An Unjust Conviction that Undermines Rule of Law: The Case of Quader Molla

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Executive Summary

The judgment of the International Crimes Tribunal-2 in the case of top opposition islamist leader Abdul Quader Molla marks the use of the judiciary in political purposes in Bangladesh. The judgment finds the accused guilty based on hearsay evidence and contradictory testimony. The defence's pleas of alibi and other application was unreasonably rejected showing a clear bias against the accused. The Tribunal repeatedly deviated from recognized judicial norms and principles of fair trial in order to reach a verdict of conviction by any means.

Background

In 2010 the Bangladesh govt. established International Crimes Tribunal to conduct trial of war crimes committed in 1971, during Bangladesh's war of independence from Pakistan. Despite what the name suggests, it is not an international court in the sense of being founded on international law. Rather it is a national court, based on a Bangladeshi statute passed in 1973 and amended in 2009 and 2012.

In the following months, Police arrested top leaders of the opposition party Bangladesh Jamaat-e-Islami (BJI) including Abdul Qader Molla. The main perpetrators of the crime are not tried in the Tribunal as they were already handed over to Pakistan by the Bangladesh govt. in 1974.

The government had promised to meet international standards in these trials, but it has been far away from meeting this commitment. Unfortunately the present trial of war crime has been severely criticised by various institutions as biased and targeted to have political vengeance rather than securing justice.

The law governing this trial is very controversial and it fails to meet internationally recognised norms of human rights and procedural fairness.[1] International community has also been vocal about the political nature of the trial resulting in serious bias against the defence, including admitting witness statement without producing them for cross-examination, not taking any action against the perjury of the prosecution, abducting defence witnesses from the tribunal gate,[2] harassment of the defence counsels,[3] and consistent denial of almost every defence application by the tribunal.

[1] http://www.hrw.org/news/2011/07/11/bangladesh-guarantee-fair-trials-independence-era-crimes
[2] http://www.hrw.org/news/2012/11/13/bangladesh-investigate-alleged-abduction-war-crimes-witness
[3] http://www.hrw.org/news/2012/10/17/bangladesh-end-harassment-war-crimes-defense-counsel

On 18 December 2011, the government appointed prosecutors filed the 'formal charge' in the form of petition as required under section 9(1) of the Act of 1973 against Abdul Quader Molla, a top leader of Bangladesh Jamaat-e-Islami.

On February 5, 2013, the International Crimes Tribunal 2 presided over by Justice Obaidul Hassan sentenced Abdul Quader Mollah to life. The verdict stated that the accused Abdul Quader Molla was found guilty of the offences of 'crimes against humanity' and convicted and condemned to a single sentence of 'imprisonment for life' for charge nos. 5 and 6 And also for the crimes as listed in charge nos. 1, 2 and 3 to a single sentence of 'imprisonment for fifteen (15) years'.

The tribunal claimed to have considered settled principles of judicial guarantees and recognised jurisprudence from around the world. But the whole trial and judgment proves otherwise. The Tribunal repeatedly deviated from recognized judicial norms and principles of fair trial and convicted Abdul Quader Molla in a biased manner.

Verdict Based on Popular Opinion

The judgment in Quader Mollah Case states in the second paragraph that "*the degree of fairness as has been contemplated in the [International Crimes Tribunal Act of 1973] and the Rules of Procedure…are to be assessed with reference to the national wishes*."[4] This is a deeply disturbing statement to find in any legal judgment. Apparently the court was inclined to rely on popular opinion instead of provisions of law or merit of the case. This is a clear indication that the court was more interested to give a judgement of conviction rather than ensuring justice.

[4] Paragraph 2, Judgement in the Case ICT-BD Case No. 02 of 2012, The Chief Prosecutor Vs. Abdul Quader Molla, International Crimes Tribunal-2. For full judgement, see http://bangladeshtrialobserver.files.wordpress.com/2013/02/qader-full-judgement.pdf

Unsound Claim of Compliance with Human Rights

The verdict claimed that the provisions of the ICTA 1973 [International Crimes (Tribunals) Act, 1973] and the Rules framed there under offer adequate compatibility with the rights of the accused enshrined under Article 14 of the ICCPR and other universally recognised rights of the defence.[5]

The Tribunals Rules of Procedure 2012 formulated by itself prohibits the applicability of the Code of Criminal Procedure, 1898 and the Evidence Act 1872. Tribunal is authorized to take judicial notice of fact of common knowledge which is not needed to be proved by adducing evidence [Section 19(4) of the Act]. The Tribunal may admit any evidence [Section 19(1) of the Act]. The Tribunal shall have discretion to consider hearsay evidence too by weighing its probative value [Rule 56(2)]. So the absence procedural guarantees and rules of evidence and the inclusion of unproved hearsay evidence, the very basis of the principles of fair trial is destroyed.

Putting Limit on the Opportunity to Defend

The Tribunal (Tribunal-1), since his detention, has entertained a number of applications seeking bail filed on behalf of the accused and the same were disposed of in accordance with law and on hearing both sides.[6] Mechanically rejecting all the defense petitions can hardly be said to have been disposed of in accordance with law.

Out of the list of 965 defense witnesses upon which the defense intended to rely upon, the tribunal only allowed 6 witnesses by an order dated 05 November 2012. On the other hand, the prosecution was allowed to adduce all 12 of their witnesses including two Investigating Officers.

[5] Paragraph 33.
[6] Paragraph 19.

The defence filed an application seeking re-call of the order limiting defence witnesses. Tribunal rejected it, after hearing both sides by its order dated 12 November 2012. The Tribunal in its orders on this issue tried to justify its rejection by focusing that only the 'plea of alibi' could be proved by the defense through additional witnesses.[7] This indicates a clear injustice to the accused in as much as the Tribunal effectively deprived the accused from proving that at the time of the commission the alleged crimes, he was not even present in that place.

At the stage of summing up of defence case, the defence filed an application seeking direction to the museum of Miprur Jallad Khana for production of statement made and archived therein by 03 prosecution witnesses and one defence witness. The Tribunal rejected the same with an assurance that the matter would be taken into notice at the time of its final verdict.[8] But the final verdict totally ignored the clear discrepancy of the prosecution witness statements and failed to live up to its commitment.

But the tribunal claimed that the law afforded full opportunity to present the defense, including the right to call witnesses and produce evidence before the Tribunal under section 10(1)(f) and section 17(3) which are compatible with Article 14(3)(e) ICCPR.[9] Limiting defense witness to only six out, persistently rejecting to review that decision and not allowing production of documents clearly indicate that the Tribunal was not giving the accused the full opportunity to present his defense.

Conviction Based on Hearsay

The charge 1, 2 and 3 entirely depend on hearsay witnesses but for which the tribunal found the accused guilty anyway. Testimony of P.W.2, and P.W.10 relates to charge no.1 (Pallab

[7] Paragraph 27.
[8] Paragraph 30.
[9] Paragraph 34.

Killing); testimony of P.W.2, P.W.4 and P.W.10 relates to charge no.2 (Poet Meherunnesa & her inmates killing) and testimony of P.W.5 and P.W.10 relates to charge no.3 (Khondoker Abu Taleb Killing). All these witnesses are hearsay witnesses and full of inconsistencies. Some of the witnesses had been telling a different version of the incidents in various statements and interview until this trial, when they suddenly changed their story and said that the accused was the one who was involved with the crimes.

As regards charge number 1, the Tribunal itself admits that Mirpur was chiefly Bihari populated locality and for the reason of horrific situation prevailing at that *time it was not possible for a Bengali person to witness the events*. But the court contradicted itself when it convicted the accused based on the evidence of a witness who claimed to have merely heard that the accused Quader Molla accompanying the murderers.

The court assumed that *the accused formed a 'force' consisting of local Biharis on his own initiation and naturally he had effective control on its members* merely because P.W.9 Amir Hossain Molla heard that *the accused Abdul Quader Molla being accompanied by 70/80 members belonging to ICS was engaged in providing training to Biharis at Mirpur locality for protecting Pakistan*.[10] The witness did not even know for sure whether the accused was involved, he only heard, but the court was quick to come to the conclusion that the accused was indeed involved with the crimes.

Right after saying that *there was no practical chance for the them [the Bengali people] to remain present at the crime sites and to witness the events*, the court further assumed without any evidence that the *accused aided, abetted and substantially facilitated to the commission of those crime* and *therefore, it was natural to learn the incidents and involvement of perpetrators thereof. Rather learning the incidents and complicity of perpetrators from*

[10] Paragraph 49.

general people was natural.[11] How the Tribunal came to this conclusion is a mystery as there was witness who saw the events.

The testimony of witnesses in relation to charge nos. 1, 2, 3 is unattributable hearsay in nature and thus it cannot be relied upon. Prosecution has failed to establish the link of accused with the commission of crimes alleged in these charges. The telling evidence does not indicate anything as to the fact that the accused by his acts assisted or provided encouragement or moral support to the principal perpetrators of crimes alleged. But the court decided that there was reasonable proof of the guilt of the accused and convicted him.

In relation to charge nos. 4, 5 and 6, the witnesses examined in support of these three charges are not credible. Prosecution has failed to show that they had reason to see the alleged event and know the accused since prior to the events alleged. Mere seeing the accused standing in front of Physical training center, Mohammadpur having a rifle in hand in the month of November, as narrated by P.W.1 Mozaffar Ahmed Khan does not link him with the commission of any of crimes alleged and that he was Al-Badar Commander. P.W.3 Momena Begum claims to have witnessed the event of killing of her father and atrocities as alleged in charge no.6 but according to her own version she heard about her father Hazrat Ali Laskar's killing. Besides, her statement made and archived in the museum of Mirpur Jallad Khana speaks something else. The Defence has submitted photographed copy of her earlier statement made to the said museum before the Tribunal on 09.1.2013 which would show glaring inconsistencies between that and her testimony made before the Tribunal. Apart from this, Momena's version has not been corroborated by any other witnesses and as such relying on uncorroborated testimony of a single witness is not safe.

[11] Paragraph 51, Judgement in the Case ICT-BD Case No. 02 of 2012.

No Proof of Mens Rea

It is a cardinal requirement in criminal law that in order to convict an accused, there must be clear proof of *mens rea* i.e. guilty intention and knowledge of the accused. But the court totally ignored this principle when it says that proof of *mens rea* was irrelevant simply because *the accused has taken a plea of alibi contending that at the relevant time even during the entire period of war of liberation in 1971 the accused was not in Dhaka and had been staying at his native village Amirabad, Fairdpur which is far from the Dhaka city*.[12]

Conviction Based on Unfounded Speculations

The court has come to the conclusion that the accused has murdered Pallab because he had previously participated in election campaign in favour of Jamaat-e-Islami in 1970 and they used to chant slogans against their political rival Awami League leader Sheikh Mujibur Rahman in those processions. The tribunal made its reasoning the following way:

(i) since prior to 25 March 1971 the accused's position was predominantly against the movement of Bengali nation for its self-determination (ii) thereby the accused had cleared his position in favour of Jamat E Islami ideology and (iii) the accused was a close and active associate with the gang of local Bihari consisting of Aktar goonda, Hakka goonda, Abbas Chairman, Hasib Hasmi, Nehal.[13]

P.W.2 Shahidu Huq Mama does not claim to have witnessed the accused giving order to kill Pallab nor did he witness the fact of bringing Pallab to the accused. Nevertheless, *the pre-25 March 1971 role of the accused* was the reason the court believed that the accused was involved with the killing of Pallab months later and *that accused Abdul Quader Molla, despite the fact that he was a Bengali civilian, was an active and close associate of local*

[12] Paragraph 133.
[13] Paragraph 180, Judgement in the Case ICT-BD Case No. 02 of 2012

Aktar Goonda and Bihari hooligans.[14] The court found the accused guilty simply because *Abdul Quader Molla was absolutely against the movement of self determination of Bangalee nation which was in active movement demanding freedom*.

The tribunal found that it the hearsay evidence given by P.W.2 is enough to find the accused guilty simply because the witness did not claimed to have seen the incident. The court argued, quite ridiculously that the witness *could make exaggeration by saying that he witnessed the accused ordering his bihari accomplices to kill Pallab, while he testified before the Tribunal. But he did not do it*.[15] But an unreliable hearsay does not become a reliable proof it the witness admits that it is indeed a hearsay.

The defence counsel's argument that anonymous hearsay evidence does not carry probative value by citing an ICT Rwanda decision[16] was simply ignored by the court because hearsay evidence was made admissible under the Act of 1973, which itself a provision opposing established principles of fair trial.

Ignoring Defense Witness on Unsound Ground

But the court dismissed the evidence of defence witness number 4 Mrs. Sahera in favour of Quader Molla simply because she was by the defense to come and give testimony in this case.

D.W.4 Most Sahera stated in cross-examination that son of accused Abdul Quader Molla 3-4 days back, meeting her asked to depose 'in favour of his father' (accused) and thus she came to depose as brought by him (son of Abdul Quader Molla). This version does not indicate that D.W.4 has preferred to testify as a defence witness to tell the 'truth'. […] Deposing before the Tribunal as asked and brought by the son of accused Abdul Quader Molla 'in favour' of

[14] Paragraph 159, ibid.
[15] Paragraph 173.
[16] Prosecutor v. Kajelijeli [(ICTR Trial Chamber : case no. ICTR-98-44A-T 01 December 2003)

the accused was simply a mechanism to 'disprove' prosecution case and not to disclose the truth. But it is to be reiterated that the defence is not burdened to disprove prosecution case. Therefore, she seems to have been a 'managed' witness.[17]

So, apparently, according to the court, the defense cannot even ask anyone to give evidence in the case and if they do so, the witness becomes a *managed witness* and thus not credible. But the court did not take the same position in the case of the prosecution witnesses. Naturally the prosecution witnesses were also approached by the prosecution to give evidence in the case, a person cannot be a witness unless they are asked by one of the parties. But the tribunal seemed to have forgotten this ordinary practice of criminal cases in its desperate attempt to ignore defense witnesses.

Verdict Based on Contradictory Testimony

Prosecution Witness 2 Syed Shahidul Huq Mama admitted, on cross-examination, that he on 20 April 2012 made an interview in a program titled 'Ekattore Ranangoner Din guli' in Bangladesh Television (BTV) wherein he has not made any account involving the accused. So the statement implicating the accused was clearly an afterthought. But the court tried to justify this contradiction by saying:

Earlier statement or any account made to any non judicial forum is not evidence and it may simply be used to see inconsistencies or omissions with the evidence made in court.[18] The court seemed to be requiring that the statement of a witness can be contradicted only by his earlier statements made in a court, which is utterly impracticable. This stance totally ignores the fact that if a witness makes a non-judicial statement in TV and subsequently makes a different version of the statement in court, his testimony admits no credibility at all.

[17] Paragraph 184, Judgement in the Case ICT-BD Case No. 02 of 2012, ibid.
[18] Paragraph 206.

The court finds it *proved beyond reasonable doubt* that Quader Mollah was actually involved with the murder of Pallab because he had previously associated with the Biharis who allegedly committed the murder.

Although it is proved that the local Bihari extremists and Aktar Goonda were the main offenders, yet it is proved beyond reasonable doubt that accused Abdul Quader Molla, for the reason of his continuing culpable association with the principals, had 'complicity' to the criminal acts constituting the offence of Pallab killing as he 'consciously' used to maintain such culpable association with the perpetrators. […] *It was not necessary that the accused must remain present at the crime site when the murder of Pallab was actually committed*.[19]

Conviction in Charge 2 on Hearsay Evidence

Prosecution entirely relies upon hearsay evidence in proving the charge nos. 2 relating to the event of horrendous killing of Meherun Nessa and her inmates. It is found that P.W.2, P.W.4 and P.W.10 have merely testified in Tribunal that they had learnt that accused Abdul Quader Molla and his Bihari accomplices Aktar goonda and others committed the offence of those murders. They do not claim to have witnessed the alleged horrific events.

Prosecution witness 2 claimed that during 1970's election accused Abdul Quader Molla, Aktar goonda and other associates were actively involved with campaigning in favour candidate of Jamat e Islami and accused Quader Molla used to chanting slogan against their rival Sheikh Mujib. Based on this information, the Tribunal said:

Therefore, we arrive at an unerring conclusion that local Bihari Aktar goonda, Nehal goonda, Hakka Goonda and Bihari hooligans were 'full time accomplices' of the accused

[19] Paragraph 214.

Abdul Quader Molla.[20] Therefore the court found Quader Molla guilty of aiding the crime committed by Aktar goonda and others.

Witness's Own Book Contradicts Herself

PW4 Kazi Rosy in a book written by her titled 'Shahid Kabi Meherunnesa' published in June 2011, while narrating the event did not incriminate the accused with the alleged killing. P.W.4 even in her earlier statement made to IO has not stated anything incriminating the accused. But at the trial, PW4 Kazi Rosi came up with an entirely claim that the accused Quader Molla was involved with the killing of Meherunnisa.

During cross examination, P.W.4 Kazi Rosy claimed that she did not mention the name of the accused in her book there was no proceeding going on against the accused at that time. So the witness made the claim incriminating Quader Molla simply because the prosecution started a proceeding seeking to convict the accused.

She tried to offer another explanation that for the reason of fear she could not name the accused. The Tribunal also accepted this explanation and said that *presumably a predictable fear might have prevented P.W.4 in mentioning name of perpetrators in her book*.[21] The Tribunal totally ignored the fact the book was published in June 2011 when the accused was already arrested and in custody for months.

The Tribunal once again accepted hearsay evidence in charge 2 and found the accused on the sole basis of it. The court says:

[20] Paragraph 225, ibid.
[21] Paragraph 241, Judgement in the Case ICT-BD Case No. 02 of 2012, ibid.

Merely for the reason of absence of direct evidence the hearsay evidence, as discussed above, as to the complicity and conduct of the accused Abdul Quader Molla to the accomplishment of actual commission of the offence alleged cannot be brushed aside.[22]

Conviction in Charge 3 on Hearsay Evidence

Charge No. 03 alleges that on 29.3.1971 victim Khandoker Abu Taleb was apprehended from a place at Mirpur-10 Bus Stoppage, tied up by a rope and brought to the place known as 'Mirpur Jallad Khana Pump House' and slaughtered to death by the accused Abdul Quader Molla being accompanied by other members of Al-Badars, Razakars, accomplices and non-Bengalese.

P.W.5 Khandoker Abul Ahsan(55) is the son of victim Khandoker Abu Taleb and P.W.10 Syed Abdul Qayum was a friend of the victim. Both of them are hearsay witnesses as to the actual event of killing. The court found the accused guilty on the basis of hearsay evidence as there was no one who had any direct knowledge regarding the involvement of the accused.

Conviction in Charge 5 on Contradictory Evidence

Charge No 05 alleges that on 24.4.1971 at about 04:30 am, the accused Abdul Quader Molla accompanied the Pakistani armed forces launched an attack directed against civilian population of the village Alubdi (Pallabi, Mirpur) and killed of 344 civilians.

The witnesses are P.W.6 Shafiuddin Mulla and P.W.9 Md. Amir Hossain Molla. They claim to have witnessed the atrocious event of mass killing participated by the accused Abdul Qauder Molla with the principal perpetrators.

The credibility and integrity of the prosecution was questionable and they were accused in various criminal cases. But the tribunal nevertheless accepted their testimony by saying, *we*

[22] Paragraph 249.

are not required to reject the testimony of a witness who has been convicted of a crime or has engaged in criminal conduct.[23]

Moreover, the statement given by the witnesses given in the court totally contradicts an earlier statement given by the witnesses P.W.3 Momena Begum, P.W.4 Kazi Rosy , P.W.5 Khandoker Abu Taleb given to the museum of Mirpur Jallad Khana. In the earlier statements, none of the witnesses ever said anything incriminating the accused Quader Molla. But the tribunal refused to consider the earlier statements because *the 'photographed copy' of alleged statement submitted before this Tribunal is not authenticated*.[24] At the same time the Tribunal rejected the defense application praying direction to the museum authority for production of the originals archived therein for showing contradiction and inconsistencies between the earlier narration and the testimony made in court. So the court at one hand does not accept a statement because it is not authenticated, on the other hand it does not allow the defense to authenticate the same. This attitude of the court reveals that it is clearly prejudices against the accused.

The court further commented that *inaccuracies or inconsistencies between the content of testimony made under solemn declaration to the Tribunal and their earlier statement made to any person, non-judicial body or organisation alone is not a ground for believing that the witnesses have given false testimony*.[25] This is a very convenient approach taken by the court that a statement which contradicts an earlier statement of the same person is true because it was said under oath? If one says different things at different times, his sworn testimony itself loses credibility. But the Tribunal had failed to appreciate this gross anomaly.

[23] Paragraph 327.
[24] Paragraph 391.
[25] Paragraph 393.

Rejection of the Plea of Alibi

Defense witness 3 Moslem Uddin Ahmed stated that he saw Abdul Quader Molla (D.W.1) running business at Chowdda Rashi Bazar for about one year after March 1971. The accused Quader Molla stated that he used to run business from March till December 1972. The court rejected the plea of alibi on ground that these two statements contradicts as about one year as stated by the DW3 ends in March 1972, not on December 1971. The court came to the conclusion that the *above contradictory version of D.W.1 and D.W.3 thus patently makes the claim of staying of accused at own native village and running business there becomes untrue causing reasonable taint to the plea of alibi*.[26] But the fact in issue here is that whether or not the accused was in his village during the liberation war, both the statements of DW1 and DW3 corroborated on this point. More over the statement about one year does not necessarily have to be an exact 365 days. But the court tried to impose a contradiction where there existed none just to ignore the plea of alibi.

The court saw no explanation as to *why the accused could not be able to come to Dhaka one year after the independence alone? Additionally, accused could allegedly come to Dhaka University Hall alone even during the war of liberation but he had to come in December 1972 with the help of alleged local Awami League leader. Why? In absence of any explanation the above story does not inspire any credence at all*.[27] The court failed to see the obvious fact Awami League, a rival party of Jamaat-e-Islami of which the accused was supporter, was in the power during 1972 which explains the necessity of help from an Awami League Leader and the situation was totally opposite in 1971. It indicates that the court was desperate to reject the defense plea of alibi by any means.

[26] Paragraph 399, Judgement in the Case ICT-BD Case No. 02 of 2012, ibid.
[27] Paragraph 401.

In the next paragraph, the tribunal states that the claim of the accused of his of remaining at native village Amirabad, Faridpur does not carry any credence because according to the Tribunal, the story of accused's coming to Dhaka from Amirabad, Faridpur at the end of July 1971 is false. But there is no logical link between these two incidents requiring that if one is false, the other becomes false too.

The court quite conveniently cited an Indian case namely *Mohan Lal Vs. State of HP* in order to hold that the plea of alibi must be proved with absolute certainty. But this standard of absolute certainty was not required for the prosecution. This is a double standard maintained by the tribunal manifesting a bias against the accused.

The court claimed to have found that defence put contradictory suggestions to prosecution witnesses, in order to prove the plea of alibi. The defense suggestions were:

(a) Suggested to P.W.2 Syed Shahidul Huq Mama: since 07 March to 31 January 1972 Abdul Quader Molla had not been in Dhaka

(b) Suggested to P.W.3 Momena Begum: at the relevant time Abdul Quader Molla did not reside in Mirpur

(c) Suggested to P.W.4 Kazi Rosy: since first part of 1971 to March 1972 Abdul Quader Molla had not been in Dhaka city

(d) Suggested to P.W.5 Khandokar Abul Ahsan: Abdul Quader Molla had not been in Dhaka city during 1971 and first part of 1972.[28]

But there is no real contradiction among these suggestions because all of them concur that the accused was not present in Dhaka during the commission of the crimes. But the court failed to appreciate this fact in order to convict the accused by any means.

[28] Paragraph 425, Judgement in the Case ICT-BD Case No. 02 of 2012, ibid.

Presumption of Innocence Denied

It is a cardinal principle of criminal law that the guilt of an accused must be proved beyond any reasonable doubt in order to convict him. But in the judgment, the court takes an opposite position when it says that *it must be borne in mind too that no guilty man should be allowed to go unpunished, merely for any faint doubt, particularly in a case involving prosecution of crimes against humanity and genocide committed in 1971 in violation of customary international law during the War of Liberation*.[29]

The court also virtually denies the universal principle of presumption innocence in the verdict. The Tribunal said, *wrong acquittal has its chain reactions, the law breakers would continue to break the law with impunity. 'No innocent person be convicted, let hundreds guilty be acquitted'—the principle has been changed in the present time*.[30] This contradicts the Tribunals own law as well as international human rights treaties. Rule 43(2) of the Rules of Procedure of the Tribunal states that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. Similar provision can be found in article 14(2) ICCPR 1966 to which Bangladesh is a party.

[29] Paragraph 425.
[30] Paragraph 426.