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Murder, Extermination and Torture as the Underlying Offenses of Crimes against Humanity: A Practical Reflection on the International Crimes Tribunal Bangladesh

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Abstract: The current government of Bangladesh introduced a criminal tribunal namely, the International Crimes Tribunal Bangladesh (ICTB) in 2010, aiming to try and penalize the offenders of crimes against humanity committed in the Liberation War of Bangladesh in 1971. Generally, crimes against humanity are perpetrated thru natural person, not by an intangible entity. Establishing each element of a specific criminal act is essential to prove such crimes' guilts and punish the criminal. Hence, this study analyzes the elements of murder, extermination, and torture as the underlying offenses of crimes against humanity according to international customary law and the ICTB Statute. Firstly, this study scrutinizes the latest international customary law development and international criminal tribunals' findings on these mentioned offenses. Secondly, this study examines whether specific requirements of such underlying offenses of crimes against humanity are being applied by the ICTB with the latest development enshrined in international criminal law and tribunals. Finally, this study examines any legal failure ascertained by the ICTB to apply elements of specific offenses of crimes against humanity that are internationally known as the established norm before proving crimes against humanity as the main international crimes. Then, this study recommends some ways forward; otherwise, the ICTB would be considered the victor's justice type of initiative to suppress the alleged perpetrators, mainly from the opposition political party of Bangladesh.

Keywords: underlying offenses of crimes against humanity; murder; extermination; torture

1. Introduction

The ICTB was formed by the current Bangladeshi regime in 2010, aiming to try and punish the offenders of crimes against humanity committed in the Liberation War of Bangladesh in 1971. Crimes against humanity are indicted as the principal category of international offense in the ICTB. To date, in all of the cases so far concluded by the ICTB-1 and ICTB-2, most of the perpetrators were accused and prosecuted for committing crimes against humanity in the Bangladesh Liberation War. Crimes against humanity are documented as heinous offenses in international law as these misconducts demoralize the very spirit of the presence of humanity. Hence, the juristic views have described the enormity of these crimes in the following countenance,

The phrase "crimes against humanity" has acquired enormous resonance in the legal and moral imaginations of the post-World War II world. It suggests, in at least two distinct ways, the enormity of those offenses. First, the phrase "crimes against humanity" suggests offenses that aggrieve not only the victims and their communities, but all human beings, regardless of their community. Second, the phrase suggests that these offenses cut deep, violating the core humanity that we all share, and that distinguishes us from other natural beings.¹

¹ D. Luban, 'A Theory of Crimes against Humanity', 29 (1) *Yale Journal of International Law* (2004) 85-167, at 86; R. Dubler, 'What's in a Name? A Theory

It is clarified from the above-mentioned juristic opinion that crimes against humanity are being perpetrated in a way that shocks the consciences of humankind and authorize intervention by the global civic precisely as they are not distant accidental actions of individuals; nonetheless, instead consequence as of a deliberate effort of targeting a noncombatant individuals.² The crimes in question as the first types of international crimes pleaded guilty against by all the accused in the ICTB. Crimes against humanity might be perpetrated in the forms of a couple of underlying offences such as murder, extermination, deportation, enslavement, abduction, imprisonment, rape, torture, or other inhumane acts by perpetrating counter to any noncombatant populace.

In the ICTB jurisprudence, most of the offenders were charged with crimes against humanity perpetrated in the forms of murder, extermination, and torture, as an underlying crime. Though these categories of crimes against humanity were perpetrated fifty years ago, they are being tried and punished through the ICTB since 2010, when many legal developments took place in the advancement of international criminal law to differentiate numerous forms of crimes against humanity from common domestic offences. It deserves an in-depth legal analysis whether, in the ICTB jurisprudence, murder, extermination, and torture, are legally characterized and identified as the underlying offences of crimes in question by fulfilling international penal law standards with the harmonization of the domestic legislation of Bangladesh. Hence, this study critically analyses the elements of murder, extermination, and torture as the underlying offenses of crimes against humanity according to international criminal law and the ICTB Statute. Firstly, this study scrutinizes the latest international customary law development and international criminal tribunals' findings on these mentioned offenses. Secondly, this study examines whether specific requirements of such underlying offenses of crimes against humanity are being applied by the ICTB with the latest development enshrined in international criminal law and tribunals. Finally, this study examines any legal failure ascertained by the ICTB to apply elements of specific offenses of crimes against humanity that are internationally known as the established norm before proving crimes against humanity as the main international crimes. Then, this study recommends some ways forward; otherwise, the ICTB would be considered the victor's justice type of initiative to suppress the alleged perpetrators, mainly from the opposition political party of Bangladesh.

2. Crimes against Humanity in the International Crimes Tribunal Act 1973

Section 3(2)(a) of the International Crimes Tribunal (ICT) Act 1973 penalizes crimes against humanity as the first type of offense. The law defines following actions as offenses 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.

Crimes against humanity's definition in the ICTB is almost analogous to the meaning of the similar offenses adopted in the International Military Tribunal (IMT) Nuremberg Charter Article 6(c).³ But, the link of 'international armed conflict' to be the threshold

of Crimes against Humanity', 15 *Australian International Law Journal* (2008) 85-107, at 89; See also, M. Lippman, 'Crimes against Humanity', 17 (2) *Boston College Third World Journal* (1997) 171-278, at 171.

² Maruf Billah, 'Prosecuting Crimes against Humanity and Genocide at the International Crimes Tribunal Bangladesh: An Approach to International Criminal Law Standards', 10 (4) *Laws*, (2021) 1-34, at 29, <https://doi.org/10.3390/laws10040082>.

³ Maruf. Billah, 'Non-retroactivity in Prosecuting Crimes against Humanity and International Crimes Tribunal Bangladesh', 13 (3) *Journal of Politics and Law*, (2020) 180-195, at 181; See also at Art. 6(c) of the IMT Nuremberg Charter 1945 says, "[c]rimes against humanity: namely, murder, extermination, enslave-ment, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in con-nection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated".

prerequisite of crimes in question in order to sufficiently differentiate crimes against humanity at the Nuremberg Charter from normal criminalities were purposely left out in the ICTB's 1973 Act.⁴ Customary international law in 1971 imposed that crimes against humanity need to be executed in an 'interstate war,' that was reasoned by the defense in many cases. Nonetheless, the Tribunal repeatedly observed, '[c]rimes against humanity can be committed even in peacetime; the existence of armed conflict is, by definition, not mandatory'.⁵

Then, crimes against humanity's definition in the ICTB also did not replicate the current advancement of the international customary law of the equivalent crimes that were promulgated in the international law documents in the late 1990s.⁶ The ICTB's defense team confronted that the meaning of crimes against humanity in the 1973 Act for example insufficient and erratic with the definition as per international customary law nowadays. In responding to the challenge of the defense, the ICTB decided that "the definition does not require the commission of the constituent offenses to be 'widespread or systematic,' a legal element required in Article 7 of the ICC Statute".⁷ Therefore, it is clarified that the ICTB failed to apply customary law conditions of crimes against humanity in 1971 and 2010, while offenses in question are considered as the primary type of offenses in the ICTB material jurisdiction.

Once it is established that the ICTB failed to adhere to international customary law definitions of crimes against in 1971 and 2010, another legal question advances whether the Tribunal in question has been able to apply customary law definitions of murder, extermination, and torture as the fundamental offenses of crimes against humanity. One of the reasons is that such crimes need to be separated from ordinary crimes due to their level of severity as an international crime. They are tried under a special tribunal in Bangladesh. Furthermore, these are the crimes that have been charged against most of the accused of the ICTB, proved culpability, and punished with capital punishment by both the Trial Court and Appeal Court (Appellate Division of Bangladesh Supreme Court). Hence, the subsequent discussion is indispensable to study the customary law requirements of the above-mentioned underlying crimes against humanity before examining whether the ICTB applied customary law elements of such offences in its jurisprudence.

3. The Underlying Offenses of Crimes against Humanity in Customary International Law

Crimes against humanity are committed by natural persons and not by abstract entities. Establishing each element of a specific criminal act is essential to prove such crimes' guilts and punish the criminal. Hence, this part of the paper outlines the offences of crimes against humanity in international customary law by referring to the latest cases law from international criminal tribunals (ICTs). Some of the underlying offenses that constitute crimes against humanity are as follows.

⁴ M. Billah, *supra* note 2, at 7.

⁵ See in the International Crimes Tribunal (ICTB) cases of *Chief Prosecutor v. Professor Golam Azam*, (ICTB Case No. 06 of 2011), Trial Judgement, 15 July 2013, § 32; also, *Chief Prosecutor v. Motiur Rahman Nizami*, (ICTB Case No. 05 of 2011), Trial Judgment, 19 October 2014, §§ 30, 35, 40; *Chief Prosecutor v. Salahuddin Quader Chowdhury*, (ICTB Case No. 02 of 2011), Trial Judgment, 1 October 2013, § 33.

⁶ M. Billah, *supra* note 2, at 7.

⁷ See in the ICTB cases of *Chief Prosecutor v. Abul Kalam Azad*, (ICTB Case No. 05 of 2012), Trial Judgment, 21 January 2013, §§ 40, 72; *Chief Prosecutor v. Abdul Quader Molla*, (ICTB Case No. 02 of 2013), Trial Judgment, 5 February 2013, §§ 61, 122; *Chief Prosecutor v. Muhammad Kamaruzzaman*, (ICTB Case No. 03 of 2012), Trial Judgment, 9 May 2013, § 127; *Chief Prosecutor v. Md. Abdul Alim*, (ICTB Case No. 01 of 2012), Judgment, 9 October 2013, § 73; and *Chief Prosecutor v. Delowar Hossain Sayeedi*, (ICTB Case No. 01 of 2011), Trial Judgment, 28 February 2013, §§ 18, 28.

3.1. Murder

According to international customary law, the basic elements of 'murder' as an offense of crime against humanity entails that the prosecuting tribunal prove that the subsequent acts were executed as part of a 'widespread or systematic' attack against a civilian population.

1. To guarantee the victim's death, it is not required to establish that the deceased person's body has been recovered.⁸
2. The fact that a death has arisen might be set by circumstantial evidence, providing it is the 'only reasonable inference'.⁹
3. Relevant factors in grounding this implication will comprise of the following:¹⁰
 - a. incidents of maltreatment directed against the victim;
 - b. patterns of ill-treatment and losses of other victims;
 - c. coincident or near coextensive time of demise of other victims;
 - d. whether victims were last seen in an area where an armed attack was carried out;
 - e. when, where, and the surroundings in which the victim was last seen;
 - f. the general environment of disorder in the area where the acts were perpetrated;
 - g. the behavior of militaries in the locality, counting towards other noncombatants; and the measurement of time which has gone since the person missing; absence of communication by the victim with those they would be probable to contact i.e., family.

Article 7(2) (a) of the Rome Statute of the ICC 1998 also confirms that the above conditions are indispensable to prove the guilt of murder as an offense of crimes against humanity. Therefore, the ICC Pre-Trial Chamber (TC) II has initiated a similar approach in the case of *Bemba Gombo* by inferring that it is not needed to figure out or detect the corpse in evidencing the crime of murder. Nonetheless, the prosecuting tribunal obliges to provide details in the charging file in proving that the offender murdered precise individuals.¹¹ In particular, the Prosecutor is still expected to specify, to the extent possible, *inter alia*:¹²

- the site of the suspected murder; its estimated date;
- the way the act was perpetrated with sufficient correctness;
- the surroundings of the incident; and
- the offender's link to the misconduct.

Once the victim's death by the accused is established, it is also equally important that the perpetrator essentially has instigated the victim's death,¹³ which is called the 'causation element' that might be fulfilled either by an 'act or omission.'¹⁴ Similar method has been

⁸ See Judgment, *Tadić* (IT-94-1-A), International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber, 15 July 1999, § 240; Judgment, *Lukić Milan and Lukić Sredoje* (IT-98-32-1-T), ICTY Trial Chamber Judgment, 20 July 2009, § 904; Judgment, *Charles Ghankay Taylor* (SCSL-2003-01-T), Special Court for Sierra Leone (SCSL) Trial Chamber Judgment, 26 April 2012, § 413.

⁹ See Judgment, *Katanga and Chui* (ICC-01/04-01/07), International Criminal Court (ICC) Trial Judgment, 7 March 2014, § 768; Judgment, *Jean-Pierre Bemba Gombo* (ICC-01/05-01/08), ICC Trial Judgment, 15 June 2009, § 88.

¹⁰ See Judgment, *Halilović* (IT-01-48-T), ICTY Trial Chamber Judgment, 16 November 2005, § 37; Judgment, *Brima, Kamara and Kanu* (SCSL-04-16-T), SCSL Trial Chamber II Judgment, 20 June 2007, § 689.

¹¹ Judgment, *Jean-Pierre Bemba Gombo*, (ICC-01/05-01/08), ICC Confirmation of Charge, 15 June 2009, § 133.

¹² Ibid.

¹³ Judgment, *Kordić & Čerkez* (IT-95-14/2), ICTY Appeal Chamber, 17 December 2004, § 37; Judgment *Kvočka* (IT-98-30/1-A), ICTY Appeal Chamber, 28 February, 2005, § 261; Judgment, *Blaskić* (IT-95 14-T), ICTY Trial Chamber, 3 March 2000, § 217; Judgment, *Akayesu* (ICTR-96-4), International Criminal Tribunal for Rwanda (ICTR) Trial Chamber, 2 September 1998, § 589; Judgment, *Katanga and Chui* (ICC-01/04-01/07), ICC Decision on the Confirmation of Charges, 30 September 2008, § 421.

¹⁴ Judgment, *Galić* (IT-98-29), ICTY Appeal Chamber, 30 November 2006, § 149.

used in the ICC to prove the causation element of murder.¹⁵ In this circumstances, the criminal's demeanor does not have to be the 'sole cause' aimed at the object's murder; it is enough to show that it was a 'substantial' motive of or 'contributed substantially' to the person's killing.¹⁶ For example, one of the Panels in East Timor Tribunal has inferred this condition to state that the wrongdoer's performance obliges to one that 'proximately caused' the killing and requires 'not be so isolated.'¹⁷ Such type of condition will not be required once an independent act breaks the chain of causation.¹⁸

Hitherto, the ICC has not seemed to depart from the stands of the *ad hoc* Tribunals.¹⁹ In the ICTY *Krnjelac's* case, the problem of causation came forward regarding an allegation of homicide in a situation wherever the victim did commit suicide.²⁰ The offenders had tortured the man physically, deprived him from health treatment, and at that moment kept him to an inaccessible cell. In this case, the applicable causation was not fulfilled according to the evidence,²¹ hence, the Chamber was not in disputing that the causation was done in the case. However, the causation would have been done, if the wrongdoers had "induced the victim to take action which resulted in his death and that the suicide was either 'intended' or was 'an action of a type which a reasonable person could have foreseen' as a consequence of the conduct."²²

From the above analysis, it has been elucidated that the victims' death is not enough to establish the element of murder against the accused. There shall be a link or nexus to show that the perpetrators' acts directly cause the victims' death. Sometimes though the culprit's demeanor does not have to be the 'sole cause' aimed at the object's murder; it is enough to show that it was a 'substantial' motive of or 'contributed substantially' to the person's killing as outlined above, with the findings of international criminal tribunals. Similarly, this requirement means wrongdoer's performance obliges to one that 'proximately caused' the killing and requires 'not to so isolated' as enshrined in one of the Panels in East Timor. So, it is the utmost duty of a prosecuting tribunal to establish the requirements mentioned earlier to prosecute and punish a criminal for murder as crimes against humanity.

3.2. Extermination

According to international customary law, the elements of 'extermination' to be a crime against humanity necessitates the prosecuting Tribunal to fulfill that the subsequent acts were committed as part of a 'widespread or systematic' attack against a civilian populace.

¹⁵ *Katanga and Chui*, *supra* note 13, § 287; *Jean-Pierre Bemba Gombo*, *supra* note 11, § 132.

¹⁶ Judgment, *Zdravko Mucić et al* (IT-96-21), ICTY Trial Chamber, 16 November 1998, § 424; *Charles Ghankay Taylor*, *supra* note 8, § 413.

¹⁷ Judgment, *Linode Carvalho* (CaseNo10/2001), Special Panel for Serious Crimes (SPSC) in East Timor Trial Chamber, 18 March 2004, § 12.

¹⁸ Judgment, *Francisco Perreira* (CaseNo34/2003), SPSC in East Timor Trial Chamber, 27 April 2005, §§ 20-21 (where the perpetrator struck the victim with a sword and the intention to kill, but the victim was in fact killed by a contemporaneous gunshot wound).

¹⁹ *Jean-Pierre Bemba Gombo*, *supra* note 11, §§ 132; 217' *Akayesu*, *supra* note 13, § 589; *Blaskic*, *supra* note 13, § 217; *Katanga and Chui*, *supra* note 13, § 768 and *Kordić & Čerkez*, *supra* note 13, § 37.

²⁰ Judgment, *Krnjelac* (IT-97-25), ICTY Trial Chamber, 15 July 2002, §§ 328-329.

²¹ *Ibid.*, § 342.

²² *Ibid.*, § 329. In this case, the standard is also expressed as requiring that the suicide be the 'likely and foreseeable result.'

- a. Murdering on a grave or large scale,²³ including the infliction of conditions of life that would, or was considered to, facilitate to the victims' deaths.²⁴
- b. The offender takes part in, or commences any action or lapse which donates, directly or indirectly, to the murder.²⁵
- c. The culprit does so with the intent to:
 1. kill, or participate in the killing, on a large scale;²⁶ or
 2. subject (or participate in the subjection of)²⁷ people to circumstances of life that would, or was intended to, lead to their demises; or
 3. commit the relevant act with acquaintance that the demises of a great number of people were the plausible consequence of the acts or omissions.²⁸

Similarly, Article 7(1)(b) of the ICC Statute proposes 'extermination' as a crime against humanity, by defining that extermination means 'the intentional infliction of conditions of life, *inter alia*, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.' It reveals that the offense of extermination contains firstly an action or grouping of unlawful activities that facilitate to the murder of individuals in large-scale.²⁹ Therefore, criminal accountability for large annihilation of people (extermination) individually awards to whom are liable for many killings, even though, the perpetrator's actual participation in the criminal activities was distant or incidental.³⁰ On the contrary, accountability for one or an inadequate quantity of such murders is inadequate chiefly, to establish the conduct of extermination.³¹ Activities of large-scale eradication of people is essential, thus, be joint instead of directed to singled-out individuals.³²

Dissimilar to genocide, however, the perpetrator does not need to have proposed in destroying the targeted group partially or wholly to which the victim is belonged.³³ The

²³ Judgment, *Stakić* (IT-97-24), ICTY Appeal Chamber, 22 March 2006, § 260; Judgment, *Martić* (IT-95-11), ICTY Trial Chamber, 12 June 2007, § 62; *Akayesu*, *supra* note 13, § 591 (following the commentary on the ILC Draft Code of Crimes against the Peace and Security of Mankind, Report of the ILC on the work of its 48th session, 6 May - 26 July 1996, UN Doc. A/51/10, 51st session, supp.no.10, Article 18).

²⁴ Judgment, *Krstić* (IT-98-33), ICTY Trial Chamber, 2 August 2001, § 503; Judgment, *Brđanin* (IT-99-36), ICTY Trial Chamber, 1 September 2004, § 389; *Stakić*, *supra* note 23, § 259.

²⁵ *Martić*, *supra* note 23, § 62; Judgment, *Perišić* (IT-04-81), ICTY Trial Chamber, 6 September 2011, § 106; Judgment, *Emmanuel Ndindabahizi* (ICTR-01-71), ICTR Trial Chamber, 15 July 2004, § 479; Judgment, *Yussuf Munyakazi* (ICTR-97-36A), ICTR Trial Chamber, 5 July 2010, § 506.

²⁶ Judgment, *Ntakirutimana et al* (ICTR-96-10 & ICTR-96-17-T), ICTR Appeal Chamber, 13 December 2004, § 522, *Stakić*, *supra* note 23, § 259.

²⁷ While not stated explicitly by the ad hoc tribunals, this addition appears to be implied, see in R. Dubler SC, and Matthew Kalyk, *Crimes against humanity in the 21st Century: Law, Practice and Threats to International Peace and Security* (Leiden: Brill | Nijhoff, 2018), at 778.

²⁸ Judgment, *Stakić* (IT-97-24), ICTY Trial Chamber, 31 July 2003, § 641; *Martić*, *supra* note 23, § 65; Judgment, *Brirna, Kamara and Kanu* (SCSL-2004-04-16-T469), SCSL Decision on Defense Motion for Judgment of Acquittal Pursuant to Rule 98, 31 March 2006, § 73.

²⁹ Judgment, *Vasiljević* (IT-98-32), ICTY Trial Chamber, 29 November 2002, § 229; Judgment, *Nahimana et al* (ICTR-99-52-A), ICTR Trial Judgment, 3 September, 2003, § 1061.

³⁰ *Emmanuel Ndindabahizi*, *supra* note 25, § 479; *Vasiljević*, *supra* note 29, § 227; Judgment, *Kamuhanda* (ICTR-99-54A), ICTR Trial Chamber, 22 January 2004, §§ 691-692.

³¹ *Vasiljević*, *supra* note 29, § 227. The Trial Chamber in this case noted that the suggestion made by the Trial Chamber of *Kayishema and Ruzindana* (ICTR-95-1-A), ICTR, Trial Chamber Judgment, 11 June 2001, § 147) that "a limited number of killings or even one single killing could qualify as extermination if it forms part of a mass killing event was completely unsupported thereby very much weakening the value of its ruling as a precedent. No state practice has been found by this Trial Chamber which would support the finding of the *Kayishema and Ruzindana* Trial Chamber (*Vasiljević* Trial Judgment, note 586)".

³² *Kamuhanda*, *supra* note 30, § 694; *Vasiljević*, *supra* note 29, § 227.

³³ *Vasiljević*, *supra* note 29, § 227; *Krstić*, *supra* note 24, § 49,

perpetrator may not even have known the identity of any of the victims.³⁴ In such a case, nevertheless, he must have known generally who his victims were and that they were marked for elimination. The International Law Commission (ILC) made it clear that the offense of 'extermination' was distinct as of genocide. Particularly, the ILC says, '[e]xtermination covers situations in which a group of individuals who do not share any common characteristics are killed.'³⁵ The vast or huge scale of the facts in question obliges to underlie the wrongdoing of extermination is what distinguishes it after murder. For example, in the case of *Akayesu*, ICTR, TC confirms that, '[e]xtermination is a crime which by its very nature is directed against a group of individuals. Extermination differs from murder in that it requires an element of mass destruction which is not required for murder.'³⁶ Contrary to what might have been said in several unsupported decisions,³⁷ a single killing may not, therefore, qualify as extermination.³⁸ In effect, based on this evaluation method, any action or combination of activities may qualify to be extermination if it subsidized, whether instantly or finally, in a straight line or incidentally, to the illegitimate bodily abolition of a big amounts of individuals.³⁹

Furthermore, an act of extermination includes participation in mass killings and arguably participation in the Planning of these killings. In the case of *Kayishema and Ruzindana* Trial Judgment says by holding that, in such an event, the prosecutor must establish a connection between 'the planning and the actual killing.'⁴⁰ Egon Schwalb rightly proposed that the IMT Charter's drafters encompassed the offense of extermination to 'bring the earlier stages in the organization of a policy of extermination under the action of the law.'⁴¹ By focusing on the Planning of the killing, the court may thus consider extermination acts that would be too remote to constitute complicity to homicide.⁴²

Despite an unsupported suggestion by the *Krstic*'s TC that an act of extermination must destroy a 'numerically significant part of the population,'⁴³ there seems to be no prerequisite in international customary law that the homicidal enterprise must influence or bring near the annihilation of a definite proportion of a targeted populace.⁴⁴ Indeed, there is no precedent nor any authority that supports the *Krstic* requirement.⁴⁵ As a result, the conclusions of the *Krstic* TC seem to be exclusively based on the ICC definition of the offence. The ICC Statute, as already pointed out, although useful in determining the *opinion Juris* of state parties at the time when they adopted the Statute, is not *per se* customary international law.⁴⁶ It appears that the *Krstic* TC mistakenly combined one element of the *chapeau* (a 'civilian population') with the definition of one underlying offence (extermination).⁴⁷ The reference in the *chapeau* to a 'civilian population' purports to underline the

³⁴ G. Mettraux, *International Crimes and the ad hoc Tribunals* (Oxford: Oxford University Press, 2005), at 177.

³⁵ ILC Draft Code of Crimes against the Peace and Security of Mankind 1996, Report of the ILC on the work of its 48th session, 6 May - 26 July 1996, UN Doc. A/51/10, 51st session, supp.no.10, para. 97.

³⁶ *Akayesu*, *supra* note 13, § 591.

³⁷ Judgment, *Kayishema and Ruzindana* (ICTR-95-1-A), ICTR Trial Chamber, 11 June 2001, § 645.

³⁸ Judgment, *Kajelijeli* (ICTR-98-44A-T), ICTR Trial Chamber, 1 December 2003, § 893.

³⁹ *Kayishema and Ruzindana*, *supra* note 37, §§ 146-147.

⁴⁰ *Ibid.*, § 146.

⁴¹ E. Schwelb 'Crimes Against Humanity', 23 *British Year Book of International Law* (1946) 175-208, at 178 and 192.

⁴² *Ibid.*, at 192.

⁴³ *Krstic*, *supra* note 24, §§ 502-503.

⁴⁴ *Blaskic*, *supra* note 13, § 207.

⁴⁵ *Ibid.*

⁴⁶ Judgment, *Furundžija* (IT-95-17/1), ICTY Trial Chamber, 10 December 1998, § 227.

⁴⁷ G. Mettraux, *supra* note 34, at 178.

scale of the attack of which the crime of the accused – extermination, for instance – is only one, possibly little, part, and it sets the context within which the acts of the accused take place.⁴⁸ As stated above, the 'civilian population' is the target of the 'attack,' not the victim of individualized unlawful demeanors of the accused. Such a requirement would blur the distinction between genocide and extermination, creating a dangerous gap in the protection afforded by international humanitarian law.⁴⁹

Lastly, concerning the requisite *men's rea* for that offence, the Prosecution must establish that the offender envisioned to destroy a big quantity of entities, or to perpetrate serious physical impairment, or to impose grave wound, in the practical acquaintance that such conduct or lapse was probably to execute death, same as of in the case of offense of killing.⁵⁰ In addition, the accused must also be shown to have understood on the massive arrangement of joint murders and ready to participate therein.⁵¹ Contrary to the offense of persecution according to Article 5(h) of the ICTY Statute and Article 3(h) of the ICTR Statute, the Prosecutor does not need to demonstrate that the accused acted on any discriminatory grounds.⁵² Also, TC II of the ICTY noted that 'the ultimate reason or motives – political or ideological – for which the offender carried out the acts [of extermination] are not part of the required *mens rea* and are, therefore, legally irrelevant.'⁵³ The Prosecution's legal duty is only to prove that the offender planned to kill the targeted person, with acquaintance of the larger murderous context. As such, the perpetrator's motive in selecting his victims is legally irrelevant in the case of extermination before proving the guilt of crimes against humanity.

3.3. Torture

As stated by international customary international law, the elements of the offense of 'torture' as a crime against humanity entails the prosecuting tribunal to prove that the succeeding essentials were done as part of a 'widespread or systematic' attack counter to a noncombatant people.

1. The criminal inflicts, by acts or omissions, causes extreme pain or suffering – whether bodily or psychological - on one or more victims.⁵⁴
2. The offender intends the acts or omissions.⁵⁵
3. The perpetrator does so for such determinations as obtaining from the victim or a third party material evidence or a confession, punishing the victim for an act he/she or a third party has perpetrated or is alleged of having committed, or threatening or forcing the victim or a third party, or for any motive created on discrimination of any type.⁵⁶ Contrary to the Torture Convention, the act does not need to be dedicated for a forbidden purpose or be perpetrated in the presence of a State official.⁵⁷

As per Article 7(2)(e) of the ICC Statute, torture is a *jus cogens* ban in international legislation, is defined as 'the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused'

⁴⁸ Ibid.

⁴⁹ Judgment, *Aifred Musema* (ICTR-96-13-T), ICTR Trial Chamber, 27 January 2000, § 366.

⁵⁰ G. Mettraux, *supra* note 34, at 178.

⁵¹ Vasiljević, *supra* note 29, §§ 228-229.

⁵² Ibid., § 228.

⁵³ Ibid.

⁵⁴ *Furundžija*, *supra* note 46, § 262; Judgment, *Kunarac et al.* (IT-96-23& IT-96-23/1-A), ICTY Appeal Chamber, 12 June 2002, §§ 142 & 144; *Akayesu*, *supra* note 13, §§ 593-594.

⁵⁵ Ibid.; See also *Krnojelac*, *supra* note 20, § 184.

⁵⁶ *Kvočka*, *supra* note 13, § 140; Judgment, *Kunarac et al.* (IT-96-23& IT-96-23/1-A), ICTY Trial Chamber, 22 February 2001, § 497.

⁵⁷ *Kunarac et al.*, *supra* note 56, § 496; *Krnojelac*, *supra* note 20, § 187.

excluding 'pain or suffering arising only from, inherent in or incidental to, lawful sanctions.'⁵⁸ This definition differs from torture as an individual crime, provided for in Article 1(1) of the United Nations Convention against Torture (hereinafter CAT),⁵⁹ in two respects—it omits (1) the purpose and (2) official capacity requirements.⁶⁰ As to the latter, the omission is in line by means of the recent ICTY case law.⁶¹ In the ICTY *Kunarac* case, the TC held that 'the presence of a state official or of any other authority-wielding person in the torture process is not necessary.'⁶² Therefore, the Chamber concludes that 'the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention.'⁶³ In the Appeal Judgment of the *Kunarac*, it states that 'the definition of torture in the Torture Convention reflects customary international law as far as the obligation of States is concerned, however, this 'must be distinguished from an assertion that this definition wholly reflects customary international law regarding the meaning of the crime of torture generally.'⁶⁴ In any case, given the context requirement of the *chapeau* of Article 1(1), it is clear that a link to a (state-like) organization is required; that is, an individual, purely personal case of torture would not suffice.⁶⁵

As to the purpose requirement, an annotation to the 'Elements of Crimes' explicitly notes 'that no specific purpose must be proved.'⁶⁶ In contrast, the *ad hoc* tribunals' cases have always applied Article 1(1) of the CAT then essentially approved its purpose prerequisite.⁶⁷ However, from the wording of the provision ('such purposes as'), it follows that the purposes listed are not exhaustive but only exemplary; that is, other similar purposes may also suffice or complement the purposes mentioned.⁶⁸ It is, of course, another matter of whether such other purposes may also amount to international customary law requirement in establishing the elements of torture as an international crime.⁶⁹

In international customary law, another condition of the torture is the 'pain or suffering' compulsorily needs to be 'severe.'⁷⁰ This severity distinguishes torture from other forms of inhumane treatment that do not 'attain a minimum level of severity.'⁷¹ Of course,

⁵⁸ *Furundžija*, *supra* note 46, §§ 153-157.

⁵⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1987, 1465 UNTS 85.

⁶⁰ Article 1(1) Torture Convention: 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions' (emphasis added).

⁶¹ *Akayesu*, *supra* note 13, § 594; Judgment, *Delalic et al.* (IT-96-21-A), ICTY Trial Chamber, 16 November 1998, §§ 473-474; Judgment, *Furundžija*, (IT-95-17/1), ICTY Appeal Chamber, 21 July 2000, § 111.

⁶² *Kunarac et al.*, *supra* note 56, § 496.

⁶³ *Ibid.*

⁶⁴ *Kunarac et al.*, *supra* note 54, § 148.

⁶⁵ K. Ambos, *Treatise on International Criminal Law*, Vol. 2 (Oxford: Oxford University Press, 2014), at 90.

⁶⁶ See, Article 7(1)(f), Elements of Crimes (ICC Statute); W. Rücker and G. Witschel, 'Genocide and Crimes Against Humanity in the Elements of Crimes', in H. Fischer, C. Kress and S. Rolf Lüder (eds) *International and National Prosecution of Crimes Under International Law*, (Berlin: Berlin Verlag Arno Spitz, 2001) 46-101, at 59, 79-80.

⁶⁷ *Akayesu*, *supra* note 13, §§ 593-594; *Delalic et al.*, *supra* note 61, §§ 456, 493; *Furundžija*, *supra* note 46, § 111.

⁶⁸ *Delalic et al.*, *supra* note 61, § 470; *Kvočka*, *supra* note 13, §§ 140, 157.

⁶⁹ *Kunarac et al.*, *supra* note 56, § 485.

⁷⁰ K. Ambos, *supra* note 65, at 91.

⁷¹ *Ireland v UK* (Application No. 5310/71), European Court of Human Rights (ECtHR) Judgment, 18 January 1978, § 162.

there is no mathematical formula to distinguish 'severe' torture from 'non-severe mistreatment. For example, in the case of *Furundžija*, ICTY Appeal Court considered it somewhat apodictically, 'inconceivable that it could ever be argued that ...the rubbing of a knife against a woman's thighs and stomach, coupled with a threat to insert the knife into her vagina, ... are not serious enough to amount to torture'.⁷² What this statement clearly shows, and what already tracks since the language of Article 1(1) CAT and Article 7(2)(e) ICC Statute-is that the perpetration of bodily hurt is not a condition of torture.⁷³ In any case, what is clear is that there must be a difference between torture and mistreatment if the severity element should have any significance. Ultimately, the correct qualifications of torture and mistreatment depend on the circumstances of each case.⁷⁴ However, if the 'pain or suffering' is the results of a 'lawful sanction'⁷⁵ for example the death penalty in some domestic jurisdictions, the demeanor is not amounted to qualify as torture. In order to be legitimate, a sanction compulsorily needs to be executed in a fair judicial proceeding under the international least standardized norms as promulgated, for example, in Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).⁷⁶ Furthermore, the imposing law itself fundamentally needs to observe through the minimum conditions for the humane behavior with the imprisoned individuals according to Article 10 of the ICCPR.⁷⁷

In sum, the offense of torture under Article 7(1)(f) ICC Statute necessitates the bodily harm or mental hurt or sorrow, that must attain a minimum severity level. The victim must be under the perpetrator's control, that is, in such a state of affairs from which it is not possible to be freed. The culprit must hunt a particular object to inflict the victim. Such objectives comprise of but are not restricted toward procurement of material evidence or a concession, exhausting, embarrassing, threatening, or forcing the targeted person or a third party, and discriminating, taking place in any ways, against the relevant individuals.⁷⁸ If the hurt or mental sorrow is the consequence of a lawful sanction, it does not constitute torture in the legally relevant sense.

From the above analysis on the elements of crimes against humanity in the forms of murder, extermination and torture, it is clarified that all of the mentioned crimes are prohibited under customary international law due to their severity and level of seriousness in an escalation of such criminal acts on the civilian population. Hence, the perpetrators of murder, extermination, and torture shall be punished without undue delay in any competent criminal tribunals, be it domestic or international. The ICTB is one of the examples which is trying and punishing the offences mentioned above committed in the form of crimes against humanity. So, the following discussion is dedicated to analyzing whether the Tribunal in question applies aforesaid customary law requirements of such crimes as the underlying offenses of crimes against humanity.

⁷² *Furundžija*, *supra* note 46, § 114.

⁷³ *Kvočka*, *supra* note 13, § 149; A. Byrnes, "Torture and Other Offences Involving the Violation of the Physical or Mental Integrity of the Human Person", in McDonald et al (eds) *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts* (The Hague, London, Boston: Kluwer Law International, 2000) 207-225, at 210.

⁷⁴ *Delalic et al.*, *supra* note 61, § 461; Judgment, *Limaj et al.*, (IT-03-66-T), ICTY Trial Chamber, 30 November 2005, § 23

⁷⁵ See for example, Art. 7(2)(e) ICC Statute 1998.

⁷⁶ K. Ambos, *supra* note 65, at 91.

⁷⁷ Art. 10. (1) of the ICCPR says, "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".

⁷⁸ K. Ambos and S. Wirth, 'The Current Law of Crimes Against Humanity: An Analysis of UNTAET Regulation 15/2000', 13 *Criminal Law Forum*, (2002) 1-90, at 70.

4. The Underlying Offenses of Crimes against Humanity in the ICTB

As outlined earlier, though crimes against humanity are indicted and proved guilty against all of the accused in the ICTB, no express definition or explanation of murder, extermination, and torture is given to define the offense of crimes against humanity in the primary Statute of the ICTB- The ICT Act 1973 and its (Amendment) Act 2009, unlike the ICC, ICTY, and ICTR Statutes. Therefore, it is crucial to examine the jurisprudence of ICTB and domestic laws of Bangladesh on shedding light to the relevant discussion.

4.1. Crime of Murder in the ICTB

First of all, crime against humanity in form of murder is not defined in any of the judgments of the ICTB. The Appellate Division found the domestic definition of murder applicable, arguing that the ICT Act does not explicitly bar the application of the Bangladesh Penal Code 1860. Section 300 of the Penal Code says,

Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done to cause death, or Secondly, if it is done to cause such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or Thirdly, if it is done to cause bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or Fourthly if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

In applying the above definition of murder to international legislations, the mental element established under the domestic definition becomes relevant. As discussed above, in customary law, murder requires that: (1) the perpetrator has caused another person's death through his unlawful conduct; and (2) the perpetrator is conscious of the significant probability that the behavior will be the outcome of the victim's death.⁷⁹ However, in the cases of the ICTB, the prosecution never established such international criminal law requirements of murder as crimes against humanity except by proving that a murder conducted by the accused as the consequences of the Liberation War 1971. The ICTB never sufficiently established a link in identifying the victims' actual death as the underlying offences of crimes against humanity under international customary law. For example, the accused *Mujahid* was found guilty of cooperating with the Pakistani Army to murder intellectuals. However, the Pakistani military was not connected with these killings; instead, it was conducted exclusively by the *Al-Badr*,⁸⁰ a para-military force to the Pakistani army. Hence, it is elucidated that the Tribunal failed to connect between killing of victim and the conduct of the accused.

Furthermore, the accused *Mujahid* was charged for killing several detainees at the Army camp in the War Liberation in 1971. The Tribunal found that "accused *Mujahid* has been charged for participating, abetting and facilitating the commission of offence of 'murder as crime against humanity' by his conduct forming part of attack against the civilian population."⁸¹ However, the ICTB was unsuccessful to evidence that there was a 'common plan' of instigating killing of detained victims at the alleged place.⁸² Mere action of initiating torture to the detained persons at the camp is not treated as part of actions supported by the defendant in the absence of any proof of link among the so-called behavior of the suspect and the real perpetration of killing of the hostages.⁸³ Though the

⁷⁹ G. Werle and F. Jessberger, *Principles of International Criminal Law* (3rd edn., The Hague: 2014), at 919.

⁸⁰ *Chief Prosecutor v Ali Ahsan Muhammad Mujahid*, (ICTB Case No. 04 of 2012), Trial Judgment, 17 July 2013, § 429. See also *Chief Prosecutor v. Uddin et al.* (ICTB Case No. 01 of 2013), Trial Judgment, 3 November 2013, § 221.

⁸¹ *Chief Prosecutor v. Mujahid*, *supra* note 80, § 331.

⁸² *Ibid.*, § 353.

⁸³ *Ibid.*

Tribunal used testimony from a witness which is not a reliable eyewitness and the declaration was inconsistent and erratic. Furthermore, the evidence neither proved the participation of the defendant with the authentic commission of the suspected assassination, nor connection of any planning to commit such murderous activities by the accused with the Pakistani army.⁸⁴

Then, in the case of *Mujahid*, the Tribunal records that ‘from the evidence it is found that the victims in the case of *Mujahid* were valiant and brave guerilla fighters and at the relevant time they were in Dhaka city for the purpose of carrying out guerilla actions targeting Pakistani army and its auxiliary forces.’⁸⁵ This finding of the Tribunal means the hostages were guerilla freedom fighters who supposed to fight against Pakistani army, which is contradictory with the earlier decision of the same case that said that “accused *Mujahid* has been charged for participating, abetting and facilitating the commission of offence of ‘murder as crime against humanity’ by his conduct forming part of attack against the civilian population.”⁸⁶ So, the status of sufferers is confusing whether they are civilian or combatant while such clarification is crucial because the offense of murder as the forms of crimes against humanity need to be instigated against noncombatant people under customary law.

Again, in the same case, the Tribunal has doubted on the actual killing done by the accused *Mujahid* as no attestations were produced to support that the accused done the offense of real assassination of victims who were kept captive at the army-based premises.⁸⁷ In absence of evidence, the Tribunal decided

We thus conclude, on the basis of circumstances and relevant facts revealed that the victims were liquidated by the army either at the camp or somewhere else. The actual commission of crime might have been perpetrated by the army alone or by the army with the assistance and support of non-military individual or group of individuals.⁸⁸

It is evidenced that the above verdict of the ICTB put serious doubt on proving the actual killing done by the accused *Mujahid*, which is contrary to the criminal law principle because in criminal law every charge needs to be proved beyond reasonable doubt. So, the overall findings of the Tribunal in the case of *Mujahid* is far beyond customary law requirements of crimes of murder as enshrined by the jurisprudence of previous ICTs and their statutes.

In the case of *Molla*, the Tribunal found the accused liable for killing one civilian named Pallab in the War of Liberation. In this case, the Prosecution submitted the reason for killing Pallab was that he favoured pro-liberation activities. The Tribunal decided that ‘he was in favor of pro-liberation activities and as such it may be unambiguously presumed that killing him was in furtherance of attack directed against civilian population by the Pakistani army.’⁸⁹ The ICTB further observed that ‘the accused incurs criminal liability for having his ‘complicity’ to the commission of the murder of Pallab constituting the offence of crime against humanity as specified in section 3(2)(a) of the Act of 1973.’⁹⁰ In this case, it was not discussed by the Prosecution and the Tribunal whether the perpetrator essentially had instigated the death of the victim, which is legally essential as enshrined by ICC and *ad hoc* Tribunals’ jurisprudence.⁹¹ In this case, the elements of such

⁸⁴ Ibid.

⁸⁵ Ibid., § 355.

⁸⁶ Ibid., § 331.

⁸⁷ Ibid., § 356.

⁸⁸ Ibid.

⁸⁹ *Chief Prosecutor v. Abdul Quader Molla*, *supra* note 7, § 215.

⁹⁰ Ibid.

⁹¹ *Kordić & Čerkez*, *supra* note 13, § 37; *Kvočka*, *supra* note 13, § 261; *Blaskić*, *supra* note 13, § 217; *Akayesu*, *supra* note 13, §. 589; *Katanga and Chui*, *supra*

murder might be gratified by any action or lapse.⁹² Under customary international law, culprit's alleged conduct does not have to be the 'sole cause' aimed at the person's murder; it is enough to show that it was a 'substantial' motive of or 'contributed substantially' to the person's killing, with the findings of international criminal tribunals,⁹³ as discussed in the relevant section. Similarly, this requirement means wrongdoer's performance obliges to one that 'proximately caused' the killing and must 'not to so isolated' as enshrined in one of the Panels in East Timor.⁹⁴ However, in the said case of the ICTB, there was no discussion on the specific acts or omissions done by the accused to commit the offence of murder. Furthermore, the Tribunal failed to analyze why killing one pro-liberation civilian amounted to crimes against humanity without establishing that it was portion of a 'systematic and widespread' outbreak carried out by the Pakistani Army and their local collaborators.

Lastly, in many other cases of the ICTB,⁹⁵ the accused's murderous acts and the mental element were not examined to prove whether the criminal triggered the victim's grave grievance in reckless contempt aimed at human life expectancy, which is established in international customary law.⁹⁶ So, it is evidenced from the above analysis that the Prosecution of and Tribunal deliberately fail to adhere to customary law requirements in proving the guilt of murder as the original offense of crimes against humanity, which downgrades the legal credibility of the Tribunal in question, as it is trying and punishing international crimes in a specialized judicial proceeding in Bangladesh.

4.2. Crime of Extermination in the ICTB

Similar to the offense of murder, the offense of extermination also has not been well-defined by the ICT Act 1973 and the Tribunal. The Tribunal analyzed the specific offence in the context of the intellectual killings throughout the Liberation War. In several cases, the Tribunal initiated that extermination as a crime against humanity entails to prove that it has been executed on a large scale.⁹⁷ In *Mujahid's* case, the Tribunal established that there must be many killings to distinguish extermination from murder, and the attack necessarily needs to be instigated against a set of people. The Tribunal found that "Bengali intellectual group" that formed part of the national group was targeted."⁹⁸ However, the Tribunal omitted to mention whether extermination requires a specific group to be targeted rather than a civilian population.⁹⁹ The ICTB also did not clarify whether the targeted group has to share many common characteristics because the ICTY *Tadic* Appeal

note 13, § 421.

⁹² Judgment, *Galić*, (IT-98-29), ICTY Appeal Chamber, 30 November 2006, § 149; *Katanga and Chui*, *supra* note 13, § 287; *Jean-Pierre Bemba Gombo*, *supra* note 11, § 132.

⁹³ *Zdravko Mucić et al*, *supra* note 16, § 424; *Charles Ghankay Taylor*, *supra* note 8, § 413.

⁹⁴ *LinodeCarvalho*, *supra* note 17, § 12.

⁹⁵ See for example in the ICTB cases, *Chief Prosecutor v. Abul Kalam Azad*, *supra* note 7, §§ 214-215; *Chief Prosecutor v. Delowar Hossain Sayeedi*, *supra* note 7, §§ 163, 168; *Chief Prosecutor v. Muhammad Kamaruzzaman*, *supra* note 7, §§ 75, 84, 181; *Chief Prosecutor v. Salauddin Quader Chowdhury*, *supra* note 5, §§ 89, 163; *Chief Prosecutor v. Professor Golam Azam*, *supra* note 5, §§ 290-291, and *Chief Prosecutor v. Motiur Rahman Nizami*, *supra* note 5, §§ 144-145.

⁹⁶ *Akayesu*, *supra* note 13, §§ 589-590; Judgment, *Kupreskic* (IT-95-16), ICTY Trial Chamber, 14 January 2000, § 561.

⁹⁷ *Chief Prosecutor v. Mujahid*, *supra* note 80, § 494; *Chief Prosecutor v. Qaiser*, (ICTB Case No. 04 of 2013), Trial Judgment, 23 December 2014, §§ 896, 899; *Chief Prosecutor v. Sobhan* (ICTB Case NO. 01 of 2014), Trial Judgment, 18 February 2015, §§ 420, 421; *Chief Prosecutor v. Uddin et al.*, *supra* note 80, § 189.

⁹⁸ *Chief Prosecutor v. Mujahid*, *supra* note 80, § 495.

⁹⁹ *Ibid.*, §§ 495-496.

judgment enshrined that the victims of extermination do not need to be under a common feature compared to genocide victims.¹⁰⁰

In the case of *Uddin et al.*, the Tribunal recognized the large-scale measure¹⁰¹ to separate extermination from murder. It is required two critical factors for the qualification of murder as extermination:

- (1) the defendants knew the designed scheme of collective murder;¹⁰² and
- (2) they took part in it to enforce the murderous scheme.¹⁰³

These conditions relate to the mental elements of the joint criminal enterprise (JCE-I). Nevertheless, these requirements do not establish criteria to differentiate extermination from murder. Though the Tribunal did not explicitly say throughout the entire judgment that the accused were liable for involvement in a JCE, the defendants were finally becoming liable of 'participation by abetting and complicity' concerning the eleven charges.¹⁰⁴ In this case, the Tribunal also dealt with the question of whether the killing of 18 persons could amount to extermination and merely held that 'it is needless in the present case to determine whether 18 deaths ... alone satisfy this requirement of scale.'¹⁰⁵ However, it is mislaid by the Tribunal to clarify why it considered extermination to have been so clearly fulfilled in the decided cases. The Tribunal, though, quoted the ICTR Appeals Chamber's verdict of *Ndindabahizi*, where the Chamber held that extermination does not require a numerical minimum. Though a big number of victims can be considered an aggravating factor;¹⁰⁶ the Tribunal did not apply this finding to the case. At the same time, there was no scope of application for an aggravating factor based on 18 victims. The 18 victims are the sum of the 11 charges for extermination as enumerated in the case of *Uddin et al.*¹⁰⁷

Accordingly, in this case, the legal ruling of the ICTY, TC is identical, that held that the number of victims of separate incidents could be aggregated to establish the large-scale character of the killing.¹⁰⁸ Nevertheless, the Tribunal did not find all the happenings together to be one count of extermination but instead found the accused guilty of extermination in 11 cases.¹⁰⁹ It is totally against international courts and tribunals' findings. The Tribunal did not establish the number of victims as the aggravating factor before proving the guilt of extermination by means of the offense of crimes against humanity. In the same case, the Tribunal appeared to set a precise intention obligatory for the crime of extermination in proving it to be a crime against humanity. It ruled that the accused acted with a 'intent to exterminate the nation's intellectual class,'¹¹⁰ even though a specific purpose is not required for extermination offence, as the form of crimes against humanity, compared to genocide.¹¹¹

In the case of *Nizami*, the Tribunal again found that the accused was guilty of the offence of extermination for involving with the intellectual killing at the very last moment of the War. The Prosecution proved that the defendant Nizami was one of the

¹⁰⁰ *Tadić*, *supra* note 8, §§ 281-305.

¹⁰¹ *Chief Prosecutor v. Uddin et al.*, *supra* note 80, § 189.

¹⁰² *Ibid.*, § 190

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*, § 432.

¹⁰⁵ *Ibid.*, § 194.

¹⁰⁶ Judgment, *Emmanuel Ndindabahizi* (ICTR-01-71), ICTR Appeal Chamber, 16 January 2007, § 135.

¹⁰⁷ *Chief Prosecutor v. Uddin et al.*, *supra* note 80, § 194.

¹⁰⁸ *Brđanin*, *supra* note 24, § 391.

¹⁰⁹ *Chief Prosecutor v. Uddin et al.*, *supra* note 80, § 432.

¹¹⁰ *Ibid.*, § 190.

¹¹¹ Judgment, *Krstić* (Case No. IT-98-33), ICTY Appeal Chamber, 2 August 2001, § 499.

commanders of *Al-Badr*,¹¹² a paramilitary force to Pakistani Army, and he aided, abetted, and participated with the Pakistani Army for such large-scale killing of intellectuals.¹¹³ In this case, some issues that need to clarify that were purposely omitted by the Prosecution. Firstly, the Prosecution failed to produce evidence in supporting that the suspect Nizami was a commander of *Al-Badr* force in 1971. The Prosecution only articulated that the accused was the Chief of Islami Chhatra Sangha (ICS) in 1971, so he was the commander of *Al-Badr* force because the said force was created of armed members of ICS and the ICS is the student wing of Jamaat E Islami (JEI)- a political party who opposed the Liberation War and sided with Pakistani Army.¹¹⁴ It is true that JEI adequately opposed the War of Liberation in 1971, with many other political parties in the United Pakistan.¹¹⁵ So, the Prosecution was trying to justify that the accused was automatically involved in the *Al-Badr* force because he maintained the anti-liberation war ideology and sided with the Government of Pakistan. However, this is not legally convincing because the *Al-Badr* force was not legally defined in the ICT Act 1973 or any other documents of the ICTB to show that the defendant was straight forward engaged in the said paramilitary force of the Pakistani Army. The Tribunal and Prosecution decided this case based on some narratives that *Razakars*, *Al-Badr* forces joined with the Pakistani Army and committed international crimes, but it is not plausible in international criminal legislation to identify the offenders of extermination as crimes against humanity. As a result, the Tribunal failed that the act or combination of actions of perpetrator directly contributes to the killing of many individuals, because it is required in international customary law before proving the guilt of extermination.¹¹⁶ To form crimes against humanity, the criminal charge for extermination consequently individually confers to those liable for many deaths, even if their part therein was remote or indirect¹¹⁷ and is missing in the ICTB case of *Nizami*. Secondly, in this case, the Prosecution did not prove that the accused was involved in planning such large-scale killing in the absence of direct participation in the act of extermination. In international customary law, extermination includes involvement in mass killings and arguably involvement in the Planning of these killings.¹¹⁸ Hence, in the case of *Kayishema and Ruzindana* Trial Judgment truly says by holding that, in such an event, “the Prosecutor must establish a nexus between ‘the planning and the actual killing.’”¹¹⁹ Nevertheless, the Prosecution missed out on establishing any link between Planning and the actual killing of intellectuals by the accused.

Lastly, in the ICTB’s *Islam* case, the Court stated that the defendant was found guilty for ‘the extermination of individuals because of their membership to distinct national, ethnic, racial, religious or political group’ that has been perpetrated throughout the period of War of Liberation in 1971 within the territory of Bangladesh.¹²⁰ In this case, firstly, the Tribunal failed to take note that ‘the ultimate reason or motives such as national, ethnic, racial, political or ideological – for which the offender carried out the acts of

¹¹² *Al-Badr* Force was an armed para militia force which was created for ‘operational’ and ‘static’ purpose of the Pakistani Army. See in *Chief Prosecutor v Motiur Rahman Nizami*, *supra* note 5, § 309.

¹¹³ *Chief Prosecutor v Motiur Rahman Nizami*, *supra* note 5, § 309.

¹¹⁴ *Ibid.*, § 310.

¹¹⁵ Many Islamic Political parties such as, Democratic Party, Council Muslim League, Muslim League, Nejam E Islami were against the independence movement, see in *Chief Prosecutor v. Abdul Quader Molla*, *supra* note 7, § 12.

¹¹⁶ *Vasiljević*, *supra* note 29, § 229; *Prosecutor v. Nahimana et al*, *supra* note 29, § 1061.

¹¹⁷ *Emmanuel Nindabahizi*, *supra* note 25, § 479; *Vasiljević*, *supra* note 29, § 227; *Kamuhanda*, *supra* note 30, §§, 691-692.

¹¹⁸ *Kayishema and Ruzindana*, *supra* note 37, §§ 146-147.

¹¹⁹ *Ibid.*, § 146.

¹²⁰ *Chief Prosecutor v. A.T.M Azharul Islam*, (ICTB Case No.05 of 2013), Trial Judgment, 30 December 2014, § 190.

extermination' were not fragment of the obligatory *mens rea* hence, lawfully inappropriate.¹²¹ In any case, the Prosecution is obliged only prove that the criminal proposed to kill the individual, with facts of the larger murderous context. As such, the perpetrator's motive in selecting his victims is legally irrelevant in the case of extermination before proving the guilt of crimes in question. Secondly, in this case, the Prosecutor failed to prove the requisite *mens rea* for that offence-the offender planned to murder a big sum of individuals, or to perpetrate grievous physical injury, or to impose grave wound, practically it shows that such deed or lapse was probable to execute demise as in the case of killing.¹²² In addition, the Prosecution missed out on analyzing that the accused must also be shown to have recognized massive structure of joint murders and eager to participate therein as enshrined by the *ad hoc* tribunals' cases law,¹²³ as discussed above. The Tribunal used very general wording to prove the offence of extermination in most cases, which is not legally conclusive to successfully demonstrate the crime of extermination as the form of crimes against humanity.

4.3. Offense of Torture in the ICTB

The offense of torture to be the original offence of crimes against humanity was dealt with in many cases by the Tribunal, while the specific crime was not defined by the ICT Act 1973 and ICTB. In Bangladesh's domestic law, a general prohibition of torture is enshrined in Article 35(5)¹²⁴ of its Constitution. In 2013, the Torture and Custodial Death (Prevention) Act was enacted to implement the CAT 1984 provisions, to which Bangladesh acceded to in 1998. The domestic act integrates parts of the UNCAT definition of torture.¹²⁵ However, it omits some essential elements. For instance, it is not clearly mentioned that the action has to be executed intentionally, and it does not restrict the conduct to acts that cause severe pain.¹²⁶ At the same time, these are necessary conditions for torture to be an international crime.

The jurisprudence of the ICTB barely examined which concrete acts amount to torture. In most cases, the Tribunal stated that the victims were tortured without mentioning the perpetrators' specific conduct.¹²⁷ For illustration, in ICTB *Ali's* case, charge framing order noted that the accused was indicted for torture in 12 of the 14 charges, but the behavior was not disclosed in any of the charges.¹²⁸ As an alternative, the indictment states that torture was committed and thus employs the legal term without referring to an action.¹²⁹ In the judgment of the same case, the Tribunal nearly approves the definition

¹²¹ Ibid.

¹²² G. Mettraux, *supra* note 34, at 178.

¹²³ Vasiljević, *supra* note 29, §§ 228-229.

¹²⁴ Art. 35(5) of the Constitution of Bangladesh 1972 says, "[n]o person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment".

¹²⁵ For two unofficial translations, see

<http://www.humanrights.asia/countries/bangladesh/laws/legislation/Torture-Custodial-Death-ActNo50of2013-English.pdf> view, and Bangladesh Legal Aid and Services Trust (BLAST), Review of the Torture and Custodial Death (Prevention) Act, Death (Prevention) Act, 2013, [http://www.blast.org.bd/content/publications/Re-view%20of%20The%20Torture%20&%20Custodial%20Death\(Prevention\)%20Act,%202013.pdf](http://www.blast.org.bd/content/publications/Re-view%20of%20The%20Torture%20&%20Custodial%20Death(Prevention)%20Act,%202013.pdf), p.

4. However, both translations are imprecise.

¹²⁶ See in Sec. 2(vi) of the Torture and Custodial Death (Prohibition) Act, 2013, Bangladesh.

¹²⁷ See, for example, in ICTB cases of *Chief Prosecutor v. Motiur Rahman Nizami*, *supra* note 5, §§ 202-215. In this case, the charges already state that the accused was 'inhumanly tortured' without referring to specific acts. Also, the parts of the witness testimonies reproduced in the judgment do not contain further details.

¹²⁸ *Chief Prosecutor v. Mir Quasem Ali* (ICTB Case No. 03 of 2013), Charge Framing Order, 5 September 2013, at 9-18.

¹²⁹ Ibid., at 11 and 12.

established in customary law. It held that the following three elements must be fulfilled: (1) the presence of an action or lapse to inflict or cause relentless pain or suffering, whether bodily or cerebral; (2) the action or blunder compulsorily be deliberate or intended; and (3) the action or lapse must have been supported with a precise purpose, such as to get evidence or a concession, to penalize, threaten or force the victim or a third party.¹³⁰ In the adjudication of one charge, however, it concluded in a general manner that torture and inhumane mistreatment were used to extract information about the freedom fighters.¹³¹ Nevertheless, details on the specific torture cases remain absent from all charges. The testimonies are either given or reproduced without further information regarding the conducts of torment that were executed.¹³²

In the case of *Khokon*, the Tribunal contended that forced conversions fall under torture. It found that torture does not require physical harm but instead can be committed through 'mental pressure, forceful conversion, intimidation for deportation, even by way of making loudly ... sound of horn ...'¹³³ However, in listing these acts, the Tribunal omitted to mention that severe pain or suffering must be caused by their actions to amount to torture. As an alternative, the Tribunal found that forceful conversions constitute 'other inhumane acts in a case in which the indictment classified this as persecution.'¹³⁴ There is thus no consistency in the application of the offense of torture to forceful conversions that can be seen in the ICTB Cases.

In the ICTB's *Kamaruzzaman* case, the Trial Court concluded that the victim was abducted to the army camp by *Al-Badr* force to whom the accused accompanied, later the victim was killed by torturing physically.¹³⁵ In this case, the Tribunal and Prosecution did not claim that defendant Kamaruzzaman did participate materially in the genuine acts of torture and murder; instead, it was discovered that the specific detention place had completed the commission of torment activities and assassination of the victim.¹³⁶ However, it was claimed by the Tribunal that the murder executed in the interior of a pair of hours; the gang commanded by defendant Kamaruzzaman kidnapped the victim and took him to the camp.¹³⁷ There was confusion on the exact position of the accused in committing torture because the latter part of the judgment was not accorded with the former part of the judgment on the actual participation of the accused. So, in this case, the Tribunal and the Prosecution failed to prove that at least an act or behavior of the defendant facilitated 'directly or substantially' to the concrete execution of the offense.¹³⁸ It is required by customary law that the culprit inflicts, through acts or omissions, instigates serious pain or suffering - whether bodily or psychologically- on single or group of individuals to commit the crime of torture.¹³⁹ Furthermore, the Prosecutor did not prove the *men's rea* of the suspect's so-called demeanor of associating the army in kidnapping the targeted person because, without verifying the 'intent requirement', it is not logical to assume that the defendant went to accompany with the armed cluster of *Al-Badr* know that the seized

¹³⁰ *Chief Prosecutor v. Mir Quasem Ali* (ICTB Case No. 03 of 2013), Trial Judgment, 2 November 2014, § 176.

¹³¹ *Ibid.*, § 296.

¹³² *Ibid.*

¹³³ *Chief Prosecutor v. Khokon* (ICTB Case No. 04 of 2013), Trial Judgment, 13 November 2014, § 90.

¹³⁴ *Chief Prosecutor v. Jabbar Engineer* (ICTB Case No. 01 of 2014), Charge Framing Order, 14 August 2014, at 16; *Chief Prosecutor v. Jabbar Engineer*, ICTB Trial Judgment, 24 February 2015, § 219.

¹³⁵ *Chief Prosecutor v. Muhammad Kamaruzzaman*, *supra* note 7, § 220.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*, § 234.

¹³⁹ *Furundžija*, *supra* note 46, § 262; *Kunarac et al.*, *supra* note 54, §§ 142 and 144; *Akayesu*, *supra* note 13, §§ 593-594.

victim would be ultimately tortured and murdered.¹⁴⁰ In customary international law, the perpetrator's intention to the act or omission is crucial to prove the crime of torture- underlying offense of crimes against humanity.¹⁴¹ However, all of these requirements were disregarded by the ICTB in indicting crimes against humanity of torture.

5. The Legal Miscarriage of the ICTB and the Way Forward

The above legal analysis elucidated that in prosecuting and punishing crimes against humanity of murder, extermination, and torture, the ICTB adequately failed to adhere to customary international law requirements of such offences. In the decided cases, the Tribunal is used to prove the elements of murder, extermination, and torture as the underlying offence of crimes against humanity in such a way which differs enormously from the internationally recognized elements of these crimes in 1971 and nowadays. Concerning the elements of the crime against humanity of murder, extermination, and torture, the problem lies mainly in the practical application rather than that the Tribunal does not consider internationally established conditions. So, there might be a question of whether such continuous non-compliance with customary international law in fulfilling the requirements of specific offenses of crimes against humanity would amount to the ultimate legal failure of the ICTB. This legal issue is examined in the following discussion.

Crimes against humanity are considered as *jus cogens* crimes in international law which are hardly disputed in international customary law.¹⁴² Furthermore, it is evidenced beyond a reasonable uncertainty that crimes in question are considered as *jus cogens* offenses because of prevalent embargoes of such crimes from IMT Nuremberg, International Military Tribunal for the Far East, Tokyo, the UN *ad hoc* tribunals (ICTY and ICTR), hybrid courts to the ICC regime.¹⁴³ Therefore, in order to indict and punish such offense, any criminal tribunal requires to observe customary law rudiments of each and every essentials of crimes against humanity, if not the crimes in question never be able to segregate from domestic misconducts of murder, extermination, and torture.¹⁴⁴ When a criminal tribunal ignores in applying customary law elements of crimes against humanity, the lawful competency of such tribunal places serious distrust to ensure criminal justice to the parties.¹⁴⁵ The ICTB is one of the cases that has been interrogated its lawful credibility and legally unsuccessful for not adhering customary law essentials of murder, extermination, and torture in order to prove the culpability of crimes against humanity. As a result, the outcome of the Bangladesh Tribunal is not setting a good precedent for the international criminal justice system.

In order to prosecute and punish international offenses, a criminal tribunal objects in strengthening the rule of law and emphasize its moral standards.¹⁴⁶ Thus, a criminal trial at the national level can aid in reconstructing or enhancing the municipal courts and

¹⁴⁰ *Chief Prosecutor v. Muhammad Kamaruzzaman*, *supra* note 7, § 234.

¹⁴¹ *Furundžija*, *supra* note 46, § 262; *Kunarac et al.*, *supra* note 54, §§ 142 and 144; *Akayesu*, *supra* note 13, §§ 593-594 and *Krnjelac*, *supra* note 20, § 184.

¹⁴² M. M. Jackson, 'Customary International Law Duty to Prosecute Crimes against Humanity: A New Framework', 16 *Tulane Journal of International and Comparative Law* (2007) 117-157, at 130.

¹⁴³ Crimes against humanity had been recognized as the core crimes in the following international and *ad hoc* tribunals. See for examples, IMT Nuremberg Charter, Art. 6(c); IMTFA Tokyo Charter, Art. 5(c). Also defined as an international crime in the Rome Statute of the ICC, Art. 7; the ICTR Statute, Art. 3, and the ICTY Statute, Art. 5. The International Residual Mechanism for Criminal Tribunals, continuing the ICTY and ICTR's jurisdiction, and hybrid tribunals such as, ECCC Statute Art. 5, and SCSL Statute, Art. 2, also have criminalized crimes against humanity.

¹⁴⁴ M. Billah, *supra* note 2, at 28.

¹⁴⁵ *Ibid.*

¹⁴⁶ M. J. Aukerman, 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice', 39 (15) *Harvard Human Rights Journal* (2002) 39-99, at 72-73.

reinforce its legal integrity.¹⁴⁷ However, criminal tribunals that are assumed to be ‘victor’s justice’ will not completely encourage society to admit the ethical values strengthened through them.¹⁴⁸ This is indeed identical for the trial proceeding of the ICTB, because it is run by the winning party in the Bangladesh Liberation War, the Awami League, and indicted and penalized defendants who were belonged to one party in the conflict.¹⁴⁹ Therefore, the ultimate legal miscarriages of the ICTB are regarded the performance of victor’s justice that has no input to the legal study on the domestic trial of international offenses.¹⁵⁰ As a consequence, the Bangladesh Tribunal’s overall performance will be questioned to ensure criminal justice to the appropriate parties, and likely to be one of the dangerous precedents for the upcoming global community who will be indicting and penalizing international crimes via the internal machinery. Furthermore, at present, the ICC is operating well in the different part of the world and international criminal justice system is well-developed in trying and punishing the offenders of heinous crimes perpetrated in any part of the globe.¹⁵¹ Therefore, the ICTB needs to do the following in contributing to the development of international criminal justice.

Firstly, the ICT Act 1973 is a portion of law that expressively affects curing the previous wound of the Bangladesh Liberation War fatalities and motivates the current generation of Bangladesh to create a civil society wherever the decree of law is valued even after 51 years of the Liberation War of Bangladesh. Consequently, the ICTB is continuing its operation nowadays. Therefore, the Tribunal in question must requires to amend the ICT Act 1973 to legislate the meaning and definition of murder, extermination, and torture as the underlying offenses of crimes against humanity. These underlying offenses already defined well in the ICTY, ICTR, ICC, and hybrid criminal tribunals’ Laws with the latest development of international customary law. Though it might be predictable that national law is frequently not enough developed in dealing with international criminalities such as, crimes against humanity, genocide, and war crimes, it does not indicate that states never recognize the disgraceful nature of such offenses.¹⁵² Relatively, these crimes’ international responsibilities and practices as mentioned above demonstrate that a certain number of actions, which are even not banned properly by domestic criminal legislations, have gradually been criminalized as international misconducts.¹⁵³ Hence, in circumstances of any failure to adhere customary law definitions of murder, extermination and torture as the forms of crimes against humanity, the ICTB’s legal credibility is questioned and it failed to secure criminal justice to the relevant parties. As a result, it will be considered as one of the hazardous models for the future global community who will be willing to prosecute and punish international wrongdoings in their national settings because such crimes already well recognized and documented as international crimes in the previous international and internationalized criminal tribunals. The current Tribunal is prosecuting the offenders of international crimes committed fifty years ago, hence it needs to step forward judiciously to comply with international penal law.¹⁵⁴

¹⁴⁷ N. J. Kritz, ‘Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights’, 59 *Law & Contemporary Problems* (1996) 127-152, at 133.

¹⁴⁸ M. J. Aukerman, *supra* note 146, at 90.

¹⁴⁹ M. Billah, *supra* note 2, at 31.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² V. Spigga, ‘Non-retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga’, 9 (1) *Journal of International Criminal Justice* (2011) 5-23, at 12.

¹⁵³ *Ibid.*

¹⁵⁴ Maruf Billah, Fuad Mahbub, and Tan Birun Nisa, ‘The Impact of the Political Interference on Prosecuting International Crimes: An Experience from the International Crimes Tribunal Bangladesh’, 58 (1) *Hong Kong Journal of Social Sciences* (2022) 607-617.

Secondly, if the above amendment to the ICT Act 1973 is not probable then the ICTB can apply customary law elements of murder, extermination, and torture to fulfill the basic rudiments of crimes against humanity in the Tribunal's cases, that were established through the ICTY, ICTR, and ICC's jurisprudence, as examined in the appropriate segment of this research. It is indispensable to note that in most of the ICTB's cases, crimes against humanity are being sued at the present time while they were executed in the Liberation War of Bangladesh in 1971, 51 years back. During this time, numerous variations and legal developments have been taking place in the fundamentals of crimes in question. Therefore, it is essential to adhere to the up-to-date jurisprudence of ICTs in order to define the crimes mentioned above before proving international criminality of murder, extermination, and torture- fundamental offenses of crimes against humanity. Any failure to the adherence of customary law definitions of such offences by the ICTB, the legal credibility of the Tribunal will be dubious in safeguarding punitive justice to the victims and accused. One reason could be justified by inferring that the ICTB is aimed to prosecute and punish crimes against humanity that are regarded as *jus cogens* offenses under general and customary international law. Hence, the prosecuting tribunal is obliged to adhere customary law conditions in honoring the *jus cogens* rank of the crimes in question. Without such adherence of customary law definition, crimes of murder, extermination, and torture may not be able to separate from domestic criminalities to assess their seriousness that shocks the scruples of humankind. So, it is considered as one of the fatal mistakes of a criminal tribunal who is trying and punishing international criminalities either in national or international apparatus.

6. Conclusion

In conclusion, it is generally evident from the above analysis that concerning the underlying offenses of murder, extermination, and torture attached to crimes against humanity, the major problem lies in the absence of clear definitions of the legal terms in the ICT Act 1973, and ICTB cases, in which meanings are provided in their unsatisfactory application. Detailed scrutiny of the mental elements is often entirely omitted and leads to a pervasive application of the offenses. Overall, concerning most of the distinct crimes against humanity, there is no systematic application in practice. The application of the elements of crimes in different judgments also varies significantly. The definition of crimes of murder, extermination, and torture as crimes against humanity applied by the ICTB is, to a great extent, not following customary international law. The absence of clear definitions and the failure to apply them precisely to the cases produce a high risk of arbitrary application of the law by the ICTB.

Specifically, in most of the cases the Prosecution was trying to justify that the accused were automatically involved in the *Al-Badr* (a paramilitary) force of Pakistani army because they were maintained the anti-liberation war ideology and sided with the Government of Pakistan. However, this is not legally convincing because the *Al-Badr* force was not legally defined in the ICT Act 1973 or any other documents of the ICTB to show that the defendant were straight forward engaged in the said paramilitary force of the Pakistani Army. The Tribunal and Prosecution decided in many cases based on some narratives that *Al-Badr* forces joined with the Pakistani Army and committed international crimes, but it is not plausible in international criminal legislation to prove the offenses of murder, extermination, and torture as crimes against humanity with such vague argument. As a result, the Tribunal certainly failed that the act or combination of actions of perpetrators directly contributes to the commission of murder, extermination, and torture as the basic elements of crimes against humanity, that sufficiently poses a big question mark on the final outcome of the ICTB in ensuring criminal justice to the relevant parties.

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