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**INTERNATIONAL COMMISSION OF JURISTS (ICJ) SUBMISSION
TO THE UNIVERSAL PERIODIC REVIEW OF BANGLADESH**

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Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952, in consultative status with the Economic and Social Council since 1957, and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

ICJ SUBMISSION TO THE UNIVERSAL PERIODIC REVIEW OF BANGLADESH

1. The International Commission of Jurists (ICJ) welcomes the opportunity to contribute to the Human Rights Council's Universal Periodic Review (UPR) of Bangladesh. In this submission, the ICJ brings to the attention of the Human Rights Council's Working Group on the UPR (Working Group) and to the Human Rights Council (Council) issues concerning: (1) the independence and impartiality of the judiciary; (2) the lack of transparent appointment procedures for public prosecutors; (3) the use of the Presidential Pardon in cases concerning allegations of gross human rights violations; and (4) Bangladesh's engagement with international human rights instruments and mechanisms.

Independence and Impartiality of the Judiciary

2. As noted by the Special Rapporteur on the independence of judges and lawyers, "the principle of separation of powers... is the bedrock upon which the requirements of judicial independence and impartiality are founded."¹ The Human Rights Committee has affirmed that States parties to the International Covenant on Civil and Political Rights (ICCPR), including Bangladesh, must "take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of member of the judiciary and disciplinary sanctions taken against them".² The Committee has warned that "[a] situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal" and violates article 14 of the ICCPR.³ Similarly, the Committee against Torture, as well as the Committee on the Elimination of Racial Discrimination, have repeatedly stressed the importance of enacting legislation or taking other measures to guarantee an independent judiciary. The Committees stress that ensuring judicial independence is part of a State's obligation to guarantee effective protection against, and remedies for, violations of international treaties.⁴

3. Independence and impartiality, while intrinsically related, are distinct concepts. Independence refers to the autonomy of a judge to decide a case without any interference. Judicial independence is often assessed on two levels: (1) institutional independence of the judiciary (the degree to which the judiciary is free from any influence or interference from the other branches of Government); and (2) individual independence (the degree to which a particular judge is able to decide a case on the basis of facts in accordance with law without any political pressure, improper influence, threats, inducements, violence or any other form of interference).

4. Impartiality refers to the state of mind of the judge. The Human Rights Committee sets out two requirements to assess impartiality. First, judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial.

5. International standards require States to appoint judges in a transparent manner, on the basis of their legal skills and qualifications. The UN Basic Principles on the Independence of the Judiciary specify that: "Persons selected for judicial office be individuals of integrity and ability with appropriate training or qualifications in law". While the means of appointment is left to States' discretion, any procedure or method of appointment must guarantee judicial independence, both institutional and individual, as well as impartiality, both objective and subjective.

6. In 2000, the Supreme Court of Bangladesh issued the landmark judgment *Secretary, Ministry of Finance v Masdar Hossain* (20 BLD (2000) AD 141) in which it called for the separation of the lower Judiciary from the Executive, enumerating 12 criteria to strengthen the independence of the judiciary. In 2007, the then Caretaker Government took steps to implement the judgment, issuing two ordinances and four service rules.⁵ In 2009, the present Government amended the Code of Criminal Procedure 1898 by Act No. XXXII of 2009, formally removing any further interference from the executive in the appointment of judicial magistrates. In its first UPR, Bangladesh pledged to "take measures to ensure the independence of the judiciary".

7. In this regard, the ICJ raises the following issues relating to the independence and impartiality of the judiciary in Bangladesh:

(i) *The Need to Uphold the Separation of Powers*

8. Notwithstanding the efforts to establish an independent Judicial Service Commission, no separate secretariat has yet been created for the judiciary. Thus, procedures for the appointment, transfer and promotion of lower judiciary judges are still administered through the Ministry of Law, Justice and Parliamentary Affairs. As a result, premature transfers, arbitrary postings, promotions and removals may be used as incentives or disincentives. This invariably affects the independence of the judiciary both at an institutional level as well as at the individual level.

(ii) *The Need for Specific Criteria for Judicial Appointments*

9. Bangladesh does not have legislation establishing appointment criteria for Supreme Court judges. The fourth amendment to the Constitution in 1975 abolished the requirement that the President consult the Chief Justice of the Supreme Court of Bangladesh in the appointment of superior court judges. In the early 1990s, political appointments became more frequent. In 2008, the High Court Division of the Supreme Court made clear that the Chief Justice's recommendations for judicial appointments were binding on the President.⁶ The Supreme Court upheld this judgment in 2009 and recommended that a law be enacted specifying guidelines, stating that: "in the matter of selection of judges, the opinion of the chief justice should be dominant in the area of legal acumen and suitability for the appointment...in the area of antecedents the opinion of the executive should be dominant".⁷ In June 2010, the High Court asked the Government why specific guidelines had not been framed for the appointment of judges.⁸ Two years have passed and the Government has yet to enact specific legislation for the appointment of judges. Instead, in 2011, the 15th Amendment to the Constitution brought back the requirement to consult the Chief Justice. Whether this is being fully complied with is unclear.

(iii) *Minimum Qualification for Members of the Judiciary*

10. According to international standards, the appointment of judges must be transparent and objective, based on legal skills and education. Currently, Article 95 of the Constitution of Bangladesh provides few requirements for appointing judges to the Supreme Court such that the candidate must: (1) be a citizen of Bangladesh; and (2) have practiced law in the Supreme Court for at least ten years or held judicial office for at least ten years *or have other such qualifications as may be 'prescribed by law'*. The open nature of these guidelines leaves appointment prone to political considerations, rather than competence and expertise.⁹

(iv) *The Need for Criteria in the Promotion of Judges*

11. Under international law, the promotion of judges must be based on objective factors, notably ability, integrity and experience.¹⁰ The Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region also states that judges must be promoted on the basis of an objective assessment of factors such as competence, integrity, independence and experience.¹¹ In 2009, the Supreme Court held that the appointment of the Chief Justice must be on the basis of seniority.¹² This is reflected in Articles 96 and 97 of the Constitution. Notwithstanding, four of the last six appointments to the office of Chief Justice have disregarded the principle of seniority. The President's appointment of Chief Justice A.B.M. Khairul Haque in September 2010 superseded two more senior judges in the Appellate Division. The Supreme Court Bar Association condemned the selection.¹³ The appointment of the current Chief Justice of Bangladesh, Justice Mazammel Hossain in May 2011 again superseded the most senior judge Justice Shah Abu Nayeem Mominur Rahman. Justice Mominur Rahman subsequently resigned his post¹⁴. The lack of transparent and objective criteria for the promotion of judges undermines the independence and impartiality of the judiciary.

(v) *Arbitrariness in Judicial Action*

12. There are frequent reports of High Court Judges refusing to hear matters on the grounds of feeling 'embarrassment.'¹⁵ It is not clear what is meant by this or from where the 'embarrassment' emanates. In May 2012, for example, certain judges of the High Court said they were 'embarrassed' to hear the bail petitions of prominent opposition leaders. Another bench passed dissenting orders on a bail petition.¹⁶

13. These examples raise concerns about whether the Courts are functioning independently and impartially. In December 2009, the Dhaka Court refused to grant bail to opposition BNP leader Arif Islam for his involvement with the 21 August grenade attack.¹⁷ In June 2010, another opposition leader Mirza Abbas, an ex-minister and member of the BNP Standing Committee, was arrested.¹⁸ He was granted bail but not released, as he was at the same time arrested on other

charges and denied bail on those charges.¹⁹ In May 2012, two High Court benches refused to hear the bail petitions filed by senior BNP leaders who were implicated in two criminal cases regarding arson attacks and bomb blasts in Dhaka during hartal.²⁰ On 16 May 2012, the Dhaka Chief Metropolitan Magistrate Court rejected the bail petitions of 33 top leaders of the 18-party opposition alliance in an arson attack.²¹

(vi) *Withdrawal of Cases*

14. In 2009, a Committee was established by the Minister for Law to review applications for withdrawal of frivolous cases instigated for political reasons. By March 2011, the Committee had recommended withdrawal of 4,687 cases, most of which allegedly involved members of the ruling coalition.²² Cases included twelve corruption cases implicating senior ruling party leaders, their supporters and relatives.²³ The Committee was reluctant to withdraw similar cases against opposition party leaders, journalists and human rights activists including journalist Jahangir Alam Akash, whom the caretaker government had implicated in false criminal charges after his work on extrajudicial killings.²⁴ The Committee has not been consistent in reviewing and withdrawing cases, apparently using its power to benefit those affiliated with the ruling party.

Appointment of Public Prosecutors

15. Bangladesh has a longstanding practice of appointing ruling party-affiliated lawyers as public prosecutors. It is alleged that the current Government has replaced the entire group of public prosecutors with members or supporters of the governing party and has also made politically-motivated appointments to the Office of the Attorney General.²⁵ While there is no universal prescription for the process of appointment of public prosecutors, States are nonetheless required to ensure that persons appointed as prosecutors are individuals of integrity and ability, with appropriate training and qualifications.²⁶ The appointment procedure must also “embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth economic or other status...”²⁷

Presidential Pardons

16. The repeated granting of presidential pardons to persons convicted of serious crimes is a matter of concern. The United Nations Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity stresses that clemency measure must not interfere with the State’s duty to provide reparations for human rights violations. In situations involving human rights violations,²⁸ the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law require States to investigate, prosecute and where the evidence is sufficient, to convict and duly punish perpetrators of human rights violations.

17. In September 2010, President Zillur Rahman granted presidential pardons to 20 death row inmates convicted of murdering the Jubo Dal (opposition party BNP’s Youth Group) leader Sabbir Ahmed Gama. Gama had been the nephew of former BNP deputy minister Ruhul Quddus Talukar Dulu, who had been gunned down in 2004 in Natore.²⁹ In July 2011, the President granted a pardon to AHM Biplob, son of ruling party leader Abu Taher of Laxmipur; Biplob was convicted and sentence to death for the murder of Nurul Islam, BNP leader – the main opposition party.³⁰

International Human Rights Instruments and Mechanisms

18. The Government of Bangladesh is a party to several of the core human right treaties, but it is yet to become party to the Optional Protocol (OP) to the ICCPR, the Second OP to the ICCPR, the OP to the International Covenant on Economic, Social and Cultural Rights (ICESCR), the OP to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), the Third OP to the Convention for the Rights of the Child (CRC), and the International Convention for the Protection of All Persons from Enforced Disappearances (CPED).

19. The Government of Bangladesh has not adhered to the periodic reporting deadlines to the treaty bodies with initial Reports under the ICCPR and the ICESCR pending for a decade. It has not extended a standing invitation to the Special Procedures, and has pending requests for visits by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Independent Expert on water and sanitation; the Independent Expert on minority issues; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special

Rapporteur on independence of judges and lawyers; the Special Rapporteur on contemporary forms of slavery; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; and the Special Rapporteur on the human rights of internally displaced persons.

Recommendations

20. The ICJ calls upon the Working Group and the Council to recommend to the Government of Bangladesh to:

Concerning the independence and impartiality of the judiciary

- i). Establish an independent secretariat to work with the Judicial Services Commission to ensure that the appointment, transfer and promotion for members of the lower judiciary is not administered by the Ministry of Law, Justice and Parliamentary affairs;
- ii). Enact specific guidelines in the Constitution or by law for the appointment of judges so as to ensure that there is no discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, linguistic or social origin, property, income, birth or other status;
- iii). Implement the 2009 Supreme Court decision in *Idrisur Rahman v Bangladesh* so as to follow recommendations of the Chief Justice of the Supreme Court of Bangladesh concerning the appointment of Supreme Court judges;
- iv). Amend Article 95 of the Constitution to include more detailed minimum qualifications for the appointment of members of the judiciary; or enact legislation prescribing such qualifications as per Article 95;
- v). Respect the principle of seniority as reflected in articles 96 and 97 of the Constitution, in the appointment of the Chief Justice of the Supreme Court of Bangladesh;

Concerning the appointment of public prosecutors

- vi). Enact legislation ensuring that only persons of highest integrity and expertise, with appropriate training and qualifications, are appointed as public prosecutors;
- vii). Ensure that any appointment guidelines include safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth economic or other status;

Concerning the use of Presidential Pardons

- viii). The granting of pardons or clemency should not be used to frustrate or interfere with the obligation to provide effective legal remedy and reparations to victims of human rights violations;

Concerning international instruments and mechanisms

- ix). Become party to: the OP to the ICCPR, the Second OP to the ICCPR, the OP to the ICESCR, the OPCAT, the Third OP to the CRC, and the CPED;
- x). Accept the requests of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Independent Expert on water and sanitation, the Independent Expert on minority issues, the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on independence of judges and lawyers, the Special Rapporteur on contemporary forms of slavery, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, and the Special Rapporteur on the human rights of internally displaced persons to undertake official missions in Bangladesh at the earliest possible opportunity, and extend to them all reasonable cooperation and assistance to facilitate a timely and effective country mission;
- xi). Present to the Council, as soon as possible after adoption of the outcome document for the UPR of Bangladesh, a national plan of action for the implementation of accepted recommendations and voluntary pledges and commitments; and
- xii). Present to the Council, two years after adoption of the outcome document, a mid-term progress report on the status of implementation of recommendations and voluntary pledges and commitments.

ENDNOTES:

¹ *Report of the Special Rapporteurs on the situation of human rights in Nigeria*, UN Doc. E/CN.4/1997/62/Add.1, para 71.

² United Nations Human Rights Committee, General Comment No. 32, *Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32 (2007) para 16 (double check)

³ *ibid.*

⁴ *Committee on the Convention for the Elimination of Racial Discrimination, Concluding Observations on Belarus*, UN Doc. A/59/18(2004) 50 at para 268; *Committee on the Convention for the Elimination of Racial Discrimination, Concluding Observations on Kazakhstan*, UN Doc. A/59/18 (2004) 54 at para 295; *United Nations Human Rights Committee, Concluding Observations on Ukraine*, UN Doc. A/57/40 vol. I (2002) 32 at para 74(8); *United Nations Human Rights Committee, Concluding Observations on Azerbaijan*, UN Doc. A/57/40 vol. I (2002) 47 at para. 77 (14); *United Nations Human Rights Committee, Concluding Observations on Viet Nam*, UN Doc. A/57/40 vol. I (2002) 67 at paras 82(9), 82(10); *United Nations Human Rights Committee, Concluding Observations on Republic of Moldova*, UN Doc. A/57/40 vol. I (2002) 76 at para. 84(12);

⁵ Bangladesh Judicial Service Commission Rules 2007; Bangladesh Judicial Service (Pay Commission) Rules 2007; Bangladesh Judicial Service Commission (Constitution of Service, Appointments in the Service and Suspension, Removal & Dismissal from Service) Rules 2007; and Bangladesh Judicial Service (Posting, Promotion, Grant of Leave, Control, Discipline and other Condition of Service) Rules 2007.

⁶ *Idrisur Rahman v Bangladesh* (2008) 60 DLR 714.

⁷ *Bangladesh and others v Md. Idrisur Rahman, Advocate and others*, 17 (2009) BLT (AD) 231, at para 60 of the Judgment

⁸ "Govt gets 4 weeks to explain selection", The Daily Star, June 7, 2010, at: <http://www.thedailystar.net/newDesign/news-details.php?nid=141667>

⁹ Particularly, since the reintroduction of parliamentary democracy in the early 1990s, appointment of additional judges in the High Court Division has reportedly been politicized. The 2004 appointment of 19 additional judges by the BNP-led four party alliance government was vehemently opposed by the Supreme Court Bar Association as the appointments were allegedly based on political consideration. Recently, the AL-led government appointed 17 additional judges. There has been controversy over two of the appointees, who were not administered the oath by the then Chief Justice. Mr. Fazlul Karim. M. Abdul Latif Mondal, "Enact a comprehensive law to regulate the higher judicial appointments", Journal, Dhaka Law Reports, 62 DLR (2010), pp.21-22; See also "Get rid of politicization in judges' appointment", The Daily Star, December 25 2011, at <http://www.thedailystar.net/newDesign/news-details.php?nid=215547>; "Bangladesh: Back to the Future", International Crisis Group, 13 June 2012, at <http://www.crisisgroup.org/~media/Files/asia/south-asia/bangladesh/226-bangladesh-back-to-the-future>; and "the state of judiciary in Bangladesh", Dr. M. Saidul Islam, at <http://www.weeklyholiday.net/Homepage/Archive/250311/edit.html>

¹⁰ Principle 13, UN Basic Principles on the Independence of the Judiciary.

¹¹ *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*, para 17 (need full citation)

¹² *Bangladesh and others v Md. Idrisur Rahman, Advocate and others*, 17 (2009) BLT (AD) 231, at para 60 of the Judgment

¹³ Barrister Nazir Ahmed, 'Having Provided justice for 15 years Justice Abu Nayeem became himself a victim of injustice,' at <http://www.sonarbangladesh.com/article.php?ID=6190>;

see also Dr Zahidul Islam Biswas, 'Do we have an Independent Judiciary?' Forum, September 2012, at: <http://www.thedailystar.net/forum/2012/September/do.htm>; 'Muzammel made CJ,' New Age, May 2011, at: http://newagebd.com/newspaper1/archive_details.php?date=2011-05-11&nid=18405

¹⁴ "CJ hopeful Naeem resigns", The Daily Star, May 13 2011, at <http://www.thedailystar.net/newDesign/news-details.php?nid=185465>

¹⁵ On June 18, Speaker Abdul Hamid stated that Justice Chaudhary violated the Constitution by making derogatory remarks about the Parliament and Speaker. On July 18, a Bench of High Court Justices Naima Haider and Muhammad Khurshid Alam Sarkar felt "embarrassed" to hear a petition that sought an order to declare the Speaker's ruling illegal. On October 1, a Supreme Court lawyer petitioned the High Court to declare Mr. Suranjit Sengupta's inclusion in the Cabinet as a "Minister without Portfolio" illegal. A Bench comprised of Justices Hasan Foez Siddique and A B M Altaf Hossain felt "embarrassed" to hear the case, forcing the petitioner to take his plea before another bench. See "Suranjit's Ministerial Position Challenged", Daily Sun, October 2 2012, at: http://www.daily-sun.com/details_yes_02-10-2012_Suranjit's-ministerial-position-challenged_279_1_2_1_4.html and "Judge embarrassed to hear petition", The Daily Star, Jul 19 2012, at: <http://www.thedailystar.net/newDesign/news-details.php?nid=242676>

¹⁶ HC judge feels 'embarrassed', The Daily Star, May 3, 2012, at: <http://www.thedailystar.net/newDesign/news-details.php?nid=232520>

¹⁷ "BNP leader Ariful refused bail in Aug 21 case," bdnews24, December 14, 2009, at: <http://www.bdnews24.com/details.php?id=148899&cid=2>

¹⁸ "Abbas, Mobin, Annie, 164 others detained in city," The Daily Star, 27 June, 2010, at: http://www.thedailystar.net/newDesign/latest_news.php?nid=24448

¹⁹ "Abbas shown held in bus torching case," *The Daily Star*, 28 August, 2010, at: http://www.thedailystar.net/newDesign/latest_news.php?nid=25533

²⁰ "HC refuses bail petitions of BNP leaders," *The Independent*, 2 May, 2012, at: <http://theindependentbd.com/online-edition/107479-hc-refuses-bail-petition-of-bnp-leaders.html>

²¹ "33 leaders of 18-party alliance sent to jail." *The Independent*, 17 May, 2012, at: <http://theindependentbd.com/paper-edition/frontpage/129-frontpage/110159-34-leaders-of-18-party-alliance-sent-to-jail-cmm-court-refuses-to-give-bail.html>

²² "Overview of corruption within the justice sector and law enforcement agencies in Bangladesh", Anti-Corruption Resource Centre, p.5

²³ UNHCR, "Countries at the Crossroads 2011 - Bangladesh" at: <http://www.unhcr.org/refworld/country,,,FRRHOU,,BGD..4ecba653c,0.html>

²⁴ UNHCR, "Countries at the Crossroads 2011 - Bangladesh" at: <http://www.unhcr.org/refworld/country,,,FRRHOU,,BGD..4ecba653c,0.html>

²⁵ AHRC IS HARDLY THE STRONGEST SOURCE Asian Human Rights Commission, 'The State of Human Rights in Bangladesh 2009', at p. 23, at: <http://material.ahrchk.net/hrreport/2009/AHRC-SPR-001-2009-Bangladesh-HRReport2009.pdf>

²⁶ Guideline 1, *UN Guidelines on the Role of Prosecutors*. UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, recommended by Commission on Human Rights resolution E/CN.4/RES/2005/81 of 21 April 2005.

²⁷ Guideline 2(a)

²⁸ Principle 24, *United Nations Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*,

²⁹ "President pardons 20," *The Daily Star*, Dhaka, September 7, 2010, at: http://www.thedailystar.net/newDesign/print_news.php?nid=153988

³⁰ "Clemency for killer," *The Daily Star*, Dhaka, July 21, 2011, at: <http://www.thedailystar.net/newDesign/news-details.php?nid=195059>