

ICT- BD Case No. 01 of 2011

Present

Mr. Justice Md. Nizamul Huq, Chairman
Mr. Justice A.T.M Fazle Kabir, Member
Mr. A.K.M Zaheer Ahmed, Member

Order No.35

Date: 28.11.2011

Mr. Mahubay Alam, Attorney General with

Mr. Golam Arif Tipu, Chief prosecutor, with

Mr. Syed Rezaur Rahaman

Mr. Syed Haider Ali

Mr. Rana Das Gupto

Mr. Zeyad Al- Malum

Mr. Mohammad Ali

Mr. Muklesur Rahaman Badal

Mr. Mr. Abdur Rahaman Howlader

Mr. Altaf Uddin Ahmed

Mr. A.K.M Saiful Islam

Mr. Shahidur Rahaman

Mr. Md. Sultan Ahmed

Ms. Nurjahan Mukta

..... Prosecutors

Mr.Md. Abdur Razzak with

Mr. Moudud Ahmed with

Mr. Khondaker Mahbub Hossain

Mr. Tajul Islam, and

Mr. Tanvir Ahmed, counsels

..... for the accused

1. Today is fixed for delivering the order on the application of Accused-Petitioner Delowar Hossain Sayeedi to “provide and record reasons as to why Mr. Justice Md. Nizamul Huq continues to sit as chairman of the International Crimes Tribunal, Dhaka” filed on 16.11.2011 (hereinafter referred to as the Second Petition), which was heard on 20.11.2011. This Second Petition relied on the Order dated 14.11.2011 passed by Mr. Justice A.T.M Fazle Kabir and Mr. A.K.M Zaheer Ahmed, learned members of this Tribunal, pursuant to an application filed by the said Accused-Petitioner on 27.10.2011 for recusal of the chairman of the Tribunal (hereinafter referred to as the First Petition).

The First Petition:

2. The main contention of the First Petition was that the Chairman of this Tribunal was a member of the Secretariat of the People’s Inquiry Commission (hereinafter referred to as the Commission), a civil society campaign of the 1990s for justice for the crimes committed in 1971 in Bangladesh.

3. The result of the Commission’s investigation was published in a Report in 1994 and the secured enlarged edition in 2005, that the petitioner attached it (hereinafter referred to as the Report), where the name of the Chairman of this Tribunal appears as one of the 40 members of the Secretariat of the said Commission. The function of the Secretariat, according to the petitioner, was to assist the People’s Inquiry Commission in its investigation against the Accused-Petitioner.

4. The Petitioner submitted that the Commission’s Report had a chapter on its findings against the Accused-Petitioner, because of which the petitioner feared that the Chairman will lack impartiality given his prior role in the said Secretariat. The petitioner also maintained that the Chairman has thus developed a relationship with one of the parties in the Accused-Petitioner’s case, and that an objective observer would find that there is an “appearance of bias” on his part.

5. In the application, the petitioner referred to Articles 96(4)(a) and 148 of the Constitution of Bangladesh, Clauses 1, 2, 3(6)(A), 3(6)(d)(iv) of the Code of Conduct prescribed by the Supreme Judicial Council, Art.14 of the International Covenant on Civil and Political Rights (ICCPR), Articles 40 and 41 of the Rome Statute of the International Criminal Court, Art 10 of the Universal Declaration of Human Rights (UDHR), cases of Human Rights Committee, House of Lords, International Criminal Court for Former

Yugoslavia, Special Court for Sierra Leone etc, and prayed for “immediate recusal” of the Chairman of the Tribunal.

6. During the oral submission, the lead counsel of the Accused-Petitioner, presented the findings of the Commission and submitted that from the Report it transpired that the Chairman was one of the members of the Secretariat of the Commission that investigated the allegations of war crimes against the Accused-Petitioner. Thereby the Chairman was already involved in the investigation process of the alleged crimes against the Accused-Petitioner thus harbouring preconception about the Accused-Petitioner and as such he shall not get fair and impartial justice from the Chairman of the Tribunal. He further submitted that the Chairman took part in the investigation of war crimes in 1993-94 and as such he was a party to the case, and thereby with regard to his impartiality as a judge there is a reasonable apprehension of bias. The counsel for the accused petitioner also submitted that the chairman is likely to be a “material” witness to the proceedings and that alone disqualifies him to hold this position, because of his name being mentioned as a member of the Secretariat of the Commission and the Commission’s activities.

7. In reply, the learned Prosecutor submitted that the Chairman of the Tribunal was a lawyer by profession during the period and that nowhere in the Report the Chairman’s role in the Secretariat of the Commission is mentioned. The Report does not mention that the Chairman of the Tribunal took part in any activity of the Commission regarding investigation of war crimes against the Accused-Petitioner, except that his name was merely included as one of the members of the Secretariat of the Commission. He further submitted that neither the said Report nor its recommendations was accepted by the government and maintained that the mere appointment of the Chairman as a judge of the Tribunal under the International Crimes (Tribunals) Act, 1973 (hereinafter referred to as the Act) signifies a strong presumption of impartiality which cannot be questioned without any cogent ground. Moreover, he submitted that the Commission had no legal sanction and that it was merely a civil society led campaign to demand perpetrators of crimes committed in 1971 to justice and as such inclusion of the Chairman’s name in the Report as a member of the Secretariat cannot be neither a valid nor a sufficient ground, of either disqualification or recusal, and that the said Application for recusal should be rejected.

8. Another learned Prosecutor made the argument that the said application for recusal is not maintainable in law since there is no provision in the Act or

in the Rules of Procedure (hereinafter referred to as Rules) to consider such petition in its present form, and on this ground alone the application for recusal should be rejected.

9. Since the application involved the Chairman of the Tribunal, he graciously disassociated himself from this proceeding and decided not to sit or be present in the Court on the dates of the hearing. Thus the hearing was conducted by the remaining two Members of the Tribunal, and a lengthy hearing took place on 13.11.2011. The defence was represented by a number of senior lawyers, and submission was made also by the the prosecution.

10. Disposing the First Petition of, the learned Members of the Tribunal examined whether they had the legal authority to decide an application for recusal which has been filed against another judge of the same Tribunal. The learned Members of the Tribunal found that the Tribunal has been functioning in accordance with the Act and its Rules, none of which has any provision to entertain an application for recusal. They further found that since the Tribunal is legally bound to proceed in accordance with the Act and the Rules, they cannot pass any order on any matter which is not specifically authorised by the Act or the Rules. Moreover, they observed that the Tribunal consists of three Judges, one is the Chairman and the rest two are its members, having equal powers and jurisdiction under the Act. As such, it was held that they were not “legally authorised” to make any comment or pass any order on the application for recusal which involved a co-Judge of the same Tribunal, observing that the matter in issue largely depends upon the good conscience of the judge concerned.

11. Since the recusal petition has been disposed of, and the Tribunal did not order for the Chairman to recuse, or neither the Chairman found any reason whatsoever to recuse himself, the Chairman continued to discharge his duty under the Act and the Constitution.

The Second Petition

12. On 16.11.2011, the Accused-Petitioner filed a Second Petition which relied on the observation of the Tribunal in the First Petition that the question as to whether or not to recuse is largely dependent on the good conscience of the judge concerned. The petition sought from the Tribunal to provide and record reasons as to why the Chairman of the Tribunal continues to sit as the Chairman of the International Crimes Tribunal. Hearing on this Second Petition took place on 20.11.2011.

13. In the Second Petition, the Accused-Petitioner stated that the Tribunal did not remove the Chairman despite allegations of bias made against him but left it to his “good conscience”, and therefore, exercise of such good conscience is required to be recorded in writing by the Tribunal in the interest of justice. The Accused-Petitioner made the very serious and specific allegations of both “actual bias” and “reasonable apprehension of bias” against the Chairman which the other Members of the Tribunal did not clear him of, and thus the Chairman remained in his position on a mere technicality and by default.

14. The petition re-stated that the Chairman was a member in the Secretariat of the Commission that gathered information and investigated allegations of war crimes against the Accused-Petitioner, and that 7 (seven) out of 20 (twenty) charges framed by the Tribunal on 3.10.11 against the same Accused-Petitioner were already investigated by the Chairman when he was a member of the said Secretariat. The petition claimed that the Prosecutors did not deny the content of the Report of the Commission, and neither did the Chairman made any statement before the Tribunal disputing the allegation that he was involved in gathering information regarding those 7 (seven) charges.

15. The petitioner also mentioned that unlike the *Prosecutor v Issa Hassan Sesay* of the Appeals Chamber of Special Court of Sierra Leone where Justice Geoffrey Robertson provided a written statement defending his position, Mr Justice Md Nizamul Huq did not present any statement before the Tribunal, thus the allegations against the Chairman remains uncontroverted, and as such the Chairman should clarify and explain how he has concluded that he is not biased and competent to try the Accused-Petitioner despite his prior involvement in the said investigation as a member of the Secretariat. Furthermore, the petition claimed that the Chairman should explain how he has exercised his good conscience while judicially considering materials investigated by the Commission and introduced as evidence while taking cognisance of the offences made out in the Formal Charge by the Prosecution against the Accused-Petitioner.

16. The petition also stated that despite his involvement in gathering information against the Accused-Petitioner, the Chairman did not disclose his involvement in the preparation of one prosecution document to the defence, and as such, he is required to reveal how in his view such failure to disclose his involvement was an exercise of his good conscience.

17. The petition further stated that a Prosecutor of the Tribunal was also a member of the Secretariat of the Commission and worked to gather

information against the Accused-Petitioner. Since prosecution is a party in the case against the Accused-Petitioner, the Chairman should have disclosed his association with the Prosecutor being one of the parties to the case. His failure to disclose constitutes misconduct on the part of the Chairman and that he is required to explain how in such circumstances he has exercised his good conscience to continue to function as the Chairman of the Tribunal and to maintain independence and fairness of his judicial functions, given that he worked together in the past with one of the parties to the case against the Accused-Petitioner.

18. During hearing, the learned counsel Mr. Abdur Razzak, Mr. Moudud Ahmed, Mr. Khondakar Mahbub Hossain and Mr. Tajul Islam appeared for the petitioner, while Mr. Mahbubey Alam, the learned Attorney General for Bangladesh stood for the Prosecution.

Summary of defence submission

19. Mr. Abdur Razzaq in his submission stated that the two members of the Tribunal without rejecting the application for recusal have disposed of the same with the observation that the matter in issue largely depends upon the good conscience of the Judge concerned and thus the two judges have kept the issue open for the Chairman to decide whether or not he should recuse himself.

20. He maintained that the Tribunal did not clear the Chairman of the allegations of bias against him, and it is now up to the Chairman to record reasons as to how his good conscience clears himself from the apprehension of bias. The counsel submitted that the Chairman should clarify his position and explain how he has come to the conclusion that he is not biased. He further submitted that the chairman judicially considered the report while taking cognisance to frame charges and as such he is required to disclose how in view of failure to disclose his involvement in the report, he has exercised his good conscience to continue as Chairman of the Tribunal.

21. In support of his submissions he referred the cases - *State of West Bengal Vs Aotul Krishna Shaw and another reported in AIR 1990 (SC) 2205*, *M/S Mahabir Prasad Santosh Kumar Vs State of U.P. and others reported in AIR 1970 (SC) 1302*, *M/S Woolcombers of India Ltd Vs Woolcombers Workers Union and another reported in AIR 1973 (SC) 2758*, *Cyril Lasrado (Dead) by LRS and others Vs Juliana Maria Lasrado and another reported in (2004) 7 SCC 431* and the case of *M.H. Khondkar Vs State reported in 18 DLR (SC) 124*. He submitted that all the cases support his argument that the chairman is required to give reasons as to how he is continuing his functions and hence the application should be allowed.

Attorney General's submission:

22. In reply to the submissions made by Mr. Razzak in favour of the Accused-Petitioner, the learned Attorney General submitted that if there is a challenge from the Defence counsel regarding the integrity of a Judge of the Tribunal, then such challenge must be raised during the initial stages of the proceedings against the Accused-Petitioner. He questioned why such a challenge is now being raised through an application for recusal so much down the proceedings?

23. The learned Attorney General submitted that the purpose of setting up the Commission was to campaign for the trial of war criminals and collaborators and was a civil society movement and it has no connection whatsoever with Tribunal's process.

24. With regard to the publication of the Chairman's name in the Report of the Commission as a Secretariat member, the learned Attorney General stated that even his name was also in the Secretariat at number 24, yet he was not even aware of his name being incorporated in that list. Therefore, the inclusion of the Chairman's name is not a matter of significance and does not imply in any way that he had investigated crimes.

25. He also submitted that the Report of the Commission is not the basis of the proceedings of the ICT. The Investigation Agency has conducted and completed investigation and evidence from the investigation is the basis of the charges brought against the Accused-Petitioner.

26. The learned Attorney General further argued that asking for an explanation/reasons as to what prompted the Chairman to remain as Chairman in itself is contemptuous, outrageous and unheard of.

27. With regard to the cases referred by the learned defence counsel, the learned Attorney General stated that the facts of those cases have no relevance whatsoever with the present case. Moreover, the learned Attorney General argued that the application is not maintainable as it is barred under section 6(8) of the Act, and that petition also lacks legal base as it does not mention any provision of the Act or Rules under which it has been filed, and as such, the learned Attorney General submitted that the petition is liable to be rejected on this ground as well.

Analysis, Conclusions and Decisions of the Tribunal

An unprecedented petition

28. We have carefully perused the petition and heard the counsel from both sides and find that the petition as it has been framed, is unprecedented in character and unheard of in the long legal history, rich legal heritage and culture and practices in the courts of Bangladesh. It is certain that this is for the first time a petitioner has preferred an application seeking explanation from a judge himself to provide and record reasons how he has exercised his good conscience in seating in and discharging his constitutional obligation as the Chairman of the Tribunal.

Contempt

29. We find it equally astonishing that a petitioner seeks a Judge to explain and defend his position mandated by the Constitution. No provision of the Act or Rules of Procedure or even no law of the land requires a Judge to defend his position. The learned Attorney General has rightly submitted that asking for explanations or reasons of what prompted the Chairman of the Tribunal to remain as the Chairman is contemptuous. The Tribunal is inclined to agree to this statement of the learned Attorney General.

Petition lacking legal base

30. The petition refers to no provision of the Act or Rules of Procedure thereof and devoid of legal foundation cannot merit consideration by the Tribunal. Moreover, as the learned Attorney General rightly mentioned, under Section 6(8) of the Act, the petition is not maintainable since it effectively challenges the constitution of the Tribunal and appointment of its Chairman. The said provision is quite categorical and comprehensive in that it provides that “Neither the constitution of a Tribunal nor the appointment of its Chairman or members shall be challenged by the Prosecution or by the accused persons or their counsel.” This is indeed what the petition has done seeking the Chairman to explain and defend his position! As such, the petition is bound to be summarily rejected.

Failure to raise concern at the first opportunity

31. The learned Attorney General also raised a valid question about the timing of the petition which has been preferred just before the prosecution's opening statement and deposition by the witnesses. The Accused-Petitioner first appeared before the Tribunal in person on 21.09.2010 along with his lawyers, whereas the Report that prompted the Accused-Petitioner to file the First and Second petitions, was in the public domain for over a decade and half. As such, the Accused-Petitioner had plenty of time and opportunity to raise his concerns, if any, since he appeared before the Tribunal but he chose not to. Any concern regarding bias of a judge or likelihood that a party will "suffer irreparable loss and injury" as the petition has claimed, should have been brought to the attention of the Tribunal immediately after the act or fact in question concerned became known to the party. Here, the Report of the Commission that the Accused-Petitioner relied on, as already noted, was always in public knowledge and therefore the Tribunal is inclined to agree with the learned Attorney General's submission that the petition may have been filed not out of concerns of impartiality of the Chairman but to delay the trial.

32. Given the widely publicised nature of the Report, it was never a secret that Chairman's name was mentioned on the list of Secretariat members. Similarly, it was no secret that the Accused-Petitioner was one of the persons investigated in that civil society initiative and that allegations against him were included in the said Report.

33. The defence counsel argued that only after receiving documents related to the case, they discover that the said Report has been adduced as evidence against the Accused-Petitioner, and only then they noted the potential bias of the Chairman. However, this argument is unsustainable, because, as noted above, the Accused-Petitioner had or ought to have the knowledge of both the Report and the Chairman's name in it as a member of the Secretariat of the Commission, and that the Accused-Petitioner being a subject-matter of the Report. The Accused-Petitioner should have raised his concern regarding likelihood of alleged bias of the Chairman at the very first opportunity when he made his first appearance before the Tribunal more than thirteen months ago regardless of whether or not the said Report was introduced as evidence in his case. Since the Chairman was still then the Chairman of the Tribunal, and the Accused-Petitioner knew or ought to have known that the Chairman was

the very person whose name was in the said Report that he is suddenly beginning to find objectionable.

34. Moreover, in the case of *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1A, Judgment (July 21, 2000) (hereinafter mentioned as *Furundzija*), which the Accused-Petitioner has cited very selectively in our opinion, the Appeals Chamber of International Criminal Tribunal of Former Yugoslavia (ICTY) noted that the information regarding Judge Mumba on which the appellant relied was in fact in the public domain, and as such the appellant could have raised this issue before the Trial Chamber or at pre-trial stage, rather than on appeal. On that basis alone, the Appeal Chamber judges in *Furundzija* opined that it “could find that the Appellant has waived his right to raise the matter now” and dismiss the ground of appeal, quite rightly, in our view as well. In the present case, information related to the Chairman’s alleged prior role in the Secretariat of the Commission was also available in the public domain, as was in *Furundzija*. Thus, we too find that the Accused-Petitioner has waived his right to raise the matter at this trial stage of the proceeding since he failed to raise it at the first opportunity.

Allegation of misconduct

35. In paragraph 12 of the petition, the Accused-Petitioner imputed serious allegation of misconduct against the Chairman as, according to the Accused-Petitioner, he was required to disclose his association with a Prosecutor Mr. Zead Al- Malum, a party in the case, whose name also appeared in the Report, that they worked together to gather information against the Accused-Petitioner and that such failure to disclose such association with a member of prosecution constitute misconduct.

36. The Tribunal find this statement in the Second Petition preposterous in that, as noted above, the said Report of the Commission had been in the public domain for years together, and since the information was widely known and available, and that information was not in any way restricted or confidential in nature. As such, had the Accused-Petitioner or his counsel really wanted to peruse the Report, they could have obtained it effortlessly, and it is safe to conclude that the Accused-Petitioner had constructive knowledge of the content of the Report all along, given the highly publicised nature of both the Reports, more so given the position the Accused-Petitioner holds as a political figure.

37. Therefore, the Tribunal is of the view that the Chairman is under no legal obligation to reveal his non-existing association in the context of the Report with a member of the prosecution about information already in the public domain. Clearly, the Chairman cannot be expected to answer for each of his activism related associations throughout his long career as a veteran human rights lawyer prior to assuming the position of a Judge, where the nature of the association was in no manner partisan or political or sectoral, rather for a cause for justice aimed at ending impunity which every person of “good conscience” should be part of.

38. The defence and his counsel, therefore, should be very careful before imputing such serious allegations against a judge based on non-existing working relationship in the context of the Secretariat of the Commission and without any credible evidence to the contrary, potentially undermining the institution of the Tribunal and as such, such imputation merits a serious reprimand.

Material Witness

39. The counsel for the accused petitioner argued that the chairman is likely to be a material witness to the proceedings, and that, that alone disqualifies him to hold this position because of his name being mentioned as a member of the Secretariat of the Commission and the Commission’s activities. We find this submission unusual.

40. According to Oxford Dictionary, a material witness is a witness whose evidence is likely to be sufficiently important to influence the outcome of a trial that facts so far presented before this Tribunal does not in any manner suggest that the chairman of the Tribunal has any information whatsoever as being a witness in any of the crimes, the accused petitioner is alleged of, which may be sufficiently important to influence the outcome of this trial. Therefore, by any stretch of imagination, the chairman could never be considered a “material witness”.

Bias

41. The main contention of the defence centres on the notion of bias. In paragraph-23 of the First Petition the Accused-Petitioner maintained an ‘appearance of bias is present’ ‘due to his prior role in the Secretariat of the Commission’. The Accused-Petitioner maintained that “irrespective of how limited a role” the Chairman may have played in the Secretariat’s inquiry, since

the Prosecution relied on the findings of the Commission, an objective observer would conclude that there is a legitimate fear that the Chairman will lack impartiality. Here, the “objective impartiality test” made out by the Accused-Petitioner is that any objective observer could only conclude that an “appearance of bias” is present. Even during the hearing on the petition on 13.11.2011, the counsel for the Accused-Petitioner stressed on this particular notion of “appearance of bias” on the part of the Chairman and categorically stated that his integrity is not in any manner under question.

42. However, in paragraph-2 of the Second Petition, the Accused-Petitioner, referring to the content of their First Petition, stated that they have raised serious allegations of both “actual bias” and “reasonable apprehension of bias” against the Chairman due to his prior membership in the Secretariat of the Commission that investigated allegations of war crimes against the Accused-Petitioner.

43. We have carefully compared to two petitions and found major variations in their assertions of bias. While the Chairman’s involvement in the Secretariat was presented as an “appearance of bias” in the First Petition, whereas in the Second Petition, the very same facts was claimed to be “both an actual bias and a reasonable apprehension of bias”.

44. The Tribunal did not find either in the petition or in the oral submissions of the learned counsel of the Accused-Petitioner any new facts that could justify “an appearance of bias” in one petition to turn into a claim of “actual bias” in the next petition. As it transpires, within a span of 2 days, i.e., between the hearing of the First Petition and the filing of the Second, the Accused-Petitioner managed to change his plea from “appearance of bias” to “actual bias” when nothing whatsoever happened in between that the Accused-Petitioner could present to justify this sudden change of position.

45. It appears to the Tribunal that the Accused-Petitioner has been too cavalier with their claims as well as use of international jurisprudence. For example, in this case, in the First Petition, the Accused-Petitioner referred to *Furundzija* heavily relying on the principles of bias as set in the case. However, upon detail examination of the case, it transpires that the Appellate Chamber of the International Criminal Tribunal for Former Yugoslavia (ICTY) in that case did not find Judge Mumba as “either a party to the cause, or had any disqualifying interest”.

46. To argue applicability of their allegations against the Chairman, the Accused-Petitioner referred to the 3 conditions laid down in the *Furundzija* case, with which we do not have any disagreement. However, we find no facts on the record, neither in the petitions, nor in the oral submissions, any substance that would indicate “actual bias” on the part of the Chairman, or any “potentially disqualifying personal interest or associations”, or any “unacceptable appearance of bias” as the judges in the *Furundzija* case has stated. This means, even mere “appearance of bias” may not be adequate unless the level of bias reaches the threshold of unacceptability.

47. Another example cited in the First Petition by the Accused-Petitioner also had similar problem with regard to points made in *R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No.2)* [1999] 1 All ER 577. However, the *Pinochet* case is clearly distinguishable from the instant case on at least two grounds. First, the judge in question in the *Pinochet* case Lord Hoffmann was “at the time of the hearing of that case” a Director of Amnesty International Charity Limited, a group that vigorously campaigns against torture whereas the case was against Mr Pinochet who was accused of widespread torture. Therefore, Lord Browne Wilkinson rightly observed - “only in cases where a judge is taking an active role as trustee or director of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or disclose the position to the parties”. And as such, the circumstances in the *Pinochet* case are clearly distinguishable from the Accused-Petitioner’s claim against the Chairman in the present case.

48. The other example the Accused-Petitioner relied on is the case *Prosecutor v Issa Hassan Sesay* (Case No. SCSL-2004-15-AR-15, 13 March 2004). In that case, Judge Geoffrey Robertson, who was the President of the Appeal Chamber in the Special Court of Sierra Leone (SCSL), and a recusal motion was brought against him by the accused for writing a book titled “*Crimes Against Humanity - the Struggle for Global Justice*” (1999) before he became a judge, where he gave opinions and comments and statements against demonstrating in clearest possible terms of culpability of Revolutionary United Front (RUF) leaders of which were before the SCSL. The book was regarded as a major contribution on the crimes committed in Sierra Leone by RUF. In their ruling the judges of SCSL Appeal Chamber held that it is irrelevant whether what is written in the book were true or not, but whether an independent bystander

who is a reasonable man reading those passages will have a legitimate fear that justice Robertson lacks impartiality. His brethren judges were convinced that such a reasonable man would indeed apprehend bias in the case concerned, and hence allowed the recusal petition against Mr Robertson disqualifying him only from adjudicating cases that involved members of RUF.

49. The Tribunal finds no relevance whatsoever of the case made out by the Accused-Petitioner against the Chairman since he was neither involved in writing, drafting or in any other way preparing the said Report of the Commission, unlike Judge Robertson who wrote a seminal book against individuals and a group who were before him on trial.

50. Therefore, the cases referred to by the Accused-Petitioner, in no way further strengthen their arguments as they are clearly not applicable in the instant case.

On showing reasons

51. Citing five cases from the Sub-Continent, four of which Indian and one from Pakistan, the learned Counsel argued that the Chairman is “required to give reasons” as to how he is continuing his functions in the Tribunal on the face allegations of bias. The cases, as mentioned, are: *State of West Bengal Vs Aotul Krishna Shaw and another* reported in AIR 1990 (SC) 2205, *M/S Mahabir Prasad Santosh Kumar Vs State of U.P. and others* reported in AIR 1970 (SC) 1302, *M/S Woolcombers of India Ltd Vs Woolcombers Workers Union and another* reported in AIR 1973 (SC) 2758, *Cyril Lasrado (Dead) by LRS and others Vs Juliana Maria Lasrado and another* reported in (2004) 7 SCC 431 and *M.H. Khondkar Vs State* reported in 18 DLR (SC) 124.

52. According to the learned counsel, these cases support the view that while passing an order, judicial or administrative, reasons must be given. The Tribunal does not dispute this proposition, and it must be put on record that in the Order dated 14.11.2011 related to the First Petition, the two members of this Tribunal have indeed given their reasons, as mentioned above.

53. However, it needs to be noted that the facts, proposition of law and claim of the parties of the four cited Indian cases and the instant case are very much dissimilar and in no way the proposition of law as arrived at those four decisions can be applied in the facts and circumstances of the case, since no

Order passed by the Tribunal is under challenge in this petition. As regards the fifth case from the Supreme Court of Pakistan that deals with a contempt matter, can in no way be considered an appropriate case to be relied upon in this matter.

Presumption of impartiality

54. In Bangladesh and elsewhere, the law presumes that a judge always acts impartially, unless an absence of impartiality is firmly and beyond reasonable doubt proven. This is known as the “presumption of impartiality” that attaches to all the judges. Even *Furundiza*, the case that has been cited by the Accused-Petitioner, clearly upholds this presumption (para 197). Thus in order to displace this presumption, the Accused-Petitioner must meet this very high threshold of law, which the Accused-Petitioner failed to satisfy.

55. The case that is most akin to the present case is the *Prosecutor v Sam Hinga Norman* (Case No. SCSL-2004-14 dated 28 May 2004) of SCSL relating to a motion to recuse Judge Winter from dealing with the case before her which involved the issue of child soldiers. In this case the defence submitted a motion for withdrawal of Judge Winter from the proceedings that dealt with the question whether the recruitment of child soldiers amounted to a crime under international customary law. In that case, Judge Winter granted an *amicus curiae* brief prepared by the United Nations International Children Emergency Fund (UNICEF) which dealt with the subject of recruitment of child soldiers.

56. The defence raised the issue of close connection between Judge Winter and UNICEF due to her prior involvement in a report jointly published by UNICEF titled *International Criminal Justice and Children* (2002). The report dealt with SCSL and its power to prosecute conscription or enlisting children in armed conflicts. The defence also stated that there was yet another report by UNICEF, where it was mentioned that “the UNICEF benefited immensely from the technical assistance provided by Austrian Judge Renate Winter and would like to recommend her to other country offices”. The defence also found that Judge Winter was listed with a number of senior UNICEF personnel as forming part of an experts panel for a Masters degree on children’s rights run by the University of Freiburg. As such, the defence has argued that Judge Winter has displayed actual bias by pre-judging the very issue she was called upon to determine and that she has developed a personal

interest and/or personal association by her relationship with UNICEF. According to the defence, the Judge Winter declined to withdraw from deliberating in the motion on child soldiers, thus the remaining members of the Appeal Chamber must disqualify justice Winter.

57. The Prosecution at SCSL in *Prosecutor v Sam Hinga Norman* responded that there is a presumption of impartiality which attaches to a judge and it is for the party seeking disqualification of judge to adduce sufficient evidence that justice is not impartial or that there is a reasonable apprehension of bias. According to the Prosecution in that case, there is a high degree of threshold to reach in order to rebut this presumption, and that a “reasonable apprehension of bias” must be “firmly established”. Moreover, according to the Prosecution, Judge Winter was not one of the authors of the report or had any editorial or other responsibilities.

58. In deciding the matter, judges at SCSL questioned whether reviewing of the draft or supporting the drafting of the UNICEF report demonstrate bias on the part of Judge Winter, and whether technical assistance provided by her constitute bias on her part. Upon consideration of the facts and laws, the Appeal Chamber of SCSL rejected the petition for recusal of Justice Winter on finding that there is a presumption of impartiality which attaches to a judge. This presumption derives from their oath of office and the qualifications for their appointment, which places a high burden on the party moving for the disqualification in order to displace that presumption. The judges in the Appeal Chamber also looked at the nature and extent of involvement of Judge Winter in preparation of the said UNICEF report and observed that it is not uncommon for authors of publications or institutions to submit drafts to experts for their comments and suggestions, neither it is uncommon to acknowledge such assistance. Therefore, the views expressed in the publication remains those of the author and cannot be attributed to the person who reviewed such draft.

59. In that case, the Appeal Chamber found that there is no material to suggest that the views expressed in the publication are also of Judge Winter’s or that she approved its content. It so happened that she was one of over 50 persons who reviewed the draft and who supported the drafting process. Based on these facts, the Appeal Chamber held, a reasonable observer properly informed of the professional practice of reviewing publications would not apprehend bias.

60. The Appeal Chamber at SCSL in that case also held that a party challenging the Judge's impartiality must demonstrate that the judge entertains a personal interest in, or a particular concern for any other parties, and such interest may not necessarily be of financial or pecuniary nature, but it must be such that the judge in question is so closely associated that he can properly be said to have an interest in the outcome of the proceedings. Such an interest is different from a professional interest in the subject matter of the case. The fact that there may be some history of professional association however limited is not alone sufficient to meet the required threshold. Therefore, reviewing a report does not itself show or even suggest an appearance of bias.

61. A distinction must be drawn between the requirement for a person to serve as a judge of the Tribunal and the issues relating to the grounds of disqualification of a judge from sitting in a particular case. The intervention of Judge Winter in the appeal hearing that she remained firmly committed to the view expressed in the report it is not clear whether Judge Winter expressed a view similar to the one in the publication does not create the link between Judge Winter and the publications the defence tried to establish. Furthermore the fact that Justice Winter may have expressed an opinion which is unfavorable to the defence is not a sufficient ground for bias and the same motion praying for recusal of Judge Winter was rejected.

62. In the present case before this Tribunal, the Chairman was one of the 40 members in a Secretariat of a Commission formed by the civil society, simply inferred by facts that his name was published in the list. Beyond that, there is no suggestion that in preparation of the said Report of the Commission, he had any role whatsoever in - investigating the facts, or compiling data, or sifting through data, or analysing, or drafting, or checking, or supervising, or proof-reading, or editing, or publishing, or gave any opinion, or propagating or canvassing for it, or did perform any other function in relation to the said Report. Whatever, assumption of bias the Accused-Petitioner is attempting to impute are in fact imaginary and without any factual basis.

63. In fact Judge Winter in the above case went much further in terms of her own association with the alleged activities the defence before the SCSL objected as grounds for recusal, and that motion was rejected. On the contrary, in case of the Chairman of the Tribunal, he had no involvement as stated in any activity of the Secretariat or in preparation of the Report.

Therefore, the suggestion of pre-judging the case or being biased in the matter in some way merely because of a name mentioned in a Report does not stand ground in any standard of reason, and as such, following the same rationale as in *Prosecutor v Sam Inga Norman*, the present petition is also liable to be rejected.

64. Furthermore, the claim made by the Accused-Petitioner also is not adequate to displace the presumption of impartiality that is attached to the Chairman as a judge of the Supreme Court of Bangladesh. In this instant case, the burden of disproving or displacing the legal presumption of impartiality is on the Accused-Petitioner and the Chairman is not obliged to provide proof of his impartiality as the law presumes in favour of his neutrality. As such, on these ground alone of failure to reach the threshold, the petition is liable to be rejected.

Objective observer

65. In both First and Second petitions, and in the submissions by the Accused-Petitioner's counsel - the term "objective observer" has been repeatedly referred in order to impute the perception or apprehension of bias against the Chairman. As a concept or as a construct, the notion "objective observer" is not a simple one to pin down, and can be easily imputed to mislead. As such, this Tribunal feels the notion deserves some explanation which must be put on record.

66. "Objective observer" is, in a larger measure, a construct of the Court as rightly articulated by Lord Mance in *R v Abdroikov, Green and Williamson* (2007 UKHL 37 at 81). In his words:

“. . . the fair-minded and informed observer is him or herself in large measure the construct of the court. Individual members of the public, all of whom might claim this description, have widely differing characteristics, experience, attitudes and beliefs which could shape their answers on issues such as those before the court, without their being easily cast as unreasonable. The differences of view in the present case illustrate the difficulties of attributing to the fair-minded and informed observer the appropriate balance between on the one hand complacency and naivety and on the other cynicism and suspicion.”

67. The term “objective observer” also underlines two factors: (1) the observer’s personality and character; and (2) knowledge and understanding of the observer. As such, deciding on how or whether some fictitious character may perceive or view something in the perception or imagination of a petitioner, is indeed a notoriously impossible situation for a judge. At the same time, a petitioner is hardly an appropriate authority to argue as to who among the general population might or might not perceive something when the pool of characters is an amorphous and undefined one.

68. The informed observer is a paragon of balance, virtue and wisdom, is informed of all the surrounding facts and circumstances, and must be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances.

69. Therefore, the Accused-Petitioner’s notion of “objective observer” is fraught with imprecision and thus unsubstantiated, given the level and standard of legal submission presented before this Tribunal.

The nature of the Commission’s inquiry

70. In analysing the nature of the Commission’s inquiry reflected in the said report, it appears that the investigation carried out there cannot be termed as “investigation” within the meaning of law in any stretch of definition. It was an informal process. In contrast, Judge Winter’s involvement was more formal in nature in that the UNICEF report in question was a product of an intergovernmental body. Even then the Appellate Chamber at SCSL did not find Judge Winter’s involvement to provide sufficient ground for disqualification, a view we fully endorse.

Tribunal’s treatment of the accused

71. It has by now been established that in the present case, as claimed by the Accused-Petitioner, there is no substantiated bias or existence of bias against the Accused-Petitioner by the Chairman or the Tribunal. Instead, on perusal of the record of this case, we can see that this Tribunal has taken several steps to ensure full respect of the rights of the accused and on occasions prompted by its good conscience even afforded facilities to the Accused-Petitioner to the highest standard of compliance with the Act and its Rules which other accused in Bangladesh ordinarily do not enjoy.

72. For example, during interrogations of the accused the Tribunal has required presence of lawyer and a doctor in a room adjoining to the interrogation room in order to ensure the complete protection of rights of the accused. The Tribunal only allowed the Investigation Agency to interrogate the Accused-Petitioner, only for one day, for 6 (six) hours, and allowed the counsel of the Accused-Petitioner to consult, and be examined by the doctor during the recesses. If required, the doctors were permitted by the Tribunal to visit the Accused-Petitioner in the middle of interrogation. Hence, the Tribunal, ensured that the Accused-Petitioner is always under medical supervision.

73. It needs to be mentioned that according to the provisions of the Act and the Rules, statements which were made by the Accused-Petitioner in course of interrogation, are not admissible as evidence.

74. Moreover, the Accused-Petitioner was permitted to avail medical facilities both in and outside the jail as and when necessary. The jail authorities were specifically directed to provide him with food appropriate for a diabetic patient, which he is, and also to provide a health-friendly vehicle while being moved out of prison. It may be mentioned here that such facilities are not provided to a person in prison.

75. The Tribunal has permitted the Accused-Petitioner to sit on a chair while in the dock and has always been given proper care when produced before the Tribunal.

76. All these practices facilitated by the Tribunal clearly establish that the Tribunal headed by the Chairman is particularly mindful about the rights, well being and special needs of the Accused-Petitioner and that there is no indication of harbouring any kind of bias or apathy towards the Accused-Petitioner.

77. Wherefore, mere presence of the name of the Chairman in the last page of the said Report without any mention of as to how he participated in the process of preparing the report, or his involvement in any other ways, can in no way be described as adequate to establish actual bias or apprehension of bias. The Chairman is not only the Chairman of the Tribunal but also he is a Justice of Supreme Court of Bangladesh. He took oath of office under the

Constitution. Once the Judges take their oath, it gives rise to a very strong presumption of impartiality that the Judge's commit themselves to the sacred endeavour of mentality in judging matters before them come what may, on which the entire edifice of Justice and judicial establishment is founded upon.

78. This Tribunal takes this presumption of impartiality very seriously. While any possibility of bias deserves our highest consideration, we are of the opinion that displacing this presumption of impartiality in relation to a particular Judge requires facts regarding the existence of bias, and not merely suspicion, perception, or conjecture. Because, the sanctity and security of a judicial office is a *sine qua non* of the principle of judicial independence, under which a Judge must be secured in his office and cannot be subject to frivolous attempts to disqualify.

79. Upon perusing the instant petition, the First Petition, the Report, and the submissions of the learned counsel for the Accused-Petitioner, the Prosecutors, and the learned Attorney General, we are convinced that there exists no material proving actual bias, perception of bias, apprehension of bias in any manner that could prejudice the parties particularly the Accused-Petitioner. As such the petition has got no merit to consider.

80. For the reasons and observations mentioned above, the petition is hereby rejected.