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Silent Shadows of Justice: Unveiling the Enigma of in Absentia Proceedings in The International Crimes Tribunal of Bangladesh

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ABSTRACT

This research paper examines the practice of holding trials in absentia in the International Crimes Tribunal of Bangladesh (ICT BD) in light of international standards of criminal law. Although the audi alteram partem principle supports the defendant's right to be present in legal procedures, Section 10A of the International Crimes (Tribunal) Act, 1973 amended in 2012, permits trials to be conducted in the defendant's absence by the ICT BD. The article assesses how well ICT BD follows global standards and discusses court rulings that have shaped its current position. Through examining qualitative and quantitative data, the research reveals notable deficiencies in the tribunal's procedures and proposes suggestions for improving fair trial rights, to ensure closer alignment with recognized international norms for the ICT BD.

Keywords: *In absentia trials, International Crimes Tribunal Bangladesh, international criminal law, fair trial rights, audi alteram partem, legal standards, ICT BD legitimacy.*

I. INTRODUCTION

De Smith once mentioned - "...until he has had a fair opportunity to see the evidence against him³." It is believed that the defendant has the right and responsibility to appear in proceedings against him, according to the principle of *audi alteram partem*. However, the idea of conducting trials in absentia, a frequently seen practice in international criminal law ("ICL"), permits the trial to proceed without one party present.⁴

The International Military Tribunals conducted in absentia proceedings for the Nuremberg Trial Charter in the *pursuit of justice*⁵. This method was not approved by the International Criminal

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³ BNB LEGAL, <https://bnblegal.com/audi-alteram-partem/> (last visited Aug. 15, 2023).

⁴ Musferat Mazrun Chowdhury et. al., *Criminal Trial in Absentia in Bangladesh: A Comparative Study*, 8 J. BUS SOC & SCI 47, 47-59 (2021), <https://www.las.ac.bd/ui-conteint/uploads/2020/09/IU-Journal-Vol-07-Issue-09-Part-7.pdf>.

⁵ UNITED NATIONS, ART. 12, *Chrter of the Internatonal Military Trbunal - Annex the Agreement for the prosecuton*

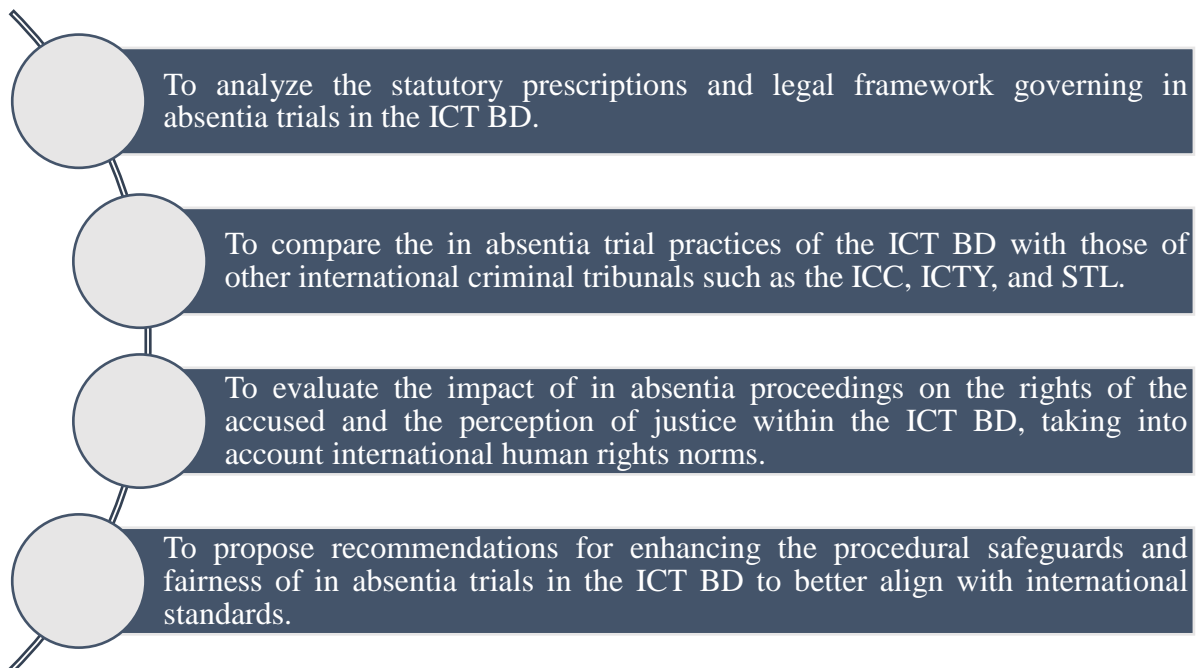
Court (“**ICC**”), International Criminal Tribunal for former Yugoslavia (“**ICTY**”),⁶ Cambodia's Extraordinary Chambers, and Sierra Leone's Special Courts⁷. It is important to emphasize that these courts hardly ever allowed trials without the defendant present, only doing so for very special situations. An example would be Rule 80(b) of the ICTY, which allows for the removal of the accused from the courtroom in cases of “*disruptive conduct*”.⁸

The International Crimes Tribunal-Bangladesh (“**ICT BD**”), founded in 2009 to prosecute those responsible for crimes during the 1971 Bangladesh Liberation War, allows trials in absentia under Section 10A of the International Crimes (Tribunal) Act, 1973, added by a 2012 amendment.⁹

This article aims to explore the validity of trials held in the absence of the defendant in the ICT BD, in accordance with recognized international standards of international criminal law. The goal is to provide a thorough examination of this subject by taking into account viewpoints from all sides. In the end, the goal is to carefully evaluate the accuracy and come to a logical conclusion with recommendations.

(A) Research Question

The Research Article aims to address the following questions:



and punishment of the major war criminals of the European Axis (Aug. 7, 1956).

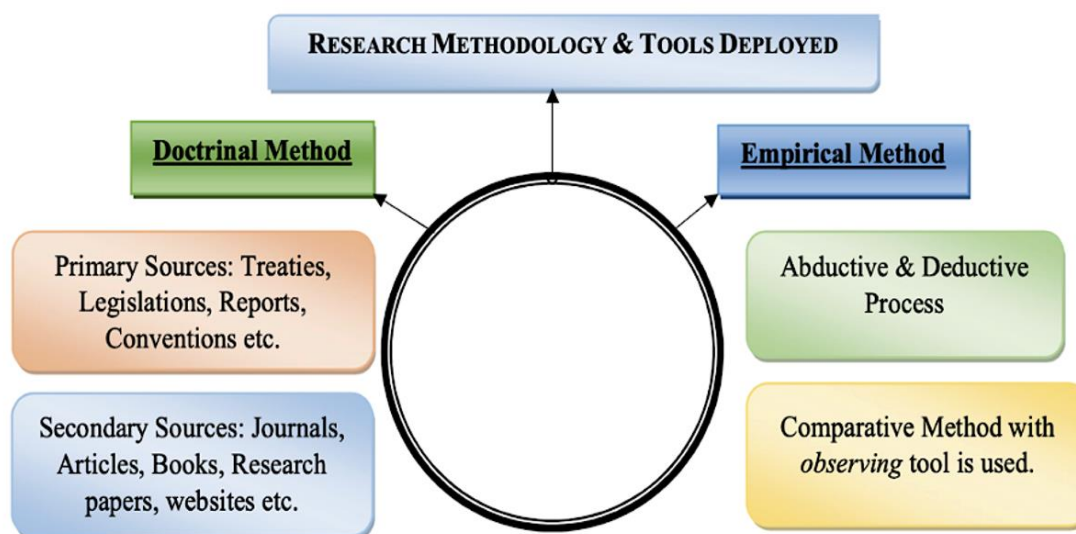
⁶ UN SECURITY COUNCIL, ART. 21(D), *Statute of the International Criminal Tribunal for the Former Yugoslavia* (June 5, 1987).

⁷ UN SECURITY COUNCIL, ART. 18(6)(e), *Statute of the Special Court for Sierra Leone* (Jan. 16, 2002).

⁸ UNITED NATIONS, RULE 87(b), *Rules of Procedure and Evidence* (Jul. 8, 2015).

⁹ International (Crimes) Tribunal Act, 1973, § 10A, No. 19, Acts of Bangladesh, 1973 (Bangladesh).

(B) Research methodology



This study draws on a wide range of scholarly works, such as those included in the references section, to analyse a wide range of ideas and case laws, using the methodology of *doctrinal research*. Both *qualitative and quantitative approaches* will be used in this study.

The research will rely heavily on secondary data gathered from a wide range of online and print resources. Relevant publication data from India will comprise the *quantitative data*, and statistical methods will be utilised to categorise the results. The *qualitative information* will be gathered from a wide range of sources, such as published studies, databases, websites, blogs, journals, and books. Triangulation will be employed as the method of data collection and analysis in this study.

II. RELEVANT LAW

(A) Statutory Prescriptions of ICT BD

As mentioned before, Article 10A¹⁰ of the ICT BD Statute addresses trials held in the absence of the defendant. Ensuring the presence of the accused should not have been guaranteed due to his fleeing. It states that the Tribunal's proceedings commence following the submission of formal charges for the crime by the Chief Prosecutor or an authorized Prosecutor. The ICT BD then schedules a date for the accused's hearing.

Yet, if it is discovered during the examination process prior to the setting of the date that the defendant is missing, the Tribunal may proceed with its activities as long as certain conditions

¹⁰ International (Crimes) Tribunal Act, 1973, § 10A, No. 19, Acts of Bangladesh, 1973 (Bangladesh).

are met. If there is an in absentia trial, Section 10A(2)¹¹ of the Act allows the ICT BD to appoint a counsel at the government's expense to represent the accused. It will also establish the costs that must be paid in those situations.

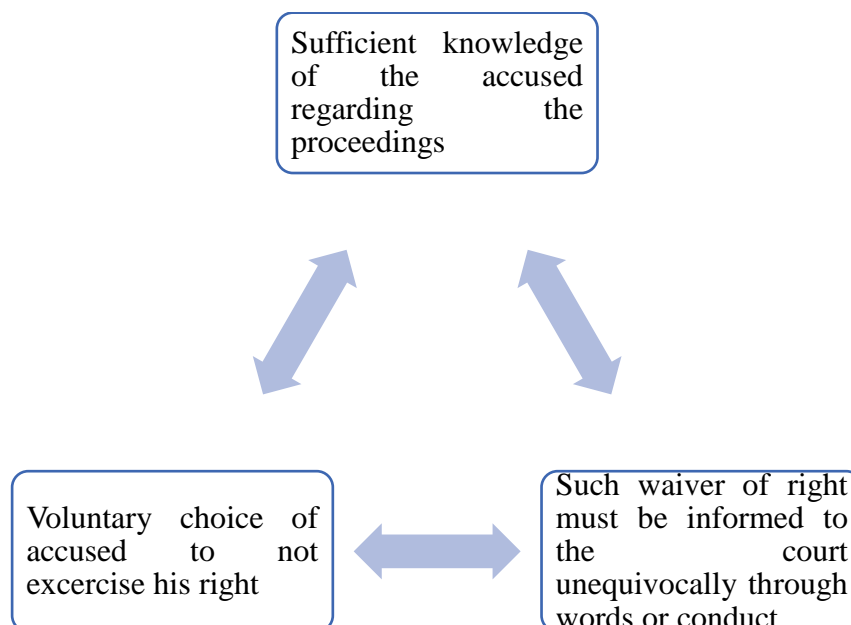
(B) International Laws

General Comment No. 13 of the UNHRC stated that in limited situations, in absentia proceedings may be allowed if "*the rights of the defense*" are rigorously upheld. During the *Mbenge v. Zaire*¹² case at the UNHRC, clarity was provided regarding this matter when it said that "*proceedings in absentia are in some circumstances (for instance, when the accused person, although informed of the proceedings sufficiently in advance, declines to exercise his right to be present) permissible in the interest of the proper administration of justice.*"

Additionally, according to General Comment No. 32, the UNHRC stated that in absentia hearings must adhere to Article 14(3)(d) of the ICCPR by ensuring the prosecution has taken adequate measures to notify the defendant of the accusations and trial well in advance.¹³

(C) European Court of Human rights

Following up on the case of *Poitrimol v. France*,¹⁴ in absentia trials are allowed if these safeguards are present-



¹¹ *Id.*, at 10A(2).

¹² *Mbenge v. Zaire*, U.N. Doc. CCR/C/OP/3.

¹³ Centre for Civil and Political Rights, Human Rights Commission, 90th Session, Gen. Comment No. 32, ART. 14, para. 36, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007).

¹⁴ *Poitrimol v. France*, 277 Eur. Ct. H.R.. (ser. A).

(D) Other ICL Tribunals

The Special Tribunal for Lebanon (“STL”) is the sole international criminal law tribunal that specifically allows proceedings in absentia.¹⁵ This point was highlighted by *Salim Jamil Ayyash, et al.*¹⁶ while other tribunals like ICTY, ICTR, and the ECCC explicitly prohibit it. However, in rare instances like in *Blaskic*,¹⁷ the ICTY determined that trials in absentia can be held in limited circumstances “involving disrespect for the international tribunal, when the accused does not show up in court, therefore hindering the legal process.” The ICTR ruled that in *Barayagwiza*,¹⁸ situation, if the defendant gives up his right to trial, then “no law, including human rights laws, prohibits the case from continuing without him.”

(E) Necessity in ICT BD

ICT BD firmly supports in absentia trials because many defendants are influential figures who could easily escape. Additionally, the reason for permitting total trials in absentia during the Nuremberg Trials was due to the seriousness of the crimes that were committed.¹⁹ Utilizing this information, since the perpetrators committed heinous crimes during the Liberation War (resulting in the deaths of 3 million people and the rape of 2 lakh women)²⁰, their intentional nonappearance cannot be used as a means to avoid accountability.

III. JUDICIAL PRONOUNCEMENTS

The ICT BD till date has convicted over 44 persons in absentia. The Tribunal stated that it can conduct trials in absentia for *Abul Kalam Azad*,²¹ as long as it does not breach human rights norms outlined in the ICCPR and other international agreements. The court cited the accused's intentional departure from the country as evidence of obstructing justice and refusing a trial.

In the case of *Asfar Hussain et. al.*,²² the court found that even after the publication of the trial in two daily newspapers- “*Daily Janakantha*” and “*Daily Sun*”- the accused had not appeared, thereby necessitating an in absentia proceeding. The same two newspapers’ notice was also relied on in the case of *Shamsuddin Ahmed et. al.*²³

¹⁵ UN SECURITY COUNCIL, ART. 22, *Statute of the Special Tribunal for Lebanon* (2007).

¹⁶ Prosecutor v. Jamil Ayyash, et. al., Case No. STL-11-01/I/TC.

¹⁷ *supra* note 11.

¹⁸ Prosecutor v. Barayagwiza, Case No. ICTR-78-55-I.

¹⁹ A. CASSESE, INTERNATIONAL CRIMINAL LAW 367 (Oxford University Press, 2008).

²⁰ OUTLOOK INDIA, <https://www.outlookindia.com/website/story/india-news-50-years-of-bangladesh-liberation-and-indo-pakistan-war-of-1971-how-it-happened/405179> (last visited Aug. 15, 2023).

²¹ *supra* note 9.

²² Chief Prosecutor v. Md. Mahdur Rahman & Md. Afssar Hossain @ Chtu, Case No. 03 of 2013.

²³ Chief Prosecutor v. 1. Shamsddin Ahmed 2. Gazi Abdul Manan [absconded] 7. Nasruddin Ahmeed Md. Nasir alias Captain Nasir [absconded] 3. Md. Hafizuddin [absconded], and 5. Md. Azhaaarul Islam [absconded], Case No. 03 of 2012.

In *Sakhawat Hossain et. al.*,²⁴ case, the Tribunal determined that the accused's presence could not be obtained even after following all required legal procedures. Therefore, it assigned two defense lawyers to represent them at the cost of the State.

In *Syed Md. Qaiser*,²⁵ case. In determining Qaiser's guilt under ICT BD, the court mainly considered his previous trial in absentia by the Special Tribunal under the Collaborator's Order of 1972.

In the case of *Khokon*,²⁶ the court used the manner, circumstances, and the time the accused had absconded while he has been holding the post of Mayor, to draw a lawful inference that the accused had willingly declined to face the trial.

Another example can be taken from the case of *Abul Kalam Azad*²⁷ of the ICT BD wherein the court made reference to Article 22(1) of the Special Tribunal for Lebanon's Statute²⁸ which allows for in absentia trials. Similarly, even the ICTY which in its statute explicitly disallows in absentia trials, in the case of *Blaskic*²⁹ held that it "may be exceptionally warranted."

Furthermore, this also impacts public perception and international comment on ICT BD's legitimacy. Scholars such as Museferat Chowdhury,³⁰ and Elizabeth Herath³¹ have already raised concerns on the same. Yet, the ICT BD seems to be proceeding with its method of holding trial, without any recourse to the absent defendant. Moreover, this topic also brings forth a **global south perspective** to the ongoing discourse on in absentia trials.

IV. CRITICAL ANALYSIS

(A) Scrutiny of International Law

Initially, although UNHRC acknowledges in absentia trials, there are still several restrictions attached to them. UNHRC ruled in *Maleki v. Italy*,³² that simply notifying the accused is not enough; it is crucial to make reasonable efforts to determine the accused's identity and provide

²⁴ Chief Prosecutor v. 1. Md. Sakawat Hosain 2. Md. Bllal Hosain Biwas 3. Md. Lufor Mrol [died during trial] 4. Md. Ibrahiim Hosain Ghugur Ibrahm [absconded] 5. Shekh Mohamad Mujbur Rahan Mujbur Rahan [absconded] 6. Md. A. Aziiz Sarrdar son of late Ful Miihah Sarrdar [absconded] 7. Abdul Aziiz Sarrdar son of late Ahmad Sarrdar 8. Kazii Ohiidul Islam and 9. Md. Abdul Khalque Mrol [absconded], Case No. 04 of 2012.

²⁵ Chief Prosecutor v. Syed Mdd. Qaiiser, Case No. 03 of 2012.

²⁶ Chief Prosecutor v. Zahid Hosain Khkon @ M.A. Zahid @ Khkon Mattubbar @ Khkon, Case No. 05 of 2011.

²⁷ Chief Prosecutor v. Abul Kalam Azad, Case No. 05 of 2012.

²⁸ UN SECURITY COUNCIL, ART. 22(1), *Statute of the Speeciial Trbunal for Lebanon* (2007).

²⁹ Prosecutor v. Tihmir Blaskiic, IT-67-12-R.

³⁰ Musferat Mazrun Chowdhury et. al., *Criminal Trial in Absentia in Bangladesh: A Comparative Study*, 8 J. BUS SOC & SCI 47, 47-59 (2021), <https://wwwac.bd/wy-content/2021/10/UI-Journal-Vol-09-Issue-05-Part-3.pdf>.

³¹ Elizabeth Herath, *Trials in Absentia: Juriisprudence and Comentary on the Judggment in Chief Proisecutor v. Abul Kallam Azad in the Bangladesh Internatiional Criimes Tribunal*, 55 HILJ 1, 1-12 (2014), https://journals.law.harvard.edu/ui-uploads/siites/87/2012/08/WUTH-Online_volume-55_Herth.pdf

³² *Maleiki v. Italy*, Com. No. 667/1235, U.N. Doc. CCP/C/33/D/765/1989

the opportunity for a retrial as well. "The decisive factor shall be having a genuine understanding of the proceedings."

Secondly, while the ECHR has allowed in absentia proceedings, it has clearly established its discouragement of the same in the case of *Sejdovic v. Italy*.³³ In the case of *Colozza v. Italy*,³⁴ the court stated-

"everyone charged with a criminal offence" has the right "to defend himself in person," "to examine or have examined witnesses" and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court," and it is difficult to see how he could exercise these rights without being present."

Additionally, in the ECHR, a defendant's silence alone does not count as a waiver³⁵. It has also stressed that trials held in the absence of the defendant must be followed by an unreserved right to a new trial.³⁶

Furthermore, in ICTY and ICTR cases, they are reserved for rare occasions and with protective measures in place. The only instance of this provision being used in the Nuremberg Trials was against Martin Bormann³⁷. The ICC has determined that hearings in absentia are not to be taken into account. According to Article 63³⁸, the defendant must be present during their trial, regardless of whether they were present during the pre-trial proceedings³⁹. Moreover, the STL Statute also states that even in cases where trials are conducted in the absence of the accused, they still have the right to request a new trial.⁴⁰

Following on this analysis, even if in absentia proceedings were to be considered permissible, the ICT BD **does not even have the minimum safeguard of a right to re-trial.**

(B) Case-Study: Criticising Safeguard Mechanisms

In order to understand the consequences of trials conducted in absentia at the ICT BD, the author analyzes the key *Abul Kalam Azad*,⁴¹ case which introduced in absentia trials at the ICT BD. In this instance, Abul Kalam Azad escaped to Pakistan to evade facing trial. On October 7,

³³ Sedjovic v. Italy, App. No. 56581/00, Euri. Ctt. H.T.

³⁴ Colozza v. Italy, Ap. No. 7869/50, Eurr. Ctt. H.T.

³⁵ Colozza v. Italy, Ap. No. 6890/40, Eurr. Ctt. H.T.

³⁶ Peladoah v. The Netherrlands, App. No. 56874/69, Eurr. Ctt. H.T.

³⁷ Yale Law School, Nuremberg Trial Proceedings Vol. 2 Indiictment, THE AVALON PROJECT, <http://avlon.law.yalee.edu/count.ap>.

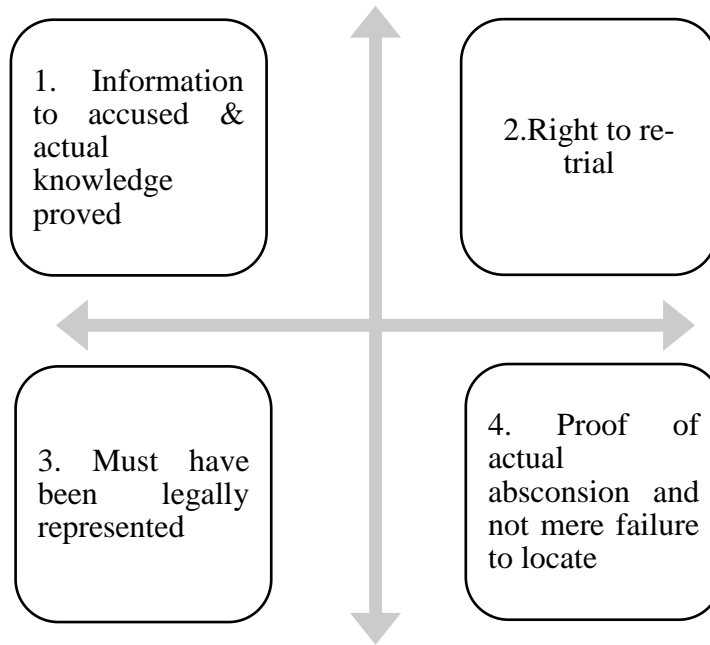
³⁸ UN GENERAL ASSEMBLY, ART. 63, *Rome Statute of the Internatiional Crimiinal Court* (Aug. 16, 1978).

³⁹ UN GENERAL ASSEMBLY, ART. 61, *Rome Statute of the Internatiional Crimiinal Court* (Jul. 16, 1989).

⁴⁰ UN SECURITY COUNCIL, ART. 22(3), *Statute of the Special Triibunal for Lebanon* (2009).

⁴¹ *supra* note 11.

2013, the ICT BD chose to continue the case without the individual present since there was no immediate possibility of apprehending him, and assigned a lawyer to represent him. Continuing in line with previous legal decisions, in absentia trials are allowed in ICL only if specific protections are in place. These can be summarised as-



Condition	Analysing the Case
1	It arises that the Police had stated that he had already absconded and left the country before the arrest warrant was issued. Following this, notices were published in two national daily newspapers requesting his attendance within 10 days. However, publication of notice while being a procedural requirement does not in itself satisfy the “actual knowledge” requirement.
2	The ICT BD while referencing Article 22 of the STL Statute in its judgement to show how in absentia trials are valid, has cleverly not mentioned Article 22(3) which mentions the right to re-trial. Moreover, in cases where in absentia trials are held due to unexplained absences, to fulfil Article 14 of the ICCPR and Article 6 of the ECHR, right to re-trial becomes necessary. ⁴²

⁴² *supra* note 25.

3	The ICT BD had appointed a counsel- Abdus Shukur Khan- on October 7, 2012 and supplied him with the materials on October 11, 2012. The trial commenced on November 26, 2012 with over 22 prosecution witnesses. This means that Khan merely had 6 weeks to prepare for such a complicated case.
4	The ICT BD has not mentioned the facts leading up to its conclusion on Azad absconding. It merely states that the Police had submitted a report to that extent under para. 20 of the judgement. ⁴³ There was also express waiver on the same by Azad.

Given this state of in absentia trial in ICT BD, the legitimacy of the same is called into question.

V. SUGGESTIONS/ WAY FORWARD

While the best course scenario would be invalidating in absentia trials, given the necessity for the same in ICT BD, the author proposes these recommendations.

- A clear and open set of criteria needs to be established to define what qualifies as the "absence" of the person accused. Factors like fugitive status, repeated non-cooperation, express waiver, etc., could be part of this criteria. In the ECHR, mere silence after notice should not automatically mean absence.
- Absence of accused in a trial must not be equated to his admission of guilt.
- The selection of a defense attorney must align with a valid set of principles. Ethical guidelines can be established to guarantee sufficient time for preparation, required resources, etc. Compensation for these advisors should also be fair to prevent them from delivering subpar services in their absence.
- The notification given to the defendant for proper understanding of the proceedings needs to be more than just a simple newspaper announcement. The same message should be included in the Rules of Procedure through various communication channels in all appropriate languages. Additionally, the notice must be provided with enough advance notice, not just 10 days. The ICT BD must also save all these communications and include them in its decisions to demonstrate the effectiveness of notification.
- The ICT BD Statute needs to include the right to a new trial when there has been no

⁴³ *supra* note 9, at para. 20.

explicit waiver. An impromptu appellate body needs to be established for this purpose.

- The ICT BD needs to consistently evaluate its standards for trials held in absentia to make sure they align with the latest principles of international criminal law. It must be open to criticisms for enhancements due to its inadequate safeguards currently. However, the journalist was held in contempt by the ICT BD when questioning the legitimacy of the in absentia process in *Bergman*,⁴⁴ case.

VI. CONCLUSION

Although absentia trials are generally seen as violating principles of natural justice, they have been permitted under specific conditions in various tribunals globally, starting with the Nuremberg Trials. The UDHR, ICCPR, and the American Legal System all acknowledge the same thing, such as the Arizona Criminal Procedure Rules⁴⁵. In Bangladesh, besides ICT BD, in absentia trials are also acknowledged by the "Code of Criminal Procedure, 1898" and the "Special Powers Act, 1974". Nevertheless, they have significant shortcomings when compared to global benchmarks. The Azad case shed more light on the presence of these issues. The Rules of Procedure should be revised accordingly to align with the recommendations in Part VI of this paper. The author concludes her paper hopeful that the ICT BD will improve its adherence to fair trial rights. According to Shakespeare, the ICT BD should function as a "*stage where every man must play a part.*"

⁴⁴ THE DAILY STAR, <https://www.thedailystar.net/bergman-guilty-of-contempt-53160> (last visited Aug. 15, 2023).

⁴⁵ *supra* note 6.