

THE INTERNATIONAL CRIMES TRIBUNAL OBSERVER

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Asian International Justice Initiative (AIJI), a project of East-West Center and UC Berkeley War Crimes Studies Center*

I. OVERVIEW

This week was dominated by the second Judgment of the ICT, issued by Tribunal 2 in the case of *Chief Prosecutor vs. Abdul Qader Molla*. The Judgment was issued on February 5th. The Accused was found guilty of 5 of 6 charges, all counts of crimes against humanity. Closing arguments in the case were completed on January 17, 2012. The Judgment comes less than three weeks after the close of the case. Qader Molla was sentenced to life imprisonment.

Tribunal 1 heard matters in the *Gholam Azam*, *Nizami*, and *Chowdhury* cases. In the *Gholam Azam* case the Defense witness 1, Abdullahil Aman Azmi (the son of the accused and a former Army officer), provided testimony in both direct and cross-examination. In the *Nizami* case the Defense cross-examined Prosecution witness 18, Zohiruddin Jalal alias Bishu Jalal, a former Freedom Fighter. In the *Chowdhury* case the Prosecution conducted the examination-in-chief of its 18th witness, Debabrata Sarkar. Tribunal 1 also accepted a request for additional time from *The Economist* for its response to contempt proceedings related to its publication of the alleged Skype and email conversations between the former Chairman and expatriate Bangladeshi lawyer, Ahmed Ziauddin.

TRIBUNAL 1: CASES IN SESSION THIS WEEK

- *GHOLAM AZAM*
- *NIZAMI*
- *CHOWDHURY*
- *CONTEMPT PROCEEDINGS*

TRIBUNAL 2: CASES IN SESSION THIS WEEK

- *QADER MOLLA*
- *KAMARUZZAMAN*
- *CONTEMPT PROCEEDINGS*

On February 4th, Tribunal 2 announced that it would issue its Judgment in the *Qader Molla* case the following day. On February 5th, the verdict was read out in open court in the Tribunal 1 courtroom, which is

larger than the Tribunal 2 courtroom. The accused was found guilty on 5 of 6 Charges. He was found not guilty on Charge 4. The court sentenced Qader Molla to 15 years imprisonment each for Charges 1, 2, and 3. They sentenced him to life imprisonment for Charges 5 and 6.

In addition to issuing its Judgment, Tribunal 2 also dealt with ongoing contempt proceedings against Home Minister Mohiuddin Khan Alamgir and BNP leader MK Anwar, and issued an Order to Jamaat to explain comments made by its Central Executive member and Assistant Secretary General of Dhaka or face contempt.

II. TRIBUNAL 1: DETAILED WEEKLY CASE SUMMARIES

CHIEF PROSECUTOR VS. GHOLAM AZAM

Direct and Cross-Examination of Defense Witness 1

This week Tribunal 1 heard both the direct and cross-examination of Defense witness 1, Abdullahil Aman Azmi, the son of the accused and a former Army officer.

Defense Examination-in-Chief

On direct examination the Defense had the witness testify about numerous newspaper reports from 1971, as well as books regarding events that occurred during the Liberation War. These materials were entered into the record as exhibits. Azmi testified that Gholam Azam did not hold official status when he was a member of the Peace Committee. Rather, the witness testified, he was in fact a leader of the Language Movement. Azmi testified that Gholam Azam was sent to prison three times for his activities in the Language Movement. He alleged that the prosecution of Gholam Azam is politically motivated, and noted that none of the official members of the Peace Committee (Chairman, Vice-Chairman, Secretary, or Joint Secretary) had been prosecuted.

Prosecution Cross-Examination

On February 4th the Prosecution began its cross-examination of Defense witness 1. Azmi admitted that he had heard that his father (Gholam Azam) met with Pakistani occupying forces on April 4, 1971. He said he did not know what was discussed during the meeting. He also stated that he did not know how many times his father met with the Pakistani occupying forces.

Azmi acknowledged that his father went to Pakistan several times to join the central meeting of Jammata-e-Islami, as he was the Chief of East Pakistan Jamaat-e-Islami. He said he was not aware where the meeting of Jamaat-e-Islami was conducted in East Pakistan. He said that in 1970, Gholam Azam periodically left Dhaka to attend the Election Campaign.

The Prosecutor also cross-examined Azmi about different exhibits, including ‘*Gibone Ja Dekhlam*,’ the autobiography of Gholam Azam. Azmi acknowledged that his father had written in the book that on March 26, 1971 Gholam Azam left his home in his car and observed the atrocities committed on March 25, 1971 while he crossing Dhaka University, Nobabpur Road and Gulistan areas. In the book Gholam Azam described the atrocities as being committed by a country trying to conquer an enemy state.

Prosecutor Haider Ali read out page 207 from volume 3 of a book titled ‘Meeting with President Eahyia.’ The book described an April 1971 meeting that was held at the initiative of Khaja Khoiruddin and Moulove Farid Ahmed. According to the written description, members of different political parties were present, including Gholam Azam and two leaders of the Awami League. The book further said that the Peace Committee was formed there by unanimous voting.

Azmi testified that he heard that in 1971 the Pakistani Government banned the Awami League, and a gazette notification was issued demanding that members of the National Assembly elected in 1970 express their obedience towards the Pakistani Government. Azmi admitted that in 1971 Gholam Azam used the word “miscreants” to describe the armed opposition that was against a united Pakistan. However, he denied that his father used the term to describe unarmed civilians. He stated the political figures who were in support of united Pakistan in 1971 were unarmed, and that they formed the Peace Committee. He stated that he did not know anything about the activities of the Peace Committee. He said that the Peace Committee worked under the supervision of Muslim League Leaders. The witness was not aware whether the Peace Committee worked under the supervision of the Central Peace Committee or not. Azmi claimed that on December 4, 1971, his father went from Saudi Arabia to Pakistan and did not come to Dhaka.

CHIEF PROSECUTOR VS. MOTIUR RAHMAN NIZAMI

Cross-Examination of Prosecution Witness 2

In the *Nizami* case, the Defense cross-examined Prosecution witness 2, Zohiruddin Jalal, alias Bishu Jalal, a former freedom fighter. The Defense sought to undermine the credibility of the witness, questioning whether he was truly a freedom fighter. Additionally the witness admitted that he had made mistakes in his testimony before Tribunal-2, misidentifying persons due to the gap of 41 years since the events.

CHIEF PROSECUTOR VS. SALAUDDIN QADER CHOWDHURY

Examination-in-Chief of Prosecution Witness 18

This week prosecution witness 18, Debabrata Sarkar, provided testimony before the Tribunal regarding Chowdhury’s alleged involvement in the disappearance and murder of his father and uncle, as well as a plan to forcibly convert Hindus to Islam. He testified that on April 4th or 5th, 1971, his father and uncle went with three other men to Chittagong in order to bring Sarkar’s other uncle back to their village home. Sarkar

claimed that the next day the cook of the uncle in Chittagong arrived in the village covered in blood, and told Sarkar that the Pakistani Army had taken seven persons from the uncle's home, including Sarkar's father and uncle, to Chowdhury hill. That night, two persons reportedly came from Gonimiah Hat, and warned him that Salauddin Qader Chowdhury had order that he be killed, so that no male persons in his family would remain. Sarkar said that he was also warned that there was a plan to convert his family members to Islam, and to marry the female members of his family. He claimed that he then went into hiding, and that the next day their village home was burned and looted. He and his family reportedly fled to India until after the Liberation War. Upon their return to Chittagong he claimed that they found that their home there had also been destroyed. He stated that some people told him that his father and uncle were sent to Pakistan, but others said that they had been killed after being tortured. He also testified that he had heard that those who were detained by Fazlul Qader Chowdhury were allowed to live, but that those who fell into the hands of Salauddin Qader Chowdhury did not survive. He identified Salauddin Qader Chowdhury in the dock.

Issues of Access to the Tribunal

Salauddin Qader Chowdhury spoke up in court to allege that his sons and one of his sisters were not being given permission to come inside the Tribunal, and that his wife had been forced to leave her car outside of the Tribunal gate, and was only allowed to come through the Tribunal gate on foot. The court has recently heard numerous complaints about restricted access to the Tribunal, particularly from Defense counsel. The Tribunal called the Registrar to deal with security related issues.

CONTEMPT PROCEEDINGS AGAINST THE ECONOMIST

Application for Additional Time to Respond: Granted

On February 3, 2013 Mustafizur Rahman requested 4 weeks of adjournment on behalf of the Economist to reply to the 6 December 2012 Tribunal order in which the former Chairman of ICT-1 asked them to show cause for contempt in relation to their reporting of alleged Skype and email conversations between the Chairman and foreign legal expert Ahmed Ziauddin. The Tribunal granted Mr. Rahman and the Economist a month extension of time, and fixed the next date for hearing as 3 March 2013.

III. TRIBUNAL 2: DETAILED WEEKLY CASE SUMMARIES

CHIEF PROSECUTOR VS. ABDUL QADER MOLLA

Final Judgment: Guilty on 5 of 6 Charges, Life Imprisonment

In the final Judgment of the case of *Chief Prosecutor vs. Abdul Qader Molla*, the Tribunal found the accused guilty on 5 counts of crimes against humanity. They acquitted him of one count of crimes against humanity. The court sentenced Qader Molla to 15 years imprisonment each for Charges 1, 2, and 3. They sentenced him to life

imprisonment for Charges 5 and 6.

A detailed breakdown of the charges shows that the court found Qader Molla guilty of the following:

Charge 1: complicity in murder as a crime against humanity for acting as the mastermind in the murder of Pallab, a civilian. The Tribunal found Qader Molla guilty based on the testimony of Prosecution witnesses 2 and 10, both of whom the Court acknowledged only provided hearsay evidence. The Tribunal dismissed the credibility of Defense witness 4, who was originally listed as a Prosecution witness, by concluding that because Qader Molla had requested that she testify “in favour of his father,” it is “legitimately inferred that the purpose of deposing in court was to ‘favour the accused’” and not for the purpose of telling the truth. (Judgment, para 184). The Tribunal stated that the witness “seems to have been a ‘managed’ witness.”(Judgment, para 185).

Charge 2: complicity in murder as a crime against humanity for providing moral support and encouragement to the gang of perpetrators responsible for the murder of Meherunessa and others. The Tribunal found Qader Molla guilty based on the testimony of Prosecution witnesses 2, 4, and 10, all of whom the Tribunal acknowledged as hearsay witnesses.

Charge 3: complicity in murder as a crime against humanity for culpable association of the accused with the principals responsible for the murder of Khandoker Abu Taleb, a pro-liberation civilian. The Tribunal found Qader Molla guilty based on the testimony of Prosecution witnesses 5 and 10. These witnesses are also acknowledged as hearsay witnesses without direct knowledge of the actual killing.

Charge 5: murder as a crime against humanity for accompanying and assisting the principals with full "awareness" in committing a massacre of unarmed civilians at Alubdi. The Tribunal found Qader Molla guilty based on the testimony of Prosecution witnesses 6 and 9, who testified that they witnessed the mass killing at Alubdi village, as well as the presence of Qader Molla at the scene. The Tribunal dismissed the testimony of Defense witness 5 (the younger brother of PW 6), who claimed that PW 6 was not actually present during the incident, and could therefore not have witnessed the massacre. The Tribunal noted his age at the time of the incident (7 years old), and questioned how he would have learned of the whereabouts of Prosecution witness 6 when he himself was not present at the incident.

Charge 6: murder and rape as crimes against humanity for physically participating in the attack targeting Hazrat Ali and his family members, and for rape committed by members of the attacking group. The Tribunal found Qader Molla guilty based on the testimony of Prosecution witness 3, a surviving member of the victim’s family who claimed to have witnessed the killings. They noted that the testimony of a single witness on a material fact

does not, as a matter of law, require corroboration. (Judgment, para 366).

The Tribunal acquitted Qader Molla of the following:

Charge 4: Abetting, or in the alternative, complicity in murder as a crime against humanity, for the Ghatat Char and Bhawal Khan Bari killings. The Tribunal acquitted the accused of the charge, stating that Prosecution witness 7 provided conflicting accounts of events that undermine his credibility. In turn, the testimony of Prosecution witness 1 was also undermined, as that witness claimed to have heard about the event from Prosecution witness 7. The Tribunal also discredited the testimony of Prosecution witness 8, who was a young girl at the time of the occurrence, as they did not trust her ability to identify the accused 41-42 years after the events. Therefore the Tribunal found that the Prosecution had not sufficiently proven the charges beyond a reasonable doubt.

Case History

The trial of Qader Molla officially began May 28, 2011 when Tribunal 2 issued the Charge Framing Order against him. However, he was originally detained in July of 2010 in connection with a murder and arson case filed in 2008 by an injured freedom fighter in Pallabi Thana. On October 2, 2010 he was detained on charges of crimes against humanity under the authority of the International Crimes Tribunal, and has remained in custody since then.

The Prosecution called and examined a total of 12 witnesses in support of the charges against Qader Molla. On an application by the Prosecution, the Defense was limited to calling 6 witnesses to provide testimony for the Defense case. The examination and cross-examination of all witnesses was concluded on December 13, 2012. Closing arguments in the case were completed on January 17, 2012, at which point the Tribunal took the case into consideration, issuing its verdict slightly less than three weeks later.

The verdict closely tracked the Judgment in the *Kalam Azad* case, both in terms of its historical, factual and legal conclusions. In terms of legal issues, the judgment addressed whether unexplained delay frustrates the prosecution case; whether the ICT Act of 1973 was intended by legislators to be used in prosecuting Bangladeshi civilians; the effect of the Tripartite Agreement and immunity granted to the 195 Pakistani Prisoners of War; accusations of *malafide* intent and the purpose of the Collaborators Order of 1972; whether the accused may be prosecuted as an aider or abettor without prosecuting the principal; the definition and elements of the crimes; and the required *mens rea* or mental state for the crimes.

Undue Delay in Prosecution

Mirroring their conclusions in the *Azad* case, the Tribunal stated that “from the point of morality and sound legal dogma, time bar should not apply to the prosecution of human rights crimes.” (Judgment, para 82). The Tribunal stated that there is no statute of

limitations in the Genocide Convention of 1948 or the Geneva Conventions of 1949, and that the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968 specifically protects against such limitations. The Tribunal also cited ongoing prosecutions of Nazis, trials for war crimes committed during the 1973 Chilean revolution, and the current trials of the Pol Pot regime in the Extraordinary Criminal Chambers of Cambodia. The Tribunal further explained the delay by noting the assassination of Sheikh Mujibur Rahman in 1975, followed by a period “not favourable for raising voice for prosecuting the perpetrators of serious crimes.” (Judgment, para 88).

The Legislative Intent of ICT Act of 1973, and the addition of “individual” and “groups of individuals”

The Tribunal rejected the Defense’s assertion that the ICT Act of 1973 and the 1st Amendment of the Constitution show that legislators intended them to be used to try the 195 listed Pakistani war criminals, and not civilians. The Tribunal acknowledged that, “initially the Act of 1973 was enacted to prosecute try [sic] and punish the 195 listed war criminals of Pakistani occupation armed force and their ‘auxiliary force.’” However they said that the 2009 amendments inserting the terms ‘individual’ and ‘group of individuals’ expanded the jurisdiction of the Tribunal to allow it to prosecute such persons. They further noted that Article 47A(2) prohibits challenges to the validity of the ICT Act. The Tribunal concluded “since the accused has been prosecuted for offences recognized as international crimes as mentioned in the Act of 1973 he does not have right [sic] to call in question any provision of the International Crimes (Tribunals) Act 1973 or any of amended provisions thereto.” (Judgment, para 100).

Tripartite Agreement and Immunity to the Pakistani 195

The Tribunal also rejected the Defense’s argument that the Tripartite agreement of 1974 granted clemency to the Pakistani war criminals, and that the possibility of prosecuting such criminals under the Act of 1973 ended with that agreement. The Defense argued that local perpetrators alleged to have assisted the Pakistani Army in committing atrocities could only be prosecuted under the Collaborator’s Order of 1972. The Defense alleged that instead of using the Collaborator’s Order, prosecution was brought based on *malafide intent* under the ICT Act. The Tribunal stated, as it had in the *Azad* judgment, that the Tripartite agreement was an ‘executive act’, and the amnesty was in breach of customary international law. Under the Universal Declaration of Human Rights and the Geneva Conventions, the Court opined, Bangladesh is obligated to prosecute these crimes, and there is no justifiable reason for derogation of that obligation.

Malafide Intent and The Collaborators Order of 1972

The Tribunal found that allegations of *malafide* intent based on the delay in prosecution and use of the ICT Act are unfounded. They stated that the Collaborators Order of 1972 could not have been used as the offences enumerated under it are penal code offences, and not the international crimes at issue in these cases.

Prosecution of Aider or Abettor without Prosecution of the Principal

The Tribunal concluded that it could try the accused for accomplice liability (aiding or abetting) without prosecuting any other as the Principal. In reaching this conclusion, the Court cited to the case of *Prosecutor vs. Akayesu*, International Criminal Tribunal for Rwanda, Trial Chamber, (1998) para 531 and *Prosecutor vs. Musema*, ICTR, Trial Chamber, (2007) para 174.

Definition and Elements of Crimes

A major Defense argument in this and other cases has been that the ICT Act does not include “widespread or systematic attack” as an element in its definition of Crimes Against Humanity, despite it being an essential element of the crime, recognized in international tribunal statutes and leading jurisprudence. Furthermore, the Defense has argued that the Prosecution failed to show that the alleged incidents were part of such an attack. Accordingly, Defense claim, the Prosecution have not differentiated these instances from ordinary crimes under the penal code. The Tribunal rejected these arguments stating that the ICT Act is “fairly compatible” with international jurisprudence. They asserted that, in examining contemporary definitions of Crimes Against Humanity the “observation can be made that there is no ‘consistency among definitions.’” (Judgment, para. 126). They assert that the element of ‘widespread and systematic attack’ does not appear in the statute of the ICTY. While it does appear in the Rome Statute, the ICT emphasized that this is a domestic judicial body and is therefore “not obliged by the provisions contained in the Rome Statute.” The Tribunal further asserted that the context of the 1971 war “itself is sufficient to prove the existence of a ‘systematic attack’ on Bangladeshi self-determined population in 1971.” The Tribunal cited Section 19(3) of the Act, stating that it would take judicial notice of facts of common knowledge such as the context of the 1971 war.

Mens Rea (Mental State) and Knowledge

Tribunal 2 rejected the Defense argument that the Prosecution had failed to present any facts of circumstances that could allow the inference that the accused acted with knowledge of the outcome of his participation in alleged events. For accomplice liability (aiding, abetting, or complicity), the Court concluded that the *mens rea* of the accused does not have to be explicit, and can be inferred from the circumstances. Nonetheless, the Tribunal stated that the “matter of *mens rea* ... may be well determined while adjudicating the charges independently.”

The closeness with which the conclusions of the Tribunal track with the prior decision in the *Azad* case, would seem to suggest that the Tribunal considers many historical and factual matters to have been determined as a matter of precedent.

CHIEF PROSECUTOR VS. KAMARUZZAMAN

Re-Examination of Prosecution Witness 16

Prosecution witness PW-16, Mr. Azabuddin Miah, was re-examined by the Prosecution. Mr. Miah is the Assistant Librarian of Bangla Academy (Newspaper Branch) and testified as to the authenticity of various newspapers collected from the Bangla Academy archive by the Investigating Officer. The Defense conducted a brief cross-examination, asking who had originally collected the documents in question. The witness replied that they belonged to the Bangla Academy.

CONTEMPT PROCEEDINGS

Contempt Proceedings against Home Minister Mohiuddin Khan Alamgir

On February 3rd the Defense notified the Tribunal of comments made by the Home Minister Mohiuddin Khan Alamgir at a program organized by the Bangladesh Mission in Cairo, Egypt. Daily newspapers including *Naya Diganta*, *Amar Desh* and the *Daily Sangram*, had reported that the Minister announced that the Tribunal would be issuing its second verdict this week, and a third verdict next week. The Tribunal issued an order requiring the Minister to submit an explanation of his comments on matters *sub judice* (matters under consideration by the Tribunal).

Contempt Proceedings against BNP Leader MK Anwar

Counsel for MK Anwar requested additional time to prepare a response to the contempt proceedings initiated against him last week, as he wished to contest the allegations. The Tribunal stated that it would have been easier if the BNP leader had provided an unconditional apology instead. Nevertheless, the Court elected to adjourn the matter until February 26th.

Contempt Proceedings against Jamaat-e-Islami Party Leaders

On February 7th, Tribunal 2 passed an order *suo moto* (of its own volition), demanding explanation for comments made by Jamaat leaders during a public Party engagement on 4th February—one day prior to Qader Molla's judgment. The comments came from the Jamaat Central Executive member, Mr Hamidur Rahman Azad MP, and the Assistant Secretary General of the Party's Dhaka city unit Mr Selim Uddin. The former had allegedly threatened the start of a civil war if the Tribunal delivered a verdict. The latter had also publicly commented that the tribunal should not exist anymore. These comments were reported by the *Daily Star* and *Prothom Alo* a day later. The Tribunal took the matter into cognizance, opining that no one may threaten the nation with a civil war and no one may obstruct the proceedings of the Tribunal. The Court passed an order requiring the accused to appear in person, and to submit written explanations through their lawyers within the stipulated time.

* AIJI is a collaborative project between the East-West Center, in Honolulu, and the War Crimes Studies Center, at the University of California, Berkeley. Since 2003, the two Centers have been collaborating on projects relating to the establishment of justice initiatives and capacity-building programs in the human rights sector in South-East Asia. The Program is funded through the East-West Center, thanks to generous grants from the Open Society Foundation and private donors.

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