enshrined in the ICCPR. Moreover, the ICTBD guarantees the required procedural protections of the defendant's right to fair trial both in pre-trial phase and during trial are being guaranteed while imparting trial process following the ICTA and the ROP.[34] Let us have a glance to the comparison below:

(i) Fair and impartial Tribunal: [section 6 (2A) compatible with Article 14(1) of ICCPR];

(ii) Public trial: [section 10(4)], compatible with Article 14(1) ICCPR

(iii) Accused to know of the charges against him and the evidence against him: [Rule 9(3) and Rule 18(4) of the ROP and section 9(3) and section 16(2) compatible with Article 14(3)(a) ICCPR];

(iv) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law: [Rule 43(2) of ROP compatible with Article 14(2) ICCPR];

(v) Adequate time of getting preparation of defense: [section 9(3) and Rule 38(2) of the ROP compatible with Article 14(3)(b) ICCPR];

(vi) Services of a defense counsel and interpreter: [section 10(3) and section 17(2) compatible with Article 14(3)(d) and 14(3)(f) ICCPR];

(vii) Full opportunity to present his defense, including the right to call witnesses and produce evidence before the Tribunal: [section 10(1)(f) and section 17(3) compatible with Article 14(3)(e) ICCPR];

(viii) To be tried without undue delay: [Section 11(3) compatible with Article 14(3)(c) ICCPR];

(ix) Not to be compelled to testify against himself or to confess guilt: [Rule 43(7) ROP which compatible with Article 14(3)(g) ICCPR];

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[33] Ibid.

[34] See *The Chief Prosecutor v Abdul Quader Molla*, above n 32, 15.

(x) Right of appeal against final verdict: [section 21(1) compatible with Article 14(5) ICCPR].

In addition to ensuring the above recognized rights to accused, the ICTA also envisages the right of appeal of a person convicted by the Tribunal.[35] Moreover, the Tribunal has adopted the practice of keeping a doctor present when the accused is interrogated, allowing the defense counsel to consult the accused, maintaining privileged communication and allowing the accused to be represented by capable and courageous counsel.[36] Therefore, it is evident from comparison of the procedural account mentioned above with the ICCPR, that the Act of 1973 does indeed adhere to most of the rights of the accused enshrined under Article 14 of the ICCPR. The above rights of defense and procedure given in the ICTA and the ROP are the manifestations of the due process of law and fair trial which make the legislation of 1973 more compassionate, jurisprudentially significance and legally valid.[37]

3.2 Adaptation of International Law in the Judgements of International Crimes (Tribunals) of Bangladesh

In the matter of the prosecution in ICTBD, the ICTA has to be treated as the primary source of law. However, by referencing the enumerated international crimes, the body of laws on which these crimes have been developed in customary and treaty law is probably also to be treated as a source of law.[38]I will be focusing on four recognized principles of international criminal law and attempt to explain how the ICTBD is applying these principles while trying a case.

3.2.1 The Superior Responsibility Principle

The principle of superior responsibility is one of the principles which was adopted in section 4(2) of the ICTA from the Nuremberg Charter and the judgments of Nuremberg Trials.[39] This principle was further developed through the judgments of ICTY[40] and ICTR[41]. The first challenge for ICTBD was the *Professor Ghulam Azam case*[42]. In that case and in other cases where Prosecution pleaded superior responsibility

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35 Rahman and Billah, above n 18, 19.

36 Quader Molla Judgment, above n 32, 16; see also, Geoffrey Robertson, *Report on the International Crimes Tribunal Bangladesh* (International Forum for Democracy and Human Rights, 2015) 17.

37 Rahman & Billah, above n 18, 6.

38 See above n 23, 31.

39 *The Nuremberg Charter (Charter of the International Military Tribunal, 1945),* Article 7.

40 *The Statute of the International Criminal Tribunal for the Former Yugoslavia, 2009*. Article 7(3).

41 *The Statute of the International Criminal Tribunal for Rwanda, 1994.* Article 6 (3).

42 *The Chief Prosecutor v Professor Ghulam Azam,* ICTBD Case No. 06 of 2011, date of delivery of Judgment 15 July 2013. Professor Ghulam Azam was the head of Jamat-e-Islami in 1971 and he conspired, planned, aided and abetted and complicated as a civil superior with the Pakistan Occupation Army in 1971.

of the accused, the ICTBD faced challenge in establishing the civil superior responsibility of the concerned accused. It was relatively easier under ICL to establish the superior responsibility of a military officer since in a military scenario the Prosecution can establish superior-subordinate relationship without much effort because factors[43] to be considered in assessing whether a superior exercised effective control or not are clearly visible, whereas the same cannot be true when the superior-subordinate relationship is to be established between a civil superior and military subordinates. In the later scenario, the burden to establish such relationship is very high on the Prosecution. To meet this end the ICTBD heavily depended upon the judgments of Nuremberg Tribunals, ICTY, SCSL and ICTR. In determining the culpability of the accused as a superior, the Tribunal put forward the following questions to itself: (I) whether the accused as a civilian had superior responsibility during the War of Liberation of Bangladesh, and (II) whether the accused had link and complicity with the Executives of the Pakistani Government and thereby exercising superior power and position substantially contributed and facilitated the offences committed during Liberation War.[44] To find the necessary 'link', the Tribunal established the status of the accused persons first and then established whether they had the knowledge about what is happening in Bangladesh due to their actions in 1971.[45] Then they established the culpability through a grave fault of the accused. For example, in the *Azam* case, the Tribunal took the help from *Delalic et al.* (ICTY)[46] and *General Yamashita*[47] (Tokyo Tribunal) to show that superior criminal responsibility can also arise when the superior fails to take proper steps against his subordinates for committing brutal crimes and violating the IHL principles. The judges of the ICTBD cited *Kayeshima and Ruzindana*[48] (ICTR) to establish that the superior responsibility extends up to the civilian political leaders, as Heads of State or Party or Government Officials or other civilians holding positions of authority. The Tribunal to determine superior – subordinate relationship and the effective control of the civil political superior looked for four elements, i.e., (1) crime has been perpetrated (2) crime has been perpetrated by someone other than the accused (3) the accused had material ability or influence or authority over the activities of the perpetrators (4) the accused failed to prevent the perpetrators in committing the offence.[49] In *Mujahid*'s case, the Tribunal followed the trial judgment of ICTY, i.e., *Blagojevic and Jokic*[50], and decided that a de facto civilian

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43 For these factors, please see: ICTY, *The Prosecutor v Radovan Karadžić,* 2016, 580-583.

44 *The Chief Prosecutor v Professor Ghulam Azam*, [2011] ICT-BD, 31.

45 Ibid, 197.

46 ICTY, *Prosecutor v Delalić et al. ("Čelebići")*, "Appeal Judgment", IT-96-21-A, 20 February 2001.

47 The United Nations War Crimes Commission, Law Reports of Trials War Criminal 1974-48 (Law Reports), vol. IV at 3.

48 *The Prosecutor v Clément Kayishema and Obed Ruzindana* (Trial Judgement), (ICTR-95-1-T).

49 *Chief Prosecutor v Ali Ahsan Muhammad Mujahid* ICT-BD[ICT-2] Case No. 04 of 2012 at 178.

50 Trial Chamber: ICTY, January 17, 2005, para 791.

political superior can also wield effective control over his subordinates even without any formal appointment letter and thus he cannot escape criminal responsibility.

3.2.2 'Rape' as Genocide

Totten and Bartrop has defined 'genocidal rape' as an action of a group who has carried out acts of mass rape during wartime against their perceived enemy as a part of their genocidal campaign.[51] Rape during wartime was used with prior planning with a pre-meditated two-fold objective, i.e., to instill terror in the civilian population with the intent to forcibly displace them from their property and to degrade the chance of coming back and rebuilding by inflicting shame and humiliation on the targeted population.[52] Later, in *Akayesu*[53] and *Nyiramsuhuko's*[54] case it was argued by the Prosecution that rape can be used for killing a genocidal group or to cause serious bodily or mental harm to members of the group or deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part and hence genocide can be committed through rape (however, in none of these case the accused persons were not convicted for genocidal rape, both of them were convicted for rape as crimes against humanity[55]). After the principal being established in those cases, the first conviction and sentencing took place in the ICTBD in three cases, i.e., *Idris Ali et al*[56], *Moslem Pradhan et al*[57] and *Md. Reaz Uddin Fakir*[58]. In all the three cases, identifying genocidal group was not challenging since all the female victims were from Hindu religious group who were only targeted

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51 Samuel Totten, Paul Robert Bartrop and Steven L. Jacobs, *Dictionary of Genocide: Volume 1*, 1st ed. (Greenwood: Connectocut, 2008) at 159-160.

52 Leaning Jennifer; Bartels Susan and Mowafi, Hani (2009). "Sexual Violence during War and Forced Migration". In Susan Forbes Martin, John Tirman (eds.). *Women, Migration, and Conflict: Breaking a Deadly Cycle.* Springer. pp. 173–199.

53 *The Prosecutor v Jean Paul Akayesu*, 2001 [ICTR].

54 *The Prosecutor v Pauline Nyiramsuhuko, Arsene Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi and Elie Ndayambaje*, 2015 [ICTR].

55 *The Prosecutor v Jean-Paul Akayesu* (International Crimes Database, 2019) and "Pauline Nyiramasuhuko" (Trial International 2019).

56 ICT-BD [ICT-1] Case No.06 OF 2015, Judgment delivered on 5 December 2016. Charge No. 2 constituted the offence of 'genocidal rape'. Idris Ali was convicted by a majority decision of 2:1, however, he was sentenced to death unanimously. Suhrawardy J., in his minority judgment convicted him for committing crimes against humanity by rape since, according to him, the Prosecution failed to establish genocidal intent of the accused person.

57 ICT-BD [ICT-1] Case No.01 OF 2016, Judgment delivered on 19 April 2017. This was again a split judgment. Suhrawardy J., in his minority judgment again convicted them for committing crimes against humanity by rape since, according to him, the Prosecution failed to establish genocidal intent of the accused person.

58 ICT-BD [ICT-1] Case No.04 OF 2016, Judgment delivered on 10 May 2018. This would be first case where three judges unanimously convicted the accused for committing genocidal rape. Charge 3 involved both genocide and genocidal rape.

because of their religion[59] and the Pakistan Army during the Liberation War had a policy to annihilate Hindu Populace from Bangladesh.[60] This was not the only case where the Prosecution pleaded genocidal rape, rather these were the cases where they were successful in proving the international requirement of the genocidal group, genocidal intent (*dolus specialis*) and genocidal act all coinciding in the relevant charges. In most of the cases, the Prosecution could not go forward with genocidal rape even though rape was committed *en masse* on Muslim women[61], since there were very few cases where genocide on national groups[62] were successful. ICTA has also included 'political group' (since they were followers of *Awami League*[63]) in its definition, however, to frame charges for committing genocide on political groups the Prosecution had very few 'successful' precedents before them. *3.2.3 Joint Criminal Enterprise (JCE)*

Among the three kinds of liabilities under the International Criminal Law, JCE[64] has been the most prominent one in ICTBD since most of the accused were convicted for committing the crimes jointly – either with the Pakistan Occupation Army or with other fellow members of the auxiliary forces. The idea of joint liability of an offence was not foreign in Bangladesh.[65]. The application of JCE in the context of international criminal law, more specifically in the scenario of 1971 Liberation War was challenging. First of all, the threshold of proving the second and third element, i.e., the existence of a common

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[59] See above n 50, para 309; see also, The requirement of a genocidal group is stated in Genocide Convention of 1948 (A/RES/3/260). Also 'The victim of the crime of genocide is therefore the group itself and not the individual alone, the individual is just an element of the group' in ICTR, *The Prosecutor v Musema*, Case No. ICTR- 96-13-A, Trial Judgment (27 January 2000), para. 165 and Furthermore: "the victim is singled out not by reason of his individual identity, but rather on account of his being a member of a national, ethnical, racial or religious group" in David Nersessian, Genocide and Political Groups (Oxford: Oxford University Press, 2010) at 45.

[60] See above n 57, 309.

[61] *The Chief Prosecutor v Muhammad Kamaruzzaman*, ICT-BD (ICT-2) Case No. 03 of 2012, Date of delivery of Judgment: 09 May 2013. See Charge 3 Sohagpur Widow Village and the discussion at 98 onwards.

[62] For the definition of 'national group' of genocide see: *Akayeshu* Trial Judgment (2 September 1998) at Para 510. Also see: ICJ Nottebohm Case (*Liechtenstein v. Guatemala*), Second Phase, Judgment (6 April 1955), ICJ Reports 1955, p. 22.

[63] The followers of Awami League were specially targeted due to their political ideology. See: Suzannah Linton, Completing The Circle: Accountability For The Crimes Of The 1971 Bangladesh War Of Liberation, Criminal Law Forum (2010) 21 at 53. Linton cited International Commission Of Jurists, The Events In Pakistan: A Legal Study By The Secretariat Of The International Commission Of Jurists 9 (1972) at 56.

[64] JCE is placed under section 4(1) of ICTA as: "4. (1) When any crime as specified in section 3 is committed by several persons, each of such person is liable for that crime in the same manner as if it were done by him alone."

[65] Both the sections have three elements, i.e., plurality of persons involved in the commission of the crime, a common plan or agreement which include an element of criminality and the participation of the accused in the common plan or agreement.

plan or agreement between the principal perpetrator and the accused and the accused person's participation in this joint plan, is quite high. Secondly, it is challenging to establish these principles in three categories of JCE, the basic, systematic and extended forms of JCE. Both the tribunals have tried to establish, as per the celebrated decisions of other international tribunals, the subjective and objective elements of JCE. To mitigate the first challenge the judges identified the facts which showed that the accused and other co-perpetrators were all mutually aware and mutually accepted that implementing their common plan may result in the realization of the objective elements of the crime[66] and particularly the accused was aware that he provided an essential contribution to the implementation of the common plan[67]. Regarding degree of participation of the accused the tribunals in line with the international precedents cited in *Krajisnik* Appeals Chamber[68] found that a contribution of the accused to the JCE need not, as a matter of law, be substantial but the accused's contribution to the crimes for which he is found responsible should at least be significant.[69] The judges were careful about adopting the Extended Form of JCE since it did not develop till *Tadic*[70] and for that reason till today there is no judgment on extended form. *Mir Quashem* is the only case where the accused was convicted and sentenced under systematic form of JCE since he was running a torture cell in Chittagong.[71] In this case citing *Belsen Concentration Camp case*[72] and *Dachau Concentration Camp Case*[73], the Prosecution submitted that common plan need not be proved and it is suffice to show the general system of cruelties and mistreatment of detainees and the system was practiced within the knowledge of the accused. Like the

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66 For details see: ICC, *Prosecutor v Lubanga Dyilo*, "Decision on the confirmation of charges", (ICC-01/04-01/06-803, 2008) 361, 362; ICC, *Prosecutor. Jean-Pierre Bemba Gombo*, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, 15 June 2009, para. 351; ICC, *Prosecutor v Banda, A.N.*, "Corrigendum of the "Decision on the Confirmation of Charges"", (ICC-02/05-03/09, 2011) 150; ICC, *Prosecutor v Abu Garda*, "Decision on the Confirmation of Charges", (ICC-02/05-02/09, 2010)161.

67 For details see: ICTY, *Prosecutor v Krajišnik*, "Trial Judgment", (IT-00-39-T, 2006) 883; ICTY, *Prosecutor v Krajišnik*, "Judgment", (IT-00-39-A, 2009) 675-676; ICTY, *Prosecutor v Milutinović et al.*, "Judgement", (IT-05-87-T, 2009) 98.

68 ICTY, *Prosecutor v. Krajišnik*, (IT-00-39-A, 2009) 675-676.

69 See ICTBD, *Chief Prosecutor v A. T. M. Azhar*, (ICT-BD (ICT-1) Case No.05 of 2013) 43.

70 ICTY, *Prosecutor v Duško Tadić*, (Case No. IT-94-1-A, Appeal Judgment, 1999)197.

71 ICT-BD (ICT-1) Case No. 03 of 2013, 02 November 2014. In this case all the charges were brought about the crimes committed in Dalim Hotel, a Hotel turned into a torture cell. About the status and evidence of Dalim Hotel being turned into a torture cell, see para 63 and 712.

72 Trial of Josef Kramer and 44 others (The Belsen Trial), Case no. 10, British Military Court, Luneberg, 17 September-17 November 1945, in United Nations War Crimes Commission, Law reports of trials of War Criminals, Vol. II (1947) at 120-127.

73 Trial of Martin Fottfried Weiss and Thirty-Nine others (The Dachau Concentration Camp Trial), Case No. 60, at the General Military Government Court of the United States Zone, Dachau, Germany, 15 November-13 December, 1945, in United Nations War Crimes Commission, Law reports of trials of War Criminals, Vol. XI (1947) at 14.

principles discussed above, in ICTBD under ICTA the principle of JCE and its interpretations were entirely adopted from the decisions of different international courts.

3.2.4 Genocidal Intent

It is well known to international criminal law practitioners and scholars alike that genocidal intent is the main challenge to establish for prosecution. To establish genocide, three elements, i.e. the genocidal act is to be committed upon a protected group (genocidal group: national, religious, ethnic and linguistic) with the genocidal intent, have to be proved beyond reasonable doubt. In 1971, Hindu religious people were the common target.[74] So when there was any *en masse* killing in any Hindu populated village by the Pakistan Army and their local perpetrators, it was easy for the Prosecution to identify the genocidal group, however, proving genocidal intent required higher threshold. In *Idris*, the Tribunal summarized that,

> In respect of the matter of 'special intent', an element to constitute the offence of 'genocide', can be well inferred from the facts and circumstances divulged from the evidence tendered ... Hindu religious group is a 'protected group' as mentioned in the Genocide Convention 1948. Violating the prohibition contained therein the perpetrators, the Pakistani occupation army being assisted, encouraged, abetted, and facilitated by the accused persons the offence of 'genocide' was committed.[75]

The Tribunal has also decided that intent is a mental factor, and thus, it may reasonably be inferred from a number of presumptions of facts together with the context.[76] In this regard the judges considered the scale and nature of atrocities committed and the fact of deliberately and systematically targeting the civilians on account of their membership of the religious group which was attacked.[77] The latter observation of the Tribunal of Bangladesh was an echo of the observation given by the ICTR Appeal Chamber in *Rukundu*[78]. Bangladesh Tribunal has also followed the decision of *Bradjnin*[79] of ICTR to settle that an individual who complicited or aided and abetted with the principal perpetrators in committing genocide upon a protected group, can be tried for complicity to commit genocide even when the principal perpetrator is not even tried.[80] So here as well it can be observed that to establish genocidal intent ICTBD followed the internationally recognized decisions.

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74 Ibid, 38; see also, Sydney H. Schanberg, 'Hindus Are Targets Of Army Terror In An East Pakistani Town', New York Times, 1971.

75 See above n 57, para 42.

76 Ibid, para 206.

77 Ibid.

78 ICTR, *Prosecutor v Emmanuel Rukundo*, (Case No. ICTR-2001-70-A, Judgement (AC), 20 October 2010) 235-238.

79 ICTR, *Prosecutor v Brdjanin*, (Case No. IT-99-36-T, 2004)728.

80 Ibid, para 47.

4. Analyzing the Data: In Search Of Pattern and Understanding the Interlink

The data that are discussed earlier need to be analyzed from different perspectives. From the perspective of international law, Bangladesh, being both a dualist and a monist state,[81] could not apply the precedents of international tribunals if there was no Act passed by the Parliament.[82] Shamsuddin J. in *Quader Mollah* judgment clearly stated that it is a musical chair situation for international law in Bangladesh and international law will only sit if a chair is unoccupied by the national law.[83] The ICTA has given that avenue to apply international precedents to the Judges. Both the tribunals of ICTBD applied the precedents to interpret 'the elements of international crimes'[84] since they were not defined and developed in the national law nor it was developed internationally till 1973. The adaptation of these precedents from international tribunals provides necessary 'interlink' between two systems of law and makes it possible for the judges of a dualist state to apply it in their judgments. Application of these precedents to interpret the elements have also answered the concern of the pundits of international criminal law on whether the ICTBD will be successful upholding fair trial by applying the norms of international law or not. This concern is not only for the ICTBD, it is for all the domestic tribunals who are applying international law. If I analyze these judgments of ICTBD then the patterns reveal it followed the precedents established through different international tribunals. This pattern shows that the ICTBD has treated these precedents as customary international law and used these norms for interpreting the ICTA 1973, which was less detailed compared to ICTY, ICTR or ICC statute. Application of these precedents has both interlinked two streams of law, i.e., national and international in a domestic tribunal of a dualist state and placed ICTBD in line with the international tribunals.

5. Nexus Between Domestic Court and International Law

The role of domestic courts in applying international criminal law and thus trying international crimes is a much-debated issue. The group of scholars who argue in favour of international prosecution of international crimes believe that domestic court cannot be trusted with due and effective prosecution of grave international crimes.[85]

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81 Harun ar Rashid, "Relationship between municipal and international laws", *The Daily Star*, 2004

82 Previously, in *Hussain Md. Ershad* (21 BLD (AD) 69, at 70) and *Sheikh Hasina Wazed*'s case (60 DLR (AD) 2008 (90) at 104) the Supreme Court of Bangladesh decided that the domestic courts would not apply international treaties if they are ratified but not transformed into domestic law. This was also confirmed in Appellate Division judgment of *Quader Mollah* (Criminal Appeal Nos. 24 – 25 of 2013 at 559 per Shamsuddin J.).

83 Ibid.

84 The definition and elements of crimes, like – murder, rape etc. are defined in the Penal Code of Bangladesh. Hence the crimes defined in the Penal Code were not redefined by international precedents.

85 See Charney, above n 1, 120.

The International Criminal Court (ICC), which is a relatively a newer initiative than the Statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR, respectively),[86] gives preference to domestic procedures if those are conducted bona fide. If a bona fide initiative is taken and disposed of by a State which is willing and able to genuinely prosecute then the rule of complementarity will apply and the case will be inadmissible before the ICC.[87]

As a matter of fact, states find it more expedient to resolve a case domestically than to going to an international body for adjudication.[88] States, in most of the cases, wish to preserve the control over prosecutions rather than letting the crimes committed in its own land be tried by an international tribunal.[89] The reasons may be twofold, firstly, a state might feel that an alien body will not be able to do justice to the phycological trauma that it's people went through, and secondly, if a state fails to prosecute international crimes through domestic proceedings then that shows the inadequacy and unwillingness of the state to try a crime which is so heinous and grave in nature.[90] Moreover, the insertion of the issue of complementarity in Article 17 of the ICC Statute paved the way for states to reserve the jurisdiction over the cases which fall under their jurisdiction. If the any state fails to prove bona fide prosecution, willingness and ability to try a case then it risks the possibility of ICC taking over the prosecution. In such situations the ICC might determine that prior domestic proceedings had not met the standards set out in Article 17.

The discussion above essentially clarifies the doubts regarding the application of international criminal law through a domestic court. However, in pursuit of understanding the relation between ICTBD and international criminal law, I would further explore the scope and expansion of the tribunal. The Act provided for establishment of a tribunal with jurisdiction over international crimes.[91] There was no scope for exercise of jurisdiction over crimes in domestic law, i.e. the regular criminal code.[92] The Tribunal, a domestic body, thus was established to apply

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86 Ibid.

87 *Rome Statute of the International Criminal Court*, Article 17.

88 Examples: ECCC, Argentina, IHT (Iraqi High Tribunal) Similar cases have gone forward in South Africa. The Spanish court's indictment of Augusto Pinochet led not only to proceedings in the domestic courts of Spain, but also to extradition proceedings in England, as well as indictments in Belgium, France, and Switzerland.

89 Ibid; see also, Libyan initiative to prosecute the persons accused of the Lockerbie bombing. At first it refused to cooperate then it sought to prosecute the accused domestically, but such prosecution did not attract international credibility. Ultimately, Libya was forced to hand over the accused for foreign prosecution.

90 *Rome Statute of the International Criminal Court,* Article 17.

91 International Crimes (Tribunals) Act, 1973 Section 3.

92 See Linton, above n 24, 16.

domestic law which was drafted meticulously with the help of best scholars of that time to prosecute international crimes.[93]

As I discussed earlier, the Tribunal did not restrain itself within the boundary of domestic law rather it has always been referring international criminal law norms and precedents. This culture of prosecuting international crimes in domestic court, goes hand in hand with ICC's jurisdiction and reflects the success of the International Criminal Court in eliminating impunity for international crimes.[94]

6. Conclusion

Being one of the pioneers in prosecuting international crimes in domestic courts, ICTBD has come a long way. It has already been able to prove that the domestic court is always the place where accountability should start. Bangladesh has waited far too long to bring the perpetrators of the 1971 crimes to justice. The ICC statute was basically motivated from Bangladesh's domestic endeavor of enacting an international crime legislation, the ICTA. Through this Bangladesh has created an excellent example of domestic legislation and tribunal which contain an adaptation of international criminal law norms into domestic arena. Apart from contributing in the development of international criminal jurisprudence the ICTA is playing an important role in ending the culture of impunity. It is a running testament of the glory of the liberation war of Bangladesh and the sacrifice of the innocent victims and heroic freedom fighters. However, when the prosecution initiated it started with the accountability to uphold the international standard of fair trial and due process. The judges of the ICTBD by this procedure of trying the war criminals are applying international norms through domestic court. This attempt, in the process, is helping the growth of a mutual status of international law and domestic court. This shows how the domestic courts are becoming new hubs for the application of international law and how this can significantly contribute towards the development of international law. The domestic courts when willing and able to prosecute international crimes maintaining the international standards through incorporating and adapting international materials and norms the international community must appreciate it. In the pursuit of ending the culture of impunity, the ICTBD is playing a positive role which should be appreciated and welcomed. To quote, Jonathon I. Charney,

> A single international court can accomplish little, especially if its fundamental purpose is to promote international mores that discourage impunity. Success will be realized when the aversion to impunity is internalized by the domestic legal systems of all states.[95]

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[93] See Linton, above n 24, 7.

[94] *The Rome Statute of the International Criminal Court* 1998, Preamble and Article 1.

[95] See Charney, above n 1, 124.

Sustainability of the 2°C Temperature Target

Sharowat Shamin*

> *"Climate change is one of the greatest challenges of our time and its adverse impacts undermine the ability of all countries to achieve sustainable development. Increases in global temperature, sea level rise, ocean acidification and other climate change impacts are seriously affecting coastal areas and low-lying coastal countries, including many least developed countries and Small Island developing States. The survival of many societies, and of the biological support systems of the planet, is at risk"*
>
> — Para 14, Transforming Our World: the 2030 Agenda for Sustainable Development[1]

1. Introduction

1.1 Background and definition of 2°C temperature target

In December 2009, State parties all over the world and high officio stakeholders met at Copenhagen to negotiate post Kyoto (Kyoto Protocol 1997) framework at the 15th Session of the Conference of Parties to the United Nations Framework Convention on Climate Change (hereinafter COP). Unfortunate though, the Copenhagen Accord (CA) is termed as one of the 'successful failures' of multilateral diplomacy[2] except for 'top-down' approach to limit temperature increase within 2°C above pre-industrial level. The European Union (EU) advocated for this 2°C temperature target long before the Copenhagen Accord. The strategy of the EU was hypothetically to contemplate 2°C target as the ultimate objective of global climate response strategies, to set corresponding greenhouse gas (GHG) concentration to materialize the target, then to set global emission pathways, and to set emission reduction/limitation targets in 2020 and after to each country (including the United States and all the emerging economies like China and India) in accordance with the principle of common but differentiated responsibilities and respective capabilities (CDR), and make them legally binding.[3] COP 15 was the turning point because the paradigm shifted from top down (often called as target and timetable) to bottom up (pledge and review) approach.'[4]

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1 UN SDG Knowledge Platform, *Transforming Our World: The 2030 Agenda for Sustainable Development* <https://sustainabledevelopment.un.org/post2015/transformingourworld> accessed 14 August 2019.

2 Mepielan Centre, *The Copenhagen Accord: The Failure of Multilateral Diplomacy?* (16 July 2010) <http://www.mepielan-ebulletin.gr/default.aspx?pid=18&CategoryId=2&ArticleId=5&Article=The-Copenhagen-Accord:-The-Failure-of-Multilateral-Diplomacy?> accessed 2 September 2019.

3 Mitsutsune Yamaguchi, *A critical review of "2 degree target" and a desirable and feasible post-Kyoto international framework* <http://www.gispri.or.jp/english/symposiums/images110706/Prof_Yamaguchi.pdf> accessed 3 September 2019.

4 Ibid.

In 2013, the 2°C target has again been upheld by the High Level Panel of Eminent Persons (HLP) in setting a total of 12 goals for post-2015 development agenda.[5] The 2030 Agenda for Sustainable Development calls on countries to begin efforts to achieve the 17 Sustainable Development Goals (SDGs) over the next 15 years by unanimously adopting the 2030 Agenda for Sustainable Development by 193 Heads of State and other top leaders at a summit at UN Headquarters in New York in September 2015.[6] Goal 13 aims to take urgent action to combat climate change without mentioning any fixed temperature cut-down target though it recognizes the UNFCCC to be the primary international, intergovernmental forum for negotiating the global response to climate change.[7] Moreover, in the 21st session of the Conference of Parties to the United Nations Framework Convention on Climate Change (UNFCCC) (hereinafter COP 21) in Paris, the State parties adopted the second additional protocol to the UNFCCC, i.e. the most awaited Paris Agreement (PA), reiterating its 'objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and … holding the increase in the global average temperature to *well below 2°C* above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.'[8]

Framing a response to climate change represents a critical policy challenge in the 21st century. In order to initiate policies regarding mitigation or adaptation; cost,

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5 United Nations Secretary General, The Report of the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda: *A New Global Partnership: Eradicate Poverty and Transform Economies through Sustainable Development, at* Goal 12c <http://www.un.org/sg/management/pdf/HLP_ P2015_Report.pdf> accessed 5 September 2019.

6 UN Sustainable Development Goals, *17 Goals to Transform our World* <http://www.un.org/sustainabledevelopment/blog/2015/12/sustainable-development-goals-kick-off-with-start-of-new-year/> accessed 30 October 2018.

7 SDG 13: Take urgent action to combat climate change and its impacts*

13.1 Strengthen resilience and adaptive capacity to climate-related hazards and natural disasters in all countries

13.2 Integrate climate change measures into national policies, strategies and planning

13.3 Improve education, awareness-raising and human and institutional capacity on climate change mitigation, adaptation, impact reduction and early warning

13.a Implement the commitment undertaken by developed-country parties to the United Nations Framework Convention on Climate Change to a goal of mobilizing jointly $100 billion annually by 2020 from all sources to address the needs of developing countries in the context of meaningful mitigation actions and transparency on implementation and fully operationalize the Green Climate Fund through its capitalization as soon as possible

13.b Promote mechanisms for raising capacity for effective climate change-related planning and management in least developed countries and small island developing States, including focusing on women, youth and local and marginalized communities

*Acknowledging that the United Nations Framework Convention on Climate Change is the primary international, intergovernmental forum for negotiating the global response to climate change.

8 Article 2 of the Paris Agreement 2015.

efficiency and setting priorities are very crucial issues to decide. Stressing on the three pillars[9] of sustainable development, i.e., economic development, social development and environmental protection, the post-2015 development agenda[10] for 2°C temperature target albeit generates a challenge on the developing economies, Least Developed Countries (LDCs) and Small Island Developing States (SIDS). The Sustainable Development Goals (SDGs) should be "action-oriented, concise and easy to communicate, limited in number, global in nature and universally applicable to all countries while taking into account different national realities, capacities and levels of development and respecting national policies and priorities".[11] It should also "be consistent with international law"[12], incorporate all dimensions of sustainable development in a balanced and coordinated manner and be implemented "with the active involvement of all relevant stakeholders"[13].

The 2°C climate target has now become the focal point of emphasis to the present climate negotiations and sustainable development policies. The world community finally reached to the consensus that overlooking the environmental and climate change concern could never accomplish sustainable development targets. The sustainable development goals have been placing equal emphasis towards combating climate change and decreasing the world's surface temperature, which was absolutely overlooked in its preceding phase, i.e., the Millennium Development Goals (MDGs).

The primary objective of this paper is to find out the sustainability of the 2°C temperature target in current sustainable development regime. In doing so, it first draws a brief analysis on the meaning of 2°C target. The paper proceeds further linking applicable climate laws and their longstanding conflicts with State sovereignty issue. The paper finally analyzes the existing legal challenges in reaching

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9 UNCSD, *Three Pillars of Sustainable Development* <http://www.uncsd2012.org/index.php?page=view&type=12&nr=228&menu=63> accessed 18 October 2018.

10 The process of arriving at the post 2015 development agenda was Member State-led with broad participation from Major Groups and other civil society stakeholders. There has been numerous inputs to the agenda, notably a set of Sustainable Development Goals (SDGs) proposed by an open working group of the General Assembly, the report of an intergovernmental committee of experts on sustainable development financing, GA dialogues on technology facilitation and many others. The General Assembly called upon the Secretary-General to synthesize the full range of inputs and to present a synthesis report before the end of 2014 as a contribution to the intergovernmental negotiations in the lead up to the Summit. The United Nations has played a facilitating role in the global conversation on the post 2015 development agenda and supported broad consultations. It also has the responsibility of supporting Member States by providing evidence-based inputs, analytical thinking and field experience." For more information UN SDG Knowledge Platform, *Post-2015 Development Agenda* <https://sustainabledevelopment.un.org/ post2015> accessed 3 August 2019.

11 UN SDG Knowledge Platform, Future We Want – Outcome Document <https://sustainable development.un.org/rio20/ futurewewant> accessed 28 August 2019.

12 Ibid.

13 Ibid.

the target in current development agendas and therefore concludes on its findings regarding the sustainability of the 2°C target.

The following sections of this paper puts an attempt to find, first, the link between the 2°C target and the ultimate objective of the UNFCCC and second, outstanding challenges behind the target and its sustainability in meeting the desired goal(s).

2 The 2°C Target: An Analysis

2.1 Understanding global warming of 1.5°C

IPCC recently published a Special Report (hereinafter as SR15) on the impacts of global warming of 1.5°C above pre-industrial levels. Paris Agreement's central aim is to keep the temperature increase *well below* 2°C above the pre-industrial level. PA's target year is the end of 21st century. Also, PA efforts to constrain the temperature increase even further to 1.5°C. This 1.5°C target is undoubtedly ambitious. Meeting this requires extensive policy measures on part of the both rich and poor states. How far the current development plans, policies and goals are equipped to address this temperature target is still a difficult to answer question. However SR15 reiterates the findings of its preceding five Assessment Reports,[14] which confirmed human anthropogenic interference into the climate system to be primary reason of global warming and climate change. SR15 with high confidence states that "human activities are estimated to have caused approximately 1.0°C of global warming above pre-industrial levels, with a likely range of 0.8°C to 1.2°C. Global warming is likely to reach 1.5°C between 2030 and 2052 if it continues to increase at the current rate."[15] SR15 suggests that Climate-related risks for natural and human systems are higher for global warming of 1.5°C than at present, but lower than at 2°C.[16] It is quite well understood that the more we aim to limit the temperature, the better we might acquire in meeting the 2°C. Nevertheless, the burden is on all the stakeholders which imposes policy and implementation challenges. These have been discussed in the later parts of this paper.

2.1.1 Climate Change Impacts

Inter-Governmental Panel on Climate Change (IPCC) in its Fifth Assessment Report (AR5) affirms with high confidence that total anthropogenic GHG emissions have continued to increase over 1970 to 2010 with larger absolute decadal increases

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14 AR1 to AR5.

15 IPCC, *Global Warming of 1.5°C* (2018) 4. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty.

16 Ibid, 5.

toward the end of this period. Irrespective of the global trend of increasing number of climate change mitigation policies, AR5 confirms following impacts of climate change with medium to very high confidence, which has been quoted below:[17]

- "In recent decades, changes in climate have caused impacts on natural and human systems on all continents and across the oceans.
- In many regions, changing precipitation or melting snow and ice are altering hydrological systems, affecting water resources in terms of quantity and quality (medium confidence).
- Many terrestrial, freshwater, and marine species have shifted their geographic ranges, seasonal activities, migration patterns, abundances, and species interactions in response to ongoing climate change (high confidence).
- Based on many studies covering a wide range of regions and crops, negative impacts of climate change on crop yields have been more common than positive impacts (high confidence).
- At present the worldwide burden of human ill health from climate change is relatively small compared with effects of other stressors and is not well quantified.
- Differences in vulnerability and exposure arise from non-climatic factors and from multidimensional inequalities often produced by uneven development processes (very high confidence).
- Impacts from recent climate-related extremes, such as heat waves, droughts, floods, cyclones, and wildfires, reveal significant vulnerability and exposure of some ecosystems and many human systems to current climate variability (very high confidence).
- Climate-related hazards exacerbate other stressors, often with negative outcomes for livelihoods, especially for people living in poverty (high confidence).
- Violent conflict increases vulnerability to climate change (medium evidence, high agreement)."

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[17] IPCC, 'Summary for policymakers' in Field, C.B., V.R. Barros, D.J. Dokken, K.J. Mach, M.D. Mastrandrea, T.E. Bilir, M. Chatterjee, K.L. Ebi, Y.O. Estrada, R.C. Genova, B. Girma, E.S. Kissel, A.N. Levy, S. MacCracken, P.R. Mastrandrea, and L.L.White (eds), *Climate Change 2014: Impacts, Adaptation, and Vulnerability* (Cambridge University Press ,2014) 1-32. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change.

2.1.2 Ultimate objective of the UNFCCC and emission right

The ultimate objective of the UNFCCC is '*stabilization of greenhouse gas concentrations'* in the atmosphere at a *level* that would '*prevent dangerous anthropogenic interference'* with the climate system.[18] Such a level should be attained within a *'time-frame'* sufficient to allow ecosystems to '*adapt naturally'* to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.[19] In interpreting this ultimate objective, Working Group III (WGIII) of the IPCC in its Fourth Assessment Report (AR4) states that the choice of a stabilization level implies the balancing of the risks of climate change (risks of gradual change and of extreme events, risk of irreversible change of the climate, including risks for food security, ecosystems and sustainable development) against the risk of response measures that may threaten economic sustainability.[20] WGIII could not reach any conclusive solution to operationalize Article 2.[21]

The anthropogenic interference into the climate system by way of CO2 and other GHG emission has been increased in the last century. The industrial development and new scientific inventions have triggered human needs and increased never-ending desire of luxury, which is often treated as one *form* of development. However, imposing strict obligation on developed states to cut off their emission limit still seems an outstanding task after the Copenhagen Accord due to economy, GDP growth and other social and political aspects.

It is estimated that if the current CO2 emission by individual states continue, the global temperature might increase to about 6°C and indeed will be a threat to drinking water, food production, ecosystem, flood and other coastal disasters including extreme onset events like sea level increase and overall threat to the health of humankind.[22] Since the poorer countries were not responsible to GHG emissions (until late 20th/early 21st century) which the developed ones have been for centuries[23]

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18 Article 2, UNFCCC.

19 Ibid.

20 IPCC, 'Summary for Policymakers' in B. Metz, O.R. Davidson, P.R. Bosch, R. Dave, L.A. Meyer (eds), *Climate Change 2007: Mitigation* (Cambridge University Press, 2007). Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change.

21 Ibid.

22 Projected impact of climate change: Global climate change may impact food production across a range of pathways: 1) By changing overall growing conditions (general rainfall distribution, temperature regime and carbon); 2) By inducing more extreme weather such as floods, drought and storms; and 3) By increasing extent, type and frequency of infestations, including that of invasive alien species. For details, UN Environment Programme, *Projected Impacts of Climate Change* <http://www.grida.no/graphicslib/detail/projected-impacts-of-climate-change_154e> accessed 2 September 2019.

23 SGM Energy Modeling Forum EMF-21 Projections, Energy Journal Special Issue, in press, reference case CO2 projections.

and now the developing states' right to development puts into a big question in reaching the emission cutting goals. To stabilize the overall emission limit is easier for the developed countries but it is a challenge to ensure sustainable development for the LDCs and SIDS without the appropriate implementation of the CDR principle. Also, it should be kept in mind that the ultimate objective of the UNFCCC prioritizes sustainable economic development, food security and natural adaptation to climate change over limiting GHG emissions.

2.2.2 Territorial Sovereignty vs. Emission Right

The state sovereignty principle allows state to exploit its own resources in accordance with its own national needs and policies. One of the basic norms of international law is that States shall not cause damage on or interrupt the rights of other States. In environmental law, this is captured in the so-called ''no harm rule'' which has its foundations in the principle of good neighborliness between States formally equals under international law.[24] Principle 2 of the 1992 Rio Declaration, which echoes Principle 21 of the 1972 Stockholm Declaration, reaffirms this rule of customary international law, prohibiting transboundary environmental damage: *''States have, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.''*[25] The principle of prohibition of transboundary harm has become the corpus of international environmental law,[26] which achieved its status as *jus cogens* and thereby legally binding.

"Under the principles of international law, no state has the right to use or permit the use of its territory in such a manner as to cause injury (…) to the territory of another state or the persons or properties therein, when the case is of *serious* consequence and the injury is established by *clear and convincing evidence*."[27]

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[24] Franz X. Perrez, 'Relationship between Permanent Sovereignty and the Obligation Not to Cause Transboundary Environmental Damage' (1996) 26 *Envtl. Law* 1187.

[25] Principle 2, 1992 Rio Declaration on Environment and Development and Principle 21, 1972 Declaration of the United Nations Conference on the Human Environment (commonly referred as Stockholm Declaration).

[26] "The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment" (*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996 (I), p. 242, para. 29).

[27] Trail Smelter Arbitration (*US v Canada*) (1939) 33 AJIL 182 and (1941) 684.

Therefore, states must irrespective of their sovereign right to exploit its own natural resources consider the transboundary effect and environmental degradations while exercising the right. In this way the states' territorial sovereignty over its natural resources is not absolute rather conditional on the transboundary environmental damages. Same principle applies in case of GHG emissions.

Considering the 'established' customary norm of international environmental law, States' 'emission right' is conditional on its transbounbary environmental impacts. Every state is obligated not to knowingly allow its territory to be used to commit acts against the rights of any other state.[28] Therefore, in order to reach the temperature target, a harmony should be created between each State's emission right and their territorial sovereignty. This could only be possible through the *true* and effective implementation of the principle of common but differentiated responsibility and the principle of international cooperation. Otherwise, the LDC, SIDS and developing state parties probably would never keep pace with the overall sustainable development trends if they be left solitary with their individual effort(s).

According to IPCC, numerous mitigation measures that have been undertaken by many Parties to the UNFCCC are inadequate for reversing overall GHG emission trends.[29] The experience within the European Union (EU) has demonstrated that while climate policies can be and are being effective, they are often arduous to fully implement and coordinate, and require continual improvement in order to achieve objectives.[30] In overall terms, however, the impacts of population growth, economic development, patterns of technological investment and consumption continue to eclipse the improvement in energy intensities and decarbonization.[31] Regional differentiation is important when addressing climate change mitigation– economic development needs, resource endowments and mitigative and adaptive capacities are too diverse across regions for a 'one-size fits all' approach.[32]

IPCC suggested in 2007 that properly designed climate change policies can be part and parcel of sustainable development, and the two can be mutually reinforcing and therefore, mainstreaming climate change mitigation is an integral part of sustainable development.[33] In order to achieve SDGs, it is albeit absurd overlooking the adverse impact of climate change. WGIII suggested that sustainable development

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28 *Corfu Channel Case*, 1949 I.C.J. 4, 1949 I.C.J. Rep. 4 (1949).

29 IPCC, *Climate Change 2007: Synthesis Report* (2007) 104. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, Pachauri, R.K and Reisinger, A. (eds)].

30 Ibid.

31 Ibid.

32 Ibid.

33 Ibid.

could condense GHG emissions and lower vulnerability to the adverse impact of climate change. But it also took a cautious note and stated that projected climate changes can exacerbate poverty and undermine sustainable development, especially in the least-developed countries.[34] Hence, global mitigation efforts can enhance sustainable development prospects in part by reducing the risk of adverse impacts of climate change.[35]

2.3 Two degree increase: dangerous or sustainable?

2.3.1 "Pre-industrial level": ambiguous term in assessing the increase limit

The term 'pre-industrial' lacked a proper definition until lately. Earlier it was so squarely referred to as the period before industrial revolutions.[36] The 2018 SR15 defines it as 'the multi-century period prior to the onset of large- scale industrial activity around 1750. The reference period 1850–1900 is used to approximate pre-industrial global mean surface temperature (GMST).'[37] SR15 definition, therefore, further complicated the whole temperature target, which has been discussed below.

As IPCC Fourth Assessment Report 2007 states, if the temperature increases between 1-3°C above 1990 levels, effects will be mixture of net benefits and net costs, depending on regions and sectors. It continues to describe, however, that "it is very likely that all regions will experience either declines in net benefits or increases in net costs for increases in temperature greater than about 2-3°C."[38] It is clear in the context that the increase of temperature is relative to 1990 levels. The temperature has already boosted by 0.74°C during 1906 to 2005.[39] AR5 predicts that the global surface temperature change if compared with the period of 2016-2035 to the period of 1986–2005; it would range from 0.3°C to 0.7°C (in postulation that there will be no major volcanic eruptions or changes in some natural sources e.g. CH4 and N2O, or unexpected changes in total solar irradiance).[40] By mid-21st century, the scale of

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[34] IPCC, 'Executive Summary' in *Working Group III: Mitigation of Climate Change* (2007) s<https://www.ipcc.ch/publications_and_data/ar4/wg3/en/ch1s1-es.html> accessed 4 September 2019.

[35] Ibid.

[36] Please see the glossary of AR5 (2014).

[37] See above n 15, 556.

[38] IPCC, 'Mitigation of Climate Change' in B. Metz, O.R. Davidson, P.R. Bosch, R. Dave, L.A. Meyer (eds), *Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*. (Cambridge University Press, 2007).

[39] IPCC, 'The Physical Science Basis, in Solomon, S., D. Qin, M. Manning, Z. Chen, M. Marquis, K.B. Averyt, M. Tignor and H.L Miller (eds) *Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2007).

[40] IPCC, 'Climate Change 2014: Synthesis Report' in R.K. Pachauri and L.A. Meyer (eds), *Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2014) 151.

the projected climate change is considerably affected by the choice of emissions situation.[41] While considering this recent significant change, Yamaguchi (2012) reasonably assumed that the temperature increase from pre-industrial level to that in 1990 was be around 0.6°C.[42] If this assumption is correct, 2-3°C temperature increase above 1990 corresponds to 2.6-3.6°C above pre-industrial level.[43] IPCC AR5 urged for 'limiting total human-induced warming to less than 2°C (by the end of this century) relative to the period 1861–1880 with a probability of >66% would require cumulative CO2 emissions from all anthropogenic sources since 1870 to remain below about 2900 GtCO2 (with a range of 2550 to 3150 GtCO2 depending on non-CO2 drivers). About 1900 GtCO2 had already been emitted by 2011.'[44] However, Hawkins (2017) found 'the term 'pre-industrial' was used in AR5, often inconsistently, in other contexts—for example, when discussing atmospheric composition, radiative forcing (the year 1750 is used as a zero-forcing baseline), sea level rise, and paleo-climate information.'[45]

The term 'pre-industrial' has been adopted in the Paris Agreement[46] as well as in post-2015 development agenda by the HLP. Current mitigation measures are aimed at reaching the well below 2°C temperature target as set by the PA. Moreover, PA aspires for limiting temperature 1.5°C above 'pre-industrial' level. But neither the Agreement nor its parent treaty UNFCCC anywhere defines the term 'pre-industrial', which causes much ambiguity. Without reaching a consensus about this baseline 'pre-industrial', it is absurd to decide actually what temperature increase we need to limit.

2.4 Development vs. Emission Cut-off

2.4.1 Per capita emission target

Yamaguchi (2012) drew an interesting comparison of country specific per capita emission targets. As he mentions, "global CO2 emissions was 22.7 billion tons in 2000 (13.8 billion tons from Annex I[47] countries and 8.9 billion tons from Non-Annex I countries). Per capita emissions was 3.7 tCO2 (11.0 tCO2 for Annex I and

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41 Ibid.

42 Mitsutsune Yamaguchi,(ed), *Climate change mitigation: a balanced approach to climate change* (Springer Science & Business Media, vol 4, 2012).

43 Ibid.

44 See above n 35.

45 Ed Hawkins, Pablo Ortega, and Emma Suckling, 'Estimating Changes in Global Temperature since the Preindustrial Period' (2017) *BAMS American Meteorological Society* <https://doi.org/10.1175/BAMS-D-16-0007.1> accessed 3 September 2019.

46 Article 2 of the Paris Agreement.

47 Annex I to the UNFCCC: developed countries.

1.8 tCO2 for Non-Annex I countries).”[48] In order to decrease emission by 50%, it requires global CO2 emissions to be reduced to 11.35 billion tons.[49] According to the UN World Population Prospects 2008, population in 2050 is estimated as 9.2 billion (1.4 billion for Annex I and 7.8 billion for Non-Annex I). Based on those data, if Annex I countries decrease their per capita emissions by 80% to 2.2 tCO2 in 2050, Non-Annex I countries' per capita emissions in 2050 must be 1.1 tCO2 to extent global total emissions to 11.35 billion tons. Even if Annex I countries' emission will become zero, Yamaguchi showed that Non-Annex I countries must reduce their per capita emissions to 1.5 tCO2 to decrease global emissions.[50] Under this situation, even if developed countries become successful to reduce per capita emissions by 80%, whether developing countries will be able to reduce their per capita emissions by 40% (from 1.8 tCO2 in 2000 to 1.1 tCO2 in 2050) is yet to be seen, especially in view of the fact that developing countries' per capita emissions has already increased to 2.3 tCO2 (in this case reduction ratio is more than 50%).[51]

In order to reach the 2°C target of Paris Agreement, absolute reliance on the State parties' individual Nationally Determined Contributions (NDC)[52] might lead to frustration to the overall temperature cut-off. Therefore, as it was reaffirmed in COP 16 at Cancun that parties should take *urgent* action to meet this long-term goal, consistent with *science* and on the basis of *equity*[53], without mutual efforts from both developing and developed countries the emission cut off must fail in the long term quest with development goals and agendas. Nonetheless, state sovereignty principle might hinder in many cases in achieving this temperature target. Paris Agreement is now emphasizing on Nationally Determined Contributions (NDC) fixed by the States themselves. However, it should always be vigilant that economic growth, poverty alleviation, food security etc. remain within high priority list of LDCs, SIDs or any other developing countries.

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48 Mitsutsune Yamaguchi, 'The Ultimate Objective of Climate Response Strategies, and a Desirable and Feasible International Framework' in Yamaguchi, M. (ed) *Climate change mitigation: a balanced approach to climate change* (Springer Science & Business Media, Vol. 4, 2012).

49 Ibid.

50 Ibid.

51 Ibid.

52 The COP, by its decisions 1/CP.19 and 1/CP.20, invited all Parties to communicate to the secretariat their INDCs well in advance of COP 21 (by the first quarter of 2015 by those Parties ready to do so) in a manner that facilitates the clarity, transparency and understanding of the INDC. In decision 1/CP.20 the COP also invited all Parties to consider communicating their undertakings in adaptation planning or consider including an adaptation component in their intended nationally determined contributions. For details, <http://unfccc.int/focus/indc_portal/items/8766.php> accessed 3 September 2019.

53 Decision 1/CP.16 The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (para 4). FCCC/CP/2010/7/Add.1.

3. Paris Agreement vs. SDG 13

SDG 13 aims to strengthen resilience and adaptive capacity to climate-related hazards and natural disasters in all countries;[54] integrate climate change measures into national policies, strategies and planning;[55] improve education, awareness-raising and human and institutional capacity on climate change mitigation, adaptation, impact reduction and early warning.[56] It also targets to implement the commitment undertaken by developed-country parties to the United Nations Framework Convention on Climate Change to a goal of mobilizing jointly $100 billion annually by 2020 from all sources to address the needs of developing countries in the context of meaningful mitigation actions and transparency on implementation and fully operationalize the Green Climate Fund through its capitalization as soon as possible[57] and to promote mechanisms for raising capacity for effective climate change-related planning and management in least developed countries and small island developing States, including focusing on women, youth and local and marginalized communities.[58] On the other hand, the Paris Agreement in its center provision in Article 2 aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by holding the increase in the global average temperature within 1.5 to 2°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change. Paris Agreement also aims at increasing adaptive capacity in such a way so that food production remains adequate and development flourish in a 'climate-resilient' way.[59]

What lies in the centerpiece of 2°C temperature target is the mitigation of anthropogenic emissions along with realization of resilient adaptation measures. The issue of climate change is too complex that it could not single-handedly be entrusted on the shoulder of so-called international 'treaties' unless the commitments the State parties respectively undertake according to that particular treaty are *effectively* (in absolute sense) being implemented. While an international negotiation is taking place, it is possible that on that very precise moment a small island developing State is facing irreversible damages caused by climate change due to historic anthropogenic emission by its developed counterpart. Paris Agreement emphasizes on the principle of equity and the principle of common but differentiated responsibilities and respective capabilities[60] but it is obvious that this aim would

[54] SDG 13.1.
[55] SDG 13.2.
[56] SDG 13.3.
[57] SDG 13.a.
[58] SDG 13.b.
[59] Article 2, Paris Agreement 2015.
[60] Ibid.

frustrate without proper and absolute success of the Green Climate Fund, the utilization of which is also considered to be a basic commonality in both SDG 13 and PA. Moreover, it should be kept in mind that 'absolute' success of any international treaty provision is probably something unprecedented. But when it comes to climate change, currently it requires that absolute unprecedented success to reach the temperature cut down goal and ensure sustainable climate system for the mankind.

4. Right-based approach, development goals, resource allocation and 2°C climate target: brief comparative discussion

Governments, policy makers and other stakeholders have to handle various nationally and internationally urgent issues including geo-politics, civil and political rights as well as best realization of socio, economic and cultural rights and many more resource constraints and donor-contingencies. Even though climate is the common concern of human kind, the Governments often try to ensure best utilization of their resources in order to guarantee food security, energy sufficiency, proper healthcare; combat poverty and inequality and many more. The issue of environment and climate often remain overlooked because of their slow onset and often-invisible damaging procedure. The temperature target is crucial here. It requires absolute attention on policy implementation leading to reach the temperature target with zero deviation. Enduring below this threshold does not pledge avoidance of substantial adverse impacts of climate change. Even if we exceed it, impacts are projected to become much more severe, widespread, and irreversible, and we are likely to cross more dangerous thresholds in the climate system that could trigger large-scale catastrophic events.[61] Nonetheless, in order to ensure inter and intra generational equity, the sustainable utilization of natural resources is a must without which the core objective of sustainable development might become a failure.

Discursive force of development agendas should be taken seriously and deserves a human rights engagement though development agendas have a very mild direct policy impact except where they provide a boost.[62] The target also focuses attention on the question of future risks and which ones are bearable, whereas at the same time encouraging debate about maximum sustainable use of the atmospheric resource. Discussed and disputed by scientists and social scientists alike, the adoption of a 2◦C target from a set of heuristics is not without problems. First, scientists have doubted the efficacy of the target on the basis of the difficulties of establishing such a target in

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[61] Susan J. Hassol, *Emissions Reductions Needed to Stabilize Climate* (2011) <https://www.climatecommunication.org/wp-content/uploads/2011/08/presidentialaction.pdf> accessed 16 August 2019.

[62] Malcom Langford, on 13 March 2014 in his lecture on 'Human Rights and Development: Interdisciplinary Perspectives on Theory and Practices' at the Norwegian Center for Human Rights (NCHR).

the context of so many uncertainties about climate sensitivity.[63] Secondly, economists have critiqued it for being too costly and based on insufficiently clear damage costs.[64] Thirdly, researchers interested in science-policy dynamics have critiqued it for forcing a rather tenuous policy debate that has detracted from the process of reducing emissions.[65]

Although the discussions over the extent of precautionary action on climate change lingered on, researchers examined the potential consequences of delaying action to reduce emissions.[66] The policy analysis of Seidel and Keyes in 1983 concluded that the changes in energy policies would not significantly affect the date the planet was committed to a 2◦C temperature rise[67], is highly disputed among the scientists, researchers and policy makers. But nonetheless, lack of information and certainty should not be a ground for not limiting mitigation measures. The planet's lives, ecology, biodiversity as well as the sustainable use of resources should be prioritized in accordance with the right-based approach to keep in pace with 2030 development goals.

Hayward (2007) recognized that carbon emissions are necessary to secure subsistence for most people.[68] The problem discovered by this fact, however, is that the poor, like the rich, are sealed into a global economy that is hooked on carbon emissions.[69] This dependence is suggested to be overcome. If the poor are to be assisted toward less carbon-dependent development paths, this end is not well served by converging exclusively on how emissions rights are distributed, since one of the goals is precisely to empower the poor not to require the levels of emissions that the West have reached.[70] Hayward considered these inequalities to be the debts of the rich. He wrote: "if the rich are to be allowed a ''soft landing'' from the high levels of

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63 Malte Meinshausen, *What does a 2°C target mean for greenhouse gas concentrations*? *A brief analysis based on multi-gas emission pathways and several climate sensitivity uncertainty estimates*. in: Schellnhuber HJ, Cramer W, Nakicenovic N, Wigley T, Yohe G, eds. Avoiding Dangerous Climate Change. Cambridge University Press; 2006, 265-279.

64 Richard SJ Tol, *Europe's long-term climate target: A critical evaluation*. Energy Policy 2007.

65 Maxtell Boykoff, David J. Frame, Samuel Randalls, *Discursive stability meets climate instability: A critical exploration of the concept of 'climate stabilization' in contemporary climate policy. Global Environmental Change* 2010 Feb 28; 20(1): 53-64. Also in Huebener, H., S. Baumgart, N. Jansky, F. Kreienkamp, A. Spekat, and H. Wolf. "Regional Climate Change and Impact Assessment for the Federal State Hesse, Germany, and Implications of the Global 2°C Climate Target." *Climate Change-Socio-Economic Effects* (2011): 367-384.

66 Samuel Randalls, (2010), History of the 2°C climate target. *WIREs Climate Change*, 1: 598–605.

67 Stephen Seidel and Dale Keyes, *Can We Delay a Greenhouse Warming?* (U.S. Environmental Protection Agency; 1983).

68 Tim Hayward, 'Human rights versus emissions rights: climate justice and the equitable distribution of ecological space' (2007) 21(4) *Ethics & International Affairs*, 431-450.

69 Ibid.

70 Ibid.

emissions they currently depend on and benefit from, this continuing advantage of theirs over the poor must be seen for what it is—*a debt*—and thus duly compensated."[71] What the rich owe to the poor is a share of the benefits they have derived from the emissions for which the poor have not been responsible.'[72]

Having a closer look to the Kyoto Protocol's innovative flexibility mechanism that allows a developed country (Annex I countries)[73] to easily earn emission reduction credit through emission trading,[74] joint implementation[75] or clean development mechanism,[76] which could be 50% to 100% cheaper than cutting emission in its own territory. 'Advocates of carbon trading and other flexibility mechanisms advertise the benefits of harnessing the market to allow emission credits to find their way, via the price mechanism, to their most efficient users. Trade in emission rights is said to yield a win-win situation whereby aggregate emissions are reduced and aggregate economic benefits are maximized.'[77] Nonetheless, since the Kyoto Protocol could not yet succeed to reach its emission reduction target by all responsible State parties, rather the big economies are always skeptical about their assigned amount unit of emission. Moreover, the Second Commitment period of the KP failed to be entered into force till today and meanwhile State Parties unanimously agreed on Paris Agreement 2015 which aims to limit temperature increase well below 2°C.[78] Therefore, the current goal of holding the increase in global average temperature below 2°C above pre-industrial levels, in line with international agreements seems a great challenge on the international community. The success of NDCs by the state parties is yet to be measured. It is obvious that without strict implementation of equity and CDR principle, the goal would rather enhance the sufferings of the poorer economies due to the irreversible adverse impacts of climate change.

5. Conclusion

The 2°C target is historically significant. IPCC's projection of 2°C increase's dangerous impacts is well documented and there is no room for denial of those projected dangerous impacts. The target prescribes an estimated goal, a deliverable climate for the pains of decarbonization policies, which is useful in the context of

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71 Ibid.

72 Ibid.

73 Annex I to the UNFCCC (mostly developed countries).

74 Article 17 of the Kyoto Protocol 1997.

75 Article 6 of the Kyoto Protocol 1997.

76 Article 12 of the Kyoto Protocol 1997.

77 See above n 68.

78 Article 2.1a, 2015 Paris Agreement.

justifying costly decisions.[79] It is also addressing the question of future risks (whether bearable or not) and at the same time uplifting debate on maximum sustainable use of the atmospheric resource.[80]

Whether the 2°C increase is dangerous or sustainable is still a matter of debate. But climate uncertainty leaves us no other way just to overlook this issue anymore except to ensure effective adaptation measures. The adverse impact of climate change will pave the way to many extreme climate disasters as well as slow onset events like sea-level increase, saline water intrusion etc. 'Climate change is a global challenge that does not respect national borders. Emissions anywhere affects people everywhere. It is an issue that requires solutions that need to be coordinated at the international level and it requires international cooperation to help developing countries move toward a low-carbon economy.'[81] Therefore, the failure to reduce and level the anthropogenic emission to the climate system would foster severe human rights violation including displacements, climate refugees, food and water scarcity and overall violation of individual's freedom and right to life. The historical anthropogenic interference into the climate system by the rich States burdened them with a debt to their poorer counterparts, which must be discharged. In line with 17 other SDGs, sustainable climate and environment should get equal priority in implementation of policy strategies. Because if temperature increases more than 2°C, the severity of catastrophe is unforeseen and might ruin the success stories of other 'achieved' development goals.

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[79] Samuel Randalls, 'History of the 2°C climate target. WIREs Climate Change, (2010) 1(4) *WIRE Climate Change* 598-605.

[80] Ibid.

[81] For details, vide UN Sustainable Development Goals, *Goal 13: Take urgent action to combat climate change and it impacts* <http://www.un.org/sustainabledevelopment/climate-change-2/> accessed 2 September 2019.

From Land to Real Estate: Need for a Sensorial Approach

Md. Khairul Islam*

1. Introduction

The exclusive title of aborigine over their land is the most contested aborigine's right all over the world. The dispute originates from the conventional notion of land and land ownership. Land could be a subject to ownership. However, there is a gulf of difference between aboriginal and common law conception of ownership. While the common law considers land as private property, aboriginal tradition recognizes land as a cultural identity. The common law of the land is based on the doctrine of tenure and developed in capitalist agrarian society. It converts the land into a commodity like many other saleable goods. The concept private ownership and convenient alienability of land under common law reminiscent another technical term 'Real Estate'.

'Real Estate' is a phrase of corporate world, provides a sense of commodity and represents land like many other salable goods.[1] The term 'land' and 'real estate' are used interchangeably in common law. Real estate also includes the buildings constructed over the land.[2] The idea of ownership and transferability converts 'land' into 'real estate'. Land registration and cadastral survey facilitate the transferability of the estate in this process. The term 'real' refers the thing itself or a particular right in the thing, and 'estate' means the land, things attached to land so as to become part of it.[3] A conveyance of real estate *prima facie* includes everything directly beneath the surface of the land conveyed and the space directly above.[4] Therefore, the land regulations under the common law transform the subject into real estate law, or a course of conveyancing. Title to land is, in fact, completely isolated from the material events on the land.

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1 Where a person has a legal term of years and an equitable freehold estate, or vice versa, the term becomes attendant upon the inheritance, and is treated as real estate: see *Shribman v Hall* [1954] 1 NI 34.

2 See 'Real estate' in P. H. Collin (ed), *Dictionary of law* (A&C Black, 5th ed,. 2007) <https://proxy.library.mcgill.ca/login?url=https://search.credoreference.com/content/entry/acblaw/real_estate/0?institutionId=899> accessed 11 December 2018.

3 See LexisNexis, 'real estate' in *Halsbury's Laws of Canada* <http://www-lexisnexis-com.proxy3.library.mcgill.ca/ca/legal/results/ docview/docview.do?docLinkInd=true&risb=21_T28242132745&format=GNBFULL&sort=RELEVANCE&startDocNo=1&resultsUrlKey=29_T28242132749&cisb=22_T28242132748&treeMax=true&treeWidth=0&csi=274661&docNo=7> accessed 11 December 2018.

4 Ibid.

The common law of land, meaning real estate, is not compatible with the aborigine's relationship to the surface of the earth and to other people. It only suits for arable land and does not acknowledge other aspects of the land. Land is not all about its parcels but about the ways in which people exploit the earth. Apart from the use of land, the aborigine has a deep attachment to the land which needs to be acknowledged by legislation. The Aborigine has a spiritual and cultural relationship with the land. The aborigine's rights in land are something which is inapt to record through a cadastral survey. These rights cannot be examined meaningfully without adopting a cross-cultural approach. International human rights regime creates an obligation to understand the aboriginal title over land from a sensorial approach.

To reconcile the gap between common law and aboriginal tradition about land, *Mabo v Queensland (No 2)* [hereinafter referred as "Mabo"][5] developed the doctrine of the Native title of aborigine over their land. It defines the native title as the rights of aborigine under their traditional laws and customs recognized by the common law of Australia. It also includes the right to possess and occupy the aboriginal land in exclusion of others. The *sui generies* nature of the native title is that the title must be recognized by the aboriginal law and customs and the title must be capable to be accepted by the common law.

After the *Mabo* judgement, it is claimed that common law doctrine of native title incorporates the aborigine's long-standing rights in their land.[6] However, it is still in doubt to what extent *Mabo* judgement paid due attention to the aborigine's right to the land and their relationship with the land. Aborigine's title in the land needs to be perceived through senses and cannot be understood from a written record. This paper argues that the aborigine's relationship to land cannot be a 'real estate'. It examines, in proper place, the common law's ability to recognize aborigine's spiritual relationship to their land.

The paper begins with the description of the contrasting idea of land in common law and aborigine tradition in section II. To reconcile the gap between the two traditions, the High Court of Australia developed the doctrine of 'Native Title'. Section III of the paper deals with the nature and incidents of native title. It is stated that the native title is not a title under common law but a title recognized by the common law to that extent of its consistency with the common law. In section IV, the paper argues that the concept of native title is a mere process of recognizing the exclusive possession and proprietary rights of the aborigine in their occupied territory to that extent of the capacity of Australian legal system. It is claimed that the 'native title' is not an aboriginal title within the international normative framework.

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5 *Mabo and others v Queensland* (No 2)[1992] HCA 23.

6 See Peter H Russell, *Recognizing Aboriginal Title: the Mabo case and indigenous resistance to English-settler Colonialism* (University of Toronto Press, 2005).

Furthermore, Australia recognizes the doctrine to a limited extent. In fine, the paper raises the question whether the very nature common law able to recognize the aboriginal's spiritual relationship to their land.

2. Divergent idea of land in common law and ingenious tradition

The common law of the land is based on the doctrine of tenure. Every parcel of land in England is held either mediately or immediately of the King who is the Lord Paramount; the term "tenure" usually signifies the relationship between tenant and lord. In other words, all lands in the hands of subjects are ultimately held of the Crown and no land in the hands of a subject which is not held by some service and for some estate.[7] Therefore, an individual is a tenure holder, in exchange for rent.

Land, in its legal signification, includes any ground, soil or earth, such as meadows, pastures, woods, moors, waters, marshes and heath; houses and other buildings upon it; the airspace above it and all mines and minerals beneath it. It also includes anything fixed to the land, as well as growing trees and crops, except those which, broadly speaking, are produced in the year by the labor of the year. A grant of all the profits of land passes the whole land, herbage, trees, mines and whatever is parcel of the land, but a grant of a particular profit of or right in the land does not extend beyond such profit or rights. For the purposes of ownership, land may be divided horizontally, vertically or otherwise, and either below or above the ground.[8] Separate ownership may exist in strata of minerals, in the space occupied by a tunnel, or in different stories of a building. Typically, the common law does not include hunting, gathering and fishing rights as land or benefits arising out of the land. Therefore, the concept of land in common law is materialistic and is based on the idea of capitalist agrarian society.

On the other hand, the indigenous idea of land is substantially different from the common law. For indigenous people, territories and lands are not only an issue of property but also the source of spiritual, cultural and social identity. Indigenous people cannot survive without the land and the knowledge that mainly comes from the use of the land.[9] They believe that the country had not existed until their ancestor

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7 The Eighteenth-century chronicler of British law William Blackstone, in his Commentaries on the Laws of England in 1765-9 (published before New South Wales was settled, and reprinted many times) states: (Blackstone, Vol. II, 1830) 50-51. cited by Brennan J. in *Mabo and others v Queensland* (1992) above n 5.

8 Law of Property Act 1925, s 205(1)(ix) (UK).

9 See Lars Anders Baer, *Protection of Rights of Holders of Traditional Knowledge, Indigenous and Local Communities* cited in Jérémie Gilbert, *Indigenous Peoples' Land Rights under International Law From Victims to Actors* (Brill, 2016) 172.

could see and sing it in Dreamtime.[10] They consider land as their mother and they are the son of the soil. The spiritual connection to the land obliges aborigine to take care their cultural sites, which are 'living museums' of their ancestors which include their dreaming sites, archaeological sites, waterholes, burial grounds and so forth. No Aboriginal believe that the created world is imperfect in any way. The religious life of aborigine has a single aim: to keep the land, the way it was and it should be. The aborigine's spiritual relationship with the land has been recognized in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) 2007.[11]

3. The concept of 'Native Title'

In *Mabo v Queensland*[12], the High Court of Australia held that the common law of Australia recognizes a form of native title which, in cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands and that, subject to the effect of some particular Crown leases, the land entitlement of the Murray Islanders in accordance with their laws or customs is preserved, as native title, under the law of Queensland. The court illustrated three basic features of native title. Firstly, the court confirms that the native title is a title recognized by common law but not a common law tenure. Secondly, native title, though not as a common law tenure, may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence, whether proprietary or personal and usufructuary in nature and whether possessed by a community, a group or an individual. Lastly, where an indigenous people (including a clan or group), as a community, are in possession or are entitled to possession of land under a proprietary native title, their possession may be protected or their entitlement to possession may be enforced by a representative action brought on behalf of the people or by a sub-group or individual who sues to protect or enforce rights or interests which are dependent on the communal native title.

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[10] Early anthropologists used 'Dreamtime' to refer a religio-cultural worldview attributed to Australian Aboriginal beliefs. The term was first used by Francis Gillen. Later, Baldwin Spencer and A. P. Elkin popularized the term. According to Aboriginal belief, all life as it is today - Human, Animal, Bird and Fish is part of one vast unchanging network of relationships which can be traced to the Great Spirit ancestors of the Dreamtime. The Dreamtime is the Aboriginal understanding of the world, of its creation, and its great stories. The Dreamtime is the beginning of knowledge, from which came the laws of existence. For survival these laws must be observed. *See* Baldwin Spencer & Francis James Gillen, *The native tribes of Central Australia* (Macmillan and Company Limited, 1898). *See* also Aboriginal Art and Culture, <http://www.aboriginalart.com.au/culture/dreamtime2.html> accessed 11 December 2018.

[11] United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) 2007, Article 25. *See* UN General Assembly resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> accessed 11 December 2018.

[12] *Mabo and others v Queensland* (No 2) [1992] HCA 23.

The court also held that unless there is a clear and plain intention to extinguish native title, the native title continues even on a change of a sovereign. Native title is not extinguished by the creation of reserves nor by the mere appointment of 'trustees' to control a reserve where no grant of the title is made. The Native title may be extinguished through a Crown grant which vests in the grantee an interest in land which is inconsistent with the continued right to enjoy a native title in respect of the same land.

Following the decision of the court, Australia passed the Native Title Act, 1993.[13] The Act defines the native title or native title rights as a form of common law rights and interests meaning the communal, group or individual rights and interests of aboriginal people in relation to land or waters possessed under the traditional laws acknowledged, and the traditional customs observed, by the aborigine; and the aboriginal peoples by those laws and customs, have a connection with the land or waters; and the rights and interests are recognized by the common law of Australia.[14] The native title includes hunting, gathering and fishing rights.

One of the key objectives of the Act 1993 is to provide the recognition and protection of native title.[15] Therefore, the concept of the Native Title under the Act is a title recognized by the common law of Australia. The Act establishes 'Native Title Registrar' and 'National Native Tribunal' for determination of the Native Title claims by the Aboriginal peoples or Torres Strait Islanders. At present, native title has been recognized over more than one million square kilometres of Australian land and water (approximately 15% of Australian territorial land and waters). As of June 2017, there are 629 registered 'Indigenous Land Use Agreements'.[16]

After the introduction of the doctrine of native title, like many scholars, Professor Russell finds the *Mabo* judgement a historic revolution in recognizing aborigine right over their land. Although Russell is not certain about the future of aborigine rights in Australia, he confirms that *Mabo* will not be back to a condition of *terra nullius* when the very existence of indigenous peoples as ongoing human societies and a defining part of Australia is denied by the majority.[17] He claims that *Mabo* decision is a major advancement which raised awareness of aboriginal affairs to unprecedented levels and legal recognition of indigenous rights inevitably cede some legitimacy to the judicial and political institutions of the colonizing state. However, the scholars, perhaps, fail to understand that 'native title' is not the 'aboriginal title'. They also discount the unsettled issues of the *Mabo* judgement and subsequent the Native Title Act, 1993.

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13 *Federal Legislation of Australia*, Act No. 110 of 1993.
14 *Native Title Act 1993*, s 223 (Australia).
15 Ibid, s 3.
16 See The University of Sydney, <https://sydney.edu.au/news-opinion/news/2017/06/02/five-things-you-should-know-about-the-mabo-decision.html> accessed 20 April 2018.
17 Peter H Russell, *Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-settler Colonialism* (University of Toronto Press, 2005) 13.

4. A Title without Land

As mentioned above, there is a gulf of difference between common law and aboriginal law regarding the concept of law. The doctrine of native title is an attempt to bridge that gulf. The title depends on the aboriginal custom which the common law will recognize so far it is consistent with the common law. *Mabo* constructed inconsistency as the test to decide whether the common law can recognize the aboriginal title.[18] Where there is an interest inconsistent with the continued enjoyment of native title by the native titleholders, then the High Court's schema in *Mabo* will not allow recognition. Where there is no inconsistency, then the native title is recognized. Therefore, the native title is not a self-sufficient right rather a right recognized by the common law subject to its capacity. It merely recognizes the aborigine's traditional use of the land such as hunting, gathering, fishing and so forth and does not recognizes aborigine's spiritual relationship with the land. Additionally, the title extinguishes by valid government acts that are inconsistent with the continued existence of native title rights and interests, such as the grant of freehold or leasehold estates. Thus, Professor Short rightly argued that the Native Title should be understood as an exercise in rights limitation behind a veneer of agrarian reform.[19]

The court developed the idea of native title on the premise that there was no law before the European settlement in Australia. Brennan J. observed that

> [U]nless there are pre-existing laws of a territory over which the Crown acquires sovereignty which provides for the alienation of interests in land to strangers, the rights and interests which constitute a native title can be possessed only by the indigenous inhabitants and their descendants. Native title, though recognized by the common law, is not an institution of the common law and is not alienable by the common law. Its alienability is dependent on the laws from which it is derived. If alienation of a right or interest in land is a mere matter of the custom observed by the indigenous inhabitants, not provided for by law enforced by a sovereign power, there is no machinery which can enforce the rights of the alienee.[20]

From the above observation, it appears that the primary purpose of the doctrine is to validate the existing non-aboriginal title and provides guarantees of future land negotiations within the framework of existing power inequalities.[21]

The High court, in fact, acknowledged the native title of aborigine to a very limited extent. Since the native title is not alienable by the common law, the title

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[18] Noel Pearson, 'The Concept of Native Title at Common Law' (1997) 5 *Australian Humanities Review* <http://australianhumanitiesreview.org/1997/03/01/the-concept-of-native-title-at-common-law/> accessed 24 April 2018.

[19] See Damien Short, 'The Paradox of 'Native Title' as a Remedy to Historic Injustice' (Conference Paper, CPSA Annual Conference, 2006).

[20] *Mabo and others v Queensland* (No 2) [1992] HCA 23[1992] 175 CLR 1, para. 65.

[21] Damien Short, *The Paradox of 'Native Title' as a Remedy to Historic Injustice* (Conference Paper, CPSA Annual Conference, 2006) 6.

dependents on custom which the common law will recognize and to the extent of its consistency. In other words, the common law will recognize a native title if it is consistent with the common law and based on the tradition of the title holder. Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. Therefore, aboriginal peoples cannot use their lands in a way that would prevent their special relationship with the land from continuing into the future.

The doctrine of native title, developed in the Act 1993, raises two substantial issues: achievement of sovereignty over aboriginal territory and the determination of native title.

4.1. Sovereignty over the Land

Mabo and subsequent Native Title Act, 1993 declares that Australia was not *terra nullius* (land belonging to no-one) at the time of European settlement since the indigenous people inhabited in the land. Thus, the issue arises how the Crown, thereafter Australia, obtained sovereignty over aborigine's territory. The court avoided this issue by stating that the acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state.[22] They argued that the acquisition of territory is chiefly the province of international law and the acquisition of property is chiefly the province of the common law. However, the court claimed that it has jurisdiction to determine the consequence of the acquisition of territory under the municipal law.

The court rejected the contention that the indigenous inhabitants were 'low in the scale of social organization' and, therefore, they did not have any proprietary interest in their occupied land. To recognize the common law native title, the court relied on the theory of radical title of the crown. It argued that the Crown became the absolute beneficial owner in possession of all colonial land - on first settlement, the event which conferred sovereignty on the Crown. It further argued the native title survives with the Crown's acquisition of sovereignty and it is unnecessary to examine the alternative arguments advanced to support the rights and interests of aborigine people to their traditional land.[23]

The theory of radical title of the Crown alternatively extinguishes the native title of the aborigine. Therefore, the court made a distinction between the Crown's title to territory and the Crown's ownership of land within its territory. In case of *Mabo*, the court claimed that although the Crown had radical title to the aboriginal territory, it had no ownership over that land. From the distinction between acquisition of territory and acquisition of land, a reasonable question might arise how the Crown obtained

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[22] *Mabo and others v Queensland* (No 2) [1992] HCA 23[1992] 175 CLR 1, para. 31.

[23] Ibid, para 62.

sovereignty over a territory which did not belong to it. The governance of a territory is a mere supposition if the sovereign has no control over the land which constitutes the territory.

The common law distinction between radical title and ownership is based on the idea of private ownership of land. This distinction is not applicable to the land occupied by aboriginal because of its *sui generis* nature. The aboriginal ownership of land, from a western perspective, is a kind of communal ownership. In *Mabo*, the court did not explain any significant impact of the exercise of sovereignty over Mariam Island. On the other hand, referring to the position of Mariam people, the court held that where a clan or group has *continued to acknowledge the laws* and to observe the customs based on the traditions of that clan or group, *whereby their traditional connection with the land has been substantially maintained*, the traditional community title of that clan or group can be said to remain in existence. It seems that there was no well-founded impact of the change of sovereign over the aborigine territory since they were able to practice their own laws and customs. The aboriginal land was within the sovereignty of the Crown is a presumption having no normative basis. In Eastern Greenland case, the Permanent Court held that a claim to sovereignty based not upon some particular act, or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and *some actual exercise or display of such authority*'.[24]

In *Mabo*, the court did not illustrate any actual exercise or display of sovereignty on the Murray Island. In addition to the display of sovereignty, international law requires continuous and peaceful exercise of sovereignty. The exercise of sovereignty particularly important where the territory is not *terra nullius* but inhabited by a community. The claim of indigenous inhabitants as 'low in the scale of social organization' and incapable to exercise sovereignty over their territory is a blatant example of ethnocentrism and unacceptable. Indigenous peoples' special relationship to the land is significant enough to justify recognition via the notion of 'group rights' and 'differentiated citizenship'. The positivist attitude of the court failed to appreciate the traditions and customs of aborigine as law. Indeed, the acquisition of territory by a sovereign state cannot be challenged before a municipal court. Nevertheless, without settling the issue of the acquisition of sovereignty over the territory of the aborigine, the claim of radical title of over the land of aborigine remains a mere presumption.

4.2. Determination of the Native Title

Apart from the issue of sovereignty over the aboriginal territory, the process of ascertaining native title ignores aborigine's exclusive relationship with the land. The

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[24] *Denmark v Norway*, Judgment, PCIJ Series A/B No 53, ICGJ 303 (PCIJ 1933), 5th April 1933; see also *Eritrea v Yemen*, Award on Territorial Sovereignty and Scope of the Dispute, (1998) XXII RIAA 211, (1999) 119 ILR 1, (2001) 40 ILM 900, ICGJ 379 (PCA 1998), 9th October 1998, Permanent Court of Arbitration [PCA].

claimant of a native title has to face procedural difficulties in proving the title. The proof of native title requires evidence of the claimants' knowledge about traditional laws as well as the practice of these laws.

As alluded above, the native title is neither an institution of the common law nor a form of common law tenure, but a title is recognized by the common law. In *Fejo v. Northern Territory*[25], the court noted that native title is an intersection of traditional laws and customs with the common law. An application for determination of native title requires the location of that intersection, and it requires that it be located by reference to the Native Title Act.[26]

The nature and incidents of native title as a matter of fact depends on the aboriginal laws and customs.[27] The claimant of native title requires to prove: the rights and interests are possessed under the traditional laws and customs of the aborigine, and connection of the laws and customs with the land or waters. Furthermore, the rights and interests are capable to recognize by the common law of Australia. A valid question arises who will ascertain the existence of the rights and interest in the traditional laws and customs. Section 13 of the Native Title Act, 1993 reads that the Federal Court of Australia will determine the native title of the aborigine possesses under the traditional laws and customs of the aborigine, and the connection of the laws and customs with the land or waters.

The institutionalization of native title firmly shifts the burden of proofing the title on the aboriginal groups whose fate will continue to be decided by white settler institutions. The Act requires a high level of evidence of each aboriginal group's traditional connection which needs to go back to the date when the Crown asserted sovereignty over Australia. Unlike western written history, aborigines' laws and customs are mostly oral evidence. Like *Delgamuukw*[28] case in Canada, the oral testimony of aborigine's culture and custom might fall on deaf ear. The common law of evidence gives primacy of written record as opposed to oral testimony. Furthermore, the ongoing connection is often difficult to prove, especially where there has been widespread urbanization or agricultural development, both of which extinguish the native title under the Act.

In common law, the facts of the case are brought before the judge or jury through evidence so that they may establish the incident. Once facts are identified, the relevant legal principle will be applied to produce the decision of the case. Generally, evidence is taken as a reasoned process of revealing the world through the senses of

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[25] (1998) 195 CLR 96 at 128 [46] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

[26] *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.

[27] *Mabo and others v Queensland* (No 2) [1992] HCA 23[1992] 175 CLR 1, para. 64.

[28] *Delgamuukw v British Columbia* [1991] 79 DLR (4th) 185; [1991] 3 W.W.R. 97.

the witness or the court itself, via eyewitness or expert testimony, documentation or exhibited objects. Many scholars claim that evidence is a matter of persuasion but not purely a 'rational' exercise.[29] It is also claimed that the process of judgment is neither rational nor determinate, and both facts and law are highly constructed, dependent on language, reasoning and discourse for their representation. Therefore, the proof of native title substantially depends on how the evidence in support of the title is presented before the court.

Scholar Twining stated that events and facts have an existence independent of human observation.[30] This statement is particularly relevant for the cross-cultural claim. Aborigines' divine relationship with the land is difficult to understand for non-aboriginal people. Their traditions and customs are not only facts but also a philosophy. The claim of native includes some abstract issues since it is based on their spiritual and cultural relationship. The aborigine believes that their ancestors created the country by singing.[31] The map of aboriginal territory seems like a painting to the western people. Although the common law of evidence allows paintings, dances and songs as supplementary evidence (though not primary evidence); however, the problem lies with how these 'facts' are communicated to a western judge. How does the dance, the song, the iconography explain a fact?

Any documentary evidence is subject to interpretation. Since the native title is subject to the Australian law's capacity to recognize, the court usually follows the common law of evidence. In *Yorta*[32] case, the high court rejected a claim of the native title because of the insufficiency of evidence to prove traditional laws and customs and its connection with the claimed land. The common law of evidence is not enough to recognize a native title. Aborigines' proof of title requires a cross-cultural understanding. Their relationship with the land needs to be perceived through senses rather than understand from a written record. Without having a plural character of evidentiary practices, the native title will remain a discretion of the court. Professor Howes rightly explained that law requires to hear and see from both sides.[33]

5. Conclusion

The paper examined the conceptual differences between common law and indigenous law about land. It also investigated the compatibility of common law in

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[29] Kirsten Anker, 'The Truth in Painting: Cultural Artifacts as Proof of Native Title' (2005) 9 *Law Text Culture* 91, 102.

[30] See William L Twining, 'Theories of evidence: Bentham and Wigmore' (1985), cited in Kirsten Anker, 'The Truth in Painting: Cultural Artifacts as Proof of Native Title' (2005) 9 *Law Text Culture* 91, 101.

[31] See Bruce Chatwin, The songlines, Open Road Media, 2016.

[32] *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.

[33] David Howes, 'Introduction: Culture in the Domains of Law' (2005) 20(1) *Canadian Journal of Law & Society/La Revue Canadienne Droit et Société* 9, 15.

recognizing the native title of aborigine over their land. Unlike common law, land is a relationship to aboriginal people. Being a title recognized by common law, the doctrine of native title fails to appreciate the spiritual and cultural relationship of the aborigine. Like other forms of title in common law, the native title merely provides a proprietary right to the aborigine. Additionally, the way through which the court developed the doctrine raises many issues.

The contrasting view of land in common law and aboriginal law[34] becomes more apparent in *Mabo* case. The court decided the aborigine's land right from the common law perspective. It admitted common law's inability to recognize aboriginal title. Where the Crown validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy the native title, native title extinguished to the extent of the inconsistency. The court assumed fictitiously that aboriginal law extinguishes where the common law is unable to recognize that law. The positivist attitude of the court denied aboriginal custom as law. Aboriginal law is a social reality.

The native title is a kind of proprietary rights under common law and by no standard is an aboriginal right as identified in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), 2007. There is a gulf of difference between settler state granted indigenous rights and the normative content of aborigine right. Native title cannot act as a shield to protect aborigine's exclusive right to their land since sovereign can expropriate the title. Being a settler state granted 'rights', it should be viewed as part of colonialism and not a remedy to it since such rights are invariably controlled and regulated by the state. The institutionalization of native title is a social process bound by colonial structures and ultimately intertwined with power, elites, privilege and the actions, intentions and interests of the actors involved. *Mabo* judgement also ignored the fact the settler state arbitrarily and illegitimately imposed its sovereignty on indigenous peoples, who were distinct political entities with land and sovereignty at the time of the conquest, and many indigenous nations still retain such status.

This paper highlights that the notion of land, meaning real estate, in common law is incompatible with the aborigine's idea of land. The cultural difference between common law and aboriginal custom is hardly possible to reconcile before a court of law. Unless the common law judges come out from their stereotype concept of land, the Aborigines' rights in land will not achieve. As the aborigine's title to their land is based on their spiritual relationship, their title should be ascertained through a cross-cultural approach. Human relationships cannot be a real estate; aboriginal evidence of title needs to be perceived through senses.

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[34] Aboriginal Law means and includes the legal traditions, customs, and practices of Indigenous peoples and groups in a legal system. It also includes internationally recognized rights of the indigenous people in the United Nations Declaration on the Rights of Indigenous Peoples, 2007.

War Victim's Rights and Reparation within International Crimes Tribunal Bangladesh (ICT-BD): An Evaluation of Issues and Challenges

Khadiza Nasrin*

1. Introduction

It is now universally understood that the recognition of rights, interests and role of victims is crucial component to the purpose of achieving justice and 'retributive judicial achievements are superficial unless justice is ensured for the victim[1]'.The International Crimes Tribunal, Bangladesh (hereinafter ICT-BD) is the domestic tribunal established in 2010 by the domestic legislation named 'International Crimes (Tribunals)Act, 1973'[2] for the trial of war criminals and their collaborators who committed mass atrocities, crimes against humanity, genocide and international crimes during the liberation war of Bangladesh in 1971. Despite the prime objective to set up the Tribunals is to come out from the culture of impunity, but surprisingly it was established without including victims in its procedure. There was not even any definition of victims in the original Act, let alone the provisions of right and role of victims to express their views and concerns in criminal proceedings of the Tribunals. Due to the huge concerns and criticisms raised by the human rights groups, NGOs and civil society, the Tribunal by exercising its regulatory power adopted the International Crimes Tribunal Rules of Procedure in 2010[3] to provide definition of 'victim' and 'witness and victim protection' in Chapter VIA. However, there is relatively minor appreciation and inadequate framework for the victims' legal right as only being witnesses at International Crimes Tribunal of Bangladesh comparing with the right and role afforded to victims at international level and recognized by human rights standards.

The redress regime of victims in international criminal law achieved its momentum through the establishment of International Criminal Court by Rome Statute[4]. The significant creation of victims' redress regime at ICC has influenced the subsequently established mixed model of international criminal justice mechanisms,

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1 Rupert Holden, 'Victim Participation within the International Criminal Court' (2013) 3 King's Inns Student L Rev 51, 73.

2 Available at <http://bdlaws.minlaw.gov.bd/pdf_part.php?id=435> accessed 30 April 2017.

3 Rules of Procedure for International Crimes Tribunal, Bangladesh, 2010 as amended in 2011, <https://ictbdwatch.wordpress.com/laws-governing-ict-bd/> accessed 30 April 2017.

4 Rome Statute of the International Criminal Court (hereinafter ICC), adopted July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M (entered into force July 1, 2002).

for example, the ECCC[5] and the STL[6] which have accommodated broad mandate[7] with respect to victims' rights regime. There is considerable body of research focusing on ICC, ECCC and other internationalized tribunals to find out the appropriate way to incorporate victims' rights and interests to empower victims without jeopardizing core functions of criminal justice systems and infringing upon the rights of the accused. On the contrary, the victims' right at ICT-BD has not yet received the same academic attention and research as have got victims of international crimes at ICC, ECCC or other internationalized criminal justice bodies. The aim of this article is to examine whether victims of war crimes can be afforded legal rights in national prosecution of international crimes at ICT-BD and if so, to analyze and assess what categories of rights can be provided within existing national legal system and adversarial structure of ICT-BD, what should be the ambit of victims' rights and to what extent victims' rights can be effectively protected without deviation from common law tradition and jeopardizing accused due process rights.

Although ICT-BD is a domestic tribunal, it has similarity with ICC and ECCC to the extent that both deal with most serious international crimes raising concerns among international community. This article will analyze the current legal provisions of ICT-BD in relation to position and rights of war victims comparing with legal rights at ICC and ECCC to examine what are the existing limitations and potentials to include rights for victims of international crimes within current framework of domestic criminal legal system. This study argues that rights focusing on services for victims, right to reparation and strictly tailored post convict participatory rights for the purpose of claiming reparation can be potentially accommodated within the frame of domestic legal system and adversarial institutional setting of ICT-BD without interfering and deviation to existing structure of national legal system.

2. Emergence of Victims' Rights in International Criminal Justice and Human Rights Norm Setting Regime

The development of growing concerns for uplifting the recognition and protections of victims' rights regime in the context of criminal proceedings can be traced back its origin with the parallel movement for the development of modern human rights law regime[8].As Schabas has noted that 'any real interests in the rights

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5 The Extraordinary Chambers in the Courts of Cambodia established by the 2001 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia and the 2004 Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea.

6 The Special Tribunal for Lebanon.

7 Valentina Spiga, 'No redress without justice victims and international criminal law' (2012) 10 *Journal of International Criminal Justice* 1377, at 1380.

8 Cherif M. Bassiouni, 'International Recognition of Victims' Rights' (2006) 6 *Human Rights Law Review* 203, at p. 204.

of victims in contemporary international law neither comes from international humanitarian law nor international criminal law traditions, rather a victim- focused approach first developed within the related field of human rights law[9]'.

Prior to World War II, the classical framework of international criminal law considered 'notion of sovereignty' as unimpeachable and regarded 'victims as objects of rights and obligations[10]'. However, the magnitude of human victimization during World War II heightened international communities' persuasion to recognize 'individual' as the subject for the purpose of international criminal responsibility which also contributed to make individual the subject of international legal rights[11]. The recognition of 'individual' as subject of international law after World War II worked as ideal baseline for the growing awareness and development of increased recognition of victims' rights and interest. Eventually, the right to remedy for the individual victim was recognized within international legal regime by both regional and human rights treaties[12] requiring states to enact domestic law to protect rights of individuals[13].

The 'victimology' movement emerged demanding monetary compensation of victims of common crimes and claimed that compensation to victim would encourage their cooperation in the pursuit of criminal prosecution[14]. The 1960s victims' right movement got its formal endorsement by the milestone UN Victim Declaration of Basic Principles[15] which was the 'first international standard on the rights of victims[16]'. It recognized 'victimhood'[17] at international level and affirmed that 'victims should have right to prompt access to justice and redress mechanism fully

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9 William A. Schabas, *An introduction to the international criminal court* (3rd edn, Cambridge University Press 2011) at pp. 327-328.

10 Markus T. Funk, *Victims' rights and advocacy at the International Criminal Court* (Oxford University Press 2015), Chapter " Tracing the Developments of Victims' Rights Under International Law", p.1 <http://www.oxfordscholarship.com> accessed 19 June 2017.

11 Bassiouni , above n 8 , at pp. 206-211.

12 Conor McCarthy, 'Victim Redress and International Criminal Justice Competing Paradigms, or Compatible Forms of Justice?' (2012) 10 *Journal of International Criminal Justice* 351, 356.

13 Article 2(3), International Covenant on Civil and Political Rights 1966999 UNTS **171** (ICCPR): Universal Declaration on Human Rights. GA Res. 217A (1Ht), 10 December 1948, A/810at **71** (Universal Declaration); African Charter on Human and Peoples' Rights 1981, (1982) 21 ILM 58 (AfChHPR): American Convention on Human Rights1969,1144 UNTS 123 (ACHR): and European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, ETS No. 5 (ECHR)and Fundamental Freedoms 1950, ETS No. 5 (ECHR).

14 See Bassiouni, above n 8, 210.

15 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/Res/40/34 [hereinafter UN Victim Declaration of Basic Principles] <http://www.un.org/documents/ga/res/40/a40r034.htm> accessed 24 April 2018.

16 Harry Hobbs, 'Victim Participation in International Criminal Proceedings: Problems and Potential Solutions in Implementing an Effective and Vital Component of Justice' (2014) 49 *Texas International Law Journal* 1 4.

17 Mina Rauschenbach and Damien Scalia, 'Victims and international criminal justice: a vexed question?' (2008) 90 *International Review*, of the Red Cross (2005) 441, 443.

respected[18]'.The human rights supervisory bodies started to address 'victim issue as horizontal violation of human rights[19]' and developed elaborate international mechanisms to establish and enforce individual rights for the prosecution and punishment of human rights offenders[20].Twenty years later, the General Assembly adopted more comprehensive guidelines[21] on 'victims' right to a remedy and to reparation[22] and ECOSOC[23] adopted guidelines on child victims and witnesses of crime which have fundamentally strengthened victims' redress regime.

The right to redress for serious violation of human rights had been frequently interchangeably referred as 'right to justice'[24] owed to victims and urged that victims are crucial component of efforts for the protection of individual's human rights[25]. The victims' rights' movement raised the point that the trial must be fair not only to the position of the defendant but also with regard to rights and interests of victims. Consequently, despite the different thinking trends, the retributive and utilitarian schools of thoughts were becoming more or less sympathetic to extend scope of criminal law and criminology for recognizing that victim had a compelling interest in the trial proceeding of crime.[26]

The recognition of victims' right agenda within the context of international criminal proceedings are the outcome of the cross- fertilization of international human rights law, criminal justice discourse, the response of international community, victims' rights group, NGO and the UN following the atrocity occurred in the wake of WWI, WWII in their attempt to attain common goal-justice and redress for victims.[27] M. Cherif Bassiouni succinctly points out that 'throughout the 1980 and 1990s, the cause of victims' rights was furthered as a result of the establishment of *ad hoc* and hybrid tribunals and the International Criminal Court (ICC), various national prosecutions and the burgeoning truth commission industry'[28].

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18 Schabas, above n 9 326.
19 Ibid.
20 Ibid, 325.
21 Robert Cryer and others, *An introduction to international criminal law and procedure* (3rd edn, Cambridge University Press 2014) 483.
22 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by General Assembly Resolution 60/147 of 16 December 2005 <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx> accessed 30 April 2018.
23 Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime of 22 July 2005
24 See Spiga, above n 7, 1383.
25 See Bassiouni, above n. 8 at p. 211
26 Cryer, above n 21, at pp. 482-483
27 Carolyn Hoyle and Leila Ullrich, 'New Court, New Justice? The Evolution of 'Justice for Victims' at Domestic Courts and at the International Criminal Court' (2014) 12 *Journal of International Criminal Justice*, 681, 684.
28 See Bassiouni, above n 8 at p. 211.

3. Rome Statute and Victims' Right of International Crimes at International Criminal Court

Although victims are an inevitable part of armed conflict[29], they had back seat having no status other than limited role of witness for prosecution and their rights were not recognized satisfactorily prior to the establishment of ICC. Victims had traditionally left out of international criminal trials. That was the case with Nuremberg and Tokyo trials, as well as the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). After World War II, the international prosecution at Nuremberg (IMT) and Tokyo (IMTFE) created new era to represent a step forward in international criminal justice by the recognition of war crimes, crimes against humanity and genocide regarding individual accountability for their actions in international arena[30]. The said international criminal tribunals were particularly hailed for their achievements in bringing war criminals to justice and promoting peace and stability in their respective regions.

However, neither Nuremberg tribunal (IMT) and Tokyo tribunal (IMTFE) nor in *ad hoc* Tribunals which followed, namely International Criminal Tribunal for the former Yugoslavia (ICTY) and Rwanda (ICTR) provided the active role and participatory right of victims[31] . Prior to ICC, all the international criminal tribunals only considered war victims' primary role as that of appearing as witness on behalf of any of the parties in the proceedings and accordingly, they failed to address victims' concerns and needs. Studies show that investigations at the ICTR, for example, did not always bear the interests of victims in mind and the ICTR's perceived lack of engagement with war victims created deep disappointment and frustration with international criminal justice. Godfrey Musila observes that inadequate considerations to address needs and interests of victims at ICTR led many in Rwanda to consider the Tribunal 'a wasteful parody of justice'[32].

The sufferings of War Victims had not been adequately addressed at the ICTY, either. Over the last few years, while winding up its activities, the president of ICTY in 2009 stated,

> I fear that failure by the international community to address the needs of victims of conflicts that occurred in the former Yugoslavia will undermine the Tribunal's efforts to contribute to long term-peace and stability in the region.[33]

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[29] Miriam Cohen, 'Victims' Participation Rights Within the International Criminal Court: A Critical Overview' (2008) 37 Denv J Int'l L & Pol'y 351, at p. 355.

[30] Ibid.

[31] Gerard J. Mekjian and Mathew C Varughese, 'Hearing the victim's voice: analysis of victims' advocate participation in the trial proceeding of the International Criminal Court' (2005) 17 *Peace Internation Law Review 1*, pp. 7-15.

[32] Godfrey Musila, *Rethinking International Criminal Law: Restorative Justice and the Rights of Victims in International Criminal Court*(Sarabriicken: Lap Lambert, 2010), at p 45.

[33] Judge Patric Robinson, the president of the ICTY, address to the UN General Assembly, October 2009 <https://www.icty.org/x/file/Press/Statements%20and%20Speeches/President/091008_pdt_robinson_un_ga.pdf> accessed 29 November 2019.

International Criminal Court (ICC) established by Rome Statute in 1998. It is the permanent international criminal court which for the first time has provided codified recognition of most comprehensive and specific participatory rights for victims of international crimes[34]. The old focus towards prosecution and punishment of offenders in criminal justice system has shifted because 'Rome Statute has added restorative justice function with traditional retributive justice mandate by incorporating victims' right to participation and reparation into ICC mandate[35]. Despite ICC is more adversarial than inquisitorial in its structure[36], the participatory rights for victims under Statute and Rules[37] are derived in part from civil law tradition which allow victim to act as *partie civile*.[38]

The Rome Statute's provides expanded role[39] and ambitious scheme of participatory[40], reparatory and protective rights[41] for victims of mass atrocities which are regarded as remarkable progress in the history of international criminal law. It has thus been contended that 'from the victims' perspective, it is not far-fetched to say, the Rome Statute is a momentous advance compared to the ad hoc tribunals for not only the former Yugoslavia and Rwanda, but also Nuremberg and Tokyo[42]'. Indeed, the unprecedented incorporation of participatory rights along with reparation and protection rights for victims at ICC makes it an unparalleled model among the institutions of international criminal judiciary, both historical and existing[43].

4. Victims' Rights Scheme at Courts of Cambodia

The Extraordinary Chambers in the Courts of Cambodia commonly called as 'Khmer Rouge Tribunal' was established in 2006 to prosecute serious international crimes

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34 Mekjian and Varughese, above n 31, 15.

35 See Hoyle and Ulrich, above n 27 689.

36 Scott T Johnson, 'Neither Victims nor Executioners: The Dilemma of Victim Participation and the Defendant's Right to a Fair Trial at the International Criminal Court' (2009) 16 *ILSA J Int'l & Comp L* 489, 490-491.

37 International Criminal Court, Rules of Procedure and Evidence, DOC No ICC-ASP/1/3 adopted 9 September 2002.

38 See Mekjian and Varughese, above n 31, 16.

39 Timothy K Kuhner, 'The status of victims in the enforcement of international criminal law' (2003) 1, 21.

40 Raquel Aldana-Pindell, 'In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes' (2002) 35 Vand J Transnat'l L 1399, pp. 1428-1432 discussed in detail victims participatory rights provided at Rome Statute and Rules of Procedure and Evidence of the International Criminal Court.

41 Rome Statute Arts. 75 (1, 2, 5) provides reparation for restitution, compensation and rehabilitation,68 provides for protection of victims.

42 Marc Henzelin, Veijo Heiskanen and Guénaël Mettraux, *Reparations to victims before the International Criminal Court: Lessons from international mass claims processes* (Springer 2006) 317, at pp. 317-318.

43 Marianna Tonellato, 'Victims' Participation at a Crossroads: How the International Criminal Court Could Devise a Meaningful Victims' Participation while Respecting the Rights of the Defendant, The' (2012) 20 Eur J Crime Crim L & Crim Just 315.

committed during the Khmer Rouge regime between 1975 and 1979[44]. It is the illustrious example of evolution of international criminal justice in Asia-Pacific region which has combined traditional retributive justice model with restorative victim- oriented justice element[45]. It has reflected the legacy of ICC for the comprehensive protection of victims' rights who suffered grave harm and serious victimization. It is essentially a domestic tribunal based on Cambodian's civil law system but jointly operated by UN and Cambodian Government. The ECCC provides notable roles and rights for victims of international crimes which have been hailed as remarkable achievements and unparalleled experiments among all existing international (-ized) tribunals[46]. Being the French model (civil law jurisdiction), without any procedural difficulty it has provided broad scheme of participation for victims. For example, 'the right to call witnesses, to access the case files, to make written submissions on all aspects of trial[47] and 'as civil parties' victims apparently enjoy the same rights as the prosecution and defence[48] who have the entitlements 'to participate in criminal proceedings' and to 'seek collective and moral reparations[49]'.

5. War Victims' Rights and International Crimes Tribunal of Bangladesh

The International Crimes Tribunal is the domestic judicial forum in Bangladesh established on 25th March 2010 under national legislation 'International Crimes (Tribunals) Act, 1973'[50] to 'provide for the detention, prosecution and punishment of persons liable for internationally recognized crimes such as genocide, crimes against humanity, war crimes and other crimes under international law[51]' committed within the territory of Bangladesh, 'particularly between the period of 25 March and 16 December, 1971[52]. In March 1971, when Bangladesh, then East Pakistan was fighting for its independence, the Pakistani Army with the collaboration of their local auxiliary forces and their associates committed large scale atrocities, worst genocide,

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44 Elisa Hoven and Saskia Scheibel, ''Justice for victims' in trials of mass crimes Symbolism or substance?' (2015) 21 *International Review of Victimology* 161, 163.

45 Brianne N McGonigle, 'Two for the price of one: Attempts by the Extraordinary Chambers in the Courts of Cambodia to combine retributive and restorative justice principles' (2009) 22 Leiden Journal of International Law 127- 149.

46 Christoph Sperfeldt, 'From the Margins of Internationalized Criminal Justice Lessons Learned at the Extraordinary Chambers in the Courts of Cambodia' (2013) 11 *Journal of International Criminal Justice* 1111, 1117.

47 Hoben and Scheibel, above n 44, 164.

48 Mahdev Mohan, 'The paradox of victim-centrism: victim participation at the Khmer Rouge Tribunal' (2009) 9 *International Criminal Law Review* 733, 736.

49 Ibid.

50 Hereinafter referred as ICT Act of 1973.

51 The Preamble of International Crimes Tribunal Act, 1973, above n 2 <http://bdlaws.minlaw.gov.bd/pdf_part.php?id=435> accessed 23 April 2017.

52 The Chief Prosecutor V A. T. M Azharul Islam, ICT-BD 05 of 2013, para 02 <http://www.ict-bd.org/ict1/Judgment%20part%202/ICT-BD%20Case%20No%205-2013.pdf> accessed 11 August 2017.

war crimes and crimes against humanity against unarmed people of Bangladesh in an attempt to curb growing liberation movement. It was reported that during nine months long War, about three million people were killed, nearly quarter million women were raped, and over 10 million people were deported to India causing brutal persecution upon them[53].

Regrettably, victims of mass atrocities of 1971 in Bangladesh suffered long denial of justice even after the enactment of ICT Act in 1973. The government of Bangladesh established ICT-BD in 2010 as part of moral and constitutional obligation to end the culture of impunity and to further rule of law by prosecuting and punishing the persons responsible for committing genocide, crimes against humanity, war crimes and other crimes under international law.

The common feature that ICT-BD shares with ICC and ECCC is that it deals with the prosecution of international crimes for the purpose of providing justice to the surviving victims and to come out from the culture of impunity and fight against mass atrocities. Both the ICC and ECCC contain specific references with respect to victims' rights. However, although victims and survivors are considered as direct beneficiaries of justice process at ICT-BD, it is apparent that victims' rights related provision in the founding Act of the ICT-BD and ICT-BD Rules of Procedure[54] are limited and accordingly, victims' views and concerns are marginalized. We will now examine what are the potentials and challenges to accommodate war victims' rights at ICT-BD within the existing frame of domestic legal system.

5.1 Nature of Tribunal and Jurisdiction of International Crimes

The International Crimes Tribunals in Bangladesh was not established with formal mandate and material support provided by UN or international community. For all meaning and purposes, ICT-BD is a national criminal justice institution for prosecuting individuals or group of individuals who have committed crimes against humanity, war crimes and other crimes under international law in 1971. The only international element within the framework of ICT-BD is the 'nature' of the offences that it deals with is the 'most serious international crimes'. The nature of the ICT-BD is described by its official website as follows-

> The Tribunal is a domestic judicial mechanism set up under national legislation and it is meant to try internationally recognized crimes and that is why it is known as International Crimes Tribunal.[55]

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[53] The Chief Prosecutor versus DelowarHossainSayeedi date of delivery of judgment 28 February, 2013 <http://www.ict-bd.org/ict1/ICT1%20Judgment/sayeedi_full_verdict.pdf> accessed 20 June 2017.

[54] International Crimes Tribunals Rules of Procedure, 2010 as amended in 2011 <https://ictbdwatch.wordpress.com/laws-governing-ict-bd/> accessed 30 April 2017.

[55] Available online at <http://www.ict-bd.org/ict1/> accessed 11 August 2017.

The trial process of the ICT-BD is conducted in accordance with the provisions of ICT Act of 1973 and its Rules of Procedure 2010 made there under. Although, ICT-BD is undoubtedly a domestic one, however 'it is not debarred from applying international legal principles in the trial process to supplement the provisions of ICT Act in the interest of fair justice[56]'. The jurisdiction of the Tribunal to prosecute individuals or group of individual prima facie responsible for international crimes has been stated in section 3(1) of ICT Act. As per section 3(2) of ICT Act, the international crimes such as crimes against humanity, crimes against peace, genocide, war crimes, violation of any humanitarian law applicable in armed conflict laid down in Geneva Convention of 1949, any other crimes under international law and attempt, abet, conspiracy or complicity to commit any specified international crimes are within the jurisdiction of the ICT-BD[57].

5.2 Comparative analysis of Victims' Right at ICT-BD with ICC and ECCC

It is now universally acclaimed that rights for the victims of international crimes need to be ensured and protected to achieve meaningful justice in criminal justice process. Despite it is not explicitly mentioned in the preamble of ICT Act, like all other international and hybrid criminal tribunals, the inherent objective and mandate of ICT-BD is to fight against impunity and ultimately to provide 'justice for the victims' of international crimes. Undoubtedly, victims and survivors are the direct beneficiaries of justice process, but surprisingly there was not even the definition of 'victim' in the founding Act of ICT-BD, let alone the framework to address victims' rights and concerns. The ICT-BD by exercising its regulatory power conferred by section 22 of ICT Act has introduced amendment to provide definition of 'victim[58]' and 'witness and victim protection[59]'within its Rules of Procedure. The aim for incorporating the definition of victim and provisions for 'witness and victim protection' is to facilitate their abilities and confidence to participate as witness/victim in the trial procedure of war criminals without confusion, insecurity and fear of reprisal from the accused.

5.2.1Definition of victim

International Crimes Tribunals Rules of Procedure define the term 'victim' in rule 2(26) as 'a person who has suffered harm as a result of commission of the crimes under section 3(2) of the ICT Act, 1973. The section 3(2) of ICT Act describes

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[56] The Chief Prosecutor versus Salauddin Quader Chowdury , delivery of Judgment 01st October , 2013 para 274 <http://www.ict-bd.org/ict1/ICT1%20Judgment/ICT-BD%20Case%20No.% 2002%20of% 202011%20Delivery%20of%20judgment%20final.pdf> accessed 12 September 2017.

[57] Section 3(2) of International Crimes Tribunal Act, 1973.

[58] Sub Rule 26 of Rule 2 was inserted by International Crimes Tribunal Rules of Procedure (Amendment) 2011.

[59] Chapter VIA including Rule 58A, was inserted by International Crimes Tribunal Rules of Procedure (Amendment) 2011.

different kinds of 'international crimes' namely crimes against humanity, crimes against peace, genocide, war crimes, violation of any humanitarian rules, and any other crime under international law.

Looking comparatively, both the ECCC[60] and ICC[61] replicate the broad definition of victim of UN Victim declaration of Basic Principles[62] with additional requirement of 'causal connection' between alleged harm and the accused for declaring who is victim and to provide participatory rights for the victims. The definition of victim at ECCC and ICC include both direct and indirect victims while distinguishing between natural persons and legal entity[63]. Both at ICC and ECCC, the stipulating condition for victim to demonstrate sufficient causal link between harm suffered and charges against alleged accused is both significant and necessary to limit the potentially mass victim participants at criminal trials[64].

The definition of victim in ICT-BD Rules of Procedure articulates only 'victim' is someone who has suffered harm for the commission of international crimes but it is not clarified whether legal person, i.e. organizations and indirect victims such as family members, descendant generations who have suffered collective traumatic experiences of someone killed, sexually abused, child soldiers are included within the definition of victim. Moreover, the Rules do not clarify for what purposes or intentions the definition of victim has been inserted by amendment. Reading the definition of victim with Chapter VIA of the Rules, it appears that the definition is intended only for the purposes of protection of victims and witnesses since no other rights are granted at neither in ICT Act of 1973 nor in Rules of Procedure of ICT – BD.

Hence, the definition of victim in the ICT-BD Rules of Procedure is clearly limited, falls short of international standards and clarity comparing with the definition of victim provided at UN Declaration of Basic Principles for victim, ECCC internal rules[65] and ICC RPE[66]. A number of key legal issues in relation to victims'

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60 The Extraordinary Chambers in the Courts of Combodia, Internal Rules Rev. 8 Glossary <http://www.eccc.gov.kh/sites/default/files/legal-documents/ECCC%20Internal%20Rules%20(Rev. 8)%20English.pdf> accessed 24 April 2017

61 Rome Statute art. 68(3) mirrors the art. 6(b) of UN Declaration of Basic Principles of Justice for Victims Crime and Abuse of Power (1985). International Criminal Court, Rules of Procedure and Evidence, DOC No ICC-ASP/1/3 adopted 9 September 2002. Rule 85 of the ICC Rules of Procedure and Evidence provides definition of victim which includes both natural and legal entity.

62 The UN Victim Declaration of Basic Principles, Annex, para. 1(n 61) provides broad definition of victim as "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States.

63 See Hobbs, above n 16, 3-5.

64 Ibid, 4-5.

65 The ECCC Internal Rules; see above n 60.

rights and role has been clarified and shaped by judicial interpretation and practice at ICC, particularly in *Lubanga* case[67], whereas regrettably judicial practices at ICT-BD have so far paid no attention to shape the definition of victim and the notion, nature and types of 'harm' suffered by the victim as per international guidelines and practices. The reason behind this reluctance of Tribunal is perhaps the founding Act and its Rules of Procedure do not provide any kind of rights for victims of international crimes except the protection and support services for victims/witness.

5.2.2 Protection for Victims/ Witness

The protection and security measures for victim and witnesses 'are difficult and demanding task for any criminal jurisdiction[68]' and it is more pressing need while prosecuting international crimes to ensure deliberate and spontaneous participation of the witnesses without fear of reprisal. Despite it is the responsibility of the state to ensure safety and security of witnesses and victims but unfortunately no legal instrument exists to provide effective mechanism for the witnesses/victims protections in Bangladesh. The ICT Act of 1973 does not provide any provision regarding witness/victim protection. The Tribunal under Chapter VIA of ICT-BD Rules of Procedure has inserted a new Rule 58A by amendment in 2011 on witness and victim protection motivated by physical security, privacy and well-being reasons[69]. However, the provision is insufficient to contain comprehensive aspect of 'witness/victim protection'. For example, the Rule 58A is mainly related with in trial stage protection but no pre- trial or post-trial protection of witnesses/victims are ensured. It fails to recognize the need based protection services strategy particularly for female victim who faced sexual violence and gender-based crimes in 1971.Although, the provision empowers the Tribunal to pass orders towards concerned authorities of the government to ensure protection and security, accommodation services to victim(s)/ witness(s), but it does not provide for effective enforcement and supervisory mechanisms to protect victim/witness in war crimes trials.

The existing mechanism has hopelessly failed to provide efficient security mechanisms to witness and this weakness contributed the killing of recorded

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66 ICC Rules of Procedure and Evidence; see above n 61.

67 ICC Trial Chamber rendered its decision on victim participation in Lubanga trial on 18 January 2008 and subsequently, the Appeal Chamber delivered its decision on the Defence and Prosecution appeal on 11 July 2008.

68 Cryer, above n 21 at p. 485.

69 Rules of Procedure for International Crimes Tribunal, Bangladesh, (n 3). Rule 58 A says "[t]he Tribunal on its own initiative, or on the application of either party, may pass necessary order directing the concerned authorities of the government to ensure protection, privacy and well-being of the witnesses and or victims. This process will be confidential and the other side will not be notified". Sub Rule 02 inserted arrangements of accommodation of witnesses or victims and other necessary measures regarding camera trial and keeping confidentiality as necessary where violation of such undertaking shall be prosecuted under section 11(4) of the Act.

prosecution witness Mostafa Howlader, bomb blast on the shop of the witness Ranjit Kumar Nath and reported death threats against other witnesses/victims[70]. There is no clear provision for support mechanisms that address physical, psychological, and economic wellbeing of victims and witnesses who will testify before the Court. Since the founding statute does not provide substantive provision on 'victim/witness support services and protection', apparently being the procedural instrument the 'Rules of Procedure' of ICT-BD could not introduce comprehensively the substantive matters to ensure 'victim/witness service and protection'.

On the other hand, comparatively looking, the founding statute of ECCC empowers broad power to provide for the protection measures which 'shall but not limited to the conduct of in camera proceedings and the protection of victim's identity[71]' and its internal rules[72] provides extensive protective measures of victims/witnesses. A rich jurisprudence on protection measures of victims and witnesses have been developed by the statutes and Rules of ICTY[73], ICTR[74] and specifically by ICC[75] which provide comprehensive statutory provisions establishing 'Victim and Witness Unit' and specifying victim and witness protection obligations of Prosecutor, pre-trial chamber, and trial chamber to provide protective measures at all stages of the proceedings, particularly in cases of sexual violence. Therefore, protection measures at ICT-BD are not comprehensive rather distressingly inadequate compared to international and hybrid tribunal.*5.2.3 Potentials and Challenges of War Victims' Legal Right at ICT-BD:*

There is growing international consensus and recognition that sustainable justice requires promotion and protection of victims' rights which is more significant in case of prosecution of international crimes because of its hideous nature and magnitude of human victimization. Like all other international, *ad hoc* and hybrid criminal justice mechanisms, the ICT-BD is ultimately aimed at fighting impunity and achieving justice for victims of Liberation War in 1971 through prosecution of international crimes. Against the backdrop of growing convergence between human rights and criminal justice discourse to include attention for the rights of victims with the aim of providing comprehensive meaningful justice, an obvious issue needs to consider that as a national tribunal to which extent ICT-BD can be responsive towards protecting

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[70] Protect Witnesses, newspaper report <http://www.thedailystar.net/protect-witnesses-3871> accessed 24 April 2017.

[71] Article 33 of Law on the establishment of the Extraordinary Chambers in Cambodia <http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf> accessed 24 April 2017.

[72] Rule 29 of ECCC Internal Rules , above n 60.

[73] Article 20 (1) and 22 of the ICTY statute <http://www.icty.org/x/file/Legal%20Library/=Statute/statute_sept09_en.pdf> accessed 24 April 2017.

[74] Article 19(1) and 21 of the ICTR Statute <http://www.icls.de/dokumente/ictr_ statute.pdf> accessed 24 April 2017.

[75] Arts 54(1)(b) and (3)(f), 57(3)(c), 64(6)(e) and 68 of ICC Statute, Rs.16-19 of the ICC RPE.

the rights and interest of war victims consistent with international standards. To answer this question it is pertinent to examine the prevalent difficulties of adversarial criminal justice system to provide extensive rights for victims.

5.3 Limitations and Barriers to Integrate War Victims' Rights

The rights of victims in criminal trial process of Bangladesh have been traditionally confined to that of 'witnesses'. Being based on common law tradition and retributive justice paradigm with adversarial model, the key aspects of criminal justice system in Bangladesh are 'wrongdoers should be punished because they have violated certain legal and moral standards[76]' and 'the rights and interests of the victim should be pursued under civil law using law of tort, as opposed to criminal law[77]'. Because of traditional inherent features of adversarial system in common law countries, the impact of international human rights norm setting regime on victim rights along with victims' rights movement is actually limited in formulation of criminal justice policy in domestic context[78].

The ICT-BD resembles domestic common law tradition with purely adversarial court structure. As part of adversarial system, the provision for the procedure of trial clearly states that victims who called to testify for the prosecution are subjected to cross- examination by adverse defence party[79].Normatively, because of contest culture between prosecution and defence, ICT-BD does not provide victims standing in criminal process as participants along with prosecutor since it would potentially cause immense structural and normative problems within any adversarial systems.

It is pertinent to mention that the scope of incorporation rights for the victims is significantly broad in civil law system jurisdictions compared with common law jurisdictions. For example, the hybrid Court ECCC introduced broader scheme of rights for victims of atrocity based on Cambodian's national civil law system.[80]

The detail discussion on difference between common law and civil law tradition is beyond scope of this article. However, for the purpose of this article, it is necessary to cite the basic structural and normative difficulties to grant broader scheme for victims' rights within adversarial structure of common law tradition. The civil law tradition also referred to as 'European Continental Law' and common law tradition is also known as 'Anglo-American Law[81]'. Unlike civil law tradition, common law

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[76] Brianne M. Leyh, *Procedural justice? Victim participation in international criminal proceedings*, vol 42 (Utrecht University 2011), at p. 358.

[77] Jonathan Doak, 'Victims' rights in criminal trials: prospects for participation' (2005) 32 *Journal of Law and Society* 294-316, at p. 299.

[78] Ibid p. 303.

[79] Section 10 of ICT Act of 1973.

[80] Sperfeldt , above n 46, at pp. 1117.

[81] Leyh , above n, n 76, at p. 70.

system revolves around the 'bifurcated structure of adversarial criminal justice system[82]' and 'the trial has been supposed to center upon the 'sharp clash of proofs presented by litigants in a highly structured forensic setting[83]'. The entire trial proceedings are typically characterized by a highly competitive atmosphere[84] in which 'mode of procedure conceived as a contest between prosecution and defence[85]' with maximum adversarial effect. As Jonathan Doak puts it-

> In contrast to continental systems, victims have no right to be heard and are denied any form of proactive participation in the trial since their interests are deemed to fall outside the remit of criminal trial as a forum for the resolution of the dispute between the state and the accused.[86]

The Rome Statute of ICC has been drafted picking both common law and civil law tradition to integrate inquisitorial features on adversarial trial model[87] in order to grant victims procedural participatory rights. The experience of ICC shows that it is facing immense and multifarious challenges to safeguard due process and fair trial rights of accused while implementing victims' participatory regime due to its 'constructive ambiguity[88]' and 'skewed trial procedure[89]'. The significant proportion of ICC Chambers' time has been spent for mass number of victims' participation issue causing chronic undue delay in criminal proceedings, which is ultimately conflicting with the basic purpose of ICC to fight impunity[90].

Despite ICT-BD deals with international crimes, the mixed procedural model like ICC would not be locally relevant and become faulty because it was established by national law based on adversarial systems and it would be an attempt to add new form of justice structure violating domestic legal traditions and practice. Again, 'the attempt to weld elements of civil law approach into the adversarial system at ICC[91]' raises concern among scholars and subject to high criticism for cumbersome combination[92]. Damaska aptly warns that 'a mixing of procedure can produce a far

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82 Doak, above n 77, at p. 297.
83 Ibid.
84 Ibid.
85 John Jackson, 'Finding the Best Epistemic Fit for International Criminal Tribunals Beyond the Adversarial–Inquisitorial Dichotomy' (2009) 7 *Journal of International Criminal Justice* 17, at p. 22.
86 Doak, *supra* note 77, at p. 299.
87 Jackson, above n 85, at p. 33.
88 Christine Van den Wyngaert, 'Victims before International Criminal Courts: Some views and concerns of an ICC trial judge' (2011) 44 Case W Res J Int'l L 475, at 476 cited War Crimes Research Office, Am. Univ. Washington Coll. of Law, Victim Participation before International Criminal Court 8 (2007), at p.478.
89 Scott T Johnson, 'Neither Victims nor Executioners: The Dilemma of Victim Participation and the Defendant's Right to a Fair Trial at the International Criminal Court' (2009) 16 *ILSA J Int'l & Comp L* 489, at p. 491.
90 Wyngaert, above n 89, at p. 494.
91 Antonio Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', (1999)' 10 *European Journal of International Law* 144, at pp168-169.
92 Leyh, above n 76, at p. 359.

less satisfactory fact finding result in practice than under either continental or Anglo-American evidentiary arrangements in their unadulterated form[93]'.

Therefore, it appears from the above mentioned discussion that the procedural participatory rights for victims are inconsistent with retributive adversarial structure of criminal justice system. The extensive victims' rights for participation and reparation attributed at ICC had been structurally possible because it was constructed adhering both common law and civil law justice model. Again, ECCC has granted broad scheme of rights to victims of mass crimes because it was established within domestic continental legal system. It is evident that without radical structural and procedural reform to the existing adversarial trial structure of ICT-BD or without mixing the inquisitorial approach to existing adversarial model of ICT-BD as have been done in ICC, it is not possible to grant extensive procedural rights for the war victim at ICT-BD.

5.4 Potential of Service Rights and Reparatory Rights for War Victims at ICT-BD

The practice and jurisprudence of ICC and ECCC indicate that procedural framework become more cumbersome with the inclusion of broad participatory rights for victims of international crimes for which the realization of prime goals as criminal justice institutions become far more difficult[94]. The extensive scheme of rights, particularly participatory procedural rights for victims of mass crimes cannot simply be transplanted into proceedings at ICT-BD dealing with international crimes because of its adversarial structure and jurisdiction in question is based on common law traditions of which primary value and objectives is to prove guilt of the accused rather than reconciliation between victim and defendant[95]. However, in order to deliver comprehensive justice and upheld human rights norms to 'empower victim' in trial of international crimes, extensive procedural participatory rights for victims can not necessarily be the only avenue, rather it can be achieved through post convict reparatory rights, for example, service related rights 'with focusing increased victim support in the form of protective measures, medical and psychological services as well as information services'[96].

Undoubtedly, only the judgment and prosecution without addressing victims' needs and concerns is not enough to redress victims' sufferings and harm of international crimes. It is important for the victims and survivors to be treated with respect and care, receiving information to understand justice process, having an enabling environment and receiving protection at all stages of the proceedings[97].The

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93 Jackson, above n 85, at p.33.
94 Leyh, above n 76, at p.359.
95 Hoyle and Ullrich, above n 27, at p. 688.
96 Leyh, above n 76, at p. 362.
97 Jo-Anne Wemmers, 'Victims' Rights and the International Criminal Court: Perceptions within the Court Regarding the Victims' Right to Participate' (2010) 23 *Leiden Journal of International Law* 629, at pp. 641-642, at p. 641.

statutory reformation for providing victims better service and protection rights in common law countries within adversarial justice structure have been broadly welcomed which spread out from the recognition of victims' as consumers of criminal justice services[98]. Moreover, the service rights for victims have been assumed as relatively non-disputable in contrast to extensive participatory rights because 'they neither threaten the public character of criminal justice system nor the due process rights of the accused'[99].

The social and service rights are broadly recognized by various common law countries and have been introduced as effective tool to recognize and protect interests of victims and witnesses for their healing and rehabilitation. For example, UK has a wide range of statutory reformation to provide strong state compensation scheme and victim support services such as improved access to information, upgraded court facilities[100]. The practice and experience of common law countries in granting 'service related rights' and 'reparation scheme' can be an inspiring lesson for Bangladesh adversarial criminal justice system. It indicates that these two categories of rights are reconcilable with current normative structure of adversarial justice model of ICT-BD by statutory reformation without jeopardizing the rights of accused and hampering current domestic criminal justice structure.

At present, the ICT Act of 1973 does not provide provision regarding 'reparation or compensation to the victims. In the absence of explicit provision, ICT-BD cannot order for reparation or compensation for victims. In trying the rape charge in the case of Syed Md. Quiser case, the prosecution side urged compensation for war time rape victims in addition to sentence to be awarded, however, ICT-BD stressing the importance of compensation scheme observed –

> We must say that the Government cannot ignore designing program removing the stigma of rape by honoring and compensating the victims for the supreme sacrifice they laid and also to provide long-term support to them aiming to see that the ripple effects do not continue to haunt our society and community. Mothers and sisters of this land contributed the supreme wealth of their own for the cause of our independence. But in the absence of explicit provision, we going beyond the provision of the Act of 1973, cannot order for 'reparation' or 'compensation'.[101]

The Court also suggested in the above mentioned case that the Government may take immediate initiative of forming Reparation/Compensation and Rehabilitation scheme board for war time rape victims.

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98 Doak, above n 77, at p. 295.

99 Ibid.

100 Mugambi Jouet, 'Reconciling the conflicting rights of victims and defendants at the international criminal court' (2007) 26 *St Louis University Public Law Review* 249, at pp. 255-256, Doak , above n 75, at pp. 294-295.

101 Sayed Md. Quiser judgment, 23 December 2014, paragraph 982 <https://www.ict-bd.org/ict2/ICT2%20judgment/QAISER%20JUDGMENT.pdf> accessed 29 November 2019.

In view of the above discussion, it appears that the service-related rights and reparatory rights for victims of war crimes focusing on 'support, protection, assistance and respect for victims'[102] can potentially be incorporated within domestic judicial context of Bangladesh by statutory amendment of its founding statute ICT Act. Without interfering the existing adversarial procedural structure and function of ICT-BD, minimal participatory rights can be granted to the victims to claim compensation after the determination of guilt of the accused.

5.5 Recommendations for accommodating War Victims' Rights at ICT-BD

To alleviate the silence and gap of the current legal framework on the war victims' rights issue, the following key statutory reformative steps within founding ICT Act of ICT-BD are required to be taken:

1. The existing definition of victim needs to be amended to include both direct and indirect victims as provided by 1985 UN victims declaration with explicit mention of purposes to provide protection, support services and reparation rights of war victims.
2. The notion of harm within the definition of victim needs to be clarified following the UN Victims Declaration and the practices of ICC and ECCC to cover material, physical and psychological harm maintaining the nexus between harm and crime actually investigated or prosecuted. It is also necessary to provide compensatory rights for victims.
3. The comprehensive statutory framework are required to be taken within the founding statute of ICT-BD to address and redress the need based concerns, interests and rights of vulnerable groups especially women and children who was victimized by rape, other kinds of sexual violence and suffered collective traumatic experiences in order to protect them from 'secondary victimization' during the proceedings of trial.
4. An effective witness and victim protection system with enforcement mechanism and formal protection programmes needs to be set up within the framework of ICT-BD. A neutral office with strong administrative capacity under the International Crimes Tribunal Registrar could be set up for protection and support services to victims/witnesses during pre-trial, trial and post-trial stages. To fully ensure its effective role, the office must be adequately resourced and protection officials must be properly trained in assessing protection concerns of witnesses and victims referred to them by any party to the trial or the bench.

[102] Leyh, above n 76, at p. 363.

5. The ICT Act and ICT-BD's Rules of Procedure needs to be amended to empower the Tribunals to award reparation by ordering confiscation, forfeiture of the property for the rehabilitation and providing compensations to the direct victims and indirect victims who have personally and financially suffered by the killing of only bread earner of their family and suffered by the traumatic impact of mass atrocities. A narrowly tailored participatory right could be granted during post-conviction reparation proceedings to the victims for the purpose of claiming compensation without compromising functional adversarial criminal justice system. In order to avoid delay in disposal of cases due to enforcement of reparation proceedings, a separate bench within the existing ICT-BD can be set up to exclusively deal with reparation claims of war victims. A detail guideline about the role of victims and the manner in which the victims may participate in the reparation proceedings need to be formulated within ICT Act of 1973 and Rules of Procedure, 2010.

6. To meet the challenges of limited funding sources and resource scarcity, ICT-BD might follow the model of ICC to establish a 'Victim Trust Fund' which needs to be consistent and feasible to the current socio-economic context of Bangladesh. It is necessary to mention some background on 'Victim Trust Fund' of ICC. It was established by the Assembly of State parties of Rome Statute for the benefit of victims of crimes within the jurisdiction of ICC, and of the families of such victims. The role and structure of Trust Fund is laid down in general terms in article 79 of Rome Statute and the operational design was subsequently complemented by a Resolution of the Assembly of State Parties[103].

   In order to provide victim reparations within the jurisdictions of ICT-BD, apart from confiscating, forfeiture of the convicted persons' property and imposing fine, the international, regional and national, NGO (non-governmental organization) contributions and donations can be encouraged as other 'alternative realistic avenues' to improve support services of victims and meet the challenges of lack of funding and resources of Victims Trust Fund.

7. Improved access to information and notification about tribunal proceedings and progress of case disposal need to be ensured for war victims to provide them a sense of satisfaction about adjudication system of ICT-BD. Support services like information services as well as psychological services need to be explicitly worded by statutory amendment for war victims.

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[103] 'Establishment of a Fund for the Benefit of Victims of Crimes Within the Jurisdiction of the Court, and of the Families of Such Victims', ICC-ASP/1/Res.6, adopted at the third plenary meeting on 9 September 2002 (by consensus).

6. Conclusion

The worst suffering episode in the lifetime of Bangladesh had been committed by the Pakistani Army and their local collaborators during Liberation War in 1971. The comparative analysis of victims' rights scheme incorporated and practiced at ICC and ECCC might be insightful and inspirational for International Crimes Tribunals of Bangladesh to accommodate war victims' rights maintaining international trends and framework of domestic criminal justice systems. The lessons of ICC and ECCC experience about victims' rights scheme have so far indicated that irrespective of adversarial or inquisitorial justice model, the integration of service rights and reparatory rights can be successfully accommodated in a criminal justice system while safeguarding due process and fair trial rights of the accused as well as core functions of justice mechanisms to fight against impunity.

The establishment of ICT-BD in 2010 by the government of Bangladesh can certainly be appreciated for its effort to come out from the culture of impunity and to render justice to victims and justice seekers. It is not surprising that being the common law jurisdiction, the founding statute ICT Act 1973 contained no specific provisions for the rights of victims. Moreover, at the time of enactment of founding statute of ICT-BD, the surge of UN based human rights movement to recognize victims' rights movement had not got their peak of success as at the of establishment of ICC and ECCC.

War victims at ICT-BD are the key stakeholder in its justice process. There will be no substantial justice without ensuring effective support services, protection and reparatory rights to the victims since those are the primary interests for the victims. In the light of the research and analysis, this study draws conclusion that the service related rights and right to reparation for victims are not inconsistent with domestic context of adversarial criminal justice system, however, broad scheme of participatory rights for victim redress is not appropriate within the context of domestic jurisdiction of question in Bangladesh. The government of Bangladesh has ratified Rome Statute of ICC and major international human rights instrument on victims' rights. In the context of growing international human rights standards on rights for victims and emerging international practice to promote and protect rights for victims of international crimes, the Government of Bangladesh should strive to meet international standards on war victims' rights consistent with domestic criminal justice system. It is incumbent upon the Government to incorporate clearly defined service rights and reparatory rights for war victims of international crimes by statutory amendments of ICT Act to address unimaginable harm of victims suffered from war crimes and to provide sense of satisfaction among war victims, survivors and justice seekers about justice mechanism.

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Standard articles written on one side of good quality A4-sized papers, double spaced with wide margins, should be of 8,000-10,000 words including footnotes. The contributions must be in journal style outlined below.

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The text must contain appropriate headings, subheadings and authoritative footnotes. The footnotes should be numbered consecutively and typed single spaced at the bottom of each relevant page. Citations conform generally to a Uniform System of Citation. Thus the style should be as follows:

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Journal Articles: Multiple Authors

Taslima Monsoor and Raihanah Abdullah, 'Maintenance to Muslim Women in Bangladesh and Malaysia: Is the Judiciary Doing Enough?' (2010) 21(2) *Dhaka University Law Journal* 39, 47. [Note: honorific titles (and initials) are omitted. However, M, Md, Mohd and any other abbreviated form of Mohammad which are part of author's name should not be removed. 21 is the volume and 2 is the issue no of the journal. 2010 is the publishing year. Year should be placed in square brackets [ ] for journals that do not have volume number.]

Books: Single Author

Shahnaz Huda, *A Child of One's Own: Study on Withdrawal of Reservation to Article 21 of the Child Rights Convention and Reviewing the Issues of Adoption/fosterage/*

kafalah in the Context of Bangladesh (Bangladesh Shishu Adhikar Forum, 2008) 187. [Note: here 187 is the pinpoint reference. This reference is from the first edition of the book. In the case of editions later than the first, the edition number should be included after the publisher's name. It should appear as: 3rd ed]

John Finnis, *Natural Law and Natural Rights*, (Oxford University Press, 2nd ed, 2011) ch 4. [Here, a broad reference is made to chapter 4 of the book.]

Books: Multiple Authors

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Paul Rishworth et al, *The New Zealand Bill of Rights* (Oxford University Press, 2003). [Note: when there are more than three authors, only first author's name should appear and 'et al' should be used instead of remaining authors' names.]

Books: Edited

Tom Ginsburg (ed), *Comparative Constitutional Design* (Cambridge University Press, 2012). [Note: where there are more than one editor, '(eds)' should be used instead of '(ed)'.]

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Cases

A (FC) v Secretary of State for the Home Department [2004] UKHL 56.

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A T Mridha v State (1973) 25 DLR (HCD) 335, 339. [Here, the case is reported on page 335, and the pinpoint is to page 339. Full stops should not be used in abbreviations.]

Bangladesh Environmental Lawyers Association (BELA) v Bangladesh [1999] Writ Petition No 4098 of 1999 (pending). [Note: '& others,' '& another' should be omitted.]

Shahida Mohiuddin v Bangladesh [2001] Writ Petition No 530 of 2001 (unreported).

Parallel citations should not be used in citations of Bangladeshi cases. But in citations of United Kingdom Nominate Reports and early US Supreme Court decisions, parallel citations are used.

Statutes (Acts of Parliament)

Evidence Act 1872, s 2. [Note: 'The' should not precede the name of the statute, and comma (,) should not be used before the year]

Evidence Act 2006, s 15 (New Zealand). [Note: when necessary, give jurisdiction in parentheses to avoid confusion.]

Delegated Legislation

Family Courts Rules 1985, r 5.

Financial Institutions Regulations 1994, reg 3.

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