
“The purpose of the meeting was to discuss the current challenges faced by the ICT in fulfilling its mandate through an independent, fair and impartial judicial process. Speakers included Advasiful Islam, Prosecutor at the Bangladesh International Crimes Tribunal; Schona Jolly, Bar Human Rights Committee of England and Wales; Ahmed Ziauddin, Professor of International Criminal Law; Toby Cadman, Defence Counsel.”

Chair:

It is a privilege today of introducing four speakers and hopefully beginning a discussion also with other participants on the Bangladesh International Crimes Tribunal, the name should not lead us into thinking that this is one of those hybrid courts, or certainly the international courts, like the International Criminal Court. The International Crimes Tribunal relates to international Crimes which was established under national law to deal with crimes under international law but in a domestic legal setting. It is perhaps one of the most clear examples of national prosecutions for crimes under international law that in many ways took inspiration or even some of the applicable laws from people who are better qualified than me, from the Rome Statute system. At this Assembly of States Parties we have heard this particularly emphasised and this certainly is one of the positions that we have been pushing for a long time, including in Rome, that the ICC is not the place to bring all crimes under international law but is the machinery whereby only the cases where countries are unable or unwilling to do their responsibility which is to investigate, prosecute and provide justice to the victims.

You will hear different points of view and this is perhaps this is the greatest value of this session on the ICT, we are extremely privileged and also very grateful to Mr Islam who is a prosecutor at the ICT for having made it to the Hague, it is a long way to come and we were somehow able to fit him into an existing travel schedule so that he was able to join us.

We are also very pleased to welcome Schona Jolly who is a Barrister in London and she will speak from the perspective of the Bar Human Rights Committee of England and Wales. We have other distinguished experts from civil society that will be joining us, Mr Rasheed is representing a civil society organisation called the ‘International Crimes Strategy Forum’, he is based and works at Oxford University in the UK and very importantly for us to give an balance to perspectives. We also have perspectives from one of the international experts on international crime tribunal who is by profession defence counsel and has worked in many different both domestic and international jurisdictions dealing with crimes of international law, who is Toby Cadman. So we have a fair spread of perspectives and we hope to make this a dynamic discussion, so I would ask first of all our panellist to make a relatively short introductions so that we can then throw questions at them, I would be gathering questions and either assigned then to a particular speaker or throw them to all the panellists based on what we have from the floor, so feel free to prepare as you listen what you would like to ask and we will try to have it as a debate.

First of all, I will ask Mr Islam who is Prosecutor at the ICT to give us a broad stroke idea of the Tribunal, mandate, context and of the efforts of the office of the Prosecutor to provide redress the victims of crime.
Mr Islam:

Good afternoon everybody, first of all I salute the chair and also the dignified persons and professionals over here present and thanks on half of Bangladesh and also the prosecution team. At this moment very shortly as the chair said that I will submit in details, I will take a short time first of all.

Formation of Tribunal

By 1971 we had the atrocities that committed by the West Pakistani regime it was a coalition between the civil Government and the military Government both parties, having East Pakistan the Bengali nationalism with the majority that continues, that the Bengali majority from back beginning of the 1900 the history says, this history you can get from the Genesis of Bangladesh, the book written by a Barrister, forgotten that name [Subrata Roy Chowdhury] from Calcutta, and it was printed in the USA at that time in 1971 and 1972. That's the basic book he wrote and on the light of that we got a lot of materials to come up with the International Crimes Tribunal Act 1973 which was promulgated at that time.

In 1975 Sheikh Mujibur Rahman along with his family members was killed, after that the Society of Bangladesh was unable to bring those perpetrators of 1971 into justice and before that I should have a silent moment to celebrate to observe for the martyrs of that time and at this stage I will be requesting everybody including the chair, I would request to have a minute for a standing ovation

for in the memory of our martyrs in 1971, they have sacrificed their life, so may we please stand up [everyone in the room observes one minute].

Thank you

We always remember our martyrs that have given their life and sacrificed and also there are some of the victims still alive with their permanent disabilities and also longstanding traumas we visit them.

So it is our responsibility to come up with the fair justice to end the impunity. So I am going back to the 1973 Act, to make it short, what the 1973 Act as of today stands it has got very vital and very important issues, sections, that always gives the guarantee of equal treatment to the defence and prosecution which is, there is a bail provision, where in the other international laws of this type of statues they have not but we have, we do have the bail provision. We do have the review provision that any orders that the defence or the prosecution aggrieved on, they can within seven days call for the review of that order and also we do have the appeal provision to the appellant division as I mentioned [inaudible] that status of these international tribunal is consisting of three High Court...
Judges which is over the High Court Division because in Bangladesh the High Court Division is always consists of two judges, high court judges. So the status of this Tribunal is over the High Court and just below the supreme authorities’ appellant division. So at this stage, any appeals goes from the Tribunal is only to the Appellant division, for the purpose of the acquittal or the conviction.

Now another set of rules and the provisions and structures that we do have is victim and witness protection we do have for the interrogation the accused person, shelter, safe home and it is very much designed as per the provision which meets the standard of international standard. And also when the process of interrogation goes a physician standby for accused person and also one lawyer will be for the accused person will be there. So it is [inaudible] the accused can be taken care of right away about his rights and right away about his health.

Also, it is the nature of the Court is the open trial, we do not have, not less than like from different News agencies, the reporters over there, they have the sitting arrangements as Mr Toby Cadman also visited that court room, he knows it, he saw it, he was an observer there. So it is quite open trial, open to everybody, journalists, reporters, news reporters like 25/30 always from different agencies are there, every day they have their fixed assignment to be there. Also, as for the Tribunal, you know we as prosecutors sometimes feel that the Tribunal is treating us as a stepson and is very much accused friendly, whatever application they come up with, the tribunal was very happy to entertain and fix a date for a hearing and not a single application was denied right away and though the Tribunal have that power and the act gives them the power to do that, but there was, if they choose to expedite this system they can just make it at the side of the application or without giving any time, they can just ignore it or make a no no to that.

But still the Tribunal was very much happy to embrace those applications and say okay we will fix this one maybe after seven days. So that way the Prosecution and the Defence also get there time windows to get ready and have decent time to face that. So in that case the Tribunal is sitting openly and any sort of objections or submissions from the defence is always welcomed by them and has been given proper priorities always with priority in that case. Also as I mentioned the observers, observers from the worldwide we received from the US Stephen Rapp, Mr Nicolas over there, then recently we had an observer from Uganda, Chief Justice of Criminal Division came in, we are often receiving a lot of international observers and here I also invite you, all of you to have a visit to our country and have a visit to our Tribunal and enjoy and see, share our knowledge and share your knowledge to us and comment on our performance and everything.
In the Prosecution team I would like to say one thing, is our chief prosecutor [name inaudible] has a long standing experience of more than 50 years in Criminal practice. So he is very efficient, he is very knowledgeable in this standing and also that the Bangladesh is part of British India and having a 250 years long standing judicial experience and decisions and we embrace decisions from all over the World and nowadays we are very much open to take decisions of the other system, which of course, matches, most of the things matches with our existing law, International Crime Tribunal Act 1973. And very recently we have passed an amendment into the act of, for three things, there was a window of 60 days to go for appeal from the Tribunal to the Appellate Division against any acquittal or conviction. That time frame has been reduced to 30 days because 60 days for no reason we can’t keep our accused person like 30 days more in jail, taking that consideration also, we are trying to shortcut the trial process in the sense the accused that should not be suffered unduly staying under custody. So on that point it is reduced to from 60 days to 30 days.

Also another provision included in the current amendment is that the Tribunal will be passing the judgement and delivering the certified copy of that judgement that very day so we save time or the party that wants to go for an appeal they get the document, they don’t need to wait for the certified copy for like one to two weeks or something like that because the bar of the time is calculated like this, when the certified copy is in my hand and from that day I will calculate 60 days or 30 days so here the Tribunal is very particular to deliver their judgement and give deliver the certified copy at that day so to save time and give an enough nice time to the party that wants to go for appeal.

Another is, there are some accused person when they heard of their position they know it’s a, what they did, during 1971, now last 35 years they have been into powers in so many ways and those people were ministers, they were the flag carriers that’s the irony for Bangladesh and now they have enough power, they have enough money, enough resources all over the world and they can really spend those money to do anything they want. At this moment also what we see is, what is our experience is that when they know there position they try to abscond from the Country and in the meantime we have three accused persons that is staying outside Bangladesh which is inside in a very powerful Country. So we urge from this table also that globally all nations whoever believe in Humanity here, is no peace without justice we say, so from this table I will be calling to the World Forum that nobody should be interested to keep any those accused persons inside their Country. So once the judgment is there then he is a person either acquittal or convicted. If he is convicted person
then no nation should be keeping them into their house and for that reason if in absentia trial we added a provision a section that this tribunal can hear the cases or go for trial in absentia of the accused person, of course, when an accused in not there and also is not providing a lawyer then state has their own responsibility to provide a state lawyer there, so that is another option there that we do have for the Defence, for the accused to go for their Defence and those Lawyers when they select, they’re totally neutral and from the other forum not even having a touch of belief on the Prosecution teams matching with their third process, so they find totally neutral professionals to speak for the accused person in the Court, that is also there. As I have, actually I want to go into due process also, if we look into the due process of the Court, so far I have already given you little account about the role of the Tribunal that …from that light you can really get an impression that our Tribunal are taking the role of the accused friendly, so far from the very beginning.

As for the prosecution team we face a lot of hard time because if the Court does not give us time, we didn’t ask for time, if we need, they don’t allow us time, so in that case we have to be very rush. We work day and night, we are only 14 prosecutors we give our full time and we never do any other thing unless you now, only with this subject matter, wherever we go we just think about this and if you have any questions, any concerns your most welcome from any corner as the chair permits and I will say, I really thanks for listening, thanks to everyone…and everybody thank you so and the audience.

Chair:

Thanks the Prosecutor, I am sorry for cutting you off, we want to hear more from you I think it maybe more movement and more engaging if we have a little more question and answer…I am sure that people are very anxious to hear more. It is now a pleasure to hear different perspective, Toby Cadman is a, I mentioned he is a working on international criminal justice in many jurisdictions and he has particularly been following the Bangladesh Tribunal so he comes and shares his expertise and his perspective.

Toby Cadman:

I would also like to thank ‘No Peace Without Justice’ for organising this event and this is something that we have been striving for probably the last 2 years to actually be able to share a platform with
representatives of the Prosecution and representatives of the Government, those speaking on behalf of the Government, in order to discuss these issues.

I have been quite, I would say – critical – of this process in the past and I don’t consider this to be a legitimate judicial process. I have listened to the Prosecutor, I have concerns with many of the points he has raised, I only have 6 minutes now and I will try to address some of those issues, if questions are asked but is its particular enlightening for me to sit next to the Prosecutor and listen because I am not allowed into Bangladesh anymore. I was prevented from entering Bangladesh in August of last year because I have been critical. I have spoken quite openly in a number of different forums saying that I don’t think this process meets international standards. I actually think it falls far below international standards, the one thing that I will share that I agree with the Prosecutor that is the nature of this conflict. 1971 saw victimization on a massive scale that needs to be recognised and there needs to be a judicial response to that. I do not believe that the International Crime Tribunal and the Government of Bangladesh has shown itself to be capable to run these trials properly in the interest of justice, bringing justice to the victim.

I would like to set out a number of concerns that we do have and many of these concerns I would say coming from me, I am a member of the Defence, so my statements are for a purpose. I am not claiming to be impartial; I represent the interests of a number of individuals who currently face trial. One of the issues that the learned Prosecutor made was the question of bail and I disagree completely with the comment he has made that there is a right to bail. There is no right under this procedure, when bail applications have been made the refusals by the Tribunal have been on the basis that the Defendant are not sick enough so that they don’t qualify for bail.

They gauge this procedure solely on the gravity of the allegations and that is of great concern and as we were concerned we filed urgent appeals with the United Nations Working Group on Arbitrary Detention. That body issued an opinion which was published in February of this year stating that all of these individuals are detained arbitrarily and in breach of international law. They particular made the point that the due process concerns are what lead them to believe that this process is Arbitrary and they made a recommendation that the act should be brought in line with the Rome statute, which it is not, and international covenant on civil and political rights, which again, it is not. We have
filed subsequent appeals with the working group and we are expecting further opinions to be issued by that working group shortly.

I appeared before the working group yesterday in Geneva to set out my concerns. We have also raised concerns with the special rapporteur on independence of judges, prosecutors and lawyers, because we are deeply concerned as to the independence and impartiality of this process. In particular, we have raised concerns over the chairman of Tribunal who is a member of an investigative commission in the early 1990’s that investigated these crimes, largely in relation to those who are now facing trial. When I challenged the chairman by writing a letter to him and asking him of recuse himself on the basis of these concerns. I was reported to by my Bar Council by the Government of Bangladesh for disciplinary measures which the Bar Council thankfully dismissed. The Chairman acknowledges his involvement in this process but does not consider it necessary to recuse himself. One of the problems in this particular area is that the 1973 Act does not permit any challenge to a judge, the jurisdiction of the Tribunal, or any decision it reaches.

The learned Prosecutor spoke about review, there is a right to review any decision issued by the Tribunal and that is correct, there is, to the same judges who made that decision. There is no right to challenge it to a higher level of authority, there is no right of judicial review, there is no right of interlocutory appeal. There is only the right to request those same judges within seven days, as the learned prosecutor has rightly stated, to review their own decisions. We haven’t been particular effective in getting those judges to review their own decisions – unsurprisingly.

The learned Prosecutor also spoke of the right to appeal being reduced from 60 days to 30 days, again that is correct. I consider it rather to be rather dishonest… I do apologise, the Prosecutor was not the one who made the amendment. The change in the law from 60 to 30 days has not been amended in the interest of the accused, it has been amended to accelerate these proceedings and the Tribunal is under huge pressure to accelerate these proceedings because members of the Government frequently make statements on timelines. They have made statements as to the conclusion of these proceedings. That these individuals will be convicted and will executed, these are all capital cases. We have concern that the level of interference in this process by the Government is rendering this process illegitimate. There has been comment about the rights of the accused and that this is a Defence friendly process, I couldn’t disagree more strongly; this is not in accordance with universal principles; universal standards as we understand and in order to give one
example of where that is a false statement, is that the amendment to the First Constitutional
Amendment. The Constitution of Bangladesh has a number of fundamental rights set out in the
constitution. Anybody charged with an offence under this war crimes legislation has those rights
removed by virtue of the of the First Constitutional amendment, they not apply to these individuals;
they cannot rely on their Constitutional protections.

The presumption of innocence is frequently violated by the Government by making statement as to
the conclusion of these proceedings as to the guilt of the accused and in particular one statement
which is of grave concern by a member of the Government has stated that “anybody who puts
themselves forward as a Defence witness for Sayedee, the first accused should be considered a
traitor to the Nation and should be dealt by the Public accordingly”. That kind of remark is
aggravated when you consider that one of the Defence witnesses who was previously a prosecution
witness was recently abducted outside the Court building. This Prosecution witness has agreed to
give evidence for the Defence. We have filed a motion for him to be permitted to give a statement
and he was abducted and he remains missing. I know that our colleagues will disagree that he was
abducted because the counter argument has been made that it was the Defence that actually
abducted this witness in order to cast doubt on the legitimacy of these proceedings. The point that I
would like to make is that whoever is responsible for abducting this witness, it requires a full
independent investigation and this particular event is indicative of these proceedings.

The point that I would like to make clear is yes there should be trials; I do not oppose any judicial
process. There should have been trials 40 years ago and I agree with the learned Prosecutor and I am
sure that my colleague to my left will make the same point there should have been a trial process a
along time ago, the International Community should have supported Bangladesh in establishing a
judicial process. Bangladesh is now a state party to the ICC and certain responsibilities must flow
from that membership and this is a process which is deserving of an international tribunal not a
domestic tribunal.

The final point I would like to make is that there has been much talk of the status of this Tribunal
whether it is national or international. It is not international; it is international in name only. The
question is whether it can be considered as a domestic Tribunal and again I would say No, it cannot
be considered as such; it does not apply domestic law, only the 1973 Act which is domestic law but it
does not apply to criminal procedure act, the criminal evidence act and it excludes the fundamental rights under the Constitution and it prevents any challenge to higher authority. Again, there is a right of an appeal to the High Supreme Court but that procedure has not been concluded. We have no idea other than we have 30 days to appeal after a trial which has lasted 18 months, we have no idea what that appeal procedure is going to be.

I hope that my brief remarks has invoked interest and so that there will questions asked. I fully expect my colleagues to disagree largely with what I have said, because I am representing one side but I am here to respond to any questions that you have. Thank you.

Chair:

Thank you for that Toby, sorry for interrupting you earlier and I obviously thank you also for the disclaimer that you represent one side, but the Defence is an essential side of any criminal justice process and of course your passion is part of what makes you a great defence lawyer in many jurisdictions. Thank you for your statement, I was going to go to Shona but it might be more interesting to have a Civil Society perspective first. Human Rights organisations are often at the forefront in the fight against impunity and they have according to many been part of the reason the ICC exists and surely any observer of the ICT in Bangladesh will recognise that the civil society advocacy was one of the reasons the ICT itself eventually was established. Also civil society and human rights organisation are at the forefront of the fight for Human rights including fair trial. So I now give the floor to Rayham Rasheed who is from the Bangladeshi civil society organisation International Crimes Strategy Forum and teaches at the University of Oxford. How do you reconcile different views on the ICT what is the Human Rights organisation perspective?

Mr Rasheed:

First of all thank you No Peace Without Justice, this is probably the first time we are seeing on one table the prosecution and member of the defence and I can see many civil society actors here as well in the same room which is great, a process like this needs to have discussions like this, like what we are having today. I will try to be very brief and there are many points Mr Cadman and Mr Islam raised and I am I am not sure as to how far I can cover but let me be very brief.
Mr Cadman mentioned and rightly so the Tribunal, the Act claims to be domestic law but does not follow the civil and evidence act.

My humble opinion is that the ICT Act, I consider it to be a self-contained act. I say self-contained act in a sense that not only substantive law having the definitions but it also lays down the procedure, it also lays down the evidence rules and probably there is good policy behind them. I have my own views and I hope to discuss these things in more detail.

Mr Cadman also mentioned that Bangladesh as per the Rome Statute has an obligation to the ICC...[inaudible] yes Bangladesh government has signed and ratified the Rome Statute to the International criminal court with itself a demonstration of commitment on the part of the Bangladesh Government towards ending impunity. It was not necessary for Bangladesh Government to ratify or either to sign it because as we all know the ICC does not have jurisdiction to past crimes...

What I feel, in fact it is not what I feel, whatever the obligations of the Rome statute imposes the obligation is very clearly mentioned in the treaty and that is my understanding of the treaty and that it is how it works in case of every international treaty and my reading of the international Rome statute is the only two obligations that I could find in the Rome treaty are the obligation to co-operate in the sense...[inaudible] when member state prosecution is a state party it will help with the investigation, help with resources, logistics and that is my understanding.

The second obligation as per my understanding, is to contribute financially, that I mean the subscription to ICC, apart from those two obligations I would be very happy if someone can quote me where something is clearly written in terms of obligation of state party so that is my humble opinion to Mr Cadman.

Mr Cadman rightly said that the Tribunal made some rules introducing the provision of review and it is done by the same judges, that is true; and there is no provision of interlocutory appeal from these decisions, that is also correct. The way I see it, the whole point of review or any re-thinking of a
decision, we have to look at whether the accused, whether the parties are getting the chance actually to rectify the mistakes, that is my understanding of the whole process. My understanding is that given the... [Inaudible] that even without interlocutory appeal there is still a scope to rectify if there is a mistake because any party can actually appeal a final decision and why there is no interlocutory appeal why there is only appeal, my understanding is to probably prevent endless [inaudible] reviews for appeals...[inaudible] because we have already waited 40 long years for this process to begin; I as part of the civil society, I feel it has been delayed enough.

We should also think about the defendants we can’t keep in custody for endless period, the trial should go on whatever outcome will be decided soon. It should not be delayed for any endless period and reviews in Bangladesh as the legal system works...[inaudible] there have been a couple of studies like showing how actually reviews are dealing in the justice process so I see no reason why it would different in the case of the ICT.

Mr Cadman rightly mentioned that he actually personally wrote to the chairman of the tribunal asking him personally to recuse himself. The point I would like to mention to this house is that when he wrote that application there was actually a pending procedure because two days later there was a review date in the tribunal to have an open hearing. I, actually any person with the slightest sense of rationality would think it is quite usual to write to a judge directly on matter, especially on a matter when it is pending. However, he rightly said that the judge reported the matter to the Bar Council and the Bar Council dismissed the objection. Here is one clarification there is one actually, there were three objections I had opportunity to read the document. Three objections, one was the issue of content; I don’t think the issue of the content was dealt by the Bar Council at all. The only two grounds that were dealt by the Bar Council was whether Mr Cadman broke any practice rule that is applicable in England and probably in that sense it was up to the Bar Council, the bar council has a final say in that matter.

Chair:

We are going to have more questions. Thank you very much for that, the different voices of different perspectives, I think it is useful to have a human rights civil society perspective, maybe there are other human rights organisations that can also jump in the remit during the debate later
on, so I am sure that you will have the opportunity to answer also further questions......[inaudible] so I guess my next question Schona Jolly is a barrister in the UK and she is representing the Human Rights Committee of English and Welsh Bar and Schona what is your impression on equality of arms, what is your, what idea have you made both here at this session but also in your examination of the ICT procedures, what can you give us?

Schona Jolly:

We thank you Peace Without Justice for organising this very interesting forum between different views, just before I answer questions on equality of arms, I thought I should state the organisation of which I am representing today. It is the Bar Human Rights Committee of England and Wales, it is the international arm of the Bar of England and Wales and we have a mandate to have a look at the rule of law, human rights, upholding justice as well as the independence of judges, protection of judges and lawyers worldwide but not within the UK.

Last week some of you may have seen that we issued a statement about our concerns on aspects of the Bangladesh Tribunal and I will invite you to look at that statement on our website, if you haven’t already. We have a number of concerns about the fairness of the Tribunal proceedings and those concerns arose most recently following the alleged abduction of the witness Bali and I will talk to you about that in just a moment once I have answered the chair’s question in relation to the equality of arms. We raised a number of questions about our concerns about the fairness of the proceedings and in fact, I a terribly concerned to hear that my colleague talk about the notion of review and appeal and it seems to me that is the problematic notion within the Tribunal practice perhaps someone would like to ask questions about that. One of the concerns about the equality of arms that it is absolutely imperative in order to have a fair trial is that both parties are given effectively a proper opportunity to present their case and to defend their case and in one of the ways in which judges can ensure that is to ensure that both sides have an opportunity to call evidence which they consider relevant and pertinent to their case.

One of the concerns that the Bar Human Rights Committee has had relates to exactly that point, what we understand is that there have been limitations which we consider to be unreasonable and disproportionate placed by the number of witnesses that the Defence team can call and that in itself
is a real obstacle to the notion of equality of arms and what we understand has happened is that the
prosecution initially indicated that they were going to call some 138 witnesses and as I understand it
no objection by the Tribunal was raised to that number of witnesses. What we then understand that
in fact happened is that the Prosecution called some 28 witnesses with a further 16 witness
statements entered into evidence under Article 19(2) which permits that in certain circumstances so
the Tribunal effectively had 44 witness statements or 44 witnesses before it from the prosecution.

The Tribunal had perhaps surprisingly asked for a list of witnesses from the Defence and that list had
been had been set at 48 witnesses. As I understand it, the Tribunal has recently requested that that
list be reduced to 20, and that no explanation has been given other than that it would be
unreasonable to have more than that number and we consider that to be potentially unreasonable
interference, in the way in which the defence wishes to conduct its case, it amounts as it seems to
one witness per charge, it amounts to half of the witnesses that they indicated they wished to call
and it amounts to in fact half of the witnesses that the prosecution have called.

At the very least if there is going to a restriction on the number of witnesses for reasons of
proportionality that those restriction should come as a result of relevance not on sheer numbers and
certainly the impression has been given by that is that the desire to expedite the proceedings
without giving both side an opportunity to call their evidence is a real concern. It is that background
which we understand led to an alleged abduction of the defence witness Bali and what we
understand happened is that the defence then filed a petition for further evidence to be called by
Bali and I think 2/3 other witnesses who we were told were going to say that the evidence they had
been set to be given by the prosecution was not correct and that their prosecution statement was
not correct.

That hearing was due to take place on the 5th November 2012, it had been fairly well recorded
through a number of statements from number of different of sources as to what the defence said
happened on the morning of the 5th November. The defence lawyers told the court shortly after the
incident alleged to have happened, that the following things took place: that the defence witness
Bali was driven to the Court buildings and at about 10.30 am that morning was asked to get out of
the car right in front of the Court, effectively the steps of the Court by two plain clothed men who
identified themselves as special branch and Bali was then bundled into a white van and the real
concern that BHRC has is that he has not been seen or heard from since and this is an alarming turn of events for any tribunal in particular a tribunal that is dealing with capital offences and where the final sentence is so severe relating to crimes of the utmost severity. What we understand has happened is that the defence asked the judge to order an investigation and we understand what then happened the judge charged the prosecutor with investigating that alleged abduction and the BHRC considers that this was an highly inappropriate direction in the circumstances, given the severity of the allegations of abduction of a witness it was absolutely essential that that there should have been an independent and impartial investigation ordered immediately and that has not taken place and what in fact happened was that the prosecution came back a short while later and simply alleged that that the whole incident had been fabricated and in fact a press briefing offered by the office of the Prosecutor on the 8th November 2012 effectively said the abduction claim had been fabricated by the defence in order to bring the Tribunal into disrepute. Whatever the truth of the facts as to what happened to Bali on the 5th November 2012 those facts have to be established immediately and any failure to do so will really invalidate the credibility of these proceedings. So the BHRC has called to give the Bangladeshi authority to immediately order an investigation, an independent and impartial investigation and of course, in particular, to find out what has happened to Bali.

Chair:

Thank you very much, so different opinion so different perspectives. I don’t know whether we want to have a quick 3 or 4 words around the table before we open the floor or the prosecutor would like to respond to the questions directly.

Prosecutor Mr Islam:

Regarding the Bail case I wanted to update one thing that in last February 2011 when this witness was a prosecution witness and all of a sudden who was missing and often when a witness come to the prosecution and it is under the prosecution they have to stay in Dhaka for a little longer so everybody have their relatives and they request us to go to the relatives house or sometimes to visit their daughters or something like that, so he took that plea and he was given a chance to visit his daughter, now in the meantime he got missing, when he was missing and we and the relatives of Bali was looking for him and his daughter filed a GD entry with the Police about his missing now after that all of a sudden when in that very case, Sayedee’s case, the defence witness was closed on 23rd of this October 2012. After that the Defence have made, on that very day the 5th November 2012...
was fixed for the final legal argument now in the meantime after the 23rd October defence came with an application to produce additional defence witness but didn’t name about Bali.

Now as they know very well that prosecution witness Bali is missing from February if defence got that witness why didn’t they report to the Tribunal or to the Police that this missing person that we have that address and we got it, so let the Tribunal call for this witness. They didn’t do it. All of a sudden without mentioning for producing additional witness they just file a petition to produce an additional witness without mentioning his name, so no people, no parties know about the existence of Bali at that time and immediately in fact that the defence bring him to the Court area without anybody’s notice now and they claim he has been abducted again from the Court, now if any other agency wanted to do that they don’t need to do in a [inaudible] manner.

Now this is a fabricated thing they wants to make the tribunal bad, they wants to put a question before the administration and make nullification of all the stuff that this is not acceptable and in the processes also they concealed they were not fair enough to the Tribunal for disclosing about Bali, here also I from the prosecution disagree from the standing of the Defence about Bali.

Chair:

Toby can I come back to you on that, we have a few more questions, we have got issues of review verses appeal, we have got issues of whether or not there is a sense of pressure to conclude proceedings. We have got issues of time for appeal whether that is something in favour of the accused, the prosecution or neither. So we have a lot of meat on the fire; we have got disappearing witnesses that are disappearing for the Prosecutor and then disappearing again on the Court steps; so lots of stuff but I would like to take some more before we go around again and I notice that a few people that have indicated that...

Audience Member:

Thank you for the interesting presentation, I have to say I am not quite sure what to believe, I have researched Bangladesh but not in terms of trials...
Chair:

Please introduce yourself

Audience Member:

I am Kjell Anderson from the Hague Institute of Global Justice and I did a small bit of research before this on 1971, so I have a comment, a question but for the prosecutor just very generally speaking I was wondering how many people have been charged actually, how many trials are on-going but also I was wondering if the crime of genocide has been charged and I know in terms of the situation in Bangladesh there has certainly been a debate whether Genocide is applicable as most of the victims were, perhaps, political opponents or social groups so I was wondering about that. I also had a question for Toby Cadman, I think you used to work in the court of [inaudible]...

Toby Cadman:

Prosecution

Audience Member:

With that in mind, one comment you made very briefly in your presentation was that you did not understand why is should be a domestic tribunal for international just more on theoretical why do you think it can't be a domestic tribunal, why do you think there has to be an international component and I know the court of the [inaudible] has its own nature but I am curious as to why you think that.

Chair:

With you permission I would take some more, if we can mark down the questions I have Grey Guy-Smith.

Greg Guy-Smith:
Thank you very much for the interesting presentation, listening to the comments made by the from all the speakers there is one thing that you do agree upon is that I would call a rush to judgement whether or not you believe that it is appropriate or not of all parties indicated [inaudible] tight schedule and with regards to the issues reducing the time of appeal considering as I understand this is a capital case. If the accused is convicted, he needs further time to perfect their appeal will they be given that time or is the 30 day rule which you have jurisdiction on [inaudible – too far from microphone]. Another question, I have is with regards to the issue of the in absentia trials, if an individual is convicted and returns to the jurisdiction, will they be entitled to a re-trial at that point or whether the judgement that occurred during the trial [inaudible]. No right for re-trial... I have a series of other questions but I will stop at two because I think we will be talking...

[Recorded time 1:04]

Chair:

Thank you.....Golam Maruf?

Golam Maruf:

There is no right for bail.....[unable to get most of the content as he is some distance away from the microphone] Mr Cadman did not mention that he went to Bangladesh five times. This is not correct statement.

It is a real surprise that not one is mentioning here that Mr Bali was a witness of prosecution, he was missing.

Toby Cadman:

We did mention he was a prosecution witness.

Audience Member:

GPD No 713???? Was fined and that nobody would tell them that he was missing and if he found by defence counsel why didn't they let the prosecution know that he was in our custody and point...
should be noted on 5th November 2012 when there is a time for an argument for defence counsel there was [inaudible] in Bangladesh by political party Jamaat-e-Islami they actually beat up police with their guns and burn the houses and stuff so I want to mention one thing whether there is a connection between these activities of Jamaat-e-Islami and these incident [inaudible] why didn’t the police know that I have got the missing person in our custody and all this statement is being made with the reference of the defence lawyer, there is no individual lawyer, there is no impartial lawyer over there that can say I saw that there is all difference people I thinking this statement is not proper [inaudible] I really, this is my concern that really why [inaudible].

Last point is that there are saying this trial is actually not proper, I want to mention one thing, one judge [name inaudible] he actually resigned from his position then defence counsel started saying that he was a very good man he was a proper person at the Tribunal but my question is why didn’t they until [inaudible] when they are writing who was judge who was very nice, giving good judgment, we are happy when the top tribunal try to tell order Mr Chairman he was involved in 1992 they don’t say the good things about the tribunal which actually made after the resignation [name – inaudible] from my side, the victim family because my grandmother was raped in 1971.

Chair:

Okay, I have a few more people on the list [names unknown] I will ask you to wait as your colleague has recently just spoken. I will have another request from the floor and then I will come back – Sarah.

Sarah Bafadhel – 9 Bedford Row International:

I have two brief questions, first the prosecutor said the trial is very open and transparent with regards to new agencies operating within a court room and we understand that the media is bipartisan in Bangladesh [inaudible] do you have any other scope to record these trials are they being transcribed? Are these transcripts been given to both parties?

My second question is that you also said that you are willing to take provisional from other systems, I would like your opinions as to one, has this already happened? 2 how you think this will work with
regards to Bangladesh [inaudible] and also what kind of assistance or experience getting in that regard?

Chair:

What me might do now have Rohan, Muhammed Mulla and I have a request from the floor from down there, what we might do is just in the interest of keeping it going a little we might go briefly as there has been a lot of things that have been asked I don’t expect that each of you will have an answer to everyone of the things that were mentioned, if you want to start and go this way. Toby, quite a few questions were asked was asked of you personally and the history of your referral by the court to your bar and the issue if your [inaudible] obviously we are all very interested in you personally, maybe you can take those quickly rather than in detail and concentrate more on the questions which are not about you.

Toby Cadman:

I will respond briefly in the interest of full disclosure so that it is very clear. I have been to Bangladesh five times, you’re quite right, the first time was in October 2010 when I was asked to speak at a conference organised by the Supreme Court Bar Association. I then visited Bangladesh 4 times after that, the last two times I visited to coincide with the US Ambassador for war crimes Stephen Rapp’s visit. I have had the opportunity to visit the tribunal, to speak to the judges, I have not had the opportunity to really speak with the Prosecutors before but on the final occasion I was visiting Bangladesh to speak at a seminar. I was very clear as to what I was going there to do, it was first to speak at a seminar on the Tribunal and I was going to be critical the second thing was to meet with ambassador Rapp’s envoy prosecutor from the Cambodia tribunal, Nicolas and the third thing was to have a series of meetings with the diplomatic community in Bangladesh to raise my concerns. I was not permitted into the country and I was deported.

As regards to being entitled to practice at the ICT that is a completely separate matter. I am not permitted; none of the foreign council are permitted to appear before the Tribunal that decision was made by the Bar Council. I believe that was incorrect but that is their decision. They made the decision that without being a citizen of Bangladesh we didn’t have the right to appear before the Tribunal and I have to respect that decision, I don’t agree with it but I have to respect it. The reason
why I don’t agree with it is that because the rules of procedure of the ICT clearly states that foreign
counsel may appear either for the prosecution or the defence with the consent of the Bar Council.
So I was not seeking to be admitted to the Bangladesh bar to appear before the Courts in
Bangladesh but before what I consider to be a specialist tribunal that operates under a specialist law.
Again, that was their decision.

In relation to the judge that we spoke about and who was and there has been suggestions that he
had been forced to resign, I am not making any statement as to why he resigned but he did resign.
There have been statements that he was a fair judge and that there was a conflict between him and
some of the other judges, that is not for me to say that those comments have been made by others,
other than me, I have never made that comment. I have never criticised that judge, the only judge
who presence at the tribunal I have called into question is the chairman of the tribunal and only
because of his involvement with the Inquiries Commission and for no other reason. I haven’t alleged
actual bias and in the letter that I sent to the judge was in a very respectful tone, making the point
that in the interest of justice I believe he should resign or he should recuse himself from those
proceedings, that was the only point I made.

In relation to the question that was asked to genocide, yes genocide is charged we have raised
concerns as to the definitions under the act and we don’t agree and I would in my opinion would
differ from Mr Rasheed is that we do not consider that the definitions clear enough under the ICT
and we have made that point quite clear throughout and you’re quite right that the point you make
as to why it is complicated to charge genocide under this particular statute. Regarding as to why I
think there should be an international tribunal, my view is that we are talking about large scale of
victimization that has affected I would say almost the entire population of Bangladesh and in much
the same way that in Bosnia it was considered very difficult for the judges and the prosecutors to be
able to distance themselves from the crimes and to be able to sit independently and impartially in
judgment, I made the point that there should be an international presence; not necessarily that it
should be a full blown international tribunal because I don’t necessarily believe that the ad hoc
tribunals have been particular successful, but the model in Bosnia has had more success where it is a
national institution under national law with international assistance. I believe for this process that
would have been a better solution than a purely national jurisdiction.
Chair:

630 Thank you – Mr Islam you have a million questions, maybe you want to do a little selection.

Mr Islam:

633 Right, I will give a touch base to each and every question

Chair:

635 Can I suggest that we don’t talk about Mr Toby now that we have the responses the questions are designed to listen to the responses so you actually have to listen to the responses otherwise there is no point providing questions.

Mr Islam:

640 Thank you again for giving me a chance to give the answers if I miss any questions just please raise your hands and please remind me the question. Let me start with the rushing of the judgement questions that actually this is the thing that first of all let me give you a little account about the whole plot. The persons today, the individuals today and the trial are being under trial as an individual if we see whether they have committed that offence or not they are in the history for 40 years in the mouth of the people always that these are the known person, very known person in 1971, who collaborated with the Pakistani military regime under a civil and military operation to execute and successfully execute the master plan of eliminating Bengali nationalism by 30 million so Mr Yahya Khan [President of Pakistan in 1971] he made a meeting with Mr Bhutto in the month of February in 1971 he came out from the meeting and say kill 3 million of Bengali’s and the rest will eat out hands what does it indicate, it very much indicates that it is a plan to reduce the majority to the minority, to reduce a section a specific group of people to just eliminate this world and the next one he says that we don’t need people we need land.

...
the arm civilian was killed and they were targeted that’s the thing that all systematically were
happened. After the 25th March the President accused people the leader is PGA and his other
leaders they on 7th, July no 7th April they went to the Pakistani military authority saying that
whatever you are doing is very correct, we will help you in bringing all this peace but what they did is
they just killed Bengali people. They never say that stop killing let us see find out some solutions
peacefully they never said it and after a while, by an ordinance that Government formed a radical
force which is an auxiliary force which is always questionable or obligated or responsible to take the
direction from the military government, military regime of West Pakistan at that time they act as an
auxiliary force to the main military force and subsequently, [inaudible] force was created just an off
shoot of the radical force that is also in just the name to operate the very specific targeted
operations, they were given armed training, they were given salary they were under the total
disciplinary design within the ambit of the whole regimented force, so if they act like this they are
part of the regiment force, so their role was not a single civilian that did something without knowing
anything, they knew what they are doing.

Audience Member:

Can I get an answer to my question please Sir?

Mr Islam:

Sure

Audience Member:

My question specifically in relation to the deduction, which is quite different from what we are
discussing here, I was asking the question before and I would like an answer to my question

Chair:

May I, may I, I know that spirits are high in this meeting which is good, but we have to maintain
discipline particularly because the spirits are high. What I have asked the panellist to do is to go
through some of the questions and provide answers, I though this introduction was particularly
interesting and I was going to follow it up later with a question about how does this involve West Pakistan then and now Pakistan, but I am not going to do that because I will allow the prosecutor to move onto the other question. He was specifically answering the question on Genocide.

Mr Islam:

I found that the question before was about the Genocide so I started from there and then actually it helps me to answer to your question so I didn’t need to go back there again, I am sorry about that.

Now Genocide very much applies in that region at that time what happened. Mr Defence Counsel Mr Toby Cadman said you know in the definition I don’t want to go inside but the thing is when the word in the penal section 321 its genocide is there, it is not an individual but international law effects on it now practically.

Toby Cadman:

Sorry to interrupt but the penal code does not apply.

Mr Islam:

I am not saying the penal code I am saying that this law is composed of substantive and procedural law and the penal section, penal code is different, penal section inside this act is 321 and 232. 322 is all the offences and everything is given there and by the way 321 expresses that the offence are the perpetrators anybody, does not mean who is and also it has got retrospective effect that means that before the law is enacted the crime is happened can bring into justice over here so 321 now taking all this consideration I am just cutting short my senior who had asked the question [inaudible]

Your question is rushed judgement right and then 30 days you know appeal time.

Audience Member:

One questions is whether or not could the accused who is convicted can get an extension [inaudible] what I have said that the rushing to judgement, that is one thing that you all read upon and absentia trials.
Mr Islam:

Because actually we are facing every day to answer a lot of questions so I have an experience of so say, this is the thing that this is on a simple matter is something that has happened 40 years before and it is the jurisprudence of this law and the regular criminal procedure is quite different. From that light I would like to answer like in the in your question it comes to the political party rivals thing also like what you have mentioned okay, now the answer is always if we submit before the court to allow us sometime and that is the discretion of the appellant jurisdiction to allow it and I am very much sure that window lies with the appellant division and the appellant division have one have all the discretion to extend for the [inaudible] fair justice. But the law say 30 days it cannot be less than 30 days but it is always we as a in this profession when we go before the Court, now that we can satisfy the court why we need additional time or select how many weeks then that depends on the defence or the prosecution like the appellant party to convene the appellant division to have more time which is the window.

Chair:

From my understanding Sir it is 30 days to file notice for appeal or is it 30 days to file the appeal itself?

Mr Islam:

Appeal itself.

Toby Cadman:

Perhaps if I could ask Mr Ahmed, I have one question on the appeal because it is my understanding and please correct me if I am wrong, there is no actual procedure set out for the appeals right now other than the 30 day deadline so my question to either of you would be in answering this, whether it is the rules of the high court division of the supreme court or whether there would be a separate procedures for these appeals because as we know the criminal procedure act does not apply so that cannot be the legislation so would it fall under the rules of the High Court division supreme court or is there likely to be new rules shortly after convictions.
Chair:

Maybe you can incorporate this?

Mr Islam:

I am just in one segment of time regarding the appeal it is under the appellant division, the appellant division have their own rules and procedure set up already now from the tribunal, if any appeals goes there that appeal will be doing in the style of the appellant division so we don’t need any new procedural law to try this one as an appeal over there. Okay, one thing is of course, the appellant division will be looking into matter on the basis of basic law that it was in a trial so and also if they deem fit and proper they can regulate, they can introduce or they can put their opinion in their own style in the jurisdiction and I would like to add one thing that as the, somebody asked the political rivalry actually it is not the, it happened to be [inaudible] took their shelter under a political party there are a lot of people at that time when they were against the independence of Bangladesh they took the shelter under different political party, not under the pro-independence party but there are some that took shelter under the pro-independence party party also they rectified themselves, they correct themselves but even those persons if any cases institute if any investigation starts against them and found them enough grounds to believe, reasonable grounds to believe that and prove some evidence that this person was involved in atrocities will be tried irrespective of any party so this is not for political gain but it is something what happened that these all people took the shelter under this under certain umbrella so people can say or anybody can say or the defence says that for the political attainment, you know to make other people win, it is not that case.

Chair:

Thank you, Sir I know Mr Mulla is aching to speak but I do want to complete the round and I have another two people in front of you in the list so you will get your chance inshallah very soon. I wonder Schona if you want to take some of the questions or contribute to comments.

Schona Jolly:

I think there was only one question which was really addressed to me, I think it was suggested by the Barrister over there from New South Wales that it wasn’t proper [inaudible] that defence lawyers’
point of view, in fact, that is not what we have done and our statement is based on what the
defence lawyers have told us but also what we have learnt from the prosecutor and the large part of
our statement is based on the prosecution have alleged that the allegation of abduction are
fabricated in order to discredit the Tribunal and that is what it makes all the more important that the
Tribunal should order an independent and impartial investigation to get to the bottom of what has
actually happened because here we have a forum like this in the Hague somebody saying that this
witness has been missing for 9 months already and nobody knows where he is and that has been
reported to the local police and someone else saying that he has been abducted in a ??? vehicle with
some 10-12 witnesses who apparently saw the incident from whom statements have not been
taken.

So nobody knows the truth of the matter and this is a very serious allegation, the truth of it has to
be established that is why the court's credibility is massively threatened if this is not undertaken
immediately. Can I just say that in the light of that as I understand it that the local police have
refused to investigate the allegations about the abduction they say that they can't do so without the
permission of the court and that comes in the context that the statement we issued last week that
concerns have been raised of harassment of defence lawyers and we understand that there was a
raid on the offices of Muhammad Islam, one of the defence lawyers on the 8/9th October and that
raid was without a warrant and on any unjustifiable grounds we also understand that that Abdul
Razak Also one of the defence lawyers has been threatened with criminal charges against him that
he has been harassed by the local authorities and has been under surveillance by local authorities
and so all of these concerns tie up the credibility of the tribunal and it is absolutely imperative that
the authorities investigate immediately, I will stop there.

Chair:

Thank you and going onto our civil society colleagues Rayhan that you have a few things arising from
the discussion but I want to add one to you, the Prosecutor is very clear that part of the context of
the charges laid is that the people whom were indicted are alleged to have taken part in a plan
which was essentially hearing him speak it seems to me essentially was within the chain of command
over the battle of what was then the West Pakistan military and in fact he has described them as an
auxiliary force and as such part of the systematic killing which seemed to be directed by the West
Pakistan military forces. As a member of civil society are you disappointed that there is no indictment again any of the former West Pakistan army personnel, right now it is Pakistan.

Mr Rasheed:

[Audio time 45.51]

There are two different perpetrators involved in this, let me add first the military armed forces and the second one was the collaborators [inaudible] carried out the crimes in many cases plan the crimes and sometimes providing logistics so that is how it worked. Of course we definitely of course want the Pakistan military brought to justice and we prefer it to be there but I did not say that the law does not make any difference or make any [inaudible] who is more responsible as long as individuals are accused of crimes committed individually according to the law. So everyone is individually responsible so it is not like that one set of accused needs yo be tried for another set of accused [inaudible] as the law stands.

Toby Cadman:

Can I just make a very short…?

Chair:

The question was not on the floor, so I guess very quickly...

Toby Cadman:

First of all I would like to thank Mr Rasheed referring to them as alleged perpetrators and I wish everybody who spoke about this would use the same level of constraint because the presumption of innocence is which something has come up today and repeatedly comes up, so first of all thank you for that and putting it in a proper context the point as to the 195 Pakistani prisoners of war, the point that I have always made is that anyone bearing criminal responsibility for what happened in 1971 should and must be brought to justice irrespective whether they are sitting in Pakistan, India or
Dhaka and they should be brought to justice and as civil society that is the point that you should be making so I am pleased that you make that point and of course there is no bar under the ICT Act on bringing anyone from Pakistan to justice and if this process is to have any meaning those individuals if they are still alive should be brought before the Tribunal that’s why I was advocating for a more of an internationalised process that can bring those individuals to justice because they were identified as the most senior military officials responsible for Crimes committed in 1971. My concern however, not in relation to Pakistan but in relation to those who fought for Liberation and I would find it very difficult to believe that not a single person committed a crime and there has been a lot of comments about the attacks on the Biharis and I think for this process to have any meaning it has to be equal on both sides because the Prosecution has to have the ability to independently assess which cases should be brought to trial. My concern is when you have Presidential decree number 16 which effectively gives immunity to those who fought for Liberation, my concern is that this is a practice which is discriminatory in nature so that would be my concern. It has to be, the prosecution has to have the ability to select cases no matter what group they represent or claim to represent.

Chair:

I give the opportunity for the Prosecutor to respond because then we will open again, otherwise it comes a bit of a too much conversation.

Mr Islam:

At this stage, the role of the Prosecution team I get to answer I have to go little bit about the structure of, under the ICTPD the prosecution team, under the prosecution team the investigation and the prosecution team so we work together and of course, we independently prosecute, prosecution team independently goes through the investigation and also goes in detail all those papers and evidence and if they think that this is a good case or no further investigation needed then they proceed on. They have the power to say no to the investigation team that your investigation is not done so take this file and go for detail for investigation and we always stand by that. Number 2, regarding the 195, 195 was the Pakistani military personnel and 195 was subjected to the war crime, it was not subject to the specifically crime against humanity the person accused for the, we are trying the crime against humanity right now and we didn’t accuse anybody for war crime but the door is always open for trying the war criminals over there and that has not been closed.
Chair:

We throw it back open we have four interventions, Kareem

Colleen Rohan

I am a lawyer at the ICTY and an defence attorney I would admit immediately and rightly so, I am therefore concerned about two statements that were made, one by Mr Prosecutor then also comment by Ms Jolli, I am hoping that you both might have an answer and that goes back to a statement made earlier on that there is a safe home for the accused when they are interrogated and that there are physicians there, lawyers there, lawyers are provided and I am wondering in that context of the accused are provided because must tell you I am a lot today, I am very painful about coming to this because there is of a great deal I want to know about the Bangladesh Tribunal.

Are the accused are entitled to a right to silence meaning not just they don’t just make a statement that there silence will not be held against them in the court proceedings and then in conjunction with that and maybe the flip side, given that the comments made about the limitation on evidence recorded by the defence at trial, are the accused entitled testify on oath at trial can an accused be precluded otherwise in otherwords by the court from testifying or are they able to make an unsworn statement at trial if that a preference that I find this to be a very important issue because these are people looking at the death penalty and in my career I have the unfortunate experience of representing many people who were charged with the death penalty and I know how important it is, I suppose regardless of context that individuals within that position, are given some opportunity should they choose to make themselves known to the court who they are etc. Ao one quickly I am not sure my friend across the room has had a question yet whether there is a transcript or not. Thank you.

Chair:

Just to mention that Adler has been one of the civil society activists most engaged and effective in the establishment of the ICC from the very start before me and I have been there from the beginning and one of the people who has contributed to the rules of procedure and evidence at the ICC.
Audience Member:

[inaudible] review or appeals process and back with the same judge’s deal with the appeal that deal with the trial is that correct?

Toby Cadman:

Not entirely, the review during the trial of interlocutory appeal are dealt by the same judges and the same judges who actually draw up the charges and the appeal would be death with by separate judges in the High Court Division of the Supreme Court who we don’t know who they are yet, that process will be established at some point.

Audience Member:

So the appeals process is still incomplete in terms of how the court operates then, am I correct?

Toby Cadman:

From my view yes but I have been educated today that it will be the procedural of the Supreme Court.

Audience Member:

My other question is that the most senior military official were they given amnesty, are they now before the court or can they be brought before the court or are they in a place where one can find them?

Chair:

You mean the people fighting on the side of the Liberation?
Audience Member:

When I say liberation that those who would also be allegedly guilty for the crimes themselves.

Chair:

I have Mohammed Mulla???, I have prevented you from talking because we wanted to hear from you, time to express

[Time 35.23]

Mohammed Molla:

I have a question to Mr learned Prosecutor, as I am very aware that the chairman of the Parliament Human Rights Committee in the British Parliament Lord Carlile it is more than two months that he has not received an invitation the reason I am asking is that you said anyone is welcome to visit Bangladesh visiting Tribunal can you [inaudible] Can you make sure they will be given this one?

Second question, is that is it not true then defence have supplied photo of the police car which has taken away Bali and it was submitted to the Court and is it not true that all of the Police car number was written on the photo and the second thing is that, the second question is that is it not true that police have denied to accept the [inaudible] The police have denied to accept the evidence [inaudible]

Chair:

We are back to the witness let’s, we have another intervention from Mr Arifur Rahman

Arifur Rahman

Thank you for that, I am not a legal professional so I am just an observer and I am a Bangladeshi national who is enraged by the show that the defence has put up to have you believe that the actual victims are [inaudible] The real victims is actually the people who died 40 years ago four hundred thousand woman who were raped systematically who were [inaudible] the Pakistani government
was actually training and I mean the stories goes on. Unfortunately, the story by a mission with is a
media mission I know that something are not to mention......I don’t have a question to anyone
because Mr Cadman wants we just saw in the beginning that he was not allowed in Bangladesh but
we actually find out that he has actually been there, this is an example of the whole media
machinery created, we should be asking questions about what we are actually doing to make sure
that the victims of those many dead people the justice they get, why are we having further
international community has been so much silent so many years and who were in power for the last
40 years these people who are on trial now because they prevented the whole justice process event
to begin, loss of evidence has gone and it is such a difficult matter [inaudible] the prosecution they
are doing a great job giving us closure, you know I don’t know how many nations have seen there
you know people who commit crimes against humanity you can’t actually [inaudible] in power for
such a long time we are the ones that have been trying [inaudible] but the international community
should be helping us, should have been helping us, but rather than personally here by simple things
which they should be helping us, should have been helping us, I mean I may have a lot of other
things, that is all I can say for the time being thank you.

Chair:

Thank you for bringing that personal perspective and testimony to the session, time if of the essence
and we have to find a way to wrap up. Ahmed Yodeen(?) Is a Professor of International Law and one
of the advocates for the establishment for where the ICC but also the ICT in Bangladesh and I would
like him to have a few minutes but also I would like very much to wrap up from all of us speakers so
can I ask you to be telegraphic in your comments.

Professor (?):

Thank you, in fact what brought me to international justice is the pain that I do have and the
collective failure of the nation and of the international community to help us do justice. So what I
have thought of since then that we are not dealing with international criminal law when it was not a
fancy subject and now it is a very sought after subject and that I must feel that a campaign to justice
in Bangladesh and there should be a mechanism and a law mechanism where for example cases like
Bangladesh we couldn’t bring the top perpetrators which we all know very well and I am one of the
leading witness to what happened in 1971 that when we couldn’t do it [inaudible] so that has
brought me to the ICC campaign since day one before that only a couple of individuals here have
been around since that period. I am really a passionate person for justice. I am really happy and I
can see why the ICC [inaudible] I can see both sides, I can see what some of the international
concerns are but not necessarily agree with that because what I see missing here is the interest of
the international community also interest of international human rights organisations and major
justice organisations to engage with that process. I have personally begging the international human
rights organisation many of my friends, please do come and [inaudible] In the beginning the interest
was that it would be an interesting International process with lots of money flowing, so I did see lots
of consultants, international experts coming around and hoping that it will be a big cash cow - I
know exactly what I am talking about.

[time 26.50]

The United Nations was first that was approached by the Bangladeshi government met President of
the UN Kofi Anan they did discuss and what we have got context...Kofi [then] Secretary General
Annan..............so he was strongly advised by this Geneva place advisors, that the UN should not be
involved in this process and there was not even a remote you know indirect support because I read
that one of the person was invited to Geneva to brief the UN officials and I argue very strongly the
necessity and the importance of the UN process at least you got get a [inaudible] get international
politics in case at an technical lever because we know in Bangladesh there are not many
international lawyers with international crime law expertise but then when I come that it is not
really happening I really sought help from the international organisation and then each of them
having different limitations, mandate limitations, limitations because the law provides for the death
penalty so they can’t be part of the process when there is the death penalty around and in the
middle were the victims, and nobody was really seriously thinking about the victims and actually that
is the main concern that I have, so I can see why I am [inaudible] about the death penalty because
......death penalty chapter deeply involved in that and keeping getting that....understand that that
there should have been some understanding, some proportionality of the crime committed and the
interest of the of the International Community to engage. Just because the name was International,
the International was not the name of the tribunal it was International crimes so it is not the
International tribunal by any means. The crimes have been international and also for example when
there was an initial justice process those processes were frustrated and nobody in the world said
anything about it not a single country, not a single organisation, not even Human Rights Watch, well
Human Rights Watch was not around then, Amnesty international was there, nobody said anything.
Now I keep on seeing [inaudible] of these organisations one after another of expressing deep
concern but no commitment to engage and that is really to frustrating. Thank you.
Chair:

Thank you Ahmed, I would have gone a different way but Schona has to catch at 15.40 train which is the quite right train, we were supposed to finish at 15.00, so I am going to give her the floor first in a last very quick round of the panel and Schona you have the floor.

Schona:

I think other than one comment specifically directed at me and it was in terms on limitations of the evidence I don’t profess to be an expert on this Court, so I can’t tell you. I terms of what I have looked at myself we are really concerned about the limitation specifically for the reasons that you have said, these are capital cases and the restrictions on the rights of the defence to properly put their defence forward to call evidence, the number of witnesses they require and in the manner in which they have chosen to do so, the fact that they have been prevented from doing that with the objectives appears of meeting a timetable an arbitrary timetable is of deep concern to us and so we make those comments known to the Tribunal and the Authorities.

The only other point to say, I think there was another point generally perhaps made to Human Rights Organisations generally in terms of their failure to engage, I can speak for my own organisation which is to the extent that we can say is that the objective the Tribunal are lauded, the objectives of trying to settle issues relating to impunity which have been going around for 40 years are indeed applauded but that can only be done if the path to justice is transparent, fair and meets due requirements and due process as otherwise any tribunal runs the risk appearing like a witch hunt and that does no justice to the victims of any genocide and crimes against humanity or any other crime.

Chair:

Thank you and you are excused and with our deepest thanks - 3 minutes or less Rayhan do you...
Rayhan:

I think answer to both of your questions is that .... [inaudible] Mr Cadman mentioned asking about whether we as a civil society ....[inaudible] the definition we do [inaudible] not only that anyone who is alleged of international crimes is no friend of any society and it doesn’t matter where he belongs so even if he is a freedom fighter that doesn’t matter, that actually to your next question about the [inaudible] Law Mr Cadman my understanding of this law is that law was not about a blanket amnesty

That law was about and yes that law was passed in 1972 then meant that actions relating to military necessity... A country that was born on international crimes, such....[inaudible] The definition of genocide under the act is actually directly taken from the Genocide Convention, except for one word [inaudible]...

Toby Cadman:

There is a difference between such as, as such...

Chair:

This is a complex issues that requires [inaudible] it is a legitimate discussion that we should not have now we don’t have time and we do want to hear both.

Rayhan:

It actually is a rule the Tribunal may admit a Foreign Counsel subject to the [inaudible] now the bar council position basis of the Act so that is a superior law and the tribunal rule is that rule made by judges so...

Chair:

I don’t think we are going to...let’s move on, 3 minutes, Toby

Toby Cadman:

The comment that was made concerning the openness to observe the Tribunal, I never travelled to the Tribunal as an independent observer, I attended as a member of the defence so that is quite clear so I am not asking for permission to go to the Tribunal as an independent observer but there should be independent observers following these proceedings.

The comment that was made in relation to Lord Carlile From the UK House of Lords was that the Law Minister stated to him in a visit very recently where I believe one of the two of you may have been present stated that a delegation from the House of Lords would be allowed to go to the Tribunal to observe the proceedings and now Lord Carlile said that he would only do that if he was given unrestricted access to observe all of the proceedings and I spoke to Lord Carlile two days ago to find out whether he has in fact been invited and his concern is that despite repeated requests to the Bangladeshi High Commissioner he has not received an invitation and does not now expect to receive one and that was the first point.

In relation to the definitions and I am not going to get into any detail on the definitions that one of the concerns that we have and have always expressed is that it is not just the definition it is the way that they are understood and applied by the Tribunal and there have been concerns when you look at statements made Prosecutors in charging these matters that for example one statement was if it is one murder it is crime against humanity, if it is more than one it is genocide, that is very worrying statement made by a Prosecutor and then in the closing remarks in the Sayedee case we cannot think of crimes against humanity without genocide.

These are quotes you can shake your heads and tell me that I am wrong but these are quotes our concern has always been not only the way that the statute is drafted but the understanding of the parties and that was why we always have said that there should be International assistance to all parties concerned and I really do, I don’t think I would say this today but I agree a lot with what you said earlier when you were talking about the request for International assistance and my understanding is that the United Nations wanted to assist but were told by the Government of Bangladesh that this was a domestic problem that would be dealt with domestically. Obviously, I was wrong from what you have said today and all the representations made by the United Nations I
think that this is something they can now reconsider and certainly through the special procedures
branch that have requested country visits, that have requested to get involved, the representation
was from what we are hearing from the Government today that would be welcomed so I think that
is a very important message that has been stated, so thank you for that.

Chair:

Mr Prosecutor

Mr Islam:

First of all let me start with the answer of recording, in the court room we have court person to
record each and every words that is the Court procedure they type in a computer so it is recorded
there under the Tribunal’s jurisdiction there is no access for either party to go there but in the
presence of three parties, so any corrections that need to be done they have to raise at that
moment and then correction is done in the Tribunal in front of the Defence and the Prosecution. So
after that nothing can be done and the availability of those documents upon the application with a
stamp fee, as it requires, you can have it, so either you go through the Prosecution team or you go
through the defence it is open, if the defence wants that all the orders from the first date till today
they can get it.

Audience Member:

[Inaudible] what the witness is saying?

Mr Islam:

Yes what the witness deposition, cross, chiefs and all the staff, if then what they word to word
recorded
Mr Cadman:

But no audio recordings

Mr Islam:

Which one?

Mr Cadman:

Is there any audio recording?

Mr Islam:

No audio recordings.

Mr Cadman:

Is there a reason for that?

Mr Islam:

Well it’s a system that we have traditional system there we can’t break it so there is a constant [inaudible] so sometimes we audio maybe you know here and there so if we have, that is the only court only tribunal all over Bangladesh have computerised system and access to the prosecution access at the same time to the defence is looking into the same screen and the accused in the dock also looking into the same screen, what he is saying or what is happening there, so it is all open.

Audience Member:

So the entirety of the trial proceedings are available to the public by request so that we can educate ourselves...
Mr Islam:

Yes of course, of course, that is available, on top of it we do have like all the agencies, news agencies they sent their reporters inside the court room to sit down and the court was very much happy to give them spaces, like you know, sometimes we count how many reporters, it is full, sometimes it is 40 and what can you say about that.

Chair:

Okay now I have 16 requests from the floor but I would like the prosecutor to finish his response and then I will conclude the proceedings and then I can close the session and then we can continue but I do need to close the session.

Mr Prosecutor:

One more thing about the resignation of one the Justice Judge in the Tribunal, it is not because of any other reason, only because of his health reasons and he needed therapy and he had an ailment which cramped his right side in the arm and in the leg so for doing the therapy, the doctor are not available in the evenings, he had to go to a special therapy with available at the I think it's a at 9am and his therapy goes on until 10.30 and court comes up at 10.30 and when he comes it is almost like 11, 11.30 so he feel, he felt that he can't continue so he just resigned. And another regarding the invitation, see this is not, this is the matter of any foreigner goes to any country is a matter of immigration and we consider anyone from foreign country like Justice Lord Carlile you say, is very important to me, to us, as a nation we need look into the securities and the protection all the stuff that need to be maintained before we accept, you know give the invitation and on top of it those people, those persons, officials will be present so Ministers they have their own set up schedule already for long. Now it's totally beyond my jurisdiction, I can what you say just off the record we can send a message that because it relates to the Tribunal they are interested on a Tribunal matter so I can just past your, you know, I can just pass this, convey this this message that expedite the process.
Toby Cadman:

I can tell Lord Carlile that you welcome his visit...thank you.

Mr Islam:

Thank you so much

Chair:

Speaks briefly

Audience Member:

May I please get an answer to my questions?

Chair:

No you may not, I am sorry but I have to close the session and I want to conclude then we can open the session again, I am sorry it really does not work.

Toby Cadman:

It is a very important question.

Audience Member:

Whether or not an accused can testify? Right to silence?

Chair:

I thought it was...
Audience member:
You can answer yes or no?

Chair:
Right to silence

Mr Islam:
Right to silence is there and also he has been at the first instance been given to for plea, plead guilty so you know like so I am not guilty but during.....

Chair:
The question can you draw negative inferences like they do in the UK from refusal to testify or there is a right to silence, so right to silence is absolute?

Audience Member:
Right to silence is absolute and in response to your question whether he can testify the tribunal will ask the accused who has already... [Inaudible]

Toby Cadman:
Not in the case of Sayeedee he has been prevented from giving his speech, yes he is.

Chair/audience member [inaudible]
Mr Toby Cadman:

He was told to shut up and sit down effectively.

Audience Member:

Because he cursed the President of the Tribunal.

Mr Islam:

You cannot curse anybody

Audience Member:

You…… [To many people talking at once - inaudible]

Chair:

The accused has a right...

Audience Member:

But if he does it on oath he will be considered as a witness.

Audience Member:

Yes and subject to cross examination.

Chair:

But you can make a statement not under oath and not subject to cross-examination because of …
Mr Cadman:

The only additional point sort of connected to that I would like to say though is when the accused is interrogated by the investigative agency, the suggestion was made that he has a lawyer present and a doctor present in the same building yes, in the room where he is being interrogated no, is he allowed to advise his client whilst he is interrogated no, is he allowed to advise his client before he is interrogated no. That was one of the major concerns that we raised with the UN they during the interrogation that, one he has no right of counsel and he has no advance notification of the nature of the questions that are going to be put to him and he has no assistance of Counsel but also when the charges are read out to him, hearing them for the first time, will confirm, charged that have been confirmed by the judges he is not allowed to seek advice before entering a plea, he has to enter a plea immediately so those are the concerns inter-connected to that and we have requested on numerous occasions for the lawyers to be entitled to be present during interrogations and they have said no we have asked for the investigative file and they have said no

Chair:

We need this session to close, we obviously also need this conversation to continue. It seems to me that there is complete agreement on certain issues and I want to list them so we know what they are. There is complete agreement for the need for a judicial response to the atrocities committed during the war of Liberation, the war of Independence so whatever you want to call it there is complete agreement that it seems also that this should be also directed to those who bear the great responsibility for the violations. We heard the prosecutor putting together in a striking context that it is clear that the actions of West Pakistan armed forces need to be looked at in terms of contributory violations.

It seems to me that there is complete agreement that the trials should be fair and now there is disagreement as to whether they are fair but there is complete agreement that for the system to be credible and to actually close the chapter in the way that the country can move forward in a positive way there is a need for fair trials and whether or not this is...it is also clear that this is not an international tribunal and everybody agrees on this, it is International Crimes I think there is also
complete agreement on International standard, not of International procedures as for the ICT... The international standards as for equality for arms and fair trials are necessary to apply whether they are applied or not there is...

**Toby Cadman:**

It is a big question

**Chair:**

No but for each of us there is a question but there is complete agreement that they should apply for the system to be effective and the International standard sof fair trial are applicable to all domestic procedures and that why they are called International standards.

**Audience Member:**

What standards? [inaudible]

**Chair:**

ICCPR... I don’t think we need to go into list of articles, we will be here forever but there is absolute agreement that the victims of the conflict require justice and there is absolute agreement that this need is not diminished by time but also there is not tolerable that more time goes by without a credible system. There are a lot of questions which are open and I think by coming here Mr Prosecutor you have started what I hope is a more pro-active because hearing of the voice of the Prosecution office and of the Court. One of the opportunities that was missed was the findings by the United Nations Working Group on Arbitrary Detention which found that your accused were detained arbitrary which is quite a big thing to say for the United Nations, which is quite unusual and that was an opportunity that I think was like a warning bell - come and tell us your side of the story and I think that is a very important process the tribunal now engaged in and I am quite privileged to have been part of this public exchange on issues of fair trial.
My only other conclusion is that we hope that these issues will continue to be discussed soon in a timely manner, particularly because given the fact that this tribunal has a death penalty it is of imperative importance that there is national and International concern that proceedings were conducted in a fair way and the Defence, it is there job to raise concerns but I think that the concerns go much wider than the defence, the United Nations spoken to the Bar Council of, I’m sorry the Bar Human Rights Committee, we heard a lot of credible people voice concerns and it is one wonderful that the Court has started answering those concerns, I think it is imperative that for the sake of the victims that justice not only be done but also be seen to be done and also in terms of future proofing the work of this Tribunal, who knows that the next Government will bring. It is important that the International Community stand behind the outcome of the tribunal and for the International Community stand behind the outcome I think a lot of leg work from all of us is still necessary so that the legitimate concerns expressed are addressed and I think in a credible way as you have said my Prosecutor and everybody has helped us. I am sorry if I was bit hard from the chair I hope we all take it in the spirit of [inaudible] we are 25 minutes late and I am very grateful to everybody for all their attendance thank you.

***END***