Let there be Light: Commentary on IBA *Fatwas*

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Introduction

Fatwas, in general terms, are understood as formal legal opinions issued by a recognized (religious) legal authority. In late 2009, the UK Parliament Human Rights Group (PHRG) made a request to the War Crimes Committee of the International Bar Association (IBA) to conduct a 'legislative review' of the *International Crimes (Tribunals) Act*, 1973 (as amended in 2009) of Bangladesh. In essence, the UK PHRG requested the IBA to provide a *legal opinion* as to whether the 1973 Act of Bangladesh is consistent with current international criminal standards. Following the request, IBA has religiously performed the requested task and produced a document containing the preliminary observations, detailed opinions and the relevant recommendations on the 1973 Act.[2] It is, however, not known as to what prompted the UK PHRG in the first place to select that one particular legislation of Bangladesh for such 'legislative review'.

It is also not known as to why only IBA, being an association of professional lawyers, was selected and requested by the UK PHRG to perform the above task. International law is not only practised and propagated by the international professional lawyers but also by the international academic scholars. There are other lawyers' bodies too; including the famous English Bar in the UK. UK PHRG could have balanced its position by requesting *legal opinion* from some of these renowned legal professionals and international academic scholars. Therefore, there remains enough scope to question the sincerity of the UK PHRG in dealing with the 1973 Act.

The first conclusion that IBA made in its *legal opinion* is that the 1973 legislation, together with the 2009 amending text, provides a system '*which is broadly compatible with current international standards*.'[3] IBA, however, goes on stating that '*there are some areas which now appear out of date, having fallen behind the more recent practice in international tribunals*.'[4] In its detailed opinion IBA thus has tried to point out certain such *out of date* provisions in the 1973 Act and recommended necessary amendments to the 1973 Act. The IBA recommendations are 17 in number.

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[2] 'Consistency of Bangladesh's International Crimes Tribunals Act 1973 with International Standards', *International Bar Association, War Crime Committee Legal Opinion*, 29 December 2009. (Henceforth, IBA Legal Opinion, 29 December 2009).

[3] 'Conclusions', IBA Legal Opinion, 29 December 2009, at paragraph (i).

[4] *Ibid*.

This paper argues that IBA recommendations are self-contradictory, unnecessary, and suffers from conceptual fallacy. Therefore, it concludes that there is no need to amend the 1973 Act as recommended by IBA. The paper further argues that the 1973 Act need not accommodate in its text each and every detailed issues and procedure available within the international legal framework. The Tribunal that the 1973 Act establishes for the trial of international crimes, being independent in exercising its judicial functions, has been empowered under the 1973 Act to promulgate its own *rules of procedure*.

The following part of this paper provides an in-depth critical analysis of each of the 17 recommendations provided by the IBA. The analysis will also establish that the IBA recommendations are self-contradictory, unnecessary, and suffer from conceptual fallacy and therefore, should be rejected.

Recommendation One

The definition for Crimes against Humanity should be amended to read:

> '*Crimes against Humanity means any of the following acts when committed as part of a widespread or systematic attack, with knowledge of the attack: murder, extermination, enslavement, deportation, imprisonment, abduction, confinement, torture, rape or other inhumane acts committed against any civilian population or persecutions on political, racial, ethnic or religious grounds, whether or not in violation of the domestic law of the country where perpetrated;*'

Comment:

The 1973 Act defines 'Crime against Humanity' in the following manner:

> *'Crimes against Humanity: namely, murder, extermination, enslavement, deportation, imprisonment, abduction, confinement, torture, rape or other inhumane acts committed against any civilian population or persecutions on political, racial, ethnic or religious grounds, whether or not in violation of the domestic law of the country where perpetrated;'*[5]

IBA has expressed its concern by the degree to which the above definition of 'Crimes against Humanity' in the 1973 Act differs from international standards.[6] According to IBA, the *Statute of the International Criminal Tribunal for the Former Yugoslavia,* 1993, the *Statute of the International Tribunal for Rwanda,* 1994 and the *Rome Statute of the International Criminal Court*, 1998 - all provide a consistent definition.[7]

It is unfortunate that a professional organization like IBA has misstated the provisions of international law. As a matter of fact, there is no consistency among the *Statute of the*

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[5] Section 3(2)(a), *International Crimes (Tribunals) Act*, 1973 (as amended in 2009).
[6] Paragraph 7, IBA Opinion, 29 December 2009.
[7] *Id*.

International Criminal Tribunal for the Former Yugoslavia, 1993, the *Statute of the International Tribunal for Rwanda,* 1994 and the *Rome Statute of the International Criminal Court*, 1998 regarding the definition of 'Crimes against Humanity'. Therefore, it follows that there does not exist any internationally recognized standard for the definition of 'Crimes against Humanity'. If it is so, then there is no need to amend the 1973 Act definition of 'Crimes against Humanity' in the name of matching it up to any *non-existent* international standard.

Article 5 of the *Statute of the International Criminal Tribunal for the Former Yugoslavia,* 1993 defines the 'Crimes against Humanity' as:

> *'Crimes against Humanity: The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.'* [8]

From the above definition it is clear that the *Statute of the International Criminal Tribunal for the Former Yugoslavia,* 1993 neither requires the presence of *Widespread and Systematic Attack* nor the presence of *knowledge* thereto as conditions for establishing the liability for 'Crimes against Humanity'.[9]

Similarly, Article 3 of the *Statute of the International Tribunal for Rwanda,* 1994 defines the 'Crimes against Humanity' as:

> *'Crimes against Humanity: The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape; (h) Persecutions on political, racial and religious grounds; (i) Other inhumane acts.'*[10]

From the above definition it is again clear that according to the *Statute of the International Tribunal for Rwanda,* 1994, there is no need to prove the existence of *knowledge* regarding the attack to establish the liability for 'Crimes against Humanity'.[11]

Therefore, it is clear that there does not exist any consistent definition of 'Crimes against Humanity' between the *Statute of the International Criminal Tribunal for the Former Yugoslavia,* 1993 and the *Statute of the International Tribunal for Rwanda,* 1994. Finally, the definition of 'Crimes against Humanity' under the *Rome Statute of the International Criminal Court*, 1998 differs from both *Statute of the International Criminal Tribunal for the Former Yugoslavia,* 1993 and the *Statute of the International Tribunal for Rwanda,* 1994. Article 7 of the *Rome Statute of the International Criminal Court*, 1998 defines the 'Crimes against Humanity' as:

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[8] Article 5, *Statute of the International Criminal Tribunal for the Former Yugoslavia, 1993*.
[9] *Id*.
[10] Article 3, *Statute of the International Criminal Tribunal for Rwanda, 1994.*
[11] *Id*.

> *'… "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.'*[12]

From the above discussion it is very clear that there is no actual consistency in the definition of 'Crimes against Humanity' as per the *Statute of the International Criminal Tribunal for the Former Yugoslavia,* 1993, the *Statute of the International Tribunal for Rwanda,* 1994 and the *Rome Statute of the International Criminal Court*, 1998. Therefore, the claim made by the IBA as to the existence of a consistent international standard for the definition of 'Crimes against Humanity' is totally baseless. It is nevertheless conceived that the various definitions of 'Crimes against Humanity' under the *Statute of the International Criminal Tribunal for the Former Yugoslavia,* 1993, the *Statute of the International Tribunal for Rwanda,* 1994 and the *Rome Statute of the International Criminal Court*, 1998, do contain a common spirit. In this regard it is claimed that the similar spirit can also be found in the definition of 'Crimes against Humanity' under the 1973 Act.

As per IBA, the definition in the 1973 Act misses an important element of the more modern definition, namely, the *widespread or systematic nature* of the attacks. IBA further claims that the offending acts must also be committed *with knowledge* of the widespread or systematic attack.[13]

It may be mentioned that the purpose of evaluating the 'Crimes against Humanity' as part of a *widespread and systematic attack* is to eliminate the possibility of the same being committed as an isolated or sporadic event. If the specific offences of 'Crimes against Humanity' which were committed during 1971 are tried under 1973 Act, it is obvious that they were committed in the context of the 1971 war. Therefore, the specific offences were very much a part of a *widespread and systematic attack* of the ongoing war. Therefore, it is unnecessary to separately prove that the 'Crimes against Humanity' was committed as a part of a *widespread and systematic attack*. Moreover, it has already been mentioned above that there are a number of international documents where 'Crimes against Humanity' does not need the proof of *widespread and systematic attack*.[14]

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[12] Article 7, *Rome Statute of the International Criminal Court*, 1998.

[13] Paragraph 9, IBA Opinion, 29 December 2009.

[14] Article 5, *Statute of the International Criminal Tribunal for the Former Yugoslavia, 1993*; Article 3, *Statute of the International Criminal Tribunal for Rwanda, 1994.*

As far as the issue of proving the existence of *Knowledge* is concerned, it is argued that like the 1973 Act of Bangladesh, there is no need to prove such element to establish the 'Crimes against Humanity' under the *Statute of the International Criminal Tribunal for the Former Yugoslavia*, 1993, the *Statute of the International Tribunal for Rwanda*, 1974 or the *Statute of the Special Court for Sierra Leone, 2002*.[15]

Therefore, Recommendation One of the IBA with regard to amendment of the definition of 'Crimes against Humanity' seems illogical and not based upon sound legal argument.

Recommendation Two

Section 4 of the 1973 Act should be amended to include the words 'knew or should have known' in the definition of superior responsibility, which would bring the section in line with the more recent statutes.

Comment:

Section 4(2) of the 1973 Act states:

> *'Any commander or superior officer … who fails or omits to discharge his duty to maintain discipline, or fails to control or supervise the actions of the persons under his command or his subordinates, whereby such persons or subordinates or any of them commit any such crimes, or who fails to take necessary measures to prevent the commission of such crimes, is guilty of such crimes.'*[16]

IBA argues that the above definition of *superior responsibility* is not entirely consistent with the definition adopted in more recent statutes.[17] According to IBA, the above definition does not contain any reference to the 'mental element' of *superior responsibility* as is found in the definition of superior responsibility under Article 28 of the *Rome Statute of the International Criminal Court*, 1998.[18] Hence, IBA's Recommendation Two directs to amend section 4 of the 1973 Act to include the words *knew or should have known* in the definition of *superior responsibility*.

It is conceded that to establish *superior responsibility* under Article 28 of the *Rome Statute of the International Criminal Court*, 1998, one of the important elements, *inter alia*, is to prove that the accused superior either *knew* or *should have known* that the subordinates were committing or about to commit relevant offences.[19] It is also conceded that no such element is made a requirement to establish *superior responsibility* under section 4(2) of the 1973 Act:

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[15] Article 5, *Statute of the International Criminal Tribunal for the Former Yugoslavia, 1993*; Article 3, *Statute of the International Tribunal for Rwanda, 1994*; Article 2, *Statute of the Special Court for Sierra Leone, 2002*.

[16] Section 4(2), *International Crimes (Tribunals) Act*, 1973 (as amended in 2009).

[17] Paragraph 10, IBA Opinion, 29 December 2009.

[18] *Ibid*., Paragraph 15.

[19] Article 28, *Rome Statute of the International Criminal Court*, 1998 reads as: '*A military commander or person … shall be criminally responsible for crimes … committed by forces under his or her effective command and control, or effective authority*

> *'Any commander or superior officer … who fails or omits to discharge his duty to maintain discipline, or fails to control or supervise the actions of the persons under his command or his subordinates, whereby such persons or subordinates or any of them commit any such crimes, or who fails to take necessary measures to prevent the commission of such crimes, is guilty of such crimes.'*[20]

However, it is stated that the extent of *superior responsibility* is wider under the 1973 Act than that of under Article 28 of the *Rome Statute of the International Criminal Court*, 1998. In essence, to establish *superior responsibility* under the 1973 Act the prosecution need not prove that the accused superior either had any 'actual knowledge' (*knew*) or 'constructive knowledge' (*should have known*) about commission of the subordinate's crime. In other words, under the 1973 Act, a superior is always responsible for the activities of his subordinates, whether he had any kind of knowledge or not. On the contrary, under the *Rome Statute of the International Criminal Court*, 1998 a superior is made liable for his subordinate's crimes, only when he had either actual or constructive knowledge of the same.

It is argued that such difference in the *state of knowledge* would not prejudice any trial under the 1973 Act. Necessary protection is given to the accused person (including superiors) regarding his extent of involvement in an offence. In this regard section 20 of the 1973 Act can be referred:

> '*(1) The Judgment of a Tribunal as to the guilt or the innocence of any accused person shall give the reasons on which it is based; … (2) Upon conviction of an accused person, the Tribunal shall award sentence of death or such other punishment proportionate to the gravity of the crime as appears to the Tribunal to be just and proper.*'[21]

Therefore, IBA's Recommendation Two with regard to the amendment of section 4 of the 1973 Act to include the words 'knew or should have known' in the definition of superior responsibility is not necessary and can be safely avoided.

Recommendation Three

The Tribunal's jurisdiction should be extended to cover criminal responsibility for civilian superiors, not just military commanders.

Comment:

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and control … as a result of his or her failure to exercise control properly over such forces, where: (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.'

[20] Section 4(2), *International Crimes (Tribunals) Act*, 1973 (as amended in 2009).

[21] *Ibid.*, Section 20.

IBA's recommendation is unnecessary as the recommended provision has already been included in the 1973 Act by 2009 Amendment Act.[22] IBA itself concedes that the 2009 Amendment Act, by its amendments to section 3 of the 1973 Act, extends the tribunal's jurisdiction to civilian as well as military commanders.[23] As per amended section 3, tribunal now has jurisdiction to try and punish any non-military person, *whether superior or subordinate*, who has direct or indirect involvement with the relevant crimes.[24] In other words, the tribunal now has jurisdiction to try any accused non-military person, including a civilian superior. There can not be any ambiguity regarding this. Therefore, IBA recommendation becomes redundant.

IBA further argues that section 4 of the 1973 Act only provides for *military commanders and superiors* to be held responsible for criminal conduct of subordinates; however, it does not provide for civilian superiors to be held similarly accountable.[25] It is stated that section 4 of the 1973 Act generally asserts the liability for crimes. Very specifically, at section 4(2) it is stated:

> '***Liability for Crimes:*** *Any commander or superior officer who orders, permits, acquiesces or participates in the commission of any of the crimes specified in section 3 or is connected with any plans and activities involving the commission of such crimes or who fails or omits to discharge his duty to maintain discipline, or to control or supervise the actions of the persons under his command or his subordinates, whereby such persons or subordinates or any of them commit any such crimes, or who fails to take necessary measures to prevent the commission of such crimes, is guilty of such crimes.*'[26]

It is stated that the above section uses the terms *commander or superior officer* in general. It does not specify whether the said section would only refer to military commanders and/or military superiors. In other words, the said section does not preclude the liability of the civilian superiors. If the amended section 3 and the section 4 of the 1973 Act are read together it would affirm that liability for crimes under section 4 would also entail the liability of the civilian superior.

It is further argued that the texts of the 1973 Act under section 4 should be interpreted literally. In plain English literature, *commander* means one who can command and *superior officer* means senior officers. Both these posts can be found in the military as well as non-military or civilian strata and as such, criminal liability under section 4 can be applicable for both military and civilian superiors.

Therefore, IBA Recommendation Three of further amendment to the 1973 Act to include the responsibility of the civilian superiors is completely unnecessary.

Recommendation Four

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[22] *Ibid.*, Section 3.
[23] Paragraph 14, IBA Opinion, 29 December 2009.
[24] Section 3, *International Crimes (Tribunal) Amendments Act*, 2009.
[25] *Id*.
[26] Section 4(2), *International Crimes (Tribunals) Act*, 1973 (as amended in 2009).

Subsection 6(5) of the 1973 Act should be amended so that if any one of the Tribunal members is unable to attend a hearing, the trial is adjourned.

Comment:

Section 6(5) of the 1973 Act states that:

> *'If, in the course of a trial, any one of the members of a tribunal is, for any reason, unable to attend any sitting thereof, the trial may continue before the other members.'*[27]

IBA argues that the abovementioned legal provision is contrary to international practice.[28] IBA's concern is that if a trial continued without all Tribunal members present, 'it could affect the authority and trustworthiness of the process.'[29] IBA therefore recommends that section 6(5) of the 1973 Act should be amended so that if any one of the Tribunal members is unable to attend a hearing, the trial should be adjourned.[30]

It is argued that IBA has failed to conceive the appropriate legal interpretation of section 6(5) of the 1973 Act. Section 6(5) establishes that in the absence of a tribunal member, *the trial may continue before the other members.* It is to be noted that the language of the said legal provision only suggests a prescriptive, as opposed to a peremptory, norm of action. The text does not suggest that in absence of one of its members, the Tribunal must continue the hearing before the other members. Rather, by using the word, *may continue*, the Tribunal is actually given a discretion in a particular situation whether or not to continue with the hearing.

It is argued that the inherent purpose of the section 6(5) is to keep the trial process of the Tribunal free from unnecessary interruptions and delay. Such unnecessary interruptions or delay might defeat the purpose of the law. There is also a statutory direction to the Tribunal to follow an expeditious hearing process:

> *'… Tribunal shall – (a) confine the trial to an expeditions hearing of the issues raised by the charges; (b) take measures to prevent any action which may cause unreasonable delay, and rule out irrelevant issues and statements.'*[31]

Therefore, the Tribunal is under a statutory compulsion to follow an expeditious hearing process. However, it does not leave out the possibility of the Tribunal adhering to necessary adjournments in appropriate cases. For example, the Tribunal may decide to adjourn a hearing process in case of its member's absence if it is for the benefit of justice. In this regard there is a clear direction given at section 13 of the 1973 Act:

> *'No trial before a Tribunal shall be adjourned for any purpose unless the Tribunal is of the Opinion that the adjournment is in the interest of justice.'*[32]

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[27] *Ibid.*, Section 6(5).
[28] Paragraph 18, IBA Opinion, 29 December 2009.
[29] *Id.*
[30] *Id.*
[31] Section 11(3), *International Crimes (Tribunals) Act*, 1973 (as amended in 2009).

Therefore, it is argued that section 6(5) of the 1973 Act does not lead the Tribunal, in any way, to compromise on the issues of *fairness* and *impartiality* as claimed by the IBA.[33] Further, if required, the Tribunal is empowered to promulgate necessary rules to clarify its procedural details.[34]

Hence, IBA recommendation is ill conceived and based upon wrong interpretation of law.

Recommendation Five

A Provision should be added allowing for challenges to the constitution of the Tribunal or appointment of its Chairman or members based on impartiality. A different chamber (preferably a Court of Appeal) should adjudicate challenges to Tribunal members within a limited and fixed timeframe to ensure a speedy recommencement of the trial itself.

Comment:

Section 6(8) of the 1973 Act states:

> '*Neither the constitution of a Tribunal nor the appointments of its Chairman or members shall be challenged by the prosecution or by the accused persons or their counsel*.'[35]

IBA argues that the above section is problematic because of its potential to compromise the fairness of the Tribunal.[36] It further argues that 'the accused must have the right to challenge either the constitution of the Tribunal or the appointment of certain of its members if possible prejudice arises during trial'.[37] Therefore, IBA recommends that a different chamber should be established to adjudicate the challenges to tribunal members.

It is stated that IBA recommendation is self-contradictory. IBA, on one side shows utmost concern for maintaining international standard; on the other, miserably fails to recognize that there has actually been no such international practice to allow the parties in trial to challenge the constitution of the tribunal. Moreover, similar legal provisions like that of 1973 Act can be found in the Nuremberg Charter.[38] Further, neither the *Charter of the International Military Tribunal for the Far East*, 1946, nor the *Statute of the International Criminal Tribunal for the Former Yugoslavia, 1993* or the *Statute of the International Criminal Tribunal for Rwanda, 1994* contains any provision whereby parties in trial are provided with a right to challenge the constitution of the tribunal or the court on the ground of *impartiality*. Even the *Rome Statute of the International Criminal Court*, 1998 does not provide such right to the prosecution or the defendant. Therefore,

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[32] *Ibid.*, Section 13.
[33] Paragraph 16, IBA Opinion, 29 December 2009.
[34] Section 22, *International Crimes (Tribunals) Act*, 1973 (as amended in 2009).
[35] Section 6(8), *International Crimes (Tribunals) Act*, 1973 (as amended in 2009).
[36] Paragraph 19, IBA Opinion, 29 December 2009.
[37] *Ibid.*, Paragraph 20.
[38] Article 3, *Charter of the International Military Tribunal (Nuremberg)*, 1945.

it is not clear as to under which international standard IBA is claiming such a right to challenge the constitution of the tribunal or its appointment of any member.

It is however conceded that on the issue of *fairness*, it is very natural that the Tribunal members may feel embarrassed to try a particular matter if a concern on 'prejudice' is raised by any party or parties to a trial.[39] Tribunal can of course regulate such issue of 'prejudice' by promulgating its own Rules of Procedure.[40] Besides the 1973 Act empowers the Chairman of the Tribunal 'to make such administrative arrangements as he considers necessary for the performance of the functions of the Tribunal'.[41] Therefore, it is suggested that in appropriate cases the Chairman can take necessary steps to deal with the matter of 'prejudice' regarding constitution of the Tribunal, if raised by the party or parties of a trial.

Therefore, IBA's Recommendation Five is uncalled for and should be rejected.

Recommendation Six

Subsections 8(5) and (7) of the 1973 act should be removed on the basis that they are unworkable and unnecessary.

Comment:

Section 8(5) of the 1973 Act states that:

> '*… (a) person shall be bound to answer all questions put to him by an Investigation Officer and shall not be excused from answering any question on the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such person.*
>
> *Provided that, no such answer, which a person shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding.*'[42]

Section 8(7) of the 1973 Act states that:

> '*Any person who fails to appear before an Investigation Officer for the purpose of examination or refuse to answer the questions put to him by such Investigation Officer shall be punished with simple imprisonment which may extend to six months, or with fine which may extend to taka two thousand, or with both.*'[43]

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[39] M G Rabbani and W Rahman, 'Rejoinder: War Crimes Act Does Not Need Reform', *The Daily Star* (Point-Counterpoint), 1 March 2010.
[40] Section 22, *International Crimes (Tribunals) Act*, 1973 (as amended in 2009).
[41] *Ibid*., Section 11(6).
[42] *Ibid*., Section 8(5).
[43] *Ibid*., Section 8(7).

IBA claims that the above two sections are complicated, difficult to use in practice, confusing and hence, should be removed as unnecessary.[44] However, no logic or explanations have been given to support such a claim. Therefore, it is stated that IBA has failed to justify its recommendation.

It is argued that the abovementioned legal provisions are not complicated, rather very clear. The basic objective of these legal provisions is to create an effective legal procedure for a meaningful investigation. The aim of any investigation procedure is to find the truth, and the whole truth. Incomplete information frustrates the purpose of any investigation. It might also lead to miscarriage of justice. Therefore, it is strongly argued that sections 8(5) and 8(7) of the 1973 Act are very effective and very much necessary to ensure a meaningful investigation.

Though IBA has absolutely failed to justify its recommendation for removing sections 8(5) and 8(7) of the 1973 Act, it nevertheless discussed this recommendation under the heading of 'Self-Incrimination'. Now it may be so that IBA would like to suggest that sections 8(5) and 8(7) of the 1973 Act might result in self-incrimination by the persons under investigation.

Apart from various national laws, *Right against Self-Incrimination* has been protected under article 21(4)(g) of the *Statute of the International Criminal Tribunal for the Former Yugoslavia*, 1993,[45] article 20(4)(g) of the *Statute of the International Criminal Tribunal for Rwanda*, 1994,[46] article 17(4)(g) of the *Statute of the Special Court for Sierra Leone*, 2002[47] and article 67(1)(g) of the *Rome Statute of the International Criminal Court*, 1998.[48] All these recognize that every accused person has the right 'not to be compelled to testify against himself or to confess guilt'. In other words, if a person is compelled to testify against himself or to confess guilt, then his right against self-incrimination will be violated.

Now, again, it is argued that possibility of such self-incrimination has been clearly ruled out by the second paragraph of section 8(5) of the 1973 Act:

> '*Provided that, no such answer, which a person shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding.*'[49]

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[44] Paragraph 22, IBA Opinion, 29 December 2009.

[45] Article 21(4)(g), *Statute of the International Criminal Tribunal for the Former Yugoslavia*, 1993 states that: '*In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: … not to be compelled to testify against himself or to confess guilt*.'

[46] Article 20(4)(g), *Statute of the International Criminal Tribunal for Rwanda*, 1994 states that: '*In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: … Not to be compelled to testify against himself or herself or to confess guilt*.'

[47] Article 17(4)(g), *Statute of the Special Court for Sierra Leone*, 2002 states that: '*In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality: … Not to be compelled to testify against himself or herself or to confess guilt*.'

[48] Article 67(1)(g), *Rome Statute of the International Criminal Court*, 1998 states that: '*In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality: … Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence*;'

[49] Section 8(5), *International Crimes (Tribunals) Act*, 1973 (as amended in 2009).

The 1973 Act gives here a clear direction – even though, during an investigation stage, a person may be compelled to disclose truth, he or she may not be made subject to any criminal proceeding on such disclosure. It is argued here that the end-result of such provision is exactly similar to the right of accused not to be 'compelled to testify against himself or to confess guilt' in any proceeding. Therefore, sections 8(5) and 8(7) of the 1973 Act do not violate the *Right against Self-Incrimination* of persons under investigation.

Hence, IBA's Recommendation Six suffers from lack of conceptual clarity and does not merit any consideration.

Recommendation Seven

Subsection 11(2) should be amended so as not to allow the tribunal to draw a negative inference from an accused person's silence.

Comment:

Section 11(2) of the 1973 Act reads as:

> '*For the purpose of enabling any accused person to explain any circumstances appearing in the evidence against him, a Tribunal may, at any stage of the trial without previously warning the accused person, put such questions to him as the Tribunal considers necessary.*
>
> *Provided that the accused person shall not render himself liable to punishment by refusing to answer such question or by giving false answers to them; but the Tribunal may draw such inference from such refusal or answers as it thinks just.*'[50]

IBA argues that the abovementioned section permits the Tribunal to draw a negative conclusion from an accused person's silence, which would nullify the *Right against Self-Incrimination*.[51] Hence, IBA recommends to amend section 11(2) of the 1973 Act.

It is argued that there is no reason to conclude that the Tribunal will always draw a *negative* inference from an accused person's silence. In fact, it has been clearly mentioned in the above section that the Tribunal may draw such inference from an accused person's silence *as it thinks just*. The section actually recognizes the discretionary power of the Tribunal that may be exercised in case an accused person does not want to provide a reply to the questions asked by the Tribunal. The section does not suggest, in any way, that such refusal to reply Tribunal's question should always find the accused guilty.

Further, it may be mentioned that every tribunal (or court) can and does exercise its discretion to consider an accused person's silence. Section 11(2) of the 1973 Act only gives recognition to this universal practice of the judicial forums. It does not add anything more to the trial process

[50] *Ibid*., Section 11(2).
[51] Paragraph 24, IBA Opinion, 29 December 2009.

violating the widely accepted general principles of the rules of evidence. The burden of proof still lies on the prosecution and according to the law of this country, *the accused is presumed to be innocent until proven guilty*. No where in the 1973 Act can be found a clause which is contradictory to such general principles of law.

Moreover, it is argued that section 11(2) does not in any way affect the *Right against Self-Incrimination* of the accused person. Paragraph two of section 11(2) of the 1973 Act clearly states that: '*… the accused person shall not render himself liable to punishment by refusing to answer such question or by giving false answers to them ...*'.[52]

In support of Recommendation Seven, IBA further argues that 'Pakistan has never apologized for possible war crimes and this provision (section 11(2) of the 1973 Act) might force the accused to make a statement that would open him/her up to persecution or prosecution in Pakistan'.[53] It is unfortunate that IBA has suggested 'political considerations' as a basis for the Tribunal's judicial decisions. In essence, IBA has conceptualized the Tribunal as a 'political body', and suggested that the Tribunal should be a part of the national and international political bargain.

It is stated that Tribunal is a judicial body backed by national law enacted by the House of the Nation. The matters before the Tribunal should essentially be followed in accordance with the law of the country. There is no scope for the Tribunal to act as a bargain place for national and international politics. The Tribunal shall be independent in the exercise of its judicial functions and shall ensure fair trial.[54] Therefore, *whether Pakistan has apologized for possible war crimes or not*, can never be an issue before the Tribunal to decide a case under its national law.

Further, it is absolutely not clear why on one side IBA is criticizing 1973 Act on the ground of international legal standard and justice; and on the other, provoking the Tribunal to make 'political considerations' as a basis for its legal and judicial decision. Amendment of section 11(2) of the 1973 Act as per Recommendation Seven hence becomes superfluous and unwarranted.

Recommendation Eight

Section 18 should be removed.

Comment:

Section 18 of the 1973 Act reads as:

> '*A witness shall not be excused from answering any question put to him on the ground that the answer to such question will criminate or may tend directly or indirectly to criminate such*

[52] Section 11(2), *International Crimes (Tribunals) Act*, 1973 (as amended in 2009).
[53] Paragraph 24, IBA Opinion, 29 December 2009.
[54] Section 6(2)(a), *International Crimes (Tribunals) Act*, 1973 (as amended in 2009).

> *witness, or that it will expose or tend directly or indirectly to expose such witness to a penalty or forfeiture of any kind:*
>
> *Provided that no such answer which a witness shall be compelled to give shall subject him to any arrest or prosecution or be proved against him in any criminal proceeding, except a prosecution for giving false evidence.'*[55]

IBA argues that the abovementioned section 18 of the 1973 Act raises concerns about the rights of witnesses to protection from self-incrimination.[56]

It is again stated that the basic objective of section 18 is to create an effective procedure for a meaningful trial. Like investigation, the aim of any trial procedure is to find the truth, and the whole truth. Incomplete information frustrates the purpose of any trial. It might also lead to miscarriage of justice. Therefore, it is strongly argued that section 18 of the 1973 Act is very effective and very much necessary to ensure a meaningful trial.

Now, again, it is argued that the possibility of self-incrimination by the witnesses has been clearly ruled out by the second paragraph of section 18 of the 1973 Act:

> '*Provided that no such answer which a witness shall be compelled to give shall subject him to any arrest or prosecution or be proved against him in any criminal proceeding, except a prosecution for giving false evidence.'*[57]

Therefore, 1973 Act gives a clear direction – even though, during the hearing, a witness may be compelled to disclose truth, he or she may not be made subject to any criminal proceeding on such disclosure. It is argued here that the end-result of such provision is exactly similar to the right not to be 'compelled to testify against himself or to confess guilt' in any proceeding. Therefore, it is strongly argued that section 18 of the 1973 Act does not violate the *Right against Self-Incrimination* of witnesses on trial.

It may be mentioned that in the interest of *fair trial*, witness protection generally remains as an important issue for the trial court. It is recognized in many international documents. For example, the *Statute of the International Criminal Tribunal for the Former Yugoslavia*, 1993 states:

> '*The International Tribunal shall provide in its rules of procedure and evidence for the protection of … witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings ...'*[58]

Similarly, the *Statute of the International Criminal Tribunal for Rwanda*, 1994 states:

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[55] *Ibid.*, Section 18.
[56] Paragraph 25, IBA Opinion, 29 December 2009.
[57] Section 18, *International Crimes (Tribunals) Act*, 1973 (as amended in 2009).
[58] Article 22, *Statute of the International Criminal Tribunal for the Former Yugoslavia*, 1993.

> '*The International Tribunal for Rwanda shall provide in its Rules of Procedure and Evidence for the protection of … witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings ...*'[59]

However, it is argued that although these other statutes recognize the need for protection of witnesses in general, they do no list out detail provisions regarding the same. Rather a direction is given to include such matters in the Rules of Procedure and Evidence. It is presumed that such protection would of course include witnesses' *Right Against Self-Incrimination*. If that is so then section 18 of the 1973 Act clearly states out such witness protection provision and it should be considered as an effective and necessary clause for witness protection against self-incrimination.

Hence, IBA's Recommendation Eight suffers from lack of conceptual clarity and does not merit any consideration.

Recommendation Nine

Protection against self-incrimination for accused persons should be made explicit. Similar protection should be provided for witnesses as well.

Comment:

IBA has not clarified what it meant by 'protection against self-incrimination … should be made explicit'. It is argued that the 1973 Act has explicitly guaranteed protection against self-incrimination to the accused persons and the witnesses. Provisions concerning accused persons during investigation and trial can be explicitly found at sections 8(5) and 11(2) of the 1973 Act respectively.[60] Similarly the witnesses are explicitly protected against self-incrimination under section 18 of the 1973 Act.[61]

Therefore, IBA Recommendation Nine is unnecessary and should be ignored.

Recommendation Ten

A provision should be added to section 10 to allow defense counsel to make an opening statement.

Comment:

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[59] Article 21, *Statute of the International Criminal Tribunal for Rwanda*, 1994.
[60] Discussed above under Recommendations Six and Seven respectively.
[61] Discussed above under Recommendation Eight.

Section 10 of the 1973 Act describes the Procedure of trial at the Tribunal. Very specifically, section 10(d) mentions that 'the prosecution shall make an opening statement'.[62] IBA claims that the defense should also be allowed to make an opening statement.[63] However, IBA did not provide any further justification for such claim.

It is argued that the 1973 Act is a basic law for an independent institution i.e. the Tribunal. Section 10 is simply like an overall roadmap for the Tribunal to conduct the trial. There is lot more issues to be considered and agreed before an actual trial can take place at the Tribunal. Therefore, the Tribunal, as an independent institution, must proceed with finalizing the exact trial procedure before initiating any hearing. As a matter of fact, under the 1973 Act, the Tribunal is empowered to promulgate its own *Rules of Procedure*.[64] Therefore, if it appears to the Tribunal that, in the interest of justice, defense should also be allowed to make an opening statement, then it can include such provision into its own *Rules of Procedure*. Hence, there is no need to amend section 10 of the 1973 Act as per Recommendation Ten of IBA.

Recommendation Eleven

The rights provided in Article 14 of the *International Covenant on Civil and Political Rights*, 1966 (ICCPR) should be added to the 1973 Act. At minimum, section 12 of the 1973 Act should be amended to include mandatory language. For example, the amended provision could read as follows:

> '*Where an accused person is not represented by counsel, the Tribunal shall, at any stage of the case, direct that a counsel shall be engaged.*'

Comment:

IBA argues that Article 14 of the ICCPR sets out a series of fundamental principles which protect the rights of individuals before a court of law.[65] Hence, IBA's Recommendation Eleven claims that the rights provided in Article 14 of the ICCPR should be added to the 1973 Act.

It is argued that IBA has simply failed to analyze the legal provisions of the 1973 Act as all the provisions of the Article 14 of the ICCPR are already there in the 1973 Act. There is absolutely no need of adding Article 14 of the ICCPR to the 1973 Act. The following table lists out the corresponding legal provisions of the Article 14 of the ICCPR in the 1973 Act.

Rights of accused persons provided under Article 14 of	**Corresponding rights of accused persons provided under 1973 Act**

[62] Section 18, *International Crimes (Tribunals) Act*, 1973 (as amended in 2009).
[63] Paragraph 26, IBA Opinion, 29 December 2009.
[64] Section 22, *International Crimes (Tribunals) Act*, 1973 (as amended in 2009).
[65] Paragraph 31, IBA Opinion, 29 December 2009.

the ICCPR 1966	
Article 14(1) Right to fair and public hearing by a competent, independent and impartial tribunal. Right to have camera trial in appropriate cases.	According to Section 6(2A) of the 1973 Act the tribunal shall be independent in the exercise of its judicial functions and shall ensure fair trial. According to Section 10(4) of the 1973 Act the proceedings of the Tribunal shall be in public. Provided that the Tribunal may, if it thinks fit, take proceedings in camera.
Article 14(2) Right to be presumed innocent until proved guilty according to law.	Presumption of innocence is a principle of English legal system which is automatically adopted in Bangladesh legal jurisprudence. Hence, there is no need to include the principle separately in each and every legislation of Bangladesh.
Article 14(3)(a) Right to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.	Section 10(1)(a) of the 1973 Act reads as: '*…at a trial before the Tribunal … the charge shall be read out;*' Section 10(3) of the 1973 Act reads as: '*Any accused person or witness who is unable to express himself in, or does not understand, English may be provided the assistance of an interpreter.*' Section 16(2) of the 1973 Act reads as: '*A copy of the formal charge and a copy of each of the documents lodged with the formal charge shall be furnished to the accused person at a reasonable time before the trial and in case of any difficulty in furnishing copies of the documents, reasonable opportunity for inspection shall be given to the accused person in such manner as the Tribunal may decide.*'
Article 14(3)(b) Right to have adequate time and facilities for the preparation of his defence and to communicate with	Section 17(2) of the 1973 Act reads as: '*An accused person shall have the right to conduct his own defence before the Tribunal or have the assistance of counsel.*'

counsel of his own choosing.	
Article 14(3)(c) Right to be tried without undue delay.	Section 11(3) of the 1973 Act reads as: '*A tribunal shall –* *(a) Confine the trial to an expeditious hearing of the issues raised by the charges;* (b) *Take measures to prevent any action which may cause unreasonable delay, and rule out irrelevant issues and statements.*'
Article 14(3)(d) Right of representation.	Section 17(2) of the 1973 Act reads as: '*An accused person shall … have the assistance of counsel.*' Section 12 of the 1973 Act states: '*Where an accused person is not represented by counsel, the Tribunal may, at any stage of the case, direct that a counsel shall be engaged at the expense of the Government to defend the accused person and may also determine the fees to be paid to such counsel.*'
Article 14(3)(e) Right to produce and examine/cross-examine witnesses.	Section 10(e) of the 1973 Act reads as: '*the witness for the prosecution shall be examined, the defence may cross-examine such witnesses and the prosecution may reexamine them;*' Section 10(f) of the 1973 Act reads as: '*the witnesses for the defence, if any, shall be examined, the prosecution may cross-examine such witnesses and the defence may reexamine them;*' Section 10(g) of the 1973 Act reads as: '*the Tribunal may, in its discretion, permit the party which calls a witness to put any question to him which might be put in cross-examination by the adverse party;*' Section 17(3) of the 1973 Act reads as: '*An accused person shall have the right to present evidence at the trial in support of his defence, and to cross-examine any witness called by the prosecution.*'
Article 14(3)(f) Right to have the free assistance of an interpreter.	Sections 10(2) of the 1973 Act states: '*All proceedings before the Tribunal shall be in Bangla or English.*' Section 10(3) of the 1973 Act states:

	'*Any accused person or witness who is unable to express himself in, or does not understand, English may be provided the assistance of an interpreter.*'
Article 14(3)(g) Right not to be compelled to testify against himself or to confess guilt.	Section 8(5) of the 1973 Act states that: '*… (a) person shall be bound to answer all questions put to him by an Investigation Officer and shall not be excused from answering any question on the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such person.* *Provided that, no such answer, which a person shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding.*' Section 18 of the 1973 Act reads as: '*A witness shall not be excused from answering any question put to him on the ground that the answer to such question will criminate or may tend directly or indirectly to criminate such witness, or that it will expose or tend directly or indirectly to expose such witness to a penalty or forfeiture of any kind:* *Provided that no such answer which a witness shall be compelled to give shall subject him to any arrest or prosecution or be proved against him in any criminal proceeding, except a prosecution for giving false evidence.*'
Article 14(4) Right of juvenile accused persons to get special consideration.	*The Children Act*, 1974 sufficiently deals with the issue of juvenile justice in Bangladesh. There is no need to include such provisions into each and every penal laws of Bangladesh.
Article 14(5) Right to review the conviction and sentence.	Section 21 of the 1973 Act reads as: '*A person convicted of any crime specified in section 3 and sentenced by a Tribunal shall have the right of appeal to the appellate Division of the Supreme Court of Bangladesh against such conviction and sentence;*'
Article 14(6) In case of miscarriage of justice, right to get	In the legal and judicial jurisprudence and practice of Bangladesh, there is no provision of providing compensation to the people who has become victim of miscarriage of justice. If this is so, then the

compensation for unnecessary punishment suffered.	1973 Act can not simply add such provision which will distort the national criminal jurisprudence, until the jurisprudence and the very practice are changed itself.
Article 14(7) Right not to be tried for offences which has been tried before.	Article 35 of the *Constitution of the People's Republic of Bangladesh* reads as: '*No person shall be prosecuted and punished for the same offence more than once*.' This is of course a general principle of law in Bangladesh. There is no need to add this provision to each and every piece of legislation in Bangladesh.

Hence, we can see from the above table that all necessary rights of individuals provided under Article 14 of the ICCPR are already present in the 1973 Act. Therefore, there is no need to add the same again to the 1973 Act.

IBA further argues that by use of the word 'may', rather than 'shall' or 'must', at section 12 of the 1973 Act, the legislation implies that the Tribunal's power to require the Government to provide the accused with legal representation is discretionary.[66] Therefore, IBA suggests that section 12 of the 1973 Act should be amended to include mandatory language.[67]

It is argued that such amendment should be considered unnecessary as at section 17(2) of the 1973 Act it is made mandatory that:

> '*An accused person shall … have the assistance of counsel*.'[68]

Further as far as exercising jurisdiction over the said matter is concerned, it is argued that even the text of Article 14 of the ICCPR is not mandatory:

> '… everyone shall be entitled … to have legal assistance assigned to him, *in any case where the interests of justice so require*, …'[69]

The above ICCPR provision, therefore, suggests that legal assistance will be assigned to an accused person only when '*the interests of justice so require*'. It means that if the *interests of justice* do not require so, an accused person may not be assigned any legal assistance. In this regard it seems that IBA's claim for use of mandatory language at section 12 of the 1973 Act is unreasonable.

Hence, IBA's Recommendation Eleven is irrelevant, unnecessary and unreasonable and as such, should be ignored.

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[66] Paragraph 27, IBA Opinion, 29 December 2009.
[67] *Ibid*., Paragraph 32.
[68] Section 17(2), *International Crimes (Tribunals) Act*, 1973 (as amended in 2009).
[69] Article 14(3)(d), *International Covenant on Civil and Political Rights*, 1966.

Recommendation Twelve

The provision in the 1973 Act allowing for the death penalty to be used against a convicted accused person should be removed from the legislation.

Comment:

Section 20(2) of the 1973 Act states that:

> '*Upon conviction of an accused person, the Tribunal shall award sentence of death or such other punishment proportionate to the gravity of the crime as appears to the Tribunal to be just and proper*.'[70]

IBA states that death penalty has been consistently opposed in United Nations resolutions for many years and all international courts or tribunal supported by the United Nations have rejected the notion of including a death penalty.[71] Therefore, IBA claims that the provision of death penalty should be removed from the 1973 Act.

It is argued that IBA has failed to appreciate that 1973 Act is a national law and the Tribunal set under the said law is essentially a national court. Therefore, if any comparison is to be made with the 1973 Act, it has to be done in the background of the national criminal jurisprudence of Bangladesh. Under Bangladeshi law, killing of one person attracts death penalty; therefore, it is quite natural that punishment of killing of many would surely be death penalty. Hence, the 1973 Act is quite compatible with the national criminal jurisprudence of Bangladesh.

It is however conceded that all international courts or tribunals supported by the United Nations have rejected 'death penalty' as a provision of punishment. Even the International Criminal Court is not empowered to give such punishment.[72] However, there is so far no international consensus regarding rejecting 'death penalty' as a provision of punishment all together from the national legislations. Moreover, respecting the national criminal jurisdiction, the *Rome Statute of the International Criminal Court*, 1998 states:

> '*Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdiction*.'[73]

Further, in the part of the *Rome Statute of the International Criminal Court*, 1998, where applicable penalties for the ICC crimes are discussed, it is stated:

> '*Nothing in this part affects the application by States of penalties prescribed by their national law*.'[74]

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[70] Section 22(2), *International Crimes (Tribunals) Act*, 1973 (as amended in 2009).
[71] Paragraph 34, IBA Opinion, 29 December 2009.
[72] Article 77, *Rome Statute of the International Criminal Court*, 1998.
[73] *Ibid*., Preamble.
[74] *Ibid*., Article 80.

Therefore, IBA's Recommendation Twelve is not well-argued and hence, fails to provide any logical justification. Recommendation Twelve should be rejected.

Recommendation Thirteen

The legislation should be amended so that convicted persons are provided the right to appeal to an appellate court apart from the regular judicial structure.

Comment:

Section 21 of the 1973 Act reads as:

> '*A person convicted of any crime specified in section 3 and sentenced by a Tribunal shall have the right of appeal to the appellate Division of the Supreme Court of Bangladesh against such conviction and sentence;*'[75]

IBA states that all other international criminal tribunals have established an appellate court within their own structures.[76] It increases the legitimacy of the process, and ensures that the appellate court is outside of the influence of the regular judicial structure.[77] Hence, IBA recommends that the 1973 Act should be amended so that convicted persons are provided the right to an appellate court apart from the *regular judicial structure*.

It is argued that IBA recommendation contains conceptual fallacy. Appeal of any international trial court can never go to any national court. Therefore, it is natural that the international trial court appeals should be heard by an appellate court within the same international court structure. However, it is argued that trial under a national court need not follow the same appellate structure.

It is stated that the Tribunal under the 1973 Act is a national judicial forum. It is then very much a part of the *regular judicial structure* of Bangladesh. Now, IBA suspects that if appeal from this Tribunal is preferred to an appellate court within the *regular judicial structure*, then there may remain a possibility of influence from the *regular judicial structure*. It is argued that IBA's logic is self-contradictory. Under the national *regular judicial structure*, if there remains possibility of influence at the appellate stage, then there remains similar possibility of influence at the trial stage too. This is due to the fact that both the trial and appellate court are part of the same *regular judicial structure*. Therefore, this nullifies the need for creating an appellate tribunal outside the *regular judicial structure* when the very 'trial tribunal' itself remains within.

Therefore, IBA's Recommendation Thirteen is meaningless and should be rejected all together.

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[75] Section 21, *International Crimes (Tribunals) Act*, 1973 (as amended in 2009).
[76] Paragraph 36, IBA Opinion, 29 December 2009.
[77] *Id*.

Recommendation Fourteen

Subsection 19(1) should be deleted from the 1973 Act.

Comment:

Section 19(1) of the 1973 Act reads as:

> '*A Tribunal shall not be bound by technical rules of evidence; and it shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and may admit any evidence, including reports and photographs published in newspaper, periodicals and magazines, films and tape-recording and other materials as may be rendered before it, which it deems to have probative value*.'[78]

IBA states that in the above section, the use of the word 'technical' is 'potentially prejudicial, implying that the rules of evidence are (details) of little importance or value.'[79]

It is argued that by avoiding *technical rules of evidence*, the Tribunal hearing would not essentially result in prejudicial outcome. Similar verbatim direction, as to avoid *technical rules of evidence*, can be found in the *Charter of the International Military Tribunal* (Nuremberg), 1945[80] and the *Charter of the International Military Tribunal for the Far East*, 1946.[81] Therefore, the use of the word, 'technical', in Section 19(1) of the Act of 1973 is consistent with the international standard.

It is further argued that Section 19(1) does not, in any way, imply that the rules of evidence are of little importance or value. It is true that the section directs the Tribunal not be bound by *technical rules of evidence*. However, it does not mean that, the Tribunal would not follow any *rules of evidence*. Even though declaring the *Evidence Act*, 1872 as non-applicable in any proceedings under this act,[82] the 1973 Act clearly states:

> '*(Tribunal) shall adopt and apply to the greatest possible extent expeditious and non-technical procedure …*'[83]

Form above it is clear that the 1973 Act directs the Tribunal to adopt and apply its own effective *rules of evidence*, which would support an *expeditious* and *non-technical* hearing procedure. It may be mentioned here that the 1973 Act also empowers the Tribunal to promulgate its own *rules of*

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[78] Section 19(1), *International Crimes (Tribunals) Act*, 1973, as amended in 2009.
[79] Paragraph 38, IBA Opinion, 29 December 2009.
[80] Article 19, *Charter of the International Military Tribunal* (Nuremberg), 1945 states: '*The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non technical procedure, and shall admit any evidence which it deems to be of probative value*.'
[81] Article 13(a), *Charter of the International Military Tribunal for the Far East*, 1946 reads as: '*The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value. All purported admissions or statements of the accused are admissible*.'
[82] Section 23, *International Crimes (Tribunals) Act*, 1973 (as amended in 2009).
[83] *Ibid.*, Section 19(1).

procedure.[84] Now it is argued that similar provisions can also be found in the *Statute of the International Criminal Tribunal for the Former Yugoslavia*, 1993,[85] in the *Statute of the International Criminal Tribunal for Rwanda*, 1994,[86] and in the *Statute of the Special court for Sierra Leone*, 2002.[87]

IBA further argues that Section 19(1) of the 1973 Act allows the Tribunal to admit evidence which it (Tribunal) deems to have 'probative value' and this 'probative value' test appears to override the standard hearsay rule and it is questionable whether this would be consistent with the rules of other United Nations *ad hoc* tribunals.[88]

It is argued that the rule of admitting evidence having probative value is consistent with international standard and practice. Section 19 of the *Charter of the International Military Tribunal (Nuremberg)*, 1945 states:

> '*The Tribunal … shall admit any evidence which it deems to be of probative value*.'[89]

Besides, the *Rules of Procedure and Evidence* of the International Criminal Tribunal for the Former Yugoslavia states:

> '*A Chamber may admit any relevant evidence which it deems to have probative value*.'[90]

It may be mentioned that similar provisions can also be found in the *Statute of the International Criminal Tribunal for Rwanda*, 1994[91] and the *Statute of the Special Court for Sierra Leone*, 2002.[92]

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[84] *Ibid*., Section 22.

[85] Article 15, *Statute of the International Criminal Tribunal for the Former Yugoslavia*, 1993 states: '*The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters*.'

[86] Article 14, *Statute of the International Criminal Tribunal for Rwanda*, 1994 states: '*The judges of the International Tribunal for Rwanda shall adopt … the rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the former Yugoslavia with such changes as they deem necessary*.'

[87] Article 14(1), *Statute of the Special court for Sierra Leone*, 2002 states: '*The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable mutatis mutandis to the conduct of the legal proceedings before the Special Court*.'

[88] Paragraph 39, IBA Opinion, 29 December 2009.

[89] Article 19, *Charter of the International Military Tribunal (Nuremberg)*, 1945.

[90] Rule 89(c), International Criminal Tribunal for the former Yugoslavia, *Rules of Procedure and Evidence*, U.N. Doc. IT/32/Rev.7 (1996), *entered into force* 14 March 1994, *amendments adopted* 8 January 1996.

[91] Article 14, *Statute of the International Criminal Tribunal for Rwanda*, 1994 reads as: *'The Judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the Rules of Procedure and Evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the former Yugoslavia with such changes as they deem necessary*.'

[92] Article 14, *Statute of the Special Court for Sierra Leone*, 2002 states: *'(1) The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable mutatis mutandis to the conduct of the legal proceedings before the Special Court. (2) The judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not adequately, provide for a specific situation.'*

Therefore, it is not at all clear as to why IBA fears that allowing evidence with 'probative value' under the 1973 Act would be inconsistent with the rules of other United Nations *ad hoc* tribunals.[93]

IBA further claims that 'probative value test' would override the standard *hearsay* rule.[94] It seems that IBA is resting its argument on the assumption that 'probative value test' might admit *hearsay* evidence as the Tribunal shall not be bound by *technical rules of evidence*.

It is argued that IBA has failed to appreciate that none of the evidences which are mentioned in Section 19(1) of the 1973 Act is *hearsay* evidence. For example, reports and photographs published in newspapers, periodicals and magazines *that are written or captured by the eye witnesses of the incident*, would surely have 'probative value'. However, they are not considered as *hearsay* evidence. Similarly, films and tape-recordings that capture the actual event or record interviews of the eye witnesses can be found to have 'probative value' even though they do not fall under the category of *hearsay* evidence.

Moreover, Section 19(1) of the 1973 Act allows the Tribunal to exercise its jurisdiction to decide on whether any particular evidence merits 'probative value' or not.[95]

Therefore, IBA's Recommendation Fourteen is not based upon any logical reasoning and hence, should be rejected.

Recommendation Fifteen

Special evidentiary provisions regarding proof of historical facts should be added to the legislation.

Comment:

Section 19 of the 1973 Act states:

> '*(1) A Tribunal not be bound by technical rules of evidence; and it shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and may admit any evidence, including reports and photographs published in newspaper, periodicals and magazines, films and tape-recording and other materials as may be rendered before it, which it deems to have probative value.*
>
> *(2) A Tribunal may receive in evidence any statement recorded by a Magistrate or an Investigation Officer being a statement made by any person who, at the time of the trial, is dead or whose attendance cannot be procured without an amount of delay or expense which the Tribunal considers un-reasonable.*

[93] Paragraph 39, IBA Opinion, 29 December 2009.
[94] *Id*.
[95] Section 19(1), *International Crimes (Tribunals) Act*, 1973 (as amended in 2009).

> *(3) A Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof.*
>
> *(4) A Tribunal shall take judicial notice of official governmental documents and reports of the United Nations and its subsidiary agencies or other international bodies including non-governmental organizations.'*[96]

IBA advises that in addition to above, some special evidentiary provisions should be added to proof historical facts related to events that occurred over 40 years ago.[97] IBA, however, assumes that there are no statutes dealing with proof of historical facts under Bangladesh Law.[98]

First of all, it is stated that IBA's assumption is wrong. Bangladesh does have legal provisions, both statutory and common law, relating to proving historical facts. As far as statutory legal provision is concerned a reference can be made to section 90 of the *Evidence Act*, 1972.[99] However, the provisions of the *Evidence Act*, 1872 are made inapplicable to any proceedings under the 1973 Act.[100]

In the circumstances, our judicial jurisprudence and case precedents can come to aid in proving historical facts in the Tribunal trial. For example, it has been stated in the case of *Nurul Islam and Others v the State* that reports published in newspapers can be admitted without official proof; however, evidence of the provider is needed to proof the fact of such report.[101] Furthermore, it has been stated in the case of *Shahid Mia v Liton* that if any document or report which is older than 30 years is presented before the court, that will be considered as an authentic document.[102]

Now, regarding IBA's advice to add some special evidentiary provisions to prove historical facts of 40 years ago, it is argued that there is no need to do such addition. This is basically argued on three grounds:

Firstly, IBA has failed to provide any specific direction regarding the lack of evidentiary provisions in the 1973 Act. It is therefore confusing and unclear. In this regard it is stated that the provisions of the 1973 Act are sufficient. Hence, such addition is unnecessary.

Secondly, the general *rules of evidence* as described under section 19 of the 1973 Act are sufficient to assist in establishing historical facts. This section is also consistent with the *Charter of the*

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[96] *Ibid*., Section 23.
[97] Paragraph 40, IBA Opinion, 29 December 2009.
[98] *Ibid*.
[99] Section 90, *Evidence Act*, 1872 states: '*Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested*.'
[100] Section 23, *International Crimes (Tribunals) Act*, 1973 (as amended in 2009).
[101] 55 *Dhaka Law Reporters* 299.
[102] 5 *Bangladesh Law Chronicles (AD)* 74.

International Military Tribunal (Nuremberg), 1945[103] and the *Charter of the International Military Tribunal for the Far East*, 1946.[104] So, IBA's recommendation for further addition is unnecessary.

Thirdly, there is no such provision added to the statutes of other United Nations' *ad hoc* tribunals. For example, Article 15 of the *Statute of the International Criminal Tribunal for the Former Yugoslavia*, 1993,[105] Article 14 of the *Statute of the International Criminal Tribunal for Rwanda*, 1994,[106] and Article 14(1) of the *Statute of the Special Court for Sierra Leone*, 2002[107] do not contain specific evidentiary provisions for proving historical facts. Therefore, it is not at all clear why IBA is so keen on adding something which is not there in any relevant international legal document.

Hence, it is argued that IBA's Recommendation Fifteen is very much uncalled-for and as such, must be ignored.

Recommendation Sixteen

The duties and powers of the prosecution set out in Article 54 of the *Rome Statute* should be added to the 1973 Act.

Comment:

IBA states that Article 54 of the *Rome Statute of the International Criminal Court*, 1998 provides for fair trial protections and as such, should be added to the 1973 Act.[108]

It is argued that there is no need to add Article 54 of the *Rome Statute of the International Criminal Court*, 1998 to the 1973 Act as most of the provisions of Article 54 are either irrelevant or already included in the 1973 Act. Whatever is left out, the Tribunal can, if needed, include in the Tribunal's *Rules of Procedure*. Therefore, there is absolutely no need to amend the 1973 Act as per IBA's Recommendation Sixteen.

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[103] Article 19, *Charter of the International Military Tribunal (Nuremberg)*, 1945 reads as: '*The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to be of probative value*.' Further, Article 21 of the same statute reads as: '*The Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof. It shall also take judicial notice of official governmental documents and reports of the United Nations, including the acts and documents of the committees set up in the various allied countries for the investigation of war crimes, and of records and findings of military or other Tribunals of any of the United Nations*.'

[104] Article 13(a), *Charter of the International Military Tribunal for the Far East*, 1946 states: '*The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value. All purported admissions or statements of the accused are admissible*.' Further, Article 13(d) states: '*The Tribunal shall neither require proof, of facts of common knowledge, nor of the authenticity of official/government documents and reports of any nation nor of the proceedings, records, and findings of military or other agencies of any of the United Nations*.'

[105] *Op. cit. no*. 85.

[106] *Op. cit. no*. 86.

[107] *Op. cit. no*. 87.

[108] Paragraph 41, IBA Opinion, 29 December 2009.

The following table makes a comparative analysis between Article 54 of the *Rome Statute of the International Criminal Court*, 1998 and the corresponding provisions of the 1973 Act.

Article 54, *Rome Statute of the International Criminal Court*, 1998	**Corresponding Provisions in the 1973 Act**
Article 54(1) 'The Prosecutor shall: (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally; (b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and (c) Fully respect the rights of persons arising under this Statute.'	**Section 8** '(1) The Government may establish an Agency for the purposes of investigation into crimes … and any officer belonging to the Agency shall have the right to assist the prosecution during the trial. (2) Any person appointed as a Prosecutor is competent to act as an Investigation Officer and the provisions relating to investigating shall apply to such Prosecutor. (3) Any Investigation Officer making an investigation under this Act may, by order in writing, require the attendance before himself of any person who appears to be acquainted with the circumstances of the case; and such person shall attend as so required. (4) Any Investigation Officer making an investigation under this Act may examine orally any person who appears to be acquainted with the facts and circumstances of the case. (5) Such person shall be bound to answer all questions put to him by an Investigation Officer and shall not be excused from answering any question on the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such person.' Provided that, no such answer, which a person shall be compelled to give, shall subject him to

	any arrest or prosecution, or be proved against him in any criminal proceeding. (6) The Investigation Officer may reduce into writing any statement made to him in the course of examination under this Act.
Observation on Article 54(1), *Rome Statute of the International Criminal Court*, 1998: The detail procedure for investigation under 1973 Act can be included in the *Rules of Procedure*. There is no need to amend the 1973 Act.	
Article 54(2) 'The Prosecutor may conduct investigations on the territory of a State: (a) In accordance with the provisions of Part 9; or (b) As authorized by the Pre-Trial Chamber under article 57, paragraph 3(d).'	Part 9 of the *Rome Statute of the International Criminal Court*, 1998 deals with International Cooperation and Judicial Assistance. ICC is an international court where state parties are bound to provide cooperation whenever there is a need for judicial assistance. However, the Tribunal under 1973 Act is a national judicial forum. It can not directly seek judicial assistance to the international community. Similarly, the provision of Pre-Trial Chamber does not have any relevance to the 1973 Act.
Observation on Article 54(2), *Rome Statute of the International Criminal Court*, 1998: Article 54(2) of the *Rome Statute of the International Criminal Court*, 1998 is totally irrelevant as far as the 1973 Act is concerned. It is not at all clear as to why IBA has recommended adding this article to the 1973 Act.	
Article 54(3) 'The Prosecutor may: (a) Collect and examine evidence; (b) Request the presence of and question persons being investigated, victims and witnesses;	Articles 54(3)(a) and 54(3)(b) of the *Rome Statute of the International Criminal Court*, 1998 are already included in the Section 8 of the 1973 Act. Note discussion under Article 54(1) of the *Rome Statute of the International Criminal Court*, 1998.

(c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate; (d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person; (e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and (f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.'	Articles 54(3)(c) and 54(3)(d) of the *Rome Statute of the International Criminal Court*, 1998 are inapplicable to the Tribunal under 1973 Act. The Tribunal, being a national judicial forum, can not directly request for international cooperation or directly enter into any arrangement for the same. Provisions of Articles 54(3)(e) and 54(3)(f) of the *Rome Statute of the International Criminal Court*, 1998 can be included in the *Rules of Procedure*. There is no need to amend the 1973 Act.
Observation on Article 54(3), *Rome Statute of the International Criminal Court*, 1998: Some provisions of Article 54(3) of the *Rome Statute of the International Criminal Court*, 1998 are already included in the 1973 Act. Some are totally irrelevant as far as the 1973 Act is concerned. Also, some detail provisions which are not there in the 1973 Act can be included in the Tribunal's Rules of Procedure. There is absolutely no need to amend the 1973 Act.	

Therefore, it is clear from the above discussion that IBA's Recommendation Sixteen does not merit any attention.

Recommendation Seventeen

The rights of a suspect during the investigation stage set out in Article 55 of the *Rome Statute* should be added to the 1973 Act.

Comment:

IBA states that Article 55 of the *Rome Statute of the International Criminal Court*, 1998 provides for fair trial protections and as such, should be added to the 1973 Act.[109]

It is argued that there is no need to add Article 55 of the *Rome Statute of the International Criminal Court*, 1998 to the 1973 Act as most of the provisions of Article 55 are already included in the 1973 Act or protected under the *Constitution of the People's Republic of Bangladesh*. Whatever is not, the Tribunal can, if needed, include in the Tribunal's *Rules of Procedure*. Therefore, there is absolutely no need to amend the 1973 Act as per IBA's Recommendation Seventeen.

The following table makes a comparative analysis between Article 55 of the *Rome Statute of the International Criminal Court*, 1998 and the corresponding provisions of the 1973 Act.

Article 55, *Rome Statute of the International Criminal Court*, 1998	**Corresponding Provisions in the 1973 Act**
Article 55(1) 'In respect of an investigation under this Statute, a person: a. Shall not he compelled to incriminate himself or herself or to confess guilt;	Section 8(5) states: '… no … answer (during investigation) … shall subject (a person) to any arrest or prosecution, or be proved against him in any criminal proceeding.' Further, the *Right against Self-Incrimination* is also protected under Article 35(4) of the *Constitution of the People's Republic of Bangladesh*.[110]
b. Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;	This is also protected under Article 35(5) of the *Constitution of the People's Republic of Bangladesh*.[111]
c. Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and	Section 10(3) of the 1973 Act guarantees the assistance of interpreter during the trial. However, no such assistance is explicitly guaranteed in the 1973 Act. Therefore, the Tribunal can include necessary provisions in its *Rules of Procedure* and as such, there is no need to amend the 1973 Act.
d. Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in	This is protected under Articles 32 and 33(1) of the *Constitution of the People's Republic of*

[109] Paragraph 41, IBA Opinion, 29 December 2009.

[110] Article 35(4), *Constitution of the People's Republic of Bangladesh* reads as: '*No person accused of any offence shall be compelled to be a witness against himself.*'

[111] Article 35(5), *Constitution of the People's Republic of Bangladesh* reads as: '*No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.*'

accordance with such procedures as are established in this Statute.'	*Bangladesh*.[112]
Observation on Article 55(1), *Rome Statute of the International Criminal Court*, 1998: Most of the rights mentioned in Article 55(1) of the *Rome Statute of the International Criminal Court*, 1998 are either included in the 1973 Act and/or guaranteed under the *Constitution of the People's Republic of Bangladesh*. Some not mentioned so clearly under the 1973 Act can be included in the *Rules of Procedure*. There is no need to amend the 1973 Act.	
Article 55(2) 'Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned: a. To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court; b. To remain silent, without such silence being a consideration in the determination of guilt or innocence; c. To have legal assistance of the persons choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and	Out of the four rights mentioned in Article 55(2) of the *Rome Statute of the International Criminal Court*, 1998, only one (Right to Remain Silent) has been denied under Section 8(5) of the 1973 Act. There is of course reasonable ground of doing so.[113] All other three rights mentioned in Article 55(2) of the *Rome Statute of the International Criminal Court*, 1998 involves procedural issues. Therefore, the Tribunal can include the same in its Rules of Procedure. There is absolutely no need to amend the 1973 Act. It may be mentioned that the right of the Accused person *to Remain Silent* during trial is recognized under the 1973 Act at section 11(2): '… Tribunal may, at any stage of the trial without previously warning the accused person, put such questions to him as the Tribunal considers necessary. Provided that the accused person shall not render himself liable to punishment *by refusing to answer such question* …'

[112] Article 32, *Constitution of the People's Republic of Bangladesh* reads as: '*No person shall be deprived of life or personal liberty, save in accordance with law*.' Further, Article 33(1) reads as: '*No person who is arrested shall be detained in custody without being informed, as soon as may be of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice*.'

[113] See comments under Recommendation Six above.

d. To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.'	

Observation on Article 55(2), *Rome Statute of the International Criminal Court*, 1998:

All but one rights mentioned in Article 55(2) of the *Rome Statute of the International Criminal Court*, 1998 can be included in the *Rules of Procedure*. There is no need to amend the 1973 Act.

Therefore, it is clear from the above discussion that IBA's Recommendation Seventeen regarding amendment of the 1973 Act to include the provisions of Article 55 of the *Rome Statute of the International Criminal Court*, 1998 is unnecessary and hence, should be rejected.

Conclusion

This paper provides an in-depth critical analysis of each and every 17 recommendations made by IBA. It establishes that IBA's said recommendations are self-contradictory, unnecessary, and suffers from conceptual fallacy and therefore, should be rejected. It concludes that IBA has failed to make a strong case in support of adopting the said recommendations. Therefore, there is no need to further amend or update the *International Crimes (Tribunals) Act*, 1973 (as amended in 2009) as per IBA's pseudo recommendations or *fatwas*.