

State Practice of Asian Countries in International Law

Bangladesh

Sumaiya Khair, State Practice Rapporteur

Professor, Department of Law, University of Dhaka

Muhammad Ekramul Haque, State Practice Rapporteur

Professor, Department of Law, University of Dhaka

International Relations & Co-operation

India-Bangladesh Bilateral Relations 2020

The year 2020 witnessed high level engagements at the political and official levels between Bangladesh and India. Some of the areas of engagement are highlighted below:

Territory and Jurisdiction – Security and Border Management

Talks between the border forces of both countries, namely, Border Security Force (BSF) of India and the Border Guard Bangladesh (BGB) were held on 22–26 December 2020 in Guwahati, India. These were Director General Level Talks (DGLT). Border coordination conferences between Regional Commanders of BGB and the Frontier Inspectors General of BSF were also held to discuss management and security of the 4096.7 km of the India-Bangladesh land border.

Territory and Jurisdiction – Connectivity

Bangladesh and India are implementing various measures to restore the pre-1965 rail links and other connectivity links that had existed between India and Bangladesh. The Prime Ministers of both countries jointly inaugurated the newly restored railway link between Chilahati (Bangladesh) and Haldibari (India) on 17 December 2020 to enhance people-to-people contacts. The frequency of two passenger trains, i.e., Maitree Express and Bandhan Express, was increased from 4 days a week to 5 days a week and from one day a week to two days a week, respectively, from February 2020. Both countries have also started to use side-door containers and parcel trains to maintain uninterrupted supply chains during the COVID-19 pandemic. The Government of India handed over 10 broad gauge diesel locomotives as part of its grant assistance to Bangladesh Railways in a virtual event on 27 July 2020.

The two countries signed the second addendum to the Protocol on Inland Water Transit and Trade (PIWTT) in May 2020 for including two new India-Bangladesh Protocol Routes (Sonamura-Daudkandi on river Gomti and extension of Dhulia to Godagiri up to Aricha on river Padma), five new ports of call and two extended ports of call. Sonamura-Daudkandi Protocol Route opened for operations in September 2020. The trial run of trans-shipment of Indian goods from Kolkata to Agartala via Chattogram was successfully conducted in July 2020.

Defense Cooperation

A number of defense cooperation events took place in 2020, which included the second edition of India-Bangladesh CORPAT 'Bangosagar' exercise on 03–05 October 2020, the Regional Commanders meeting of Coast Guards on 19 October 2020, and the third Annual Defense Dialogue on 02 November 2020. The Indian Army has gifted trained horses and dogs to the Bangladesh Army in November 2020.

Economic and Commercial

Bilateral trade between India and Bangladesh has grown steadily over the last decade contributing to increased exports between the two countries. To promote cooperation on bilateral trade, an India-Bangladesh CEO's Forum was launched in December 2020 to provide inputs at the policy level in various areas of trade and investment and to facilitate exchanges among the business communities of both the countries. The first meeting of the India-Bangladesh Textile Industry Forum was held in February 2020 to foster cooperation and collaboration in the textile sector.

International Economic Law

IMPLEMENTING INTERNATIONAL ECONOMIC LAW – BUSINESS, SALE, CONTRACT, TAX, COMPETITION LAW – RESPONSIBILITY OF GOOGLE, YOUTUBE, FACEBOOK, AND AMAZON TO PAY APPLICABLE TAX IN BANGLADESH

Humayun Kabir and Others vs Government of Bangladesh and Others [Writ petition no. 5227/2018, High Court Division of the Supreme Court of Bangladesh, judgment delivered on 8 November 2020]

The petitioner filed a writ before the High Court Division of the Supreme Court of Bangladesh for the collecting tax from different foreign online service

providers by the Government of Bangladesh. The court ordered the government to collect appropriate tax and revenue from the internet giants like, Google, Facebook, Amazon, Yahoo, YouTube, etc., that are providing and selling their services in Bangladesh. The court added that all these entities incorporated in different countries cannot make profit by giving services to the people without paying appropriate taxes to the government.

***Preferential Trade Agreement (PTA)/Free Trade Agreements (FTA)
Protocols Set for Adoption***

Committed to revising its guidelines on preferential trade agreements (PTAs) and free trade agreements (FTAs), Bangladesh prepared the Policy Guidelines for Preferential Trade Agreement (PTA)/Free Trade Agreement (FTA)-2020, which consider evolving global and domestic economic and trade patterns. While the earlier guidelines focused on goods and services, the revised protocols address several emerging issues in areas of intellectual property rights, technology, and the environment. This initiative rides on Bangladesh's attempts to accelerate its trade agreements to mitigate the impact of leaving the United Nation's LDC category in 2024, which would result in the loss of many of its current duty-free export privileges.

***Preferential Trade Agreement between Bangladesh and Bhutan,
6 December 2020 (Signed Virtually)***

Bangladesh signed a preferential trade agreement with Bhutan on 6 December 2020 through a virtual ceremony owing to the COVID-19 pandemic. This came in the wake of Bangladesh's efforts to graduate out of the LDC status by 2024 and to boost its export earnings by emphasizing on bilateral preferential trade agreements (PTA) and free trade agreements (FTA). Indeed, this is the first ever bilateral preferential trade agreement that Bangladesh has signed with any country since its independence in 1971. The signing of the Agreement on 6 December held another significance for the two countries as on this day in 1971, Bhutan was the first country to have recognized Bangladesh as a sovereign state. Under this agreement, some 100 Bangladeshi products would get duty-free access to Bhutan, whereas 34 Bhutanese products will make its way into the Bangladeshi market without any duty. The number of items is expected to increase gradually based on consultation between the two countries.

***Tripartite Memorandum of Understanding with the Serum Institute
of India (SII) and Beximco Pharmaceuticals Ltd., Bangladesh,
5 November, 2020***

Bangladesh signed a tripartite memorandum of understanding (MoU) with the Serum Institute of India (SII) and Beximco Pharmaceuticals Ltd to procure

30 million doses of the Oxford-AstraZeneca SARS-CoV-B2, AZD1222 vaccine. Under the MOU, the vaccines would be provided free of cost.

***Bangladesh and India Sign Several MoUs and Agreements
(at a Virtual Summit), 17 December 2020***

The Prime Ministers of India and Bangladesh held a virtual summit on 17 December 2020 to discuss the different aspects of their bilateral relations and exchanged views on regional and international issues, during which they signed seven MOUs and agreements. The agreements include a framework of understanding in the hydrocarbon sector, a framework agreement on High Impact Community Development Project (HICDP), a protocol on transborder elephant conservation, an MoU for the supply of equipment and improvement of garbage and solid waste disposal, an MoU in the field of agriculture, and an MoU between National Museum Delhi and Bangabandhu Sheikh Mujibur Rahman Memorial Museum in Dhaka and Terms of Reference for creating an India-Bangladesh CEO forum. Amongst the various MOUs signed, the High Impact Community Development Project (HICDP) focuses on education, health and sanitation, water-treatment, and cultural heritage to enhance socio-economic development of local communities. In the field of energy, both countries agreed to promote a two-way investment, technology transfer, joint studies, and capacity building in hydrocarbons. They also agreed to establish a high-level CEO forum comprising of the top CEOs from both the countries to provide policy level inputs for enhancing bilateral trade and investment and boost export to third countries. Textiles, Pharmaceuticals, Leather, Agriculture and Food processing value chains, Automobiles, and Services sector would be the major focus areas.

International Environmental Law

**PROTECTION OF WETLANDS – THE CONVENTION ON
WETLANDS OF INTERNATIONAL IMPORTANCE ESPECIALLY AS
WATERFOWL HABITAT**

***Bangladesh Environmental Lawyers Association (BELA) vs
Government of Bangladesh and Others [Writ petition no. 1683/2014,
High Court Division of the Supreme Court of Bangladesh,
judgment delivered on 2 December 2020]***

The petitioner filed a writ of petition before the High Court Division of the Supreme Court of Bangladesh seeking the declaration of nullity of the filling of wetlands in a local district in view of the destruction these activities

caused to the environment. The court declared the filling of wetlands to be illegal and observed that all wetlands are public trust properties which none can destroy. In deciding the case, the court relied on both national and international laws regarding the protection of wetlands. The court also directed the government to adopt necessary laws to give effect to its obligations under the Convention on Wetlands of International Importance, especially the Waterfowl Habitat (Ramsar Convention) to which Bangladesh acceded in 1992.

Law of the Sea

STATE LEGISLATION ON MARITIME ZONES, RIGHTS & OBLIGATIONS

The Marine Fisheries Act, 2020

The Parliament enacted the Marine Fisheries Act on 26 November 2020 invalidating the earlier legislation in the same field, the Marine Fisheries Ordinance 1983. The 2020 Act defines “deep sea” as international sea territory beyond the territorial sea and Exclusive Economic Zone (EEZ) (section 2(4)). ‘Bangladesh Sea Fisheries Waters’ include territorial waters as determined by any law of Bangladesh, contiguous zones as determined by article 33 of the United Nations Convention on Law of the Sea 1982 (UNCLOS) and Exclusive Economic Zones (EEZ) as determined by article 55 of the UNCLOS or any other territories under the law of Bangladesh or international conventions (section 2(10)). Such determinations imply that the territorial sea is 12 NM from the baseline according to section 3 of the Territorial Waters and Maritime Zones Act 1974, and the contiguous zone is 24 NM according to article 33 of the UNCLOS. Article 57 of the UNCLOS has settled the maximum limit of the EEZ area, which is 200 NM from the baseline, and the Act of 2020 refers to that provision to determine the limits of its EEZ. Although all three zones are covered in both the Territorial Waters and Maritime Zones Act 1974 and the UNCLOS, it is unclear why the territorial sea should be measured by national laws while the other two zones are measured under UNCLOS.

Section 3 of the law empowers the government to declare the ‘Bangladesh Sea Fisheries Waters’ as fishing area based on the depth of the sea or any internationally recognized system. The government may also determine the kind of vessel with which fishing can be conducted. The government may also prohibit the fishing of all or any species of fish in the fishing area necessary to preserve the fish resource. Punitive measures are in place for violation of this prohibition. The Act permits the government to classify both the vessel and number of vessels, for the purpose of granting a fishing license (section 4).

These provisions enable the government to limit the scope of fishing pursuant to international standards towards sustainable use of fish resources. The Director-General of the Fisheries Department of Bangladesh is responsible to determine the “allowable catch” and also to monitor, control and conduct surveillance to ensure “maximum sustainable yield,” which is in accordance with article 61 of the UNCLOS (section 5). However, the Act makes no reference to article 61 of the UNCLOS, which provides some key factors in determining the allowable catch which include, e.g., considering the best scientific evidence available, nor does it incorporate any guidelines on how the allowable catch shall be determined. The inclusion of such a provision would have ensured that the living resources in the exclusive economic zone is not endangered by over-exploitation.

This law empowers the government to, inter alia, declare an area in ‘Bangladesh Sea Fisheries Waters’ as mariculture area to expand the blue economy (section 6). Given that the government has been exploring ways to tap into untapped maritime resources for sustainable development, such a provision shall benefit the national economy. However, nobody can conduct fishing in the declared fishing area without a license (section 7). The only exception is that foreign vessels shall not be subjected to such conditions in deep waters, as resources in deep waters are common resources of mankind under article 136 of the UNCLOS. However, both national and foreign owners of vessels can apply for permission to the Director of the Fisheries Department (section 8).

Article 62 of the UNCLOS stipulates that the coastal State shall promote the objective of optimum utilization of the living resources in the exclusive economic zone and when a coastal state lacks the ability to harvest the whole allowable catch, it shall grant other States access to the surplus of the allowable catch through agreements or other arrangements subject to terms, conditions, laws, and regulations including those related to licensing of fishermen, fishing vessels and equipment and authorizing fisheries research programmes. The Act of 2020 allows foreign individuals to get licenses for fishing and research purposes. Section 22 of the Act entitles the government to deny licenses to any foreign vessel with or without showing any cause. Section 23 prohibits the arrival of any foreign vessel in ‘Bangladesh Sea Fisheries Waters’ without license. However, section 23(2) provides some exceptions to which any foreign vessel can claim the transit passage. Such exceptions are in line with article 38 of the UNCLOS whereby a foreign vessel can have the ‘freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.’ Moreover,

by providing this exception, the law gives latitude to vessels or crews which are in danger and need assistance. The exception also extends to the right of innocent passage the definition of which, under the Act, is the definition provided in the UNCLOS. Sections 24 and 25 make it an offense for any foreign ships to enter, fish, load and offload in the 'Bangladesh Sea Fish Waters' without any license. Section 26 restricts the scope of giving immunity to any foreign ship from tax, immigration, health, and seaworthiness-related laws. However, such immunity can be granted to the vessel having received a license to conduct research activities.

Section 27 of the Act prohibits the use of explosives, toxins, and other harmful substances during fishing. In line with Article 194 of the UNCLOS, which obliges states to take measures against the pollution of the marine environment, Section 27 of the Act would help prevent pollution of the marine environment. Section 28 of the Act penalizes the use of prohibited nets, equipment, etc. The government can declare protected areas in the 'Bangladesh Sea Fisheries Waters' in which the living species are at risk of becoming extinct or are gradually disappearing (section 29). Section 30 prohibits the catching of fish, dredging, throwing polluted materials, and constructing any building in the protected area.

Section 35 of the Act authorizes officials to exercise the right of hot pursuit against a vessel beyond the 'Bangladesh Sea Fisheries Waters,' if such vessel does not stop in response to any signal and code transmitted to it by the authorized officials while in the 'Bangladesh Sea Fisheries Waters.' This is in line with Article 111 of the UNCLOS, which grants the coastal states the right of hot pursuit if it believes that a vessel has violated the laws and regulations of that State.

Statement by Bangladesh under Agenda Item 76: 'Oceans and Law of the Sea,' 75th Session of the United Nations General Assembly, 08 December 2020

Recalling how the COVID-19 pandemic seriously impacted the ocean economy and acknowledging the Secretary-General's report A/75/70 reflecting on the adverse impact of sea level rise and its mitigation measures; and his report A/75/157 on the impact of bottom fishing on the deep sea vulnerable marine ecosystem and its fish stock, Bangladesh stressed on the importance of making environment-friendly deep-sea fishing technology accessible to the developing countries.

Bangladesh informed that it was at the final stage of enacting the Maritime Zones Act, to ensure efficient utilization, conservation, and scientific management of its marine resources. Further, it has recently lodged an amended

submission to the Commission on Limits of the Continental Shelf (CLCS) for determination of its outer continental shelf in the Bay of Bengal. The amendment has been made to give effect to the judgment of the ITLOS and the award of the Annex VII Arbitral Tribunal in the maritime delimitation proceedings with its neighboring countries. The determination of outer continental shelf would enable Bangladesh to explore the natural resources, which is critical for achieving the country's development agenda.

The statement recognized that the common future would be determined by the oceanic resources and services if they are conserved, developed, and utilized. In this regard, it is critical to address the climate induced sea-level rise by timely and effective implementation of the various provisions of the UNCLOS, the United Nations Framework Convention on Climate Change and the Paris Agreement. The statement emphasized on the early conclusion of the international legally binding instrument on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction (BBNJ) to ensure a balance between the equitable and efficient utilization and conservation of ocean resources, and the protection and preservation of the marine environment.

The statement called for increased international cooperation to address the continued threats to maritime security including those caused by large movements of refugees and migrants by sea, mostly in perilous situations. In this regard, Bangladesh urged States to comply with their obligations for search and rescue at sea, and to address the root causes of irregular movements. Bangladesh recognized the significance of capacity building and technical assistance, especially for developing economies, for the implementation of legal and policy framework for the oceans and seas. Bangladesh sought integrated cooperation and coordination at the international, regional, and local levels, especially in supporting developing and small island states, and coastal communities to recover from the impacts of the impacts of COVID-19.

Ocean Science and Sustainable Development – Statement by Bangladesh at the High-Level Meeting (Virtual) to Present the Draft ISA Marine Scientific Research Action Plan in Support of the UN Decade of Ocean Science for Sustainable Development, 17 November 2020

Lauding the draft Action Plan on Marine Scientific Research by ISA as a good beginning towards supporting the UN Decade of Ocean Science for Sustainable Development, Bangladesh conceded that this initiative would help to institutionalize scientific research in the deep sea and responsible management of ocean resources. The statement emphasized the importance of

strategic partnerships among relevant stakeholders, including sub regional, regional, and global organizations, for enforcing the Action Plan to maximize the full potentials of the Blue Economy through equitable share of marine resources. The statement reiterated Bangladesh's commitment to build strategic partnership with other entities for conducting advanced scientific research in the deep sea. In this context, the Statement pointed out the need for capacity building of, and technical assistance to developing countries in advancing marine scientific research in the deep sea, so that no one is left behind, especially those with limited or no access to the deep-sea resources. This would also require adequate, predictable, and innovative financing. The statement noted that gender parity in the field of marine scientific research was critical from the inclusivity perspective. Pursuant to UNCLOS provisions, Bangladesh called for the protection of the integrity of the marine environment and its biodiversity when conducting research in the deep sea.

Air Law & Law of Outer Space

Carriage by Air (Montreal Convention) Act, 2020

The Parliament enacted the Carriage by Air (Montreal Convention) Act on 26 November 2020 to implement the rules of the Montreal Convention, 1999 (1999 Convention) regarding carriage by air which Bangladesh has signed (Preamble). The incorporation of the 1999 Convention rules into the domestic laws of Bangladesh would facilitate the ratification of the Montreal Convention by Bangladesh. The Act has not repealed the other laws in this field entirely, such as, the Carriage by Air Act, 1934, the Carriage by Air (International Convention) Act, 1966 and the Carriage by Air (Supplementary Convention) Act, 1968 (Act No. v of 1968), except those parts which are inconsistent with the present Act.

This law states that the Convention shall be tantamount to any other laws in Bangladesh with regards to the right and obligations of the passengers, transporters, consignors, and consignees (section 3). Such direct and wholesale incorporation of an international convention into a domestic law is quite rare. Section 4 of the Act states that all the parties to the Convention will be regarded as legal persons with regard to the filing of court cases. It also provides that the Code of Civil Procedure, 1908 will apply in the determination of the procedures. Section 5 allows the family of any passengers who die in an accident to file case for compensation in the court. The compensation shall be determined based on the Special Drawing Rights (SDR) in accordance with the Convention, then converted into Bangladeshi Taka and delivered to the entitled victims.

Alternatively, under section 6, the family of the victim can apply for compensation to the carrier itself. The family members must apply to the court for inheritance certificate so that the compensation amount could be distributed to the family members according to the ratio specified in the certificate. Any person authorized by the government may inspect and examine the documents and records of any carrier, its representative and any other related person, in such a manner as may be prescribed by the rules (section 9). The Act includes in its schedule the whole Montreal Convention 1999 which shall have the effect of being a law of Bangladesh. This Act, thus, acknowledges the superiority of this Convention over the Warsaw Convention, Hague protocol, Guadalajara Convention, Guatemala City Convention, and the Montreal Protocol.

**RESPONSIBILITY OF AIRLINE UNDER THE CARRIAGE BY
AIR (INTERNATIONAL CONVENTION) ACT, 1966 – LIABILITY
OF THE CARRIER FOR PASSENGER – INTERNATIONAL CIVIL
AVIATION ORGANIZATION (ICAO) HUMAN RIGHTS – CRUEL
TREATMENT-LIABILITY OF THE CARRIER**

Tanjin Brishti vs Government of Bangladesh and Others

[Writ petition no. 6049/2011, High Court Division of the Supreme
Court of Bangladesh, Judgment Delivered on 8 October 2020]

The petitioner and her mother purchased tickets to Canada from the Dhaka office of Etihad Airlines. On 28 June 2011, the petitioner and her mother went to Hazrat Shahjalal International Airport and received two boarding passes from the Etihad Airlines' counter. Out of the two boarding passes, one was for the Dhaka-Abu Dhabi flight EY253, the other for the Abu Dhabi-Toronto flight EY141. The petitioner and her mother boarded the EY 253 flight and reached Abu Dhabi the next morning. Their next flight from Abu Dhabi (Abu Dhabi-Toronto) was scheduled to depart at 10:00 PM. At the aforementioned time, the petitioner and her mother stood in line to board the Toronto-ward EY 141 flight. After the security check, the petitioner was led into the waiting room for boarding the flight, but her mother was not allowed to do the same on the ground that her boarding pass did not have a stamp. The officials of the aforementioned Etihad flight compelled the petitioner and her mother to buy tickets back to Bangladesh, and travel back on those tickets. Upon return to Dhaka on the 30 June 2011, the petitioner filed a General Diary (GD) at the Airport Police Station. The incident made the news in a national daily on the 2 July 2011, following which the petitioner filed a complaint to the

International Civil Aviation Authority via e-mail and to the country manager of Etihad at its Dhaka office. Finally, the petitioner filed a writ before the High Court Division of the Supreme Court of Bangladesh.

The government formed an inquiry committee, which found clearly that the actions of the Etihad officials were wrong, rude, negligent, and unprofessional. Instead of fixing the stamp issue, they proceeded to wrongfully send the petitioner and her mother back to Bangladesh.

After careful consideration of relevant evidence, information, and the report of the inquiry committee, the court opined that Etihad committed an arbitrary, malafide and unreasonable act manifest in negligent and rude behaviour of the airlines' officials. Their acts included harassment, forceful unloading of their baggage from the plane, the compulsion to purchase return tickets to Bangladesh and the denial of allow entry onto the plane bound to Toronto. These acts by the airlines were deemed to be in violation of the principles of natural justice, illegal and without jurisdiction. The court awarded compensation to the petitioner and her mother. Etihad Airlines paid the compensation under The Carriage by Air (International Convention) Act, 1966 (Para 1, Article 22, Chapter 3), which was enacted to give effect 'to the Convention concerning international carriage by air known as "the Warsaw Convention as amended at The Hague, 1955,"' and to enable the rules contained in that Convention to be applied.

Human Rights

Implementation of Human Rights Treaties

The Women and Child Repression Prevention (Amendment) Act,
2020

Enacted on 26 November 2020, the Women and Child Repression Prevention (Amendment) Act has increased the severity of the penalty for rape. Anybody convicted of rape now faces either life imprisonment or the death penalty, whereas previously, only life imprisonment was applicable (section 9(1)). Similarly, section 9(4)(A) has been amended to enhance the penalty for attempting to murder or injure after rape from life imprisonment to the death sentence. These amendments have been brought in an attempt to restrict the escalation of violence against women and in line with the General Recommendation No. 19 (1992) of the Committee on the Elimination of Discrimination against Women in its general recommendation no. 19 (1992) which urged states to ensure that laws prohibiting domestic violence and abuse, rape, sexual assault,

and other forms of gender-based violence adequately protect all women and to take all legal and other measures necessary to provide effective protection for women against gender-based violence, including effective legal measures, including penal sanctions, civil remedies, and compensatory provisions.

The Usage of Information and Communication Technology by
Court Act, 2020

The Supreme Court of Bangladesh remained closed since 24 March 2021 due to the COVID-19 pandemic. Consequently, the President exercised his ordinance-making power under article 93(1) of the Constitution to enact the 'Usage of Information and Communication Technology by Court Ordinance 2020' for the virtual operation of the judiciary of Bangladesh during the pandemic. The High Court Division of the Supreme Court started hearing petitions virtually from 12 May 2021. The ordinance was then enacted as a law by the Parliament on 9 July 2020 titled "The Usage of Information and Communication Technology by Court Act 2020." The Act enabled the court to conduct the court proceedings with the virtual presence of the parties, lawyers and witnesses following the practice directions provided by the Supreme Court under section 5 of the same Act. Section 4 of the Act states that virtual presence would be presumed as physical presence under both civil and criminal proceedings.

This initiative reflects compliance with international law, which guarantees access to justice. For instance, article 2(3) of the International Covenant on Civil and Political Rights asks State Parties to ensure that any person whose rights or freedoms as recognized herein are violated has an effective remedy, regardless of whether the violation was committed by persons acting in an official capacity, and to ensure that any person claiming such a remedy has his right to it determined by competent judicial, administrative, or legislative authorities. Article 8 of the Universal Declaration of Human Rights 1948 (UDHR) states that 'everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.' Article 10 of the UDHR further states that 'everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.'

Specific Human Rights Incidents or Cases

HUMAN RIGHTS – CHILDREN IN DETENTION – CHILDREN IN CONFLICT WITH THE LAW – CONVENTION ON THE RIGHTS OF THE CHILD – DUE PROCESS – CHILD’S RIGHT TO BE HEARD

*State vs Ministry of Law, Justice and Parliamentary Affairs,
Government of Bangladesh, Represented by Its Secretary [Suo-Moto
Rule No. 07 of 2019, Judgment Delivered on 11 March 2020]*

The Prothom Alo, a national daily, covered a news on 31 October 2019 about the detention of 121 children in child development centers at Tongi, Gazipur and Pooler Hat, Jashore. The children were held in detention pursuant to orders of conviction and sentence passed by the Executive Magistrates of Mobile Courts under the Mobile Court Act 2009. Mr. Abdul Halim, who heads a child welfare organization, brought the news to the attention of the Court stating that although the Children Act 2013, a special law, provided special procedures for the trial of child offenders, some Mobile Courts have convicted and sentenced the said 121 and other children in different cases without jurisdiction. The Court issued a Suo-moto Rule calling upon the concerned Ministries and departments of the government, the Rapid Action Battalion (RAB), and the concerned executive magistrates to show cause as to why the trials, conviction, sentences, and detention of these 121 children, or any other children, by the Mobile Courts in Bangladesh, should not be declared to be without lawful authority and of no legal effect.

At the time of issuing the Rule, the Court passed an ad-interim order directing the authorities of the respective detention centers to immediately release all children under the age of 12 whom they had detained pursuant to the said orders of conviction and sentence. By the same order, the Court granted bail to children who were aged between 12–18 years for a period of 6 (six) months, to the satisfaction of the Children Courts of the districts concerned. The Court also asked the special force, RAB, and the concerned Executive Magistrates to create separate files of cases in which they had convicted and sentenced the said 121 children or any other children and send them to the Court. The detention centers and the Executive Magistrates complied with the Court orders, but RAB remained silent.

However, the principal respondent in this case, namely, the Ministry of Law, filed an affidavit stating that some of the children were convicted under the Narcotics Control Act 2018 in conjunction with the Mobile Court Act of 2009. The affidavit alluded to section 57 of the Narcotics Control Act, which empowers the Mobile Courts to summarily convict and sentence offenders. The

affidavit also pointed out that this provision overrides provisions of the said Act including section 52, which provides for the application of the Children Act 2013 in case of child offenders. As such, in so far as conviction and sentence of the said children under the Narcotics Control Act were concerned, no illegality has been committed.

The learned counsel for the children, in his affidavit-in-reply, stated that the said children, some of whom were below 12 years of age, were convicted on the basis of confessional statements extorted from them, which violated some of the provisions of the Penal Code. He further added that some of the allegations against the children were that of robbery, which was punishable under the Penal Code, and as such, was outside the jurisdiction of the Mobile Court's jurisdiction. Nonetheless, they convicted and sentenced the children by framing charges against them under the Penal Code. The learned counsel informed the Court that the way confessions of the said children were recorded violated the safeguards provided by the Code of Criminal Procedure. Interestingly, the same sets of witnesses were used while recording confessional statements of the said children; for example, in one particular case, one of the Executive Magistrates, recorded confessional statements of 23 children in two cases regarding occurrences at two different places within a period of 32 (thirty-two) minutes only, which clearly suggests that the cases were, in all certainty, prepared in the office of the said Executive Magistrate and that he had never actually visited the places of the occurrences. The counsel for the children contended that since the Children Act 2013 provides special procedures for dealing with children in conflict with the law in line with the UN Convention on the Rights of the Children (CRC), the Mobile Courts did not have any jurisdiction to convict and sentence the children for any offence.

The Attorney General representing the State responded by reiterating that the children between 12 and 18 years of age in this country are found to be repeatedly engaged in various offences and gang activities that include drug peddling, extortion, kidnapping, and murder. He submitted that these crimes cannot be stopped unless Mobile Courts are allowed to intervene instantaneously. He referred to successful drives of the Mobile Courts against adulterated food, hoardings, etc., which received appreciation from the public.

After hearing both sides and assessing the merit and facts of the case, the Court referred to the fundamental rights guaranteed by the Constitution for all citizens to enjoy the protection of law and to be treated in accordance with law and only in accordance with law, and that no action detrimental to the life, liberty, body, reputation, or property of any person may be taken except in accordance with law (article 31). The Constitution further guarantees the personal liberty of all persons, except in accordance with the law (article 32). Every

person has the right to consult and be defended by a practitioner of his choice (article 33), and if arrested, to be produced before a judicial magistrate within 24 hours of arrest (article 34). Besides, an accused has the right to a public trial by an independent and impartial court or tribunal (article 35). Questioning the violation of the fundamental rights of the children in the way they were tried, convicted, and sentenced, the Court was convinced that the Executive Magistrates ignored the substantive penal law provision which declares that children under 12 years of age cannot commit any offence, unless proven to have sufficient maturity to understand the nature and consequences of his/her act during their trials. Indeed, there was nothing on record to prove that the Executive Magistrates did anything to understand the state of the children's minds. As such, the convictions of the children under 12 years were a nullity in the eye of law.

The Court observed that the nature of Mobile Court procedures is such that it denied the children the necessary safeguards when extracting confessions from them and deprived them of the opportunity to exercise the right to counsel, all of which violated the Constitution. Questioning the credibility of the confessions, the Court recognized that they were given under severe compulsion. In addition, the trial, conviction and sentencing by Executive Magistrates were tantamount to prosecution by the state and as such, was neither independent nor impartial, as required by the Constitution. Referring to the extensive provisions in the Children Act 2013 on the trial, conviction and sentencing of children in conflict with the law, the Court maintained that the Mobile Courts had no jurisdiction to try children, as the special law, which was promulgated after the Mobile Courts Act, prevails over all other laws, including the Mobile Courts Act 2009. Similarly, the Mobile Courts are not empowered to try any narcotics-related offences; sections 44 and 45 of the Narcotics Control Act 2018 provide that the narcotic-related offences shall be triable only by the Special Tribunals established by the Government, and judges of the rank of the Additional District Judge. Until such tribunals are established, the Government may confer such powers on an Additional District Judge or a Sessions Judge. That said, when narcotics-related offences are committed by children, they will be dealt with under the Children Act 2013.

Taking everything into consideration, the Court declared the conviction and sentencing of the concerned children to be null and void *ab initio* and without any lawful authority. It ruled that the children in question would not bear any consequences, legal or factual, of such conviction and sentences in their future life. Accordingly, there shall not be any criminal records against the said children in so far as these cases were concerned. With these observations, the *Suo-moto* Rule was made absolute.

Migrants' Right to Health – Statement by Bangladesh at the Joint IFRC/IOM Briefing 'Advancing Migrant's Access to Healthcare in the Time of COVID-19,' Virtual Event, 10 December 2020, Organized by IFRC and IOM, The Friends of Migration Group

Referring to the deep nexus between migration and health and the significance of ensuring inclusive access to health care, regardless of migration status during the COVID-19 pandemic, Bangladesh co-led a Joint Statement on the Impact of COVID-19 on Migrants, which was eventually supported by 103 member states. Recalling the contribution of migrants to the socio-economic progress of both host and sending countries and the increased vulnerability of migrants in the wake of the pandemic, the statement called upon States to incorporate the health needs of migrants in national and local health care policies and plans. To overcome this situation, global solidarity and cooperation were essential. The call of the Global Network on Migration to suspend forced returns during the pandemic to protect the health of migrants and communities and to uphold the human rights of all migrants, regardless of status was welcomed here. Bangladesh lauded the initiatives taken by some countries, e.g., Portugal, Canada, and Italy, to remove barriers and facilitate migrants' access to the labour market, social protection, temporary citizenship, and basic services. For example, Portugal has temporarily granted all migrants and asylum seekers citizenship rights. The statement offers some pragmatic recommendations for ensuring the health concerns of all migrants, which include:

- the integration of the health of migrants and their families in the global discourse of Universal Health Coverage with increased investments, with the aim of developing a unified agenda and global common principles for the health of migrants, including those who are in irregular situations;
- the need for international support and cooperation in ensuring the availability of affordable vaccines, medicines, and equipment for migrants in vulnerable situations;
- the need to harness the development potentials of migration by the host countries to further integrate migrants and mobile populations into their national health systems; and
- the need to foster global solidarity to combat rising racism, xenophobia and intolerance against migrants by exerting a strong political to ensure the rights, well-being, and dignity of migrants during this unprecedented crisis.

Rights of Persons with Disabilities – Statement by Bangladesh at the 13th Conference of the State Parties to the CRPD, 30 November 2020 (Submitted as E-Statement)

As one of the early signatories to the Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol, Bangladesh reiterated its

deep commitment to implement the CRPD and uphold the rights of persons with disabilities, with particular emphasis on the unprecedented challenges faced by them during the COVID-19 pandemic. The statement highlighted the programmes and policy and legislative measures that Bangladesh undertook till date in line with its obligations under the CRPD and how NGOs, civil society and the private sector were partnering with government efforts to address the special needs of this vulnerable group. Alluding to life-changing stories of persons with disabilities in Bangladesh who have benefited from different programmes and opportunities, Bangladesh concluded by stressing the need for an inclusive and innovative approach, supplemented by access to affordable and assistive technology, for meaningful development of persons with disabilities.

Safe, Orderly and Regular Migration – Statement by Bangladesh at the High-Level Launch of Secretary-General's Report on the Global Compact for Safe, Orderly and Regular Migration, 01 December 2020

Bangladesh observed how the COVID-19 pandemic underpinned the need for enhanced collaboration for migration management and of the potentials of the Compact for Safe, Orderly and Regular Migration. The statement acknowledged the daunting challenges triggered by the pandemic which resulted in job losses, salary cuts, and lack of access to social security, not to mention the added problem of managing returnee migrants, dipping remittances and the overall shrinking of the overseas labour market. The statement outlined a few policy priorities for effective implementation of the Compact:

- Enhance international cooperation by adopting a comprehensive 360-degree approach to benefit from the knowledge and experiences from all relevant stakeholders, at the national, regional, and global levels.
- Ensure strong political will to ensure the rights, well-being, and dignity of migrants during the pandemic situation and to that end, foster global solidarity to combat rising xenophobia and intolerance, and discrimination against migrants.
- Harness the development potentials of migration and strive to further integrate migration issues with the 2030 Agenda.
- Adopt a holistic approach in dealing with the post-pandemic job market, with special emphasis on imparting new skills, providing capital for small businesses, exploring inter-agency collaboration, as well as developing partnerships with the private sector.
- Tap into innovative approaches of international cooperation in migration governance, focusing on strengthening pathways for enhanced regular migration, skills development, and institutional capacity building, as well as safeguarding decent work of migrants.

International Humanitarian Law

Sexual Violence during Conflicts – Statement by Bangladesh at the Security Council Open Debate on Conflict Related Sexual Violence: Turning Commitments into Compliance, 17 July 2020

Expressing concern about the continued occurrence of sexual violence in conflict zones, with virtually no redress, Bangladesh recalled its own experience of conflict-related sexual violence (CRSV) during its war of liberation in 1971 and the more recent experience of the forcibly displaced Rohingya women, most of whom had suffered sexual violence in Myanmar, before their flight to Bangladesh. Bangladesh emphasized that the international community must persuade Myanmar to cooperate with relevant UN bodies to hold the perpetrators accountable for the atrocities committed to the Rohingya women.

Referring to the National Action Plan on Women, Peace and Security, which Bangladesh recently adopted, Bangladesh highlighted some of the measures it has taken to prevent and redress conflict-related sexual violence, particularly during humanitarian crisis to ensure implementation of Security Council resolutions in respect of women, peace, and security (WPS). Bangladesh called for, inter alia:

- Full implementation of the compliance framework recommended by SC resolutions, including Resolution 2467, with particular emphasis on regular monitoring and actions for prevention;
- Greater synergies between the mandated UN entities and the Committee on the Elimination of all forms of Discrimination against Women (CEDAW) to ensure compliance of the General Recommendation 30 of CEDAW, which obliges its 189 States parties to report on the resolutions related to conflict-related sexual violence;
- Strengthening accountability and justice mechanisms in the conflict and post conflict contexts to ensure redress and stop impunity;
- Stronger implementation of mechanisms for Security Council's WPS agenda at the national, regional and global levels;
- The internalization of the CRSV commitments by the entire UN system, including at the ground level by the Resident Coordinators and other UN agencies in the country teams, to better address capacity gaps in the security sector, in the justice systems and in the overall political process for increasing women's participation at all levels of the peace process.
- The addressment of the root causes of conflict, as discrimination, persecution and subjugation weaken vulnerable and marginalized communities and reduce their ability to prevent incidents of sexual violence by parties to the conflict.

Use of Force

USE OR THREAT OF FORCE – INTERNATIONAL TERRORISM

Statement by Bangladesh on the Agenda Item No: 114 “Measures to Eliminate International Terrorism,” 07 October 2020

Recognizing that terrorism is a serious threat to international peace and security and to the achievement of the Sustainable Development Goals, Bangladesh reiterated its support to various counter-terrorism initiatives undertaken by the UN. The statement highlighted Bangladesh's policy of 'zero tolerance' towards terrorism and violent extremism. Bangladesh is a party to all international counter-terrorism instruments and as part of its treaty obligations, has been investing heavily in national capacity-building including awareness-raising, community engagement and resilience, in a 'whole-of-society' approach to combat terrorism.

While highlighting some issues for consideration by the United Nations in its efforts to eliminate terrorism, the statement emphasised on generating the global discourse and action on counter-terrorism in a more robust manner and observed that continued exchange of information and intelligence-sharing among nations is critical in this regard. Bangladesh recommended that national capacity building and training of counter-terrorism personnel in developing countries should receive top priority in the UN agenda to assist in the implementation of obligations under the UN Global Counter Terrorism Strategy. The statement affirmed that since women and children are disproportionately affected by terrorism, efforts must seek to integrate the gender dimension in national and international campaigns against terrorism and violent extremism. Overall, respect for human rights and for the rule of law should essentially shape the anti-terrorism agenda. The statement cautioned that the COVID-19 pandemic may potentially divert attention of governments away from terrorism and violent extremism, which could be disastrous as restricted mobility and online education could trigger the emergence of innovative terrorist activities.