The Compatibility of International Crimes (Tribunals) Act 1973 with Rome Statute of the International Criminal Court

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Abstract

After 38 years of silence on the part of national and international community, the government of Bangladesh revived a dormant International War Crimes (Tribunals) Act of 1973 through an amendment in 2009 to prosecute local collaborators who sided Pakistani armed forces and perpetrated a list of heinous crimes under the Act. The 1973 Act is purely a national legislation but it finds its subject matter jurisdiction in international law since criminalizing those crimes were not possible in domestic law. The principal aim of the present paper would be to examine the jurisdictional aspects of the ICT legislation and to outline its compatibility with international standards, more particularly with Rome Statute of the International Criminal Court. Henceforth, the paper firstly offers a brief background of 1971 liberation war and the post war efforts to put an end to the impunity. The second chapter focuses on the nature, scope and application of the Act in light of temporal, territorial and personal jurisdiction. Lastly, the paper highlights the subject matter jurisdiction of the Act, which derives from international penal law. Notably, this paper would emphasize on the recent judgments of the Bangladesh International Crimes Tribunal as well as the Supreme Court's decision in pursuance to the appeal from ICT to clarify the jurisdictional and other relevant aspects of the ICTA 1973.

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1. Introduction

The Rome Statute has mandated effective prosecution of international crimes which shocked the international community as a whole to put an end to impunity and it has held every state primarily responsible to exercise its criminal jurisdiction over those perpetrators.[1] The principle of complementary provided in the Rome Statue means the national courts have the priority to punish international crimes which ultimately implies that the ICC cannot exercise its jurisdiction unless the state concerned is unable or unwilling to investigate the crimes.[2] In general, ICC functions prospectively and it has jurisdiction only with respect to those crimes which are committed after the Rome Statue came into force.[3] Consequently, the obvious response of ICC was not seen as an appropriate institution to address the violations of human rights and humanitarian law in many situations, in particular, where crimes occurred before the entry into force of the Rome Statute.[4] In such a situation, a question arises do international crimes which were committed before the entry into force of the Rome Statue go unpunished? In fact, the idea of setting up an international criminal court to bring every individual perpetrator responsible for violation of international crime to justice goes back to the aftermath of World War 1.[5] The world witnessed the multilateral *ad hoc* military tribunals i.e. International Military Tribunal (IMT) in 1945 and International Military Tribunal for Far East (IMTFE) in 1946 with limited

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[1] Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, (Concluded in Rome on July 17, 1998 and came into force on July 1, 2002), Preamble [hereafter Rome Statute].

[2] *Ibid.,* article 17, for details see Lijun Yang, "On the Principle of Complementarity in the Rome Statue of the International Criminal Court"*, Chinese Journal of International Law,* Vol.4, No.1, 2005, pp. 121-132.

[3] Rome Statute, Note 1, Article 11.

[4] Eileen Skinnider, "Experiences and Lessons from Hybrid Tribunals: Sierra Leone, East Timor and Cambodia", *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. 4.

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

jurisdictions.[6] The UN Security Council through the creation of International Tribunal for Former Yugoslavia (ICTY) in 1993 and International Criminal Tribunal for Rwanda (ICTR) in 1994 established that the prosecution of international crime is necessary to maintain international peace and security under chapter VII of UN Charter.[7]

After the inaction of UN Security Council the government of newly independent Bangladesh, immediately after seceding from Pakistan enacted International War Crimes (Tribunals) Act 1973 to prosecute the perpetrators of most grievous and heinous crimes committed in 1971 atrocities.[8] Most importantly, Bangladesh as a first developing country made a historical record by enacting a legislation to penalize international crimes in 1973. However, no tribunal was set up and no trial took place under the Act until the present Awami government established the International Criminal Tribunal on 25thMarch of 2010.[9] Thus the tribunal under the Act is absolutely domestic but it has been empowered to try internationally recognized crimes committed in violation of customary international law.[10] Whereas, it is purely a domestic tribunal then again why is the comparison of the ICTA with contemporary international criminal law important? Nevertheless it is quite significant in the language of the tribunal itself that it shall not be precluded in seeking guidance from international references and evolved jurisprudence and it is indispensably required in the interest of fair justice.[11] The question arises what constitutes international standard in prosecuting international crimes? The Tribunals referred the Statute of ICTY 1993, ICTR 1994, Rome Statute 1998

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

[7] Skinnider, Note 4, p. 6.

[8] Ved P. Nanda, "A Critique of the United Nations Inaction in the Bangladesh Crisis", *Denver Law Journal,* Vol. 49, (1973), p. 53.

[9] *The Chief Prosecutor V. Delowar Hossain Sayeedi*, ICT-BD Case No. 01 of 2011, ICT-1 judgment, (28 Feb. 2013), para.14, [hereafter *The Chief Prosecutor V. Delowar Hossain Sayeedi,* ICT Judgment]. It is important to note that this case is being cited almost throughout the entire paper because both the tribunals followed same reasoning in all the cases.

[10] *Ibid.*, para.16.

[11] *Ibid.*, para.62.

and the Statute of Special Court of Sierra Leone (SCSL) 2002 as contemporary standard of international criminal law.[12]The paper intends to compare ICTA 1973 with Rome Statute taking into account the relevant contribution of different international criminal tribunals starting from IMT Nuremberg to SCSL. In particular, it would endeavor to emphasize more on the Rome Statute provided that it is the most important multilateral treaty in this regard up to the present time which has been acceded by 123 countries. The study would be limited to the historical background, comparison of the scope, nature, application and subject matter jurisdiction of International Crimes Tribunals Act with contemporary international standards. While the procedural aspects would be entirely overlooked. Before going to the substantive analysis, the paper demonstrates the brief fact of 1971 war and highlights the post independent war efforts and politics to punish war criminals.

2. Background of the Bangladesh's Crimes Tribunal

2.1 Liberation War and War Crimes

The two- nation theory resulted in the creation of two states in August 1947, which was propositioned on the basis that India will be for Hindus and Pakistan a state for the Muslims.[13] The theory culminated to the formation of Pakistan comprising of two geographically and culturally distinct east and west parts of India; eventually the western zone was named West Pakistan and the eastern zone was named East Pakistan which is today Bangladesh.[14] This division between East and West Pakistan was perhaps historically inevitable.[15] Apart from the geographical distance, linguistic, ethnical and cultural differences between the people of the two wings, the inherent imbalances in their respective socio economic structure reached such a stage that they could

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[12] *Ibid*., para.19.

[13] *The Chief Prosecutor v. Motiur Rahman Nizami,* ICT-BD Case No. 03 of 2011, ICT-1 Judgment, (Oct.29, 2014), para.9.

[14] *Ibid.,* para. 5.

[15] Moudud Ahmed, *Bangladesh: Constitutional Quest for Autonomy,* (2nd edn, Dhaka: University Press Limited, 1991), p. 238.

no longer be held together.[16] East Pakistan was unhappy because of its lack of economic and political power and suspected that the West was making concerted effort to prevent the East from advancing. [17] The perceived domination, racial and linguistic exploitation by West originally rooted the ground for a direct confrontation between West and East.[18]

There was always tension between these two wings which greatly influenced two events in late 1970.[19]The tremendously suppressed anger had been reflected in the general elections after the failure of the West to respond adequately and promptly to a cyclone that flooded major portion of the region.[20]Despite the landslide victory of the Awami League of East Pakistan under the leadership of Bangabandhu Sheikh Mujibur Rahman in the general election of the Pakistani National Assembly, the Pakistan government did not hand over power to the leader of the majority party as democratic norms required.[21] Following the above turn of events, a movement started in this part of Pakistan and Bangabandhu in his historic speech of 7th March 1971 urged for independence; "if people's verdict is not respected and power is not handed out to East Pakistan".[22]The Speech of 7th March is regarded by Bangladeshis with the same respect as President Abraham Lincoln's Gettysburg address.[23]

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[16] *Ibid.*

[17] Richard Sisson & Leo E. Rose, *War and Secession: Pakistan, India and the Creation of Bangladesh,* (California: University of California Press, 1990) p. 8.

[18] Willem Van Schendel, *A History of Bangladesh,* (Cambridge: Cambridge University Press, 2009).

[19] Jhumasen, "The Trial of Errors in Bangladesh: The ICTA and the 1971 War Crimes Trial" *Harvard Asia Quarterly*, Vol. XIV, No. 3, (Fall 2012), p. 35.

[20] Donald Beachler, "The Politics of Genocide Scholarship: The Case of Bangladesh" *Patterns of Prejudice*, Vol. 47, No. 5, (2007), pp. 467-92. Available at : http://www.cbgr1971.org/files/AcademicArticlesGenocide/politicsGenocideBangladeshcbgr.pdf

[21] *The Chief Prosecutor v. Professor Ghulam Azam*, ICT-BD Case No. 06 OF 2011, ICT-1 Judgment, (July 15, 2013), para.7, p. 6.

[22] *Ibid.*

[23] Suzaannah Linton, "Completing the Circle: Accountability for the Crimes of the 1971 Bangladesh War of Liberation", *Criminal Law Forum,* Vol. 21, No. 2, (June 2010), p. 193. Available at: http://link.springer.com/article/10.1007%2Fs10609-010-9119-8

After this speech the Awami league called for general strike and they virtually took over the administration in East Pakistan.[24]

After the departure of Military Chief General Yahya Khan and the leading West Pakistani politician Zulkifar Ali Bhutto in the middle of the negotiation with Awami League from Dhaka, the Pakistani army started military action with unprecedented brutality, gunning down hundreds of innocent people in Dhaka and other places in East Pakistan on the night of 25th March 1971.[25] Following the night mass killing of 'Operation Search Light', Bangabandhu declared independence on 26th March exercising right of self-determination,[26] immediately before he was arrested by the Pakistani army[27] and called the people of Bangladesh to defend the honour and integrity of Bangladesh.[28] Major Ziaur Rahman on behalf of Bangabandhu made the formal declaration of independence from Kalurghat, Chaittagong on the very same day.[29] On 10th April 1971, after the meeting with Mrs. Gandhi, the then Prime Minister of India at New Delhi, Tajuddin Ahmed formed a government declaring himself as the Prime Minister and Sheikh Mujib as the President of Bangladesh.[30]The members of the National Provincial Assembly who were elected in the 1970 election from East Pakistan formally formed the government of Bangladesh and proclaimed independence.[31] To give effect of the new legal order, the newly formed government of Bangladesh passed the 'Laws Continuance Enforcement Order' which came into force from 26th March 1971.[32] In order to legalize the Government and the liberation war, the above mentioned proclamation and enforcement order were finalized and formally published on

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[24] Mahmudur Islam, *Constitutional Law of Bangladesh,* (3rdedn, Mullick Brothers Publication, Dhaka, 2012), p. 17.

[25] *Ibid.*

[26] The Constitution of the People's Republic of Bangladesh, adopted on Nov. 4, 1972, (hereafter the Constitution of Bangladesh), Sixth Schedule; see also article 150(2) of the Constitution.

[27] *The Chief Prosecutor v. Professor Ghulam Azam*, Note 21, para.7.

[28] The Constitution of Bangladesh, Note 26, The Proclamation of Independence in para. 6 of the Seventh Schedule. see also: the Preamble

[29] Mahmudul Islam, Note 24, p.17.

[30] Moudud Ahmed, Note 15, p. 243.

[31] The Constitution of Bangladesh, Note 26, Seventh Schedule.

[32] *Ibid.,* Appendix I.

10th April 1971 keeping consistence with Tajuddin's earlier declaration of the formation of government.[33]Though it had not been possible for the newly formed government to frame a constitution during the war, but the people of Bangladesh through their heroism, bravery and revolutionary resistance had established effective control over the territory of Bangladesh.[34]The elected representatives also undertook to observe and give effect to all duties and obligations that evolve as a member of the United Nations and to follow its Charter with a view to attaining the support of international community.[35]

India trained, advised, equipped and assisted *Muktibahini* (freedom fighters) and maintained effective control on the exile government and various liberation forces.[36] With the assistance of India, Bangladesh Armed Forces led by a former army officer Col. M. A. G Osmani was made and different training camps were established.[37] However, the war was officially declared when India invaded East and West Pakistan on 3rd December in response to the bombing by Pakistan in eleven Indian airfields.[38] The liberation war continued for about nine months and at the end an official war broke out between the Pakistani army on the one side and the Indian army and Bangladesh's Freedom fighters on the other side.[39] The war came into an end on 16thDecember 1971 when all the Pakistani military personnel present in Bangladesh surrendered before the Joint Indian and Bangladeshi forces in Dhaka.[40] At the very end days of war, there was a further wave of shooting university teachers, professionals, intellectuals and other leading persons among the Bengalis.[41]

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[33] Moudud Ahmed, Note 24, p. 244.
[34] *Ibid*., p.245.
[35] *Ibid*., p. 246.
[36] Suzaannah Linton, Note 23, p. 196.
[37] Richard Sisson & Leo E. Rose, Note 17, pp. 183-184.
[38] Jhuma Sen, Note 19, p.35; see also, Suzaannah Linton, Note 36, p. 199.
[39] Mahmudus Islam, Note 24, p. 18.
[40] *The Chief Prosecutor v. Professor Ghulam Azam,* Note 21, para.7.
[41] Niall Macdermot, Q.C., 'Crimes Against Humanity in Bangladesh' *International Lawyer (ABA)*, Vol. 7, Issue 2, (April 1973), p. 479. Available at:http://heinonline.org/HOL/Page?handle=hein.journals/intlyr7&div=40&collection=journals&set_as_cursor=9&men_tab=srchresults#486.

The road to freedom for the peoples of Bangladesh was arduous and torturous, smeared with blood, toil and sacrifices, overshadowing all other struggles for independence in the contemporary history.[42]During nine months war of liberation, large atrocities were committed by the Pakistani forces and their associates including crimes against humanity, war crimes and genocide. The Pakistan army's basic orientation in war was identifying Pakistan as protector of Islam, and non-Muslims more particularly Hindus were considered as enemies of Pakistan or Islam.[43]The ordinary Pakistani army personnel and their local collaborators from Bengal and Bihar were systematically brainwashed into believing that fighting against enemies of Islam would amount to *jihad*.[44] So Hindus and any Muslims who supported Bengali national movement were put in the same category and both were equal targets for physical elimination.[45]

The meticulous plan to exterminate the Bengali intelligentsia was part of a deliberate policy of a disciplined force.[46] Rape was extremely widespread victimizing both young and elderly, wealthy and poor.[47]It was suggested that the occurrence of rape and murder targeting women and children amounted to genocide against the whole Bengali population. [48] The International Commission of Jurists in its report found that both sides violated international law,[49]although the extend of the violation was disproportionate and it found a

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[42] *The Chief Prosecutor v. Professor Ghulam Azam, Note* 21, para. 11.

[43] International Commission of Jurists (ICJ), *The Events in Pakistan: A Legal Study by the Secretariat of ICJ*, (1972), p. 29, (hereafter ICJ Report).

[44] *Jihad* is an *Arabic* word which means a religious war fought by Muslims to defend or spread their beliefs. The term has been defined in the *Oxford Advanced Learner's Dictionary* as '*a holy war fought by Muslims to defend Islam'*.

[45] Moudud Ahmed, Note 15, p. 241.

[46] ICJ Report, Note 43, p. 185.

[47] Susan Brownmiller, *Against Our Will: Men, Women and Rape,* (1stedn, Simon and Schuster, Sept. 1975), pp. 82-83.

[48] Lisa Sharlach, "Rape as Genocide: Bangladesh, the Former Yugoslavia and Rwanda" *New Political Science*, Vol. 22, No. 1,(2000), p. 95. Available at: http://www.researchgate.net/publication/240524864_Rape_as_Genocide_Bangladesh_the_Former_Yugoslavia_and_Rwanda

[49] Here both the sides indicate mainly the Pakistani armed forces and their collaborators in one hand and the paramilitary forces of Bangladesh particularly the MuktiBahini in other hand. The Pakistani Army initially created civilian groups like Peace Committee, and later

strong prima facie case for identification of crimes against humanity, war crimes and breaches of common article 3 of Geneva Conventions.[50]The report also devoted several pages to Bengali atrocities against the pro-Pakistani Biharis.[51]The ICJ report argued for an international trial for war crimes committed but it did not campaign for the establishment of international criminal tribunal to prosecute the perpetrators of 1971 atrocities.

2.2. Post-Liberation War Trial and Prisoners of War Dilemma

Just immediately after the war of liberation, a public opinion reached in the newly independent country Bangladesh to prosecute all war criminals. In early days after the surrender, there were some savage reprisals and the issue became so severe that Bangabandhu after his return declared to try collaborators along with Pakistani army who committed genocide and atrocities. He also promised that the trial of war crimes would be dealt with due process and he would use his authority to stop these reprisals.[52]Apparently it was even necessary to stop public outrage and to maintain public order in the country[53] apart from the duty to punish and prosecute those responsible for genocide.[54]To pacify the growing agitation of mass people towards the collaborators of Pakistani army, the Bangladesh Collaborators (Special Tribunals) Order 1972 came into force through

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paramilitary or auxiliary groups such as Razakars, Al Shams and Al Badar. Some Biharis and few pro Pakistani Bengalis were member of these groups, their main task was to maintain the control of the inner areas and to counter the threat of invasion from India which they feared. All the Groups collaborated operated under Pakistani Command. For details see, ICJ Report, Note 45, p. 41 and also see, Niall Macdermot, Note 42, pp. 476 -478.

[50] Jhuma Sen, Note 19, p.37; See also, ICJ report, Note 45.

[51] ICJ Report, Note 43, pp. 32-36.

[52] Niall Macdermot, Note 41, p. 479.

[53] A. Dirk Moses, "The United Nations, "Humanitarianism, and Human Rights: War Crimes/Genocide Trials for Pakistani Soldiersin Bangladesh, 1971–1974" in Stefan-Ludwing Hoffman (eds.), *Human Rights in the Twentieth Century,* (New York: Cambridge University Press, 2011),p. 275. For the interested readers the online version also available in<http://www.dirkmoses.com/uploads/7/3/8/2/7382125/moses_east_pakistan_in_hoffmann_human_rights.pdf >

[54] Niall Macdermot, Note 41, p. 483.

Presidential Order No 8 of 1972.[55] It was formulated to prosecute the local criminals who collaborated with Pakistani army or otherwise aided, abetted or waged war or aided or abetted in waging war against Bangladesh.[56] The tribunals were to use the applicable domestic laws for both substantive and procedural aspects which derived from the Penal Code 1860,[57] the Code of Criminal Procedure 1898, [58] and the rules of evidence were applied in accordance with the Evidence Act 1872.[59]Subsequently, the government of Bangladesh declared a general amnesty on November 1973 excluding the accused of rape, murder, and attempt to murder or arson.[60]

It was quite dubious that if there is any trial what kind of court should be there to try principal culprits of war crimes? Bangabandhu urged that an international tribunal should be sent to Bangladesh to try war criminals.[61]Unfortunately due to the silence of United Nations, there was no one able or willing to proceed with such a tribunal.[62] Meanwhile, Pakistan took the strategy of pressurizing UN to release the Pakistani Prisoners of War (POWs) and preventing their prosecution.[63]

In April 1973 Bangladesh announced its intention to prosecute 195 Pakistani nationals for serious crimes like genocide, war crimes, crimes against humanity, and breaches of article 3 of the Geneva Conventions,

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[55] Collaborators (Special Tribunals) Order 1972, President's Order No. 8 of 1972. For details see, Shafiq Ahmed, *EkatturerDalalera- List of Accused under the Collaborator act of Bangladesh,* Bangla (1972).

[56] Collaborators (Special Tribunals) Order 1972, Section 2.

[57] The Penal Code 1860, (Act No. XLV of 1860).

[58] The Code of Criminal Procedure 1898, (Act No.V of 1898).

[59] The Evidence Act 1872, (Act No. 1 of 1872).

[60] Bangladesh's Government declared general amnesty for collaborators on Nov. 1973. For details see, *Bangabandhu's General Amnesty Declaration: Documentary Proof*, Available at: https://mygoldenbengal.wordpress.com/2012/12/31/bangabandhus-general-amnesty-declaration/

[61] Niall Macdermot, Note 41, p. 483.

[62] *Ibid.*

[63] A. Dirk Moses, Note 58, p. 273, ('Pakistan claimed the violation of GC III regarding the detention of prisoner of War in India').

murder, rape and arson[64].On 11 May 1973, Pakistan brought the matter before international court of justice asking whether Pakistan had an exclusive claim to exercise jurisdiction over its nationals in such situation in accordance with article VI of the Genocide Convention.[65]Pakistan withdrew the case from ICJ in light of the negotiation with India which resulted in the Indo-Pakistani Agreement 1973.[66] Bangladesh has concurred with this Agreement though it was not a party to the Agreement.[67] It was a package deal covering five issues including the repatriation of 91,000 POWs saving 195 against whom Bangladesh had charged with the commission of war crimes and also the recognition of Bangladesh by Pakistan.[68]In the meantime, Bangladesh enacted International War Crimes (Tribunal) Act 1973[69] hoping that it would proceed with the trials as India and Bangladesh had earlier agreed. [70] This determination to end the impunity was seriously ignored when the three countries entered into an agreement on 9 April 1974, where it was agreed that 195 POWs would be repatriated to Pakistan along with the repatriation of other POWs under the earlier Delhi Agreement.[71]The position of Bangladesh was stated by then foreign minister that the country had decided not to

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[64] Jordan J. Paust & Albert P. Blaustein, "War Crimes Jurisdiction and DueProcess: The Bangladesh Experience" *Vanderbilt Journal of Transnational Law*, Vol. 11, No. 1, (winter 1978), p. 2.

[65] 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].

[66] 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.

[67] The Indo-Pakistani Agreement of August 28, 1973, para.4. The Special Representative of the Prime Minister of India, having consulted the Government of Bangladesh, has also conveyed the concurrence of the Bangladesh Government in this Agreement.

[68] Howard S. Levie, "The Indo-Pakistani Agreement of August 28, 1973", *American Journal of International Law*, Vol. 68, No. 1, (1974), p. 95.

[69] The International War Crimes (Tribunals) Act 1973, Act No. XIX of 1973, (20th July, 1973), [hereafter IWCTA]. For the purpose of the present paper IWCTA refers to the 1973 original Act before 2009 amendment.

[70] Jordan J. Paust, Note 64, p. 36.

[71] 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).

proceed with the trials against Pakistani as an act of clemency.[72] However, during the negotiation, Bangladesh had insisted that Pakistan would conduct its own trials of the accused and demanded justice. Instead, the country got a qualified apology from the government of Pakistan condemning and regretting the crimes they have committed.[73]However, the politics of political recognition and population exchange apparently locked the fate of accountability project in Bangladesh,[74] and in this way international criminal responsibility became entrenched in global politics and post war diplomacy.[75]

The episode after this is quite muddled and the prosecution of war criminals had never taken place. The efforts to punish both Pakistani and Bengali collaborators came to an end after the assassination of the country's first Prime Minister Sheikh Mujibur Rahman in August 1975. The new regime repealed the 1972 collaborators Act in 1975,[76] and stopped prosecutions and released all detainees.[77]It remains uncertain whether war criminals would be charged and prosecuted in the future[78].

2.3. The ICT (Amendment, 2009) Act 1973 and Revitalizing a Dormant Process

The thought about the prosecution of war crimes became a forgotten chapter in the history of Bangladesh with the exception of 2006, when the issue of war crimes returned to the nation's memory and preparation began to form such a platform.[79]The promise that the war criminals will be brought to justice was part of Sheikh Hasina's election manifesto of 2008.[80]Once Awami

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[72] *Ibid*.

[73] Jordan J. Paust, Note 64, p. 36.

[74] Suzannah Linton, Note 23, p. 203

[75] Jhuma Sen, Note 19, p. 37.

[76] The Bangladesh Collaborators (Special Tribunals) (Repeal) Ordinance 1975, (Ordinance No LXIII of 1975), 31 December, 1975.

[77] Jhuma Sen, Note 19, p. 37.

[78] Alexandra Takai, "Rape and Forced Pregnancy as Genocide before the Bangladesh Tribunal" *Temple International & Comparative Law Journal*, Vol. 25, (Fall 2011), p. 397.

[79] Zakia Afrin, "The International War Crimes (Tribunals) Act, 1973 of Bangladesh", *Indian Yearbook of International Law and Policy*, (2009), p. 341, Available at: http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1184&context=pubs

[80] Election Manifesto of Bangladesh Awami League 2008, para.5, Available at:

League formed the government, after almost fourty years they decided to prosecute local collaborators who participated in 1971 atrocities with the Pakistani army based on IWCTA 1973.[81] It is obvious that from 1973 to 2009, international criminal law has experienced progressive development through multiple forums. [82] Some authors proposed a hybrid tribunal method to prosecute war criminals of 1971 to incorporate international and national elements of international criminal justice.[83]Even though the present tribunal is focused on prosecuting auxiliary forces leaving the Pakistani military forces which seem to lack international character, still adaptations of international standards that had evolved in the interim were necessary. In 2009, the parliament of Bangladesh reviewed the 1973 Act and renamed it as the International Crimes (Tribunals) Act 1973.[84] The word 'war' has been dropped from the title keeping in mind the changing paradigm of armed conflicts post 1971 period.[85] The very Act and 2009 Amendment have been largely criticized for not adequately addressing the latest international standards to ensure a fair trial which could have been a hallmark for the rule of law and a crowding achievement for Bangladesh.[86]It is further argued that the present tribunal is unlikely to achieve its goals because the Act is afflicted with a host of

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https://kanakbarman.wordpress.com/2008/12/17/election-manifesto-of-bangladesh-awami-league-2008/

[81] Morten Bergsmo& Elisa Novic, "Justice after Decades in Bangladesh: National Trials for International Crimes" *Journal of Genocide Research*, Vol. 16, No. 4, (2011), p. 503.

[82] During the period of 1973 to 2009 the world experienced the establishment of ICTY, ICTR, ICC and some other Hybrid Tribunals, where at time of enactment of IWCTA 1973, only two instances were available before the country, one was Nuremberg Tribunal and the other was Tokyo Tribunal.

[83] Sai RamaniGarimilla, "The Bangladesh War Crimes Trials- Strengthening Normative Structure", *Journal of Law Policy and Globalization*, Vol. 13, (2013), pp. 27-37, Available at: http://www.iiste.org/Journals/index.php/JLPG/article/viewFile/5542/5655; See also, Zakia Afrin, Note 77, p. 342; Laura Dickinson, "The Promise of Hybrid Courts" *American Journal of International Law,* Vol. 97, (2003), p. 295.

[84] The International Criminal (Tribunals) Act, Act No XIX of 1973, (the Act has been amended in 2009 and it is called now as The International Crimes (Tribunals) (Amendment) Act, 2009, Act No.LV of 2009), [hereinafter ICTA 1973].

[85] Ramani Garimilla, Note 83, p. 29.

[86] Morris Davis, "Bangladesh War Crimes Tribunal: A Near-Justice Experience", Available at: http://www.crimesofwar.org/commentary/bangladesh-war-crimes-tribunal-a-near-justice-experience/.

substantive and procedural defects since its inception.[87]The present paper would largely focus on the compatibility of substantive aspects of the Act. In doing so the paper would take into account the then existing national and international penal laws applicable to Bangladesh as a successor of Pakistan[88] as well as the latest developments till today.[89]Since the trial is ongoing which is functioning under two tribunals[90] and both the tribunals have delivered judgments in seventeen cases, [91] the approach of the tribunals towards justification of jurisdictional aspects would be taken into account.

3. Nature, Scope and Application of ICT Act 1973

The 1973 Act was adopted to provide for detention, prosecution and punishment of any person irrespective of nationality with regard to any crime as mentioned in the Act before or after the commencement of this Act.[92]Here the question of citizenship of alleged accused is irrelevant. The tribunal shall under this Act prosecute any person who would be from among following categories namely, an individual or group of individuals or organization or any member of armed, defense, or auxiliary forces irrespective of their nationality.[93] Although the Act uses the term 'irrespective' of nationality in determining who shall be tried, Bangladesh has further complicated it by the

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[87] Ronak D. Desai, "A Justice Denied as Bangladesh Prosecutes War Crimes", 2014, Available at: http://www.huffingtonpost.com/ronak-d-desai/a-justice-denied-as-bangladesh_b_4363124.html?ir=India

[88] While Bangladesh seceded from Pakistan, it would be bound by all treaties entered into by Pakistan until it did not object. Pakistan ratified Genocide Convention, Geneva Convention, and International Bill of Human Rights before 1971 and as a successor to Pakistan these conventions would be applicable to Bangladesh during 1971 war.

[89] The jurisprudential development of international criminal law evolves in pursuant to the decisions of ICTY, ICTR, ICC and some other Hybrid Tribunals.

[90] The first tribunal has been set up on 25 March 2010 which is known as ICT- 1 and the second tribunal on 22 March 2010 which is called ICT-2. See for details <http://www.ict-bd.org/>.

[91] List of the cases and judgments are available in the ICTBD website, <http://www.ict-bd.org/ict1/ and http://www.ict-bd.org/ict2/ >.

[92] ICTA 1973, Note 84, section 3(1).

[93] *Ibid*., here three categories i.e. individual, group of individuals and organizations were not articulated in the original Act of 1973 and these were incorporated later in 2009 by the Amendment of the previous Act.

fact that it has made amply clear no Pakistani will be tried under this law which is applicable only to the Bangladeshi nationals.[94] This official stance originated from East Timor Special Tribunals which had a similar approach for not trying foreign nationals with arguably greater responsibility.[95] The tribunal elaborated that the Act did not subject the prosecution of an individual or group of persons from the armed forces (Pakistani), rather it manifested that even if any person is *prima-facie* found criminally responsible in section 3(2) of the Act can be brought to justice.[96] It is important to mention that this section allows jurisdiction of tribunals above any members of armed forces,[97] different auxiliary forces,[98] civilians,[99] and organizations,[100] to try under the Act. It was contended that since the original Act IWCTA 1973 was designed to try 195 listed Pakistani war criminals and not to try civilians, the tribunal lost jurisdiction when the principal offenders were given clemency by Tripartite Agreement.[101] This issue has been explained by the Supreme Court

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[94] Jhuma Sen, Note 19, p. 38.

[95] *Ibid*.

[96] *The Chief Prosecutor V. Delowar Hossain Sayeedi*, Note 9, para.16.

[97] The term 'armed forces' has been defined in section 2 (aa) of the International Crimes (Tribunals) (Amendment) Act, 2009. Though armed forces include Pakistani forces but as a matter of fact, it would be highly improbable to try them due to the grant of blanket amnesty by *Tripartite* Agreement. In reality, the Act would apply to prosecute only the secondary offenders excluding the principle offenders.

[98] Auxiliary forces include Razakar, Al-Badar, Al-Shams and Peace Committee forces. They collaborated Pakistani Army in 1971 war in identifying and killing millions of Bangalees and they even directly participated in committing war crimes. For details see, Bangladesh Genocide Archive*, Collaborators and War Criminals*, Available at:
<http://www.genocidebangladesh.org/collaborators-and-war-criminals/>.

[99] Civilians as incorporated in 2009 thorough amendment of IWCTA 1973 include any one even who is not a member of any group or individuals or group of individuals.

[100] The term organization also has been included in 2009 and not been defined anywhere in the Act. Generally it means a social unit of people that is structured to obtain some collective goals. According to *Black's Law Dictionary* it means '*A group of people, structured in a specific way to achieve a series of shared goals*'. However from the perspective of 1971 war it might refer to include Muslim league, Jamat-e-Islam and other Islamic organizations. For details see note 109.

[101] *Abdul QuaderMolla v. Government of the People's Republic of Bangladesh*, Criminal Appeal Case No. S.24-25 OF 2013, The Supreme Court of Bangladesh Appellate Division, para. 177, [hereafter *Abdul QuaderMolla v. Government of the People's Republic of Bangladesh,* SCD].

of Bangladesh. In determining jurisdiction, the court firstly referred to the definition of 'auxiliary forces' under the original Act of 1973,[102] then it referred to section 3 which specifically grants jurisdiction irrespective of nationality as a member of armed, defence or auxiliary forces in the territory of Bangladesh.[103]The amended Act 2009 extended the jurisdiction of the tribunal to 'any individual or group of individuals' and further it has also defined 'armed forces'[104] and the use of conjunction 'or' made it clear that there is no nexus between 'any individuals or group of individuals' and 'any member of armed, defence or auxiliary force'.[105]

The ICT Act provides only territorial jurisdiction, and it has limited its jurisdiction over the occurrence of crime inside the territory of the country irrespective of nationality and therefore the Pakistani armed forces also can be tried under the present Act, who have committed the listed crimes mentioned in section 3(2) of the Act within the territory of Bangladesh. On the contrary, Rome Statute provides temporal, territorial and/or personal jurisdictional requirement. [106] The exercise of these jurisdictions is subject to complementarity,[107] which means national jurisdiction comes over the ICC's jurisdiction. [108] The basic idea of complementarity is to maintain state sovereignty and it is not only a right but also a duty of the state to exercise national or territorial criminal jurisdiction.[109]

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[102] Section 2(a) of ICT Act defines that: *'auxiliary forces include forces placed under the control of the Armed Forces for operational, administrative, static and other purposes'.*

[103] *Abdul Quader Molla v. Government of the People's Republic of Bangladesh,* SCD, Note 101, para. 177.

[104] Section 2(aa) of ICT Act reads as: *'armed forces means the forces raised and maintained under the Army Act, 1952 (XXXIX of 1952), the Air Force Act, 1953 (VI of 1953), or the Navy Ordinance, 1961 (XXXV of 1961)'.*

[105] *Abdul Quader Molla v. Government of the People's Republic of Bangladesh,* SCD, Note 101, para.179.

[106] Rome Statute, Note 1, articles 11-12.

[107] Rome Statute, Note 1, para. 10 of the preamble, '*the international criminal court shall be complementary to national criminal jurisdictions*'; see also articles 1 and 17 of the Statute.

[108] Lijun Yang, Note 2, p. 122.

[109] Rome Statute, Note 1, para.6 of the preamble; See also, William A. Schabas, "Complementarily in practice : Some Uncomplimentary thoughts", presented paper in a

Section 3(1) of the ICTA 1973 points out that the Act works retrospectively as well as prospectively. The dual features of the Act gives rise to inordinate debate and controversy and makes the Act different from any other criminal laws which were adopted before. Until the creation of ICC, all previous international criminal tribunals had exercised jurisdiction retrospectively.[110] Article 11(1) of the Rome Statute provides that the court shall have jurisdiction only with respect to crimes committed after the entry into force of the statute. Further, it conditions the exercise of its jurisdiction only with crimes which are prospective in nature i.e. the crimes after 1 July 2002.[111] Since Bangladesh is a member to the ICC Statute,[112] there can be a conflict of jurisdiction between ICC and Bangladeshi national tribunals over the crimes in violation of international criminal law and humanitarian law committed after 23 March 2010 in the territory of Bangladesh. However, no such conflicts would occur in the case of ICTY and ICTR, as these two tribunals are established by UN Security Council and the statutes of the two tribunals provide that they have primacy over national courts.[113] Whereas the principle of complementarity provided in the Rome Statute means that national courts have the priority to exercise jurisdiction, which indicates that the ICC cannot exercise its jurisdiction unless the state concerned is unable or unwilling to investigate or prosecute the crimes.[114] At the time when atrocities were committed in 1971, there was no such scope for exercise of jurisdiction over those crimes in

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conference organized by *International Society for the Reform of Criminal Law*, Vancouver, 23 (June 2007), p. 1.

[110] William A.Schabas, *The International Criminal Court: A Commentary on The Rome Statute,* (1st edn, Oxford: Oxford University Press, 2010), p. 273.

[111] Rome Statute, Note 1, articles 22 and 24. Article 22 talks about the *nullumcrimen sine lege* and article 24 talks about the *non retroacitivity* and *rationepersone;* See also article 126(1) of the Statute.

[112] Bangladesh signed Rome Statute on 16 December 1999 and ratified on 23 March 2010, <http://www.iccnow.org/?mod=country&iduct=14>.

[113] Statute of the International Tribunal for the Former Yugoslavia, adopted on May 25, 1993 by UNSCR 827, article 9(2); Statute of the International Tribunal for Rwanda, S.C. Res.955, U.N SCOR 49th Sess., 3217th mtg., U.N. Doc. S/Res/955 (Nov. 8, 1994), 33 I.L.M.1998, article 8.

[114] Rome statute, Note 1, article 17 underlines four scenarios where ICC cannot exercise jurisdictions and two situations where it can.

domestic law.[115] Thus it is important to look at the issue from the international legal framework which existed in or before 1971.

There are also concerns regarding the validity of the principles of specificity and *nullumcrimen sine lege*: these two principles protect persons who reasonably believe that their conduct was lawful from retroactive criminalization, but does not protect those who were aware of the criminal nature of their act from being convicted of that crime under a subsequent formulation[116].i.e., even in absence of domestic law if the offender would have known that the offence in question was prohibited and punishable.[117] It is now well established principle in international law that mere act of prosecuting international crimes by way of law adopted after the commission of the crimes is not necessarily a violation of the fundamental prohibitions against retrospective prosecutions which has been confirmed by UDHR, the ICCPR and the Nuremberg Principles. [118] The ICCPR specifically considers the existence of both national and international law at the time of the commission of crimes.[119] Thus prosecution of genocide, crimes against humanity and other international crimes do not violate retrospective principle by using a law passed after the commission of crimes.[120]

The tribunal of Bangladesh noted that the retrospective legislation of 1973 to prosecute crimes against humanity, genocide and other crimes committed in violation of customary law is quite permitted.[121]It has substantiated the legality of retrospective effects of the Act by referring retrospective application of UN backed different tribunals such as ICTY, ICTR and SCSL.[122]

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[115] Suzannah Linton, Note 23, p. 206.

[116] *Prosecutor v. Stakic*, case no. ICTY-97-24-A, Appeal Judgment,(Mar. 22, 2006), para. 4.

[117] *Prosecutor v. Milutinovic et al.*, case no ICTY-99-37-AR72, Decision on Dragoljub Odjanic's Motion Challenging Jurisdiction- Joint Criminal Enterprize, (May 21,2003), para.40.

[118] Suzannah Linton, Note 23, p. 212.

[119] International Covenant on Civil and Political Rights, article 15, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force on March 23, 1976, Bangladesh acceded on Sept. 6, 2000).

[120] Suzannah Linton, note 23, p. 213.

[121] *The Chief Prosecutor V. Delowar Hossain Sayeedi,* Note 9, para.52.

[122] *Ibid.*

On the point of delay, the defense council argued that the prosecution had committed delay of about 40 years in bringing criminal charge against the accused without explanation and such unexplained, inordinate delay was sufficient to disbelieve the prosecution case.[123] The tribunal replied that the time bar should not be applicable to human rights crimes from the point of morality and sound legal dogma. [124] The tribunal held that criminal prosecutions with regard to international crimes are always open ended and not barred by time limitation. [125] It mentioned that neither Genocide Convention nor Geneva Conventions contain any provisions on statutory limitations to war crimes and crimes against humanity. It also mentioned that the General Assembly Resolution 2391 (XXIII) of 26 November 1968 provides protection against any statutory limitation in prosecuting crimes against humanity and genocide.[126]

4. Subject Matter Jurisdiction and Definition of Crimes

The Rome Statute states that the jurisdiction of the court shall be limited to the crime of genocide, war crime, crime against humanity and crime of aggression.[127]Article 5 is the general provision that sets the subject matter jurisdiction of the court.[128] It declares that the jurisdiction is limited to the most serious crimes of concern to the international community as a whole. It lists four crimes over which the court has subject matter jurisdiction. Even after fulfilling the subject matter jurisdiction under article 5, a case before ICC must also meet temporal, territorial and/or personal jurisdictions under articles 11 and 12 of the Statute[129].On the contrary, the ICT Act defines the crimes that fall under the jurisdiction of the tribunals- crimes against humanity, crimes against peace, genocide and war crimes.[130] The Act further

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[123] *The Chief Prosecutor V. Delowar Hossain Sayeedi,* Note 9, para.44.
[124]*Ibid*., para. 56.
[125] *Ibid*., para. 55.
[126] *Ibid.*
[127] Rome Statute, Note 1, article 5.
[128] William A.Schabas, Note 110, p. 101.
[129] *Ibid.*
[130] ICTA 1973, Note 84, sections 3(2) (a), (b), (c) and (d).

includes violation of any humanitarian rules applicable in armed conflict laid down in the Geneva Conventions of 1949 and also any other crimes under international law. [131] Regarding the subject matter jurisdiction, the Rome Statute has taken very strict and restrictive approach, whereas the ICT Act has incorporated a broad and inclusive list. The definition of these crimes also varies in some extend under Rome Statute and the ICT Act.

4.1 Crimes against Humanity

Section 3(2) (a) of the 1973 Act defines Crime against Humanity,[132] which is a direct adaptation of the Charter of the IMT Nuremberg with a few additions and alterations.[133] It has listed out ten crimes; six of those ten listed crimes are not even defined in the domestic penal laws of the country. The prohibition of crime against humanity has become part of customary international law after the General Assembly Resolution 95(1).[134] It has been further recognized by the Charter of the Nuremberg Tribunal. [135] More specifically, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity explicitely stated that the statutory limitation is not application for this crime.[136] Hence one can argue that the prohibition of crime against humanity under ICT Act is not inconsistent with the principle of non-retroactivity. This was considered by the group of experts in Cambodia that the prosecution of Khamer Rouge leaders

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[131] *Ibid.*, sections 3(2) (e) and 3(2)(d).

[132] ICTA 1973, Note 84,section 3(2)(a) provides: *'crimes against Humanity: namely, murder, extermination, enslavement, deportation, imprisonment, abduction, confinement, torture, rape or other inhumane acts committed against any civilian population or persecutions on political, racial, ethnic or religious grounds, whether or not in violation of the domestic law of the country where perpetrated'.*

[133] Jhuma Sen, Note 19, p. 38.

[134] UNGA Res 95(1), U.N. Doc. A/RES/95(1) (Dec. 11, 1946);

[135] U.N International Law Commission (ILC), *Principles of International Law Recognized in the Charter of the Nuremberg tribunal and in the judgment of the Tribunal*, U.N. Doc. A/1316 reprinted in 1950.

[136] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, article 1, (adopted 26 November, 1968 and entered into force 11 November, 1970), Pakistan voted for the convention but did not ratify till 1971, <https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-6&chapter=4&lang=en> .

for such violations in 1975 would not violate a fair and reasonable reading of *nullumcrimen* principle.[137]

The definition of crime against humanity under ICTA substantially differs from the definition given under Rome Statute.[138] Such differences would be discussed from three different aspects.

4.1.1 Widespread or Systematic

One of the hallmarks of the crime against humanity is 'widespread and systematic attack' which distinguishes this crime from any ordinary crimes and it is missing in the ICTA.[139] It appeared for the first time in the Statute of ICTR in 1994[140] followed by Rome Statute.[141]It was not there in the Charter of IMT, IMTFE and ICTY. Though it was not part of Statute of ICTY, it was confirmed in the *Tadic* decision that crime against humanity must be committed as part of a widespread or systematic attack against the civilian population. [142] Suzannah Linton argued that to criminalize crime against humanity, the Bangladeshi courts have to establish the state of customary law in 1971 and rule on this matter as crime against humanity had to be committed as part of widespread and systematic attack on the civilian population.[143] The Bangladesh's tribunal in all delivered decisions acknowledged the findings of *Tadic* case decided by ICTY that customary international law requires the attack to be either systematic or widespread.[144] The tribunal further went on to define the term widespread which is quantitative or large scale in anture and systematic which is qualitative or organized in nature.[145]The tribunal explicitly pointed out that the very term any 'civilian population' under section 3(2) (a)

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[137] Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135, UN Doc. A/53/850-S/1999/231, 1999.

[138] Rome Statute, Note 1, article 7.

[139] Suzannah Linton, Note 23, p. 233.

[140] ICTR 1994, note 125.

[141] Rome Statute, Note 1, article 7(1) (2).

[142] *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on Appeal Jurisdiction, 138 (Oct. 2, 1995).

[143] Suzannah Linton, Note 23, p. 234.

[144] *The Chief Prosecutor V. Delowar Hossain Sayeedi,* Note 9*,* paras. 25-29.

[145] *Ibid,* paras. 30(3), (4).

instead of civilian people indicates the plurality of the attack to be part of systematic or widespread attack against civilian.[146]The tribunal concluded stating that the attack in 1971 was widespread and systematic in nature.[147]

4.1.2. Plan or Policy

The Rome Statute has introduced a new test to define crimes against humanity which is known as policy or plan test.[148] The contemporary international criminal tribunals indicate that there is no need in customary law for plan or policy as such but its existence can go towards proving the systematic element.[149]The plan or policy test may have evidentiary value but it does not have any legal value in determining the element of crime.[150] Though Bangladesh's tribunal mentions about three essential components of crime against humanity in line with *Tadic* case,[151] it states that crimes against humanity do not call for a policy element under customary international law.[152] While the attack on a civilian population will typically follow some form of predetermined plan, this does not make the evidence of plan or policy an element of the crime.

4.1.3. Nexus with Armed Conflict

Neither ICTA nor Rome Statute requires a nexus with armed conflict. To prosecute crimes against humanity, does a tribunal need to prove the customary status of nexus with armed conflict? Initially the Charter of IMT, TMTFE, and ICTY created a nexus with armed conflict. The ICTY trial chamber in its decision held that customary international law may not require

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[146]*Ibid*., para. 31(2).

[147]*Ibid*., para. 30(3).

[148]Rome Statute, Note 1, Article 7(2) (a) provides for: '*attack directed pursuant to or in furtherance of a state or organizational policy to commit such attack*'.

[149] Suzannah Linton, Note 23, p. 235.

[150] *Prosecutor v. Kunarac et al*., case no IT-96-23-A & 23/1-A, Appeal judgment, 98 (Jan. 12, 2002).

[151] *The Chief Prosecutor V. Delowar Hossain Sayeedi*, Note 9, para 29 ('these three requirements are widespread and systematic, discriminatory motive and plan or policy').

[152] *Ibid.,* para. 30(4).

a connection between crime against humanity and any conflict at all.[153] Subsequently, the nexus requirement was overlooked in both ICTR and 2002 SCSL Statutes. The Bangladeshi tribunal held that to meet crime against humanity the existence of an armed conflict by definition is not mandatory. [154] The appellate division stated that neither customary international law nor Rome Statute requires nexus with armed conflict.[155]However, no one denies the fact that there was an armed conflict in 1971.[156] While the 1970 convention specifically excluded the requirement of armed conflict to determine crime against humanity and it can be committed even in peace time.[157]

There are some other crimes which are part of Rome Statute but excluded from ICTA and these are sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity. Suzannah Linton underlined that these lacunae can be filled up with reliance on 'other inhuman acts'.[158]

More interestingly, the finding of the Supreme Court seemed to have overlooked the importance of international criminal law. It was contended on behalf of the Appellant before Supreme Court that section 3(2) of the Act 1973 does not contain any element to constitute crime against humanity and in such a case the tribunal ought to have considered the above mentioned three requirements laid down by the Rome Statute.[159] In reply, the appellate division found that it was not necessary to follow the definition laid down by the Rome Statue.[160]It has further stated that in case of any conflict between national and

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[153] *Prosecutor v. Tadic*, Note 154, para. 141, where the chamber held that crime against humanity even can be committed in peace time.

[154] *The Chief Prosecutor v. Delowar Hossain Sayeedi*, Note 9, para. 32 (1).

[155] *Quader Molla v. Government of the People's Republic of Bangladesh,* SCD, Note 101, para.579.

[156]*Ibid.*

[157] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Note 146, Article 1(b).

[158] Suzannah Linton, Note 23, p. 239.

[159] *QuaderMolla v. Government of the People's Republic of Bangladesh,* SCD, Note 101, para. 141.

[160]*Ibid.*, para. 143.

international law, national law will prevail and if the national law is incomplete, vague and undefined then only the national courts are under obligation to follow international law.[161] The court concluded that for the commission of crime against humanity it is not necessary that it was committed as part of widespread, systematic attack or as part of plan or policy, what is required is that the attack has been directed against unarmed civilian population in collaboration with Pakistani army to frustrate the result of 1970 general election.[162] However, the court could have reached the same decision through adopting the reasoning of *Tadic* case.

4.2 .Crimes against Peace

Rome Statute has listed crime of aggression as one of the most serious crimes falling under ICC jurisdiction but it has not defined the term rather left it to the member states in accordance to articles 121 and 123 of the statute.[163] The amended article 8*bis* has been opened for adoption in 2010 which is limited only with the violation of the UN charter specially article 2 (4) of the Charter. On the contrary, ICTA 1973 defines crimes against peace using the IMT Nuremberg principles but omits the words *'or participation in a common plan or conspiracy for the accomplishment of any of the foregoing'*.[164] The legislatures of Bangladesh chose to rely on something for which there was already precedent.[165] Some Authors went on to justify criminal punishment of the crime against peace in customary law before the creation of IMT for Nuremberg.[166] Professor Jescheck denied the existence of customary law related to individual criminal responsibility for crime of aggression.[167] Antonio Cassese considers that crimes against peace were new crimes invented by the London Agreement and the IMT Nuremberg expression itself was contribution

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[161] *Ibid.*, para. 539.
[162] *Ibid.*, paras. 241, 242.
[163] Rome Statute, Note 1, article 5.
[164] ICTA 1973, Note 94, section 3(2)(b) and IMT Nuremberg, note 167, article 6(a).
[165] Suzannah Linton, Note 23, p. 240.
[166] *Ibid.*, p. 241.
[167] Hans-Heinrich Jescheck, "The General Principles of International Criminal Law Set out in Nuremberg, as Mirrored in the ICC Statute", *Journal of International Criminal Justice*, Vol. 2, No. 1, (2004), pp. 39-42.

to international law.[168] However, the Statutes of ICTY and ICTR did not include this crime within the subject matter jurisdiction. To bring charges of this crime, the prosecution needs to establish the existence of an international armed conflict since this crime is a state to state matter. The international commission of jurist claimed that no question arises of a crime against peace in Bangladesh.[169]Regarding the retroactive dimension of the crime against peace, the supreme court of Bangladesh referred the writing of William Schabas and stated that: *'there was a retroactive dimension to prosecution for crimes against peace, but leaving such wrong unpunished would be unjust'*.[170]

4.3 Genocide

If there is any hierarchy in international crimes, genocide unquestionably sits at its apex.[171]The definition of genocide in ICTA is that of article II of the Genocide Convention with two differences: political groups are added and the phrase as such has become such as.[172] While Rome Statue maintained the definition of genocide that already existed in treaty and customary law and which deliberately excluded political groups. [173] The rationality of non-inclusion of political group in its statue is that those states were engaged in the drafting process did not want their own people to be tried for genocide for the very common practice of targeting their political enemies.[174] The use of the term 'such as' in ICTA in place of 'as such' in Rome Statute may have the danger of turning out the list or core crimes into a mere illustrative list.[175]

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[168]Antonio Cassese, *International Criminal Law*, (2nd edn, Oxford: Oxford University Press, 2008) p. 43.

[169] ICJ Report, Note 43, p. 56.

[170] *Quader Molla v. Government of the People's Republic of Bangladesh,* SCD, Note 101, para. 578.

[171] William Schabas, Note 110, p. 119.

[172] ICTA 1973, note 84, section 3(2)(c).

[173] Rome Statute, note 1, article 6.

[174] Iliopoulos Katherine, "A Free and Fair War Crimes Tribunal", Available at: <http://www.crimesofwar.org/commentary/bangladesh-a-free-and-fair-war-crimes-tribunal/>.

[175] J huma Sen, Note 19, p. 40.

The crime of genocide was already criminalized in 1971 through the Genocide Convention 1948.[176]Pakistan was active in negotiating the genocide convention and it ratified the convention on 12 October 1957.[177]International court of justice asserted customary nature of the prohibition of genocide in 1951.[178] It does not leave any doubt that the prohibition and punishment of genocide laid down by the convention would be applicable to the 1971 armed conflict. It is highly likely that an act of genocide will be assessed as part of two groups: one is 'national groups' with particular focus on a few segments of its population like Awami League, intellectuals and students when the survival of a group depends on a limited number of people;[179] second possible group can be the religious group as reflected in the views of the tribunal: *'with intent to destroy, in whole or in part the Hindu religious group*'.[180]The determination of whether the attacks on Biharis were genocide would depend on the approach of the tribunals, though no such cases are filed so far. The Biharis appear to have an identifiable national, ethnic or racial group both under the present Act and Rome Statute.

The Genocide Convention expressly penalizes the acts of genocide by rulers, public officials or individuals,[181] so there is no bar to prosecute an individual under the present legislation. The difficulty arises whether the defence of 'superior orders' is available in favour of the local criminals. The provision of genocide convention is silent and the Nuremberg Principles which are declaratory of general principles of international penal law excluded the 'superior orders' as a defence.[182]

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[176] Convention on the Prevention and Punishment of the Crime of Genocide, adopted by Resolution 260 (III) of the UNGA on Dec. 9, 1948 and came into force on Jan. 12, 1951, [hereafter Genocide Convention].

[177] Morten Bergsmo, Note 81, p. 507.

[178] ICJ, *Trial of Pakistani Prisoners of War* (Pakistan v. India), Note 65, at p. 12.

[179] William A. Schabas, *Genocide in International Law: the Crime of Crimes*, (2nd edn, Cambridge: Cambridge University Press, 2009), pp. 61, 71.

[180] *The Chief Prosecutor v. Md. Abdul Jabbar Engineer*, ICT-BD Case No.01 OF 2014, ICT-1, (Feb. 24, 2015), para. 78.

[181] Genocide Convention, Note 176, Article 4.

[182] Niall Macdermot, Note 41, p. 481.

4.4 War Crimes

The ICTA has two provisions for war crimes and neither of which expressly provides for persecutions of grave breaches of the Geneva Conventions of 1949.[183] It has defined war crimes mainly as violation of laws and customs of war in the territory of Bangladesh. It further included justification of military necessity as required component in case of destruction or devastation.[184] But Rome Statute before defining war crime articulated the background of commission of war crime as it stated: *'when committed as part of a plan or policy or as part of a large-scale commission of such crimes'*.[185] The definition of war crime under Rome Statute is wide and includes many aspects. Among the core four crimes listed in Rome Statute, war crime is the oldest and for the first time in the history, the statute codified war crimes committed in non-international armed conflict.[186] The statute also listed some new crimes including recruitment of child soldiers and attacks on the peacekeepers.[187]To bring charges of war crimes under the Act, the assessment of the character of armed conflict is required. Linton proposed the assessment based on the *Tadic* decision on jurisdiction, where the ICTY's appeals chamber observed that the definition of the hostilities varies depending on whether the hostilities are international or internal.[188] The *'effective control'* test developed by ICJ in *Nicaragua* case and the 'overall control' test promoted by ICTY need to be examined in defining the legal nature of the conflict.[189] Moreover, the right to self-determination of the de-facto colonized countries, the liberation movement and the participation of India should be taken into account to determine the character of the war of 1971. To illustrate it further, the fight for

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[183] The first provision is under section 3(2)(d) and the second provision is under section 3(2)(e) of ICTA 1973, Note 84.

[184] ICTA 1973, Note 84, section 3(2).

[185] Rome Statute, Note 1, article 8(1).

[186]William Schabas, Note 110, p.195.

[187] *Ibid.*

[188] Suzannah Linton, Note 23, p.246.

[189] For details see, Leo Van den hole, "Towards a Test of the International Character of an Armed Conflict: Nicaragua and Tadic", *Syracuse Journal of International Law and Commerce*, Vol. 32, Issue 2, (2005), pp. 269-287, <http://surface.syr.edu/jilc/vol32/iss2/4/ >.

the right of self-determination transforms the nationalized armed conflict into international armed conflict and the direct participation of India in the month of December 1971 as discussed in the background of the paper might have changed the nature of the armed conflict. In essence, the exercise of subject matter jurisdiction for the commission of war crimes largely depends upon the identification of the nature of an armed conflict either as international or non-international.[190]

The finding of the Supreme Court in defining war crime is quite significant, the court mentions that the incorporation of section 3 (2) (e) and (f) manifests the application of customary international humanitarian and criminal law in the domestic tribunal of Bangladesh.[191] These principles would be applicable irrespective of the status of the war. The first chapter of the paper highlighted some crucial aspects of the fact from which one can easily conclude the status of 1971 war either as non-international or internationalized armed conflict. Neither the Act nor the tribunal makes it clear. While Rome Statute lays down the provisions of penalizing war crimes under both circumstances.

5. Conclusions

Prosecuting international crimes is being considered as a legitimate concern of international community which is inevitable to maintain international peace and security. The silence of the UN Security Council has largely been criticized over a period of time. Bangladesh tries to do it by her own limited resources which is remarkable and admirable. Likewise,

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[190] For details see, Suzannah Linton, Note 23, pp. 246-268; Jean Marie Henckaerts, "The Grave Breaches as Customary International Law", *Journal of International Criminal Justice,* Vol. 7, No. 4, (2009), p. 683; Theodor Meron, "The Martin Clause, Principles of Humanity, and Dictates of Public Conscience", *American Journal of International Law,* Vol. 94, (2000), pp. 78-89; R. Ticehurst, "The Martens Clause and the Laws of Armed Conflict", *International Review of the Red Cross*, Vol. 37, Issue 317, (1997), pp. 125-134.

[191] *Quader Molla v. Government of the People's Republic of Bangladesh,* SCD, Note 101, para. 555.

international community has responsibility to cooperate in strengthening the national criminal tribunal of Bangladesh.[192]

The paper has endeavoured to explain the internationalized legal perception of the domestic criminal Act to prosecute war criminals of 1971 atrocities. It is therefore essential that the country must adhere to strict standards enunciated by the contemporary international criminal law jurisprudence.

The paper made it very clear that ICTA 1973 is purely a national law but the subject matter jurisdiction finds its origin in international criminal law which is very much clear from the name of the Act itself. The Act is entirely different from Collaborators Act 1972 because the former was designed to prosecute international crimes; on the contrary, the later Act was enacted to try offences punishable under domestic penal law.[193]The paper highlighted the comparison of scope, nature, application and subject matter of ICTA with the contemporary international standards. It found justification of penalizing international crimes committed in 1971 under customary international law in most of the cases, and in some other cases as of war crimes and crime against peace depending on the characterization of armed conflict either as non-international or international. The inclusion of 'any other crimes under international law' as a subject matter of the tribunal makes the proceedings vague and ambiguous which suffers from the necessity and specificity requirement. The controversial procedural aspect of the Act has been largely criticized nationally and internationally which is beyond the scope of the paper. The wording of the legislation and the decisions of tribunal suggest that the tribunal has extremely extensive powers of prosecuting crimes in comparison with that of Rome Statute. One of the exceptional and controversial features of the Act is that it approves both retrospective and prospective application. Lastly, it can be concluded that as subject matter jurisdiction, the ICTA 1973 meets the basic standards of international criminal

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[192] Morten Bergsmo, Note 85, p. 508; Carsten Stahn , "Libya, the International Criminal Court and Complementarily: A Test for 'Shared Responsibility", *Journal of International Criminal Justice,* Vol. 10, No. 2, 2012, pp. 325-349; Lijun Yang, Note 2.

[193] *The Chief Prosecutor v. Md. Abdul Jabbar Engineer,* Note 180, para. 11.

law. However, it is yet to be seen how Bangladesh's tribunal defines the legal status of the 1971 armed conflict in future.