

International Crimes Tribunal-2 [ICT-2]

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

Old High Court Building, Dhaka, Bangladesh

ICT-BD [ICT-2] Miscellaneous Case No. 04 of 2014

[Proceeding under section 11(4) of the Act No. XIX of 1973]

Before

Justice Obaidul Hassan, Chairman

Justice Md. Mozibur Rahman Miah, Member

Justice Md. Shahinur Islam, Member

The State

Vs

The Editor, the Daily Prothom Alo and Others

For Contemnors no. 12-13:

Mr. Akthar Imam

Senior Advocate, Bangladesh Supreme Court

Ms. Rashna Imam

Advocate, Bangladesh Supreme Court

For Contemnors no. 1-9 & 15:

Mr. Mohammad Asaduzzaman

Mr. Md. Aminul Hassan

Advocates, Bangladesh Supreme Court

For Contemnors no. 10-11 and 14:

Represented individually

For Contemnors no. 16 - 23:

Exempted from personal appearance and hearing.

For Chief Prosecutor:

Ms. Tureen Afroz, Prosecutor

Date of delivery of Order: 10 June 2015

ORDER

1. Background of the Contempt Proceeding:

“**The Daily Prothom Alo**”, a leading Bengali daily, in its edition dated 20 December, 2014 ran a news item titled “*Bargman er Shajaey ponchash Nagoriker Udbek*”(50 citizens ventilates concern over the sentence of David Bergman.) According to the report, a total of 50 citizens, subscribed to such concern on the heels of awarding sentence to David Bergman by this Tribunal on 02-12-2014 that found him guilty for committing contempt of the Tribunal indicting him for posting two articles (criticism) in his personal blog that degraded the authority and majesty of the Tribunal. The awarding of above sentence prompted those 50 citizens to make such combined statement.

2. Centring similar issue, the editorial board of “*The New York Times*” in its online edition dated 23 December, 2014 went too far by publishing rather a quite spiteful editorial under the heading ‘*Muzzling Speech in Bangladesh*’ where in the concluding part, it has expressed rare guts even by asking the Tribunal to ‘*overturn Mr. Bergman’s Sentence and Conviction*’.

3. Taking in to account of such news item, this Tribunal by its order dated.28-12-2014 asked the Editor, ‘The Daily Prothom Alo’ (hereinafter referred to as “the Daily”) to submit the full text of the signed statement by which those 50 citizens voiced their concern.

4. Pursuant to the Order, the Editor of the daily complied so by way of filing a petition dated.31-12-2014 annexing the full text of the statement made in English version titled “*Statement of Concern regarding Tribunal’s Judgement on David Bergman*” as Annexure-1 (hereinafter referred to as ‘the statement’) though it embodied no signature of those 50 citizens. Since the full text of the statement did not contain any address of those 50 citizens, this Tribunal by its order dated 31-12-2014 asked Dr. Shahdeen Malik, Advocate, Supreme Court and Ms. Hana Shams Ahmed, writer and activist who had also subscribed to the statement, to furnish with the

address of 50 citizens to the Tribunal. The said order was accordingly complied with.

5. In a development, Ms. Khushi Kabir, a women's Right Activist whose name appeared in serial no.2 of those 50 citizens, meanwhile withdrew her name from the statement on the ground of not acceding with the death figure of martyrs so referred to in the statement and the Daily also published her said turn about in its edition dated 22 December, 2014 under the caption " *Bibriti Thekey Nam Prottaher Korlen Khushi Kabir* (Khushi Kabir withdrew her name from the statement) which the editor annexed it as Annexure-2 to his Petition dated.31-12-2014.

6. In the given panorama, this Tribunal by its order dated.14-01-2015 asked 49 citizens who had articulated their concern by making statements published in the Daily dated.20-12-2014 over awarding punishment to David Bergman-a British national to explain their conduct and position over making the statement. By another order dated.11-02-2015 "*The New York Times*" was also asked to submit its explanation through the Bangladesh Mission, New York, USA for making derogatory comments in its editorial titled "*Muzzling Speech in Bangladesh*".

7. In view of our order, the citizenry both stayed at home and abroad furnished their explanation by engaging counsels as well as in person. On the other hand, though the notice of the order dated.11-02-2015 has duly been served upon the concerned authority of "*The New York Times*" but it refrained from furnishing any explanation or responded in any manner.

8. Having been received the order, 26 citizens out of 49 Citizens, staying at home and abroad individually tendered their unconditional apology by submitting petition to that effect for subscribing the statement in question and craved exoneration from being prosecuted of contempt of the Tribunal.

9. The remaining 23 citizens though appeared to be regretful for making the statement but at the same breath they in their respective explanation tried to justify their conduct to be proper. However, on analyzing the explanations, this Tribunal accepted the unconditional apology so tendered by 26 citizens and exonerated all of them from further prosecution.

10. Drawing of Contempt Proceedings:

On careful perusal of the explanation so offered by those 23 Citizens, the Tribunal was of the view that, the explanation rendered by them of whom 8 citizens are found to have been staying abroad, not convincing one. In such a view of the matter, this Tribunal by order dated. 01-04-2015 drew contempt proceedings against each of 23 citizens asking them to show cause as to why they shall not be punished individually for contempt of the Tribunal under section 11(4) of the International Crimes (Tribunals) Act, 1973.

11. Following the said order, the above 23 citizens dividing in four different groups replied to the show cause notice. Amongst those, Mr, Akhtar Imam, the learned Senior counsel with Ms. Rashna Imam, learned Counsel entered their appearance representing Ali Ahamed Ziauddin and Rahnuma Ahamed made as **contemnors no.12-13**. While Mr. Mohammad Asaduzzaman with Mr.Md. Anisul Hassan, learned counsels appeared for Masud khan, Afsan Chowdhury, Ziaur Rahman, Hana Shams Ahamed , Anu Muhammad, Anusheh Anadil, Muktasree Chakma, Lubna Marium, Farida Akhter and Chowdhury Rafiqul Abrar(C.R. Abrar) –whom made as **Contemnors no.1-9 and 15**. Though Ms. Shireen Huq, Dr. Zafrullah Chowdhury and Dr. Shahidul Alam made as **contemnors no.10, 11 and 14** represented themselves in person before the Tribunal. When Dr, Bina D' Costa, Mahmud Rahman, Dr. Zarina Nahar Kabir, Lessa Gazi, Shabnam Nadiya, Nasrin Siraj Annie, Tibra Ali and Dr. Delwar Hussain made as **Contemnors no.16-23** since staying abroad sent reply to the show cause individually through respective Bangladesh foreign mission.

12. We have meticulously perused each and every one's reply so tendered by the contemnors. We have also analyzed the submissions advanced by the learned Senior Counsel Mr. Akhtar Imam supplemented by a number of decisions while his submission has chiefly been adopted by another sets of learned Counsels representing other Contemnors before this Tribunal.

13. It is worthwhile to mention here that, herein the contemnors are being prosecuted under section 11(4) of the International Crimes (Tribunals) Act, 1973 (hereinafter referred to 'the Act') not under Article 108 of our

Constitution or that of any provision of ‘The Contempt of Courts Act, 1926(Act XII of 1926) as the case commonly come about before us.

14. Before appreciating the reply of the Contemnors followed by the submission made thereof by their learned Counsels let **us** have a closer look to what the Provision of section 11(4) of the Act has been propounded:

“Section 11(4): A Tribunal may punish any person, who obstructs or abuses its process or disobeys any of its orders, directions, or does anything which tends to prejudice the case of a party before it, or tends to bring it or any of its members in to hatred or contempt, or does anything which constitutes contempt of the Tribunal, with simple imprisonment which may extend to one year, or with fine which may extend to taka five thousand, or with both”.

15. On plain reading of the above provision, it *prima facie* appears to **us**, the contemnors could be prosecuted and punished subject to proving the allegation, should their action comes under the purview of the above provision within the meaning “*tends to bring it or any of its members in to hatred or contempt or does anything which constitutes contempt of the Tribunal.*”

On close scrutiny of the above provision, we are of the patent view that excepting the provisions of the above section as quoted above, remaining parts of section 11(4) do not attract in initiating contempt proceedings against the contemnors.

16. Whether the news item itself carry any elements of Contempt:

Now, let **us** examine whether the Contemnors could be punished for mere expressing their *Udbek* (‘concern’) for awarding punishment to David Bergman which has been published in ‘the Daily ’ dated 20-12-2014 under the heading “*Bargmener Shajaey ponchash Nagoriker Udbek*”. Further, whether the very caption or ‘Title’ of the news items itself ever denotes or imply contempt of the Tribunal or any of its members, whom are the Judges of the Supreme Court.

17. Then again, whether the very contents appearing in the news item ever suggests, having any ingredients of contempt that demean the authority of

the Tribunal which calls for interference by this Tribunal on invoking jurisdiction under section 11(4) of the Act.

18. All the above queries are required to be addressed first, in order to come to a clear conclusion for furthering the proceeding for fair adjudication in as much as, this Tribunal got the primary impression of having contempt of the Tribunal while the above news item came to its notice.

19. To answer the first point, it can safely be held that no contempt on the part of the Contemnors has been constituted for mere ventilating their 'concern' over the punishment awarded to David Bergman that was published in the Daily. As, every citizen of the country including the contemnors certainly have the right to ventilate their mere concern over the delivery of sentence to any individual.

20. It is universally true; no court of law around the Globe including this Tribunal perhaps could appease everyone while adjudicating a case. A court of law, as a rule, adjudicates crime or any sorts of litigation solely basing on materials and evidence on record placed before it and upon adjudication, some quarters could naturally feel concerned.

21. For, in every case, amongst the contending parties, one party come out victorious where the other become loser. And those who lost such a legal battle or of their well wishers, or those who holds similar ideology of the defeated party or the general people who hold the view of having injustice to a party by the verdict passed, would naturally ventilate their grievance by making criticism about the verdict. But invariably, such criticism whatever its form be, should be constructive, fair and be kept within the tolerable bounds of judicial norms and fervor.

22. For instance, previously, this Tribunal after awarding sentence to the offenders who were found guilty for committing Crimes against humanity and genocide, diverse sections of people in the society raised their grievance, concerns and criticized the verdict of which had widely been published in all national daily as well as in international print media.

23. Even after passing of a recent judgement by this Tribunal against Md. Mahidur Rahman and another dated.20-05-2015 two news items have been

published in 'the Daily Prothom Alo' dated.21-05-2015 under the caption "*Rayea Ganajagoron Moncher Oshontosh*"(People upsurge platform disappointed over the Sentence) and "*Rayea Hotash Badi shoho Sthanio lokjon*" (Local people including the Plaintiff are frustrated over the verdict.)

24. Both the group of people who assembled under such banners and expressed their dissatisfaction clearly indicates that, they become aggrieved over the very awarding of sentence which they thought to be inadequate. But rationally, their such disappointment ventilated through the above caption does not imply to have constituted any contempt of court.

25. On the same note, it is to be borne in mind that, in the name of criticizing any judgement, claiming it to be unjust, one should not transgress his bounds by articulating in an inappropriate manner which could destroy the institutional dignity of entire judiciary and thereby, erode the authority, majesty, image, of the Court of Law and generate an imprecise notion in the mind of public.

26. Because, once a wrong impression is created on the fairness of the Court of law in its dispensation of justice it would have a far-reaching effect on the entire judiciary. For such obvious reason, Contempt proceeding is recognized as a legal parameter in every civilized country as a safeguard for protecting the judiciary from above all controversies. But at the same time, a 'fair criticism' on any judicial pronouncement is always welcomed for the flourishing strong judiciary that will help it enabling to be more effective in dispensation of justice.

27. For obvious reasons and in view of above discussions, it appears to **us** that, the very 'title' of the news item cannot be termed contemptuous as it does not manifest any derogatory comment towards the Tribunal or its members and the persons who subscribed the news item may have the reason to express their 'concern' (*Udbek*) and they have got the right to express their such views.

28. Now, let **us** have a look about the contents of the said news item published in the Daily on 20 December, 2014 under the said title "*Bargmener Shajaey ponchash Nagoriker Udbek*". In one place of the

news item it has been clearly asserted that, “*by the sentence the very freedom of expression and the scope of discussing and analyzing the history of our war of liberation will be squeezed*” (translated version from Bengali appeared in the Daily).

29. In plain reading of the quoted portion of the news item what we find, those 49 citizens claimed that, by sentencing David Bergman very freedom of expression in discussing over liberation war would be seriously impaired. The core objective of their such views published in the news item, so far as we understood, clearly instills a negative perception in the mind of the public about the fairness of sentence awarded by the Tribunal that obviously imputes its judges too.

30. Though the contents of news item apparently imply, those Citizens simply put forwarded their such opinion over the verdict purely in the light of their humanist point of view taking it in a very typical aspect. But their such comment manifestly carries the elements of contempt that has disregarded the highness of the Tribunal and the very statement quoted above so appeared in the news item itself disparaging one.

31. This Tribunal for obvious reason feels it urged to gather and scrutinize the full text of the statement by calling it to be produced before it by order dated.28-12-2014. Now, from the very News item as well as from the combined statement of 50 citizens, we found elements of contempt. In such a view of the matter, it is thus held, there have been elements of contempt in the contents of the news item so published in ‘the Daily ’ that demand to initiate contempt proceedings against 26 citizens by this tribunal.

32. Controversy among the Contemnors about the version and contents of ‘the Statement’ and evaluation thereof:

Reverting to the full text of the statement, now it purely rests upon this Tribunal to prove of having elements of contempt in the text of the statement for which the Contemnors could individually be held liable for contempt of the Tribunal or to its member as proceeding of the Contempt is quasi criminal adjudication where the Tribunal stands both as adjudicator as well as prosecutor. But before embarking upon such adjudication it needs to be determined about the exact text and version of the statement that had

been sent to the Editor, 'the Daily' basing upon which the concern of 50 citizens were published on 20 December, 2014.

33. Because, we noticed divergence of opinion among the contemnors over the text and version of the statement sent to 'the Daily' during the course of hearing. For instance, in paragraph no.5 of the rebuttal dated.14-05-2015 submitted by Contemnor no.12-13 against the Prosecution's submission, they though admitted the English version of the statement but plainly disowned a particular sentence appeared in that very English version which Mr. AKthar Imam, learned Senior Counsel also asserted in his submission.

34. According to Mr. Akthar Imam, learned Senior Counsel, they (Contemnor no.12-13) did neither read nor give consent to such sentence embodied in the statement. For the better understanding such particular sentence is quoted below:

“The sentencing of David Bergman is nothing but a continuation of curbing of all forms of freedom of expression and difference of opinion about the International Crimes Tribunal.”

35. On the other hand, Ms. Shrin Huq, appeared in person by annexing a Bengali version of the statement with her application dated.12/5/2015 (placed before us on 14/05/2015) stoutly asserted to have sent that 'Bengali version' only to the Daily. She went on further by claiming that, Ms. Hana Shams Ahmed, Contemnor no.4 too had sent that 'Bengali version' to the Daily on 18/12/2014 through e-mail.

36. Though Dr. Shahidul Alam, contested the contempt proceeding in person like Ms. Shrin Huq and Dr. Zafrullah Chowdhury with leave of the Tribunal, very assertively and in a humble manner submitted that, they did not make any dispute about the version of the statement and very frankly conceded to sent both English and Bengali versions to the Daily for publishing without raising any issue with regard to the contents of those statement sent.

37. By contrast, Ms. Hana Shams Ahmed by filing an application dated.12/05/2015 very robustly admitted to have sent both English and Bengali version of the statement to different Print and electronic media

through e-mail on 18-12-2014 including to 'the Daily' and annexed both the versions as "Annexure-2 Series to the application without raising any point about their contents too.

38. As has been stated in the foregoing paragraph, before calling explanation from 49 citizens' dated.14-01-2015, this Tribunal asked for the full text of the statement from the Editor of 'the Daily' by order dated.28-12-2014 and accordingly, the Editor complied so by filing application dated.31-12-2014 annexing the English version of the statement only as of **Annexure-1** subscribed by 50 Citizens. In paragraph-2 of his application he very clearly asserted that, he received the said statement transmitted by Ms. Hana Shams Ahmed, Contemnor no.4 through e-mail dated.18-12-2014.

39. On the other hand, Ms. Hana Shams Ahmed, Contemnor no.4 from whom the Daily also sourced the said statement conceded so (in paragraph no.3 of her application filed before this Tribunal on 12-05-2015) with a deviation that, she also sent Bengali version of the statement. **we** have cross checked both the English version of the statement submitted on 31/12/2014 by the Editor of Prothom Alo and that of Ms. Hana Shams Ahamed filed before us on 12-05-2015 and found both the text exactly same.

40. From the above, it can safely be construe that, English version of the statement which was submitted by the Editor before this Tribunal on 31-12-2014 was transmitted to the Daily by Contemnor no.4, Hana Shams Ahmed and it has also been proved, that English text of the statement was not translated script from any Bengali version nor he (editor of the Daily) received any Bengali Version of the statement. Had it been so, he would have certainly informed this Tribunal of receiving such Bengali version in his application dated.31-12-2014.

41. Since this Tribunal initiated the proceeding against the Contemnors on taking in to account of the English version of the statement, taking the Bengali version of the statement by some contemnors to the notice of the Tribunal, at the fag end of the proceeding, seems to be motivated one which is uncalled-for and thus redundant.

42. Regrettably, Ms. Shirin Huq, Contemnor no.10 who represented in person before us, as well as Contemnor no.11 and 14, in her application

filed on.12/05/2015 categorically asserted to have sent only the Bengali version of the statement to the Daily but when she was asked to make submission on that application she readily contended to have sent the statement both in Bengali and English version. We become stunned to find their flip flop stance.

43. Against such a backdrop, since I do not find any distinction among the contents of English version of the statement submitted by the Editor of the Daily and Ms. Hana Shams Ahmed, Contemnor no.4 so, the very contention on the part of Contemnor no.12-13 retreating from some part of the statement at a time when the proceeding is about to wrap up by way of giving rebuttal to the Prosecution's submission can never be entertained.

44. Because there is very age old maxim which means, no one should be allowed to blow hot and cold at the same pot. What we find from the proposition of the Contemnors, in one hand, they admitted to have subscribed to the statement crafted in English and on the other hand, they disowned a particular sentence thereof which they cannot make. Admittedly the Contemnors have been provided with sufficient occasion to clarify their position and other than of those two contemnors (Contemnor no.12-13) none of the 26 contemnors have ever raised such issue.

45. Regard being had to the above discussion, this Tribunal now proceed with to adjudicate the matter only taking in to account of the English version of the statement submitted by the Editor of 'the Daily' dated.31-12-2014 as the subject matter of the Contempt Proceeding basing on the individual reply of the Contemnors and Submission made thereto by the learned Counsels.

46. Discussion on reply presented by Contemnor no.12-13

The contention taken by Contemnor no.12-13 in their joint reply may be summarized in the following manner which has been placed before us by Ms. Rashna Imam, learned Counsel.

47. In the joint reply these Contemnors asserted that, the Tribunal has misunderstood the 'Statement' as it did not question about the justification of sentence awarded to David Bergman rather they merely expressed their

concern about the possible impact on the fundamental right of speech and expression by that decision.(Sentencing David Bergman)

48. Their further contention is that, this Tribunal has also misunderstood the 'Statement' as the very phrase "Stifling effect" on "freedom of expression" appeared therein is mere the opinion of the Contemnors which was also made on the apprehension that the decision will affect the scope of freedom of speech and expression.

49. Both the Contemnors tried to submit that, the statement does not create a strong or prejudicial impact in the mind of the reader as regards to honesty, integrity and impartiality of the Tribunal though it misunderstood the 'Statement' on that score.

50. They further contended that, they have at all no *mens rea* to demean the authority and dignity of the Tribunal and they are entitle to benefit of doubt in their favour. And the criticism so appeared in the Statement falls within the parameter of 'fair Criticism' which has been recognized and permitted by our Hon'ble Appellate Division, the Contemnors added further.

51. To buttress the above contention, Mr. Akthar Imam, learned senior counsel made an exhaustive submission supplemented by a plethora of decisions. At the very outset, he lays down his profound respect and honour towards the Court of law including this Tribunal and submits that, in his long chequered career in this legal arena he did never think of disrespecting any court or judges thereof and added, his Clients whom he represents before this Tribunal have high regard towards the Tribunal and the Judges as well.

52. At the beginning, learned Counsel reminded us about the scope of Freedom of speech and expression specially pointing out the restrictive clause as enumerated in Article 39(2) of our Constitution. He then referred to the decision in the case of *Andre Paul Ambard V. Attorney General of Trinidad and Tobago reported in AIR 1936 PC 141* where amongst other the following ratio has been settled:

“Justice is not a cloistered Virtue, she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.”

53. He claimed that the said decision has been followed in the case of *Mainl Hosein v. Sheikh Hasina Wazed* reported in 53 DLR, 138 wherein in paragraph no.39 it has been observed-

It should also be remembered that what can readily be remembered as contemptuous in 1900 or 1921 or 1936 is not so easily read now in the context of expanding rights guaranteed as fundamental to human existence under the constitution.

54. Aside from that, the learned senior counsel referred the decisions in the case of *Rama Dayal v.M.P., AIR 1978 SC 921, P.N. Duda V. Shiv. Shankar,AIR 1988 SC 1208, Advocate Reazuddin Khan V. Mahmudur Rahman, 63 DLR(AD), 29(Para 80), State V. Noman, 16 DLR 535, Saleemullah V. State 44 DLR(AD) 309.*

Highlighting the relevant portion of those cited decisions claiming to be applicable favouring his clients (according to the learned Counsel) Mr. Akhtar Imam then submits that all those decisions are glaring example of how the judges have dealt with the Contempt matters in the light of freedom of expression, good faith, burden of proof, benefit of doubt and of public interest in spite of making harsh criticism by the contemnors

55. Besides, the learned Counsel referred some citations by giving a brief account thereof that comprise the cases which have proved to be contemptuous and vice versa. Learned Senior Counsel then wrapped up his submission stating that, his clients have never acted in any manner for which they could be found guilty for committing contempt of court and prays for dismissal of the case.

56. We have heard the submission advanced by the learned Senior Counsel at length and perused the decisions. We thought it appropriate to assess those cited decisions in the latter part of our judgement to come to a definite conclusion as to how and to what extent those citations be

applicable and relevant in the facts and circumstances of the instant case for adjudication.

57. Discussion on reply presented by Contemnor no.1-9 and 15

In the joint reply submitted by the above contemnors, it has been contended that, they had no intention to question the transparency, openness and justification of the order of conviction and sentence and they have high regard and respect towards this Tribunal.

58. Their further contention as we found from their reply are that, since there is no provision of appeal against the order passed under section 11(4) of the Act so they raised the issue for amendment of law in their statement which cannot be termed as criticism against the Tribunal.

59. These Contemnors though cited several decisions in their reply both of our own and Indian Jurisdiction but nothing sorts of those have been pressed by the learned Counsel before us to show those decisions ever support the contention they couched.

60. Mr. Asaduzzaman, the learned Counsel by taking his turn for placing his argument only submits that, his Contemnors have no *mens rea* to belittle the authority and majesty of the Tribunal. A part from that, he by drawing our attention to the judgement delivered by International Crimes Tribunal no.1(ICT-1) in ICT-BD Misc. Case No.02 of 2013 dated.04-09-2014(In Chief Prosecutor -v- Human Rights Watch and 2 Other) submits that, the Hon'ble Tribunal no.1 exonerated the Contemnors even finding them (Contemnors of that very case) guilty for contempt of the Tribunal on consideration that, they had committed the offence for the first time and learned Counsel therefore prays before us to exonerate his contemnors taking similar view in the present proceeding too. Finally, learned Counsel adopted the submission so placed by Mr. Akthar Imam, learned senior Counsel representing Contemnor no.12-13.

61. Discussion on reply presented by Contemnor no.10, 11 and 14

Ms. Shirin Huq, Dr. Zafrullah Chowdhury and Dr. Sahidul Alam, Contemnor no 10,11and 14 have filed a joint reply. Needless to say, these three Contemnors in their joint reply while defending their position raked

up some unsolicited points which are neither relevant for their defence nor the point in issue before us for adjudication. They visibly tried to place this Tribunal as their adversary and invited further controversy departing from their core object to justify their action about making the statement over the sentence awarded to David Bergman.

62. Their very addressing the Tribunal and making out point in their defence that depicts from the reply itself, proves they lack minimum sense of decency and decorum. They in the name of taking their defence did not hesitate to indirectly impute this Tribunal for not taking any steps against the organizers of 'Ganojagron Macha' while they had agitated at *Shahbag* intersection disapproving the verdict awarded to Convict, Quader Mollah (hanged afterwards.)

63. They in their reply also found the disposal of 8 contempt cases by this Tribunal within a span of 3 years overwhelming. How such statement can be any point for their defence simply cannot be comprehended. Even, these three Contemnors did not hesitate to swipe at some distinguish personalities who though had shared the statement but eventually tendered unconditional apology before us but these contemnors(Contemnor no.10,11 &14)castigated their(Citizens, tendered unconditional apology) such noble venture as of cowardice act.

64. They in their reply finally want to assert that they did not raise any question about the justification of the sentence awarded to David Bergman rather in the statement they have pointed out that, the decision of the Tribunal would have negative impact on fundamental human rights.

65. Discussion on reply sent by Contemnor no.16-23

A part from the reply sent by Ms. Zarina Nahar Kabir, Contemnor no.18 the sum and substance of the reply of 7 other Contemnors though made individually but are same- we find on going through the respective reply. In her reply, Ms. Zarina Nahar Kabir amongst others contended that, by making impugned statement she had no intention to scandalize the Tribunal in the mind of the public and had she did so, it was unintentional and for that, she expressed her regret and finally prayed for exoneration of the charge for contempt of the Tribunal.

66. On the contrary, it depicts from the individual reply of all other 7 contemnors, they have taken three common points in justifying their respective position. **First**, they tried to assert that, the impugned statement fall well within the parameter of 'Fair Criticism' permitted by law which cannot be termed contemptuous. **Secondly, the very phrase 'Stifling effect' on 'freedom of expression' is merely an opinion of the Contemnors that was made in the belief of possible impact on freedom of expression by the decision (Sentence on David Bergman).** **Thirdly**, taking in to account of the judgement the statement merely discussed on the scope of freedom of expression guaranteed under Article 39(2) of the Constitution.

67. Contention of the prosecutor:

Since the instant Contempt proceeding has been initiated *suo motu* by this Tribunal, Prosecution did not appear in the proceeding at its commencement. But at the midst of the proceeding on 06-05-2015, Ms. Tureen Afroz, by appearing in the Tribunal expressed her intention to participate in the hearing of the instant proceeding on behalf of the Chief Prosecutor. She also prays for directing the Contemnors to supply her relevant papers they (contemnors) relied upon. As her prayer has not been opposed by any of the Contemnors, we allowed the same and accordingly she placed her submission on 11-05-2015 by filing a written submission supported by an array of citations.

68. Ms. Tureen Afroz has also submitted news clippings procured from the online editions of New Age, The Independent, South Asians for Human Rights, South Asia Citizens Web and BD Chronicle mentioning their respective links where the impugned statement shared by those 50 Citizens have been discussed. In all those publications though the statement has appeared and discussed under different title but in all those editions focal point of the statement as "*the sentencing of David Bergman is nothing but a continuation of curbing of all forms of freedom of expression and differences of opinion about the International Crimes Tribunal*" has been found common that has certainly debased the authority of the Tribunal, the learned Prosecutor underscored.

69. In her submission, learned Prosecutor emphasized four core issues basing upon which, according to her, the Tribunal thought it appropriate to initiate the instant proceeding of committing contempt by the Contemnors and thereby made submission on those four issues chronologically citing various authorities.

70. Learned Prosecutor very steadfastly submits that, by issuing the impugned statement the Contemnors have questioned the very transparency and openness of the judicial proceeding of the Tribunal which amounts to scandalizing the Tribunal. According to learned Prosecutor, the impugned Statement is aimed at belittling the authority and institutional dignity of the Tribunal in the mind of the public which is opposed to 'public interest.'

71. By awarding sentence to David Bergman by this Tribunal no amount of freedom of expression has ever been curtailed as there remain a restrictive clause in Article 39(2) of our Constitution where 'contempt of court' has been embodied as embargo in enjoying such freedom by any citizen, so if anybody is found to have infringed such legal barrier, law will take its own course as has been meted out in the case of David Bergman, learned Prosecutor further averred.

72. Learned Prosecutor lastly submits that, the impugned statement has essentially been made not to serve any public interest but to serve the interest of the unholy organized domestic and international quarters who are hell bent to criticize the Act of 1973 and the judicial process baselessly in the garb of showing solidarity with the cause of David Bergman. And on such submission, learned Prosecutor prays for convicting and sentencing the Contemnors.

73. Deliberation:

We have very carefully gone through the reply so submitted by the Contemnors and heard the learned Counsels representing them and the Contemnors contesting the proceeding in person as well and given our anxious thought over their contention. All the learned Counsels definitely deserve profound appreciation for making us enlightened us with their invaluable submissions supplemented by a variety of rulings cited from our

own authority as well as foreign jurisdiction that have immensely enriched our contemplation over the matter.

74. Undeniably, the crux of the dispute that ensue the present proceeding revolves on issuing the “statement” by 50 citizens (Afterwards one of them withdrew her name) who visibly felt aggrieved with the sentence of David Bergman- a British national. They jointly shared the said statement by making some comment therein about the precision of the Sentence (passed against David Bergman) and its future ramification. Thus, it is of quite necessary to have a look of the said statement first and for this obvious reason the full text of the entire statement is reproduced below in verbatim:

“Statement of Concern regarding Tribunal’s Contempt

Judgment on David Bergman

We express our deep concern about the use of contempt of court law to curb freedom of expression and at the recent conviction and sentencing of journalist David Bergman by the International Crimes Tribunal 2 on charges of “contempt of court”.

We state firmly and unequivocally that those responsible for committing genocide and other international crimes during the Liberation War must be prosecuted and punished. We also believe that the process of accountability should be above reproach, and that this can be best done through ensuring an open and transparent process of justice.

We are aware that in his blogs, posted most recently two years ago, Bergman cited figures from published research on death and other casualties during the 1971 Liberation War. These were sent to amongst others a senior Tribunal prosecutor, the Tribunal investigation agency as well as an Additional Attorney General and did not elicit an adverse reaction from any of them.

We firmly believe that it falls within any person’s right to examine and comment on the differing historic narratives about the 1971 liberation war including the official ones and that all institutions including the judiciary should welcome a fair share of commentary

and rigorous analysis. The number of killings carried out during the genocide by Pakistani forces and their collaborators, whether more or less, does not in any way diminish the truth that heinous and widespread war crimes were committed in 1971- and, in any case, Bergman's articles in no way seek to do that.

It is in the nature of scholarly practice that all histories, including 1971, should be subject to scrutiny, review and continuous verification. Even more so in cases where legitimate researchers and historians widely differ.

We are also particularly concerned about the portrayal by the Tribunal of David Bergman who worked on an award winning film documenting 1971 war crimes which was used as key evidence in the Tribunal's own proceedings against Chowdhury Mueenuddin; and has written widely in support of the need for accountability and war crimes trials in relation to the liberation war.

We find the Tribunal's decision may have a stifling effect on freedom of expression with ramifications for journalists and other writers and hinder research and debate on the history of our War of Liberation. We also express our distress that no appeal is allowed against contempt orders of the court which undermines the very concept of due process and rule of law since appeal against any conviction is an integral part of fundamental rights. The sentencing of David Bergman is nothing but a continuation of curbing of all forms of freedom of expression and differences of opinion about the International Crimes Tribunal.

We urge and appeal to the authorities concerned to reform the contempt of court law as it is a relic of our colonial past that undermines the very spirit of Bangladesh's glorious war of national liberation."

75. On plain reading of the Statement what we find, the persons (meaning 26 contemnors now facing proceedings) who shared the said statement are the supporter of our long cherished liberation and vocal to see the perpetrators who committed genocide and other crimes during our war of

liberation prosecuted and punished. They are in favour of the endeavor that are directed to do research work over the death figure of the martyrs and other casualties that had been perpetrated by the Pakistani invading forces and their collaborators during the war of Liberation in 1971 on which according to them, David Bergman took much pain in accomplishing such historical research work which they claim falls within his (Bergman) right.

76. They (26 Citizen made Statement) found the sentence of this Tribunal of having a ‘stifling effect’ on the ‘Freedom of Expression’ that would hold back the journalists and other writers in furthering research and debate on the history of our war of liberation.

77. They asserted further that, the very sentencing of David Bergman is aimed at curbing of all forms of ‘freedom of expression’ and ‘differences of opinion’ being made about the International Crimes Tribunal.

78. Finally in the statement the Contemnors go on to express their pain for not having any provision of appeal against the Contempt order which goes against the concept of due process of law that amounts to curtailment of fundamental right to the convict, viewed by those contemnors. They eventually urged the respective authority to go for reforming ‘the Contempt of Court Law’ finding it archaic that enacted in colonial era which is opposed to the very spirit of our glorious war of liberation.

79. Views of some of the Contemnors about the statement they made:

For the clarity of our understanding, we at the very onset of hearing on.06-05-2015, personally asked **Mr. Ali Ahamed Ziauddin and Rahnuma Ahamed, Contemnor nos.12-13** present in Tribunal whether they had ever gone through two articles that David Bergman posted in his personal blog centering which he was found guilty that culminated through awarding him sentence by this Tribunal. Their common and plain reply was that, they did not go through those articles. The next question to both of them were whether they got the opportunity to ever read the Order of sentence awarded to David Bergman dated.02-12-2014 by this Tribunal which stood uploaded in the website of the Tribunal since the very date of its pronouncement which made them concerned and prompted to issue the statement. Again they expressed their ignorance about the said Order of

sentence. In such reply, this Tribunal found it redundant to further ask him as to which portion of the Order of sentence make them concerned.

80. But to the contrary, Mr. Ali Ahamed Ziauddin tried to justify his action by submitting that, he used to write articles on diverse issues which were published in different print media and criticizing some of his articles there had been published counter-articles also but he did not feel aggrieved and ever thought it could be any issue to be adjudged by the court of law as everyone has got the right to express their individual thought.

81. Ms. Shirin Huq, contemnor no.10 who represented herself along with Contemnor no.11 and 14 was also encountered with our common query as to whether she had ever gone through the Order of sentence and which portion of the judgement of sentence makes her concerned. But she simply asserted to have not gone through the Order awarding sentence to David Bergman.

82. We also invited **Professor Anu Muhammad**, Contemnor no.5 to come before the podium and to place his personal view over issuing the impugned statement. In taking his turn, he very frankly submits that, David Bergman had taken a pivotal role in preparing a documentary film titled **“War Crimes File”**(made by UK based **Channel-4**, marked as Material Exhibit-I in ICT-BD Case no.01 of 2013 before us) on the gruesome killing perpetrated by Chowdhury Mueenuddin on intellectual martyrs–this Tribunal awarded capital punishment by judgement dated.03/11/2013. He then goes on to submit that in the film he also got the opportunity to play in a character that was screened in Channel-4 and out of such association with David Bergman he developed an impression upon him that the person of such stature cannot write or act against the spirit of our liberation war for which he could be punished. Instilling such sentiment about David Bergman he felt inspired to share the statement and nothing more even though, he did not go through the sentence awarded to him, Mr. Anu Muhammad added.

83. Fair Criticism

It is the common view of all the contemnors that whatever comment they made in the statement it falls within the parameter of ‘fair criticism’. In a

very ordinary meaning what we mean a Criticism becomes fair when its intrinsic intention be fair which can be derived from core objectives of going through entire comment itself. Again, if the Criticism or comment on the face of it does not seem to have been made for public interest and aimed at safeguarding someone's personal petty interest or have biasness to a vested group then the criticism cannot be termed as "Fair Criticism".

84. In such perspective, if we look at paragraph no.3 of the impugned statement we find the Contemnors have tried to justify their position by saying, David Bergman had earlier approached to different strata of Prosecution and Investigation agency of the state with his research work on death figures but with no unfavorable comment about its accuracy by any quarters. Interestingly enough, David Bergman while defending his case (ICT-BD (ICT-2) Miscellaneous Case no.01 of 2014) had taken exact similar defence. Though that segment of the statement carry no significance in adjudicating the instant proceeding nor did we take account of it in disposing of earlier case but the very inclusion of earlier defence version in the 'statement' patently manifest the intention and biasness of the Contemnors which proves they are dancing to David Bergman's tune.

85. Similarly, if we read the entire statement together it would demonstrate that, the statement has not been made in "good faith". The literal meaning of the phrase is 'the intention to be honest and helpful'. In the popular sense, the phrase 'in good faith' simply means 'honestly, without fraud, collusion or deceit. According to the definition in the General Clauses Act, *good faith means a thing which is in fact done honestly. In other words an act done honestly must be deemed to be done in good faith. (Madhav Rao Scindia V. Union of India, AIR 1971 SC 530,1SCC 65)*

86. If we now revert to the very preamble of the impugned statement we would find that, the Contemnors without taking any second thought have straightway accused this Tribunal for curbing freedom of expression by convicting and sentencing David Bergman. We will discuss the very justification of their attempted imputation towards the Tribunal about the sentence in the latter part. But it goes without saying, their very introductory speech itself proves to be a premeditated one having not been made out of honest intention. They even forgot to fathom to which

institution they are pointing accusation and what consequence will follow thereby.

87. Before we embarking upon the other point in issue we would like to take the opportunity to gather knowledge about how far the contemnors are conversant with the Contempt law they are harping against. We find, at the concluding part of the impugned statement these Contemnors urged the concerned authority to reform ‘the Contempt of Court Law’ treating it a relic of our colonial past. Perhaps the Contemnors tried to make point for inserting provision of appeal in the Contempt Law.

88. With that very statement, it would not be hard to comprehend that, the Contemnors are stating about the Contempt of Courts Act, 1926, since it has been enacted in the British era. But fact remains, the instant proceedings are being dealt with under the Act of 1973 which was enacted by our sovereign parliament, immediately after achieving our independence in 1971. Again, if anybody is found guilty in contempt proceedings by the High Court Division that essentially follows article 108 of the Constitution in its proceeding, the Convict then can prefer appeal to the Hon’ble Appellate Division under Article 103 of our Constitution. So, there remains provision of appeal if contempt proceeding is initiated under Article 108 of the Constitution evolving the jurisdiction from section 2 of Contempt’s of Courts Act, 1926 .

89. Where Contempt’s of Courts Act, 1926 only provides 3 sections in all and in section 2 and 3 there provides for jurisdiction of the High Court Division and Subordinate Court in respect of taking cognizance of the contempt matter and quantum of sentence respectively. So what the High Court Division adjudicates by virtue of provision under Article 108 of the Constitution purely on deriving authority from Contempt’s of Courts Act, 1926. So the alleged campaign of the contemnors for reforming the Contempt of court law without having any knowledge thereof itself proves they are totally ignorant about what they are harping for.

90. Further, from the brief account of the Contemnors we became abreast with the academic and professional background of the Contemnors who come from diverse section of academic milieu. Nobody should enter upon

any debate in which he/she has got no knowledge. So, with the above discussion it is proved that the Contemnors lack rudimentary knowledge over our legal system but they found to be vociferous in its shortcomings which are unfortunate for the nation.

91. It is true, this Tribunal will do nothing in reforming any law which is the business of the legislator mandated by our Constitution. And their very demand for reforming Contempt law whatever legitimate it may be, in no way come within the parameter of Contempt of the Tribunal or the judges but their apparent imprudence in the field of judicial development proved they demanded so by the impugned statement not in good faith but to malign the judicial process purposefully.

92. In this regard, we can safely rely upon the decision of our Apex Court in the case of **Advocate Riazuddin v Mahmudur Rahman, 63 DLR 2011, at p.49 at para 65** wherein His Lordship Mr. **Justice Surendra Kumar Sinha** observed -

“A fair criticism of the conduct of a judge may not amount to contempt if it is made in good faith and in public interest. The Courts are required to see the surrounding circumstances to ascertain a good faith and the public interest including the person who is responsible for the comments, has knowledge in the field regarding which the comments are made and the intended purpose sought to be achieved. If one having sufficient knowledge on the subject, such as a lawyer, a retired Judge, a teacher of law and an academician may make fair criticism and the Court in such case will be able to ascertain a good faith with the comments, but if a scurrilous comment is made by one who is totally foreign on the subject like the respondents whose normal duties are not the one written in the impugned article, arm of the law must strike a blow on him who challenges the supremacy of the rule of law in the general interest of the litigant public. The respondents had made comments touching to the administration of justice of the Apex Court of the country, who do not possess elementary knowledge in the field of law”.

93. Actions Deserves to be taken against Habitual Contemnor :

While sentencing David Bergman in Miscellaneous case no.01 of 2014 we amongst others took in to account of his previous conduct. We have noticed that he was earlier prosecuted on charge of Contempt of the Tribunal by the Tribunal no.1 (in ICT-BD Misc. Case no.02 of 2011) and eventually though he was exonerated of that proceeding on disposing of the matter, a serious caution had been slapped upon him by that Tribunal. We made our reasoned observation to that effect in paragraph no.114 of our said order.

94. On the same note, here we have discussed the reply so submitted by the Contemnor no.10-11 and 14 and in paragraph no.61-63 we analyzed how these three contemnors resorted to unholy and unreasonable tirade not only towards other Contemnors whom we exonerated from the contempt charge even tried to challenge the impartiality of this Tribunal in the name of justifying their action.

95. Earlier while we called for explanation individually from 49 citizen, Dr. Zafarullah Chowdhury in his explanation did not even hesitate to dictate terms for writing the order by this Tribunal in English by annexing a photocopy of a page of our sacred Constitution even it goes far from the core issue before us. This is a sheer audacity on the part of that Contemnor in the name of criticism against nothing, even day to day business of the Hon'ble Judge's of the Tribunal.

96. Even, Dr, Zafrullah Chowdhury has gone too far by annexing amongst others page no.6 of our Constitution where Article 18 to Article 22 has been outlined on furnishing additional explanation. We are simply taken aback to see the approach from none other than from Dr. Zafrullah Chowdhury who is going to teach law to the Supreme court Judges which we found to have no application in adjudicating present proceedings. In paragraph 2 of his added explanation he has rather expressed his utter disappointment for passing the order in English by this Tribunal.

97. We have noticed Dr. Zafrullah Chowdhury, contesting the instant proceeding as Contemnor no.11 had earlier been prosecuted by Tribunal no1 in ICT-BD Miscellaneous case no.03 of 2013(Chief Prosecutor V.

Channel 24 and Others, Date of Judgement-12-06-2014) where the learned Judges of the Tribunal amongst others made following observation :

It appears that Dr. Zafrullah Chowdhury [opposite party no.7] stated some irrelevant events in his written reply which are not at all related to the show cause notice issued by this Tribunal. On a plain reading of the remarks made by him we find those comments on sub-judice matter to be contemptuous as per provision of section 11(4) of the International Crimes (Tribunals) Act of 1973 as stated earlier but he, while appearing in the Tribunal, orally urged that he did not willfully and deliberately utter such comments in the 'Talk Show' in question to undermine the judges of the Tribunal. It is not desirable by the civilized society to hear derogatory remarks by highly educated person expressing in a cool brain without having knowledge on the fact in issue.

We also observed that in the written reply, opposite party no. 7 made some derogatory and unwanted remarks which are contemptuous but, the demeanour of the opposite party no. 7 was found respectful to the Tribunal at the time of appearing in person which indicated that probably he made the 15 comments innocently in the 'Talk Show' in question without knowing the manner and proceedings of the Tribunal.

98. Though the International Crimes Tribunal-1 found the reply of Dr. Zafrullah Chowdhury contemptuous but finding his manner humble towards the Tribunal disposed of the proceeding with certain specific observation and cautions which are as under.

In view of the facts and laws as stated above, we are expecting more circumspection, understanding, discretion and judgment on the part of the opposite parties because they are leading the society by holding their respective positions and with a further hope that they [opposite parties] shall be more careful, cautious and respectful in making any statement or comment with regard to the judicial proceedings or the judges of the Tribunals or any other courts of

Bangladesh in future. With the said observations the application filed by the Chief Prosecutor is hereby disposed of accordingly.

99. Though in the instant proceedings Contemnor no.10-11 and 14 contested the matter in person but after initiating the contempt proceedings those three Contemnors filed their reply jointly and on behalf of those three contemnors Contemnor no.10, Ms. Shirin Huq made submission for all the three Contemnors. But apart from Dr. Zafrullah Chowdhury, Contemnor no.11 none of other two Contemnors earlier faced any contempt Proceedings.

100. Furthermore, Dr. Zafrullah Chowdhury while facing the contempt proceeding earlier, the reply submitted by him in that proceeding was found contemptuous, but in spite of that, he was let off with certain cautions by the Tribunal no.1 as mentioned above. Even then, he did not feel it urge to get himself righted and seek regret before this Tribunal for his unceremonious utterance he penned in his reply before us.

101. We seem it reasonable to show compassion towards other two contemnors (Contemnor no.10 and 14) in spite of finding their action not up to the mark and our expectation as we view, they out of sympathy and some sorts of persuasion impulsively issued the statement without going through the order of sentence to make sure the justification of their such action which we find, they did in a very irresponsible manner, no doubt, but they did it for the first time.

102. But Dr. Zafrullah Chowdhury braving high cautions by the Tribunal no.1 earlier even dared to repeat his unsavoury comment while giving explanation and reply to our notice which is sheer impudence towards the Court of law and tantamount to show thumb to our justice delivery system. Such downright disregard towards the court of law can never go unpunished else, it would be as good as to harbor culture of impunity in favour of defiant person. In such a panorama we are constrained to find Dr. Zafrullah Chowdhury guilty under section 11(4) of the International Crimes Tribunal Act, 1973.

103. Now let us ponder over which part of the statement made by the Contemnors carry the elements of contempt. During the course of hearing

we draw the attention of Mr. Akthar Imam by asking him how come our order of sentence to David Bergman may have ‘Stifling effect’ on ‘freedom of expression’ that could ever hinder the journalists in carrying out the research and debate on the history of our war of liberation as has been shared by the Contemnors in their joint ‘Statement’. Instantly the learned Counsel firmly asserts that such view appeared in the statement is mere Opinion of the Contemnors about having possible impact on freedom of expression centering the decision not meant for demeaning the authority of the Tribunal.

104. Totally identical views have been taken by other contemnors on this point except Contemnor no.18, we find on going through the reply so submitted by the contemnors. The explanation made by the learned Senior Counsel is absolutely slipshod one that devoid of any substance. Because we do believe, everybody has got the authority to express his/her opinion concerning any order passed by a court of law and thereby this Tribunal is not above reproach but such opinion should be substantiated by facts. How could our verdict would hinder research and debate on the history of our war of liberation that made the Contemnors apprehensive and forced them even uttering the phrase ‘Stifling effect’ on ‘freedom of expression.’ In the foregoing paragraph we find that, the Contemnors without going through the verdict awarded to David Bergman made the impugned statement. Had they ever read the Order of sentence they surely would not have shared such controversial statement which we think severely shakes the confidence of general people upon the authority of this Tribunal.

105. We are not ready to analyze our own decision after pronouncing it which does not come within the purview of our business while disposing of another contempt proceeding. But for having obvious and precision of the facts and to burry all controversies once for all it is once again pointed out that, the order of sentence awarded to David Bergman was not rendered for making any comment about the death figure of martyrs in our war of liberation- which has deliberately been penetrated into the mind of the public only for intending to mislead them. Rather David Bergman was sentenced for posting two articles in his personal blogs by which he questioned the justification of Death sentence awarded to infamous Razakar

Abul Kalam Azad @ Bachchu by using very obnoxious phrase and word (Reference-Para-53,54, 60 ,61 and 135 of ICT-BD Misc. Case no.01 of 2014).

106. So on such a discussion, there should not be any ambiguity that the sentencing David Bergman has got no relation on the history of our liberation war nor it would hinder any research or debate over the history of our liberation war in future but the contemnors have been kept in the dark in knowing such fact.

107. Now question invariably crops up whether the very phrase ‘Stifling effect’ on ‘freedom of expression’ carry the elements of contempt of this Tribunal or not. Threadbare discussion made above, patently reveals that the opinion expressed in that respect was not based on facts. Their opinion was proved to be absolutely omnibus. We always welcome constructive opinion that could come to our great assistance which paves the way for rectification of our adjudication in future.

108. But in the name of passing misleading opinion a hostile impression is instilled in the mind of public on the authority and competence of the court of law which is dangerous. The above phrase ‘stifling effect’ clearly implies a wrong signal on the freedom of expression. A fundamental right is guaranteed to every citizen of the country, true. But accusing the Tribunal by using that phrase scandalizes the Tribunal before the public. So, it is obvious, the above phrase appeared in the statement is contemptible. Therefore, the authority cited by the learned senior counsel to that end is of no application in the facts and circumstances with the above conduct of the Contemnors.

109. It has been derived from the reply of the Contemnors that they issued the impugned statement being emboldened with the authority guaranteed under Article 39 of our Constitution and by their action they did not challenge the very justification of the decision of the Tribunal rather made so, on possible impact on such right by that decision. We also invite submission of the learned Senior Counsel taking in to account of a particular sentence appeared in the impugned statement which is *inter alia* “ *The sentencing of David Bergman is nothing but a continuation of all*

forms of freedom of expression and differences of opinion about the International Crimes Tribunal.”

It has earlier been discussed that learned senior Counsel find it difficult to support that particular sentence embodied in the statement and what he submitted in that respect we found it untenable.

110. Questioning the justification of the sentence awarded to David Bergman it has been alleged that all forms of freedom of expression and differences of opinion concerning the International Crimes Tribunal has been curtailed. It is a grave imputation against the Tribunal. It means, the contemnors intend to defend by contending that the Tribunal has been imposing censorship on the free thinkers from writing any positive and constructive articles about its proceeding and other affairs of it. But it is totally misconceived.

111. The very notion of the Contemnors derived from the above sentence sounds, David Bergman is above law and he could not be punished even he be found guilty for gross contempt of this Tribunal since he is a journalist of foreign national and above all, involved in making a documentary on intellectual martyrs that have used in a case before us. But mere reason of being involved in making a documentary film cannot be a hallmark or stand guarantee of being absolved from all sorts of wrongdoing to be perpetrated in future.

112. There cannot be any guarantee, a person will remain strict to same ideology throughout his life and to say the least, we from our past political history experienced sharp deviation of principle from very veteran personalities. Here, we don't want to repeat for what offence David Bergman had been sentenced by this Tribunal. It has been proved that none of the contemnors has ever read the order of sentence awarded to David Bergman and thus they have failed to make themselves comprehend what wrong that gentleman [David Bergmann] had committed towards the Tribunal. We are forced to conclude that the contemnors being inspired not by any fair cause and for public interest attempted to make misconceived comment, in the name of freedom of expression. The very utterance stated

in the statement quoted above, is thus manifestation of sheer audacity of the contemnors.

113. We agree wholeheartedly every citizen should enjoy freedom of expression as Constitution authorizes this guarantee but not over all matters, else the majesty and authority of judiciary will be jeopardized and administration of justice will be collapsed. For that obvious reason, our Constitution has put restriction by inserting article 39(2) in it to check unfettered enjoyment of such freedom by inserting the very words “*in relation to contempt of court*”. Hence, the alleged common assertion of the Contemnors that, they by making impugned statement, did not question the justification of the decision of the Tribunal but express their agony on possible impact on freedom of expression is nothing but an outcome of wrongheaded thought and strongly deprecated.

114. With the above observation it has been established that our Constitution has not given absolute right to its citizen to express his opinion, it is subject to contempt of court, otherwise it would have abused randomly. In such parlance, reliance can further be placed in the case of Advocate Reazuddin Khan V. Mahmudur Rahman, reported in 63 DLR (AD)29 where his Lordship Mr. Justice Surendra Kumar Sinha has observed:

“ No person has any right to flout the mandate of law or the authority of the court for alleged establishment of law under the cloak of freedom of thought and conscience or freedom of speech and expression or the freedom of the press guaranteed by Article 39. Such freedom is subject to reasonable restrictions imposed by the law”

115. No doubt about it by the impugned statement, it has been imbued in the mind of the general mass that grave injustice has been done to David Bergman by this Tribunal in awarding him sentence for writing against International Crimes Tribunal. This is a classic example of scandalizing a court of law even though not having any iota of truth in such statement which is enough to create mystification in the mind of public as to fairness, dignity and independence of the Tribunal. On that score, we can rely upon

the decision in the case of State V. Chief Editor, Manabjamin and others reported in 57 DLR 359 where it has been held that:

“Freedom of speech and expression is tolerated so long as it is not malicious or libelous. If speech or expression was untrue and reckless, the speaker or the author does not get protection of the Constitutional right”

In view of the above discussion, we are of the view that, the Contemnors have infringed the bounds by maligning this Tribunal with the malicious statement in the name of freedom of expression which we find to be contemptuous.

116. Then again the Contemnors went to assert that they had no *mens rea* in sharing and issuing the impugned statement and the learned Counsels put much emphasis while arguing on this point. We simply failed to comprehend how *mens rea* will get preference in determining an offence of Contempt of Court and how the adjudicator will elicit such ill mental position of an offender while adjudicating a contempt proceeding. So we are of the considered view that, *mens rea* cannot be any elements to adjudicate a contempt proceedings or can be a defence of the contemnor. Our above view gets support from the decision of the case of State V. Chief Editor, Manabjamin and others reported in 57 DLR 359 where it has been propounded that:

Mens rea is not a relevant ingredient for committing criminal contempt. So also intention is not relevant in finding out whether a particular statement or utterance amounts to contempt or not. It is also well settled that, conduct or utterance that tends to bring administration of justice in to disrespect amounts to contempt. It is the affect of contemnor’s action that is to be taken in to consideration and not the intention inasmuch as intention to cause prejudice is not a necessary ingredients in a case of contempt.

117. Paradoxically, on going through the reply as well as submissions advanced by the learned counsels, we at least do not find anything therein

as to what prompted all the contemnors to issue ‘statement’ under the heading “Statement of Concern regarding Tribunal’s Contempt Judgement on David Bergman” which we have repeatedly asked the contemnors but with no reply. Ironically, in no reply we ever found which portion of our judgement passed against David Bergman makes the above citizens concerned that forced them even to characterize our such verdict of ‘*having stifling effect on the freedom of expression.*’

118. We firmly believe, all the Contemnors before us have earned high esteem and eminence in their respective fields for their immense contribution towards the society and the nation as well by their invaluable analysis on contemporary national issues. From the reply, it further depicts, the Contemnors are all firebrand for the cause of our liberation War and vociferous in brining those war time Criminals to justice. But their reply does not appear to show, they ever feel ashamed or concerned when a foreign national who has or had no pain with the birth of their motherland dared to show audacity by criticizing the verdict awarding capital punishment to a War time Criminal by uttering words “*misleading*” and “*Mantra*” .

119. We simply become flabbergasted to find the contemnors irresponsible in sharing and issuing the statement. They even did not feel slightest urge to go through the order of sentence before sharing the statement or the consequence thereof. We know the contemnors are very learned persons and placed in a very high position in the society doing very prestigious job in their respective fields but their action proves them very careless so far trial of war time criminal is concerned. Besides, from the very beginning we noticed there had been lack of coordination among the Citizens issued the statement even they could not be agreed in coming in to a common decision. Such approach clearly proves there remained differences of opinion among themselves too. But at the same time it is perceived that the contemnors could not understand the possible consequence that may have come out from their impugned conduct. So far we know excepting Contemnor no.11, Dr. Zafrullah Chowdhury none of the Contemnors has ever faced any contempt charge before. Though we found elements of Contempt in the impugned statement against all the contemnors before us

but since they were not well aware of the consequence of their action and subconsciously issued the impugned statement for which they regretted, we decide to exonerate all the Contemnors except **Contemnor no.11, Dr. Zafrullah Chowdhury**. We thus are giving the exonerated contemnors serious cautions to be more careful in future in making or sharing any statement that could ever disparage the authority and dignity of the Court of law.

120. Above all, we ardently hope that they have now figured out their imprecision in sharing and making the impugned statements. Their such introspection will not only upgrade the majesty of the Tribunal but also signify their utmost admiration to the process of the administration of justice that will invariably usher reposing faith by the general mass on the fairness of court of law in dispensing justice.

121. Hence, We dispose of the case conferring the above cautions and observation against Masud khan, Afsan Chowdhury, Ziaur Rahman, Hana Shams Ahamed , Anu Muhammad, Anusheh Andil, Muktasree Chakma, Lubna Marium, Farida Akhter and Chowdhury Rafiqul Abrar(C.R. Abrar) –whom made as **Contemnor no.1-9 and 15. and** Ms. Shireen Huq, and Dr. Shahidul Alam made as **contemnor no.10, and 14** and Ali Ahamed Ziauddin and Rahnuma Ahamed made as **contemnor no.12-13. and** Dr, Bina D’ Costa, Mahmud Rahman, Dr. Zarina Nahar Kabir, Lessa Gazi, Shabnam Nadiya, Nasrin Siraj Annie, Tibra Ali and Dr. Delwar Hussain made as **Contemnor no.16-23** and thereby exonerate all the above contemnors from the contempt proceeding.

122. Inaction of “New York Times” in responding Contempt Notice

Initially on 28-12-2014 while this Tribunal passed order asking the Editor of the Daily to supply the full text of the ‘Statement’ subscribed by 50 citizen also found “ *The New York Times*” in its editorial dated.23-12-2014 published an article under the caption “*Muzzling Speech in Bangladesh*” where in the concluding part it totally out of blue, commented *inter alia* ‘***If justice is true what the International Crimes Tribunal seeks, It should immediately overturn Mr. Bergman’s Sentence and Conviction***’.

123. Finding such comment of a renowned international daily of severely impinging the recognized norms and civility in interfering with the authority and openness in justice delivering system of a statutory legal forum of a sovereign country, we deemed it indispensable to ask the authority of the said international Daily '*The New York Times*' to explain its conduct by 22-02-2015 by our order dated.12-02-2015 and also issued further reminder to that effect from time to time.

124. Record shows, notice of the order has duly been served upon the respective authority of "*The New York Times*" but it has not responded. In such a posture, by Order dated.01-04-2015 this Tribunal while drawing contempt proceeding against 23 individuals under section 11(4) of the Act of 1973 also asked "*The New York Times*' to clarify its position for the the impugned 'editorial' intending to confuse the mind of the public as it commented therein *inter alia* --'*It[Tribunal] should immediately overturn Mr. Bergman's Sentence and Conviction*' in its editorial dated.23-12-2014 and thereby demean its (Tribunal's) authority and dignity.

125. It has been proved from the materials on record, the respective notice of our Order has duly been served upon the '*The New York Times*' but yet it did not feel to respond, clarifying their position about the authority to ask a Court of law to overturn a verdict without bothering to know of having any such legal scope in the statute, the Tribunal goes by which is also tantamount to show insolence towards a statutory Judicial authority of a sovereign country that adjudicates Crimes which are international in nature.

126. On close scrutiny of the entire contents appeared under the above caption "*Muzzling Speech in Bangladesh*" it appears to us, alleged comment reflected in the 'editorial' was totally ill crafted, persuaded to get it published intending to misguide its readers. In the entire 'editorial' it has been tried to establish that, David Bergman was sentenced for making public of the death figure of martyrs slaughtered during our liberation war. But reality is that, it is downright misleading information and such propaganda is being made deliberately to gather international sympathy favoring David Bergman and to cover up his misdeed he committed towards the Tribunal concealing real scenario set out in the order of sentence.

127. The fact is that, David Bergman was sentenced for debasing the authority of the Tribunal by questioning the justification of sentence of Death we awarded to Abul Kalam Azad alias Bachchu on 21-01-2013 (ICT-BD Case no.05 of 2012) by uttering completely indecent word and phrase to scandalize this Tribunal that (Indecent comment) he deleted from his personal blog soon after receiving contempt notice from this Tribunal which proved his guilty mindset.

128. Apart from that, in the article titled “*Muzzling Speech in Bangladesh*” it also finds place that, journalism is a dangerous profession in Bangladesh and the journalists are not safe in this country in carrying out their professional job and they were even killed for reports - which is also not based on fact though aimed to invite controversy against the Government and to mislead the international community.

129. Final Order with regard to “*The New York Times*”

We firmly believe, the editorial appeared in ‘*The New York Times*’ under the caption “*Muzzling Speech in Bangladesh*” is not the reflection of the principle and ethics, the newspaper followed in publishing any editorial involving internal affairs of a foreign country. We are of the view that, the authority of the newspaper, ‘*The New York Times*’ should have cross checked the authenticity of the information through any independent source before publishing it. Insofar as regards to information, appeared in the above editorial centering the sentence awarded to David Bergman, was not based on reality as have been stated in penultimate paragraphs. Even, exact fact will come out if the order of sentence awarded to David Bergman be read, available in the website of the Tribunal.

130. We fervently hope and wish, in future, the respective authority of “*The New York Times*” would be careful in publishing any news to any of its edition concerning the adjudication order of this Tribunal. With the above observation the instant matter is disposed of. Let a copy of this order be transmitted to the official address of “*The New York Times*” forthwith. The Registrar of the Tribunal is asked to do the needful accordingly.

131. In view of discussion made in paragraph 102 we convict the contemnor no.11 Dr. Zafrullah Chowdhury who deserves significant punishment as prescribed in section 11(4) of the Act of 1973. But considering his age we are of the view that it would be appropriate if we sentence him to suffer simple imprisonment for one (01) hour to be commenced instantly with the rising of the court and to pay a fine of taka 5,000/= to be paid within 7 days from date, in default, to suffer simple imprisonment for 1(one) month. The convict contemnor no.11 will remain confined in the dock inside the court room for 01(one) hour under the vigilance of security persons of the Tribunal to suffer the sentence.

The convict contemnor no.11 Dr. Zafrullah Chowdhury is directed to deposit the fine as ordered above to the Registrar of this Tribunal within the stipulated time. Registrar of the Tribunal shall make the Tribunal informed about the compliance of this order.

Justice Obaidul Hassan, Chairman

Justice Md. Mozibur Rahman Miah, Member

Justice Md. Shahinur Islam, Member