Professor Jordan Paust’s comment on the United States’ treatment on the International Covenant on Civil and Political Rights (ICCPR) was cited in a position paper published on www.ebangladesh.com.

Stephen Rapp: Of misconceptions, unrealistic expectations and double standards

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By International Crimes Strategy Forum [ICSF]

The United States Ambassador-at-Large for War Crimes Issues Mr. Stephen Rapp first arrived in Bangladesh on 10 January 2011 at the invitation of the Bangladesh government. Subsequently on 21 March 2011, Mr. Rapp issued a letter to foreign minister Dr. Dipu Moni and law minister Barrister Shafique Ahmed where he offered suggestions regarding the nature of the International Crimes Tribunal (ICT) operating currently in Bangladesh and its governing statute, namely the International Crimes (Tribunals) Act 1973. Mr. Rapp visited Bangladesh again in the first week of May 2011 and held meetings with senior government officials, ICT officials, political leaders, civil society, the media, and defence lawyers to discuss his suggestions. He also visited the office of a local Bengali daily to exchange views on the war crimes trials with members of the civil society and freedom-fighters of the Liberation War of 1971.

The January 2011 invitation conveyed towards Mr. Rapp by the Bangladesh Government reflects its commitment towards conducting the war crimes trials in a manner that is fair and transparent. However, it must nonetheless be mentioned that Mr. Rapp’s recent actions and opinions he expressed with regard to the war crimes trials process in Bangladesh, a purely domestic and an internal process, amounts to a direct violation of Article 41(1) of the Vienna Convention on Diplomatic Relations. It is the responsibility of those enjoying diplomatic immunity, like Mr. Rapp, to be respectful towards the laws and regulations of a receiving state, including a duty not to interfere with the internal affairs of that state. This particular provision has long been a part of customary international law and is included in an international convention that the US is a signatory. These suggestions of Mr. Rapp are undoubtedly a subtle form of diplomatic bullying and amount to a lapse in diplomatic norms because they are designed to interfere in an internal Bangladeshi affair. There is the need, however, for broader civil society engagement that can in effect enhance the quality of the current justice initiative, and ICSF has on this occasion chosen to overlook this diplomatic impropriety and critically focus instead on the content of his observations.

It is a legitimate expectation that a letter issued by the US Ambassador-at-Large for War Crimes Issues to the Bangladesh Government would be of confidential nature. Yet, the letter issued under the official letterhead of the ‘‘United States Department of State Office of War Crimes Issues’’ reached the hands of the press, which surprisingly provided an uncritical reception to the letter’s contents subjecting the current justice process to a great deal of uninformed debate. This
also led to the generation of further misleading comments by various quarters on key doctrinal and legal issues surrounding the ICT and its governing statute. The advent of Mr. Rapp’s confidential letter before the press and the ensuing uninformed debates has prompted the ICSF to comment from an independent point of view to examine the merits of his suggestions regarding the ICT and its governing statute. ICSF believes that criticisms of the ongoing war crimes trial process in Bangladesh in the form of suggestions, especially when exposed before the public domain, must be based on correct factual and legal premises. The citizens of the People’s Republic of Bangladesh, as well as the international community at large, deserve to be made aware of the issues that are pertinent to fairness in the justice process. At the same time, criticisms or suggestions from any quarter need to be fair, well-informed, and carefully construed so they are not based consciously or unconsciously upon misconceptions about a justice process that is purely domestic in every sense.

Undoubtedly, it is necessary to ensure that the proceedings against persons alleged to have committed crimes under the jurisdiction of the ICT are carried out in a manner that is free and fair. However, it is also important to ensure that the justice process initiated by the ICTA and the ICT does not become a victim to misconceived and unrealistic demands. What must be remembered is that the objective of the justice process that the Bangladesh Government has decided to carry out has the underlying goal of ensuring justice to the countless victims during the Bangladesh Liberation War of 1971 so much so that the democratic aspirations of the people of Bangladesh are established, a death blow is given to impunity and finally a milestone step is taken towards the establishment of the rule of law.

As an exercise in civil society’s engagement with the current justice process, the objectives of this policy paper are: to evaluate Ambassador Rapp’s suggestions on ICT and ICTA, assesses the conceptual validity of his legal analysis and presents the doctrinal and conceptual positions that should correctly apply to the ICT on the issues raised.

The following paragraphs present a critical evaluation of the major suggestions offered by Mr. Stephen Rapp to the Government of Bangladesh regarding the ICT and its law and process.

**Misconceptions, Unrealistic Expectations and International Standards:**

In his letter to Bangladesh Government, Mr. Rapp wrote, “my hope is that this paper will further inform the ICT on current international judicial standards … to ensure that its proceedings are independent, fair and uphold international standards so justice can be done, and seen to be done, for the people of Bangladesh”. It is necessary to ensure the fairness and quality of the justice process initiated by the ICT, but attention must also be given so that only the legitimate standards of law are enshrined in the ICTA. A failure to maintain the right balance always leaves scope for bringing an end to impunity and establishing the rule of law of being frustrated.

If read carefully, it can be seen that Mr. Rapp, by urging the Bangladeshi Government to amend the ICTA in order to raise its standard to that of current international norm, has contradicted himself at a number of places and has done so without appreciating the true nature of the ICT operating currently in Bangladesh. Although he has mentioned that the ICT is a “purely domestic court,” in his analysis and comments, Mr. Rapp has effectively ignored the purely domestic
nature of the ICT. In fact, the only international element in ICTA is the crimes it defines, which are regarded as matters of international concern because of their grave character. Therefore, other than the specific nature of the crimes, the ICT is purely a domestic tribunal that has been established to try crimes of international nature criminalised by a piece of domestic legislation enacted by the Bangladesh Parliament.

In other words, the legitimacy of the International Crimes (Tribunals) Act, 1973 is dependent not upon any international instrument of law, irrespective of Bangladesh being or not being a party to it, but on an overwhelming decision of the Bangladesh Parliament, a democratically elected body of representatives constitutionally mandated to enact legislation. As such, the ICT can only be interpreted in light of the framework set by ICTA and not any other legal instruments of international nature.

Though Mr. Rapp himself noted at the beginning of his letter that the ICT is a “purely domestic court,” he was oblivious of this observation throughout the remaining parts of his letter. It appears that the moment Mr. Rapp noted that the name of the Tribunal was preceded by the word “international” and possessed jurisdiction over crimes such as Crimes against Humanity, Crimes against Peace, Genocide, and War Crimes, he automatically, but nonetheless, wrongfully assumed that the Tribunal must be treated as an “International Tribunal” at par to the ICTR, ICTY, SCSL, ECCC, ICC and others.

At one point in his letter, Mr. Rapp curiously argued, “many would look to the ICT as a model as to how a purely domestic court can successfully prosecute and hold accountable perpetrators of atrocities and human rights violations that are prohibited by international law” [emphasis added]. It is, however, not clear why Mr. Rapp insists that the ICT has to be a model for other countries where the mandate and priority of the ICT is limited and clearly specified—that is, to restore accountability for the crimes committed in 1971 and providing redress to the victims.

Mr. Rapp repeatedly asserted the essentiality of maintaining “international standards” and “highest international standards for justice” without analysing the standards of justice in Bangladesh, which is what the ICT has been designed to uphold as a tribunal operating under a Bangladeshi law enacted by the Bangladesh Parliament. In fact, by doing so, Mr. Rapp has joined the bandwagon of other experts and organisations that have commented and suggested incorporation of normative and procedural provisions of the ICC Statute into the ICTA. The troubling reality with regard to this particular suggestion is that it fails to point to a single provision in the Rome Statute that asks Bangladesh, as a State Party to the ICC, to copy and paste its provisions and procedures in its purely domestic trials. Suggestions of such nature also fail to consider the impacts of importing these so-called highest international standards, such as how these standards will be reconciled with the prevailing legal order in Bangladesh. Therefore, among others things, Mr. Rapp’s letter does not answer how there can presumably be two separate, distinct, and competing standards in a legal system.

Mr. Rapp also fails to understand that the ICT is not the product of negotiated compromise between States, as other tribunals like he ICTY, ICTR, ICC are, but is rather a justice process for the victims of Bangladesh and for crimes committed in Bangladesh. Accounting for those who committed the most heinous of crimes during 1971 and restoring the rule of law by bringing an
end to impunity has been a long-held aspiration of the people of Bangladesh. Therefore, the process initiated to form the ICT through the ICTA was essentially by and for the people of Bangladesh, a standard required by international instruments such as the ICC.

It also must be understood that the ICC has no overriding authority over national jurisdictions; rather, it is a mechanism complimentary to national system, which is activated in the event that a state is unwilling or unable to prosecute these crimes. Clearly, Bangladesh stands opposite to this scenario because it has on its own wisdom and authority undertaken this process even after nearly four decades of the commission of the concerned crimes.

As a State Party to the Rome Statute, Bangladesh has a “general obligation to cooperate” under Article 86, which states that the “States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.” The other obligation in Article 115, “Funds of the Court and of the Assembly of States Parties,” under which Bangladesh has to pay “assessed contributions” to fund the ICC and the Assembly of States Parties. There are no other positive obligations emanating from the ICC.

Moreover, the ICC Statute is very candid about the limitation of its applicability. This is clearly indicated in its definitions of crimes, which start with the same limiting provision that the definitions given are “For the purpose of this Statute…” [See Article 6, 7(1) and 8(2)]. This means that the definitions of crimes within the Rome Statute are to be applied only for the purposes of the Rome Statute and not beyond it.

Furthermore, Article 10 of the Rome Statute declares, “Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.” It is important to take note of the word “existing” in this Article, which clearly implies that the Rome Statute is not to override, limit, or prejudice rules of international law. Therefore, the Rome Statute does not invalidate or subvert the legal principles enshrined in the Nuremberg Code or the governing statutes of other tribunals like the ICTY and ICTR. Therefore, the Rome Statute cannot negate or subvert the ICTA.

With regard to the statutes of the ICTY and ICTR, these were drafted by the UN Security Council. Bangladesh, as a Member of UN, has an obligation to cooperate with these tribunals; but that is the end of its obligations. The statutes and accompanying Rules of Procedure and Evidence of these tribunals, except in terms of cooperation, have no effect on the laws or the legal system of Bangladesh.

In his letter, Mr. Rapp also did not adequately explain as to why Bangladesh has to maintain highest international standards for Crimes against Humanity, Genocide, and War Crimes, and not for other crimes. Furthermore, he also did not mention which international instrument in particular obligates the ICT, or for that matter Bangladesh, to uphold the highest international standards. Bangladesh already has a well-developed and time-tested legal system and respect for rule of law. These abilities are internationally recognised. In December 2009, ICC President Mr. Justice Sang-Hyun Song expressed his full confidence in the ability of the Bangladeshi legal system to address crimes identified under ICTA. Justice Song stated, “the ICC has no room to
intervene in war crimes committed in 1971.’’ Furthermore, he reiterated that the ICC’s jurisdiction covers crimes committed after the institution’s establishment in 2002. Justice Song maintained that the ICC did not override national jurisdiction. It is therefore evident in this particular case that the provisions of the ICC shall not override the jurisdiction of the Bangladesh legal system.

Thus, there is no obligation on the part of the Bangladesh Government to amend the ICTA with the purpose of incorporating international standards. The ICT is and will remain a purely domestic court, as has been rightly identified by Mr. Rapp. The ICT as a tribunal belonging to the independent and sovereign state of the People’s Republic of Bangladesh should be allowed to function as per the domestic standards determined by the Bangladesh Parliament.

**Regarding Retroactivity, Adherence to the ICCPR, and the Death Penalty:**

In his letter, Mr. Rapp referred to Article 15(1) of the International Covenant on Civil and Political Rights (ICCPR) and wrote, “The creation of a Tribunal in 2010 with jurisdiction to try certain specified crimes committed in 1971 based on a law passed in 1973 does raise a number of questions as to the permissibility of retroactive application of the law.” Mr. Rapp has also called for the Bangladesh Government to determine if whether the ICTA is ultra vires to the Bangladesh Constitution: “the question of whether a retroactive statute may be given effect must also be determined under the constitutional law of Bangladesh. A party to a proceeding before the ICT should be able to raise questions as to whether provisions of the 1973 Act and the 2009 amendments violate international or domestic law as to retroactivity as well as other jurisdictional matters.”

Mr. Rapp’s attempts to question the permissibility of the retroactive ICTA are fundamentally misconstrued as far as international crimes and their adjudications are concerned. When it comes to trying crimes of heinous nature such as Genocide and War Crimes – that is, crimes deemed to have been committed against all mankind – enacting legislation to retroactively try these crimes is a widely accepted legal practice. Mr. Rapp effectively calls for amending the ICTA to a standard that is international, but then questions the permissibility of the ICTA adopting the internationally accepted standard of retroactively trying crimes such as Genocide and War Crimes. Despite Mr. Rapp’s evident comfort with the retroactive legislation that constituted tribunals like the ICTY and ICTR, he, for some reason that is yet to be identified, questions the permissibility of retroactivity in the ICTA. It must be noted that the ICTY was formed in 1993, two years after the commission of crimes, and the SCSL was formed in 2002, eight years after the commission of the concerned crimes. It is hard to see the reasoning behind Mr. Rapp’s criticism in questioning the permissibility of the ICTA, a law that was enacted by the Bangladesh Parliament within a year and half of the commission of the concerned crimes. Not only is the retroactive justice process of crimes a widely practiced legal norm, Article 15(2) of the ICCPR makes a clear exception to non-retroactivity: “Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations.” The ICTA is entirely consistent with ICCPR Article 15(2).
The ICC is the only institution which possesses prospective jurisdiction, meaning that it can only deal with crimes committed after its governing statute came into force. Thus, the ICC is rendered incapable of exercising jurisdiction over the crimes committed in Bangladesh in 1971. This is another reason as to why Bangladesh had to, despite being a signatory to the Rome Statute, initiate its own process to try the crimes committed in 1971.

One of the unique characteristics of prospective laws such as the Rome Statute is that they have the scope and ability of incorporating extensive provisions like the Elements of Crimes. This is due to the prospective nature of such laws. Hence, retroactive laws such as the ICTY or ICTR Statutes do not contain any Elements of Crimes. It is contradictory of Mr. Rapp to, on one hand, question the retroactivity of the ICTA and, on the other hand, urge its amendment by calling for the incorporation of provisions like Elements of Crimes. The contents of Mr. Rapp’s letter do not answer these contradictions.

Constitutional safeguards against retroactive legislation are generally not applicable for laws passed with the purpose of prosecuting and punishing crimes of heinous nature, such as the crimes under the jurisdiction of the ICTA. For instance, the permissibility of retroactivity was cemented by the Australian High Court when it upheld the retroactivity of the Australian War Crimes Act of 1988 (amendment of the 1945 Act). In the case of Polyukhovich v. The Commonwealth, the High Court held, “The retrospective operation of the Australian War Crimes Act was authorized by the constitution since that operation was a matter incidental to the execution of a power vested by the constitution in the parliament.” The High Court went on to hold that the War Crimes Act of 1988 was in fact retroactive because it only criminalised acts which were crimes under international law as well as ordinary crimes under Australian law at the time they were committed. Enacting a law like the War Crimes Act of 1988 was therefore an exercise of universal jurisdiction by the Australian Parliament. In the judgment of that case, Justice Dawson observed, “[T]he ex post facto creation of war crimes may be seen as justifiable in a way that is not possible with other ex post facto criminal laws … [T]his justification for a different approach with respect to war crimes is reflected in [Article 15(1)] the International Covenant on Civil and Political Rights to which Australia became signatory on December 18.” Therefore, the retroactivity of the ICTA enacted by Bangladesh is the same as the Australian War Crimes Act of 1988. Both simply embody crimes existing then during their respective enactments; questioning the ICTA’s retroactivity amounts to overlooking standard practice in international criminal law. Offences such as Genocide, War Crimes, and Crimes against Humanity were not unheard of in 1971. In fact, the Pakistan Government was one of the first countries to sign the Genocide Convention and the Geneva Conventions were already a part of the international legal order existing in 1971. Therefore, by enacting the ICTA, the Bangladesh Parliament was merely recognising and acknowledging prevailing norms of international criminal law.

In his letter, Mr. Rapp wrote, “we suggest that the Government of Bangladesh incorporate the provisions of the ICCPR relating to fair judicial process and the statutes, elements of crimes and rules of procedure of the ICC and international tribunals among the rules and practices applicable to proceedings before the ICT.” It is evident that Mr. Rapp has placed a great deal of emphasis on the importance of the ICCPR and the ICC Statute as international legal instruments. With regard to provisions of the ICCPR, it is interesting to note that the United States has itself issued
blanket reservations for Articles 1-27 of the ICCPR. One of the most influential contemporary scholars of international law, Professor Louis Henkin, has commented on the imposition of such blanket reservations and noted:

Some see such declarations as another sign that the United States is resistant to international human rights agreements, setting up obstacles to their implementation and refusing to treat human rights conventions as treaties dealing with a subject of national interest and international concern.

Likewise, Mr. Jordan Paust, Professor of Law at the University of Houston commented, “rarely has a formal attempt at adherence to a treaty been so blatantly meaningless and so openly defiant of its terms.”

Similar concern was expressed in 1994 by the United Nations Human Rights Committee which stated:

Of particular concern are widely formulated reservations which essentially render ineffective all Covenant rights which would require any change in national law to ensure compliance with Covenant obligations. No real international rights or obligations have thus been accepted. And when there is an absence of provisions to ensure that Covenant rights may be sued on in domestic courts, and, further, a failure to allow individual complaints to be brought to the Committee under the first Optional Protocol, all the essential elements of the Covenant guarantees have been removed.

It is also worth noting that the United States is not even a member of the ICC. It has also entered into over 80 Bilateral Impunity Agreements (BIAs) with other nations, obliging these nations not to subject current or former government officials, military, and other personnel from the United States to the jurisdiction of the ICC. The US Government has itself expressed severe reservations regarding the ICCPR and has not ratified the ICC Statute, while the Bangladesh Government is a signatory to and has ratified the ICCPR, along with its Optional Protocol. Furthermore, unlike the US, Bangladesh is a State Party to the Rome Statute of the ICC.

In conclusion, it is necessary to state that the provisions of the ICTA are compatible with the rights of the accused enshrined under Article 14 of the ICCPR. The following account identifies some of the main rights and also points out the corresponding Sections in the ICTA which acknowledges those rights:

*Article 14(3)(a) of the ICCPR states, “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.” This provision is reflected in Section 10(3) of the ICTA which states, “Any accused person or witness who is unable to express himself in, or does not understand, English may be provided the assistance of an interpreter.”

*Article 14(3)(b) of the ICCPR states, “To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.” This provision is
reflected in Section 16(2) of the ICTA which states, “A copy of the formal charge and a copy of each of the documents lodged with the formal charge shall be furnished to the accused person at a reasonable time before the trial; and in case of any difficulty in furnishing copies of the documents, reasonable opportunity for inspection shall be given to the accused person in such manner as the Tribunal may decide.”

*Article 14(3)(c) of the ICCPR states, “To be tried without undue delay.” This provision is reflected in Section 11(3) of the ICTA, which states that a Tribunal shall, “(a) confine the trial to an expeditious hearing of the issues raised by the charges” and “(b) take measures to prevent any action which may cause unreasonable delay, and rule out irrelevant issues and statements.”

*Article 14(3)(d) of the ICCPR states, “To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.” This provision is reflected in Section 17(2) of the ICTA which states, “An accused person shall have the right to conduct his own defence before the Tribunal or to have the assistance of counsel.”

*Article 14(3)(e) of the ICCPR states, “To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.” This provision is reflected in Section 17(3) of the ICTA which states, “An accused person shall have the right to present evidence at the trial in support of his defence, and to cross-examine any witness called by the prosecution.”

*Article 14(3)(f) of the ICCPR states, “To have the free assistance of an interpreter if he cannot understand or speak the language used in court.” This provision is reflected in Section 10(3) of ICTA which states, “Any accused person or witness who is unable to express himself in, or does not understand, English may be provided the assistance of an interpreter.”

*Article 14(5) of the ICCPR states, “Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.” This provision is reflected in Section 21 of the ICTA which states, “A person convicted of any crime specified in Section 3 and sentenced by a Tribunal shall have the right of appeal to the Appellate Division of the Supreme Court of Bangladesh against such conviction and sentence: Provided that such appeal may be preferred within sixty days of the date of order of conviction and sentence.”

It is therefore evident from the above comparative account that the ICTA does indeed adhere to most of the rights of the accused enshrined under Article 14 of the ICCPR. Furthermore, it must be understood that the purpose of Article 14 of the ICCPR is to provide some general guidelines applicable to ordinary criminal proceedings. Instead, Article 15 of the ICCPR is meant to apply to the other special domestic proceedings related to international crimes, that is, through special tribunals like the ICT.

Since there is no consensus in international law prohibiting death penalty and because it is a form of punishment permissible under the laws of Bangladesh, the provision of death penalty in the
ICTA is not inconsistent either with Bangladeshi or international laws. It is pertinent to reiterate the fact that there currently exists no universal consensus on the issue of death penalty. Therefore, at present, no such international obligation exists requiring states to abolish the death penalty on the grounds of an international standard. Notably, in February 2009, in response to a UN “Moratorium on the Use of Death Penalty,” the Government of Bangladesh along with 52 other governments made its position clear through a document that was submitted before the UN. The position adopted by these 53 governments is:

(e) Every State has an inalienable right to choose its political, economic, social, cultural and legal justice systems, without interference in any form by another State. Furthermore, the purposes and principles of the Charter of the United Nations, in particular Article 2, paragraph 7, clearly stipulates that nothing in the Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State. Accordingly, the question of whether to retain or abolish the death penalty should be carefully studied by each State, taking fully into account the sentiments of its own people, state of crime and criminal policy.

These 53 retentionist states form a significant part of the international community, whose opinions must not be ignored. Furthermore, there is a broader perspective which deserves attention while discussing the issue of death penalty in the context of the ICT operating in Bangladesh. The provision for the death penalty is an integral part of Bangladesh’s criminal justice framework, not only of the ICTA. The death penalty is a valid form of punishment under The Penal Code, as well as a whole range of other existing special criminal legislation in Bangladesh. Thus, it would not be practicable, legally or politically, to simply abolish the death penalty with regard to one piece of legislation and retain it in case of others. It is not that any legal reform as fundamental as abolishing the death penalty has to be synchronised across the board. However, any asymmetric reform is more likely to be viewed as irrational if the criminal justice system allows death penalty for a single murder, as per ordinary penal law, and prohibits it for mass murders. What Mr. Rapp failed to realise is that if Bangladesh takes the abolitionist path, it has to first go through a total review and overhaul of its entire criminal justice system, which can take years, if not decades. It is neither prudent nor realistic for Mr. Rapp to expect the current trials in the ICT to be a testing ground for the abolition of death penalty. Oddly enough, a US Ambassador prescribing the abolition of the death penalty is the ultimate contradiction because US courts routinely sentence guilty parties to death.

Regarding Amending the Rules of Procedure:

The other issues raised by Mr. Rapp include the rights of the accused, pre-trial detention, provisional release, disclosure, interlocutory appeals, presumption of innocence, burden of proof, and the protection of witnesses. These are all valid in the sense that the tribunal’s process can benefit from express stipulations in terms of predictability of law for both the Prosecution and the Defence. There is room to improve coverage of these procedural issues by amending the ICT’s Rules of Procedure. Such issues can be addressed, and in this regard, concerned stakeholders could, and in fact should, prepare and submit concrete suggestions to the Tribunal. However, any such proposal should take into account the problems of justice administration particular to Bangladesh’s legal sphere, which would include the context of the domestic legal
order, existing professional standards, likelihood of abuse of process, time, costs, and viable protection of witnesses and victims.

a) Appeal from Interlocutory Orders

One of the procedural issues raised by Mr. Rapp, the provision of appeal from interlocutory orders, unfortunately demonstrates his lack of understanding of the challenges particular to the Bangladesh legal system. Given the legal context of the ICT, the justice process can equally and effectively benefit from Reviews, instead of Appeals. In Bangladesh, appeals are generally understood as a right with regard to verdicts passed by the Court, but appeals against procedural matters, such as appeals against Interlocutory Orders, cannot be considered as a right, in the absence of which injustice is bound to occur. Section 21 of the ICTA already provides for appeals “against conviction and sentence,” which can be filed as a matter of right. In fact, a final verdict by the ICT would only result following completion of all available procedures including Section 21 appeals, under which all procedural and other irregularities could be raised. In other words, Section 21 allows for an aggrieved appellant to raise all issues that has aggrieved him or her in the form of an appeal before the ultimate appellate authority in the Bangladesh legal system, the Appellate Division of the Supreme Court. The provision of appeal from verdicts in ICTA is in itself a progressive initiative considering some international tribunals, like Nuremberg, did not afford defendants such a right.

Furthermore, the presumption that the absence of appeals against interlocutory orders will automatically result in an unfair trial or the denial of justice has no basis. There is no evidence, legal or whatsoever, to suggest this, nor are there any causal links to demonstrate that the absence of the provision of an interlocutory appeal bears a greater likelihood of injustice for the defendant. The ICTA, through its newly incorporated Section 6(2)(A) has pledged greater commitment towards independence, thus rendering Mr. Rapp’s concerns baseless.

Even if it is assumed the absence of the right to appeal against interlocutory orders bears greater likelihood of disadvantage for the parties, it must be noted that such absence prevails for both the Prosecution and Defence. If there is at all any disadvantage, it is equally applicable to both sides, as a manifestation of the principle of the equality of arms. Moreover, the very purpose of appeal from interlocutory orders is to invoke a superior court’s supervisory jurisdiction so as to remedy a judicial error in the course of proceedings that has aggrieved the appellant. The absence of appeal from interlocutory orders does not automatically rule out remedial interventions by the Court viewing the process as a whole. In the case of ICTA, it is not such that the accused will never be accorded the opportunity to invoke remedial measures. If the accused thinks that he or she would not have been convicted except for a judicial error, there is always the ability to raise that concern in the final appeal from conviction before the Appellate Division under Section 21 of the ICTA. It is in this manner that ICTA adequately ensures that the accused is not without any recourse, even in the absence of any provision for appeal against interlocutory orders.

The ICT is a court of first instance, and the current ICT bench is comprised of three members, all of whom are required by the ICTA to be eligible to qualify as a Judge of the Supreme Court (High Court Division) of Bangladesh. It is worth mentioning that no other Tribunal of first instance in Bangladesh provides for such a senior panel of Judges.
There are also important practical and contextual aspects to take into consideration, all of which Mr. Rapp failed to do. In the Bangladesh legal context, the history and track record of interlocutory appeals is not a very promising one, having been notorious for their susceptibility to abuse of process as unscrupulous parties commonly use this otherwise useful device to drag legal disputes indefinitely. In all types of cases, ranging from custody disputes to land matters, Bangladesh’s legal system struggles with the consequences of such abuses. The risk of indefinite delay is not something the ICT can afford to face as the ongoing trials itself have commenced after 40 years. If this Tribunal, given its delayed start, is allowed to be riddled with endless motions and applications, justice will suffer and ultimately impunity will prevail. The ICT has already reviewed one of its earlier decisions recently; it reviewed and reversed one of the decisions on venue of interrogation.

b) Preliminary objections to jurisdiction and constitutional challenges to ICTA:

Mr. Rapp in his letter suggested the ICTA should be amended in order to allow for a provision to challenge the jurisdiction, as well as various provisions of the ICT. The preliminary objections to the jurisdiction of the ICT or constitutional challenges to provisions of the ICTA are not possible because the ICTA is protected by Articles 47(3) and 47A(2) of the Constitution of the People’s Republic of Bangladesh. Providing laws with such form of constitutional protection is not uncommon in the legal arena. For example, the neighboring Indian Constitution currently has a total of two hundred and eighty four Acts listed under the Ninth Schedule of the Indian Constitution which have been given constitutional protection under Article 31B. Therefore, construing the protection given to the ICTA by the Bangladesh Constitution is not at all a legal anomaly.

Mr. Rapp has also written suggestions on other miscellaneous provisions of the ICTA and its Rules of Procedure. These provisions and the Rules of Procedure should be amended and improved with the goal to further enhance the quality of the ongoing justice process. In fact, this process is facilitated by the fact that ICT Judges have the power to draft Rules if they deem it necessary. Earlier in April, the ICT Judges reviewed its own decision regarding the venue of interrogation of an accused following the filing of an application in that regard.

While Mr. Rapp is much appreciated for his concern, his suggestions need to reflect the particular, individualised, and special situation of the ICT and of Bangladesh’s justice system. Blanket statements espousing the need to amend the ICTA to the highest of international standards does not take into account the purely domestic nature of the tribunal, a fact conceded by Mr. Rapp himself. Likewise, comments about the ICTA’s retroactivity and Rules of Procedure fail to acknowledge the situation as specific to Bangladesh’s nor do they reflect past international practice.

As an act of civic engagement, this piece has sought to explore Mr. Rapp’s suggestions regarding the ICT and its governing statute. There is no argument against ensuring fairness and quality of the justice process initiated by the ICT. Attention, however, must also be given to the fundamental principles enshrined in the ICTA; any failure to maintain the right balance will allow impunity to continue and rule of law to be frustrated.