

Summary of ICT verdict in Abul Kalam Azad Case

International Crimes Tribunal-2 (ICT-2)

[Tribunal constituted under section 6 (1) of the Act No. XIX of 1973]

Old High Court Building, Dhaka, Bangladesh

ICT-BD Case No. 05 of 2012

[Charges: crimes against Humanity and Genocide as specified in section 3(2)(a) and 3(2)(c)(i) of the Act No. XIX of 1973]

The Chief Prosecutor
Vs.

Abul Kalam Azad @ Bachchu (Absconded)

Before Judges:

Justice Obaidul Hassan, Chairman
Justice Md. Mozibur Rahman Mia, Member
Judge Md. Shahinur Islam, Member

For the Prosecution:
Mr. Golam Arief Tipoo, Chief Prosecutor
Mr. Syed Haider Ali, Prosecutor
Mr. Shahidur Rahman, Prosecutor
For the Accused (Absconded):
Mr. Abdus Shukur Khan,
State Defence Counsel
Advocate, Bangladesh Supreme Court

Date of delivery of Judgment:

SUMMARY JUDGEMENT

I. Opening words

In the judicial history of Bangladesh, it is indeed the historic occasion that today this Tribunal (ICT-2), a lawfully constituted domestic judicial forum, after dealing with the matter of prosecution and trial of internationally recognized crimes i.e. crimes against humanity, genocide which were perpetrated in 1971 in the territory of Bangladesh, during the War of Liberation is going to deliver its first verdict. At all stages of proceedings the prosecution and the defence have made laudable efforts extending their precious arguments on academic and legal aspects including citation of the evolved jurisprudence. It inevitably has inspired us to address the legal issues closely involved in the case, together with the factual aspects as well. We take the privilege to appreciate their significant endeavor.

In delivering the verdict we have deemed it necessary in highlighting some issues, in addition to legal and factual aspects, relating to historical and contextual background, characterization of crimes, commencement of proceedings, procedural history reflecting the entire proceedings, charges framed, in brief, and the laws applicable to the case for the purpose of determining culpability of the accused. Next, together with the factual aspects we have made effort to address the legal issues involved and then discuss and evaluate evidence adduced in relation to charges independently and finally have penned our finding on culpability of accused.

Now, having regard to section 10(1) (j), section 20(1) and section 20(2) of the International Crimes (Tribunals) Act, 1973 [Act No. XIX of 1973; hereinafter referred to as the 'Act of 1973'] this 'Tribunal' known as International Crimes Tribunal-2 (ICT-2) hereby renders and pronouncing the following judgment.

II. Commencement of proceedings

1. The Chief Prosecutor, on the basis of the report and documents submitted therewith by the Investigation Agency, after completion of investigation, submitted the 'Formal Charge' on 02.9.2012 under section 9(1) of the Act of 1973 before this Tribunal. Thereafter, the Tribunal, under Rule 29(1) of the Rules of procedure, took cognizance of offences as mentioned in section 3(2) (a)(b)(g)(h) of the Act of 1973 and issued warrant of arrest for causing appearance of the accused as required under Rule 30 of the ROP. But the warrant could not be executed as the accused remained absconded. Thereafter, in compliance of legal requirement for holding trial in absentia by appointing state defence counsel to defend the absconded accused, the Tribunal on hearing both sides on charge framing matter framed 08 charges against the accused Abul Kalam Azad @ Bachchu by its order dated 04 November 2012 and thus the trial commenced.

III. Historical Background

2. Atrocious and horrendous crimes were committed during the nine-month-long war of liberation, which resulted in the birth of Bangladesh, an independent state. Some three million people were killed, nearly half a million women were raped and over 10 million people were forced to flee to India to escape brutal persecution at home, during the nine-month battle and struggle of Bangalee nation. The perpetrators of the crimes could not be brought to book, and this left a deep wound on the country's political psyche and the whole nation. The impunity they enjoyed held back political stability, saw the ascend of militancy, and destroyed the nation's Constitution.

3. The massacres started with program called "Operation Searchlight," which was designed to disarm and liquidate Bengali policemen, soldiers and military officers, to arrest and kill nationalist Bengali politicians, soldiers and military officers, to arrest and kill and round up professionals, intellectuals, and students.

4. Jamat E Islami (JEI), as an organization, substantially contributed in creating the para-militias forces (auxiliary force) for combating the unarmed Bangalee civilians, in the name of protecting Pakistan. Undeniably the road to freedom for the people of Bangladesh was arduous and tortuous, smeared with blood, toil and sacrifices. In the contemporary world history, perhaps no nation paid as dearly as the Bangalees did for their emancipation.

IV. Brief account of Accused

5. Accused Moulana Abul Kalam Azad @ Bachchu son of late Abdus Salam Mia & late Magfura Khatun of village Barakhadia (Choi ani), Police Station- Saltha, District-

Faridpur at present sector no. 07, road no. 33, house no. 06, Police Station Uttara, DMP, Dhaka and 'Azad Villa', 279/6 Chan Para, Uttarkhan, Dhaka was born on 05.03.1947 in village 'Barakhadia'. He studied in Faridpur Rajendra College and was a close associate of Ali Ahsan Mohammad Mujahid, the then President of East Pakistan Islami Chatra Sangha (ICS). Till formal formation of Razakar force, Moulana Abul Kalam Azad @ Bachchu actively aided the Pakistani army as an armed member of volunteer Razakar Force formed in Faridpur in committing criminal acts alleged.

V. Introductory Words

6. International Crimes (Tribunals) Act, 1973 (the Act XIX of 1973) is an ex-post facto domestic legislation enacted in 1973 and after significant updating the ICTA 1973 through amendment in 2009, the present government has constituted the Tribunal (1st Tribunal) on 25 March 2010. The 2nd Tribunal has been set up on 22 March 2012. The degree of fairness as has been contemplated in the Act and the Rules of Procedure (ROP) formulated by the Tribunals under the powers conferred in section 22 of the principal Act are to be assessed with reference to the national needs such as, the long denial of justice to the victims of the atrocities committed during 1971 independence war and the nation as a whole.

VI. Jurisdiction of the Tribunal

7. The Act of 1973 is meant to prosecute and punish not only the armed forces but also the perpetrators who belonged to 'auxiliary forces', or who committed the offence as an 'individual' or a 'group of individuals' and nowhere the Act says that without prosecuting the armed forces (Pakistani) the person or persons having any other capacity specified in section 3(1) of the Act cannot be prosecuted. Rather, it is manifested from section 3(1) of the Act of 1973 that even any person (individual or group of individuals), if he is *prima facie* found individually criminally responsible for the offence(s), can be brought to justice under the Act of 1973. Thus, the Tribunals set up under the Act of 1973 are absolutely domestic Tribunal but meant to try internationally recognised crimes committed in violation of customary international law.

VII. Procedural History

8. At pre-trial stage, the Investigation Agency constituted under section 8(1) of the Act of 1973, through the Chief Prosecutor prayed for causing arrest of the accused Abul Kalam Azad @ Bachchu by filing an application on 25 March 2012, for effective and proper investigation [Rule 9(1) of the ROP]. The Tribunal fixed 03 April 2012 for hearing and disposal of the application. The Tribunal on hearing application issued warrant of arrest against the accused. But the enforcement agency of the Dhaka Metropolitan Police could not execute it as the accused Abul Kalam Azad @ Bachchu, on sensing the matter of issuance of warrant of arrest had absconded.

9. However, after submission of the formal charge by the Chief Prosecutor, under section 9(1) of the Act of 1973 before this Tribunal cognizance of offences as mentioned in section 3(2) (a)(b)(g)(h) of the Act of 1973 was taken and warrant of arrest for causing appearance of the accused was issued as required under Rule 30 of the ROP.

10. Dhaka Metropolitan Police (DMP) submitted the execution report before the Tribunal stating that the accused Abul Kalam Azad @ Bachchu could not be arrested as he has already absconded and he is learnt to have left the country instantly before the earlier warrant for arrest issued by this Tribunal. In this circumstance, the Tribunal, as required under Rule 31 of the ROP, ordered to publish a notice in two daily news papers, one in Bangla and another in English asking the accused to appear before this Tribunal within ten (10) days from the date of publication of such notice. But despite publication of such notice the accused has not appeared before this Tribunal.

11. On 07 October, the Tribunal has observed in its order that there have been reasons to believe that the accused has absconded or has concealed himself so that he cannot be arrested and produced before the Tribunal and there is no immediate prospect for arresting him, and as such it ordered that the trial against the accused shall be held in his absents under section 10A(1) of the International Crimes (Tribunals) Act 1973 (as amended up-to-date) together with the Rule 32 of the ROP and accordingly it appointed Mr. Abdus Shukur Khan, Advocate, Bangladesh Supreme Court, as state defence counsel to defend the absconded accused who will have remuneration to be determined by the Tribunal [Section 10A(2) of the Act]. On 11 October, the state defence counsel informed the Tribunal that he received the copy of formal charge, statement of witnesses and documents submitted therewith from the office of the Registrar. Thereafter, the Tribunal after hearing both sides, the Tribunal framed eight (08) independent charges including the charge of crimes against humanity and genocide against the accused Abul Kalam Azad @ Bachchu by its order dated 04 November 2012.

VIII. Applicable laws

12. The proceedings before the Tribunal shall be guided by the International Crimes (Tribunals) Act 1973, the Rules of Procedure 2012 (ROP) formulated by the Tribunal under the powers given in section 22 of the Act. Section 23 of the Act of 1973 prohibits the applicability of the Code of Criminal Procedure, 1898 and the Evidence Act 1872. Tribunal is authorized to take into its judicial notice of fact of common knowledge which is not needed to be proved by adducing evidence [Section 19(4) of the Act]. The Tribunal may admit any evidence [Section 19(1) of the Act]. The Tribunal shall have discretion to consider hearsay evidence too by weighing its probative value [Rule 56(2)]. The defence shall have liberty to cross-examine prosecution witness on his credibility and to take contradiction of the evidence given by him [Rule 53(ii)]. The defence shall have right to cross-examine prosecution witnesses. Accordingly the state defence counsel duly cross-examined all the prosecution witnesses.

13. The Act provides provision of holding trial in absentia [section 10A] after due compliance of necessary legal requirement as contemplated in the Act and the ROP. Both the Act and the Rules (ROP) have adequately ensured the universally recognised rights of the defence. The Tribunal however is not precluded even from seeking guidance from international reference and relevant jurisprudence, if needed to resolve any crucial and relevant issue revealed in course of proceedings.

IX. Witnesses adduced by parties

14. Prosecution adduced and examined in all 22 witnesses of whom PW.21 is a seizure witness and PW.22 is the Investigation Officer. It took 13 working days to complete examination and cross-examination of 22 P.W.s. After clos-

ing of P.W.s, the learned state defence counsel informed the Tribunal once again that he would not adduce and examine any witness in support of defence as he could not have been able to submit the list of witnesses, documents as required under section 9(5) of the Act as he failed to have instruction from relatives of the absconded accused, despite contact that he made to them. The Tribunal fixed date for summing up of prosecution case as required under section 10(10) of the Act of 1973. Accordingly the learned Prosecutor Mr. Syed Haider Ali and Mr. Shahidur Rahman have summed up prosecution case and thereafter the learned state defence counsel also presented summing up of defence case by agitating several crucial legal issues.

X. The way of adjudicating the charges

15. The evidence produced by the prosecution in support of its respective case is mainly testimonial. The Tribunal considered that most of prosecution witnesses directly experienced and witnessed the terrible events they have narrated and that such trauma could have an impact on their testimonies. However, despite this reality, their testimony seems to be invaluable to the Tribunal in its search for the truth on the horrendous and atrocious incidents that happened in 1971 war of liberation in different areas of Faridpur district directing the Bangalee Hindu community, after duly weighing value and credibility of such testimonies.

16. Therefore, in the case in hand, together with the testimony of prosecution witnesses of whom most are live witnesses, we shall have to depend upon too (i) facts of common knowledge (ii) context of the attack directed against unarmed Hindu civilians (iii) documentary evidence, if any (iv) relevant facts (v) circumstantial evidence (vi) Political status of the accused at the relevant time (vii) link of the accused with the local Pakistani armed force and (viii) the jurisprudence evolved on these issues in the ad hoc Tribunals, if it is considered essential to rely upon.

XI. Burden of the Prosecution

17. The prosecution, in the light of the charges framed, is burdened to prove (a) the commission of crimes narrated in charges (b) mode of participation of the accused in committing the crimes for which he has been charged (c) What was the status and role of the accused at the relevant time and how he had maintained association with the Pakistani army (d) the context of carrying out alleged atrocious crimes directed against civilian population and a particular group of population.

XII. Backdrop and Context

18. The backdrop and context of commission of untold barbaric atrocities in 1971 war of liberation is the conflict between the Bangalee nation and the Pakistani government that pushed the Bangalee nation for self determination and eventually for freedom and emancipation. War of Liberation started following the 'operation search light' in the night of 25 March 1971 and lasted till 16 December 1971 when the Pakistani occupation force surrendered. Ten millions (one crore) of total population took refuge in India under compelling situation and many of them were compelled to deport.

19. As we see in the case in hand, the crimes are alleged to have been committed between the period of May 1971 to July 1971 in furtherance of accomplishment of policy and plan of Pakistani army. Admittedly, during the period of War of Liberation in 1971 parallel forces e.g. Razakar Bahini, Al-Badar Bahini, Peace Committee were formed as accessory forces of the Pakistani armed force who provided moral supports, assistance and substantially contributed and also physically participated to the commission of horrendous atrocities in the territory of Bangladesh.

20. It is the fact of common knowledge that thousands of incidents happened throughout the country as part of organized and planned attack. Target was the pro-liberation Bangalee civilian population, Hindu community, pro-liberation political group, freedom fighters and finally the 'intellectuals'. The charges against the accused Abul Kalam Azad @ Bachchu arise from some particular events allegedly constituting the offences of crimes against humanity and genocide, during the War of Liberation in 1971.

XIII. Points to be determined

21. In determining culpability of the accused for the perpetration of offences with which he has been charged we are to adjudicate the fundamental issues such as (i) Whether the accused was a potential member of Razakar (Volunteer) force at the relevant time (ii) whether the accused was substantially associated with Pakistani army and their activities for facilitating commission of offences (iii) whether the accused physically participated in the commission of crimes alleged and (iv) whether the allegations against the accused constitute a serious case of 'crimes against humanity' and 'genocide' within the Tribunal's jurisdiction.

XIV. Discussion

Addressing legal issues agitated
22. Before we enter into the segment of our discussion on adjudication of charges we consider it convenient to address and resolve the legal issues agitated during summing up of cases of both parties.

(i) Delay in bringing prosecution

23. From the point of morality and sound legal dogma, time bar should not apply to the prosecution of human rights crimes. Neither the Genocide Convention of 1948, nor the Geneva Conventions of 1949 contain any provisions on statutory limitations to war crimes and crimes against humanity. Article I of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity adopted and opened for signature, ratification and accession by General Assembly resolution 2391 (XXIII) of 26 November 1968 provides protection against even any statutory limitation in prosecuting crimes against humanity, genocide etc. Thus, criminal prosecutions are always open and not barred by time limitation.

24. In view of above settled position and in the absence of any statutory limitation, as a procedural bar, only the delay itself does not preclude prosecutorial action to adjudicate the culpability of the perpetrator of core international crimes. Indubitably, a prompt and indisputable justice process cannot be motorized solely by the painful memories and aspirations of the victims. It requires strong public and political will together with favourable and stable political situation. Mere state inaction, for whatever reasons, does not render the delayed prosecution readily frustrated and barred by any law.

25. In Bangladesh, the efforts initiated under a lawful

legislation to prosecute, try and punish the perpetrators of crimes committed in violation of customary international law is an indicia of valid and courageous endeavor to come out from the culture of impunity. Customary international law has finally progressed to a stage where States may not point to the passage of time to escape their duty to prosecute and punish perpetrators of genocide, crimes against humanity, and war crimes in their own courts. Crimes against humanity and genocide, the gravest crime never get old and that the perpetrators will face justice. We should not forget it that the millions of victims who deserve that their tormentors are held accountable; the passage of time does not diminish the guilt. Therefore, justice delayed is no longer justice denied, particularly when the perpetrators of core international crimes are brought to the process of justice.

(ii) Validity of holding Absentia trial

26. The Act of 1973 provides provision of holding trial in absentia, if the appearance of the accused could not be ensured for the reason of his absconson [Section 10A (1) of the Act]. In the international context, the issue of trials in absentia arose with the first modern international criminal tribunal, the International Military Tribunal (IMT) at Nuremberg, which was established to try war criminals operating under the European Axis Powers during World War II. Article 12 of the Charter of the International Military Tribunal allowed for trials in absentia whenever the Tribunal found it necessary to do so in the interest of justice.

27. United Nations reversed its policy against trials in absentia with the Special Tribunal for Lebanon (STL or Lebanon Tribunal) in 2006. The STL allows trials "to commence and to end..... without an accused ever having showed up in court. The STL (Special Tribunal for Lebanon) expressly allows for trials in the absence of the accused.

28. According to Professor William Schabas under section 22(1) (c) of the STL (Special Tribunal for Lebanon) Statute, the accused may be tried in absentia when he refuses to appear after an initial appearance (absconded) or is otherwise unable to be found after all reasonable steps have been taken to inform him of the proceedings including media publication and communication with his known state of residence.

29. Accused Abul Kalam Azad @ Bachchu could have due opportunity of being properly informed of the proceedings in advance if the warrant of arrest could have been executed. But by remaining absconded and leaving country the accused has willfully declined to exercise his right to be present for facing trial and as such under this circumstance, trial in his absence would be permissible "in the interest of the proper administration of justice." It is a patent indicium that the accused, by his conduct, has waived his right to be present, and as such on this score too trial in his absence is quite permissible.

(iii) Incorporating 'Individual or group of individuals' to the Act by amendment

30. At the out set, before we resolve the issue, it is to be noted that it is rather admitted that even under retrospective legislation (Act enacted in 1973) initiation to prosecute crimes against humanity, genocide and system crimes committed in violation of customary international law is quite permitted, as we have already observed.

31. We are to perceive the intent of enacting the main Statute together with fortitude of section 3(1) of the Act. At the same time we cannot deviate from extending attention to the protection provided by the Article 47(3) of the Constitution to the Act of 1973 which was enacted to prosecute, try and punish the perpetrators of atrocities committed in 1971 War of Liberation.

32. The legislative modification that has been adopted by bringing amendment in 2009 has merely extended jurisdiction of the Tribunal for bringing the perpetrator to book if he is found involved with the commission of the criminal acts even in the capacity of an 'individual' or member of 'group of individuals'. It is thus validly understood that the rationale behind this amendment is to avoid letting those who committed the most heinous atrocities go unpunished. This is the intent of bringing such amendment.

(iv) Tripartite Agreement and immunity to 195 Pakistani war criminals

33. It is not good enough to say that no individual or member of auxiliary force as stated in section 3(1) of the Act of 1973 can be brought to justice under the Act for the offence(s) enumerated therein for the reason that 195 Pakistani war criminals belonging to Pak armed force were allowed to evade justice on the strength of 'tripartite agreement' of 1974. Such agreement was an 'executive act' and it cannot create any clog to prosecute member of 'auxiliary force' or an 'individual' or member of 'group of individuals' as the agreement showing forgiveness or immunity to the persons committing offences in breach of customary international law was derogatory to the existing law i.e. the Act of 1973 enacted to prosecute those offences.

34. It is settled that the *jus cogens* principle refers to peremptory principles or norms from which no derogatory is permitted, and which may therefore operate a