International Crimes Tribunal-2

ICT-BD [ICT-2] Miscellaneous Case No. 01 of 2014

[Under section 11(4) of the International Crimes (Tribunals) Act 1973]

Present:

Justice Obaidul Hassan, Chairman

Justice Md. Mozibur Rahman Miah, Member

Justice Md. Shahinur Islam, Member

Abul Kalam Azad, Advocate,
Supreme Court Bar Association Bhaban
vs.
David Bergman [Contemnor]
Journalist
7/C, New Bailey Road, Dhaka-1000

For the Applicant

Mr. Mizan Sayeed, Advocate, Bangladesh Supreme Court
Mr. Md. Moksedul Islam, Advocate, Bangladesh Supreme Court
Mr. Md. Anamul Kabir, Advocate, Bangladesh Supreme Court

For the contemnor

Mr. Mustafizur Rahman Khan, Advocate, Bangladesh Supreme Court

ORDER

Delivered on 02 December 2014

I. Background of the proceedings,

1. This has been a proceeding under section 11(4) of the Act of 1973 for the offence of contempt initiated against David Bergman, a journalist on allegation of circulating three articles portraying derogatory criticism along with comment of his own. The applicant alleges that David Bergman by his such act and conduct of criticism intended demeaning, disparaging and lowering Tribunal's authority as the 'comment' made therein on the 'death figure in 1971' and on the observation made by this Tribunal on the issue of holding 'absentia trial' in the judgment of

Abul Kalam Azad were misconceived, belittling, unfair and not in the public interest.

2. Admittedly, David Bergman is a foreign national. By profession he is a journalist and has been working in Bangladesh. It has not yet been made transparent, by the contemnor, on what basis he has been here and working as a journalist. On query, it could be learnt that the contemnor opposite party has got married to a Bangladeshi citizen and in that capacity he has been staying here. However, three impugned articles making criticism on **'death figure in 1971',** during the war of liberation and also on observation made in the judgment of ICT-2 on the issue of holding **'trial in absentia'** have been circulated in the personal blog [*bangladeshwarcrimes.blogpost.com*] of the contemnor. Posting the alleged articles making criticism in his blog stands admitted.

3. To speak generally, contempt of court may be said to be constituted by any conduct that tends to bring the authority and administration of the law into disrespect or disregard. The Tribunal is authorized and empowered to punish the act of contempt effectively to see whether the contemnor had a tendency to hinder the normal course of justice or affect the dignity of the Tribunal.

4. The matter of circulating alleged derogatory criticism by David Bergman came to notice of the Tribunal when one Abul Kalam Azad, Advocate came up with an application on 19.2.2014 with a prayer to initiate contempt proceeding under section 11(4) of the International Crimes (Tribunals) Act 1973 on the ground that David Bergman, a journalist by circulating three articles in his personal blog questioning the 'death figure in 1971' during the war of liberation and making 'unfair' and 'scandalous' post-judgment criticism[Abul Kalam Azad Case] which was intended lowering Tribunal's authority by questioning the performance of its judicial duties.

5. The first article titled **'Sayedee indictment: 1971 deaths'** alleged to be contemptuous was published on 11 November 2011. The two other alleged articles titled **'Azad judgement analysis 1: 'in-absentia' trials**

and defense inadequacy' and '**Azad Judgment analysis 2: Tribunal assumptions**' respectively .were posted in his personal blog in January 2013[26.01.2013 and 28.01.2013], after the verdict passed in the case of Abul Kalam Azad.

6. Tribunal, on going through the application and on hearing the learned counsel appearing on behalf of the applicant, by its order dated 20.2.2014 directed David Bergman to explain his position on the criticism he made by circulating the articles in his personal blog on 11.11.2011 and 28.1.2013 and it fixed 06.3.2014 for submitting his explanation.

7. The opposite party David Bergman entered his appearance by engaging Mr. Mustafizur Rahman Khan, the learned counsel who in his turn submitted explanation, as directed, detailing and defending his position and countered with the allegation so brought by the applicant. In the written explanation submitted, David Bergman attempted to justify his conduct and accuracy of the comments he made in the alleged criticisms circulated in the form of 'articles' in his personal blog. No remorse even to minimum extent he has shown in his explanation. Plainly it is to say, David Bergman intended to contest the matter.

8. In view of above, on hearing both the parties on several dates and finally on examination of the written explanation and also having regard to submission advanced by both sides the Tribunal by its order dated **17.4.2014** initiated contempt proceeding under section 11(4) of the Act of 1973, having found *prima facie* elements to constitute the offence of contempt by rendering the observation as below:

> "We are of the view that there have been prima facie elements of contempt in the comments/criticism dated 11.11.2011 and 28.01.2013 made by the opposite party which warrants to draw contempt proceeding against him under section 11(4) of the Act of 1973. Thus, the proceeding under section 11(4) of the Act is hereby commenced against Mr. David Bergman, the contemnor."

9. Accordingly, This Tribunal directed David Bergman the contemnor to show cause within 15(fifteen) days from the date as to why he shall not

be punished for making derogatory comments/posting criticism in his personal blog namely *bangladeshwarcrimes.blogpost.com* on 11.11.2011 and 28.01.2013 that constitute contempt of the Tribunal and it fixed 11.05.2014 for further order.

10. On behalf of the contemnor an affidavit in opposition was filed. The contention so agitated which may be succinctly be summarized are : **(i)** The articles fall within the parameter of permissible 'fair' criticism and the same have been initiated in 'good faith' and in the 'public interest'**,** **(ii)** The application is not maintainable as it was brought by a third party, **(iii)** Proceeding with this application would be a total abuse of process due to inordinate delay in bringing the application, **(iv)** That the criticism done by circulating the articles does not demonstrate that the materials therein are contemptuous , **(v)** Contemnor's intention was not to undermining public confidence in the administration of justice, **(vi)** Criticism was reasonable and was based on accuracy of information and made on sober language and not to ridicule the authority of the Tribunal, **(vii)** The contemnor having LL.M degree from the London School of Economics and Political Science, University of London, UK is qualified to write on legal issues.

11. In addition to these, the contemnor also contended that in the third article, as regards 'death figure in 1971' the contemnor commented, without any improper motive that

> "The Tribunal could have dealt with the issue of the 'number of deaths' [on 1971] in a more judicial manner rather than referring to it like repeating a 'mantra' that has little or no factual basis".

However subsequently the contemnor also regretted the use of the word 'misleading' and the above 'phrase' and thus removed the same from the articles [second and third article]

12. Hearing on the matter took place for several days. The learned counsels for both parties took pain, with numerous citations on relevant aspects involved with the matter in issue, in advancing their respective argument.

II. Argument on behalf of the Contemnor
[Maintainability, delay in brining application by third party]

13. Mr. Mustafizur Rahman Khan the learned counsel defending the contemnor argued that the Tribunal set up under the Act of 9173 is not a 'court of record' and as such does not have jurisdiction to punish by drawing contempt proceeding

14. Mr. Mustafizur Rahman Khan the learned counsel appearing on behalf of the contemnor argued that the application suffers from significant delay as there has been a 'time gap' between circulation of alleged articles and bringing application. None including any of prosecutors or member of investigation agency felt it necessary to bring those into notice of the Tribunal, during that time.

15. Mr. Khan next argued that the application has been initiated by a third party having no *locus standi*, Neither the Act of 1973 nor the ROP permits it. As such the application is not maintainable.

16. It has been further argued by Mr. Khan the learned counsel defending the contemnor that his client initiated the alleged criticism on 'good faith' and in the 'interest of public'. Criticism made in the two articles relates to post-judgment criticism which was quite 'fair' and permissible and it did not impute any disparaging impression in the mind of public.

17. By citing the decision in the case of ***Akhtaruzzaman v Hamidul Huq*** **DLR 2004 73, at p. 82, para 11** the learned counsel Mr. Mustafizur Rahman Khan defending the contemnor submitted that power of contempt is an extra ordinary power and it should be used in an extraordinary situation which warrants intervention from the court of law. This power is to be used sparingly.

III. Argument on behalf of the Applicant

18. Argument advanced by Mr. Mr. Mizan Sayeed for the applicant may be summarized as below:

(a) The applicant is not a party to any of cases before the Tribunal. But he being a member of the public, a human rights activist and a member of the Supreme Court Bar Association felt it as his responsibility to bring the contumacious comments made in the articles by the contemnor into the judicial notice of the Tribunal. The applicant has initiated the matter for upholding administration of justice and ensuring public importance, interest and concern.

(b) Freedom of expression is a fundamental right but that does not give someone a free hand to say and to do anything he likes. Under Article 39 of the Constitution of Bangladesh, freedom of thought and conscience is guaranteed subject to reasonable restrictions imposed by law.

(c) The purported comments made by the Contemnor in his personal blog in fact intended to attack Tribunal's authority, jurisdiction and ability which by no manner of application come within the ambit of "*fair criticism*" nor the same were made on "*good faith*" or in the "*public interest*".

(d) Creating controversy on the issue of 'death figure in 1971' was made pending case before the Tribunal and it was aimed to cause hurt the emotion and aspiration of the nation to come out from the culture of impunity through lawful trial in a court of law constituted under the Act of 1973. Contemnor did it with 'malicious intention'.

(e) Raising allegation against the Tribunal for making "**factual judgment without evidence**", raising allegation of giving **"pre-determined judgment",** terming Tribunals' observation as '**misleading'** in the case of Abul Kalam Azad @ Bacchu Razakar and raising allegation that the Tribunal repeated a **"mantra that has little or no factual basis.**" and raising allegation of "**giving judgment in a very misleading and defective manner**" etc.[as found commented in the two

articles] – these are all reckless imputations against the Tribunal.

(f) The contemnor instead of seeking unconditional apology deliberately attempted to justify his reckless comments claiming the same to be 'fair' and in the 'interest of public'. Reckless imputation negates "good faith" and 'fairness'.

(g) The contemnor David Bergman is a 'habitual contemnor'. Earlier he was critically cautioned with observation, in a contempt proceeding by the Tribunal-1. But he continued criticizing the judicial process of the Tribunal in derogatory and unfair manner that tends to demean the authority of the Tribunal in the mind of public.

(h) The comments the contemnor made in the articles he posted in his blog in fact were calculated to obstruct the due course of justice and the authority of the Tribunal as well. It is immaterial to prove or whether the alleged comments obstructed the administration of justice. In this regard, the learned counsel however relied upon the decision of Indian Supreme Court in the case of *Arundhati case (2002) 3 SCC 343) Para 21and* also the observation made in the case Riaz Uddin of the Appellate Division of Bangladesh Supreme Court, para 61 of the judgment.

IV. Deliberation and Finding on some issues

(i) Tribunal: Is it a 'court of record'

19. We do not agree with the submission made on part of the learned counsel defending the contemnor that the 'Tribunal' is not a court of record'. The statute itself empowers the Tribunal to punish for contemptible act by drawing proceeding [section 11(4) of the Act of 1973].

20. Peacock, C.J. in Re. Abdool, 8 WR Cr 31 observed:

> "There can be no doubt that every Court of Record has the power of summarily punishing the contempt"

21. In **Halsbury's Laws of England**, 3rd Edition at page 346, it has been described as:

> "Courts of record. Another manner of division is into Courts of record and Courts not of record. Certain Courts are expressly declared by statute to be Courts of record. In the case of Courts not expressly declared to be Courts of record, the answer to the question whether a Court is a Court of record seems to depend in general upon whether it has power to fine or imprison, by statute or otherwise, for contempt of itself or other substantive offences if it has such power, it seems that it is a Court of record."

22. Further, according to **Jowitt**, Dictionary of English Law, a Court of Record means;

> 'A Court whereof the acts and judicial proceedings are enrolled for a perpetual memory and testimony, and which has power to fine and imprison for contempt of its authority."

23. What the Statute of 1973 says? Section 11(4) empowers the Tribunal constituted under this statute as below:

> "A Tribunal may punish any person, who obstructs or abuses its process or disobeys any of its orders or directions, or does anything which tends to prejudice the case of a party before it, or tends to bring it or any of its members into hatred or contempt, or does anything which constitutes contempt of the Tribunal, with simple imprisonment which may extend to one year, or with fine which may extend to Taka five thousand, or with both."

24. Therefore the Tribunal set up under the Act of 1973 is a 'court of record' and is empowered to punish the contemptuous act.

25. In **Morris** [Morris V. The Crown Office (1970)1 All ER 1079] Lord **Justice Salmon** Spoke:

> "The sole purpose of proceedings for contempt is to give our Courts the power effectively to protect the rights of the public by ensuring that the administration of justice shall not be obstructed or prevented."

26. It is thus quite transparent that the Act of 1973 has made the Tribunal equipped with the power and jurisdiction of punishing for the offence of contempt, to protect the administration of justice from obstruction of any kind. Understandably a duty of protecting the interest

of the public in the due administration of justice has been so cast on the Tribunal under section 11(4) of the Act of 1973.

(ii) Locus standi in brining the application

27. First, act or conduct of an individual if constitutes despicable and derogatory to the authority and dignity of court of law can be brought to notice of it. The Act of 1973 does not provide time frame as to bringing any such act or conduct to notice of the Tribunal. One's personal blog is not accessible to all. The people and regular readers are familiar with the daily news papers. They are not supposed to be acquainted with the blog of the contemnor. Only the people adapted with internet use and familiarized with contemnor's personal blog may have access to the articles posted in that blog.

28. Second, the applicant became aware of the articles by browsing contemnor's blog. It is not correct to say that on the very date the articles were posted in the blog the applicant should have gone through these, by browsing the blog. The applicant moved before this Tribunal when he discovered the articles in the personal blog of the contemnor. This reason justifies the 'time gap' in between posting of alleged articles in the blog and initiating the application before this Tribunal. It however in no way creates any clog in entertaining the application.

29. Third, this Tribunal taking cognizance of the application directed the opposite party [contemnor] to explain his conduct. On being noticed the opposite party [contemnor] submitted written explanation justifying his act and conduct that has been replicated in his articles. Considering the explanation unsatisfactory this Tribunal eventually ordered drawing contempt proceeding. Now, it is irrelevant to say that the application has been brought by a third party, neither the prosecution nor the defence of either case.

30. It is to be noted that 'coming notice of the Tribunal' about any contemptible act or conduct of an individual may happen in various modes. Even the Tribunal is empowered to take any such act or conduct into its notice *suo moto*. Not necessarily only the prosecution or defence

or investigation agency does have right to bring it to notice of the Tribunal. Besides, there has been no explicit clog, either the Act of 1973 or the ROP, in bringing any such contemptible act or conduct by any individual, to the notice of the Tribunal.

31. Fourth, the applicant, as we perceive, has come forward with the application, as a conscious citizen, being felt wounded by the comments made in the alleged articles which he considers gravely deprecating for the judiciary and administration of justice. Since an individual does have right to freedom of expression and speech including the right to post judgment criticism, another individual also does have right to come forward with his protest against any 'expression' of the former to get it remedied, to resist imputation of any kind directing the administration of justice.

32. At **para 16** of the decision in the case of **S. Mulgaokar vs. Unknown, 1978 AIR 727 it has been observed too that-**

> "But, when there appears some scheme and a design to bring about results which must damage confidence in our judicial system and demoralize Judges of the highest court by making malicious attacks, anyone interested in maintaining high standards of fearless, impartial, and unbending justice will feel perturbed"

33. The applicant thus does have *locus standi* in bringing the instant application as he seems to have felt 'perturbed' with the malicious attacks that he considered disparaging in the mind of the public in respect of confidence upon the judicial system of the Tribunal. Therefore, merely treating the applicant a third party the application intending to bring notice of the Tribunal about the alleged articles containing criticism on subjudice matter and post judgment criticism cannot be thrown on air, accepting argument agitated by the learned defence counsel.

34. The alleged 'articles' circulated in personal blog have been brought to notice of the Tribunal by the applicant. The application has thus acted as the source of 'coming into Tribunal's notice' about the impugned articles. And on having notice of the same, the Tribunal proceeded examining the contents of the articles pursuant to which the contempt

proceeding has been started eventually. The application is therefore quite maintainable. Now, we are to examine and see whether these articles contain any 'comment' indicating contemnor's malicious intent to derogate and disparage Tribunals' authority, dignity and institutional image.

V. Deliberation and Finding on the Alleged Articles

(1) The Article titled "Sayedee indictement-1971 deaths" [First Article in question] [Death Figure in 1971]

35. The first article circulated on 11.11.2011 in his blog questions the **'death figure in 1971'**. The contemnor made this issue controversial when all the cases were pending before the Tribunals. It is true that the contemnor did not opt to make any opinion of his own on this issue in his article. He, as it appears, attempted to portray various conflicting information, citing sources, in respect of 'death figure in 1971' that creates a grave confusion on a *subjudice* issue. Despite all those differing information it is now settled to the nation that 3 millions of people laid their lives for the cause of our independence.

36. It is generally considered inappropriate to make a criticism public on an issue *subjudice* and such criticism leads to contempt of court. This is mostly true in criminal cases, where publicly discussing *subjudice* matter may constitute interference with due process.

37. However, it is well settled that a person is not debarred in initiating a discussion on a matter which may fairly be regarded as one of 'public interest', by reason merely of the fact that the matter in question becomes the subject of litigation. But in the case in hand, the criticism made on 'death figure in 1971' does not seem to have been made as one of 'public interest'. Rather it has shaken and demeaned the emotion of the nation.

38. It is claimed that the contemnor has been working on war of liberation of Bangladesh since last couple of years. Hundreds of articles of his own have been posted in his blog on atrocities committed in 1971 and trial procedure in the ICT. We appreciate his efforts. But why did he not prefer to initiate any research of his own on this issue earlier by

citing the said sources? Why did he not mention the issue in the documentary he contributed to get it prepared? Why he decided to raise this sensitive issue, particularly when all the cases remained pending before the Tribunals? The issue of 'death figure in 1971' involves highest sacrosanct emotion of the nation. What was his intention in opening the door of criticism on such a perceptive issue? And what he intended to let the Tribunals learn from his criticism?

39. It will be worthy to remember the comment of **Justice Black** in dissenting judgment in **Dennis versus US (1951)341 US**.

> "There comes a time when even speech loses its constitutional immunity. Speech innocuous one year may at another time fan such destructive flames that it must be halted in the interests of the safety of the Republic. When conditions are so critical that there will be no time to avoid the evil that the speech threatens, it is time to call a halt. Otherwise, free speech which is the strength of the Nation will be the cause of its destruction…"

40. The time the contemnor chooses to circulate the criticism on 'death figure in 1971' thus fans the flame of grave disgrace in the mind of the nation, although it does not relate to the merit of the case and such criticism cannot turn down the settled history. The issue could have been researched when the contemnor had been engaged with the activities of preparing a documentary on war of liberation, as claimed. But the time he chooses to initiate such criticism surely halts the grace and interest of the nation. Such criticism was not, in any way, in the 'interest of public'. His effort was thus divorced from 'fair intention'. It has obviously caused severe hurt to the emotion of the nation and also belittled the authority of a court of law, in making its observation on this issue, reiterating the settled history.

41. We do not consider the intention of circulating the writing in his blog a 'fair' one. Although the learned counsel Mr. Mustafizur Rahman Khan appearing for the contemnor expressed regret for causing hurt to the emotion of the nation by making such criticism. But it is sorry to note that the contemnor has not preferred to express any extent of remorse and repentance, for this criticism touching the emotion of the nation. Rather, he remained silent in his written reply. We condemn his

lewdness. Judiciary of Bangladesh is not only to uphold its dignity and rule of law. It feels obligation to value the nation's emotion and sentiment too which are mingled with our heard earned independence.

42. On part of the contemnor it has been tried to 'justify' the 'truthfulness' or 'factual correctness' of the criticism he made. First, it is to be noted that in creating confusion about the 'death figure in 1971' the contemnor has cited many sources describing conflicting information. The contemnor did not arrive at decision as to which information he considered correct or accurate one. Without going into accuracy of any of information why he opted to initiate a debate on a sensitive issue involving nation's emotion? Of course, his intention was not 'fair'. Besides, factual correctness of comment made in the alleged criticism cannot be recognised as 'defence'. In this regard we rely upon the observation made by our Apex Court in the case of **Advocate, Riaz Uddin Khan vs. Mahmudur Rahman [63 DLR(AD) 2011, page 53, para 79]** which is as below:

> "There are numerous decisions of the Apex Courts of India, Pakistan and Bangladesh that truthfulness or factual correctness is not recognized as defence in the law of contempt. There is hardly any decision of English or of this sub-continent on the jurisprudence of contempt that such defence to be recognized."

43. Criticism made on 'death figure in 1971' though not relates to merit of any of cases tried by and pending before the Tribunals does not seem to have been designed in 'good faith'. And the criticism so made, though cites sources, disgraces and demeans nation's wishes and holy emotion. We fail to understand how such criticism attacking the nation's emotion conforms to 'public good'. It is true that debate on the issue of 'death figure in 1971' does not relate to merit of any case under the Act of 1973. But provoking debate on this issue by circulating criticism in personal blog rather makes the contemnor gravely disrespectful to the nation. Living in the light and air of this land, the contemnor, a foreign national, has exceeded limit of his professional ethics.

44. We reiterate that we always welcome post verdict criticism but at the same time we cannot allow an individual or a journalist making such

criticism on subjudice matter intending to derogate the institutional image and authority of the Tribunal. In such case the court of law is obliged to extend its hands to protect its image and authority in the mind of public. Also it does not appear that this article was written and circulated in the interest of public.

45. David Bergman the contemnor, in his first article however finally commented that -

> Moreover, whether 3 million, 300,000 or indeed even 30,000 were killed, the number of deaths in 1971 was very very large. And no-one can really deny that. There is enough substantiated evidence to suggest that whatever the exact number of deaths, a very large number of civilians were killed

46. Be that as it may, why he felt enthused to create confusion in the mind of public? It was his 'mind set' and 'malicious intent' from the net of which he never intends to come out, we have found it. At the end of the article titled '**Sayedee indictment: 1971 deaths'** posted on 11 November 2011 in his blog David Bergman commented:

> "As a result, coming back to the tribunal's remark in its 3 October order about the number who died, it may well have been **preferable for it not to have mentioned these particular figures**. Maybe the prosecution will provide evidence to support this figure in the course of the trial but, as yet, it has not done so".

47. The contemnor, it appears clearly, has attempted to articulate his audacity by making such comment. With the comment **--"It may well have been preferable for it [Tribunal] not to have mentioned these particular figures"**—David Bergmann, in other words, questioned the authority and ability of the Tribunal and **'advised'** it [Tribunal] **'not to mention'** the death figure. And he made such '**advice'** pending trial of all the cases including the case of Sayedee. The contemnor is a journalist and providing such '**advice'** in the name of exercising right to freedom of expression he has crossed the limit of his professional ethics. He does not have either expertise or license in making such 'unfair' and demeaning comment'. Intention was malicious. The criticism cannot be

termed as an effort of making the Tribunal's daily proceedings public through posting articles in his personal blog.

(2) Article titled ' Azad Judgment Analysis 1: in absentia trials and defence inadequacy'
[Second Article in question]

48. The article titled **"Azad Judgment analysis 1; in-absentia trials and defence inadequacy"** circulated on 26.01.2013 in contemnor's personal blog chiefly refers to criticism concerning the observation of the Tribunal [ICT-2] in its judgment passed in the case of *Abul Kalam Azad* case. The essence of the criticism that the contemnor made in this article is that the observation of the Tribunal that the *in absentia* trial did not reflect international standards as has been ensured by the European Court of Human Rights and the statute of the Special Tribunal for Lebanon [STL].

49. By this article circulated in his blog the contemnor questions the validity of holding trial in absentia [in the case of Abul Kalam Azad] terming it '**misleading'.** It is to be noted that this Tribunal is guided by the Statute of 1973 which contemplates the provisions of holding trial *in absentia*. In the judgment of *Abul Kalam Azad's* Case, simply as a reference, the provisions relating to holding trial *in abesntia* in the STL has been highlighted. It was known too that the STL Statute provides provisions of holding 'fresh trial' as well, on subsequent appearance of the convicted accused person. Thus the Tribunal is concerned only on holding trial *in abesntia* under the Act of 1973. The Tribunal inevitably had acted in accordance with the provisions laid down in the Act of 1973 and not under any other Statute. The Tribunal observed, on this issue as below:

> The Act of 1973 provides provision of holding trial in *abesntia*, if the appearance of the accused could not be ensured for the reason of his absconsion [Section 10A (1) of the Act]. In the international context, the issue of trials *in absentia* arose with the first modern international criminal tribunal, the International Military Tribunal (IMT) at Nuremberg, which was established to try war criminals operating under the European Axis Powers during World War II. Article 12 of the Charter of the International Military Tribunal allowed for trials *in absentia* whenever the Tribunal found it necessary to do so in the interest of justice. Famously, Martin Bormann, who

> served as the Nazi Party secretary, was indicted, tried, and sentenced to death, all *in absentia,* despite doubts as to whether he had even been informed of the proceedings.
>
> United Nations reversed its policy against trials *in absentia* with the Special Tribunal for Lebanon (STL or Lebanon Tribunal) in 2006. The STL allows trials "to commence and to end…… without an accused ever having showed up in court. The STL (Special Tribunal for Lebanon) expressly allows for trials in the absence of the accused in article 22 of the STL Statute, entitled "Trials in absentia." Article 22(1), lists the situations where the STL can hold trials in the accused absence.
>
> According to Professor William Schabas under section 22(1) (c) of the STL Statute, the accused may be tried *in absentia* when he refuses to appear after an initial appearance (absconded) or is otherwise unable to be found after all reasonable steps have been taken to inform him of the proceedings including media publication and communication with his known state of residence.
>
> Accused Abul Kalam Azad @ Bachchu could have due opportunity of being properly informed of the proceedings in advance if the warrant of arrest could have been executed. But by remaining absconded and leaving country the accused has willfully declined to exercise his right to be present for facing trial and as such under this circumstance, trial in his absence would be permissible "in the interest of the proper administration of justice."

50. However, merely for the reason of dissimilarity of provisions, in respect of holding trial in *absentia* or absence of provisions of holding 'fresh trial' in the Act of 1973 , the contemnor by his writing has made a futile attempt intending to identify the 'ignorance of the Tribunal' by blatantly discarding its authority, on this issue. Taking the binding effect of the Statute of 1973 in respect of holding *absentia* trial into account, the Tribunal simply observed whether *abesntia* trial is permissible even in international judicial forum.

51. At the out set, we ask the contemnor whether he is conversant with the Act of 1973 under which the Tribunal has been performing its judicial functions. Next, is he ignorant about the reason of holding *absentia* trial against Abul Kalam Azad? Does the contemnor not know how and at what stage of proceeding Abul Kalam Azad managed to flee, quitting the country? Simply showing compatibility of provision in respect of holding trial in *absentia* the Tribunal referred to the statute of

the STL and it did not consider it necessary to focus on the provision of holding 'fresh trial' as laid down therein. Finally, absence of provision of holding 'fresh trial' on surrender or arrest of the convicted absentee accused does not render his 'absentia trial' held under the Act of 1973 questionable, raising the plea of 'international standard'. This Tribunal is guided by its own statute the Act of 1973 and not that of any other Tribunal.

52. It was not at all essential to make comparative analysis of provisions, in this regard and to follow what provision exists in other Tribunals. This Tribunal is guided by its own statute, the Act of 1973 in trying a person accused of offences as enumerated in the Act. However, any person shall be at liberty in making comparative academic analysis on the provisions of different courts/tribunals relating to holding trial in *absentia*. We are quite aware about the provision of STL statute in respect of holding 'fresh trial' on surrender or availability of the convicted person. Holding 'trial in absentia' and holding 'fresh trial' are quite two different matters. Our own statute does not provide provision of holding 'fresh trial' and thus mere holding 'trial in abesntia' as provided in our statute does not *ipso facto* provides opportunity to stand on 'fresh trial'—either on surrender or on being arrested.

53. The contemnor in his article titled **"Azad Judgment analysis 1; in-absentia trials and defence inadequacy"** in criticizing the observation of the Tribunal on the issue of holding trial in *abesntia* commented that

> "The statement in the judgment [Abul Kalam Azad] of the Hon'ble Tribunal were **"misleading"** because among others, they had not mentioned that Article 22(3) of the Special Tribunal for Lebanon statute specifically provides that in case of any conviction in abesntia, if the accused did not have a designated defence counsel of his choice, he shall have the right to a retrial in his presence unless he accepted the judgment."

54. Is there any right in exercise of which a journalist can make a comment terming the observation of a court of law 'misleading'? It appears that delayed perception made the contemnor awake and thus he opted to delete the derogatory word 'misleading' which scandalizes and

attacks the authority of the Tribunal. The contemnor in his written explanation [paragraph 11(f)] submitted in response to first show-cause notice contends as below:

> " The opposite party does, however, acknowledge, on the basis of legal advice received since receiving the notice of the above Miscellaneous Case, that the words "misleading" may have a different, more pejorative connotation in legal parlance in Bangladesh, which was far from what the opposite party intended when he used the words. Hence, the opposite party has edited the blog article to replace the words "**very misleading**" and **"misleading"** with the word "incorrect" and regrets and humbly begs to be excused for this expression."

55. Excepting this word[s] there has been nothing in any of articles which can be termed as incompatible with the notion of 'fairness' and 'good faith' and thus the criticism bears reasonableness, the contemnor contended.

56. We are not convinced to go with this contention. First, editing the article in question by replacing the derogatory words was an act subsequent to bringing the article in question to the notice of the Tribunal of which it took cognizance. Second, expressing regrets and begging 'excuse' seem to be 'mechanical'. Third, despite editing the article, after its circulation in his blog, the contemnor apparently remains with the course of justifying his criticism. Thus, begging such 'excuse' which is not unqualified, on any score, does not prompt us to show any degree of leniency.

57. It was totally 'misconceived' and 'immaterial' to make criticism on the issue of holding trial in *absentia* before the ICT-2, in the name of right to freedom of expression. It rather questions the authority and jurisdiction of the Tribunal, as given by the Statute of 1973 and as such it was not for the 'public good' and a 'fair' one.

58. The contemnor David Bergman, by circulating criticism, deliberately attempted to term the observation of the Tribunal on the issue of holding *absentia* trial "misleading" and it clearly intended to lower down and demean Tribunal's authority and ability that finally

tends to shake the public confidence upon the judicial machinery of the Tribunal and its governing Statute. Deliberate use of such disparaging and scurrilous 'words' in criticizing Tribunal's observation based on the provisions contained in the Act of 1973, made in its judgment, was of course not in the 'public interest' or 'fair' and it being 'scandalous' constitutes the offence of 'contempt', we conclude.

(3)Article titled 'Azad Judgment Analysis 2: Tribunal Assumption'
[Third Article in question]

59. It appears that despite making deliberate criticism on *subjudice* matter [first article] the contemnor exceeds limit in making post-judgment criticism, with reference to the issue of 'death figure in 1971', by making undermining comment touching the lawful authority of the Tribunal. Mere subsequent deletion of a comment made in the third article does not absolve the contemnor of the responsibility of his contemptible acts and 'intention'. We are constrained to take such subsequent act [admitted] into account, for upholding the image, authority and dignity of the Tribunal and its affairs.

60. In this article **'Azad Judgment Analysis 2: Tribunal Assumption'** the contemnor again ignited the issue of 'death figure in 1971' [in the segment titled '**Number of dead**' of the article, by referring paragraph 3 of the Judgment in the case of Abul Kalama Azad]. The contemnor wrote:

> "The Tribunal asserts that 'some three million people were killed, nearly quarter million women were raped.....during the nine-month battle and struggle of Bangalee nation. In doing so, it repeats what was stated in the first indictment passed by Tribunal 1 in relation to the Sayedee case. There is however no legitimate evidence to support the contention that such a number died or raped. The only population study that has attempted to assess the numbers of deaths during the 1971 suggest that there were about 500,000 deaths arising from the war, with a large proportion of these resulting from disease. The court did not hear any evidence on the issue of 'numbers'.
>
> The point about bringing this matter up is not to undermine the nature of the atrocities committed

> during the war, or to suggest that the war did not result in a very high level of losses. It is simply to point out that **if the tribunal is supposed to be an adjudicator of truth, it would have dealt with the issue of the number of dead in a more judicial manner--rather repeating a mantra** that has little or no factual basis."

61. The contemnor thus doubts that the Tribunal is an adjudicator of truth. He also questions the 'judicial manner' in which the Tribunal has been performing. It reflects his malignant attitude and mind set. Does a journalist have license in making criticism in such scandalising manner? We fail to deprecate such act of a journalist which does not conform to professional ethics. In paragraph 12(i) of the written explanation submitted in response to first show cause notice on 18.4.2014 by the opposite party David Bergman it has been conceded that-

> " The opposite party acknowledges that the last portion of the blog, being, **"rather than repeating a mantra that has little or no factual basis",** may appear pejorative which is regretted and unintended, and accordingly, the opposite party, pursuant to common practice, has edited the bog article to delete that phrase".

62. The above does not reflect contemnor's pious intention. Expressing mere 'regret' is not enough to justify contemnor's 'good faith' and 'fair intention' in making the comment by using such scandalous 'phrase'. Next, deletion of the above extremely impolite 'phrase' is an act subsequent to the act by which the contemnor circulated his criticism in his blog. Such subsequent act cannot exonerate him from the liability of making such derogatory, unfounded and scandalous comment intending to deliberately attack Tribunal's dignity, authority and ability. Combined evaluation of the alleged comment and the admitted act of subsequent deletion of the scurrilous 'phrase' [not the total criticism] unambiguously impels the conclusion that contemnor's intention was 'malicious' and he did it consciously to malign and scandalize the Tribunals' judicial process and authority. In no way, it was 'fair' or in 'good faith' or in the 'public interest'. It was rather gravely contemptible.

63. We have already observed that at the end of the article titled '**Sayedee indictment: 1971 deaths**' posted on 11 November 2011 in his blog David Bergman the contemnor commented:

> "As a result, coming back to the tribunal's remark in its 3 October order about the number who died, it may well have been preferable for it not to have mentioned these particular figures. Maybe the prosecution will provide evidence to support this figure in the course of the trial but, as yet, it has not done so".

64. We have observed too that with the comment **--"It may well have been preferable for it not to have mentioned these particular figures"**—contemnor David Bergmann, in other words, questioned the authority and ability of the Tribunal and **'advised'** it [Tribunal] **'not to mention'** the death figure. And he made such '**advice'** pending trial of all the cases including the case of Sayedee.

65. But it is sorry to say that the contemnor continued his criticism intending to disrespect the nation and our glorified war of liberation by raising the issue of 'death figure in 1971'. And in doing so again in another article titled **"Azad Judgment Analysis 2: Tribunal Assumption'** the contemnor made another malicious attempt to question Tribunal's authority, judicial manner and ability as well as has seriously attacked the nation's emotion by making comment in most unconventional manner using belittling words. It constituted a grave contempt as such disparaging comment was calculated to lower down the majesty and authority of the Tribunal. Contemnor's subsequent conduct of deleting the above demeaning 'phrase' form his blog is by itself suggests it. Obviously the Tribunal, a judicial forum formed of Supreme Court Judges cannot remain mum as a mere spectator. It feels just and expedient to extend its hand for protection not only for the majesty of the Tribunal but the judicial system of our country

66. A journalist or an individual having no legal acumen cannot make such comment by using 'obnoxious words', in the name of criticism demeaning the authority, ability and jurisdiction of a court of law. The

use of these 'words' is a fair indicative of contemnor's 'unfair intention'. He was extremely disrespectful in making such comments.

67. An individual or a journalist cannot have unfettered right to vomit his ill intent, in the name of right to freedom of expression. This right is restricted by civility and norm of justification. But contemnor's conduct exceeded the limit and norms of civility even. We are not agreed that he made such comment in 'good faith' and in the 'interest of public'. The person intending to do it must show due care, fair intention and good faith. The way the contemnor made the comments, as discussed above, tends to lower down the authority and dignity of the Tribunal imputing disparaging impression in the mind of public. The contemnor, in his articles, has tended to prove himself a worthy law researcher and in doing so he exceeded his limit. But mere a law degree cannot make an individual qualified and competent in making criticism on legal proceedings and judgment of a court of law.

68. Admittedly, the contemnor is a foreign national. He claims to have obtained Law degree from UK. But mere obtaining law degree does not *ipso facto* make an individual a 'legal expert'. Contemnor's intention was to demean the authority and ability of the Tribunal and to generate controversy and confusion on historically settled issue in the mind of public, we conclude. The criticism could not be termed as one made in the 'interest of public', in any manner. The Tribunal also notes that the contemnor is not found, in any of his articles, proactive in focusing the incidents of crimes being tried by the Tribunal under the Act of 1973 and the rights of the victims who have been carrying untold trauma since more than last four decades.

VI. Deliberation and Finding on some crucial issues

Freedom of Expression

69. There is no doubt that freedom of expression is one of the hallmarks of a democratic society. The right of free speech is guaranteed by the Constitution, true, but must be properly guarded but nevertheless, it is recognised that it must not be abused or be permitted to destroy or

impair the efficiency, fairness, image and public confidence and respect therein. The strength of the judiciary lies in the confidence and respect of the people in the justice delivery system.

70. In the name of freedom of speech or making court's proceeding public nobody should feel inspired and excited to make criticism of such nature intimidating the notion of rule of law and authority of court of law that creates debate and mystification in the mind of public as to fairness, dignity, image, judicial process and independence of the Tribunal.

71. It is bound to suffer irreparable damage if reckless and unbridled criticism is allowed in the name of freedom of expression and thoughts. In this context, it will be worthy to note that the strength of the judiciary lies in the confidence and respect of the people in the justice delivery system. Therefore, to our mind, an individual or a journalist should have adequate and basic knowledge about functioning of law courts and the applicable law so that no incorrect and scandalous criticism for want of such knowledge takes place.

72. Since the Judges are human, the delicate task of administering justice ought not to be made confused in the mind of public even by making irresponsible post judgment criticism. One, in disseminating own view or idea and criticism of a judicial act or the judgment of a court of law, even in the interest of public, should not cast outrageous aspersions on the court. The contemnor did not take this ethics in mind in making the criticisms in question, we have found

73. We of course do not disagree that even post judgment criticism is permissible. But it appears from the alleged three articles that first one has been circulated on *subjudice* matter and in making post judgment criticism the contemnor has created a misconceived notion about the 'authority' and 'ability' of the Tribunal, a court of law.

74. The record goes to show that despite being cautioned by the Tribunal-1 in another contempt proceeding for disparaging comment made directing the judicial affairs of the Tribunal, the contemnor

deliberately continued circulating his comments in the name of criticism. This prompts us to hold that the contemnor instead of providing fruitful and mannerly indication by making post judgment criticism appears to remain in habit of creating derogatory impression in the mind of public and also to demean the dignity and authority of the Tribunal constituted under the Statute of 1973.

75. In the name of criticism, the contemnor David Bergman attempted to malign the 'judicial manner' of adjudication of issue in question and thereby made a detrimental attack on the authority and jurisdiction of the Tribunal, a judicial body constituted under valid legislation. He cannot express his view maligning the 'authority' and 'manner' the Tribunal rendered its finding in the final judgment which shall remain sustained until and unless reversed by its Appellate authority.

76. Section 11(4) of the Act of 1973 is wide and the same is referable even to doing anything which tends to bring the Tribunal or its members into hatred, in addition to obstruction to its process or doing anything which tends to prejudice the case before it. The phrase 'doing anything' refers to publication or speech or circulating criticism whether by words spoken or written or even by signs or by visible representations which scandalizes or tends to scandalize, or lowers or tends to lower the authority of the Tribunal or prejudices or interferes or tends to interfere with the due course of any judicial proceeding or interferes or tends to interfere with or obstructs or tends to obstruct the administration of justice in any other manner.

77. Transparency in functioning of every limb of democracy is not only desirable but also imperative because it adds to the credibility of the system and inspires confidence of the people. The strength of the judiciary lies in the confidence and respect of the people in the justice delivery system. No one having minimum civility should forget this fundamental notion.

78. Right to freedom of speech as guaranteed in our constitution is not absolute unfettered and it is to be exercised with some restriction and caution. Fairness of a trial process or criminal judicial proceedings is a

notion to be established in the mind of public and be maintained by the tribunal, a court of law. Contemnor David Bergaman has deliberately disregarded this restriction and caution, in exercising his right to freedom of expression.

Criticism when involves Public Interest

79. Lord Denning MR in ***London Artists Ltd v Litter*** said that there is 'no definition in the books as to what is a matter of '**public interest'.** Nevertheless he went on to describe it as 'whenever, a matter is such to affect the people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or others; then it is a matter of public interest on which everyone is entitled to make a fair comment.[**1969, QB 2 391].**

80. The learned counsel Mr. Mustafizur Rahman Khan appearing for the contemnor submitted that freedom of speech is recognised by Article 39 of our constitution. The contemnor in exercise of such right has made criticism by posting articles in his personal blog. In support of his submission he relied upon the decision in the case of **State vs Chief Editor, Manabjabin, 57 DLR (2005) 359 at Para 341 wherein it has been observed that -**

> "After liberation of Bangladesh in the case reported in 44 DLR (AD) 39, it has been observed by the Appellate Division that freedom of speech and freedom of press is recognised by Article 39 of our constitution. Therefore the courts must be ready to suffer criticism because justice is not a cloistered virtue. Only in exceptional cases of malice or bias, courts will invoke the power."

81. By citing the decision in the case of ***Akhtaruzzaman v Hamidul Huq*** **DLR 2004 73, at p. 82, para 11** the learned counsel for the contemnor further submitted that power of contempt is an extra ordinary power and it should be used in an extraordinary situation which warrants intervention from the court of law. This power is to be used sparingly.

82. We do not disagree. The principles propounded in the above cited cases are now settled. But it is to be seen whether the criticism suffers

from any 'bias' or 'malice'. The contemnor was thus required to know the objective of formation of the Tribunal under the special Statute enacted by our sovereign parliament in 1973. To come out from the culture of impunity, a national wish-- the Tribunals have been set up in 2010 and 2013 respectively. Millions of sufferers and victims of barbaric atrocities committed in 1971 during the war of liberation have been looking for justice, even about four decades after. The Tribunal is a domestic judicial forum although it is meant to prosecute try and punish the offences which are internationally recognised crimes committed in violation of international humanitarian law, in 1971 in the territory of Bangladesh.

83. As the trier of fact, the Tribunal is to function and discharge its judicial duties only in accordance with the Act of 1973 and the Rules of Procedure [ROP] framed under the Act. But since the inception of its [Tribunal] functioning all quarters have been observing, with anguish the initiation of an unholy organised domestic and international attempt to question the judicial process of the Tribunal, a court of law of an independent country terming the Statute of 1973 flawed. Criticism that the contemnor David Bergman has made in his articles, in other words, has simply endorsed such 'organised' ill and futile endeavor and not in the 'interest of public'. Such malicious attempt has not made any debarring situation for the nation to remain distanced from their urge of seeking justice, true. But it however might have intended to create mystification and extreme derogatory impression in the mind of public and the relief seekers. Thus, contemnor's conduct does not go with the 'public good'. We consider it an extraordinary situation which warrants intervention from the court of law, the Tribunal.

84. The contemnor has failed to show that the effort he made by circulating the three alleged articles was in the interest of public. Rather it suffers from lack of fair intention and public interest. The first article involving criticism on 'death figure in 1971' was circulated pending all cases before the Tribunals. Indisputably, this article hurts and affects the emotion of the entire nation. The second one attempts to create grave mystification and questions the authority of the Tribunal, on the issue of

holding trial in *abesntia*. The third article, concluded with derogatory comment, suffers from disrespectful way of criticism using extremely scurrilous phrase that imputes the authority and dignity of the Tribunal.

85. The alleged criticism that has been circulated in personal blog by the contemnor should not be guarded by the right to freedom of speech as it relates to sensitive issueThe comments made in the articles, particularly in the second and third article by the contemnor do not appear to have been done **'reasonably' and in 'good faith'** and for any genuine purpose in the 'public interest'.

Scandalizing the Court: Doctrine & Elements

86. The rationale for an offence of scandalising the court derives from the need to uphold public confidence in the administration of justice. In many ways, this need is particularly acute in a democracy, where the power and legitimacy of the judicial branch of government derives from the willingness of the people to be subject to the rule of law. In consequence, the public must have faith in the judicial system.

[A T H Smith, *Reforming the New Zealand Law of Contempt of Court: An Issues/DiscussionPaper*(2011) from http://www.crownlaw.govt.nz/uploads/contempt_of_court.pdf, p 61 and 62.]

87. The doctrine of "scandalizing the court" is rooted in English common law. The primary rationale for this form of contempt law is the maintenance of public confidence in the administration of justice. In a modern English case, the rationale was explained in the following way:

> "Scandalizing the court' is a convenient way of describing a publication which, although it does not relate to any specific judge, is a scurrilous attack on the judiciary as whole, which is calculated to undermine the authority of the courts and public confidence in the administration of justice"**.**
> **[*Chokolingo* v. *AF of Trinidad and Tobago* [1981] 1 All ER 244, p. 248.]**

88. In another decision, the Supreme Court of India indicating the parameter of fair criticism has held that <u>if the criticism is likely to interfere with due administration of justice or undermine the confidence which the public rightly response in the courts of law as court of justice, the criticism would cease to be fair reasonable criticism</u> as contemplated

by section 5 but would scandalize courts and substantially interfere with administration of justice. **(Ram Dayal Vs. State of UP, popularly known as Umaria Pamphlet case, AIR 1978 SC 921.**

89. A right of freedom of expression, however fundamental it may be, cannot be devoid of corresponding duty and obligation not to interfere with and destabilizing the functioning of other limbs, the judiciary. A journalist or an individual must perceive that in the name of right to freedom of expression none can resort improper and unethical practices to demean interfere with administration of justice and demean the judicial system of the country. In the proceeding in hand, it transpires that the contemnor opted to resort improper and unethical effort to demean the judicial process of the Tribunal that is synonymous to obstruction to administration of justice. And in this way he has shown disrespect to the nation's wish too.

90. In *Gray*, the offence of scandalising the court was described by **Lord Russell of Killowen CJ** as follows [**1900] 2 QB 36, 40.]**

> Any act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority, is a contempt of court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the courts is a contempt of court.

91. The current definition of scandalising might be interpreted to include a circumstance element, namely, that the circumstances in which the publication or circulation of criticism was made render it more likely that there will be an **undermining of the administration of public justice or public confidence therein**. This might be established by reference to factors such as the audience for the statement and the credibility of the person making it.

92. The primary rationale for this form of contempt law is the maintenance of **'public confidence'** in the administration of justice. In the case of ***R.* v. *Almon*,61 Wilmot J.** stated:

> "Criticism of judges excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men's allegiances to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever." **[(1765) 97 ER.]**

93. Therefore, as the guarantor of justice, a fundamental value in a law-governed State, judiciary must enjoy public confidence if it is to be successful in carrying out its duties. But use of scurrilous 'words' and 'phrases' in two articles with reference to the judgment in the case of *Abul Kalam Azad,* the contemnor David Bergman made a calculated effort to shake public confidence upon the judicial machinery and authority of the Tribunal. The 'words' and 'phrase' he used in his criticism are sufficient to conclude that being imbued by an inbuilt impious tendency he has ignited the alleged criticism.

94. Thus we are of unanimous view that contemnor's intention was to scandalize the Tribunal, by making unfounded and unfair criticism using scandalous 'words' and 'phrases' which have been admittedly deleted afterwards[after getting notice to show cause] from the articles posted in his blog.

95. In a recent case in Hong Kong, **[*Secretary for Justice* v. *Oriental Press Group Ltd.* [1998] 2 HKC 627]** a newspaper which attacked the local judiciary by, among other things, describing judges as "swinish whites-skinned judges", "pigs", and "judicial scumbags and evil remnants of the British Hong Kong government" was found in contempt of court in part because the comments were "scurrilous abuse" **[93 Ibid. p. 666].**

96. Thus the above decision also demonstrates too that an individual or a journalist must not forget that in making criticism on judicial acts he or she requires to remain careful and cautious in using 'words' so that the criticism or discussion he makes does not fall within the ambit of 'scandalizing the court'.

97. The use of scurrilous 'words' and 'phrases' in making post judgment criticism [second and third article] by the contemnor in other words tended to impute an impression of 'unfairness' and lack of capability and authority of the Tribunal and its judges in the discharge of judicial act. This kind of intentional act on part of the contemnor a journalist impairs the administration of justice and thus constitutes contempt.

98. In ***Prager and Oberschlick v Austria*** the court observed:

> Regard must, however, be had to the special role of the **judiciary** in society. As the guarantor of justice, a fundamental value in a law governed state, it **must enjoy public confidence** if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against destructive attacks that are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying.

99. Hundreds of thousands of sufferers of untold barbaric atrocities committed in 1971 in the territory of Bangladesh, during the war of liberation, are concerned with the trial process being carried out by the Tribunals under the Act of 1973. The comments are clearly calculated to undermine their [public] confidence in the administration of justice and must necessarily tended to lower the authority of the Tribunal. The contemnor being prompted by 'improper motive, did it, we conclude.

100. David Bergman, the contemnor was asked to show cause first pursuant to which he submitted written explanation wherein he admitted that after getting the notice he deleted the 'words' and 'phrases' [from second and third article]. Already we have observed that subsequent deletion of 'words' and scurrilous 'phrase', by editing the circulated criticism does not exonerate the contemnor, a journalist from the consequence of his act. He has been charged with making imputations on the Tribunal, by using such scandalous 'words' and 'phrase', in making so called criticism which we deem beyond the bounds of fair criticism. The contemnor failed to justify the 'imputations' he made, by using scurrilous 'words' and 'phrases' in the second and third article.

Now it is imperative to protect the authority and dignity of a court of law and it should not be allowed to be at risk making space of lack of confidence in public mind. .

101. As the guarantor of justice, a court of law must enjoy public confidence if it is to be successful in carrying out its duties. The comment was 'scurrilous' and it tended to impute unfairness and lack of partiality to a court of law in the discharge of his judicial duties.

102. It is extremely unfortunate that the contemnor David Bergman a journalist by his act who is found to have always tended to question the judicial performance of the Tribunals. Thus the Tribunal which has always stood for liberty of speech and expression of journalist and media if belittled and disparaged on account irresponsible act or comment of a journalist, it cannot keep mum. .

103. It has been observed by **Justice Sethi** in the case of **Arundhati Roy [(2000) 3 SC p.351] that-**

> "The confidence in the courts of justice, which the people possess, cannot, in any way, be allowed to be tarnished, diminished or wiped out by contumacious behaviour of any person. The only weapon of protecting itself from the onslaught to the institution is the long hand of contempt of court left in the armoury of judicial repository which, when needed, can reach any neck howsoever high or far away it may be. ……..If the judiciary is top perform its duties and functions effectively and true to the spirit with which they are sacredly entrusted, the dignity and authority of the courts have to be respected and protected at all costs. ……The foundation of the judiciary is the trust and the confidence of the people in its ability to deliver fearless and impartial justice. When the foundation itself is shaken by acts which tend to create dissatisfaction and disrespect for the authority of the court by creating distrust in its working, the edifice of the judicial system gets eroded."

104. The comment the contemnor David Bergamn has made in the second and third article under scrutiny, in the name of post-judgment criticism, is simply a deliberate blow to the dignity and authority of the Tribunal which has been functioning fearlessly and impartially and of course in accordance with law. The contemnor, by his conscious and

malicious conduct, has not only shown disrespect to the authority of the Tribunal by tending to create distrust in its working in the mind of public but also caused hurt to the nation's aspiration.

105. David Bergman the contemnor , has apparently attempted to cast an injury to the nation which intends to come out from the culture of impunity, by creating an impression in the mind of people regarding ability and authority of this institution, a lawfully constituted judicial body, by his criticism which seems to be a part of organised ill campaign,

106. It has been argued by the learned counsel appearing for the applicant that the expression 'scandalising' encompasses lowering the authority of the court and if it is not checked it may cause adverse effect on the public respect and confidence in the judicial process being carried out in the Tribunal.

107. We find substance in the above submission, considering the nature and sensitivity of judicial proceeding being dealt with in the Tribunal. **Justice Sethi** in the case of **Arundhati Roy [(2000) 3 SC p.360, para.16]** has also observed that-

> "Action of scandalising the authority of the court has been regarded as an "obstruction" of public justice whereby the authority of the court is undermined."

108. Public confidence on the judiciary and judicial system is the foundation of trust and allegiance to the law. It is now settled that scandalising the court would mean hostile criticism of a judicial institution and its functioning. In the case of DC Saxena Case **[DC Saxena case, (1996) 5 SCC 216]** that if the people's allegiance to the law is so fundamentally shaken it is most vital and most dangerous obstruction of justice calling for urgent action.

Reasonable criticism

109. The learned counsel Mr. Mustafizur Rahman Khan, for the contemnor, argued that there will be no contempt if the criticism is found to be 'reasonable' and 'legitimate'. And thus he cited a decision of Indian Supreme Court in the case of **Perspective Publications 1971 AIR 221**, wherein, in setting out four points relating to scandilisation of the court, **Justice Grover** at p.230 stated:

> "It is open to anyone to express fair, reasonable and legitimate criticism of any act or conduct of a judge in his judicial capacity or even to make a proper and fair comment on any decision given by him because "justice is not a cloistered virtue and she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men".

110. We agree with the above principle propounded by the Indian Supreme Court. But in the matter in our hand, we are to see whether the contemnor, by his alleged comment intended to make fair and respectful scrutiny of the judicial performance of the Tribunal. Mere outspokenness in making comment does not make it 'reasonable' and 'respectful'.

111. Admittedly, the contemnor of his own accord edited his articles [second and third one] by deleting the word "misleading" and the indecorous 'phrase' after receiving the order on 20.02.2014 directing him to explain his position about the criticism he circulated. This subsequent act does not absolve the contemnor of his liability of making the unreasonable, derogatory and contemptuous comment. The Tribunal notes that sometime even a single 'word' impacts a lot lowering the authority of a court of law. Contemnor's act and conduct reflecting malicious intent thus provide elements scandalising court constituting the offence of contempt. The scandalous comments the contemnor has made in the criticisms posted in his personal blog tended to obstruct due functioning of the Tribunal as it undermined its authority.

112. Mr. Mustafizur Rahman Khan, the learned counsel for the contemnor also argued that the criticism in all the articles have been made rationally and in sober language and as such it, in no way, detriments either the authority of the Tribunal or the public good. In this

regard, he relied upon the decision of Indian Supreme Court in the case of **S. Mulgaokar vs. Unknown, 1978 AIR 727**, wherein **Chief Justice Beg** stated at p.733, para 15 that -

> "National interest requires that all criticisms of the judiciary must be strictly rational and sober and proceed from the highest motives without being coloured by any partisan spirit or tactics. This should be a part of national ethics."

113. From the above decision it transpires that the criticism must be **'strictly rational'** and **'sober'**. We do agree and in such case no contempt is constituted, true. But the criticism under adjudication must be **'free from any kind of partisan spirit or tactics'**. Finally, such criticism must serve the **'national interest'**. We have already observed that the comments the contemnor David Bergman has made in his articles, in other words, has simply endorsed 'organised' futile ill attempt to obstruct and question the authority and ability of the lawfully constituted judicial forum and not in the 'interest of public'. His criticism as a whole cannot be termed free from 'partisan spirit or tactics' and it does never go with the 'national interest' and nation's aspiration.

Tendency of the contemnor

114. A mind set reflects one's faith and belief. One cannot do or say whatever he likes, in the name of exercising the right to freedom of expression. If his act or conduct attacks the interest of public and nation, it cannot be termed as 'fair' and on 'good faith'. Admittedly, the contemnor faced another contempt proceeding in the Tribunal-1[ICT-BD Misc. Case No.02 of 2011], on allegation of making wrong report and a derogatory writing in a local daily news paper. Eventually he expressed regret in the reply although not in clear terms taking which together with the entire matter into consideration the Tribunal-1 disposed of the proceeding by observing:

> "We are of the view that ends of justice will be met if we give **serious caution to him** [David Bergman] to be more careful in future and exonerate him from the charges. We believe, he will be more careful in future and try to help the Tribunal in reaching to its goal of holding fair trial by his valuable reports and comments."

115. What we see in the proceedings in the hand? We see that the learned counsel Mr. Mustafizur Rahman Khan defending the contemnor, in course of initial hearing of the application after submission of written explanation on part of the opposite party, expressed sincere regrets for the effort of tabling the issue of 'death figure in 1971' for untimely and unnecessary debate, showing highest respect to them who laid their lives in 1971 for the cause of our long cherished independence. The learned counsel conceded that such debate obviously caused hurt and disgrace to the emotion of the nation. But the contemnor either in his affidavit in opposition or in the written explanation submitted earlier did not prefer to express regret of any extent for hurting nation's emotion and aspiration. We too, being part of the nation, feel severe ache with this arrogant attitude of the contemnor.

116. We further consider it relevant to take notice of an article written by David Bergamn published in a foreign magazine in **2012,** for the purpose of assessing his attitude towards the 'war of liberation ' in 1971 when untold and countless atrocious activities happened for prosecuting, trying and punishing which the Tribunal has been set up under a valid legislation enacted in 1973. . In an articled titled **"ICT: can one-sided trials be fair?"** published in International Justice Tribune, Independent fortnightly magazine on international criminal justice, No.146, February 29, 2012 [*see also* the link: http://sites.rnw.nl/pdf/ijt/ijt146.pdf] David Bergman wrote:

> "The tribunal in Dhaka deals with events from March to December 1971, when the Pakistan military used force to try to prevent the Awami League, whose supporters were Bengalis living in East Pakistan (today's Bangladesh), from coming to power after winning the 1970 elections. The war between the Pakistan army and Awami League supporters and others ended when the Indian army intervened on behalf of the Bengali freedom fighters."

117. First, with the 'title' of the article David Bergman intended to term the 'trial processes' of the Tribunals as '**one-sided trials'.** The article though not relates to the adjudication of the charge brought against the

contemnor visibly reflects his tendency that imbued him continuing in making disparaging criticism on Tribunal and its judicial process.

118. Next, with the above comment David Bergamn has attempted to term the nation's 'war of liberation' as **'the force used to prevent Awami League in East Pakistan from coming to power'**. The war of liberation in 1971 was for self determination of 'Bengali nation'. But David Bergman further commented that **the 'war was 'between Pakistan army and Awami League supporters'.** Distorting settled history, in respect of the glorified 'war of liberation', by providing above 'perverse view' that David Bergamn made long before posting the alleged articles in his personal blog lends assurance as to his 'mindset' which is compatible to the 'malicious intent' he has shown even in making alleged criticism in the three articles. Such view touching the glory of our 'war of liberation' he made in the above article **[2012],** in other words, has demeaned the nation's pride.

119. We are surprised indeed how and on what basis David Bergman the contemnor who is a foreign national has been working in Bangladesh carrying such perverse mind set towards our 'war of liberation' and the trial process being held in the Tribunals. It is not yet clear to us. However, we are not concerned with this matter. Let the government's concerned authority make a lawful scan on this matter.

120. The atrocities committed in 1971 in the territory of Bangladesh can not be termed as mere 'force used to prevent Awami League in East Pakistan from coming to power'. The barbaric atrocities committed directing the Bengali civilians had a link with the establishment of new State [Bangladesh] under the proclamation of Independence of Bangladesh. The Appellate Division of Bangladesh Supreme Court in the case of *Abdul Quader Molla* has acknowledged this settled history by observing:

> "The Proclamation of Independence of Bangladesh point[s] to the very special tragic link between the crimes committed by Pakistani regime and the establishment of the new State**."**
>
> **[Criminal Appeal nos, 24-25 of 2013, judgment 17 September 2013,page 40 of the Judgment]]**

121. It has been further observed by the Appellate Division that-

> "Bangladesh suffered the crimes perpetrated on the entire people. By conservative estimates, three million of the civilian population was killed. After nine months of resistance against the Pakistani occupation army, victory was won in December 1971 following an effective resistance and mobilisation by the people of Bangladesh.[page 69 of the Judgment]]

122. Thus 'war was not between Pakistan army and Awami League supporters'. The entire population of Bangladesh was the sufferers and three million of civilian population was killed. This settled history once again has been acknowledged by our Apex Court. The Appellate Division in disposing of the criminal review petitions reiterated acknowledging this settled history as below:

> "All the above incidents took place when the people of the country were fighting against the occupation army of Pakistan **for liberation of the country**."
>
> [**Criminal Review Petitions Nos. 17-18 of 2013 from the judgment and order dated 17.9.2013 passed by the Appellate Division in Criminal Appeal Nos.24-25 of 2013, page 2 of Judgment in Criminal review Petitions]**

123. In disposing of the above petitions, the Appellate Division further observed:

> "These offences were perpetrated in Bangladesh following the onslaught of 'Operation Search Light' from the night following 25th March, 1971 to 16th December, 1971, by the Pakistani occupation army and their collaborators after the declaration of independence of the country by late Sheikh Mujibur Rahman. There were wide spread atrocities like killing of **three million people**, rape, arson and looting of unarmed civilians, forcing 10 million people to take shelter in the neighbouring country, India."[**Page 3 of the Judgment in criminal Review Petitions**].

124. In view of above, no space has been left to table the debate the death figure in 1971' and to question the war of liberation that was participated by the Bengali nation for the establishment of new State. Any one including the contemnor is thus obliged to keep the above observations made by our Apex court on 'settled history' in future.

125. In an address of Mr. Tajuddin Ahmed, Prime Minister, on behalf of the Government of Bangladesh, broadcast by Swadhin Bangla Betar Kendra on April 11, 1971, told:

> "Heroic and brave brothers and sisters of Independent Bangladesh, in the name of your President, Banga Bandhu Sheikh Mujibur Rahman and the Government of the People's Republic of Bangladesh, we salute you and pay homage to the departed souls of the martyred who have sacrificed their lives in the defence of their motherland. They will shine in our memory as long as Bangladesh exists, as long as a single citizen of Bangladesh lives. Since the proclamation of independence by your leader, Sheikh Mujibur Rahman, after General Yahya had on the midnight of 25th March, ordered his Army to commit genocide on the peace-loving people of Bangladesh, you have joined the ranks of the immortals among the freedom fighters of history. Your epic resistance against the colonial army of occupation from West Pakistan is an inspiration to the freedom loving peoples of the world. Each day of struggle adds a new and glorious page in the saga of our liberation struggle."
>
> [**Source: Bangladesh Documents Volume 1, page 282**: Ministry of External Affairs, New Delhi; English translation of an Addressing to the people of Bangladesh by Mr. Tajuddin Ahmed, Prime Minister, on behalf of the Government of Bangladesh headed by Sheikh Mujibur Rahman, broadcast by Swadhin Bangla Betar Kendra on April 11, 1971]

126. But David Bergman has indeed gone too far by spreading his unfounded, distorted view that is slanderous to the glorious history of our war of liberation. Is he ignorant of the history of our independence? Or does he deliberately intend to taint our pride we achieved through the bloody war of liberation? The view David Bergman has placed in the article as discussed above inevitably proves his unholy and purposeful tendency and mind set to demean and malign not only the trial process in the Tribunal but also the 'magnificent war of liberation'. David Bergman has shown patent disrespect to our 'proclamation of independence ' by uttering that 'the Pakistan military used force to try to prevent the Awami League, whose supporters were Bengalis living in East Pakistan (today's Bangladesh), from coming to power'. It was the Bengali nation who fought for their independence and self determination. Nobody living in the land of our motherland Bangladesh should have license to disrespect the sacrifice the nation paid in

achieving independent Bangladesh, by expressing such unfounded, purposeful and prejudicial view.

Conclusion

127. Admittedly, the Tribunal-1 gave serious caution to David Bergman despite expressing regret as it was considered'regret' not in clear terms, as discussed above. But in the proceeding before us [Tribunal-2] the contemnor simply casually and mechanically regretted the subsequently deleted scurrilous 'words' and 'phrases' he admittedly used in his criticisms that tended to scandalize the judicial process and authority of the Tribunal. He also begged 'excuse' for the scandalous comment made on observation of the Tribunal on 'death figure in 1971' issue in the third article. But the contemnor has made it in most egotistical manner taking which into consideration we are not prompted to extend any degree of leniency.

128. David Bergman the contemnor is not a lawyer or a teacher or a person having sufficient knowledge in the field regarding which the criticisms have been made. He, as found, in the capacity of a journalist used to make the daily proceedings of the Tribunal public, by circulating the same in his blog. But it was not his duty, as a journalist, to design criticism questioning the authority and judicial ability of the Tribunal.

129. Contemnor's attempt rather strikes a blow to the supremacy and authority of the Tribunal and thus the effort he made was 'purposeful' that substantially endorsed the unholy campaign of some quarters to malign the judicial process of the Tribunal. In this regard we recall the decision of our Apex Court in the case of **Advocate Riazuddin v Mahmudur Rahman, 63 DLR 2011, 29, at p.49 at para 65** wherein **Justice S.K Sinha** observed that -

> "A fair criticism of the conduct of a Judge may not amount to contempt if it is made in good faith and in public interest. The Courts are required to see the surrounding circumstances to ascertain a good faith and the public interest including the person who is responsible for the comments, has knowledge in the field regarding which the comments are made and the intended purpose sought to be achieved. If one having sufficient knowledge on the subject, such as

> a lawyer, a retired Judge, a teacher of law and an academician may make fair criticism and the Court in such case will be able to ascertain a good faith with the comments, but if a scurrilous comment is made by one who is totally foreign on the subject like the respondents whose normal duties are not the one written in the impugned article, arm of the law must strike a blow on him who challenges the supremacy of the rule of law in the general interest of the litigant public. The respondents had made comments touching to the administration of justice of the Apex Court of the country, who do not possess elementary knowledge in the field of law".

130. In view of above observation made by our Apex Court we are of the view that as a journalist the contemnor should not have engaged himself in making post judgement criticism which was not 'fair'. He is not a legal expert. Mere having a degree in the discipline of law one cannot be supposed to have expertise in this area, particularly on the legal process involving core aspiration of the nation. The above observation of our Apex Court has made it quite clear. The manner and the use of scurrilous 'words' and 'phrases' he opted in making the comments have tended to scandalize and to lower the authority of the Tribunal. This ill and malicious attempt tended to obstruct the administration of justice. The contemnor, a foreign national and a journalist by profession, has rather acted as a mere 'mouthpiece' of the quarters engaged in the act of organised undesirable campaign, by circulating unfair, unreasonable and scandalising 'criticism'.

131. In his **'Law Day speech'** by Hon'ble Shri **S.H. Kapadia,** Chief Justice of India at the Supreme Court Lawns on 26th November, 2011

> The foremost challenge to the Judiciary today is viability of the system. Citizens approach the Court only when there is confidence in the system and faith in the wisdom of the Judges. This is where the Public Trust doctrine comes in. The Institution stands on public trust..... We, the Judges, do not mind a studied fair criticism. However, as an advice to the Bar please do not dismantle an Institution without showing how to build a better one.
> [*See also* : http://supremecourtofindia.nic.in/speeches/lawdayspeech.pdf]

132. Irresponsible criticism on *subjudice* matter involving emotion and aspiration of the nation and victims of barbaric crimes committed in

1971 has obviously demeaned the course of fair administration of justice and dignity of law courts. We strongly condemn and deprecate such act prejudicial to the due process of justice. Creating untimely controversy by circulating a criticism on an issue that relates to nation's emotion does not reflect 'fair' intention of the contemnor. However, it did not affect the merit of any of pending cases before the Tribunals. Therefore, the criticism made on the issue of 'death figure in 1971' though does not constitute any contempt, but it was not in the 'public interest' in any way and the attempt on part of the contemnor was not in 'good faith', we conclude. At the same time, condemning such malicious and prejudicial act we warn the contemnor not to repeat such criticism on historically settled issue.

133. Mere criticism made on the issue of 'death figure in 1971' though does not constitute any contempt, it was in no way in the 'public and the attempt on part of the contemnor was not in 'good faith'. With this observation made in our preceding deliberation on the article titled '**Sayedee indictment: 1971 deaths**', we have condemned such malicious and prejudicial act and have warned the contemnor not to repeat such criticism on historically settled issue in future.

134. No affront to the splendor of law can be permitted. Viability of the system is to be protected. Confidence upon the court of law is to be kept distanced from any detriment; the view of **S.H. Kapadia J.** once again reminds it**.** The fountain of justice cannot be allowed to be infected by any individual or a journalist or quarter who is disgruntled with the judicial process being carried out by this Tribunal. We, therefore, cannot take a compassionate or indulgent view of the matter, merely treating the criticism by the contemnor to have been made in exercise of right to freedom of expression. Contemnor's deliberate attempt to scandalize the Court tended not only to shake the confidence of the public and the nation as well in the system but also tended to cause detriments too to the objective of the Act of 1973 and the trial process being held in the Tribunal.

135. In view of above discussion and having regard to the entire matter the gravity of alleged comments as depicted from the three articles in questions circulated by the contemnor David Bergman in his personal blog we are of unanimous view that the contemnor is found guilty and responsible for making the offending scandalous comments using derogatory and unfair 'words' and 'phrases' in second and third article that tended to attack and lowering the authority and majesty of the Tribunal for which the contemnor deserves punishment under section 11(4) of the International Crimes(Tribunals) Act, 1973.

Hence it is Ordered

That in result of the above discussion contemnor David Bergman, Journalist 7/C, New Bailey Road, Dhaka-1000 is hereby punished and awarded sentence of simple imprisonment of till rising of the court with a fine of Taka five thousand [Tk. 5,000] under section 11(4) of the International Crimes (Tribunals) Act of 1973. The contemnor shall deposit the fine through '*chalaan*' within seven (07) working days from date, in default he [David Bergman] shall be liable to undergo simple imprisonment for a period of seven (07) days.

The contemnor is directed to inform the compliance in respect of depositing fine as ordered above to this Tribunal through its Registrar.

The Registrar shall keep the Tribunal informed about compliance of depositing fine as ordered above so that in the event of default the Tribunal can pass further necessary direction.

Justice Obaidul Hassan, Chairman

Justice Md. Mozibur Rahman Miah, Member

Justice Md. Shahinur Islam, Member