The Prosecution of 'War Crimes' under International Crimes (Tribunals) Act 1973: Contextualizing from the Jurisprudence of International Tribunals

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1. Introduction

Prosecuting international crimes is being considered as a legitimate concern of the international community to uphold global peace and security. In fact, the idea of setting up an international criminal tribunal to bring every individual perpetrator responsible for violation of international crime to justice goes back to the aftermath of the First World War.[1] The world witnessed the multilateral *ad hoc* military tribunals i.e. International Military Tribunal (IMT) in 1945 and International Military Tribunal for the Far East (IMTFE) in 1946.[2] Likewise, the UN Security Council (UNSC) through the creation of International Tribunal for Former Yugoslavia (ICTY) in 1993 and International Criminal Tribunal for Rwanda (ICTR) in 1994 responded under chapter VII of UN Charter.[3] Ironically, no such initiative was taken by UNSC to put an end to the impunity for the commission of international crimes during the 1971 warfare in the territory of Bangladesh. After the deliberate inaction of UNSC, Bangladesh as a first developing country made a historical record by enacting domestic legislation entitled '*International Crimes (Tribunals) Act*' to penalize perpetrators of war criminals in 1973. However, after a prolonged silence, a tribunal was reinstated in 2010 on the basis of the 1973 Act to prosecute international crimes: namely, crimes against humanity, genocide and war crimes. The tribunal in many cases has already prosecuted perpetrators for genocide and crimes against humanity. Unfortunately, the tribunal has not yet framed any charge for the commission of 'war crimes', though section 3 (2) (d) of the 1973 Act

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[1] Antonio Cassese, "From Nuremberg to Rome: International Military Tribunal to the International Criminal Court," in Antonio Cassese, Paola Gaeta and John Jones, ed., *The Rome Statute and International Criminal Court: A Commentary* (Oxford: Oxford University Press, July 2002), p.1.

[2] Zachary D. Kaufman, "The Nuremberg Tribunal v. The Tokyo Tribunal: Designs, Staffs and Operations," *43 John Marshall Law Review*, spring 2010, p. 761.

[3] Eileen Skinnider, "Experiences and Lessons from Hybrid Tribunals: Sierra Leone, East Timor and Combodia" a paper prepared for the Symposium on the International Criminal Court," *International Centre for Criminal Law Reform and Criminal Justice Policy*, a paper prepared for the Symposium on the International Criminal Court, Beijing, China, Feb. 2007, p. 6.

explicitly incorporates 'war crimes' within the subject matter jurisdiction of the tribunal. This is perhaps because of the complexity in establishing such a plea under the existing Act.

The primary objective of the paper is to examine whether the prosecution of 'war crimes' is legally practicable under the present domestic legislation. In order to answer this core question, the paper will examine two major issues: first, whether there was a war in 1971 and if it is then whether it was an international, internationalized or non-international armed conflict; and second, how international tribunals interpreted the term 'war crimes' for prosecuting war criminals. At the outset, the paper is a modest effort to make a comparative analysis of the 'war crimes' related provision under ICTA 1973 and other contemporary international treaty and customary laws. Though ICTA is purely a domestic tribunal, why is the comparison of the ICTA with contemporary international criminal law important? Even so, it is quite significant in the language of the tribunal itself, that the tribunal shall not be precluded in seeking guidance from international references and evolved jurisprudence and it is indispensably required in the interest of fair justice.[4] The paper concludes finding that the prosecution of 'war crimes' largely depends on the characterization of armed conflict either as non-international or international, while the domestic tribunal of Bangladesh appears to be reluctant to enter into this debate.

2. Background and Jurisdiction of ICT Act 1973

Following independence, public opinion was reached in Bangladesh to prosecute all war criminals. The International Commission of Jurists in its report 'Commission of Inquiry into the Events in East Pakistan' found a strong prima facie case for identification of crimes against humanity, war crimes and breaches of common article 3 to the Geneva Conventions and recommended the formation of an international criminal tribunal for Bangladesh to prosecute war criminals.[5] It was quite dubious that if there is any trial which kind of tribunal should be there to try the war criminal of 1971? Sheikh Mujibur Rahman, the father of the nation urged that an international tribunal should be sent to Bangladesh to try war criminals.[6] Unfortunately, due to the silence of the UN,

[4] *The Chief Prosecutor V. Delowar Hossain Sayeedi*, ICT-BD Case No. 01 of 2011, ICT-1 judgment, (28 Feb. 2013), para 62.
[5] International Commission of Jurists (ICJ), *the Events in Pakistan: A Legal Study by the Secretariat of ICJ*, 1972, (hereafter ICJ Report), pp. 32-36.
[6] Niall MacDermot, Q.C., "Crimes Against Humanity in Bangladesh," *International Lawyer (ABA)*, Vol. 7, Issue 2, April 1973, p. 483.

neither any State nor any organization was able or willing to proceed with such a tribunal.[7] In the interim, Pakistan took the strategy of pressurizing the UN to release the Pakistani Prisoners of War (POWs) and preventing their prosecution.[8] ICJ recommended Bangladesh that they should themselves constitute an international tribunal much in the way that the victorious allies did at Nuremberg and Tokyo, and thereby framing the charges both under international and domestic penal laws.[9]

In April 1973, the government of Bangladesh announced its intention to prosecute 195 Pakistani nationals for serious crimes which include genocide, war crimes, crime against peace and crimes against humanity.[10] In few days of such declaration, on 11 May 1973, Pakistan brought the matter before the international court of justice asking that whether Pakistan had an exclusive claim to exercise jurisdiction over its nationals in such situation in accordance with article VI of the Genocide Convention.[11] Pakistan withdrew the case from ICJ in light of the negotiation with India which resulted in the Indo-Pakistani Agreement of August 28, 1973.[12] Bangladesh has concurred with this Agreement, though it was not a party to it.[13] The Agreement was a package deal covering five issues including the repatriation of 91000 POWs saving 195, the status of those 195 POWs for whom Bangladesh charges with the commission of war crimes, and also the recognition of Bangladesh by Pakistan.[14]

Meanwhile, Bangladesh enacted International Crimes (Tribunal) Act 1973[15], hoping that it would proceed with the trials as India and Bangladesh had earlier agreed.[16] Little public knowledge exists about the drafting phase of the Act.[17] This determination to end the impunity had been

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[7] *ibid.*
[8] A. Dirk Moses, 'The United Nations, "Humanitarianism, and Human Rights: War Crimes/Genocide Trials for Pakistani Soldiers in Bangladesh, 1971–1974," in Stefan-Ludwig Hoffman, ed., *Human Rights in the Twentieth Century*, (New York: Cambridge University Press, 2011), p. 273.
[9] Niall MacDermot (n 6) p. 484.
[10] Jordan J. Paust & Albert P. Blaustein, "War Crimes Jurisdiction and Due Process: The Bangladesh Experience," *Vanderbilt Journal of Transnational Law*, Vol. 11, No. 1, winter 1978, p. 2.
[11] International Court of Justice, *Trial of Pakistani Prisoners of War* (Pakistan v. India) [Application Instituting Proceeding on 11 May 1973 and was discontinued by an Order of the Court of 15 December 1973].
[12] Howard S, Levie, "Legal Aspects of the Continued Detention of the Pakistani Prisoners of War by India," American *Journal of International Law*, Vol. 67, 1973, pp. 512, 514.
[13] The Indo-Pakistani Agreement of August 28, 1973.
[14] Howard S. Levie, "The Indo-Pakistani Agreement of August 28, 1973," *American Journal of International Law*, Vol. 68, No. 1, 1974, p. 95.
[15] The International Crimes (Tribunals) Act 1973, Act No. XIX of 1973, (20th July 1973).
[16] Jordan J. Paust & Albert P. Blaustein, "War Crimes Jurisdiction and Due Process: The Bangladesh Experience," *Vanderbilt Journal of Transnational Law*, Vol. 11, No. 1, winter 1978, p.36.
[17] Zakia Afrin, "The International War Crimes (Tribunals) Act, 1973 of Bangladesh," Indian *Yearbook of International Law and Policy*, 2009, p. 343.

seriously ignored when three countries entered into a tripartite agreement on 9 April 1974, and they agreed that the listed 195 POWs would be repatriated to Pakistan along with other POWs.[18] The Agreement was signed by foreign ministers Swaran Singh of India, Kamal Hossain of Bangladesh and Aziz Ahmed of Pakistan.[19]

The tone of the agreement was conciliatory and the position of Bangladesh had been stated by the foreign minister as the country decided not to proceed with the trial against Pakistani as an act of clemency.[20] Similarly, the then Prime Minister of Bangladesh Sheikh Mujibur Rahman had declared with regard to the atrocities and trials that he wanted, 'the people to forget the past and to make a fresh start'.[21] However, the Agreement included a statement by Bangladesh that the 195 Pakistan prisoners committed excess and manifold crimes as well as war crimes, crimes against humanity and genocide.[22] Bangladesh agreed not to try the Pakistani war criminals because Pakistan had already set its own judicial commission headed by Justice Hamdoor-ur-Rahman in December 1971 and agreed to prosecute the war criminals in Pakistan.[23]

Besides, Bangladesh went ahead with the prosecution of local collaborators who committed and aided in committing international crimes in 1971 under the Collaborators (Special Tribunal) Order 1972. Though the government of Bangladesh declared a general amnesty in 1973, it excluded 1100 detainees who committed heinous crimes in 1971.[24]

The episode after this was quite muddled and the prosecution of war criminals never took place. The efforts to punish both Pakistani and Bengali war criminals came to an end after the assassination of the country's first Prime Minister Sheikh Mujibur Rahman in August 1975. However, the forgotten thought of trying war criminals of 1971 revived with the Sheikh Hasina's election manifesto in 2008.[25] Once the Awami League formed the government, the parliament

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[18] Bangladesh, India and Pakistan Agreement on the Repatriation of Prisoners of War and the Civilian Internees, which is known as *Tripartite Agreement*, Concluded on April 9, 1974, in New Delhi, 13 I.L.M. 501 (1974).
[19] Bernard Weinraub, "Pakistan Offers Apology to Bangladesh," *The New York Times*, 11 April 1974. Cited in https://www.nytimes.com/1974/04/11/archives/pakistan-offers-apology-to-bangladesh-accord-of-foreign-ministers.html, Accessed 28 June 2019.
[20] *ibid.*
[21] *ibid.*
[22] *ibid.*
[23] M Rafiqul Islam, "Adoption of the International Crimes (Tribunals) Act 1973: Its History and Application, Non-retroactivity and Amendments," in Mofidul Haque & Umme Wara, eds., *From Genocide to Justice: National and Global Perspective* (Liberation War Museum, Dhaka, Bangladesh, 2014), p. 73.
[24] *ibid.*
[25] Election Manifesto of Bangladesh Awami League 2008, para.5. cited in https://kanakbarman.wordpress.com/2008/12/17/election-manifesto-of-bangladesh-awami-league-2008/, Accessed 10 January 2019.

adopted a formal resolution in 2009 to try war criminals of 1971. After almost forty years of independence, an International Crimes Tribunal (ICT) was established in 2010 under sections 3(1) and 6 (1) of the 1973 ICT Act to try international crimes committed in 1971 war (hereafter ICTB).[26]

Though the 1973 Act is purely national legislation, it finds its subject matter jurisdiction in international law since criminalizing of those crimes were not possible in domestic law. The 1973 Act which has been in force since its enactment was amended twice on 14 July 2009 and 17 February 2014 respectively. The ICTB has been empowered to try and punish any persons accused of the designated crimes under the Act. Section 3 (1) of the amended Act 1973 states:

> 'A Tribunal shall have the power to try and punish any individual or group of individuals, or organization or any member of any armed, defence or auxiliary forces, irrespective of his nationality, who commits or has committed, in the territory of Bangladesh, whether before or after the commencement of this Act, any of the crimes mentioned in sub-section (2)'.

The designated international crimes under the Act for which ICTB has jurisdictions include crimes against humanity, crimes against peace, genocide and war crimes and any other crimes under international law.[27] Till the end of 2018, 35 trial judgments, 7 appeal judgments, and 7 review judgments have been delivered.[28] There are 37 cases which are pending before ICTB and nearly 500 cases are under investigation as of March 2019.[29] Unfortunately, the prosecution did not frame any independent charge for the commission of 'war crimes', though the ICT Act of 1973 explicitly incorporates it within the subject matter jurisdiction of the tribunal. While charges for crimes against humanity and genocide have been framed in many cases instituted before the ICTB. For example, the prosecution brought 32 genocide charges in 17 cases and succeeded in proving 23 charges.[30] The reason for not framing charges for war crimes is unknown. The succeeding parts of this paper examine the feasibility of prosecuting war crimes which were committed in Bangladesh in 1971 under the 1973 Act in light of the jurisprudence of international criminal tribunals.

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[26] Another tribunal was established in 2012. However, this paper refers to International Crimes Tribunal for Bangladesh (ICTB) to cover both the tribunals.

[27] The ICT Act 1973, (n 15), sections 3(2) (a), (b), (c) (d) and (e).

[28] M Rafiqul Islam, *National Trials of International Crimes in Bangladesh: Transitional Justice as Reflected in Judgments* (University Press Limited, 2019), p. xxxviii.

[29] Tapas Kanti Baul, "The Trial of 1971 Genocide: Reflection on ICT-BD," *Law and Our rights Page, The Daily Star*, March 26, 2019. Cited in https://www.thedailystar.net/law-our-rights/law-vision/news/the-trial-1971-genocide-reflection-ictbd-1720285, Accessed 10 April 2019.

[30] M Rafiqul Islam (n 28) p. 117.

3. Defining War Crimes under the ICT Act 1973

As mentioned in the previous section, the ICT has original jurisdiction to prosecute any person or an organization for committing war crimes or for the violation of humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949. The Act defines war crimes as the:

> 'violation of laws or customs of war which include but are not limited to murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population in the territory of Bangladesh; murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages and detenues, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.'[31]

The text of this section is taken from the statute of the IMT tribunal.[32] The ICTB recalls that the post-world war trials unequivocally support the imposition of individual criminal responsibility for war crimes on civilians where they have a link or connection with a party to the conflict.[33] Furthermore, the tribunal in several cases confirmed that it had jurisdiction to try war crimes under the Act.[34] Unfortunately, there appears to be no instance where the prosecution framed any specific charge against the perpetrators for committing war crimes in the territory of Bangladesh during 1971.[35] Though the prosecution on several occasion argued that the accused committed war crimes in violation of Geneva rules in conjunction with the charges of crimes against humanity and genocide.[36] To give an example, in *Moslem case*, the prosecution argued that the accused committed crimes against humanity and genocide under charge numbers 3 and 4 respectively, through physical participation and in some cases aiding and abetting in abduction, confinement, torture, extermination and a number of other crimes against the non-combatant civilians in violation of Geneva rules.[37]

Likewise, the tribunal did not define war crimes by itself, rather it adopted a functional and applied approach through relying upon the Nuremberg Charter.[38] Instead of defining the elements

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[31] The ICT Act 1973 (n 15) section 3(2) (d).
[32] Charter of the International Military Tribunal 1945, article 6 (b).
[33] *The Chief Prosecutor V. Md. Idris Ali Sardar and Md. Solaiman Mollah*, ICT-BD Case of 2015, ICT-1 Judgment, (5 Dec. 2016), para 66.
[34] *The Chief Prosecutor V. Md. Moslem Prodhan and others*, ICT-BD Case of 2016, ICT-1 Judgment, (19 April 2017).
[35] M Rafiqul Islam (n 28) p. 134.
[36] *ibid*, p. 135.
[37] *Moslem and others case* (n 34) paras. 100, 136, 154, 266, 311, 420, 423 and 550.
[38] *The Chief Prosecutor V. Md. Sakhawat and others*, ICT-BD Case of 2015, ICT-1 Judgment, (10 August 2017), para 773.

of war crimes, the tribunal examined the alleged violations of Geneva rules for establishing the plea of genocide and crimes against humanity. The tribunal found certain common offenses constituting genocide and crimes against humanity had direct implications for constituting war crimes for the serious violation of humanitarian laws.[39]

The observation of the ICTB on defining war crimes under the 1973 Act is very brief and superficial. War crimes have been raised as somewhat a secondary source of criminal responsibility of the accused. Though war crime is the oldest among all other international crimes,[40] and it is also one of the two international crimes that require a nexus with an armed conflict. This contextual nexus element distinguishes war crimes from both ordinary crimes and other international crimes such as genocide and crimes against humanity.

The jurisprudence of international criminal tribunals reveals that the nexus requirement is an open concept, resulting in diverging interpretations by both national and international tribunals.[41] This is perhaps one of the reasons why the prosecution did not frame any independent charge for war crimes. There are ambiguity and uncertainty surrounding the nature of the conflict in 1971. R Islam opined that there was ample evidence of the commission of war crimes in 1971 and the failure of the prosecution to bring any formal charge for war crimes may be attributable to the prosecutorial lapse of judgment in appropriate charge framing.[42] In my opinion, the prosecution faced difficulty not in finding evidence of the commission of war crimes, rather in establishing a nexus with armed conflict and more essentially in defining the 1971 war as IAC or NIAC. While the characterization of the conflict either as IAC or NIAC is linked with the framing of charges for war crimes.

4. Nexus Requirement for War Crimes and the Nature of the 1971 War

Generally, it is the obligation of the prosecuting authorities in any criminal proceeding dealing with war crimes to establish the nexus requirement beyond a reasonable doubt. Antonio Cassese argued that most of the international tribunals have not made findings about nexus requirement due to the fact that in most war crimes prosecutions the nexus between the armed conflict and the

[39] M Rafiqul Islam (n 28) p. 135.
[40] William A.Schabas, *The International Criminal Court: A Commentary on The Rome Statute* (Oxford: Oxford University Press, 2010), p.195.
[41] Harmen van der Wilt, "War Crimes and the Requirement of a Nexus with an Armed Conflict," *10 Journal of International Criminal Justice* 2012, pp.1113-1128.
[42] M Rafiqul Islam (n 28) p. 166.

alleged criminal conduct is self-evident and does not require any distinct analysis by the judges.[43] Two issues need to be clarified before framing a charge for war crimes: first, the link between the commission of war crimes and the existence of an armed conflict; second, more importantly, the characterization of the armed conflict either as international or non-international.

International humanitarian law traditionally makes a distinction between IAC and NIAC.[44] The applicable humanitarian laws differ considerably depending upon the nature of the conflict. An IAC is regulated by the four Geneva Conventions of 1949 and Additional Protocol I to the Geneva Conventions (AP I). On the other hand, a NIAC is governed by common Article 3 to the Geneva Conventions and Additional Protocol II to the Geneva Conventions (AP II). Laws regulating NIACs are not very detailed and provide less stringent rules than the former.[45] Besides, laws applicable to a NIAC lack definition for essential concepts such as combatants, non-combatants and, in particular, did not provide a prisoner of war status. More essentially, the alleged violations of the common Article 3 to the Geneva Conventions and AP II are not considered as grave breaches.

In addition, serious violations of common Article 3 and AP II were not originally considered as war crimes under international law and war crimes were considered only as such in the context of IACs.[46] Therefore, war crimes committed during NIAC did not incur individual criminal responsibility until the ICTY confronted the issue in the 1990s and applied laws regulating IAC to internal armed conflicts.[47] Though the statute of the ICTY did not contain any provision for prosecuting war crimes in a NIAC.[48] The development of customary international humanitarian laws applicable to all kinds of conflicts and the internationalization of NIAC made this possible.[49] Then the ICTR was created to try serious violations of common Article 3 to the Geneva Conventions and AP 11 in a NIAC. The statute of the ICTR explicitly mandated the prosecution of war crimes for the first time ever in a purely internal conflict. Article 4 of the statutes states:

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[43] Antonio Cassese, "The Nexus Requirement for War Crimes," *10 Journal of International Criminal Justice*, 2012, pp. 1395-96.
[44] IAC means a conflict between two states, while NIAC is defined as a conflict between the government forces and rebel groups or between rebel groups.
[45] Gauthier de Beco, "War Crimes in International Versus Non-International Armed Conflicts: New Wine in Old Wineskins," *8 International Community Law Review*, 2008, p. 320.
[46] *ibid*, p. 323.
[47] *Prosecutor V. Tadic*, Case No. IT-94-1-AR72, Decision on Appeal Jurisdiction, 138(Oct. 2, 1995).
[48] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia 1993.
[49] *Tadic case* (n 47) paras 131, and 137.

'The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Pillage;'

(g) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;

(h) Threats to commit any of the foregoing acts.' [50]

Subsequently, the drafter of the Rome Statute paid attention to this development and now the ICC has jurisdiction to prosecute war crimes in both IAC and NIAC. While the Rome Statute consolidated the contributions of the ICTY and ICTR in criminalizing war crimes in NIAC, it created two separate regimes for the prosecution of war crimes. First, Article 8(2) (a) of the Statute criminalizes grave breaches of the Geneva Conventions and Article 8(2) (b) criminalizes other serious violations of the laws and customs of war in IACs. Second, Article 8(2) (c) of the Statute criminalizes serious violations of the common Articles 3 to the Geneva Conventions and Article 8(2) (e) criminalizes other serious violations of the laws and customs of war in NIACs.

In light of the above mentioned discussions, it is fairly clear that the prosecution of war crimes depends on the existence of an IAC or NIAC. While the ICT failed to develop any uniform approach to characterize the 1971 war as IAC or NIAC. In spite of clarifying the legal definition of the 1971 war in Bangladesh, the tribunal created conundrum in defining the nature of the war as IAC or NIAC. For example, in *Moslem and Hossain case*, the ICT invoked the common Article 3 (1) (a) of the Geneva Conventions and AP II which are applicable in a NIAC.[51] On the other

[50] Statute of the International Tribunal for Rwanda, 1994 (ICTR) article 4.
[51] *Moslem and Hossain case* (n 34) para 986.

hand, in *Sakhawat and others case*, the tribunal undertook a lengthy analysis of the Geneva Convention III relating to the protection of civilians and related provisions of AP I and also invoked the interpretations of ICTY which are applicable in an IAC.[52] Thus the reference of common Article 3 and AP I is an indication of the views of the tribunal that the Bangladesh war of independence was a NIAC. On the contrary, the invocation of the Geneva Convention III and AP I designates the same as an IAC. Such dichotomy caused serious confusion in the judgments of the tribunal. There is lack of consistency on the nature of the 1971 war and it appears to remain unresolved in the ICT judgments.

It is to be mentioned that the period when ICT Act 1973 was drafted, prosecuting war crimes was linked with an IAC only. Perhaps the drafter of the Act viewed the 1971 conflict as an IAC. This is also reasonably certain because the original 1973 Act was enacted to prosecute the listed war criminals who were part of the Pakistan military. As mentioned earlier that no trial took place until 2010. While the ICTA of 1973 was amended twice, the latest development regulating war crimes at the international level was not taken into account. Accordingly, no charge for war crimes was framed by the prosecutions. Additionally, the issue has not received judicial scrutiny in a prominent and clinical manner in the ICT judgments which is a lost opportunity for evolving national criminal jurisprudence on war crimes which has been explicitly mandated by the ICT Act 1973. The next section of the paper is an effort to examine whether prosecuting war crimes under the existing ICT Act 1973 is feasible and it will specifically ask if the drafters of the Act were correct in viewing the 1971 war as IAC.

5. The 1971 war as an IAC and Prosecuting War Crimes under the ICTA 1973

The jurisprudence of international criminal tribunals reveals that the prosecution of war crimes depends upon the existence of an armed conflict. The Rome Statute provides two separate lists of war crimes for international and non-international armed conflict. While the ICT Act 1973 mandated for the prosecution of war crimes, but no charge has been framed so far against the accused of war crimes under the Act. Besides, the tribunal produced confusion regarding the legal status of the 1971 war. This section is an attempt to examine whether the 1971 war can be defined

[52] *Sakhawat and others case* (n 38) para 604-10*; Idris and Solaiman case* (n 33) paras 591-600.

as an IAC since the prosecution of war crime was arguably linked to the existence of an IAC in 1971. It defines 1971 war as an IAC through focusing upon two questions: first, could the 1971 conflict be defined as a war of liberation under international law and qualified as an IAC; and second, didn't the proclamation of independence establish Bangladesh an independent state on the day it was made (26th March/10th April 1971) and trigger the application of the Geneva laws for an IAC?

5.1 Bangladesh War of Liberation as an IAC

War of liberation is defined as 'the armed struggle waged by a people through its liberation movement against the established government to reach self-determination.'[53] The conclusion of Additional Protocol I of 1977 to the Geneva Conventions of 1949 transformed the liberation movements into the type of IAC. Article 1(4) of Protocol I provides:

> 'The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.'

Thus this provision brings liberation war into the scope of IAC. The drafting of this Article was highly contentious and the scope of application was also debated.[54] The ICRC commentary clarified that the word 'include' should be interpreted to encompass only conflicts against colonial domination, alien occupation or racist regime within the definition of IAC.[55] Allan Rosas interpreted that there should be an obvious ethnical, cultural and geographical distance between the rulers and the ruled.[56]

The adoption of additional protocol 1 has changed the traditional understanding of the international armed conflict. Depending upon this protocol, it can be argued that the Bangladesh liberation war was an IAC. But there are two issues to be resolved before characterizing Bangladesh liberation war as an international war between the liberation movement and the

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[53] Natalino Ronzitti, "Resort to Force in Wars of National Liberation," in Antonio Cassese, ed., *Current Problems of International Law* (1975) pp. 319-353.
[54] Claude Pilloud et al., *Commentary to the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1) 8 June 1977* (1987).
[55] *ibid.*
[56] Allan Rosas, "Wars of National Liberation — International or Non-International Armed conflicts?" *4 Instant Research on Peace and Violence* (1974), p. 33.

Pakistani military regime. First, how to justify the liberation movement of 1971 in East-Pakistan against the colonial, alien or racist regime as enumerated in the AP 1? Second, whether the protocol of 1977 could be applied retrospectively to the Bangladesh liberation war of 1971?

The first issue has attracted considerable attention in the literature. While there is no denying that the people of East Pakistan were treated as a second class citizen in their own territory by the government of Pakistan and their representation at the governmental level was less than minimum.[57] All the expectation of the people of East Pakistan was frustrated by the minority ruling elite of West Pakistan.[58] The West became more dominant and rich at the cost of the East as the colonial master. The *per capita* income of West was 100 percent greater than the East.[59] Bangladesh won the liberation war in exchange of losing three million lives and *izzat* of two hundred and thousands of women.[60] Hundreds and thousands of houses were burnt into ashes and 10 million people were forced to become refugee in the neighboring state India and another 65 million people were kept prisoners in their own home in their own motherland by the foreign occupation.[61]All these factors strongly support that the people of East Pakistan were subjected to alien subjugation, domination, and exploitation which fulfilled all the criteria of the colonial situation. Hence the military regime of Pakistan for all practical purposes was completely alien to the East and they very well approached the boundary of racism from every count. It will not be an exaggeration if anyone compares the West regime of 1971 with Hitler's Nazi regime.

With regard to the second question, it is difficult to establish the application of the treaty provision retrospectively to the Bangladesh liberation war to determine the nature of the 1971 armed conflict. While it is argued that the provisions related to the war of liberations under Additional protocol 1 are the reflection of the customary international norms, which evolved during 1960s-70s.[62] The state practice has been reflected through several resolutions passed by the UN before the adoption of AP 1 and it is also based upon the notion of the right of the 'people' concerned to

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[57] Jagmohan Meher, "Dynamics of Pakistan's Disintegration: The Case of East Pakistan 1947-1971," *71 India Quarterly* (2015) pp. 300-317.

[5858] M Rafiqul Islam, "Self-Determination in a Non-colonial Situation: The Bangladesh experience" *14 The Rajshahi University Studies* (1986) p. 294.

[59] Anisur Rahman, "East Pakistan: The Roots of Estrangement," *3 South Asian Review* (1970) p. 236.

[60] Belal Sarkar, *Uccho Maddomik Itihash* (Dhaka: Hasan Books, 1998) p. 198.

[61] M. Harun-Ar-Rashid, "Bangladesh Genocide and Trial of the Perpetrators," in Mofidul Hoque, ed., *Bangladesh Genocide 1971 and the Quest for Justice* (Liberation War Museum, Dhaka, Bangladesh, 2009), p. 80.

[62] Amanda Alexander, "International Humanitarian Law, Post-colonialism and the 1977 Geneva Protocol 1," *17 Melbourne Journal of International Law*, 2016, pp. 1-36.

independence.[63] Likewise, the International Law Association (ILA) elucidated that the UN resolutions may constitute evidence of *opinion juris* and state practice is established in connection with the adoption of such resolutions.[64] Therefore, the AP as a treaty may be inapplicable retrospectively to the Bangladesh war of liberation but the Protocol's provisions reflecting customary international laws of war may be applicable. Professor Islam also vehemently argued that the Bangladesh liberation war might have been an IAC in 1971 under customary international law.[65]

5.2 The Proclamation of Independence and the 1971 War as an IAC

Bangladesh has been the only entity that has successfully seceded through a Unilateral Declaration of Independence (UDI) without the consent of the parent State in 1971.[66] Bangladesh declared its independence through a formal UDI on 10 April 1971.[67] The proclamation states:

> 'In due fulfillment of the legitimate right of self-determination of the people of Bangladesh, duly made a declaration of independence at Dacca on March 26, 1971, and urged the people of Bangladesh to defend the honour and integrity of Bangladesh… We the elected representatives of the people of Bangladesh… declare and constitute Bangladesh to be a sovereign People's Republic and thereby confirm the declaration of independence already made by Bangabandhu Sheikh Mujibur Rahman.'[68]

Beforehand, Sheikh Mujibur Rahman verbally declared the independence on 26th March 1971.[69] The Declaration states:

> 'I call upon the people of Bangladesh wherever you might be and with whatever you have, to resist the army of occupation to the last. Your fight must go on until the last soldier of the Pakistan occupation army is expelled from the soil of Bangladesh and final victory is achieved.'[70]

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[63] UNGA Res 2444 (1968); UNGR Res 2621 (1970).
[64] International Law Association (ILA), *Statement of Principles Applicable to the Formation of General Customary International Law* (2000) p. 19, quoted from Stephen Allen, "The Chagos Advisory Opinion and the Decolonization of Mauritius," *23 American Society of International Law Insight,* 2019.
[65] M Rafiqul Islam (n 28) p. 139.
[66] James Crawford, *The Creation of States in International Law* (Oxford, 2006) p. 142.
[67] The Proclamation of Independence, Seventh Schedule of the Constitution of the People's Republic of Bangladesh, Mujibnagar, Bangladesh, 10 April 1971.
[68] *ibid.*
[69] Declaration of Independence by the father of the nation, Bangabandhu Sheikh Mujibur Rahman shortly after midnight of 25th March, I.E. Early Hours of 26th March 1971, Sixth Schedule, Article 150(2) of the Constitution.
[70] *ibid.*

The UDI explicitly proclaimed that Bangladesh declared itself as an independent state in due fulfillment of the right to self-determination. This raised some pressing questions. Did this declaration fall within the ambit of international law and if so to what extent was it relevant in determining the legality of the UDI of Bangladesh? Or did it fall outside the jurisdiction of international law altogether? The answer to these questions is intrinsically linked with the characterization of the 1971 armed conflict.

The question of the legal nature of UDI has been contested in the existing literature.[71] It is argued that the claim for independence through UDI does conflict with the principle of territorial integrity of states and thereby illegal under international law.[72] It is important to examine whether international law really supports this argument?

This question arose in the context of the 2010 advisory opinion on the accordance with international law of the unilateral declaration of independence in respect of Kosovo.[73] The UN General Assembly asked ICJ to provide its opinion on whether the UDI of Kosovo was in accordance with international law.[74] The court proceeded to examine the legality of UDI in international law, instead of determining the statehood.[75]

Relying upon the findings of this case, from the date of UDI, which was 10th April 1971 (formally) or 26 March 1971 (informally), the sovereignty of Pakistan ceased to exist in East-Pakistan and Bangladesh became an independent state. Being a foreign state's troops, those Pakistani troops remaining in the territory of Bangladesh after the date of UDI became 'occupation army'.[76]

Therefore, the liberation war which was between the liberation movement and the government forces of Pakistan turned into a conflict between the People's Republic of Bangladesh and the Islamic Republic of Pakistan. Accordingly, the 1971 armed conflict became the subject matter of common Article 2 of the four Geneva Conventions of 1949, which defines the scope of the application of the conventions and contributes to establishing a distinction between IAC and

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[71] Jure Vidm, "Conceptualizing Declarations of Independence in International Law," *32 Oxford Journal of Legal Studies*, 2012, pp. 153-177.
[72] Alexander Orakhelashvili, "Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo" *12 Max Planck Year Book of United Nations Law* (2009) p. 13.
[73] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion* (2010) International Court of Justice (ICJ).
[74] *ibid*, para 51.
[75] *ibid*, paras 78-121.
[76] M Rafiqul Islam (n 28) p. 140.

NIAC. Arguably, the 1971 situation in Bangladesh satisfied the test of this article under two sub-clauses. First, it was an IAC between Bangladesh and Pakistan under common Article 2(1), though there was no such declaration of war from any side and it is also not necessary under this clause. Second, it was an IAC between Bangladesh and Pakistan under common Article 2(2). Bangladesh being an independent state was under the Pakistan military occupation from 10th April 1971 to 16th December 1971, and such occupation met violent armed resistance.

6. Conclusions

It is evident from the jurisprudence of international criminal tribunals that the prosecution of war crimes depends upon the legal status of an armed conflict. The ICT Act 1973 included war crimes within its subject matter jurisdiction presuming that the 1971 war was an IAC. In addition, there was no precedent of imposing individual criminal responsibility for war crimes in NIAC before the 1990s. It is a matter of another debate whether the same was possible under customary international law. While the ICTB has acknowledged that it has jurisdiction to prosecute war crimes, however, it confuses the legal status of the 1971 war through invoking common Article 3 to the Geneva Conventions which applies only in NIAC. The attitude of the tribunal towards the spirit of the liberation war 1971 could have been reflected from people's aspiration. Unfortunately, the ICTB failed to remove ambiguities with regard to the legal status of the1971 armed conflict. Where there had always been deliberate effort to portray the conflict as an internal affair of Pakistan. The normative framework of this paper claimed that the 1971 war in Bangladesh was an IAC from two viewpoints. First, customary international law recognized war of liberation as an IAC in 1971, and the Bangladesh liberation movement met the threshold of the liberation war under AP I. Second, Bangladesh became independent on 10th April 1971/26th March through UDI and then after the country went through the foreign military occupation regime until it was physically liberated on 16th December 1971. Under both situations, 1971 war can very well be defined as an IAC in accordance with international law. Therefore, the study has been necessitated not only to examine the feasibility of prosecuting war crimes under ICTA 1973 but also to have a clearly defined narrative about the legal status of the liberation war of Bangladesh. The paper concludes finding that the trial of war crimes is very much practicable under the existing ICT Act 1973 and such prosecution might have created a notable milestone in the development of criminal jurisprudence in Bangladesh.