

Ex Post Facto Prosecution of International Crimes in the Bangladesh War Crimes Tribunal: An Issue of Constitutionality

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ABSTRACT

Bangladesh War Crimes Tribunal-a domestic criminal court is currently prosecuting the offenders of atrocious crimes perpetrated in the Bangladesh War of Independence in 1971. Though the atrocious offenses took place in 1971, the International Crimes Tribunal (ICT) Act 1973 was decreed by Bangladeshi Parliament in 1973, and the Tribunal was established in 2010; hence the ICT Act 1973 is considered as an ex post facto (retrospective) legislation because it has been promulgated after the commission of the crimes. Therefore, this study first analyzes the importance of *ex post facto* law's prohibition in customary international law. Secondly, the study highlights how the 1973 ICT Act applies to prosecute the ICTB's defendants retrospectively by amending the constitution of Bangladesh. Thirdly, it examines the ex post facto legislation's application in the Bangladesh Tribunal and the issue of constitutionality because rules on the prohibition of retrospective legislation is one of the fundamental rights of every citizen that need to be safeguarded by every constitution of civilized nations. Lastly, this study's originality proves that *ex post facto* law's application in the ICTB is unconstitutional. Then, this research paper concludes by inferring that the government of Bangladesh needs to amend the constitution to prohibit the *ex post facto* law's implementation through the Tribunal that will enhance the legal acceptability of the War Crimes Court because the recent Criminal Court in question is operating under the Bangladeshi government.

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KEYWORDS:

Ex post facto prosecution
International crimes
Constitutionality

CITATION:

Maruf Billah et al. (2023). Ex Post Facto Prosecution of International Crimes in the Bangladesh War Crimes Tribunal: An Issue of Constitutionality. *Malaysian Journal of Social Sciences and Humanities (MJSSH)*, 9(2), e002236.
<https://doi.org/10.47405/mjssh.v9i2.2236>

Contribution/Originality: This research paper aims to contribute to the existing literature on the ex post facto prosecution of international crimes in the domestic courts or tribunals. It emphasizes the constitutional embargo on the retrospective prosecution of any individual as one of the fundamental rights which is sacrosanct.

1. Introduction

Bangladesh currently has established the International Crimes Tribunal Bangladesh (ICTB) in prosecuting and penalizing persons who perpetrated international crimes in its 1971 Liberation Conflict. During the nine months of Bangladesh Liberation Conflict, the huge murders of more than a few hundreds of thousands of Bengalis in the East Pakistan in 1971, composed through wide-ranging torment and rape calculated in disturbing the racial stability and effective flying of million numbers of refugees, takes a distinct position in the record of the globe's unreciprocated shocks and fears (Robertson, 2015). Therefore, in trying and penalizing the forces of West Pakistan and their Bangladeshi traitors who contrasted with the Bangladesh War of Independence, did commit atrocious offenses against Bangladeshi civilians, the ICTB was formed in 2010 (Billah, 2020). Firstly, the Tribunal was initiated on 17th July 1973 by passing the 1973 ICT Act by the Bangladeshi Parliament afterwards the 1971 Conflict (Billah, 2020). However, due to political unevenness with Pakistan, India, and the newly emerged State of Bangladesh, instigating any legal proceeding against the Pakistani perpetrators for their wrongful acts was not possible (Billah, 2020).

Then, after a lengthy exit from the civic attention, the 1973 ICT Act re-emerged in 2009, and the Tribunal (ICTB) was initiated in 2010 in trying the offenders in the 1971 freedom war for instigating universal offenses, such as genocide, crimes against humanity, crimes of aggression, and war crimes. The international civil society well received this decent agenda and manifested the Tribunal as one of the initial criminal tribunals in South Asia in culminating the earlier impunity for the culprits of atrocious crimes since the International Military Tribunal for the Far East (IMTFE), Tokyo (1946-1948), and International Military Tribunal (IMT), Nuremberg (1945-1945) (Menon, 2017). Though the current Tribunal has been duly inaugurated by the binding Bangladeshi Government-the Awami League (AL) in March 2010, it has placed serious uncertainties on the Court's aptitude in upholding the defendant's internationally documented fair trial rights. One reason discloses that the temporal jurisdiction of the ICTB is opposes with the rule of non-retroactivity by allowing the prosecution of the accused under *ex post facto* law, which was passed in 1973, after the heinous acts took place in 1971.

More precisely, based on the jurisdiction *ratione temporis* of the ICTB, there are several statutory provisions of the ICT Act available that directly contradict the rules against non-retroactivity in international criminal law. The 1973 ICT Act's Section 3(1) says,

A Tribunal shall have the power to try and punish any individual or group of individuals, [or organization,] 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 the commencement of this Act, any of the crimes mentioned in sub-section [such as, crimes against humanity, genocide, crimes against peace, and war crimes].

The word "before" in the above Section 3(1) of the Act 1973 means the ICTB gets the power for prosecuting crimes perpetrated before 20 July 1973, the commencement day of the Act. As a result, it is *ex post facto* or retrospective law that violates the principle of "*nullum crimen sine lege*" (no crimes without the law) which indicates that a conduct has to be banned prior to any penal sanction undertaking. Due to the banning of the *ex post facto* laws in Bangladeshi Constitution under Article 35(1), to protect persons from

facing retroactive prosecution of criminal acts (Islam, 2012), it is highly tricky to conclude whether the Bangladesh Tribunal is adhering with the worldwide penal law standards enshrined in the international customary law, global and regional human rights treaties, in securing the fair trials rights of the accused. Furthermore, the constitutional amendment in validating this retrospective law also questionable, while the constitution already prohibited such law generally.

Therefore, this study firstly analyzes the importance of the ex post facto law's prohibition in customary international law. Secondly, the study highlights how the 1973 ICT Act applies to prosecute the Tribunal's defendants retrospectively by amending the constitution of Bangladesh? Thirdly, it examines the ex post facto legislation's application in the ICTB and the issue of constitutionality because rules on the prohibition of ex post facto law is one of the fundamental rights of every citizen that need to be safeguarded by every constitution of the civilized nations. Lastly, as the originality of this study it proves that ex post facto law's application in the ICTB is unconstitutional. Then, this research paper concludes by inferring that the government of Bangladesh needs to amend the constitution, to prohibit the ex post facto law's implementation through the Tribunal that will enhance the legal acceptability of the War Crimes Court, because the recent Criminal Court in question is operating under the Bangladeshi government.

2. Literature Review

It is relevant to examine the previous literature on the specific topic to understand the significance of the current research. One of the primitive lawful investigations attempted by Linton in 2010, instantly afterwards the creation of the Tribunal, scrutinized several legal inconsistencies of the 1973 ICT Act, consistent with the internal and universal criminal legislation standards (Linton, 2010). She mostly examined the ICTB under the international customary law conditions of crimes in 1971, the factual times when the crimes have been committed, and 2010, the time of prosecution of these offenses. She also parallels the Constitutional embargo imposed by Bangladesh authority against retroactive criminal prosecution to flinging "a spanner in the works (Linton, 2010)." Correspondingly, several other academics have done a series of legal investigations that desperately assess some legal provisions of the ICT Act 1973 under the global war crimes legislation. They analyzed numerous defects, i.e., non-compliance with universal standards, mainly the ICTB's material jurisdiction. Among these studies, although few analyses determined that the international offenses that have been tried and penalized under the 1973 ICT Act repetitively fall lack customary law's standards, some theoretical examinations even steered an in-depth examination through maintaining that the local legal mechanism formed by the 1973 ICT Act is an example of "complementarity went bad (Billah, 2021)." Nevertheless, the academic studies directed by Linton and other academics miss to examine why ex post facto law is permitted by the ICTB and whether such promulgation of the law is against global human rights law ideals, which is significant in international customary law in 1971 and 2010 and indispensable to secure the criminal justice to the accused of heinous offenses perpetrated in War of Independence in Bangladesh in 1971.

An additional study has been done by Robertson QC about the ICTB, concentrating on the hypothetical scrutiny of the present Court. Thus, dissimilar to Linton, his lawful examination focused on the prerequisite to prosecute crimes against humanity as the ex post facto offenses (requirements of a widespread and systematic attack against any civilian population) thru discussing many cases of the ICTB (Robertson, 2015). He also

rightly describes that Section 3(1) of the ICT Act ultimately has allowed the retrospective application of international criminal law in ICTB, which is an infirmity with Article 35(1) the Bangladesh Constitution (Robertson, 2015). However, his study also fails to analyze why the retrospective prosecution is permitted in the ICTB under Bangladesh Constitution and whether the validation of the ex post facto law is justified in any emergency under international human rights law.

In the very contemporary times, an in-depth legal analysis has been done by Islam on the Bangladesh Tribunal by describing to numerous jurisprudences of the ICTB that investigates legal attributes of crimes against humanity as the international criminalities. Mr. Islam measured the explanation of crimes against humanity in the 1973 ICT Act is parallel to the similar crimes recognized in the IMT, Nuremberg Charter 1945, through stating,

“There is a strong similarity between the constituent elements of crimes against humanity in the 1973 Act and the Nuremberg Charter, which may be attributable to the fact that there was no formal legal instrument containing the definitional elements of crimes against humanity at the time of the enactment of the 1973 Act other than the Nuremberg Charter (Islam, 2019).”

Additionally, his analysis investigates the latest advancement of treaty and customary laws' requirements of crimes against humanity, such as 'widespread' and 'systematic' attacks against any civilian population. However, no analysis was dedicated to figuring out why retrospective law is somehow justified by the ICTB by the constitutional amendment and whether such amendment poses any challenges to constitutionality. Another brief analysis endeavored by Billah in 2021 by explaining the details of international penal law standards in prosecuting genocide and crimes against humanity by the ICTB and the lawful obligation given to Bangladesh under international treaties and customary laws (Billah, 2021). Lastly, another detailed examination was carried out by Billah and others in 2023 by explaining customary law requirements of murder, extermination, and torture as the fundamental offenses of crimes against humanity. This study has proven that the ICTB has failed to apply customary law requirements of murder, torture, and extermination as the original wrongdoings of crimes against humanity (Billah et al, 2023). However, both of these studies omitted to discuss any legal reasoning in allowing ex post facto law to prosecute genocide and crimes against humanity by the ICTB, which is direct infringement of global human rights laws. Therefore, a clear research gap is obvious that needs to be overcome by the current research as it is dedicated to analyzing why ex post facto law's prohibition is important in customary and international human rights laws and suggesting 'a way forward' that needs to be implanted by the ICTB, in achieving criminal justice as it is one of the unique initiatives in the South Asia to end long-lasting impunity.

3. Methodology

The study uses a qualitative research approach by examining and discussing secondary data from ICTB cases and Statutes, several provisions from the constitution of Bangladesh, and numerous domestic cases relating to constitutional amendments. It also uses many provisions of international and regional human rights treaties worldwide. First of all, it outlines some ancient constitutional provisions of the world to know the origin of the ex post facto law's embargo that has been echoed in the modern constitution of the world. Then, it highlights several cases from the domestic courts in

Bangladesh that are significant to judge that rule on the prohibition of the retrospective law is one of the basic human rights of every citizen guaranteed by the constitution. Finally, it analyzes different provisions of the global and regional human rights instruments that are considered as the prevalent laws on the outlawing of *ex post facto* prosecution under international law.

4. An Overview on Banning the *Ex Post Facto* Prosecution of an Accused under Customary International Law

The well-versed Latin maxim *nullum crimen sine lege* (no crime without law) refers to any wrongful acts that compulsorily needs to be criminalized prior to any penal sanction comes in operation. As outlined above, the Bangladesh Tribunal (ICTB) is trying and penalizing the offenders of global crimes under an *ex post facto* law through a domestic court; therefore, this is foreseeable to inquire whether the *nullum crimen sine lege* code has been forbidden in the international and domestic laws. As the national legislation, this code had origins thru the Western laws from the 18th Century because it was firstly injected in Art. 8 of the 1789 French Declaration of the Rights of Man (Williams, 1961), via expressing, “[n]o one can be punished but under a law established and promulgated before the offense and legally applied.” The parallel code also reappeared in Art. 8 of the 1791 French Constitution and continued in the 1791 French Penal Code, with its consecutive commencing in Art. 1 of the 1871 German Penal Code and re-emergence into the Weimar Constitution (Popple, 1989). Then, the embargo against *ex post facto* rules was likewise inserted in Art. 1 of the USA Constitution (Edinger, 1995). Subsequently, this law has been fully recognized in Europe and America in early 20th Century (Billah, 2020). Afterwards, it has been followed by nearly all the civilized countries’ constitutions. Bangladesh too, injected the *nullum crimen* code in the Constitution.ⁱ Thus, it has been obvious that for the national legal principle, the *nullum crimen* code was documented from the 18th Century long before its classification as the global legal principle (Billah, 2020).

In the pre-UN period, the *nullum crimen* firstly developed by the 1919 Paris Peace Conference (Schabas, 2015). Subsequent to World War II, the non-retroactivity law of in penalizing wrongdoings was regarded as a matter of international law of custom applicable similarly for internal and international tribunals and courts (Gallant, 2009). This has been acknowledged thru the international law principles, which states, “[n]o one shall be accused or convicted of a criminal offense on account of any act or omission which did not constitute a criminal offense under national or international law to which he was subject ... when it was committed.”ⁱⁱ Since the IMT, Nuremberg the *nullum crimen* was accepted by many primary human rights resolutions universally as the non-derogable rules.ⁱⁱⁱ

Hence, the *ex post facto* law’s ban can be sometimes even measured to be the “peremptory norm” of international criminal legislation as currently enshrined in one of the cases of the Special Tribunal for Lebanon- an UN hybrid court (Prosecutor v. Salim Jamil Ayyash et al. 2011, para 76). Here are numerous justifications obvious behind the restraint of *ex post facto* law, such as protecting political power in penalizing any criminal behaviour, giving impartial notification by ensuring an opportunity to discover the forbidden demeanor, and intimidating the unpredictable lawful trial or confinement (Robinson, 2005). A backdated treatment of penal legislation is generally outlawed as it defends people against the unpredictable decision in the powerful regimes, unquestionably attributes to the growth of global penal law (Valentina, 2011). Therefore,

this is vibrant that thru international and national legal principles, the embargo against *ex post facto* hearing of any offenses is recognized as an international custom since sixteenth century, even occasionally it is measured as the “*jus cogens*” rule in international penal legislations.

5. The ICT Act 1973 as an *Ex Post Facto* Law and the First Constitutional Amendment

Soon after the ending of the Liberation War on 16 December, 1971, when Sheikh Mujibur Rahman (the first president of the newly independent Bangladesh) returned to Dhaka from West Pakistani prison, he expressed his desire to initiate the trial of war criminals through an international tribunal (McDermott,1973). There were several mandates on this noble initiative confirmed by the international stakeholders. The United Nations (UN) High Commissioner for Human Rights encouraged this idea, but there was not enough support to implement such a project for the newly independent state (McDermott,1973). The International Commission of Jurists also voiced concerns regarding establishing a national tribunal and instead recommended trials by an international tribunal under the authority of the UN by suggesting the nomination of adjudicators from neutral countries. One of the motives for this suggestion was due to the experience with the IMT Nuremberg, which was criticized for having judges exclusively from the victorious countries and it applied an *ex post facto* law (International Commission of Jurists, 1972). Then, an additional argument was advanced by the Commission favoring an international tribunal for trying the perpetrators of the 1971 event without having to pass a retroactive law (International Commission of Jurists, 1972) that is domestically prohibited in Bangladesh under Art. 35 of the Bangladesh Constitution.

Despite the recommendations from international stakeholders, the project of punishing the war criminals was approached at the domestic level; the reason was not revealed by the then Bangladeshi authority. Accordingly, the ICT Act 1973 was promulgated by the Bangladeshi Parliament. Before passing the ICT Act 1973, the ICT Bill was positioned for attention in the Parliament of Bangladesh on 17 July 1973, and followed by three days of discussion, the ICT Act was adopted on 20 July 1973 for trying and penalizing the culprits of international offenses perpetrated in Bangladesh’s “historic struggle for national liberation” so that the morality of humanity could be paid off. The 1973 ICT Act’s Section 3 (1)^{iv} has authorized in indicting crimes executed ‘before’ or ‘after’ the initiation of the Act-20th July 1973. In the 1973 Act, the term ‘before’ implies that the Statute preserves the authority to try crimes that were perpetrated beforehand the commencement day of the Act. Thus, the atrocious offenses committed in the pathway of the Bangladesh liberation conflict, that instigated on 25th March and finished on 16th December 1971, be able to be tried and punished in the current Statute. Then, the term ‘after’ basically comprises wrongdoings done after 1973 can also be brought in the Trial. However, thus far, the Tribunal (ICTB) is just indicting internationally known criminalities under an *ex post facto* law, which were committed in 1971 only. Though there is no clear indication to show that the ICT Act 1973 was enacted to prosecute the perpetrators of 1971 Liberation War only, the jurisprudence of all cases unanimously settled in ICTB spelt out that the ICT Act 1973 was aimed to try and punish those committed heinous crimes in violation of international humanitarian law in the territory of Bangladesh in 1971, during the war of liberation (See, Prosecutor v. Mir Quasem Ali, para. 87; Prosecutor v. Delowar Hossain Sayeedi, para. 53, and Prosecutor v. Abdul Quader Molla, para. 98). Therefore, it is evidenced that the ICT Act 1973 is an *ex post facto* law because it was empowered to

try and penalize offenses committed prior to its commencement, i.e., 20th July 1973, while the wrongful acts were perpetrated by the accused in 1971.

Since the ICT Act is regarded as retrospective legislation, to give immediate effect to the ICT Act 1973, several Constitutional Amendments took place in 1973. The 1972 Bangladeshi Constitution of 1972 was amended through the Constitution (First Amendment) Act, 1973 (Act XV of 1973), to guard the ICT Act 1973 against being challenged due to any inconsistencies with any other laws of Bangladesh. The amendment inserted a new sub-section (3) into Article 47 and precluded the possibility to declare any law for prosecuting and punishing the war criminals as unconstitutional. The intention behind this amendment was to overcome conflicts that arose concerning the retroactivity of the law, which was discussed broadly during the drafting process. Hitherto, Article 47(3) refers not only to retroactivity but also excludes challenges based on any constitutional ground. It states the following,

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

It is indispensable to indicate here that the constitution used the same words and phrases used by Section 3(1) of the 1973 ICT Act, as outlined above.

The amendment also inserted Art. 47A into the Constitution, which restricts certain basic rights of the defendant in the ICT Act, among them the right on the prohibition of retrospective trial. Art. 47A of the Constitution reads,

(1) The rights guaranteed under Article 31, clauses (1) and (3) of Article 35 and Article 44 shall not apply to any person to whom a law specified in clause (3) of Article 47 applies.

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

Article 31 of the Constitution spells out the equality before the law, such as,

To enjoy the protection of the law, and to be treated in accordance with the law, and only in accordance with the law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with the law.

Article 35(1) and (3) of the Constitution accordingly reads,

(1) No person shall be convicted of any offense except for violation of a law in force at the time of the commission of the act charged as an offense, nor be subjected to a penalty greater than, or different from, that which might have been inflicted under the law in force at the time of the commission of the offense. (3) Every person accused of a criminal offense

shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law.

Lastly, Article 44 of the Constitution says,

(1) The right to move the High Court Division, in accordance with clause (1) of Article 102, for the enforcement of the rights conferred by this Part, is guaranteed. (2) Without prejudice to the powers of the High Court Division under Article 102, Parliament may by law empower any other court, within the local limits of its jurisdiction, to exercise all or any of those powers.

From the above constitutional amendments, it has been clarified that the Bangladesh Constitution directly backs the ICT Act throughout its First Amendment. At the same time, Article 35 of the constitution bars the use of any *ex post facto* laws. The same amendment made to the constitution also validates the unequal treatment of the accused of the ICTB, which is in violation of Art. 31 of the Bangladesh Constitution. Thus, it is questionable whether the current accused of the ICTB, who are lawful citizens of Bangladesh can be treated as the second-class citizen of the country under the same constitution, while it is the supreme law of the country. Then, it is also subject to analyze whether such constitutional amendment is itself poses a serious question on the constitutionality of Bangladesh Constitution. These issues are highlighted in the following discussion.

6. ICTB'S *Ex Post Facto* Law and the Issue of Constitutionality

As outlined above, the ICTB is operating with specific protection given by the constitution of Bangladesh in violating some constitutional rights of the accused. Hence, one of the leading questions raised by the critiques of ICTB is whether the Bangladesh Tribunal is maintaining the principle of constitutionality. The Bangladesh Constitution contains a big hole in the issue of retroactive criminal law in the domestic system. Hence, there is a great argument exists on whether the 1973 ICT Act remains unconstitutional because it already eliminated some basic constitutional and human rights of the Bangladeshi population who had been proven guilty thru the 1973 ICT Act. The modest understanding of the exceeding constitutional provisions advocates that once someone is accused of the ICT Act 1973, would not be capable of challenging the legitimacy of the Legislation even it infringes one of the essential rights safeguarded by the Bangladeshi Constitution, which is *nullum crimen sine lege* (no crime without law). To date, none of the accused in the ICTB has been able in challenging the temporal jurisdiction of the ICTB on constitutional grounds in infringement of rights on *nullum crimen sine lege* and appealing this serious remedy is banned. However, the amendments to the Constitution that have attempted to prevent the ICT Act's challenges are not sacrosanct. Therefore, it is relevant here to analyze whether the *ex post facto* law's application in the ICTB can be challenged on the ground of unconstitutionality, as one of the accused's fundamental rights, which is infringed through the constitutional amendment in Bangladesh. Due to the lack of any provisions either in the Bangladeshi Constitution and the ICT Act 1973, some judicial interpretations of the Bangladesh court are necessary here to outline whether the judiciary sometimes challenges the Constitutional Amendments in Bangladesh or not.

One of the landmark decisions was forwarded by the Bangladesh Supreme Court in the case of *Anwar* on the validity of the 'Eighth Amendment' of the Constitution (Anwar

Hossain Chowdhury and others v. Bangladesh, p.165). The eighth Constitutional Amendment was declared partly unconstitutional.^v The Appellate Division (AD) was dealt with two main questions: whether constitutional amendments via Art. 142 of the Constitution allow Parliament to modify the Constitution's fundamental structure and whether the 'Eighth Amendment' modified the Constitution's fundamental framework. The Division decided that amendments do not allow the destruction of a fundamental pillar of the Constitution (Anwar Hossain Chowdhury and others v. Bangladesh, p. 253). It stated that "the term amendment implies such an addition or change within the lines of the original instrument as will affect an improvement or better carry out the purpose for which it was framed (Anwar Hossain Chowdhury and others v. Bangladesh, p. 214)." Also, it said that "an amendment is aimed at improvement or at making the Constitution more effective or meaningful but not at eliminating or abrogating it (Anwar Hossain Chowdhury and others v. Bangladesh, p. 252)." Concerning the second issue, the AD found that the "High Court Division with plenary judicial power over the entire republic is a basic structure of the Constitution and the amendment was unconstitutional because it dissolved this structure (Anwar Hossain Chowdhury and others v. Bangladesh, p. 270)."

Nevertheless, which principles belong to the fundamental framework of the Constitution has not been clearly defined. The AD determined the fundamental framework of the 1972 Bangladesh Constitution through its Preamble, which says,

"It should be a fundamental aim of the State to realize through the democratic process a socialist society, free from exploitation—a society in which the rule law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens."

Furthermore, AD outlines that the Constitution's basic features comprise the people's sovereignty, the Constitution's supremacy, republican government, democracy, separation of powers, unitary state, freedom of the judiciary, the rule of law, and basic human rights (Anwar Hossain Chowdhury and others v. Bangladesh, pp. 230-232). A later judgment also decided on the supremacy of law and segregation of powers as main features of the Constitution (*Sultana Kamal v. Bangladesh*, p.141).

Another landmark decision on an Amendment affecting the fundamental framework of the Constitution is *Bangladesh Italian Marble Works* case (Bangladesh Italian Marble Works Ltd. v. Bangladesh, p.70). This case is all about the Fifth Constitutional amendment.^{vi} The High Court Division dealt with the legality of the Fifth Constitutional Amendment. Though Parliament had approved all 'the Fifth Amendments' through proclamations with a two-thirds majority, the High Court Division found this amendment to be *ultra vires* of the Constitution because it infringes basic constitutional features, such as judicial review and judicial independence (Bangladesh Italian Marble Works Ltd. v. Bangladesh, pp. 252, 283). The AD upheld the decision and confirmed that the amendment contravened the essential elements of the Constitution. For that reason, Parliament could not make such an amendment even though the amendment was legally permissible (Bangladesh Italian Marble Works Ltd. v. Bangladesh, p. 298).

In applying the judgments of the Eighth and Fifth Amendments to First Amendment i.e., Article 47(3) and 47A as outlined above, it is inferred that the 'First Amendment' seems problematic, especially if one contemplates fundamental rights to be a part of the

essential elements of the Constitution. In the case of *Anwar Hossain*, Judge Rahman also stated that,

[I]f any amendment causes any serious impairment of the powers and the functions of the Supreme Court the makers of the Constitution devised as the kingpin for securing the rule of law to all citizens, then the validity of such an amendment will be examined on the touchstone of the Preamble (*Anwar Hossain Chowdhury and others v. Bangladesh*, p. 260).

So, it is already indicated here that the above constitutional amendment is not valid and subject to be challenged on the ground of protecting the fundamental human rights of the people, as cherished in the preamble of the constitution (*Anwar Hossain Chowdhury and others v. Bangladesh*, pp. 230-232). One of the basic human rights is to ban the retrospective law's application as per Article 35 of the Constitution.

7. The Way Forward: the ICTB's Application to the *Ex Post Facto* Law is Unconstitutional

As analyzed above, it has been clarified that though the invocation of the *ex post facto* law is banned in international customary law and majority constitutions of the civilized nations, the ICTB is applying and prosecuting all of the accused currently under the retrospective law, which is inconformity with domestic and international laws. Therefore, this study proves that the 'First Amendment' made to the constitution of Bangladesh was labelled as unconstitutional due to the following reasons-

Firstly, international human rights treaties^{vii} expressly prohibit the retrospective criminalization and prosecution through any criminal proceeding. Among them the International Covenant on Civil and Political Rights (ICCPR) 1966 is considered as the UN human rights legislation which is binding and needs to be adhered to all signatory states. Currently more than 173 States have been ratified the ICCPR Statute.^{viii} This widespread practice of the civilized nation-states is one of the best examples of customary international legislation to prohibit the *ex post facto* law in domestic legal systems. Since Bangladesh also ratified the ICCPR Statute on 6 September 2000 (Billah, 2020), it has failed to uphold the spirit of the UN human rights treaty, by permitting the *ex post facto* law's implementation through the ICTB. Furthermore, many regional human rights treaties^{ix} also echoes in prohibiting the *ex post facto* law's implementation with the ICCPR's prohibition. Hence, the First Amendment made to the constitution in 1973 by inserting Article 47(3) and Article 47A are incredibly challenging and was against essence of international human rights and customary laws. As a result, the above constitutional amendment is without doubt considered unconstitutional.

Consequently, Article 4(1) of the ICCPR regulates that, in case of an emergency that impends a nation's life and the existence of which is officially proclaimed, derogations from some obligations assumed under the ICCPR may be made. Nevertheless, even in an emergency case, Article 4(2) of the ICCPR hampers the derogation from several rights, together with the rule of '*nullum crimen sine lege*' enshrined in Article 15 of the ICCPR. Moreover, it is apparent that there was no case of emergency in 1973 when the ICT Act was enacted (Linton, 2010), and neither is there an emergency today when the ICT Act 1973 has been reactivated in 2010. Therefore, the constitutional restriction of rights is, therefore, inconsistent even with the exceptional cases enshrined in the Article 4(2) of the ICCPR and regarded as unconstitutional (Linton, 2010).

Secondly, by virtue of Eighth and Fifth Amendments to the Bangladesh Constitution, it is incidental that the 'First Amendment' seems seriously problematic, especially if one anticipates fundamental rights to be a part of the fundamental features of the Constitution as per the preamble of the Bangladesh Constitution 1972. Though the Parliament of Bangladesh had approved the 'First Amendment' in the same way it approved the 'Fifth Amendments' and 'Eighth Amendments' through proclamations with a two-thirds majority, the High Court Division found the later amendments were *ultra vires* to the Constitution because it infringes basic constitutional features (Bangladesh Italian Marble Works Ltd. v. Bangladesh, pp. 252, 283). One of the basic features of the constitution is the prohibition of *ex post facto* rule. So, the AD upheld the decision and confirmed that the Parliament could not make such an amendment that contravened the essential elements of the constitution, even though the amendment was legally permissible (Bangladesh Italian Marble Works Ltd. v. Bangladesh, p. 298). Thus, the 'First Amendment' is labelled as unconstitutional.

Then, from the perspective of domestic application of international law, the First Amendment is considered, the constitutional limits raise doubts regarding Bangladesh's acquiescence with the ICCPR (Linton, 2010). It emphasizes that Bangladesh, as a signatory state to the ICCPR, failed to ensure that the ICT Act needs to be adhered to the principle of *nullem crimen sine lege* (Linton, 2010). As a result, it is sufficiently proved with the evidences of domestic and international human rights laws that the ICTB is protected under such a constitutional amendment made to the Bangladesh legislative Assembly which was itself identified as illegal and unconstitutional, as it nowadays does not sufficiently reflect the universal human rights law and the national legal scheme of Bangladesh.

8. Conclusion

To conclude, the establishment of the Tribunal has facilitated Bangladesh to implement legal remedies towards the victims of the 1971 conflict to end past impunity that has permeated politics in the country since the culmination of the Conflict. However, the above constitutional limitations put by the government to validate the *ex post facto* law's adherence in prosecuting the ICTB's accused adequately regarded Bangladesh Constitution void as discussed in the numerous domestic cases and enshrined in the ICCPR Article 4 (2) & 15. At the same time, the ICTB's legal competency also has been questioned because it was aimed to provide legal remedies towards the victims of the 1971 conflict to end past impunity. As a result, it will be reiterating the claim that the ICTB is a 'victor's justice' type of criminal law mechanism that has no lawful purpose to bring the real culprit before justice, except judicial killing of political opponents in Bangladesh (Billah et al. 2022).

Furthermore, it is already proved that the accused of the ICTB are considered as the second-class citizens, whose fundamental rights guaranteed by the constitution are confiscated by the 'First Amendment' to the Bangladesh Constitution. The accused in the ICTB can invoke '*nullum crimen sine lege*', on the ground of unconstitutionality, to apply the international human rights and criminal law principle in proving the guilt of heinous crimes that are being tried retroactively against them. Therefore, government of Bangladesh needs to amend the constitution, to prohibit the *ex post facto* law's implementation through the ICTB that will enhance the lawful standing of the Court, because the current Tribunal is operating under the Bangladesh government (Billah, 2023). In case of any failure, the constitution of Bangladesh certainly will lose its

constitutional value in compromising the safeguarding of fundamental human rights as enshrined by its preamble.

Acknowledgement

Part of this article was extracted from a doctoral thesis submitted to Nagoya University, Nagoya, Japan.

Funding

This study received no funding.

Conflict of Interest

The authors reported no conflicts of interest for this work and declare that there is no potential conflict of interest with respect to the research, authorship, or publication of this article.

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ⁱ Article 35 (1) of the Bangladesh Constitution 1972 says, “[n]o person shall be convicted of any offense except for violation of a law in force at the time of the commission of the act charged as an offense, nor be subjected to a penalty greater than, or different from, that which might have been inflicted under the law in force at the time of the commission of the offense.”

ⁱⁱ Additional Protocol I to the 1949 Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts (1977), 1125 UNTS 3, Art. 75(4)(c). <https://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17512-English.pdf>.

ⁱⁱⁱ See, for example, International Covenant on Civil and Political Rights (1976) 999 UNTS 171, Art. 15; European Convention on Human Rights, (1955) 213 UNTS 221, Art. 7; American Convention on Human Rights (1979), 1144 UNTS 123, Art. 9. The rule also recognized in: Universal Declaration of Human Rights, GA Res. 217A (III), Art. 11(2); African Charter on Human and Peoples’ Rights, OAU Doc. CAB/LEG/67/3 Rev. 5, Art. 7(2); Geneva Convention Relative to the Treatment of Prisoners of War, (1950) 75 UNTS 135, Art. 99; Additional Protocol I to the 1949 Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts (1977), 1125 UNTS 3, Art. 75(4)(c); Additional Protocol II to the 1949 Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts (1977), 1125 UNTS 609, Art. 6(c).

^{iv} “[a] Tribunal shall have the power to try and punish any individual or group of individuals ... who commits or has committed [crimes against humanity, genocide, crimes against peace, and war crimes], in the territory of Bangladesh, whether before or after the commencement of this Act.”

^v The 8th Amendment modified Article 100 of the Constitution and allowed for the establishment of permanent High Court Division Benches outside the capital. It also gave the president the power to determine the territorial jurisdiction of the benches by notice. The president could thus restrain the High Court’s territorial jurisdiction in the permanent seat. The Amendment was challenged for being unconstitutional because it modified the basic structure of the Constitution by abrogating the High Court Division with plenary judicial power over the entire republic. See Mahmudul Islam, *Constitutional Law of Bangladesh*, 3rd Ed., (Dhaka: Mullik Borthers, 2002), 525.

^{vi} Paragraph 18 into the fourth schedule of the constitution and ratified all martial law proclamations that amended the constitution and all the actions taken by the martial law authorities. It also declared all acts and amendments valid and excluded the possibility of challenging them in court. It is obvious that constitutional amendments through martial law proclamations are invalid because they do not follow the procedure determined in the constitution for its amendment. See, “Liton, Shakhawat. (2010, 10 November.) The depth of 5th amendment. *The Daily Star*. <https://www.thedailystar.net/news-detail-147758>.

^{vii} Art. 11(2) of the Universal Declaration of Human Rights 1948 says “[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty

be imposed than the one that was applicable at the time the penal offence was committed;" Art. 15 of the International Covenant on Civil and Political Rights 1966 says "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."

^{viii} See https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en.

^{ix} See, at the European Convention on Human Rights, (1955) 213 UNTS 221, Art. 7; American Convention on Human Rights (1979), 1144 UNTS 123, Art. 9. The rule also recognized in: Universal Declaration of Human Rights, GA Res. 217A (III), Art. 11(2); African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 Rev. 5, Art. 7(2); Geneva Convention Relative to the Treatment of Prisoners of War, (1950) 75 UNTS 135, Art. 99; Additional Protocol I to the 1949 Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts (1977), 1125 UNTS 3, Art. 75(4)(c); Additional Protocol II to the 1949 Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts (1977), 1125 UNTS 609, Art. 6(c).