ICSF COMMENT ON

OBSERVATIONS OF US AMBASSADOR-AT-LARGE FOR WAR CRIMES ISSUES MR. STEPHEN RAPP REGARDING THE INTERNATIONAL CRIMES TRIBUNAL OF BANGLADESH

Prepared by
International Crimes Strategy Forum (ICSF)
http://icsforum.org

15 May 2011

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ICSF Members in:
Australia: Sydney, Melbourne; Bangladesh: Dhaka, Chittagong, Sylhet, Rajshahi; Belgium: Brussels; Canada: Toronto, Montreal; India: Calcutta, Delhi, Mumbai, Bangalore; Indonesia: Jakarta; Germany: Berlin, Kassel; Japan: Tokyo; Malaysia: Kualalampur; Saudi Arabia: Jeddah; Sweden: Stockholm, Orebro, Uppsala; United Kingdom: London, Oxford, Manchester, Nottingham, Reading, New Castle, Cardiff, Canterbury; United States: New York, Washington DC, Irving, Dallas, North Carolina, Urbana-Champaign, Albuquerque; UAE: Dubai.

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LIST OF ABBREVIATIONS

AD - Appellate Division of the Supreme Court

ICCPR - International Covenant on Civil and Political Rights

ICSF - International Crimes Strategy Forum

ICT - International Crimes Tribunal

ICTA - International Crimes (Tribunals) Act, 1973

ICTY - International Criminal Tribunal for the former Yugoslavia

ICTR - International Criminal Tribunal for Rwanda

ECCC - Extraordinary Chambers in the Courts of Cambodia

ICC - International Criminal Court

SCSL - Special Court for Sierra Leone

About ICSF

International Crimes Strategy Forum (ICSF)* is an independent global network of activists and organizations with membership spread out in four continents. Deeply committed to the spirit of the historic Liberation struggle of 1971 in Bangladesh, when, number of major international crimes were committed, this international network was setup to support the justice process initiated by the Government of Bangladesh through the International Crimes Tribunal (ICT), Bangladesh, to investigate and prosecute those responsible for international crimes committed in 1971. Since its inception, ICSF has been interacting and engaging with the ICT and other relevant authorities to assist the Government in its timely and momentous initiative of bringing to account the perpetrators of 1971 alleged of international crimes. The coalition is currently engaged in – providing legal research support, documentation support, and other forms of *pro bono* assistances to the Tribunal and its various components, including, maintaining strategy-facilitating archives, such as the Media Archive** (which records all media reports related to the ICT), maintaining easy-access research database portals such as the E-Library** (a full-text literature archive to facilitate strategic and academic research on Bangladesh's trial including legal research) etc. The Network is also engaged in specific project-based activities such as: PR and media-handling, lobbying, investigation, organizing training and strategic workshops and other civic engagement activities. In line with the broader policy and strategic objectives of ICSF's operation, this briefing document has been prepared collectively by its members in the legal research cell. It is requested that any queries related to this document be addressed to the ICSF WorkGroup at <icsf.workgroup@gmail.com>.

*http://icsforum.org

**http://icsforum.org/mediarchive

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INTRODUCTION

United States Ambassador-at-Large for War Crimes Issues Mr. Stephen Rapp first arrived in Bangladesh on 10 January 2011 at the invitation of the Government of the People's Republic of Bangladesh (hereinafter Bangladesh Government).[1] During that particular visit, Mr. Rapp stated, "The US government will help Bangladesh hold an open and transparent war crimes trial with the rights of defence for the accused."[2] Mr. Rapp also reiterated his desire to "send a memorandum to the law minister suggesting ideas that may meet some of the issues that have been raised by … organizations like the International Bar Association that may help assure that justice is done and seem to be done in the process here." Subsequently on 21 March 2011, Mr. Rapp issued a letter (see Annex) to Dr. Dipu Moni, the Hon'ble Minister of Foreign Affairs and Barrister Shafique Ahmed, the Hon'ble Minister of Law and Parliamentary Affairs of the Bangladesh Government where he offered suggestions regarding the nature of the International Crimes Tribunal (ICT) operating currently in Bangladesh and its governing statute, namely the International Crimes (Tribunals) Act 1973. Mr. Rapp visited Bangladesh again in the first week of May 2011 and held meetings with senior government officials, ICT officials, political leaders, civil society, the media, and defence lawyers to discuss his suggestions.[3] He also visited the office of the Daily Prothom Alo to exchange views on the war crimes trials with members of the civil society and freedom-fighters of the Liberation War of 1971.[4]

The January 2011 invitation conveyed towards Mr. Rapp by the Bangladesh Government reflects its commitment towards conducting the war crimes trials in a manner that is fair and transparent. However, it must nonetheless be mentioned that Mr. Rapp's recent actions and opinions he expressed with regard to the war crimes trials process in Bangladesh, a purely domestic and an internal process, amounts to a direct violation of Article 41(1) of the Vienna Convention on Diplomatic Relations. It is the responsibility of those enjoying diplomatic immunity, like Mr. Rapp, to be respectful towards the laws and regulations of a receiving state, including a duty not to interfere with the internal affairs of that state.[5] This particular provision has long been a part of customary international law and is included in an international convention that the US is a signatory. These suggestions of Mr. Rapp are

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1 The Daily Star, 'Top US official due today' (January 10, 2011) http://www.thedailystar.net/story.php?nid=169440.

2 BBC, 'US offers to help Bangladesh pursue war crimes trial' (January 13, 2011) http://www.bbc.co.uk/news/world-south-asia-12183361.

3 The Daily Star, 'US envoy for war crimes due today' (May 1, 2011) http://www.thedailystar.net/newDesign/news-details.php?nid=183948.

4 The Daily Star, 'No interference' (May 4, 2011) http://www.thedailystar.net/newDesign/news-details.php?nid=184178.

5 "Without prejudice to their privileges and immunities, it is the duty of all person enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State."

undoubtedly a subtle form of diplomatic bullying and amounts to a lapse in diplomatic norms because they are designed to interfere in an internal Bangladeshi affair. There is the need, however, for broader civil society engagement that can in effect enhance the quality of the current justice initiative, and ICSF has on this occasion chosen to overlook this diplomatic impropriety and critically focus instead on the content of his observations.

It is a legitimate expectation that a letter issued by the US Ambassador-at-Large for War Crimes Issues to the Bangladesh Government would be of confidential nature. Yet, the letter issued under the official letterhead of the ‘‘United States Department of State Office of War Crimes Issues’’ reached the hands of the press, which surprisingly provided an uncritical reception to the letter’s contents subjecting the current justice process to a great deal of uninformed debate. This also led to the generation of further misleading comments by various quarters on key doctrinal and legal issues surrounding the ICT and its governing statute. The advent of Mr. Rapp’s confidential letter before the press and the ensuing uninformed debates has prompted the ICSF to prepare this position paper from an independent point of view to examine the merits of his suggestions regarding the ICT and its governing statute.

The rationale behind this paper is based on the realization that criticisms of the ongoing war crimes trial process in Bangladesh in the form of suggestions, especially when exposed before the public domain, must be based on correct factual and legal premises. The citizens of the People’s Republic of Bangladesh, as well as the international community at large, deserve to be made aware of the issues that are pertinent to fairness in the justice process. At the same time, criticisms or suggestions from any quarter need to be fair, well-informed, and carefully construed so they are not based consciously or unconsciously upon misconceptions about a justice process that is purely domestic in every sense.

As an exercise in civil society’s engagement with the current justice process, the objectives of this policy paper are:

- to evaluate Ambassador Rapp’s suggestions on ICT and ICTA;
- to assess the conceptual validity of his legal analysis and the positions adopted by his office;
- to assess the viability of some of his suggestions regarding amendment of procedural and substantive laws applicable to the ICT; and
- to present the doctrinal and conceptual positions that correctly applies to the ICT on the issues raised for the benefit of the public, government, media, and other interested parties.

Section One presents a critical evaluation of Mr. Rapp’s letter. Building on that, Section Two presents a set of conceptual questions that may be useful to stakeholders, policy makers and the media in determining the validity of Mr. Rapp’s suggestions aimed at the ICT.

SECTION ONE

ANALYSIS OF MR. STEPHEN RAPP'S LETTER

Undoubtedly, it is necessary to ensure that the proceedings against persons alleged to have committed crimes under the jurisdiction of the ICT are carried out in a manner that is free and fair. However, it is also important to ensure that the justice process initiated by the ICTA and the ICT does not become a victim to misconceived and unrealistic demands. What must be remembered is that the objective of the justice process that the Bangladesh Government has decided to carry out has the underlying goal of ensuring justice to the countless victims during the Bangladesh Liberation War of 1971 so much so that the democratic aspirations of the people of Bangladesh are established, a death blow is given to impunity and finally a milestone step is taken towards the establishment of the rule of law.

The following paragraphs critically evaluate the major suggestions offered by Mr. Stephen Rapp, the US Ambassador-at-Large for War Crimes Issues, in his letter addressed to the Bangladesh Government on 21 March 2011.

Misconceptions, Unrealistic Expectations and International Standards:

In his letter Mr. Rapp wrote, "my hope is that this paper will further inform the ICT on current international judicial standards … to ensure that it's proceedings are independent, fair and uphold international standards so justice can be done, and seen to be done, for the people of Bangladesh". It is necessary to ensure the fairness and quality of the justice process initiated by the ICT, but attention must also be given so that only the legitimate standards of law are enshrined in the ICTA. A failure to maintain the right balance always leaves scope for bringing an end to impunity and establishing the rule of law of being frustrated.

If read carefully, it can be seen that Mr. Rapp, by urging the Bangladeshi Government to amend the ICTA in order to raise its standard to that of current international norm, has contradicted himself at a number of places and has done so without appreciating the true nature of the ICT operating currently in Bangladesh. Although he has mentioned that the ICT is a "purely domestic court," in his analysis and comments, Mr. Rapp has effectively ignored the purely domestic nature of the ICT. In fact, the only international element in ICTA are the crimes it defines, which are regarded as matters of international concern because of their grave character. Therefore, other than the specific nature of the crimes, the ICT is purely a domestic tribunal that has been established to try crimes of international nature criminalized by a piece of domestic legislation enacted by the Bangladesh Parliament.

In other words, the legitimacy of the International Crimes (Tribunals) Act, 1973 is dependent not upon any international instrument of law, irrespective of Bangladesh being or not being a party to it, but on an overwhelming decision of the Bangladesh Parliament, a democratically elected body of representatives constitutionally mandated to enact legislation. As such, the ICT can only be interpreted in light of the framework set by ICTA and not any other legal instruments of international nature.

Though Mr. Rapp himself noted at the beginning of his letter that the ICT is a "purely domestic court," he was oblivious of this observation throughout the remaining parts of his letter. It appears that the moment Mr. Rapp noted that the name of the Tribunal was preceded by the word "international" and possessed jurisdiction over crimes such as Crimes against Humanity, Crimes against Peace, Genocide, and War Crimes, he automatically, but nonetheless, wrongfully assumed that the Tribunal must be treated as an ''International Tribunal'' at par to the ICTR, ICTY, SCSL, ECCC, ICC and others.

At one point in his letter, Mr. Rapp curiously argued, "many would look to the ICT as a model as to how a purely domestic court can successfully prosecute and hold accountable perpetrators of atrocities and human rights violations that are prohibited by international law" [emphasis added]. It is, however, not clear why Mr. Rapp insists that the ICT has to be a model for other countries where the mandate and priority of the ICT is limited and clearly specified- that is, to restore accountability for the crimes committed in 1971 and providing redress to the victims.

Mr. Rapp repeatedly asserted the essentiality of maintaining "international standards" and "highest international standards for justice" without analyzing the standards of justice in Bangladesh, which is what the ICT has been designed to uphold as a tribunal operating under a Bangladeshi law enacted by the Bangladesh Parliament. In fact, by doing so, Mr. Rapp has joined the bandwagon of other experts and organizations that have commented and suggested incorporation of normative and procedural provisions of the ICC Statute into the ICTA. The troubling reality with regard to this particular suggestion is that it fails to point to a single provision in the Rome Statute that asks Bangladesh, as a State Party to the ICC, to copy and paste its provisions and procedures in its purely domestic trials. Suggestions of such nature also fail to consider the impacts of importing these so called highest international standards, such as how these standards will be reconciled with the prevailing legal order in Bangladesh. Therefore, among others things, Mr. Rapp's letter does not answer how there can presumably be two separate, distinct, and competing standards in a legal system.

Mr. Rapp also fails to understand that the ICT is not the product of negotiated compromise between States, as other tribunals like he ICTY, ICTR, ICC are, but is rather a justice process for the victims of Bangladesh and for crimes committed in Bangladesh. Accounting for those who committed the most heinous of crimes during 1971 and restoring the rule of law by bringing an end to impunity has been a long-held aspiration of the people of Bangladesh.

Therefore, the process initiated to form the ICT through the ICTA was essentially by and for the people of Bangladesh, a standard required by international instruments such as the ICC.[6]

It also must be understood that the ICC has no overriding authority over national jurisdictions; rather, it is a mechanism complimentary to national system, which is activated in the event that a state is unwilling or unable to prosecute these crimes. Clearly, Bangladesh stands opposite to this scenario because it has on its own wisdom and authority undertaken this process even after nearly four decades of the commission of the concerned crimes.

As a State Party to the Rome Statute, Bangladesh has a "general obligation to cooperate" under Article 86, which states that the "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court." The other obligation in Article 115, "Funds of the Court and of the Assembly of States Parties," under which Bangladesh has to pay "assessed contributions" to fund the ICC and the Assembly of States Parties. There are no other positive obligations emanating from the ICC.

Moreover, the ICC Statute is very candid about the limitation of its applicability. This is clearly indicated in its definitions of crimes, which start with the same limiting provision that the definitions given are "For the purpose of this Statute..." [See Article 6, 7(1) and 8(2)].[7] This means that the definitions of crimes within the Rome Statute are to be applied only for the purposes of the Rome Statute and not beyond it.

Furthermore, Article 10 of the Rome Statute declares, "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute." It is important to take note of the word "existing" in this Article, which clearly implies that the Rome Statute is not to override, limit, or prejudice rules of international law. Therefore, the Rome Statute does not invalidate or subvert the legal principles enshrined in the Nuremberg Code or the governing statutes of other tribunals like the ICTY and ICTR. Therefore, the Rome Statute cannot negate or subvert the ICTA.

With regard to the statutes of the ICTY and ICTR, these were drafted by the UN Security Council. Bangladesh, as a Member of UN, has an obligation to cooperate with these tribunals; but that is the end of its obligations. The statutes and accompanying Rules of Procedure and Evidence of these tribunals, except in terms of cooperation, have no effect on the laws or the legal system of Bangladesh.

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6 The Preamble of the ICC recognizes "... it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes …" which is preciously what the Bangladesh Parliament has done by enacting ICTA.

7 For instance, Article 6 of the Rome Statute defines "Genocide" as: "*For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such … .*" An identical approach is taken in Articles 7(1) and 8(2) which define Crimes against Humanity and War Crimes, respectively.

In his letter, Mr. Rapp also did not adequately explain as to why Bangladesh has to maintain highest international standards for Crimes against Humanity, Genocide, and War Crimes, and not for other crimes. Furthermore, he also did not mention which international instrument in particular obligates the ICT, or for that matter Bangladesh, to uphold the highest international standards. Bangladesh already has a well-developed and time-tested legal system and respect for rule of law. These abilities are internationally recognized. In December 2009, ICC President Mr. Justice Sang-Hyun Song expressed his full confidence in the ability of the Bangladeshi legal system to address crimes identified under ICTA.[8] Justice Song stated, "the ICC has no room to intervene in war crimes committed in 1971."[9] Furthermore, he reiterated that the ICC's jurisdiction covers crimes committed after the institution's establishment in 2002. Justice Song maintained that the ICC did not override national jurisdiction. It is therefore evident in this particular case that the provisions of the ICC shall not override the jurisdiction of the Bangladesh legal system. [10]

Thus, there is no obligation on the part of the Bangladesh Government to amend the ICTA with the purpose of incorporating international standards. The ICT is and will remain a purely domestic court, as has been rightly identified by Mr. Rapp. The ICT as a tribunal belonging to the independent and sovereign state of the People's Republic of Bangladesh should be allowed to function as per the domestic standards determined by the Bangladesh Parliament.

Regarding Retroactivity, Adherence to the ICCPR, and the Death Penalty:

In his letter, Mr. Rapp referred to Article 15(1) of the International Covenant on Civil and Political Rights (ICCPR) and wrote, "The creation of a Tribunal in 2010 with jurisdiction to try certain specified crimes committed in 1971 based on a law passed in 1973 does raise a number of questions as to the permissibility of retroactive application of the law." Mr. Rapp has also called for the Bangladesh Government to determine if whether the ICTA is *ultra vires* to the Bangladesh Constitution: "the question of whether a retroactive statute may be given effect must also be determined under the constitutional law of Bangladesh. A party to a proceeding before the ICT should be able to raise questions as to whether provisions of the 1973 Act and the 2009 amendments violate international or domestic law as to retroactivity as well as other jurisdictional matters."

Mr. Rapp's attempts to question the permissibility of the retroactive ICTA is fundamentally misconstrued as far as international crimes and their adjudications are concerned. When it comes to trying crimes of heinous nature such as Genocide and War Crimes - that is, crimes

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8 The Daily Star, 'Dhaka to ratify Rome Statute of int'l court before March' *Foreign Minister tells ICC President*' (Tuesday, December 8, 2009).

9 New Age, 'ICC envisages Bangladesh's role in global campaign for rule of law *Bangladesh's justice system capable enough to hold trial of war crimes: Song*' (Tuesday, December 8, 2009).

10 Ibid.

deemed to have been committed against all mankind - enacting legislation to retroactively try these crimes is a widely accepted legal practice. Mr. Rapp effectively calls for amending the ICTA to a standard that is international, but then questions the permissibility of the ICTA adopting the internationally accepted standard of retroactively trying crimes such as Genocide and War Crimes.[11] Despite Mr. Rapp's evident comfort with the retroactive legislation[12] that constituted tribunals like the ICTY and ICTR, he, for some reason that is yet to be identified, questions the permissibility of retroactivity in the ICTA. It must be noted that the ICTY was formed in 1993, two years after the commission of crimes, and the SCSL was formed in 2002, eight years after the commission of the concerned crimes. It is hard to see the reasoning behind Mr. Rapp's criticism in questioning the permissibility of the ICTA, a law that was enacted by the Bangladesh Parliament within a year and half of the commission of the concerned crimes. Not only is the retroactive justice process of crimes a widely practiced legal norm, Article 15(2) of the ICCPR makes a clear exception to non-retroactivity: "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations." The ICTA is entirely consistent with ICCPR Article 15(2).

The ICC is the only institution which possesses prospective jurisdiction, meaning that it can only deal with crimes committed after its governing statute came into force. Thus, the ICC is rendered incapable of exercising jurisdiction over the crimes committed in Bangladesh in 1971. This is another reason as to why Bangladesh had to, despite being a signatory to the Rome Statute, initiate its own process to try the crimes committed in 1971.

One of the unique characteristics of prospective laws such as the Rome Statute is that they have the scope and ability of incorporating extensive provisions like the Elements of Crimes. This is due to the prospective nature of such laws. Hence, retroactive laws such as the ICTY or ICTR Statutes do not contain any Elements of Crimes. It is contradictory of Mr. Rapp to, on one hand, question the retroactivity of the ICTA and, on the other hand, urge its amendment by calling for the incorporation of provisions like Elements of Crimes. The contents of Mr. Rapp's letter do not answer these contradictions.

Constitutional safeguards against retroactive legislation are generally not applicable for laws passed with the purpose of prosecuting and punishing crimes of heinous nature, such as the crimes under the jurisdiction of the ICTA. For instance, the permissibility of retroactivity was cemented by the Australian High Court when it upheld the retroactivity of the Australian War Crimes Act of 1988 (amendment of the 1945 Act). In the case of *Polyukhovich v. The Commonwealth*, the High Court held, "The retrospective operation of the Australian War Crimes Act was authorized by the constitution since that operation was a matter incidental to

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11 Tribunals such as the ICTY, ICTR, and SCSL have all been formed retroactively to try offences under their jurisdiction.

12 Mr. Stephen Rapp as the Prosecutor of the ICTR and the Chief Prosecutor of the SCSL has had experience with working with retroactive legislation.

the execution of a power vested by the constitution in the parliament."[13] The High Court went on to hold that the War Crimes Act of 1988 was in fact retroactive because it only criminalized acts which were crimes under international law as well as ordinary crimes under Australian law at the time they were committed. Enacting a law like the War Crimes Act of 1988 was therefore an exercise of universal jurisdiction by the Australian Parliament. In the judgment of that case, Justice Dawson observed, "[T]he ex post facto creation of war crimes may be seen as justifiable in a way that is not possible with other ex post facto criminal laws ... [T]his justification for a different approach with respect to war crimes is reflected in [Article 15(1)] the International Covenant on Civil and Political Rights to which Australia became signatory on December 18." Therefore, the retroactivity of the ICTA enacted by Bangladesh is the same as the Australian War Crimes Act of 1988. Both simply embody crimes existing then during their respective enactments; questioning the ICTA's retroactivity amounts to overlooking standard practice in international criminal law. Offences such as Genocide, War Crimes, and Crimes against Humanity were not unheard of in 1971. In fact, the Pakistan Government was one of the first countries to sign the Genocide Convention and the Geneva Conventions were already a part of the international legal order existing in 1971. Therefore, by enacting the ICTA, the Bangladesh Parliament was merely recognising and acknowledging prevailing norms of international criminal law.

In his letter, Mr. Rapp wrote, "we suggest that the Government of Bangladesh incorporate the provisions of the ICCPR relating to fair judicial process and the statutes, elements of crimes and rules of procedure of the ICC and international tribunals among the rules and practices applicable to proceedings before the ICT." It is evident that Mr. Rapp has placed a great deal of emphasis on the importance of the ICCPR and the ICC Statute as international legal instruments. With regard to provisions of the ICCPR, it is interesting to note that the United States has itself issued blanket reservations for Articles 1-27 of the ICCPR. One of the most influential contemporary scholars of international law, Professor Louis Henkin, has commented on the imposition of such blanket reservations and noted:

> Some see such declarations as another sign that the United States is resistant to international human rights agreements, setting up obstacles to their implementation and refusing to treat human rights conventions as treaties dealing with a subject of national interest and international concern.[14]

Likewise, Mr. Jordan Paust, Professor of Law at the University of Houston commented, "rarely has a formal attempt at adherence to a treaty been so blatantly meaningless and so openly defiant of its terms."[15]

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13 Dr. Mizanur Rahman, 'An End to Impunity' (December 2010) http://www.thedailystar.net/forum/2010/December/impunity.htm.

14 Louis Henkin, 'U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker' (1995) 89(2) The American Journal of International Law http://www.jstor.org/stable/pdfplus/2204206.pdf?acceptTC=true.

15 Jordan J. Paust, 'Avoiding ''Fraudulent'' Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights' (1992 - 1993) 42 DePaul Law review http://heinonline.org/HOL/Page?handle=hein.journals/deplr42&div=62&g_sent=1&collection=journals.

Similar concern was expressed in 1994 by the United Nations Human Rights Committee which stated:

> Of particular concern are widely formulated reservations which essentially render ineffective all Covenant rights which would require any change in national law to ensure compliance with Covenant obligations. No real international rights or obligations have thus been accepted. And when there is an absence of provisions to ensure that Covenant rights may be sued on in domestic courts, and, further, a failure to allow individual complaints to be brought to the Committee under the first Optional Protocol, all the essential elements of the Covenant guarantees have been removed.[16]

It is also worth noting that the United States is not even a member of the ICC. It has also entered into over 80 Bilateral Impunity Agreements (BIAs) with other nations, obliging these nations not to subject current or former government officials, military, and other personnel from the United States to the jurisdiction of the ICC.[17] The US Government has itself expressed severe reservations regarding the ICCPR and has not ratified the ICC Statute, while the Bangladesh Government is a signatory to and has ratified the ICCPR, along with its Optional Protocol. Furthermore, unlike the US, Bangladesh is a State Party to the Rome Statute of the ICC.

In conclusion, it is necessary to state that the provisions of the ICTA are compatible with the rights of the accused enshrined under Article 14 of the ICCPR. The following account identifies some of the main rights and also points out the corresponding Sections in the ICTA which acknowledges those rights:

- Article 14(3)(a) of the ICCPR states, "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him." This provision is reflected in Section 10(3) of the ICTA which states, "Any accused person or witness who is unable to express himself in, or does not understand, English may be provided the assistance of an interpreter."
- Article 14(3)(b) of the ICCPR states, "To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing." This provision is reflected in Section 16(2) of the ICTA which states, "A copy of the formal charge and a copy of each of the documents lodged with the formal charge shall be furnished to the accused person at a reasonable time before the trial; and in case of any difficulty in furnishing copies of the documents, reasonable opportunity

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16 University of Minnesota Human Rights Library, 'Human Rights Committee, General Comment 24 (52), General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6' (1994) http://www1.umn.edu/humanrts/gencomm/hrcom24.htm.

17 Coalition for the International Criminal Court, 'Questions & Answers US Bilateral Immunity Agreements or so-called "Article 98 Agreements," http://www.iccnow.org/documents/FS-BIAs_Q&A_current.pdf.

for inspection shall be given to the accused person in such manner as the Tribunal may decide."

- Article 14(3)(c) of the ICCPR states, "To be tried without undue delay." This provision is reflected in Section 11(3) of the ICTA, which states that a Tribunal shall, "(a) confine the trial to an expeditious hearing of the issues raised by the charges" and "(b) take measures to prevent any action which may cause unreasonable delay, and rule out irrelevant issues and statements."
- Article 14(3)(d) of the ICCPR states, "To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it." This provision is reflected in Section 17(2) of the ICTA which states, "An accused person shall have the right to conduct his own defence before the Tribunal or to have the assistance of counsel."
- Article 14(3)(e) of the ICCPR states, "To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him." This provision is reflected in Section 17(3) of the ICTA which states, "An accused person shall have the right to present evidence at the trial in support of his defence, and to cross-examine any witness called by the prosecution."
- Article 14(3)(f) of the ICCPR states, ''To have the free assistance of an interpreter if he cannot understand or speak the language used in court." This provision is reflected in Section 10(3) of ICTA which states, "Any accused person or witness who is unable to express himself in, or does not understand, English may be provided the assistance of an interpreter."
- Article 14(5) of the ICCPR states, "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." This provision is reflected in Section 21 of the ICTA which states, "A person convicted of any crime specified in Section 3 and sentenced by a Tribunal shall have the right of appeal to the Appellate Division of the Supreme Court of Bangladesh against such conviction and sentence: Provided that such appeal may be preferred within sixty days of the date of order of conviction and sentence."

It is therefore evident from the above comparative account that the ICTA does indeed adhere to most of the rights of the accused enshrined under Article 14 of the ICCPR. Furthermore, it must be understood that the purpose of Article 14 of the ICCPR is to provide some general guidelines applicable to ordinary criminal proceedings. Instead, Article 15 of the ICCPR is meant to apply to the other special domestic proceedings related to international crimes, that is, through special tribunals like the ICT.

Since there is no consensus in international law prohibiting death penalty and because it is a form of punishment permissible under the laws of Bangladesh, the provision of death penalty in the ICTA is not inconsistent either with Bangladeshi or international laws. It is pertinent to

reiterate the fact that there currently exists no universal consensus on the issue of death penalty. Therefore, at present, no such international obligation exists requiring states to abolish the death penalty on the grounds of an international standard. Notably, in February 2009, in response to a UN "Moratorium on the Use of Death Penalty,"[18] the Government of Bangladesh along with 52 other governments made its position clear through a document that was submitted before the UN.[19] The position adopted by these 53 governments is:

> (e) Every State has an inalienable right to choose its political, economic, social, cultural and legal justice systems, without interference in any form by another State. Furthermore, the purposes and principles of the Charter of the United Nations, in particular Article 2, paragraph 7, clearly stipulates that nothing in the Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State. Accordingly, the question of whether to retain or abolish the death penalty should be carefully studied by each State, taking fully into account the sentiments of its own people, state of crime and criminal policy.

These 53 retentionist states form a significant part of the international community, whose opinions must not be ignored. Furthermore, there is a broader perspective which deserves attention while discussing the issue of death penalty in the context of the ICT operating in Bangladesh. The provision for the death penalty is an integral part of Bangladesh's criminal justice framework, not only of the ICTA. The death penalty is a valid form of punishment under The Penal Code, as well as a whole range of other existing special criminal legislation in Bangladesh. Thus, it would not be practicable, legally or politically, to simply abolish the death penalty with regard to one piece of legislation and retain it in case of others. It is not that any legal reform as fundamental as abolishing the death penalty has to be synchronized across the board. However, any asymmetric reform is more likely to be viewed as irrational if the criminal justice system allows death penalty for a single murder, as per ordinary penal law, and prohibits it for mass murders. What Mr. Rapp failed to realize is that if Bangladesh takes the abolitionist path, it has to first go through a total review and overhaul of its entire criminal justice system, which can take years, if not decades. It is neither prudent nor realistic for Mr. Rapp to expect the current trials in the ICT to be a testing ground for the abolition of death penalty. Oddly enough, a US Ambassador prescribing the abolition of the death penalty is the ultimate contradiction because US courts routinely sentence guilty parties to death.

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18 United Nations General Assembly Resolution no. 63/168 adopted by the Third Committee on 20 November 2008, and subsequently by the General Assembly on 18 December 2008 by a recorded vote.

19 See: General Assembly doc no: A/63/716 dated 12 February 2009 where the Government of Bangladesh stated its position along with 52 other retentionist states.

Regarding Amending the Rules of Procedure:

The other issues raised by Mr. Rapp include the rights of the accused, pre-trial detention, provisional release, disclosure, interlocutory appeals, presumption of innocence, burden of proof, and the protection of witnesses. These are all valid in the sense that the tribunal's process can benefit from express stipulations in terms of predictability of law for both the Prosecution and the Defence. There is room to improve coverage of these procedural issues by amending the ICT's Rules of Procedure. Such issues can be addressed, and in this regard, concerned stakeholders could, and in fact should, prepare and submit concrete suggestions to the Tribunal. However, any such proposal should take into account the problems of justice administration particular to Bangladesh's legal sphere, which would include the context of the domestic legal order, existing professional standards, likelihood of abuse of process, time, costs, and viable protection of witnesses and victims.

a) Appeal from Interlocutory Orders

One of the procedural issues raised by Mr. Rapp, the provision of appeal from interlocutory orders, unfortunately demonstrates his lack of understanding of the challenges particular to the Bangladesh legal system. Given the legal context of the ICT, the justice process can equally and effectively benefit from Reviews, instead of Appeals.[20] In Bangladesh, appeals are generally understood as a right with regard to verdicts passed by the Court, but appeals against procedural matters, such as appeals against Interlocutory Orders, cannot be considered as a right, in the absence of which injustice is bound to occur. Section 21 of the ICTA already provides for appeals "against conviction and sentence," which can be filed as a matter of right. In fact, a final verdict by the ICT would only result following completion of all available procedures including Section 21 appeals, under which all procedural and other irregularities could be raised. In other words, Section 21 allows for an aggrieved appellant to raise all issues that has aggrieved him or her in the form of an appeal before the ultimate appellate authority in the Bangladesh legal system, the Appellate Division of the Supreme Court. The provision of appeal from verdicts in ICTA is in itself a progressive initiative considering some international tribunals, like Nuremberg, did not afford defendants such a right.

Furthermore, the presumption that the absence of appeals against interlocutory orders will automatically result in an unfair trial or the denial of justice has no basis. There is no evidence, legal or whatsoever, to suggest this, nor are there any causal links to demonstrate that the absence of the provision of an interlocutory appeal bears a greater likelihood of injustice for the defendant. The ICTA, through its newly incorporated Section 6(2)(A) has

[20] It must be mentioned that the moot point here involves drawing a distinction between appeals with regard to verdicts and appeals with regard to interlocutory orders.

pledged greater commitment towards independence, thus rendering Mr. Rapp's concerns baseless.[21]

Even if it is assumed the absence of the right to appeal against interlocutory orders bears greater likelihood of disadvantage for the parties, it must be noted that such absence prevails for both the Prosecution and Defence. If there is at all any disadvantage, it is equally applicable to both sides, as a manifestation of the principle of the equality of arms. Moreover, the very purpose of appeal from interlocutory orders is to invoke a superior court's supervisory jurisdiction so as to remedy a judicial error in the course of proceedings that has aggrieved the appellant. The absence of appeal from interlocutory orders does not automatically rule out remedial interventions by the Court viewing the process as a whole. In the case of ICTA, it is not such that the accused will never be accorded the opportunity to invoke remedial measures. If the accused thinks that he or she would not have been convicted except for a judicial error, there is always the ability to raise that concern in the final appeal from conviction before the Appellate Division under Section 21 of the ICTA. It is in this manner that ICTA adequately ensures that the accused is not without any recourse, even in the absence of any provision for appeal against interlocutory orders.

The ICT is a court of first instance, and the current ICT bench is comprised of three members, all of whom are required by the ICTA to be eligible to qualify as a Judge of the Supreme Court (High Court Division) of Bangladesh.[22] It is worth mentioning that no other Tribunal of first instance in Bangladesh provides for such a senior panel of Judges.

There are also important practical and contextual aspects to take into consideration, all of which Mr. Rapp failed to do. In the Bangladesh legal context, the history and track record of interlocutory appeals is not a very promising one, having been notorious for their susceptibility to abuse of process as unscrupulous parties commonly use this otherwise useful device to drag legal disputes indefinitely. In all types of cases, ranging from custody disputes to land matters, Bangladesh's legal system struggles with the consequences of such abuses. The risk of indefinite delay is not something the ICT can afford to face as the ongoing trials itself have commenced after 40 years. If this Tribunal, given its delayed start, is allowed to be riddled with endless motions and applications, justice will suffer and ultimately impunity will prevail. The ICT has already reviewed one of its earlier decisions recently; it reviewed and reversed one of the decisions on venue of interrogation.[23]

b) Preliminary objections to jurisdiction and constitutional challenges to ICTA:

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21 The provision reads as: "The Tribunal shall be independent in the exercise of its judicial functions and shall ensure fair trial."

22 See Section 6(2) of ICTA.

23 David Bergman, 'Int'l Crime Tribunal: growing independence or a return to being the rubberstamp?' (Wednesday, April 13, 2011) http://newagebd.com/newspaper1/op-ed/15296.html.

Mr. Rapp in his letter suggested the ICTA should be amended in order to allow for a provision to challenge the jurisdiction, as well as various provisions of the ICT. The preliminary objections to the jurisdiction of the ICT or constitutional challenges to provisions of the ICTA are not possible because the ICTA is protected by Articles 47(3) and 47A(2) of the Constitution of the People's Republic of Bangladesh.[24] Providing laws with such form of constitutional protection is not uncommon in the legal arena. For example, the neighboring Indian Constitution currently has a total of two hundred and eighty four Acts listed under the Ninth Schedule of the Indian Constitution which have been given constitutional protection under Article 31B.[25] Therefore, construing the protection given to the ICTA by the Bangladesh Constitution is not at all a legal anomaly.

Mr. Rapp has also written suggestions on other miscellaneous provisions of the ICTA and its Rules of Procedure. These provisions and the Rules of Procedure should be amended and improved with the goal to further enhance the quality of the ongoing justice process. In fact, this process is facilitated by the fact that ICT Judges have the power to draft Rules if they deem it necessary. Earlier in April, the ICT Judges reviewed its own decision regarding the venue of interrogation of an accused following the filing of an application in that regard.

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[24] Article 47(3) states, "Notwithstanding anything contained in this Constitution, no law nor any provision thereof providing for detention, prosecution or punishment of any person, who is a member of any armed or defence or auxiliary forces or who is a prisoner of war, for genocide, crimes against humanity or war crimes and other crimes under international law shall be deemed void or unlawful, or ever to have become void or unlawful, on the ground that such law or provision of any such law is inconsistent with, or repugnant to any of the provisions of this Constitution."

Article 47A(2) states, "Notwithstanding anything contained in this Constitution, no person to whom a law specified in clause (3) of article 47 applies shall have the right to move the Supreme Court for any of the remedies under this Constitution."

[25] Like Article 47(3) of the Bangladesh Constitution, Article 31B of the Indian Constitution states, "Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or Tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force."

SECTION TWO

QUESTIONS TO AMBASSADOR RAPP

Mr. Stephen Rapp has clearly conveyed his views about the ICTA in his 21 March 2011 letter. It can be safely assumed that during his future visits Mr. Rapp will, in all likelihood, check on progress made in adopting his suggestions, and in this regard, perhaps seek answers from the representatives of the Bangladesh Government he will be meeting. There also exists the possibility of Mr. Rapp elaborating and offering new suggestions about what he characterized in his letter as the "essential elements of a competent tribunal." Noticeable is his choice of the words "competent tribunal" is the implication that without the incorporation of Mr. Rapp's suggestions, the ICT is not a competent tribunal.

It is the duty of all parties related to the ICTA and the ICT, from legal representatives to members of the professional community to the media, to critically question the suggestions of Mr. Rapp.

Mr. Rapp may be asked question along the following cursory lines:

On the ICT:

Mr Ambassador, in your letter to the Government, you have correctly identified that the whole process of ICT is a purely domestic one. If so:

- Do you also accept that the only international element in the ICT is the nature of the crimes (i.e., international crimes) that it deals with?
- In this regard, do you agree that process has to be owned by the people of Bangladesh since victims are Bangladeshis, the territory where these crimes occurred is Bangladesh, and the ICT has been the outcome of long and sustained efforts by the people of Bangladesh?
- Do you acknowledge that it is the responsibility of Bangladesh to investigate and prosecute crimes committed in Bangladesh?
- Do you accept that Bangladesh has long and rich legal heritage capable of trying the crimes committed in Bangladesh against its nationals?
- Do you recognize that the validity or legitimacy of the International Crimes (Tribunals) Act, 1973 comes not from any international instrument, regardless of whether Bangladesh is a party to it or not, but out of an overwhelming decision of the Bangladesh Parliament, democratically elected to legislate for Bangladesh? As such, ICT is not a creation of international agreement, or imposed by any international or other authority, like, for example, the Court of Bosnia and Herzegovina created by the High Representative, which incidentally another lawyer (Toby Cadman) suggested

Bangladesh to copy. Which process, in your view, has higher legitimacy, the one developed by the victim nation or the one imposed upon from outside?

On standards:

Mr. Rapp, in your letter you have talked about international standards and the highest international standards for justice without, in our opinion, analyzing the standards of justice prevailing in Bangladesh, which is what the ICT has been designed to uphold as a Tribunal operating under a Bangladesh law in Bangladesh. We would like to know your views on the following points:

- In the absence of a full-blown impact study on the transplantation of rules, what do you consider the impacts would be of importing such so-called highest international standards in a process that is purely domestic?
- How can the highest international standards (as proposed by you) be reconciled with the existing legal order in Bangladesh? How is it rational for there to presumably be two separate, distinct and competing standards in a legal system?
- It would therefore, be helpful to know why Bangladesh has to maintain the highest international standards for Crimes against Humanity, Genocide, and War Crimes and not for other crimes?
- Your letter does not mention which international instrument obligates the ICT or for that matter, Bangladesh, to uphold proverbial highest international standards, especially when Bangladesh has a well developed and time tested legal system and culture?

On the ICC:

- Mr. Rapp, do you think the Rome Statute of the International Criminal Court has overriding effects on the legal system of the State Parties to the ICC?
- Article 10 of the Rome Statute states that "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute." Do you then accept, that the "existing rules of international law" include the Nuremberg Code, the Genocide, and Geneva Conventions on which the ICTA is based?
- Could you please explain what the Rome Statute means when Articles 6, Article 7(1) and Article 8(2) all have the common phrase "For the purpose of this Statute?" Does it not mean that the ICC will use these definitions only for itself and not impose these provisions on others?
- Is it correct that as a State Party to the ICC, Bangladesh is obliged under Part 9 to "cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court?" And, simultaneously, under Part 12 on Financing, Bangladesh is also obliged to pay "Assessed contributions?" Apart from these positive obligations, are there any other provisions in the Rome Statute that specifically obligates Bangladesh to follow the norms and procedures of the Statute? If so, would you kindly point out those Article(s)?

On retroactive nature of ICTA:

- Mr. Rapp, the International Crimes (Tribunals) Act, 1973 was adopted by the Parliament of Bangladesh about a year and half after the commission of the concerned crimes in 1971. In your letter, you have quite elaborately and prominently covered the issue of retroactivity. At the same time, you have suggested either to "use ICC's Elements of Crimes to interpret the crimes" or if needed, to amend the 1973 Act. If the Bangladesh Parliament were to follow your suggestion, how justified would it be to amend or expand crimes committed nearly 40 years ago? It would be helpful to know if you could explain to us as to how incorporating the new Elements of Crimes at this stage could be reconciled with your general position on retroactivity. Please kindly clarify your position Mr. Rapp. Are you arguing for or against the principle of retroactivity?
- In your letter, you have cited examples of the ICTY, ICTR, ECCC and other international and hybrid tribunals as ideal practices. We are struggling to understand your point as all of these tribunals you mentioned have purported to try the crimes retroactively. How would you then justify these tribunals' disregard of principle of non-retroactivity while in case of Bangladesh and the ICT, this takes up a significant part of your critique?

Questions out of curiosity:

It is necessary to put forward a few questions to Mr. Stephen Rapp regarding the relationship shared between the US and ICC, as well as US and the ICCPR (International Covenant on Civil and Political Rights), which he has relied and cited in his letter.

- Why has the US un-signed her signature to the Rome Statute, and why has the US not acceded to it as yet?
- Why does the US still have a law called the American Service-Members' Protection Act 2002, which gives the President of the United States powers to protect US nationals by using all means?
- In protecting US nationals from the ICC, why does the US engage in Bilateral Immunity Agreements with countries including the one with Bangladesh which was signed on 18/8/2003, effectively exempting US nationals from the ICC's jurisdiction?
- What are in your views the deficiencies of the Rome Statute?
- Mr. Rapp, you have referred to the ICCPR and in your letter have encourage the Bangladesh Government to adopt the principles of the ICCPR into the ICTA. However, why has the US despite ratifying the ICCPR, enforced five Reservations, five Understandings, and four Declarations effectively making sure that the ICCPR will not create any private cause of action in the US Courts?

CONCLUSION

While Mr. Rapp is much appreciated for his concern, his suggestions need to reflect the particular, individualized, and special situation of the ICT and of Bangladesh's justice system. Blanket statements espousing the need to amend the ICTA to the highest of international standards does not take into account the purely domestic nature of the tribunal, a fact conceded by Mr. Rapp himself. Likewise, comments about the ICTA's retroactivity and Rules of Procedure fail to acknowledge the situation as specific to Bangladesh's nor do they reflect past international practice.

As an act of civic engagement, this paper has sought to explore Mr. Rapp's suggestions regarding the ICT and its governing statute. There is no argument against ensuring fairness and quality of the justice process initiated by the ICT. Attention, however, must also be given to the fundamental principles enshrined in the ICTA; any failure to maintain the right balance will allow impunity to continue and rule of law to be frustrated.

ANNEX

Copy of US Ambassador-at-Large for War Crimes Issues Mr. Stephen Rapp to the Law Minister and Foreign Minister of Bangladesh, dated 21 March 2011

United States Department of State

Office of War Crimes Issues

Washington, D.C. 20520

March 21, 2011

Hon. Dr. Dipu Moni
Minister of Foreign Affairs
Government of the People's Republic of Bangladesh
Dhaka, Bangladesh

Hon. Barrister Shafique Ahmed
Minister of Law, Justice, and Parliamentary Affairs
Government of the People's Republic of Bangladesh
Dhaka, Bangladesh

Dear Honorable Ministers:

Thank you for welcoming me to Bangladesh in January and for your invitation to share my experiences and provide suggestions drawn from my office's extensive experience in promoting accountability for serious violations of international law. These suggestions are not intended to convey an official U.S. government position on the essential elements of a competent tribunal; this paper is intended to serve as a resource/guide to further inform and promote dialogue within the Government of Bangladesh concerning an array of potential avenues for strengthening the ICT.

The United States is interested in seeing that the trials of the ICT are conducted in a manner that is just, equitable, consistent with international law and that has the maximum benefit for the people of Bangladesh. The effective enforcement of international criminal law is very important to establishing lasting peace and reconciliation and many will look to the ICT as a model as to how a purely domestic court can successfully prosecute and hold accountable perpetrators of atrocities and human rights violations that are prohibited by international law.

Preliminary Issues

The main challenge facing the ICT is that the statutory language which established it and outlined its jurisdiction were adopted in 1973, before the creation of the numerous *ad hoc* international tribunals and the creation of the International Criminal Court which have greatly expanded and further defined and interpreted international humanitarian law. However, from my discussions with representatives of the Bangladesh government and the ICT, it was understood that it would be difficult to amend the Act which created the Tribunal. The ICT was first conceived by the "International Crimes [Tribunal] Act" which was adopted by the Parliament in 1973 (hereafter referred to as the "1973 Act") and marginally amended in 2009. At that time, the Bangladeshi Constitution (which was adopted in 1971) was amended to ensure that there would be no constitutional challenges to the Tribunal. It was not until the current government's election in 2008, which brought back democracy after a period of military rule that the political will and capacity was there to create the Tribunal. However, operating a tribunal in 2011 using a law created forty years ago creates problems. The 1973 Act was written based on the Nuremburg Code. Since that time, however, international jurisprudence on humanitarian law has more fully developed thanks to the Tribunals for Rwanda and Yugoslavia, the Special Court for Sierra Leone and the creation of the International Criminal Court. Even if it is not possible to alter the statutory language of the 1973 Act, the Tribunal could use the ICC's "Elements of Crimes" to interpret the crimes, which while enumerated by the 1973 Act, were never defined.

While it would be difficult to amend the 1973 Act, the Bangladeshi officials I met with welcomed suggestions for amendments to their Rules of Procedure, which were promulgated by the Tribunal itself and therefore are much easier to amend. Chapter X of the Rules of Procedure acknowledge that the rules enumerated are not exhaustive and could be amended, altered, added or repealed as the Tribunal thinks necessary. I have therefore sought to identify ways to ensure a fair process by amending the Rules of Procedure and related practices.

We hope that by using contemporary international law to interpret the crimes enumerated within the 1973 Act and by amending the Rules of Procedure, the ICT will be able to uphold current international legal standards while bringing perpetrators of atrocities committed forty years ago to justice. However, if you conclude that adopting these measures will not be sufficient, I would respectfully urge you to consider appropriate statutory amendments so that each of the proposed rules and practices could be given force and effect in the proceedings of the International Crimes Tribunal.

The suggestions herein are based upon the fact that through its actions, the Bangladeshi government has already evinced a commitment to upholding international standards for justice and to the pursuit of accountability for those responsible for atrocities and gross violations of human rights. As a member of the United Nations, Bangladesh has contributed resources to the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), which together achieved justice in over 200 cases of individuals charged with genocide, war crimes, and crimes against humanity. As a member of the United Nations, Bangladesh has also been part of the process by which the UN entered into agreements with national governments to form hybrid courts, such as the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC). Citizens of Bangladesh have figured prominently among the ranks of judges, lawyers, and investigators at the international tribunals and hybrid courts. Bangladesh is also a State Party to the Rome Statute of the International Criminal Court (ICC) and has therefore accepted application of the provisions of the Rome Statute, the ICC Elements of Crimes, and ICC Rules of Procedure and Evidence in future cases before the ICC involving Bangladesh citizens. Bangladesh has also ratified several international human rights treaties and conventions, including the International Covenant on Civil and Political Rights (ICCPR), which is particularly applicable to this paper for its provisions and standards for a fair judicial process. Accordingly, we suggest that the Government of Bangladesh incorporate the provisions of the ICCPR relating to fair judicial process and the statutes, elements of crimes and rules of procedure of the ICC and international tribunals among the rules and practices applicable to proceedings before the ICT.

Finally, as a caveat, the suggestions within touch primarily on the issues that were raised in the course of my meetings in Bangladesh and are therefore not an exhaustive list of everything the Tribunal could or should do to uphold the highest international standards for justice in its proceedings. Nor are the suggestions to convey an official U.S. government position on the essential elements of a competent tribunal. Rather, my hope is that this paper will further inform the ICT on current international judicial standards and promote dialogue within the Bangladeshi government concerning an array of potential avenues for strengthening the ICT to ensure that it's proceedings are independent, fair and uphold international standards so justice can be done, and seen to be done, for the people of Bangladesh.

Retroactivity

The creation of a tribunal in 2010 with jurisdiction to try certain specified crimes committed in 1971 based on a law passed in 1973 does raise a number of questions as to the permissibility of retroactive

application of the law. Under Article 15(1) of the ICCPR, a person cannot "be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense under national or international law, at the time when it was committed." Article 15(2) goes on, however, to allow for the trial and punishment of conduct that was criminal at the time of commission "according to the general principles of law recognized by the community of nations." Bangladeshi officials should assess the 1973 Act to ensure that the ICT's jurisdiction is consistent with Bangladesh's international obligations and should assess whether its rules and procedures help to maintain the fine line drawn by §1 and §2 of Article 15.

Additionally, as the ICT is a domestic court, and not an international or hybrid court, the question of whether a retroactive statute may be given effect must also be determined under the constitutional law of Bangladesh. During my visit, I heard many arguments about whether provisions of the 1973 Act, and the 2009 amendments, were enforceable under the Bangladesh Constitution, as amended. It is important that there be a procedure for the parties to have these issues legally resolved before trial. In each of the international tribunals and hybrid courts, which share with the ICT the attribute of being temporary judicial institutions established after the fact to try those responsible for mass atrocities, there are provisions in the rules of procedure for parties to raise preliminary motions regarding jurisdiction, and in the event of an adverse ruling to have recourse to an interlocutory appeal, as a matter of right. A party to a proceeding before the ICT should be able to raise questions as to whether provisions of the 1973 Act and the 2009 amendments violate international or domestic law as to retroactivity as well other jurisdictional matters.

However, unlike international and hybrid tribunals and courts, there is no separate appeals chamber within the Bangladesh ICT. The 1973 Act provides for appeal of final judgements to be heard by the Appellate Division of the Bangladesh Supreme Court. Therefore, it is possible that the processing of new and unique appeals from the ICT would need to be integrated into the Supreme Court's rules or practices, separate from the ICT Rules of Procedure. If that is the case, then the Supreme Court's rules or practices should also allow for the processing of interlocutory appeals on issues of jurisdiction, as a matter of right and, similarly, if discretionary interlocutory appeals are allowed as to other issues.

Consideration should be given to adoption of rule(s) allowing parties to file preliminary motions in the ICT raising issues of jurisdiction and for the right to interlocutory appeal from adverse decisions on these issues as provided, for example, in Rule 72 of the ICTR Rules of Procedure and Evidence (see Appendix I).

Defining the Crimes

As noted above, consistent with ICCPR Article 15, the substantive provisions of the 1973 Act could allow for prosecution of criminal offenses Bangladesh recognized as crimes under applicable treaty law or customary international law at the time of their commission, which for crimes allegedly committed during the liberation war, is 1971. For crimes that existed in 1971, it is appropriate for the ICT to look for guidance from courts that have defined these crimes in the more recent past. Terms such as "crimes against humanity" or "genocide" have been given more precise meaning by these courts and the meanings are most clearly set out in the "*Elements of* Crimes" created by the International Criminal Court. To the extent that these elements do not expand criminal responsibility, the Tribunal could seek guidance from their provisions.

Consideration should be given the adoption of a rule that would provide that in determining guilt for those crimes that are also included in the Statute of the International Criminal Court, the judges of the ICT would be guided by the ICC Elements of Crimes (see Appendix II).

Protecting the Rights of the Accused

Generally

No matter how great the alleged crimes, the rights of persons who are under investigation or a formal charge must be protected. If the verdicts of the Tribunal could later be called into question because the accused was not given the right to due process of law and/or other important protections, as defined by international standards, perpetrators could be held unaccountable and victims would not have the justice or a respected historical record of the atrocities they experienced or witnessed. These rights and protections owed to all accused are set forth in the ICCPR, to which Bangladesh is a State Party. Ensuring that these rights are protected in the proceedings of the ICT is necessary for its verdicts and decisions to be respected, justified and upheld by the people of Bangladesh and the international community.

Consideration should be given to the adoption of a rule that would provide that "Without prejudice to the enforcement of greater protections provided specifically by the Constitution of Bangladesh, the International Crimes Act of 1973, as amended, and the ICT Rules of Procedure, all persons under investigation and under formal charge shall be entitled to those rights set forth in Part III of the International Covenant on Civil and Political Rights" (See Appendix III).

Detention during investigation

Within Article 9 of the ICCPR are the obligations that Bangladesh and other States Party must assume regarding the arrest and detention of individuals. It provides that no person shall be subject to arbitrary arrest or detention or deprived of liberty except on such grounds and in accordance with such procedures as established by law. Individuals arrested or detained have the rights to be informed, at the time of arrest, of the reasons for the arrest and to be promptly informed of the charges against them. Individuals arrested or detained on criminal charges shall be brought promptly before a judge or other appropriate official and tried within a reasonable time or released. All individuals who are arrested or detained also have the right to initiate proceedings before a court so that the court may decide on the lawfulness of the detention. Individuals found to be the victim of unlawful arrest or detention have an enforceable right to compensation.

The ICT's "*Rules of* Procedure" permit the Tribunal to arrest individuals during the investigative phase and before the filing of formal charges. Each individual receives a single hearing to contest their detention and to seek bail, but are afforded no recourse to appeal an adverse decision. Those that have been detained and given an adverse ruling at the hearing have remained in detention (and will for an unlimited period of time) without formal charges being filed and without an opportunity for a further hearing.

In contrast, the rules of ICTR and ICTY only permit the detention of a person for up to thirty days before filing an indictment, during which a prosecutor lays out their potential case and a judge determines whether "there is a reliable and consistent body of material which tends to show that the suspect may have committed a crime over which the Tribunal has jurisdiction" and if provisional detention is a necessary measure to prevent the escape of the suspect, physical or mental injury to or intimidation of a victim or witness, the destruction of evidence or otherwise necessary for the conducting of the investigation. Under both the ICTY and ICTR rules, this preliminary detention may be extended for two additional periods of thirty days following an *in partes* hearing, but can be extended for a period of no longer than ninety days.

Another approach has been taken by the Extraordinary Chambers in the Courts of Cambodia (ECCC), whose "*Internal Rules*" follow the procedures found in civil law systems, which allow for the lengthy detention during the period of judicial investigation. This is permitted if the investigative judges make findings similar to those required at the ICTR and ICTY, but may be extended for the most serious crimes for two additional one year periods. However, the detained individual must be brought before the investigative judges every four months to discuss treatment and conditions of detention. Moreover, the accused has the right to appeal the initial order for detention and each extension.

Consideration should be given to the adoption of a rule that would regulate detention during the investigative phase with protections similar to those provided in either Rule 40bis of the ICTR or the ICTY Rules or Rule 63 of the ECCC Internal Rules (see Appendix IV).

Questioning of suspects or accused persons

Sections 8, 11, and 14, the 1973 Act includes provisions regulating the questioning of individuals "acquainted with the facts and circumstances of the case," for the taking confessions of an "accused person any time in the course of investigation or at any time before the commencement of the trial," and for the Tribunal's questioning of an accused person about "any circumstances appearing in the evidence against him." Each of these provisions include language consistent with the right against self incrimination set forth in Article 14(3)(g) of the ICCPR. However, there is no procedure for informing the questioned individual as to their privileges and rights, which means there is little assurance that the answers of the questioned individual are given voluntary and not obtained by coercive methods. The rules of the international and hybrid courts and tribunals provide additional provisions and safeguards for questions individuals, including: 1) a specific notice of rights to be given to a suspect or accused before questioning, in a language the person speaks or understands; 2) for the assistance of counsel, unless waived; 3) for the electronic recording of the questions and answers; 4) for use immunity of testimony compelled at trial; 5) and for the exclusion of evidence "obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings. (ICTR Rule 95)

Consideration should be give to the adoption of rules that would regulate questioning of suspects and accused persons with protections similar to those provided in Rule 42, 43, 63, 90(e), and 95 of the ICTR Rules (see Appendix V).

Detention and release after charging

Section 11(5) of the 1973 Act authorizes any member of the Tribunal to "issue a warrant for the arrest of, and to commit to custody, and to authorise the continued detention in custody of, any person charged with any crime specified in Section 3." While none of the persons arrested by the ICC, ICTR, SCSL, or ECCC have been released on bail or other conditions during the pendency of proceedings, the ICTY has released some individuals under conditions which did ensure their presence when required at hearings, trials, or for imposition of sentence. All of these international or hybrid courts or tribunals have included a rule allowing accused persons to move for provisional release and for a trial chamber to allow such release "only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person." An order denying release is appealable, as a matter of right, by the accused, and an order granting release is appealable, as a matter of right, by the prosecutor.

Consideration should be given the adoption of a rule that would regulate consideration of

applications by an accused person for release during the pendency of proceedings in a manner similar to that provided in either Rule 65 of the ICTY Rules or ICTR Rules (see Appendix VI).

Pre-trial and Trial Procedures

Disclosure

Section 9(3) of the 1973 Act provides that "the Chief Prosecutor shall, at least three weeks before the commencement of the trial, furnish to the Tribunal a list of witnesses intended to be produced along with the recorded statement of such witnesses or copies thereof and copies of documents which the prosecution intends to rely upon in support of such charges." It is to be presumed, though it is not stated explicitly in the 1973 Act, that material would also be provided to accused persons and their counsel at this time.

Article 14(3)(b) of the ICCPR guarantees accused persons "the time and facilities for the preparation of a defense." This has been construed at every international and hybrid court and tribunal to provide pre-trial disclosure of relevant documents and tangible objects to an accused person and his or her counsel in time to make effective use of it in his or her defense. Accordingly, the prosecution is strictly required to turn over any exculpatory evidence and all prior statements of prosecution witnesses, but may provide for disclosure of other items that are "material to the preparation of the defense" by furnishing an opportunity for the defense to inspect and copy. The exercise of this right of inspection by the defense can give rise to a reciprocal obligation on the part of the defense to make available for inspection by the prosecution of items the defense intends to offer at trial. The relevant rules also provide a procedure for the prosecutor to withhold some documents or other items if so authorized by the judges, on a showing that the disclosure may prejudice further or ongoing investigations, may create a risk to the safety of the witnesses or for any other reasons may be contrary to the public interest or affect the security interests of any State.

The disclosure rules of several of the international tribunals and courts include provisions for disclosure on dates that are a fixed number of days before or after certain events in the proceedings. The ICC Rules are more flexible requiring disclosure to be made "sufficiently in advance to enable the adequate preparation of the defense" (ICC *Rules of Procedure*, Rule 76(1)).

Consideration should be given to the adoption of a rule that would regulate the disclosure of relevant documents and other material in a manner similar to that provided in Rules 77, 78, 79, 80, and 84 of the ICC Rules (see Appendix VII).

Motions and discretionary interlocutory appeals

All of the international and hybrid tribunals and courts permit either party to file appeal motions to the judges during the course of the trial (interlocutory appeals) whose resolution cannot wait until the entire trial is finished and a verdict reached. Several have adopted rules that provide for the expeditious consideration of such motions, such as in ICTR Rule 73(A), which allows interlocutory appeals to be decided by a trial chamber or a single designated judge on written briefs only, and without oral argument in open court. All of the tribunals and courts provide for the decisions on motions to be appealed on an interlocutory basis if leave is granted. This leave requires a showing that, for example, "the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which...an immediate resolution...may materially advance the proceedings." (ICTR Rule 73(B)). Given the complexity of international crimes and the time pressure as witnesses and victims die (as the alleged crimes

occurred forty years ago), it is important that there be an opportunity for interlocutory appeals to avoid the situation that would occur when the appellate court decides on final appeal that a significant legal error was made at trial and the only fair remedy is a re-trial.

Consideration should be given to the adoption of a rule that would provide for parties to be able to file motions for appropriate rulings and relief, and to seek interlocutory appeal of adverse decisions, by leave or certification, in a manner similar to that provided in ICTR Rule 73 (see Appendix VIII).

Presumption of Innocence and Burden of Proof

Article 14(2) of the ICCPR provides that "everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law." Neither the 1973 Act nor the present ICT Rules of Procedure explicitly mention the presumption of innocence. While the existence of this right in criminal proceedings exists in Bangladesh by their ratification of the ICCPR, it would be useful to explicitly set forth this right in the ICT Rules. By way of comparison, the ECCC included the presumption of innocence among its list of "Fundamental Principles" in Rule 21 of the ECCC Internal Rules.

A fundamental component of criminal proceedings is that the prosecution has the burden to prove beyond a reasonable doubt that the defendant committed the alleged crimes. The ICT's *Rules of Procedure,* Rule 50(1) provides that "the burden of proving the charge shall lie upon the prosecution," but does not explicitly require that the charges be proved beyond a reasonable doubt as do the rules of procedure of other tribunals. If Rule 50(1) were amended with language like that in ICTR Rule 87(a), it would be clearer that requiring proof beyond a reasonable doubt is a fundamental component of the criminal procedure of the ICT. Additionally, the present Rule 50(2) reverses the burden of proof on certain issues: "The onus of proof as to the plea of 'alibi' or to any particular fact or information which is in the possession of knowledge of the defence shall be upon the defence." The international and hybrid courts and tribunals have dealt with the issue of alibis not by shifting the burden to the defense, but by requiring the defense to give notice of an alibi and listing its witnesses and evidence on this issue in time to permit the prosecution to prepare a response. A model for how this can be accomplished is set forth in ICC Rule 79.

Consideration should be given to the adoption of rules that would explicitly ensure the presumption of innocence and the burden of proof beyond a reasonable doubt in a manner similar that of ECCC Internal Rule 21(d), ICTR Rule 87(A), and ICC Rule 79 (see Appendix IX).

Admission of Evidence

Section 23 of the 1973 Act provides that the Bangladesh Evidence Act and the Code of Criminal Procedure, both of which apply to criminal prosecutions in other courts, do not apply to the proceedings brought under the 1973 Act. Section 19(1) of the 1973 Act provides that the "Tribunal shall not be bound by technical rules of evidence; and it shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and may admit any evidence, including reports and photographs published in newspapers, periodicals and magazines, films and tape-recordings and other materials as may be tendered before it, which it deems to have probative value."

This is not too different from the provisions of the rules of international and hybrid courts and tribunals. For instance, ICTR Rule 89 provides that its judges "shall not be bound by national rules of evidence" and "...shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law" and

"...may admit any relevant evidence which it deems to have probative value."

The judges of these international and hybrid courts and tribunals have given meaning to these words in hundreds of decisions which have prevented the admission of unreliable evidence or determined that certain types of evidence are entitled to greater or lesser weight. Without any change in the rules, the judges of the ICT could look to the decisions of these courts that have resolved evidentiary issues regarding similar crimes sometimes many years after their commission. However, the absence of set evidentiary rules may create a more robust need for the explicit incorporation of the presumption of innocence and burden of proof discussed above.

Witness Protection

The 1973 Act does not provide for protection of witnesses whose testimony may be needed in the trials of the ICT. It has been the experience at international and hybrid courts and tribunals that some witnesses have legitimate concerns that their testimony may subject them to threats, intimidation, or actual violence to prevent them from testifying or in retaliation for their testimony. The need to protect witnesses is sometimes in tension with the right of the parties to have access to information about the witnesses to prepare for effective cross-examination when the witnesses appear in court.

The international and hybrid courts and tribunals have provided protection for witnesses under rules that allow public disclosure of witness identity to be prohibited, and that have restricted full disclosure of witness identities to adverse parties until shortly before the testimony. ICC Rule 87 and 88 provide a flexible model of how this protection can be accomplished.

Consideration should be given to the adoption of rules that would allow for the protection of witnesses in a manner similar that of ICC Rules 87 and 88 (see Appendix X).

Other Matters

The Participation of Foreign Counsel

The field of international crimes is highly specialized, and the participation of foreign counsel, particularly those who have litigated cases in the international and hybrid courts and tribunals, is very important to ensure that uniform or generally agreed standards are observed in practice. ICT Rule 42 already permits the appearance of foreign counsel for either party, but the Bar Council must approve each submission, so if the Government of Bangladesh wants to ensure this right, they should ask the Bar Council to approve this measure. In the case of the defense, this could be limited to situations where foreign counsel associates with qualified Bangladesh counsel, and where the accused has retained the foreign counsel and the Bangladesh counsel declares that the appearance of foreign counsel is sought in the interest of the effective representation of the accused. This kind of practice has been followed in Rwanda which has tried large numbers of cases arising from the Rwanda genocide in its domestic courts. The administration of the Rwanda Bar has made it a practice to expeditiously grant these requests. A similar practice could be followed if the Chief Prosecutor seeks to have foreign counsel appear before the ICT on behalf of the prosecution. Of course, foreign counsel who will be appearing in the ICT, as well as those of good standing whose advice is sought by accused persons or the prosecution should be granted visas by the Government for the period during which their services and advice will be needed.

Death Penalty

Section 20(2) of the 1973 Act allows punishments, including the death penalty, for individuals found

guilty by the ICT. Implementation of the death penalty would be consistent with Bangladesh's obligations under the ICCPR, provided that the death penalty is imposed only for the most serious crimes and is carried out pursuant to a final judgment rendered by a competent court. Legitimate exercise notwithstanding, however, it may be useful to explore whether the ICT could lose assistance from United Nations programs and from the development agencies of the European Union or from states that promote the abolition of capital punishment. Bangladesh may wish to consider the example of Rwanda, which experienced a genocide in 1994, consisting of the murder of an estimated 800,000 men, women and children in a period of 100 days. In trials in its national system for those allegedly responsible, the Rwandan courts initially provided for the imposition of the death penalty. Its courts sentenced hundreds of individuals to death. A few executions were carried out in 1998, but none thereafter. In 2006, it abolished the death penalty and reprieved those who were sentenced to death. It has thereafter benefited from substantial international assistance to its judicial system, and proceedings are pending before the ICTR to transfer international cases from the ICTR to Rwandan domestic courts.

Prosecution Strategy

Several of the international and hybrid courts and tribunals have operated under mandates that were intended to restrict prosecutions to the most serious cases. The SCSL was mandated only to prosecute those "bearing the greatest responsibility." The ECCC is limited to prosecuting the leaders of Democratic Kampuchea and those "most responsible" for atrocities committed during the Khmer Rouge Regime. The Rome Statute limits the ICC's jurisdiction to the "most serious crimes of international concern" and requires cases to be of "sufficient gravity" to justify action by the Court (Articles 1 and 17). Accordingly, the ICC Prosecutor has adopted a policy of "focused investigations and prosecutions, meaning it will investigate and prosecute those who bear the greatest responsibility for the most serious crimes." The ICTY and ICTR were not initially so restricted, but in 2003 the UN Security Council in Resolution 1503 directed them to develop "completion strategies" that would focus their efforts on cases involving persons at the senior level. Even in national courts trying similar cases, strategies have been developed to focus on the more serious offenders. An example of a domestic court's prosecutorial strategy for crimes of this nature is the War Crimes Chamber of the State Court of Bosnia and Herzegovina, which follows a nationally established war crimes strategy. Another example is the legislation that the Government of the DR Congo has proposed to establish a system of specialized chambers for violators of international humanitarian law that sits within the national system and allows the president or prosecutor of the chambers to exclude cases because of non-severity.

The Chief Prosecutor of the ICT will face a challenging task. Without question many individuals responsible for the atrocities of 1971 have died in the intervening 40 years. Moreover, the reach of the ICT's jurisdiction is strictly limited. Alleged perpetrators living in Pakistan or any other country cannot be tried by the ICT. Furthermore, unlike the Prosecutors of the ICTY, SCSL, and ICC, who have prosecuted individual perpetrators from all sides of an armed conflict, the ICT Prosecutor will not be able to consider opening a case, even if one were warranted, against a person who benefited from Presidential Order No. 16, which provided immunity to persons who were in the service of Bangladesh or other persons who struggled for national independence or order in the aftermath of the conflict. Of course, it is not a defense for an individual charged with a crime that some other alleged offender has escaped prosecution and punishment; the nature of post-conflict accountability measures must to some extent be limited as during conflict the number of low-level perpetrators is too overwhelming for a single tribunal to handle. From the time of Nuremberg, prosecutors of international crimes have not been able to bring all of the most serious offenders to trial, but have nonetheless made historic contributions to justice and, by holding accountable the senior leaders and those most responsible for atrocities; they have also made historic contributions to lasting peace and

reconciliation.

In any system where not all offenders can be prosecuted, the criteria for deciding which living persons are investigated and prosecuted is a matter of vital public interest and must be carefully considered as it will form the basis of a prosecutor's strategy. Each prosecutor of international crimes has developed and followed strategies for case selection and has publicly explained these strategies at times when it was appropriate. The Chief Prosecutor of the International Crimes Tribunal of Bangladesh should be prepared to do the same.

Outreach and Public Information

During my visit in Bangladesh, I saw that the process by which persons would be judged by the ICT was a matter of enormous public interest and therefore it is of utmost importance to ensure maximum public access to the proceedings. The ICT will need to take steps to make up-to-date information readily accessible throughout Bangladesh. Unfortunately the record of international and hybrid courts and tribunals have had mixed success in engaging the public, which is instrumental to using the tribunal as a vehicle for national reconciliation and healing. Courts that have been successful in engaging the public, and not just in the capital or the seat of the court, include the SCSL and the ECCC. The former employed local persons as outreach officers in every district of Sierra Leone who conducted hundreds of public meetings to describe the court's procedures and proceedings, to screen videos of trials and to present court officials to answer the public's questions. At the ECCC, more than 73,000 Cambodians have made visits to the courtroom gallery, and the most important trial is yet to begin. The ECCC has also made video coverage of the trials widely available. Polling data in Sierra Leone and in Cambodia prove that they have been successful in their outreach campaigns; a large majority of the populations believe that the trials have contributed to social peace and reconciliation.

Some forty years after the atrocities of 1971, Bangladesh has undertaken a process for achieving justice for the victims of unspeakable atrocities during its war for independence. This process can honour the multitude of victims and their families and loved ones who so painfully suffered their loss. It can create a historical record and narrative that contributes to social peace and reconciliation. While the Tribunal faces many challenges, it has the opportunity to accomplish great ends as long as the process is seen as independent, impartial and fair by all of the people of Bangladesh.

Thank you again for welcoming me to Bangladesh and for the opportunity to share ideas about the historic process of achieving justice for victims for horrible crimes committed in Bangladesh. I hope that this letter sparks dialogue on how the International Crimes Tribunal can be shaped and molded to serve as a shining example of how a purely domestic tribunal can successfully prosecute those guilty of international crimes while maintaining the highest international standards of judicial process and procedure.

Best regards,

Stephen J. Rapp

Stephen J. Rapp
US Ambassador at Large
War Crimes Issues

Enclosed: Appendices with definitions, rules and procedures of other tribunals and courts as referenced in this letter.

About ICSF

International Crimes Strategy Forum (ICSF) is an independent global network of activists and organizations with membership spread out in four continents. Deeply committed to the spirit of the historic Liberation struggle of 1971 in Bangladesh, when, number of major international crimes were committed, this international network was setup to support the justice process initiated by the Government of Bangladesh through the International Crimes Tribunal (ICT), Bangladesh, to investigate and prosecute those responsible for international crimes committed in 1971. Since its inception, ICSF has been interacting and engaging with the ICT and other relevant authorities to assist the Government in its timely and momentous initiative of bringing to account the perpetrators of 1971 alleged of international crimes. The coalition is currently engaged in – providing legal research support, documentation support, and other forms of *pro bono* assistances to the Tribunal and its various components, including, maintaining strategy-facilitating archives, such as the Media Archive (which records all media reports related to the ICT), maintaining easy-access research database portals such as the E-Library (a full-text literature archive to facilitate strategic and academic research on Bangladesh's trial including legal research) etc. The Network is also engaged in specific project-based activities such as: PR and media-handling, lobbying, investigation, organizing training and strategic workshops and other civic engagement activities. In line with the broader policy and strategic objectives of ICSF's operation, this briefing document has been prepared collectively by its members in the legal research cell. It is requested that any queries related to this document be addressed to the ICSF WorkGroup at <icsf.workgroup@gmail.com>.

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