Is the international Criminal Court giving more importance on fair trial rights of an accused than the expectations of victims to ensure justice?

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Abbreviation

ICC	**International Criminal Court**
ICTB	**International Crimes Tribunal of Bangladesh**
UN	**United Nations**
ICTY	**International Criminal Tribunal for the former Yugoslavia**
ICTR	**International Criminal Court for Rwanda**
SCSL	**Special Court for Sierra Leone**
ICTA	**International Crimes (Tribunal) Act**
ROP	**Rules of Procedure**
UDHR	**Declaration of Human Rights**

1. Chapter One: Introduction

International criminal law is a concept which covers a wide range of heinous activities and levels those acts as international crimes. Genocide, crimes against humanity, war crimes and crimes of aggression are widely levelled as international crimes under international criminal justice. The concept of crimes under domestic law and international law differ from each other immensely and the nature of crimes, witness, evidence and trial procedure are also different. Evidence suggests that most of the international crimes involved high profile personalities such as presidents, army heads or political leaders. But crimes which are not in international nature often involve individuals of all level. The motive and purpose of the crimes for international and non-international also vary; the effect of international crimes is huge and suffering involve thousands to million people and often motive is politically driven where non-international crimes involve an individual or group of individuals. International crimes are a threat towards the whole world where non-international crimes a threat for a particular geographical area. However, a trial process of international crimes is not restricted for an exclusive procedure rather it can be tried domestically as well.

1.2. Research Question:

Is the international Criminal Court giving more importance on fair trial rights of an accused than the expectations of victims to ensure justice?

1.3. Research methods and sources

I examined the current settings of ICC comparing with other types of international crimes tribunal. In particular I analysed the domestic model of International Crimes Tribunal of

Bangladesh to answer the question raised above. So, the methodology for the current purpose was a doctrinal and comparative method because I focused on reading and analysing of primary and secondary sources as well as comparing ICC with domestic model tribunal of Bangladesh.

1.4. Object and purpose of the Study:

The ultimate purpose of this study is to critically evaluate the principles set out by ICC through various cases to ensure justice for the internationally recognised crimes comparing with one of the most recent domestic International Crimes Tribunal of Bangladesh (ICTB). For this purpose I have looked into the pros and cons of both domestic and international tribunals to assess international crimes. My initial hypothesis was that, the ICC emphasized on fair trial rights of the accused and undermined the expectations of victims of international crimes by imposing lesser punishment for heinous crimes.

The ICC has some disabilities in terms of issuing warrant and collecting evidence, where as a domestic tribunal, ICTB has a wide range of power in this regard. ICC is too far away from the actual scene of crimes and often not familiar with the nature of crimes and the cultural base where those crimes have been committed. Thus the ICC is not competent to see a situation with the eyes of victims to punish an accused for international crimes.

1.5. Significance of this study:

The existing work on the comparative analysis of ICC by various writers, authors and academics reveals that still there is a vast space on which no single document has been produced and that is a parallel analysis of various international tribunals with the standard set by the ICC. Recently, ICTB is the buzzword around the South East Asia and attracted

attention of the international community and organisations because of its recent judgments over the last 12 months. One of the judgements provided death punishment to the accused and accordingly executed which attracted criticisms from various quarters in relation to fair trial and other rights of the accused. It is a demand of time to compare the present settings of ICC with ICTB. So, in my opinion it is worth researching whether to ensure justice a tribunal should give importance on the rights of the accused or expectation of the victims or fair balance between these two concepts.

For the purpose of gathering all the necessary information, variety of sources has been used. These included the ICC's founding treaty, statement from ICC officials, reports from various organisations, scholarly books and articles, judgements and documents of ICTB, newspaper reports etc.

1.6. Organisation and Structure

My dissertation has been divided broadly into four main chapters. The first chapter defined the nature of international criminal law and trial, the relationship between 'rights of an accused' and the 'expectations of victims' and the domestic model tribunal of Bangladesh. The second chapter outlined the key concepts of various types of international crimes tribunals and their nature from theoretical perspectives comparing with ICC. The third chapter analysed the nature of domestic international crimes tribunal of Bangladesh comparing to other types of international crimes tribunal and its prose and cones. The last chapter critically evaluated the current settings of ICC, its functions, judgements comparing with domestic model of ICTB. In conclusion I will come up with the hypothesis whether ICC is moving in a wrong direction and if so I will include a list of recommendations.

1.7. Criminal Trial

Criminal trial involves various types of judicial mechanisms such as issuing warrant, arresting suspect, identifying witness and admissible evidence. The nature and application of these criminal trial mechanisms is very complicated in terms of international crimes, one reason is that most of the international tribunals were set up after the crimes have been committed long time back where identifying witness and evidence is a question of fact and time i.e. in Bangladesh a domestically established tribunal assessing international crimes committed in 1971 during the liberation war. This gave birth of the question whether culture of impunity should prevail just because of lack of evidence or witnesses? It is often difficult in terms of Bangladesh to identify admissible evidence and witness where crimes has been committed 42 years ago and during this time there were thousands of propaganda and manipulation which made the trial more complex. These manipulations and propagandas throughout the time established wrong conceptions which conceal the true facts. Thus a long standing debate initiated whether justice could be achieved if trials were established immediately after the atrocities committed and to what extent is it still possible to ensure justice.

1.8. Nature of International Criminal Trial

The International Criminal Court (ICC) has started its journey in 2002 which was a long battle to establish an international institution to try and assess international crimes. Where other international tribunals were established after committing international crimes in a particular political area, ICC has established for ongoing crimes and this way it is trying to standardise the underlying principles of international crimes tribunal. Internationalised domestic tribunal has also been appreciated by international community and thus International Crimes Tribunal of Bangladesh (ICTB) has established. The main focus of my current work is

to analyse the efficacy of ICC comparing with ICTB. In particular I will look into the fact that whether ICC is creating a fair balance between the rights of the accused and the expectation of victims to ensure justice or not.

The ICC is governed by the Rome Statute and Article 1 states that…"an International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in its Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute."[1]

1.9. International Crimes Tribunals of Bangladesh (ICTB)

ICTB is a domestic judicial mechanism set up under national legislation and it is meant to try internationally recognized crimes and that is why it is known as 'International Crimes Tribunal'.[2] Two separate tribunals were set up under an act of parliament of Bangladesh (ICT-1 and ICT-2) and I have referred those tribunals together as ICTB throughout this work. Although the nature of the tribunal is domestic, the Tribunal shall never be precluded to seek guidance from the universally recognised norms and principles laid down in international law and international Criminal Law with a blend of national law, in trying the persons responsible for preparation of crimes enumerated in the Act of 1973.[3]

1.10. 'Rights of an accused' and 'Expectations of victims'

Crimes under international criminal law are often heinous, brutal and inhuman. Victims of such crimes have the rights to seek justice. However, there should also be a room for the

[1] Article 1, Rome Statute
[2] ibid
[3] ibid

accused to defend his/her position under internationally recognised norms and values. It is also equally important to make a fair balance between this two conflicting rights. Expectations of the victims will refer to the fact that justice has been achieved satisfactorily, in other word the accused has been punished what the victims have anticipated.

2. Chapter Two: Types of international Crimes Tribunal and their nature

2.1.1. Introduction

Why different types of tribunals? There is a parallel relationship between the development of international criminal law and international crimes tribunals, as a result of which various types of international crimes tribunal arises. The two main barriers in the process of international criminalisation such as recognising an individual as a subject of international law and unwillingness of state party to be interfered by outsiders led to establish different types of international crimes tribunal. The first attempt to establish international criminal courts has been taken by the Versailles Peace Treaty in June 1919 and the main aim was to criminalise an individual under international law.[4] The Charter of the International Military Tribunal at Nuremburg in 1945 first established international military tribunal to criminalise individuals for war crimes in the Second World War beyond particular geographical territory which is widely known as Nuremburg Tribunal. This tribunal was further improved by the Control Council Law No. 10 in December 1945 which ensured uniformity to the subsequent trial between 1946 and 1949.[5] The codification of international criminal law has started by

[4] Humboldt University, "The Evolution of International Criminal Law" http://werle.rewi.hu-berlin.de/01_History-Summary.pdf accessed 1 October 2014
[5] ibid

various treaties such as Genocide Convention in 1948, Geneva Convention in 1949 and Additional Protocols to Geneva Conventions in 1977. The principles established by the Nuremburg Tribunal were also adopted by the United Nations (UN) General Assembly.

2.1.2. Eichmann Trial: a trial before national courts

Half a century ago, on 29 May 1962, the Supreme Court of Israel confirmed the conviction of Adolf Eichmann for crimes against humanity, war crimes and crimes against the Jewish people (genocide) during the Second World War.[6] Subsequently he was found guilty and sentenced to death in 1962. Most probably this Eichmann Trial is the very first domestic trial to criminalise an individual for international crimes and attracted attention from international community. The judgement of Eichmann Trial could be an example to prevent future international crimes and crimes against humanity as perpetrators may face proceedings against them under domestic judicial system. However, this did not happen in the different part of the world, rather international crimes have been committed and most of them were led by ethnic cleansing. The nature of international crimes is quite different from crimes under national jurisdiction where most of the accused are either part of the government and head of state or part of the armed force and state power lies at their hand. So, they never fear to face trial for their heinous criminal acts either domestically or internationally which creates culture of impunity in certain countries.

2.1.3. Criticisms of Eichmann Trial

The Eichmann Trial was controversial and attracted criticism from various quarters which can be described as follows:

[6] *Attorney-General of the Government of Israel v. Eichmann* (Israel Sup. Ct. 1962), Int'l L. Rep., vol. 36, p. 277, 1968 (English translation).

> The Eichmann judgment, controversial at the time it was delivered and still controversial now in some respects, contains much that is still of great significance for the world today. The judgment is a ringing affirmation of the sound basis in international law of universal jurisdiction as an essential tool of the international community to achieve justice. It articulated certain important procedural aspects of this form of jurisdiction and of the inappropriateness of certain bars to prosecution that courts should still heed today. The judgment also clarified that states may enact legislation defining crimes under international law as crimes in their penal codes applicable retrospectively, as long as the conduct was criminal under international law when it was committed.[7]

During the Eichmann Trial, the Defence lawyers argued and questioned the competency of the tribunal. Firstly, it was reasonable to doubt the credibility and neutrality of three judges since they were Jews and officials of Israel, so they would not be objective providing a fair trial to the accused.[8] Secondly, the accused must not face the trial at this stage as he was abducted illegally from Argentina and taken to Israel.[9] Thirdly, the Nazis and Nazi Collaborators Law 5710-1950 was a post factum law and therefore was wrong and unjust.[10]

[7] Amnesty International, 'Eichmann Supreme Court Judgment 50 years on, its significance today' < http://www.amnesty.org/en/library/asset/IOR53/013/2012/en/52ae5e58-9511-4215-a61a-51e1c56df25d/ior530132012en.pdf> accessed 2 October 2014

[8] Yad Vashem, 'THE EICHMANN TRIAL' http://www.yadvashem.org/yv/en/holocaust/eichmann_trial/pdf/eichmann_trial.pdf accessed 2 October 2014

[9] ibid

[10] ibid

Fourthly, the indictment bill listed such offences which are beyond the jurisdiction of Israel.[11]

However, the trial judges did not accept any one of the argument put forward by the Defence lawyers in relation to the neutrality of the judges and the court said that:

> When a judge sits on a bench, he does not cease to be flesh and blood with human emotions; but he is bidden by law to overcome these emotions. If this were not so, no judge would ever be qualified to sit in judgment in a criminal case evoking strong disgust, such as a case of treason or murder or some other heinous offense.[12]

2.1.4. Eichmann Trial and Fair Trial Rights

The judgement given by the Eichmann Trial is the foundation in international law since it is allowing the national courts to apply universal jurisdiction in the case of war crimes and crimes against humanity.[13] The Supreme Court judgement of the trial also established and developed procedural principles applicable to the situations of universal jurisdiction.[14] The Supreme Court did not accept the claim made by the Defence lawyer that the accused should have given the right to be extradite from Argentina before commencing proceeding against him because it could potentially hinder the pace of trial process.[15] The Supreme Court also rejected the claim in relation to the neutrality of the judges and reassured that there was no conflict in relation to fair trial to judge the accused.

[11] Israel Gutman (ed.), T*he Encyclopaedia of the Holocaust* (New York: Macmillan, 1990)
[12] ibid
[13] Supra note 9 pp. 6
[14] Supra Note 9 pp. 8
[15] Supra Note 9 pp. 8

In my opinion, some crimes under international criminal law are so gross and so evidenced that there should be no question about the fairness of the justice to delay the trial process. In this particular case, Eichmann was the real perpetrator and which is well evidenced by various types of document, hence there should be no question about the fairness of the trial that he was brought to Israel unlawfully. If Israel would follow the common procedure to bring Mr. Eichmann back from Argentina, it may not be possible to reach him and make liable for crimes he has committed, thus rights of the accused and fair trial principles sometimes undermine victims expectation. The fear which is apparent in the Eichmann judgement is that it could be abused by the other countries to be motivated by political ideology and as a result of which in Rwanda and Yugoslavia ad hoc types of international tribunal emerged.

2.2. Ad hoc Tribunals of Yugoslavia and Rwanda

International tribunals established in order to investigate and assess a particular situation for committing crimes defined under international criminal law is called ad hoc tribunals. This ad hoc type of tribunal is designed to try and assess a particular situation which is not general in nature. For example, ad hoc tribunals of Yugoslavia and Rwanda were established for their respective situations.

In 1993 the Security Council of the UN established International Criminal Tribunal for the former Yugoslavia (ICTY) and this was created by a special resolution. This ad hoc tribunal had jurisdiction over the crimes under international law committed in Yugoslavia since 1991

and for the crimes of genocide, war crimes, and crimes against humanity.[16] In 1994 another ad hoc tribunal was established by the Security Council of UN which is called International Criminal Court for Rwanda (ICTR). For this time, jurisdiction was limited to the territory of Rwanda and between the time frame of January and December 1994. One of the advantages of these ad hoc tribunals was selecting situations and cases easily. It was less burdensome for the ad hoc tribunals to select particular situations or cases because jurisdiction and types of crimes and time of event was defined and it was possible to start investigation and prosecution directly.[17]

2.2.1. ICTY and Fair Trial Provisions

The ICTY statute provides significant rights to a fair trial and Article 21 states that accused have the right to be presumed innocent until proven guilty, also accused have the right to be informed promptly about the charge against him.[18] The ICTY and other international tribunals often encountered with fair trial rights and fundamental rights of accused. The underlying principles of the human rights in the field of international criminal justice are the prohibition of discrimination and assurance of equality for both victims and accused.[19] The Universal Declaration of Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR) confer rights for the defendants which are crucial to consider during trial process as mentioned in the Eichmann Trial above. However, in ICTY the fair trial rights and other rights of the defendant have been ensured as the famous judge Shahabuddin opined in the *Sloboden* trial that:

[16] Supra note 6
[17] J A Williamson, 'An Overview of the International Jurisdictions Operating in Africa' (2006) 88 Int'l Rev. ICRC 861
[18] Statute of the International Criminal Court for former Yugoslavia, Article 21
[19] S Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press 2005) 94-95

> …the fairness of a trial need not require perfection in every detail. The essential question is whether the accused has had a fair chance of dealing with the allegations against him.[20]

It is recommended, for every tribunal to prosecute individual for international crimes, that tribunal has adopted all the aspect and principles of internationally recognised standards relating to the rights of the accused in every steps of a proceedings.[21] As a result before drafting the statute for the ICTY, the rights of the accused and fair trial rights was paramount to consider which has reflected in the ICTY Article 20 and 21. The judgement and decisions given by the ICTY also reaffirmed the principle of fair trial rights and rights of a defendant. The famous case of *Tadic* in 2001 raised the question that whether a person, who has been convicted by the ICTY, should have the rights to appeal against decision made by the tribunal judges. The finding was, such a right must be available for the accused as ensured by the Article 14 of the ICCPR.[22] However, there were several allegations against the ICTY that the right of an accused to a fair trial has not been maintained because ICTY has adopted to expedite trial proceedings.[23] The former president of ICTY, Judge Patrick Robinson stated that:

> The need for fair but expeditious trials is nowhere more urgent than in the trial of persons charged with mass atrocities involving hundreds if not thousands of witnesses.[24]

[20] , Case No. IT-02-54-AR 73.4, *Prosecutor v. Slobodan Milosevic*, Opinion of Judge MD Shahabuddeen on Admissibility of Evidence-in-Chief in the form of Written Statements, (Sept. 30, 2003)
[21] Report of the Secretary-General pursuant to the Security Council Resolution 808,106, U.N. Doc. S/25704 (1993)
[22] P Robinson, 'Ensuring Fair and Expeditious Trials at ICTY' (2001) 11 (3) E.J.I.L. 569, p. 582-83
[23] P Robinson, The Right to a Fair Trial in International Law at ICTY' (2009) 3 E.J.I.L 569, p. 9
[24] ibid

2.2.2. Balancing Rights at ICTY

At this point, it is important to find out how the concept of fairness can be determined in the international criminal tribunals. There should be no difference in terms of the application of fairness principles in both domestic and international tribunal, in particular standard application of fairness principles should be same. However, in my opinion it is important to argue about the standard application of fairness in both domestic and international tribunal since both the tribunal are dealing with two different identifiable unique nature of crimes, hence the effect of the fairness principle and considering rights of the accused is critical for both the tribunal in equal standard. However, ICCPR did not provide two set of separate rules for both domestic and international tribunal and the Judge Patrick Robinson stated that:

> I consider it important to stress the sameness of the character of fairness in both international and domestic tribunals because the applicable law in a trial for a person charged with war crimes, crimes against humanity and genocide is the same whether the tribunal or court operates in an international or domestic setting- it is international humanitarian law. For example, the Court of Bosnia and Herzegovina, the Belgrade District Court in Serbia and courts in Croatia are applying international humanitarian law in trials of persons similarly charged with war crimes, crimes against humanity and genocide.[25]

Since the Supreme Court of the United States in the case of *Synder v Massachusetts* stated that the principles of due process requires that a trial shall be fair but this fairness is not

[25] ibid

absolute rather it will be applied relatively.[26] This approach gave emphasis on the flexible application of due process which could achieve justice easily since the absolute application may hinder the pace of the proceedings most of the times. So, in international criminal trial, weight should be given equally to the rights of the accused and also to the expectations of the victims. It appears to me that various international treaties provided rights to the accused to a greater extent which sometimes make the trial process complex and lengthy.

The witnesses presented before the ICTY, who have witnessed the mass crimes committed, would not be willing to appear in the court if the trail does not provide adequate protection to them such as pseudonyms, closed session, voice distortion and image distortion.[27] These measures could raise the question of fair trial rights in relation to the rights of the accused.[28] During the drafting period of the ICTY statute, the drafters carefully considered the rights of the accused as well as the rights of the victims and witnesses which reflected in Article 20(1) that:

> …trials be conducted "with full respect for the rights of the accused and due regard for the protection of victims and witnesses" (emphasis added). Nonetheless, the Statute makes it clear that the protection of victims and witnesses if of crucial importance in the ICTY's proceedings. And in Article 21(2), the right of the accused to a fair and public hearing is made subject to Article 22, which requires the ICTY to provide for the protection of victims and witnesses in its Rules.[29]

So a balance is required by the due process principles and in assessing whether a particular protective measures is fair or not, weight must be given whether that protective measures

[26] *Snyder v Massachusetts* (1934) 291 U.S. 97 (SC)
[27] Supra Note 26, p. 10
[28] ibid
[29] ibid

itself is fair or not. If the protective measures is fair then it should also be legitimate and series of case law have developed the balancing principles and it is worth mentioning the statement given by Lord Bingham that if for the sake of justice "some adaptation of ordinary procedure is called for" and if it does not significantly compromise the overall fairness that is proper balance in relation to due process.[30] It appears to me that fair trial confers rights for every individual and these rights are universally recognised, without compromising with it, justice cannot be achieved.

2.2.3. ICTR and Fair Trial Provisions

The ICTR is governed by its own statute and its Rules of Procedure and Evidence was adopted from ICTY but it was specifically applicable to charge the member of the former Rwanda government and military.[31]. The due process of ICTR has been reflected in the Rule 62 and 63 which included the right to presumption of innocence and the right against elf incrimination.[32] Rule 42 also confirmed the status of due process in ICTR which is the right to counsel of choice or to free legal assistance if indigent and Rule 108 provide the right to appeal.[33]However, the ICTR was not free from criticism since critics said that it was serving the justice only for the winner party. This statement is so powerful which led a debate about serving justice and to what extent that justice is providing adequate fair trial rights to the accused.

[30] ibid
[31] M Noel, 'Can We Expect Fair Trials At The International Criminal Tribunal For Rwanda?' (2011) http://www.blacklawyer.org/beta/wp-content/uploads/2011/09/Fair-Trials-At-The-ICTR.pdf accessed 3 October 2014
[32] P J Magnarella, *Justice In Africa; Rwanda's Genocide, It's Courts, and the UN Criminal Tribunal,* (Ashgate Publishing Ltd 2000) p. 49
[33] ibid

One point is worth mentioning here that, international ad hoc tribunals try those crimes where there was a war between two ideological parties and one party own the war and accused the opponents for war crimes committed during the battle, what would happen if the accused's party won the battle? Would they form a trial for committing war crimes for their opponent too? In my opinion where an individual is accused for crimes committed under the definition of international crimes, it could not be a defence that other potential war criminals are not been accused where a particular individual is accused. The important thing to consider is that whether the alleged person has committed war crimes supported by evidence. However, it is equally important that that evidence is mostly fair under customary international law.

Many people argued that the ICTR was the agenda of the Rwanda foreign policy which convince the UN Security Council in establishing war crimes tribunal because pure domestic tribunal could give birth of enormous criticisms. If we consider the detainees in ICTR and closely observe the trends of the Tribunal and indictments which has been issued by the Tribunal it appears there is a predetermination to convict particular individuals.[34]

Again, in my opinion there could be no possible allegation about the fairness of the trial provided those particular individuals were convicted beyond reasonable doubt relied upon credible evidence. The first judgement delivered by the ICTR is *Akayesu,* he was charged with genocide, crimes against humanity and war crimes committed in the territory under his control where he had considerable political influences too.[35] Akayesu was found individually criminally responsible under Article 6(1) alone and was sentenced to several terms of

[34] Supra Note 34
[35] Case No. ICTR-96-4-T *The Prosecutor v Jean-Paul Akayesu*,

imprisonment ranging from 10 years to life.[36] The principles set out in *Akayesu* case was followed in the subsequent case where it had significant negative impact because the Trial Chamber confirmed that certain criminal under the jurisdiction must be committed as part of a widespread or systematic attack against civilian where civilian has been defined as "people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed *horse de* combat by sickness, wounds, detention or any other cause."[37] Also the Trial Chamber gave a narrower definition of genocide as a result of which there is no conviction for war crimes although genocide and crimes against humanity has been committed.

2.2.4. Weaknesses of ICTR

There were several weaknesses in the ICTR comparing with the domestic courts of Rwanda. Firstly, the domestic court was able to approach the local people where the crimes have been committed and in terms of collecting evidence it was an advantage. Secondly, the ICTR used English and French as the Tribunal's official language, which created huge problems in terms of translating and interpreting documents. Thirdly, there was a communication gap between the witnesses and foreign lawyers because local cultural expression could not be properly understandable by the foreign lawyers. Finally, ICTR was very expensive since it has employed over 1000 people from 80 different nationals.[38] In my opinion, an ad hoc tribunal was necessary in Rwanda to prosecute particular individuals in set period of time and the support of UN was necessary to avoid criticism or dispute about the fairness of the Tribunal. However, in fact it is very difficult to come to the conclusion about a perfect model of

[36] Ibid, para 8
[37] ibid
[38] Supra Note 34 p. 13

Tribunal. The disadvantages of ad hoc tribunals led to develop a hybrid model which would be illustrated in the later part of this work.

The case laws of ICC suggest that it is trying to establish very high standard of fair trial rights for the accused to avoid criticism. The ICC, comparing with the above mentioned ad hoc tribunals, is not able to select situation easily because theoretically ICC act on a universal scale. The jurisdiction of ICC is wider than other types of international tribunals. However its jurisdiction is restricted subject to the principle of supplementary that means ICC cannot directly investigate and assess a particular scenario unless domestic jurisdiction is unable or unwilling to take over the matter. The limitations of ICC remain unchanged in relation to cultural variations to interpret witness statements and also gap between the places of trial and the actual event.

2.3. Hybrid Courts

In the field of international criminal justice, hybrid courts are mixture of domestic and ad hoc tribunals. Hybrid courts adopted all the advantages of domestic courts and ad hoc tribunals on the other hand eradicated all the disadvantages of ad hoc tribunals and domestic courts. In other word national ad hoc tribunals working with international assistance and applying international criminal law are the hybrid courts. This type of hybrid mechanism has been used in a post-conflict scenario in East Timor and Sierra Leone, also in Kosovo there was an international tribunal in the post conflict period which was unable to address human rights violation.[39]

[39] S R Garimella, 'The Bangladesh War Crimes Trials- Strengthening Normative Structure' (2013) 13 JLPG

> In Cambodia, East Timor and Sierra Leone, the United Nations has been involved in efforts to create a new species of tribunal for the prosecution of international crimes. These are the "internationalised domestic tribunals", grafted onto the judicial structure of a nation where massive violations of human rights and humanitarian law have taken place, or created as a treaty based organ, separate from that structure.[40]

2.3.1. Benefits of Hybrid mechanism

One notable benefit of these types of hybrid mechanisms is that foreign judges are able to work with the domestic judicial officials in the trial process where domestic lawyers are entitled to work for both the prosecution and for the defence counsel and are capable to seek advice, guidance from lawyers of other countries.[41] Domestic law is applicable in these types of hybrid courts and that domestic legislation shall be drafted in compliance with the internally accepted standard and norms such as rights of the accused and due process principles.[42] Thus hybrid model creates a way to adopt internationally accepted principles in the field of international criminal justice which will broaden its legitimacy and capacity.[43] In case of post conflict scenario, a purely domestic court should not be impartial and a hybrid model is necessary. Also, it is very difficult for the post-conflict societies to establish domestic mechanism to try and assess individuals for crimes committed under international

[40] S Linton,' Cambodia, East Timor and Sierra Leone: Experiments In International Justice' (2001) https://www.essex.ac.uk/armedcon/story_id/000385.pdf accessed 5 October 2014
[41] ibid
[42] ibid
[43] ibid

criminal law where they have other administrative reconstruction matters in priority.[44] So, international assistance is fundamental for these types of special scenarios.

2.3.2. Hybrid mechanism and Fair Trial Rights

The case laws of international crimes tribunals such as ICTR and ICTY did not provide proper guidance and principles to assess international crimes by purely domestic judicial mechanism. In my opinion, hybrid courts may effectively maintain the due process principles and rights of the accused as well as expectation of the victims in the post-conflict scenarios. As Ramani Garimella stated in his article that:

> Hybrid courts, being a mix of both the legal systems, offer a blend of legitimacy by providing ownership without affecting independence and impartiality; they help prosecute more perpetrators in a less time, as compared to the costs of an international tribunal; to conduct a domestic trial that ensures compliance with international fair trial norms.[45]

The Cambodian government seek international assistance to bring the justice into light and to resolve the culture of impunity of twenty years which resulted in the establishment of the hybrid tribunal of Cambodia. The UN assisted the Cambodian government to establish hybrid judicial mechanism in dealing with the atrocities committed during the ruling period of Khemer Rouge between 1975 and 1979.[46] A United Nations Group of Experts, headed by Sir Ninian Stephen of Australia, were mandated to evaluate existing evidence with a view to determining the nature of the crimes committed, to assess the feasibility of apprehending

[44] ibid
[45] ibid
[46] Supra Note 43, pp 187

the perpetrators, and to explore the legal options for bringing them to justice before an international or national jurisdiction.[47]

2.3.3. Weaknesses of the Hybrid Tribunal in Cambodia

There was a dispute regarding the type of judicial mechanism which could effectively serve the purpose of the justice for Cambodia and a group of legal experts (the Group of Experts) were employed to come to an end. The majority of the experts suggested that an international tribunal with the direct assistance of UN could serve the purpose effectively.[48]They also considered the nature of corruption and political domination over the judiciary, and they were at the opinion that Cambodia's system was inconsistent with the international standards of criminal justice established in the International Covenant on Civil and Political Rights.[49] The Group of Experts did not even recommend any mix model of domestic and foreign fearing that it could be manipulated politically; they also anticipated that international body was not able to work independently under the supervision of the Cambodian government.[50] The Group of Experts also noticed that there was serious weakness in the judicial system in terms of expert judges, lawyers and investigators; the infrastructure was not suitable which could create a culture of respect for the process.[51]

All the limitations raised by the Group of Experts submitted that it would be difficult to ensure the rights of the accused under due process principles. However, the government of Cambodia was in a different view, they negotiated with the UN and finally succeeded to establish an international tribunal governed by Cambodian domestic law with the control of

[47] General Assembly of UN, Resolution 52/135
[48] Ibid
[49] Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135 ("Group of Experts Report")
[50] Ibid, para 137
[51] ibid

international participation. Under the negotiation with UN the Cambodian government agreed to make a dual investigatory process that means a foreign judge and a local judge will investigate each case; also the prosecutions lawyer will be combined with foreign lawyers. In my opinion, government of any State is barely interested to be interfered by outsiders because as much as a trial is involve with international lawyers, judges and experts it will make greater provision for the rights of the accused.

The Constitution of Cambodia contains notable provisions from the Universal Declaration of Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR). These provisions in the Constitution are known as fair trial provisions which included the right to be treated equally before law, the presumption of innocence and the right to an independent and impartial hearing.[52] Despite having such provisions to protect the rights of the accused, there were several allegations that Cambodian tribunal has fallen below the standard set out by the UDHR and ICCPR. One of the most notable criticisms was pre-trial detention of individuals without legitimate grounds. There were also serious question about the rights to legal representations which was very restricted and violated the rights of the accused in various quarters.

As we can see, the Cambodian government was unwilling to conduct the trial by foreign judicial mechanism and negotiated with UN which resulted in a domestic tribunal with international assistance. On the other hand there are some benefit to deploy foreign assistance; firstly it will give consistency to the trial process; secondly it will protect the trial from biasness by the State party; thirdly it will supervise the overall domestic judicial mechanism to try an individual or group of individuals for committing international crimes;

[52] The Constitution of the Kingdom of Cambodia, http://cambodia.ohchr.org/klc_pages/KLC_files/section_001/section_01_01_ENG.pdf accessed 5 October 2014

finally it will ensure trial is fair and ensuring rights of the accused reasonably. When an international tribunal is needed to try and assess international crimes committed by former government or ruling class, there is a fear that a majority of people who used to support that previous government or ruling party will criticise any tribunal which is purely domestic. Also, international crimes tribunal may be establish by any present government to prosecute the atrocities done by the former government, in that case there is also a fear that the present government may manipulate the tribunal to prosecute political opponent. So, to make a balance international interference, support or assistance in needed to make a trial process widely acceptable and free from criticism. However, international assistance is not always recommended, especially if a State has strong judicial infrastructure, expert judges and lawyers and long established culture of respecting due process rights and majority public support and they are not described as post-conflict societies, then a purely domestic tribunal may be suitable to try and assess international crimes provided that they respect the international principles established by various treaties and customary international law.

2.3.4. Hybrid model of Sierra Leone

The main purpose of the hybrid model of the Special Court for Sierra Leone (SCSL) was the completion of fair trials in accordance with international standards of justice.[53] On 14 August 2000 the UN Security Council with a Resolution established the Special Court, it was critical to the process of national reconciliation and the maintenance of peace in Sierra Leone that the SCSL be a strong and credible court operating in accordance with

[53] W Jordas and S Martin, 'Due process and fair trial rights at the Special Court: how the desire for accountability outweighed the demands of justice at the Special Court for Sierra Leone' (2010) LJIL 585

international standards of justice, fairness and due process of law.[54] The SCSL starts functioning in 2004 by adopting principles from ICTY and ICTR which reflected human rights principles recognised under national jurisdiction, also the UN Security Council and drafters of the court's governing statute considered international standards with the expectation that trial process will ensure "justice was done and seen to be done".[55] However, the SCSL attracted criticism for not complying with the due process to ensure the rights of the accused has been preserved. The most important rights of an accused is to be informed as soon as possible about the allegations against him in detail and it is recognised as the most fundamental procedural rights of a person charged for criminal acts.[56] As is recognized by prevailing international standards, the notification of the charges must be prompt, intelligible, and formulated with adequate precision.[57]

2.3.5. Hybrid model and International Criminal Court

The hybrid model is effective where the ICC cannot deal with a particular situation because of its jurisprudential limitations since the Preamble of the Rome Statute stated that the Court shall be complementary to national criminal jurisdiction.[58] Article 17 of the Rome Statute states that ICC shall determine a case as inadmissible if (a) the case is being investigated or prosecuted by a state which has jurisdiction over it (b) the case has been investigated by a State which has jurisdiction over it and the State concluded not to prosecute the person concerned, provided that decision was not resulted from the unwillingness or inability of the State (c) the alleged person has already been tried and a

[54] UN Doc. S/RES/1315 (2000) < http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/605/32/PDF/N0060532.pdf?OpenElement> accessed 5 October 2014
[55] Supra Note 49
[56] ibid
[57] *Brozicek v. Italy,* (1989) 12 EHRR 371; *Mattoccia v. Italy,* (2003) 36 EHRR 47
[58] Preamble of the Rome Statute, para 10

Trial by the Court is not permitted (d) the case is not of sufficient gravity to justify further action by the Court.[59] At this point a question may poke ourselves that to what extent ICC is necessary to try an individual and the answer would be the unwillingness or inability of a particular State that means ICC is the last resort to seek justice.

2.4. Permanent International Criminal Court

The International Criminal Court is a permanent international court established to investigate, prosecute and try individuals accused of committing the most serious crimes of concern to the international community as a whole, namely the crime of genocide, crimes against humanity, war crimes and the crime of aggression.[60] The ICC is a treaty based autonomous international judicial mechanism, only bound by those states that have ratified the governing treaty of ICC. The Rome Statute is the source of guiding principles of ICC. The ICC is not a substitute for national courts.[61] According to the Rome Statute, it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.[62] The International Criminal Court can only intervene where a State is unable or unwilling genuinely to carry out the investigation and prosecute the perpetrators.[63]

2.5. Conclusion

The primary mission of the International Criminal Court is to help put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a

[59] Rome Statute of the ICC, Article 17
[60] The ICC, 'Understanding the International Criminal Court' <http://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> accessed 2 October 2014
[61] ibid
[62] ibid
[63] ibid

whole, and thus to contribute to the prevention of such crimes.[64] Although there are various types of international tribunals available but there is no 'one size fits all' type of tribunal. Moreover, it was necessary to consider the limitations of ad hoc, hybrid and domestic tribunals and to cover the vacuum to ensure justice; ICC was a demand of time. Despite having serious jurisdictional limitations, ICC is the last resort to seek justice, it also create norms which is acceptable worldwide. The notable thing is that the standard created by ICC is too high that sometimes it may not bring expected outcomes and the current purpose of this research is to identify to what extent the ICC is ensuring the rights of the accused and how it may affect other international tribunals to try and assess international crimes.

3. Chapter Three: International Crimes Tribunal of Bangladesh (ICTB): A Matured Domestic Tribunal

3.1. Introduction

ICTB is one of the most recent domestic tribunal established in Bangladesh to punish individuals for committing international crimes. This tribunal is much more matured than other purely domestic tribunals around the world to try and assess international crimes because it has considered the principles established by other ad hoc, hybrid and domestic tribunal to date and updated its governing Act to reflect those widely accepted principles such as fair trial rights and rights of the accused. The legal infrastructure is strong enough in Bangladesh and expert judges and lawyers are also available locally. In this article I will

[64] ibid

consider this tribunal as model to compare with the ICC to analyse the nature of due process principles to ensure the rights of the accused. The main purpose behind the ICTB was its liberation war in 1971 when atrocious and dreadful crimes were committed, which resulted in the birth of an independent country.[65] The war was so dreadful that:

> Some three million people were killed, nearly quarter million women were raped and over 10 million people were forced to take refuge in India to escape brutal persecution at home, during nine-month battle and struggle of Bangladesh nation. The perpetrators of the crimes could not be brought to book, and this left an unfathomable abrasion on the country's political awareness and the whole nation. The impunity they enjoyed held back political stability, saw the ascend of military, and destroyed the nation's Constitution.[66]

3.2. Background of International Crimes Tribunals of Bangladesh

The conflict had begun with the Pakistan army operation in Dhaka city which is called 'Operation Search Light' on 25th March 1971. The main target of the 'Operation Search Light' were intelligentsia, students and ordinary people who ever demanded independence and influenced toward freedom. During the nine-month period of military operation conducted by the Pakistan army over 200,000 Bengali women were raped with the assistance of local collaborator.

> In the War of Liberation that ensued, all people of East Pakistan wholeheartedly supported and participated in the call to free Bangladesh but a small number of Bangalees, Biharis, other pro-Pakistanis, as well as members of a number of different

[65] *The Chief Prosecutor v Abdul Kader Molla*, ICT-BD Case No. 02 of 2012
[66] Ibid, para 6

> religion-based political parties, particularly Jamat E Islami (JEI) and its student wing Islami Chatra Sangha (ICS), Muslim League, Pakistan Democratic Party(PDP) Council Muslim League, Nejam E Islami joined and/or collaborated with the Pakistan occupation army to aggressively resist the conception of independent Bangladesh and most of them committed and facilitated the commission of atrocities in violation of customary international law in the territory of Bangladesh.[67]

The Pakistan military along with the government formed several auxiliary forces such as the 'Razakars', the 'Al-Badar', the Al-Shams, and the Peace Committee etc.[68]All auxiliary forces were formed to work together with the Pakistani occupation army in order to identify and torture all those who were recognised to be pro-liberation.[69] Another objectives of the auxiliary forces was to identify minority religious groups especially the Hindus, political groups belonging to 'Awami League' and 'Bangalee' intellectuals and unarmed civilian population of Bangladesh.[70] These auxiliary forces were identifiable and controlled by different level of political organisation such as the people from Islami Chatra Sangha formed Al-Badar, the general patriotic public who were supporters of 'Jamaat-e-Islami', Muslim League, 'Nizam-e-Islami' formed the Al-shams and people those who speaks in Urdu and Bihari formed the 'Al-Mujahid'.[71] The auxiliary forces were strongly organised and co-operated the Pakistan army and also formed para-militia to combat the unarmed civilians for the so called undivided Pakistan.

[67] Ibid, para 12
[68] Ibid, para 13
[69] ibid
[70] ibid
[71] M U Chowdhury, 'Sunset at Midday' citing in *The Chief Prosecutor v Abdul Kader Molla*, ICT-BD Case No. 02 of 2012

> Fox Butterfield wrote in the New York Times- January 3, 1972 that "Al Badar is believed to have been the action section of Jamat-e-Islami, carefully organised after the Pakistani crackdown last March"[72]

As the auxiliary forces were formed with the local collaborators, they were not aware about the consequences of war crimes, genocide and crimes against humanity. They abused their power notoriously and involved in killing intellectuals and unarmed civilians. They forced minority religious groups to be turned into Muslim; they also got involved in raping women of all ages and passed on young Bengali girls to the Pakistan army camp. The battle ended on 12 December 1971 and a new country emerged as Bangladesh in the world map and Bengali nation begun a new journey being independent. …'The birth pangs continued to haunt the country while it did precious little in the last three decades to overcome the horrors of the conflict zone in the month of liberation war.'[73]However, in 1973 legislation was enacted by the sovereign parliament of Bangladesh to prosecute those individuals who were the local collaborators and worked as the auxiliary forces of the Pakistan army. The aim of the legislation was to prosecute all those collaborators who took part in the hostility during the nine-month liberation war. The newly born country started to prosecute individual for international crimes but subsequently it was buried by the military intervention in the politics and thus perpetrators remained uncountable until 2010 while "victim suffered in agony and lack of justice".[74] The perpetrators took shelter under the political party and stayed in the safe heaven. However, there were protest and demonstration nationwide to prosecute all those involved in the atrocities during the liberation war in 1971. The demand of justice for the victims of 1971 turned as a campaign

[72] Ministry of External Affairs (New Delhi) 'Bangladesh Documents' Vol. 2 page 577
[73] Supra Note 42, pp 29

for justice during the general election in 2008.[75] After the election the government who promised to end the culture of impunity established the International Crimes Tribunal in 2010.[76]

> The ICTA has been an (a) unique piece of legislation as in 1973, hardly any country in the world had developed such a comprehensive legal infrastructure to enable national jurisdiction to try international crimes committed by nationals of any country in the territory of Bangladesh (ICTA Section 3. 1). It created a complete legal order, considering gravity of crimes involved as well as limitations of ordinary criminal procedures, that provided no avenues to address international crimes and for the first time, and enabled establishment of the International Crimes Tribunals (ICT).[77]

3.3. International Crimes (Tribunals) Act of 1973

The main aim of International Crimes (Tribunals) Act, 1973 was to detain, prosecute and punish those individuals responsible for committing genocide, crimes against humanity, war crimes and other crimes under international law.[78]The Act provided that the Tribunal shall have the power to accuse any individual or group of individuals or organisations, or any member of any armed, defence or auxiliary forces irrespective of his nationality, who commits or has committed, in the territory of Bangladesh, whether before or after commencement of this Act.[79] Section 6 of the Act provided that the government shall have the power to establish one or more tribunals by notification in the official gazette and each

[75] ibid
[76] ibid
[77] Ibid, para 3.4
[78] ICTB, 'About ICT-BD' < http://www.ict-bd.org/ict2/indexdetails.php> accessed 10 October 2014
[79] ibid

tribunal will consist of a Chairman and at least two or maximum four other members.[80]The 1973 Act was modified significantly in 2009 to adopt modern principles established by other international crimes tribunal including ICC and in 2010 the government formed International Crimes Tribunal consisting three judges where one judge is the Chairman and other two judges are the members.[81] There are two separate tribunals which are called International Crimes Tribunal-1 and International Crimes Tribunal-2, these two tribunals were set up by two different notifications in the official gazette.[82]

The two tribunals established by the revised Act were purely domestic mechanism to address the crimes included targeted killing of certain religious and national groups such as Bengalees and Hindus, systematic and indiscriminate killing of civilians including women and children. This domestic judicial mechanism has adopted various provision set out by other international tribunals around the world. From the Eichmann Trial to the ICC, the Tribunals in Bangladesh considered due process principles significantly. The judgement of the Chief *Prosecutor v Abdul Kader Molla* in the International Crimes Tribunal (ICT-2) of Bangladesh stated that:

> The degree of fairness as has been contemplated in the Act and the Rules of Procedure (ROP) formulated by the Tribunals under the powers conferred in section 22 of the principal Act are to be assessed with reference to the national wishes such as, the long denial of justice to the victims of the atrocities committed during war of liberation 1971 and the nation as whole.[83]

[80] ibid
[81] ibid
[82] ibid
[83] Supra note 69, para 2

3.4. Nature of International Crimes Tribunals of Bangladesh

The Tribunals were lawfully constituted judicial forum and consulted experts worldwide to reflect the fair trial provisions and rights of the accused in the international tribunals around the world. The amendment process of the Act in 2009 the government submitted a report to the Law Commission of Bangladesh to identify any weakness, any inconsistency with the due process principle, whether any amend in the regulations is necessary or not. The Law Commission, at the request of the government, contacted 33 legal experts and specialists to have their opinion on the amendment of International Crimes (Tribunals) Act 1973. The experts and specialists included leading academician, University Professors, former justice, famous barristers, members of the Bar Associations and researchers. Thus there is no point to argue about the amendment of the Act which was enacted in 1973 as the amendment was the demand of time to consider due process model in the Act.

3.5. Legal Framework of ICTB

The International Crimes (Tribunals) Act 1973 is ex-*post facto* legislation and it has been updated significantly later on, although this legislation has been used under retrospective effect, there should be no confusion to prosecute international crimes since it is broadly allowed under customary international law.[84]The notable international tribunals of ICTY, ICTR and SCLS have been supported by the UN in relation to their judicial bodies and all these tribunals were established under their respective retrospective Statutes; the only international judicial mechanism is ICC which is based on its own prospective Statute.[85]

[84] Supra note 69, para 2
[85] Supra note69, para 3

The treaty of ICCPR provides fair trial rights for an individual, especially for the accused and Bangladesh has signed the treaty and ratified including its Optional Protocol, thus the International Crimes (Tribunals) Act 1973 reflected the rights of the accused enshrined in the treaty. Article 14 of ICCPR provides adequate protection to the accused about his fair trial rights and the Act of 1973 is compatible with this provision and both the tribunals establish under the Act ensured the standard of safeguards recognised universally to be provided to the person accused.[86] Critics may argue that despite having fair trial provisions the Tribunals will not be independent to take decision. However, the amendment in 2009 guaranteed independence as section 6.2A provides that "The Tribunal shall be independent in exercise of its judicial functions and shall ensure fair trial."[87] As we can see in the Eichmann Trial mentioned above was subject to severe criticism that the trial was politically motivated and judges could not take decision independently, the ICTB under section 6.2A impose positive obligation on the judges to take decision independently being free from political and other influences. The ICTB also carefully appointed all the judges to ensure the high standard of the tribunal as section 6(2) states that any person who is a judge or is qualified to be a judge, or has been a judge of the Supreme Court of Bangladesh shall be appointed as Chairman and members.[88] The Tribunals despite being a trial court it is distinct from other domestic trial in Bangladesh and it is unique which can be described as:

> In the International Crimes Tribunals – hearing of motions and petitions, monitoring progress of investigations and the safety of the accused during interrogations, admission of evidence, ensuring protection of witnesses and victims for both the prosecution and defence, deciding on guilt and passing of sentences – are all

[86] ibid
[87] Supra Note 78, para 3.6.3
[88] ibid

> determined and adjudicated by a panel of judges who are very high in rank and rich in experience, maturity, and judicial prudence which are unmatched to any other trial courts in Bangladesh.[89]

The prosecution team and the Investigation agency was formed by the government under section 7(1) and section 8(1) of ICTA 1973 respectively where all the prosecutors of the tribunal are experienced who possess considerable expertise at handling criminal trials they also enhanced their expertise and concepts by consulting various international criminal prosecutors and government agencies.[90] It appears that the arrangement made by the Act and the actual prosecution team is well qualified. To prosecute an individual the Chief prosecutor shall submit an application before the tribunal under Rule 9(1) of the Rule of Procedure seeking either arrest or investigation.[91] In the pre-trial stage there are number of safeguards to protect the rights of the accused such as the accused before the tribunal cannot be kept in custody for prolonged period.[92] The trial period is specified by law because Rule 43(5) provided that accused shall be tried without undue delay and where the accuses is detained for conducting investigation, the investigation period shall be completed within one year with provision of 6 months extension if needed.[93] An accused under investigation has to be detained in order to prevent him from interfering with the investigation, tampering with evidence, and using force to witnesses.[94] However, the accused is entitled to apply for bail if the investigatory process takes time. The prosecutors and the investigators may interrogate an accused under the ICTB Rule of Procedure but any information given by the accused under interrogation is barred to use as evidence against

[89] ibid
[90] ibid
[91] Supra note 69, para 18
[92] Supra note 78, para 3.8
[93] ibid
[94] ibid

that particular accused.[95] This provision provides greater protection for the accused from self-incrimination and effectively removes the room for coercive treatment of the accused.[96] In my opinion, the legal provision of ICTB has been carefully drafted to ensure that the rights of the accused preserved adequately. How broadly the legal framework of the Tribunals has been preserved can be explained as follows:

> In granting permission to interrogate, the Tribunals have put in place extraordinary safeguards, that are – a) – not foreseen in the Act, b) not even practised or available for other accused in Bangladesh, and c) not even provided to the accused in any of the other South Asian countries. For example, during every interrogation, the Tribunals, as a matter of practice, have always ordered that the counsel of the accused and a doctor be present at the place of interrogation and both be allowed to consult and examine the accused before, after and during mandatory intervals. [97]

3.6. Rights of an accused in ICTB

In order to provide better protection to an accused the judges of the tribunal are very restrictive allowing interrogation permission to the Prosecutors and Investigators, if permission allowed an accused can be interrogated only once for a limited hours specified by the Tribunal.[98] During the interrogation period of an accused he has the right to ensure that interrogation take place at the presence of his counsel and a physician. It is unprecedented that accused for serious crimes such as genocide, crimes against humanity

[95] Rule 16(1, Rules of Procedure of ICTB (2010)
[96] Supra Note 78, para 3.8.2
[97] ibid
[98] ibid

and other internal crimes has been allowed such rights during investigation period and thus ICTB is balancing between the right of the accused and the expectation of the victims.[99] It is important to consider, where a counsel of the accused and a physician present in the interrogation process, there are two potential benefit, firstly it ensures that the Prosecution or Investigatory agent do not forcefully acquire information from the accused, secondly the accused cannot claim after providing information that he was not in a sound mental condition to face interrogation. Thus the interrogation process made a balance between the rights of the accused and justice for the victims.

The power of arresting and detaining a suspect remain at the hand of judiciary to ensure that the executives are not able to interfere to arrest any particular individual for political revenge or for any other interest.[100] It is the Tribunal who may order to arrest an individual accused for the crimes defined under the governing Act, even the investigation agency has no power to arrest any suspect without an order from the relevant Tribunal. It appears from the provisions of ICTB Rules of Procedure that procedural fairness is prevalent and complied with. In relation to the detention of an individual it should be noted that the Tribunal is cautious about the rights of the accused not to be detained for prolonged period and to that every detention is subject to periodic review by Tribunal judges and report should be submitted in every three months.[101] Where the Prosecution is unable to show any valid ground to detain an individual for extended period the detained accused shall be granted bail that his rights not to be detained for prolonged period has preserved.[102] The protection for the accused is notable and mirroring international provisions protecting rights of an

[99] ibid
[100] Rule 9(1), Rules of Procedure of ICTB (2010)
[101] Supra note 78, para 3.9.4
[102] Rule 9(6), Rules of Procedure of ICTB (2010)

accused such as Article 9 of the ICCPR which can be read as every individual has the rights to liberty and security and rights not to be detained arbitrarily without reasonable ground established by customary international law.

At this point it is a question of fact that to what extent the ICTB is following fair trial principles in practice, my critical analysis suggests that the judges of these two Tribunals are proven to be most fair and neutral in the history of Bangladesh judiciary. During the trail of *Chief Prosecutor v Professor Ghulam Azam* and other cases the defence counsel placed interlocutory appeal in relation to several subject matters in every steps of the trial process, there were hundreds of hearings based on those interlocutory appeal. However, with patience the judges explained each fact from the legal perspectives along with their logical opinion. The defence counsel applied that one of the Tribunal judges has to resign which never happened in the judicial history in the past; however, the Tribunal subsequently arranged hearing for the application of defence counsel. Thus it can be concluded that the judges of the Tribunals should remarkably neutrality and follow procedure to take any decision.

3.7. Legal framework and Judge's neutrality

From the very beginning of the Tribunals critiques claimed that the judges of the Tribunals merely serve the purpose of the government and they are biased. They argued that constitutionally there is no clear separation of power in Bangladesh because the Chief Justice of the highest court are appointed by the President under Article-95(1) of the Constitution of Bangladesh and all other justices are appointed by the advice of Chief Justice and the President jointly, the President on the other hand is appointed by the Prime Minister. Thus prima facie it appears that there should be some kind of interference

between the judiciary and the executive. Since the ICTB is a domestic judicial mechanism, there is a possibility that it may be interfered by the executive. But in my opinion, this is not true since in practice judges are under a duty to act independently and there is an obligation on the part of the executives not to interfere judiciary which in ensured by Article- 94(4) of the Constitution of Bangladesh.[103]

3.8. Fair Trial Rights and the liberal approach of the Tribunal judges

There are several allegations against the defence counsel that they abused the fair trial provisions to delay the trial process which is to some extent beyond ethical line. In the case of *The Chief Prosecutor v Delowar Hossain Sayeedi,* the defence lawyer applied to change the 19th hearing date for consequently 12 times this adversely affected the victims and witnesses of the Prosecution. The judges of the both Tribunals dealt with these confidently and never denied any appeal made by the Defence Counsel to keep the Tribunal itself beyond criticism. In my opinion it is not a favour though for the accused rather in the sake of fair trial the judges have taken decision accordingly. On 21 October 2013 during trial of *Motiur Rahman Nizami,* the Defence Counsel presented a fake witness which has been revealed during the cross examination and the Tribunal has been misguided by the lawyers of the accused, although it is a serious issue, judges took flexible approach towards the lawyers of the accused by giving mere warning.

In the case of *Motiur Rahman Nizami,* the lawyers of the accused made a list of witnesses including above 10 thousands people, which is badly unreasonable in every aspect and clearly conflicting with the professional conduct issues of the lawyer. The Tribunal never took strict step for these defence lawyers which could give birth of potential debate about

[103] Article 94, The Constitution of the Peoples Republic of Bangldesh

the fairness of the tribunal. The accused has not been provided with any rights to reconsideration, any particular judgement either by the Act of 1973 or by the Constitution of Bangladesh as Article 47 of the Constitution of Bangladesh restricted the accused of international crimes to apply for reconsidering their judgement. However, the defence lawyers in the case of *Abdul Quader Molla* applied to reconsider the judgement and judges of the Tribunal did not deny rather used their wider discretions in the Appellate Division which clearly prove that how the Tribunals give emphasis on the fair trial principles and rights of the accused.

In the above mentioned *Abdul Quader Molla* case the Tribunal convicted the accused for death sentence and one of the Chamber Judges issued stay order just 4 hours before executing the punishment. The notable important thing is that judges were free from external influence and they exercised their all possible judicial discretion to preserve the rights of the accused. An individual accused for international crimes was restricted to bring food or other materials from outside while they are destined; however, the defence lawyer of Professor Ghulam Azam applied to bring food from home when he was detained and the Tribunal arranged hearing on this issue and allowed the accused to have food at his choice. This is remarkable because it reveals that how liberal the Tribunals were to ensure rights of the accused has been served in every aspect. The Tribunal took decision following judicial procedure in compliance with the due process principles. On the other hand the lawyers of the accused always tried to achieve the highest possible rights preserved for the accused by the Act following international treaties and principles of fair trial rights. In my opinion, the ICTB is an example to show respect for fair trial rights and rights of the accused.

3.9. Fair Trial Provisions and the ICTB

The governing Act of both tribunals of Bangladesh contains fair trial provisions significantly and also judges in practice developed those fair trial rights which secured the rights of the accused during interpretation to make a balance between procedural fairness and rights of the accused. The Rules of Procedure of the ICTB made a provision to inform the accused that on what grounds he is going to be arrested, after arresting an individual the authority under a duty to bring the accused before the trial without delay, after the detention of an individual he has the right to ask for bail or provisional release if the investigation process become lengthy.

Article 9(2) of the ICCPR states that before arresting an accused he has the rights to be informed about the reasons for which he getting arrested and the ROP of the ICTB specifically mirroring these provisions. The Rule 18 of the ROP of ICTB provided that the Chief Prosecutor is under a duty to provide extra copies of the formal charge which to be supplied to the accused and the intention of this particular Rule is that the accused will be able to prepare his defence based on the same piece of documents provided by the prosecution.[104] The Prosecutor would also be under a duty to fully disclose any allegation against an individual which is a mirroring principle of Article 9(2) of the ICCPR.[105] In my opinion, there is no ground to argue about arresting an individual for arbitrariness since ROP of ICTB is fully consistent with the principles of ICCPR.

The ROP of ICTB is also aware about bringing an accused promptly before the tribunal. The Rule 34(1) of ROP of ICTB states that: … 'The Police shall produce the arrested accused direct before the Tribunal within 24 (twenty four) hours of arrest excluding the time needed

[104] Rule 18 (4), Rules of Procedure of ICTB
[105] Rule 9(3), Rules of Procedure of ICTB

for the journey'.[106] This is also a mirroring provisions of ICCPR which is Article 9(3) which states that using judicial power, where an individual is detained or arrested for criminal charges, shall be brought before the court promptly.

The ROP of the Tribunal also leave a room for provisional release of an accused under the Act of 1973. Rule 34(3) specifically provided that:

> At any stage of the proceedings, the Tribunal may release an accused on bail subject to fulfilment of some conditions as imposed by it, and in the interest of justice, may modify any such conditions on its own motion or on the prayer of either party. In case of violation of any such conditions the accused may be taken into custody cancelling his bail.[107]

The explanation of this particular provision is that rights of an accused conferred under international treaty have been preserved and the legal provisions of the Tribunal is always willing to comply with all the provisions relation to the rights of the accused. This provision is a proper balance to ensure justice as well as to honour an individual's rights. Under the modern principle of proportionality, the way legal provisions preserved an accused rights is to be said fully proportionate in terms of the crimes committed during the nine-month liberation war of Bangladesh and beyond this level of protection would be disproportionate for victims.

In order to make an accused fully aware about the charge against him that he can defend himself competently, Section 16(2) of the 1973 Act provides that within a reasonable time a

[106] Rule 34(1), Rules of Procedure of ICTB
[107] Rule 34(3), Rules of Procedure of ICTB

formal copy of the charge shall be given to the accused before the trial. If it is not possible to provide a copy of the charge then the accused should be allowed reasonable time that he may conduct reasonable inspect before the trial starts.[108] The explanation of this provision is that the balancing between the rights of an accused and the justice has been reflected adequately. Under this provision judges may allow additional time to prepare a defence case.

It is the rights of the accused that the Tribunal shall presumed an accused to be innocent until the Prosecution satisfy the Tribunal that the accused is guilty and guilt should be proved beyond reasonable doubt. This provision is significant because before an accused found to be guilty he has the innocent status which is helpful to ensure his fair trial rights, on the other hand the reasonable doubt threshold will protect an individual who is innocent or whose involvement with the criminal act is doubtful. Section 3(2) of the 1973 Act and Rule 43(3) of the ROP contains provision to presume an accused to be innocent and Rule 50 of the ROP contains the reasonable doubt threshold.

3.10.Admissibility of Evidence and Fair Trial Rights

Admissibility of evidence is closely connected to the fair trial rights of an accused, the Rule regarding the admissibility of evidence of ICTB required high standard of 'probative value' followed by other international tribunals such as ICTY, ICTR and ICC etc. It is the Prosecution who has the burden of proof and which should be done beyond reasonable doubt.

The Tribunals offer sufficient time to both the Prosecution and the Defence Counsel to petition the tribunal regarding the admissibility of evidence which has been developed by

[108] Section 16(2), International Crimes (Tribunal) Act 1973

the Tribunal Judges and in practice the Defence lawyers has used this petition option several times challenging indictment orders, charge orders etc.[109] The Tribunal gave emphasis on every petition made by both the parties and took decision according to law. The trial under both parts of the Tribunals has been open to the public and media as well as international observers and there were no restriction to attend in a particular hearing and report on it except the limited seating arrangement.[110] Thus it is said that …'justice is not only delivered in public but it is also seen to be delivered.'[111]

3.11.Provisions of appeal and Equality of Arms

An accused has continued rights even after the conviction and the ROP of ICTA states that an accused shall be punished which is proportionate to the gravity of crime and if an accused think the punishment is not proportionate he has the right to appeal in the highest judicial body of Bangladesh.[112] The 'equality of arms' which is one of the basic requirements of fair trial has been adopted in the ROP of ICTA and it has been developed by judges of both the tribunals. However, the 'equality of arms' principle initially was seen to be more favourable to the accused than the Prosecutors because an accused was allowed to appeal against conviction as well as sentences where the Prosecutors had only the right of appeal on case of an 'order of acquittal.[113] However, it is somehow inconsistent with the 'equality of arms' principle which was highlighted in the case of *Abdu Kader Molla,* in this particular case the Defence Counsel appeal against his conviction as well as the sentence for life imprisonment, where the Prosecutors were unhappy about the punishment for the crimes the accused has committed and they had no rights to appeal for the highest punishment

[109] Supra Note 78, para 4.9
[110] ibid
[111] ibid
[112] Supra Note 78, para 4.11
[113] Section 21(1) &(2), ICTA 1973

which is death penalty at the moment.[114] This debate attracted huge public interest and government was forced to amend the legislation to ensure equality of arms both for the accused and for the victims and finally the ICTA has been amended to reflect those principles for the sake of justice.

3.12.Protection of Witnesses and Victims

The protection of witnesses and victims is one of the major issues in the International Criminal Justice; the ROP of the ICTA adopted a number of provisions related to the protection of witnesses and victims for both the accused and victims. The provisions relating witnesses and victims protection is very new in the Bangladesh judicial history and Rule 58A (1) provided that:

> The Tribunal, on its own initiative or upon application of either party may issue necessary Orders directing the concerned authorities of the Government to ensure protection, privacy and well-being of the witnesses and/or victims.[115]

Although this provisions provided protection for the witnesses and victims but this is not automatic as it requires application from the relevant party to provide protection and also the nature of protection and duration is not clear from this provision. Although it is the common practice in Bangladesh judicial framework that witnesses and victims will always be under general protection of the local police and in some serious cases under the secret agent, but in case of international criminal trial the level of protection available for both the witness and victims is not strictly satisfactory. As a result the government failed to give adequate protection to some witnesses and victims. During the trial process of Delowar

[114] *The Chief Prosecutor v Abdul Kader Molla*, ICT-BD Case No. 02 of 2012
[115] Rule 58A(1), Rules of Procedure of ICTB (2010)

Hossain Sayeedi and Salauddin Quader Chowdhury, two witnesses have been killed by anonymous and those two witnesses were in favour of the victims, there is no evidence where the witnesses of the accused faced any personal security issue.

3.13.Conclusion

In my opinion, it can be contemplated that the whole trial process always showed greater interest regarding the rights of an accused and it has been preserved satisfactorily and in case of fair trial rights the most important thing is to consider how an accused rights has been preserved by a particular judicial mechanism. It also can be contemplated that, the judges of both the tribunals emphasises more on the rights of the accused than the victims and at this point the Tribunals should also consider the expectation of the victim to achieve justice. From the neutral point of view, I would say using limited resources and competent legal experts the domestic mechanism in Bangladesh to try and assess international crimes is much matured at the modern international criminal justice which is mostly fair and on the way to achieve expected outcome of justice.

4. Chapter Four: International Criminal Court and Modern Domestic Mechanism

4.1. Introduction

The International Criminal Court (ICC or the Court) is an independent treaty based judicial organ to try and assess international crimes under the definition of its statute. The Rome Statute is the governing Statute of ICC and the State who is the party to the Rome Statute may request the Office of the Prosecutor to carry out an investigation.[116] However, the acceptance of the jurisdiction of ICC is not limited with in the State party who have signed the treaty. Sate not a party to the Rome Statue may be subject to its jurisdiction provided that crimes have been committed with in its territory. The ICC is respectful to the fair trial provisions significantly and the legal framework of ICC also contains high standard of due process principles. The fair trial provisions in the Rome Statute thus protect the rights of an accused as well as victims. The Un Security Council also has the right to bring the attention of the ICC regarding particular situation where international crimes have been committed; however, it should be noted that ICC is an independent judicial body and not subordinate to the UN.

There are three Chambers in the ICC and these are Pre-Trial Chamber, Trial Chamber and Appeal chamber. The Pre-Trial Chamber considers the situation and supported evidence provided by the Office of the Prosecutor, Trial Chamber arranges trial after the confirmation from the Pre-Trial Chamber. The main task of the Appeal Chamber is to consider appeal either from the Pre-Trial Chamber or from the Trial Chamber. In the overall trial process of ICC, fair trial rights is paramount and the basic contents are presumption of innocence,

[116] The ICC, 'Understanding the International Criminal Court' < http://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> accessed 10 October 2014

rights of the Defence at the investigation stage, rights to a fair trial, right to a Counsel and equality of arms.

Article 66 of the Rome Statute provides that an accused presumed to be innocent before proving guilt and guilt must be proved by the Prosecutors beyond reasonable doubt.[117] Article 55 of the Rome Statute confers right of an accused during the investigation period which can be read as, a person shall not incriminate himself to confess guilt subject to coercion or force, also shall not be subject to arbitrary arrest or detention. Article 67 provides a wide range of rights for the accused under due process principles such as accused to be informed promptly about the charges against him, he will be allowed sufficient time to prepare his defence, to examine witnesses against him etc. Although there is no visible provision regarding equality of arms in the Rome Statute of the ICC, the Rule of Procedure obliged the Court to make a fair balance between the rights of an accused and that of the victims.

Balancing rights between the accused and the victims is one of the major issue in the development process of ICC.[118]

4.2. Duty of disclosure and Rights of an accused:

The duty of disclosure under the fairness ground in the ICC is not limited to accused persons but now recognised rights to the other party.[119] Human rights law has started recognising victims as beneficiaries of a general concept of fairness which is prevalent in the ICC through

[117] Article 66, Rome Statute of ICC
[118] IBA, 'ICC Monitoring Report' (2008) <http://www.ibanet.org/Human_Rights_Institute/HRI_Publications/Other_HRI_Publications.aspx> accessed 10 October 2014
[119] ibid

its legal framework and practice of the judges.[120] Although, it is a common contemplation that all the parties involved in a criminal trial has the right to be treated fairly, but the rights of an accused is paramount to establish the credibility of a trial process.[121] The first case decided by the ICC is the *Prosecutor v Thomas Lubanga* this trial was nearly dismissed because of the Defence Counsel's appeal that the fair trial rights of an accused had been compromised.[122] The issue was related to the rights of an accused where the Trial Chamber issued oral decision to release *Mr. Lubanga* based on the fact that the Office of the Prosecutors has abused the process and Trial Chamber declare the trial as 'halted' due to the lack of fairness. The Defence Counsel argued that where the Prosecution made the trial unfair, there is no legal point to detain the accused as it is contradictory to the fair rights ensured by the Rome Statue itself. However, the prosecutors appeal against the oral decision of the Trial Chamber. It is important to note that how broadly the judges of the ICC interpreting rights of an accused conferred under fair trial rights. In my opinion, the continuity to develop principle by the ICC judges in this way will dishonour the expectations of the victims and since ICC norm may penetrate to other international tribunals around the world then it may bring undesirable outcome.

4.3. Rights of an accused undermine the expectations of victims

Article 64(2) provides that a Trial Chamber has a positive duty to ensure that a trial is …'fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.'[123] The explanation of this provision

[120] G Greco, 'Victims' Rights Overview under the ICC Legal Framework: A Jurisprudential Analysis' (2007) 7 ICLR 531

[121] S Negri, *Equality of Arms- Guiding Lights or Empty Shell?* (Cameron May London 2007)

[122] The Prosecutor v Thomas Lubanga Dyilo, ICC-01/04-01/06-T-314-ENG Transcript, 15 July 2010, TC I, p 21, lines 7–9 www.icc-cpi.int/iccdocs/doc/doc908488.pdf accessed 10 October 2014

[123] Article 64(2), Rome Statute of the ICC

confer rights for the accused and protection for the victims and witnesses, that means Trial Chamber will exercise its power which will protect the rights of an accused only, in interpreting this provision very broadly by the judges of the Trial Chamber may benefit an accused so favourably that justice for the victims may be disproportionate. It is worthy to mention the case of the *Chief Prosecutor v Abdul Qauder Molaa* in the ICTB, where the accused was sentenced to life imprisonment despite proving allegation against him beyond reasonable doubt which was not highest punishment recognised in Bangladesh jurisdiction this happened because of broader interpretation of the rights of an accused. However, the Prosecutions appealed against the lesser punishment and demanded highest possible punishment to injure justice for the victims. The Tribunal judges considered the appeal made by the Prosecution and allowed highest punishment for the accused which was death penalty and executed subsequently. A close observation to this case reveals the fact that Bangladesh is a party to the Rome Statute and adopted various principles developed by the ICC which resulted undesirable outcome for the victims to achieve justice.

4.4. Concept of Fairness and Rights to Appeal

The Rome Statute of the ICC provided the appeal rights for both the accused and for the Prosecutors and this appeal rights is also related to fair trial provisions. Article 81(1) provides that a Prosecutor may appeal against the decision of the Trial Chamber relying on procedural error or error of fact or error of law.[124] On the other hand Article 81(2) states that an accused has the right of appeal against the decision of the Trial Chamber for procedural error or error of fact or error of law or any other ground that affects the fairness

[124] Article 81, Rome Statute of the ICC

or reliability of the proceedings or decision.[125] Both the provisions together suggest that the rights of an accused is preserved to appeal based on any ground what so ever which affects the fairness or reliability of the Trial. It is particularly important because of nearly unconditional rights to appeal which will affect the admissibility of evidence in the trial process. One important thing here to be noted that, one of the features of international criminal trial is that trial begun to prosecute individuals after decades of time has passed. Thus the rights to appeal of the accused impose high evidential burden to the Prosecutors which ultimately make the trial process more complex. Since hearsay evidence is admissible in the international criminal trial, so there is a scope for the defence lawyers to appeal in relation to the admission of that particular evidence. It is evident from the series of judgement from the ICC that the defence has raised argument based on the fact that relying on hearsay evidence an individual is found guilty and those evidence affected the fairness of the trial, which led the judges of the Tribunal to sanction lesser punishment for serious crimes which brought horrible situation for the victims.

4.5. Balancing Rights between parties in a Trial

It is one of the major issues for the ICC that how a proper balance of rights of an accused and that of the victims can be maintained.[126]…'The interpretation of legal provisions governing the participation of victims vis-à-vis the fair trial rights of the defendant has posed tremendous difficulties for judges, parties and participants and the issue remains unsettled'.[127] The Pre-Trial and Trail Chamber always subordinate to the Appeal Chamber's

[125] ibid
[126] Supra Note 122, pp 9
[127] ibid

in terms of clarity and procedural consistency.[128] The right to appeal of the parties has often been misused as the Defence Counsel in the ICC issue interlocutory appeal for each and every matter which raised the question of the capacity of the Appeal Chamber. The volume of pending interlocutory appeal is huge both in the ICC and in the ICTB trial process, the lawyers of the accused always relay on these types of interlocutory appeal where the Prosecutors barely use this mechanism. In my opinion, these appeal rights is more favourable for the accused than the victims. When victims expect to end a trial process with in a short period of time to reach justice, the accused always try to delay the process which ultimately affect the proportionality of justice. Although it is said that 'justice delayed, justice denied', the appeal rights of the accused in practice prolong the trial process to reach the justice and sometimes justice for the victims may be denied. This can be observed in the Lubanga case, where due to high volume of appeals from the Defence Counsel, the trial process become more lengthy and finally Mr. Lubanga found guilty and provide punishment for 14 years imprisonment against the expectation of the Prosecutors that since the accused found guilty beyond reasonable doubt for horrific international crimes he should be punished at least for 20 years imprisonment. From the critical point of view, it can be said that fair trial rights of Mr. Lubanga has been explained so broadly that it affected the expectations of the victims. To understand how expectations of the victims undermined by the fair trial rights can be better explained if we hypothetically try and assess the scenario under the domestic mechanism of Bangladesh (ICTB). The potential question is, would the punishment be same at this domestic trial just like ICC? The answer will be how the domestic tribunal interpret the rights of an accused and how they balance those rights with the expectations of the victims. In order to consider Mr. Lubanga's punishment the ICTB

[128] ibid

would not only focuses on the rights of the accused but also the nature of crimes committed and justice in the eyes of the victims.

We have seen that rights of an accused conferred by fair trial principles are not absolute rather it is relative. In the Eichmann Trial, there were allegation for the judges' biasness where it would be possible for those judge to act fairly in relation to the accused, the tribunal took strict approach toward fair trial provision and explained that judges are under the duty to act fairly and there would be no question about their neutrality. Also, in the Eichmann Trial the accused was brought to Israel illegally, however it was not material towards the judgement as the accused was found guilty beyond reasonable doubt.

4.6. Justice, Fair Trial and Fairness

At this point it is important to find out the relationship between justice and fair trial as well as the nature of fairness. The Chief Prosecutors at Nuremburg Trial opined that justice is the tribute where power pays to reason.[129] In the field of international criminal justice, justice relates to give punishment to an individual for his wrongdoing for ending culture of impunity. In our modern era of human rights, we evaluate justice in a system with the parameter of human rights that means to what extent punishment is in compliance with the human rights principles. In order to explain what justice is, Kelsen stated that:

> No other question has been discussed so passionately; no other question has caused so much precious blood and so many bitter tears to be shed; no other question has been the object of so much intensive thinking by the most illustrious thinkers from Plato to Kant; and yet, this question is today as unanswered as it ever was. It seems

[129] RH Jackson, 'Opening Statement Before the International Military Tribunal'(1947), < http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf> accessed on 12 October 2014

> that it is one of those questions to which the resigned wisdom applies that man cannot find a definitive answer, but can only try to improve the question.[130]

Although it is difficult to define what justice is, it is understandable when we see any injustice and perfect justice in practice is not possible to achieve, we can only achieve some extent of justice.[131] Where someone steals goods of others it can be corrected by giving compensation, however in case of murder there is no absolute scope to compensate the victim.[132] So it is important to achieve justice as much as possible based on strong legal mechanism. The preamble of the Rome Statute considered the fact that throughout the last century millions of children, women and men were subject to the victims of unimaginable atrocities which has shaken the sense of humanity.[133] So, before drafting the Rome Statue the rights of the victims have been considered widely. The Rome Statue established three important rights for the victims; firstly, the victims will have the rights to access to the justice including their participation rights in the proceeding where they have been personally affected; secondly, the victims will have the rights to a fair treatment including dignity and respect as well as respect of privacy; thirdly, the right to adequate and effective reparation.[134] The way ICC has developed its fairness is said to be shared right rather than exclusive and the Pre-Trial Chamber ruled for the first time that fairness should be maintain for all the parties in the proceedings and not for the defence exclusively.[135] The Pre-Trial Chamber defined fairness as the balancing rights between the procedural rights of all the

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[130] H Kelsen, *What is Justice* (Berkeley: University of California Press, 1957) 397

[131] K A Snitzer, 'Peace Through Justice? Evaluating the International Criminal Court' < http://digitalcommons.macalester.edu/intlstudies_honors/15/> accessed on 15 October 2014

[132] ibid

[133] Preamble of the Rome Statute for the ICC

[134] Rdress, 'Ensuring the Effective Participation of Victims before the International Criminal Court: Comments and recommendations regarding legal representation for victims'(2005) < http://www.redress.org/downloads/publications/> accessed 15 October 2014

[135] Supra Note 122, pp 10

participants or finding equilibrium.[136] The Pre-Trial Chamber-II in the Uganda situation distinguished two types of fairness; firstly a general fairness which requires that all participants shall be given a genuine opportunity to represent their case and respond to evidence; secondly, a specific fairness in criminal proceedings which confers certain special rights for the accused.[137] So it appears that the fairness principles is providing special rights for the defendant and it is the accused who will get privileged where balancing fair trial rights is in question.

The interpretation of the Pre-Trial Chamber of ICC clearly suggests that fair trial rights will ultimately benefit an accused and ICC fair trial rights if accused friendly which is undermining the expectation of the victims; here, expectations of the victims refer to an anticipated punishment given to an accused. The main aim of the fair trial rights of an accused is to enable him to defend his case against the vast resources of the Prosecutions and it is important not to misuse those rights which may affect justice. In the case of *The Prosecutor v Francis Kirimi Muhaura* the Prosecutions raised the issue that the order given by the Pre-Trial Chamber affected fair trial rights of the victims, where the Pre-Trial Chamber imposed duty of disclosure on the Prosecution's shoulder prior to a final decision on the admissibility challenge.[138] This duty of disclosure undemands the rights of the victims to achieve justice within a reasonable time.

4.7. The Duty of disclosure and Victims' rights of privacy

[136] Situation in the DRC, ICC-01/04-135-tEN,<www.iclklamberg.com/Caselaw/DRC/PTCI/ICC-01-04-135_tEnglish.pdf> accessed 10 October 2014
[137] Situation in Uganda, ICC-02/04-01/05-90-US-Exp, < www.icc-cpi.int/iccdocs/doc/doc278964.PDF> accessed 10 October 2014
[138] ICC-01/09-01/11-52, *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, www.icc-cpi.int/iccdocs/doc/doc1056222.pdf accessed 15 October 2014

Two major rights of a victim guaranteed by the Rome Statute are rights to privacy and protection of victims and witnesses; however, in practice if the victim's rights affect the fair trial rights of an accused then judges take decision in favour of the accused. For example, a victim may wish to give witness statement subject to his privacy and he may demand to distort his voice and not to mention his name, these rights are given by the Rome Statute to the victim, but if the defence raised question about the reliability of the witness statement or its probative value that cannot be testified, then judges may not wish to accept that particular evidence in deciding the case as an accused has the rights to testify witnesses against him. At this point, if we compare the approach taken by the ICC and ICTB, it appears that where ICC gave emphasis on the rights of an accused ICTB considered how to achieve justice by best judicial interpretation. Thus ICTB is more close to achieve justice from the victims view point and approaches taken by the ICC is even dangerous in two ways; firstly it may release an accused due to the conflict between the privacy of victims and rights of an accused to testify witness against him; secondly, where ICC is reluctant to respect the privacy of the victims in case of conflict between two parties interest, victim are unwilling to give witness statement which ultimately affect the trial process as a whole. Thus ICC is very cautious about the fair trial right of an accused and for achieving those rights of an accused they are away to achieve proportionate justice for the victims.

4.8. Accused friendly v Victims friendly approaches

The ICTB is victims friendly and interpreted legislation from neutral point of view, where ICC's approaches are Defence's darling. In ICTB, judges considered appeal from the Prosecutors regarding conviction of Mr. Quader Molla, where Persecutors argued that the

punishment given to the accused is not proportionate and they urged for the highest punishment. The Judges of the Appellate division allowed the appeal and the accused were provided highest possible punishment. The judges also considered the age of the accused in some cases and despite finding them guilty for highest punishment they provide life imprisonment, this interpretation is crucial to achieve high standard of justice. The last judgement given by the ICTB is the *Chief Prosecutor v Delowar Hossain Sayeedi,* where he has been convicted and provided death punishment; however, his lawyers appealed against the decision and finally he has been given life imprisonment as punishment. It appears that the domestic tribunal of Bangladesh is maintaining all the fair trial rights of an accused and respecting expectations of the victims. As the President of Bangladesh has got the power to give amnesty to an individual, so there is a fear that this particular convicted individual may be released which will be against the expectation of the victims. As a result a bill has been submitted to the Parliament of Bangladesh to limit the power of the President to give amnesty to an individual who has been convicted under the ICTA 1973.

4.9. Conclusion

In the case *The Prosecutor v. Germain Katanga* before ICC Mr. Katanga was found guilty as an accessory and provided punishment for 12 years imprisonment less the time he has spent in the detention centre, also in the case of *The Prosecutor v. Thomas Lubanga Dyilo,* Mr. Lubanga has been provided punishment for 14 years imprisonment less the time he has spent in the detention centre. This trend of ICC suggests that the way ICC is developing its norms and principles is accused friendly. Under a domestic tribunal such as ICTB, Mr. Katanga could have graver punishment since as an accessory, an individual will be punished

same as the principal offender; if Mr. Lubanga's case could be tried in ICTB, he would attract greater punishment. Thus ICC is giving more emphasis on the fair trial rights of an accused and moving away from the propionate amount of justice, where domestic tribunals such as Bangladesh is trying to make a proper balance and focusing on justice only which is expected by victims.

5. Conclusion and Recommendations

In the field of international criminal law there is no conclusive answer or solution to maintain a proper balance between the rights of an accused and justice. It is the accused who should have fundamental fair trial rights in any criminal justice system, without fair trial rights of an accused a proceedings may lose their credibility and integrity.[139] So it is the accused who is the ultimate beneficiary of the fair trial rights. There are other parties who may be involve in the proceeding such as prosecutors, victims and witnesses and fair trial rights of an accused may undermine their expectation of justice, hence victims are the interest holders of the fair trial rights. The main two organs of international criminal tribunals are governing Statute or legislation and Rule of Procedure and Evidence which often contain fair trial provision; judges interpreted those provisions when a fair trial right of any party involved is in question.

International tribunals may be established in various ways such as domestic legislation, international treaty and mix of both. The more a tribunal is domestic, the more it focuses on the expectations of the victims; the more a tribunal is internationalised the more it emphasises on the fair trial rights of an accused. From the above discussion we have seen,

[139] A Cassese, 'The International Criminal Tribunal for the Former Yugoslavia and Human Rights' (1997) 4 Eur. Hum. Rts. L. Rev.329

the ICC is giving more importance on the rights of an accused which ultimately affecting the expected justice by the victims since Mr. Lubanga and Mr. Katanga has been given 14 years and 12 years imprisonment less the time they are in the detention centre. From the eyes of the victims, it is not proportionate justice for the crimes they have committed. On the other hand we have seen how the ICTB is trying to create a proper balance between the rights of an accused and proportionate justice. The domestic tribunals of Bangladesh has been proved to meet the expectations of the victims towards justice since Mr. Abdul Quader Molla has been given highest punishment he deserved and for the verdict of Mr. Delowar Hossain Sayeedi rights of an accused has been considered under due process principles and his punishment has been subsequently reduced by the Appellate Division of the Supreme Court of Bangladesh.

Modern international criminal justice recognised fair trial rights both for the accused and for the Prosecutions or victims and it is a big challenge for the judges to maintain a fair balance. The fair trial rights of an accused in not absolute rather relative which has been explained in the very first Eichmann Trial, subsequently balancing principles have been established by the ICTY, ICTR and SCSL. The approach taken by ICC in relation to fair trial rights of an accused is barely maintaining a balance to achieve justice and undermining the victims' rights of justice by providing accused friendly judgement. The domestic tribunals in Bangladesh established by the ICTA 1973 is one of the modern internationalised criminal tribunal considered fair trial principles established by the ICTY, ICTR, SCSL and ICC; being a domestic judicial mechanism it is focusing on justice to maintain proper balance between the rights of an accused and justice.

To meet the justice proportionately, the ICC is recommended to maintain a fair balance which will reflect territorial principles established by various types of international tribunals around the world. In order to maintain a fair balance of rights the ICC may consider various aspects. Firstly, the ICC may consider contextual background such as where crimes have been committed before convicting an individual. Secondly, the ICC may also respect territorial judicial principles in relation to punishment. Thirdly, the ICC may consider cultural context before interpreting evidences given by local people where crimes have been committed. Fourthly, Office of the Prosecutors and Defence Counsel are recommended to consult local legal experts where crimes have been committed before going to pre-trial stage. Finally, the ICC should encourage witnesses and victims to give evidence by ensuring their security and confidentiality.

(Total 15,970 words)

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