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主 論 文 の 要 旨

論文題目

A Legal Analysis of the International Crimes Tribunal Bangladesh

(バングラデシュ国際犯罪法廷に関する法的分析)

氏 名

BILLAH Maruf

論 文 内 容 の 要 旨

This study aims to legally analyze various jurisdictional issues of the International Crimes Tribunal Bangladesh because the Tribunal is prosecuting and punishing international crimes without fulfilling international criminal law requirements of defining crimes against humanity and genocide. The study is divided into five chapters. Chapter I presents the research subject with a detailed explanation of the study's literature review, problem statement, and significance of the international criminal law application in the domestic Tribunal by sketching the whole research project's structural framework. More precisely, this chapter outlines that the legal instrument of the ICTB, International Crimes Tribunal Act 1973, was domestically promulgated in 1973 by the Government of Bangladesh. In this legal instrument, nothing has altered during the implementation of the Act in 2010, while numerous development took place in the sphere of identifying international crimes based on their heinous nature. Therefore, the recent ICTB has encountered many problems in its judicial proceeding. The ICT Act has failed to apply treaty and customary law definitions of genocide and crimes against humanity, which is crucial to differentiate

both of these crimes from domestic crimes. Simultaneously, the jurisprudence of the Tribunal in question also lacks to adhere to the treaty and customary law development in 1971, when these crimes were committed, and 2010, the time of the operation of the Tribunal.

Chapter II illustrates the historical background and provides an indulgence of the circumstances that led to the engagement of a war between the East and West Pakistanis in 1971, known as the Bangladesh Liberation War. This chapter also highlights the first attempts to deal with the war crimes and the circumstances that finally facilitated the Tribunal's postponement up to 2010.

Chapter III of the dissertation sketches a detailed overview of the ICTB. It outlines the introduction on the establishment of the ICTB after 40 years of the event. Then, it highlights the general characteristics of a criminal tribunal. This chapter also sketches the Tribunal's legal nature on the applicability of domestic and international criminal law principles that are not outlined and discussed in any other previous legal scholarship. Though the ICTB is trying to prosecute and punish the perpetrators of international crimes committed in an international armed conflict, it is operated in the domestic setting without any international community involvement. So, the Tribunal shall determine the applicability of international treaty and customary laws in the absence of any crystal-clear rule existing in the domestic criminal law. Hence, this chapter of the dissertation figures out the domestic obligation of states to apply international criminal law definitions in bridging any legal gap identified in the domestic legal system of Bangladesh. Since the jurisprudence of the ICTB does not explain the legal obligation of the Tribunal in invoking international criminal law standards, this research refers to the current jurisprudence of the international criminal tribunals. After an in-depth legal examination, it summarizes that genocide is the 'crime of crimes,' governing at the top of international crime in degrees of legal severity and moral evil. So, any failure to

define such crimes as per the definition of the Genocide Convention 1948 potentially misrepresent the state's capacity to understand and compare instances of genocide against other forms of mass violence, and devalue the experiences of victims of 'real' genocide, and undermine the effectiveness of efforts to prevent and deter genocide a universally understood crime. So, it is one of the obligations conferred by the international criminal law treaty on Bangladesh to prosecute genocide under the definition of the 1948 Convention. Then, crimes against humanity are considered the core international crimes and attained the status of *jus cogens* crimes in international law. It is established beyond a reasonable doubt that crimes against humanity are categorized as *jus cogens* crimes due to widespread prohibitions of such crimes. It is criminalized in the International Military Tribunal Nuremberg, the International Military Tribunal for the Far East, Tokyo, the UN *ad hoc* tribunals of the International Criminal Tribunal for the Former Yugoslavia, and Rwanda, several hybrid courts in Sierra Leone, East Timor, and the ICC regime. So, crimes against humanity also deserve to be criminalized based on international criminal law requirements. It is one of the obligations prescribed on Bangladesh to prosecute and punish *jus cogens* crimes based on its customary law definition as per practices of the above-mentioned international tribunals. But, the Government of Bangladesh failed to fulfill its obligation. Hence, this chapter of the study will be considered a new contribution to the current literature on 'the domestic prosecution of international crimes,' for future international community.

Chapter IV examines the different jurisdictional issues of the ICTB. This part of the dissertation analyzes explicitly the Tribunal's personal, material, and temporal jurisdiction in question, with ample jurisprudence and legal provisions of the Tribunal by referring to the international criminal law and jurisprudence. This chapter first discusses that the personal jurisdiction of the Tribunal is amended in 2009, inserting the phrase 'individuals' and 'group of individuals' in the Act. Though

the Tribunal concludes that an extension to the personal jurisdiction took place in 2009, it is proved by this study that legally, there is no extension of personal jurisdiction can be seen because the Tribunal failed to describe criminal responsibility of 'person' and 'individual' in international law.

Secondly, it pays attention to the analysis of the material jurisdiction of the ICTB, i.e., crimes against humanity and genocide, with a detailed discussion of the past and present legal scholarship on the various international courts' jurisprudence and Tribunals. It reveals that the ICTB fails to apply customary law requirements of crimes against humanity and genocide. In 1971, crimes against humanity were conditioned to be committed in an international armed conflict, and Bangladesh Liberation War was categorized as such during the last phase of the 1971 conflict. At the same time, the ICTB also fails to apply customary law definition of crimes against humanity in recent time which is such crimes need to be committed as 'widespread' and 'systematic' attack against any civilian population. Both of these requirements adequately categorized crimes against humanity from domestic crimes. In defining genocide, the Tribunal added 'political group' as one of the protected groups against genocide, and the phrase 'as such' has become 'such as.' These incorporations contradict the rule promulgated in the 1948 Genocide Convention as well as in the ICC Statute. In the ICTB, crimes against humanity and genocide as the form of international crimes were charged against all of the accused and prosecuted accordingly. Therefore, the analysis of this chapter also focuses on applying such international crimes' essentials and liability modes with the latest international criminal law development.

Lastly, this chapter is endeavored to analyze the temporal jurisdiction of the ICTB extensively by examining the rule against retroactivity in customary international law, retroactive prosecution of crimes against humanity in the IMT Nuremberg, justification of the retroactive criminalization of crimes against humanity at the IMT Nuremberg, and its crystallization into the regional and international legal instruments. Then, it illustrates various judgments of the ICTB, demonstrating that it does not comply with the rule prescribed by international laws either in 1971 or 2010 in

prosecuting crimes against humanity retroactively. Finally, it analyzes the validity of the constitutional amendment of the Bangladesh Constitution in outlawing applying the principle of *nullum crimen sine lege* to the accused of the ICTB.

Chapter V concludes the whole research. Though Bangladesh's retributive approach is considered one of the noble endeavors in punishing the offenders of heinous crimes committed in the Liberation War of Bangladesh, it is concluded that the overall performance of the ICTB is not satisfactory in securing criminal justice to the parties. The ultimate legal failures can be seen in adjudicating international crimes by the Tribunal in question without complying with a treaty and customary law requirements in defining prosecutable international crimes. This chapter also draws some insights on the hidden political motive of the current regime of Bangladesh that might strengthen the final assessment on the ultimate legal failure of the Tribunal in question. It is true that law and politics cooperate equally at the international and national stages of criminal prosecutions, and this interaction seems mainly thrilling in international penal law, where at the bottom level, a nascent lawful government aims to control the longstanding power of states to describe and manage international crimes and their trial. The ICTB also somehow politically motivated by the current regime of Bangladesh that finally contributed to the overall legal failure of the Tribunal.

Therefore, to conclude, the ICT Act is a piece of legislation that significantly affects healing the past wound of the liberation war victims and inspires the new generation of Bangladesh to substitute a society where the rule of law is cherished even after 48 years of the war. The Tribunal is pursuing its operation nowadays. At present, as a state party to the Genocide Convention 1948 and the Rome Statute of the ICC 1998, the current Government of Bangladesh fails to take the necessary initiative to draft the ICT Act 1973 for two legal obligations: firstly, treaty obligation concerning international crimes' prosecution, and secondly obligation to prosecute crimes against humanity and genocide that are

accepted as *jus cogens* crimes under international law, according to international legal definitions of these crimes. As a result, the ICTB does not secure criminal justice to the relevant parties, which is one of the dangerous precedents for the future international community who will be prosecuting and punishing international crimes through the domestic mechanism. This overarching argument is re-strengthened throughout the legal study of the International Crimes Tribunal Bangladesh, followed by some previous studies of the tribunal in question.



