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The International Legal Definition of the 1971 Armed Conflict in Bangladesh

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The International Legal Definition of the 1971 Armed Conflict in Bangladesh

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Keywords

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Abstract

This article defines the nature of the 1971 war in Bangladesh (formerly called East Pakistan) as an international armed conflict (IAC), which is essential to phase out the confusion surrounding the legal definition of the conflict and also to determine the applicable laws during the conflict and post-conflict penal prosecutions. It mainly argues that the 1971 conflict should be interpreted as a war of liberation against the *de-facto* colonization of Pakistan. It reaches this conclusion through briefly focusing upon four pertinent questions in four chapters: (1) is there any international legal definition of the war of liberation; (2) were not the ‘people’ of Bangladesh entitled to the right to independence under the principle of self-determination; (3) didn’t the UDI establish Bangladesh an independent state and trigger the application of the whole corpus of *jus in bello*; (4) had India’s assistance in the liberation war overshadowed the character of the conflict?

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1. Introduction

There has always been a striking contradiction between the right of ‘people’ to independence under the principle of self-determination and the right of a state to its territorial integrity under the principle of respect for sovereignty. Indeed, self-determination and territorial integrity are both fundamental norms in the contemporary international legal order.¹ Self-determination has been defined as a norm of *jus cogens* and an obligation *erga omnes* in favour of protecting and defending the right of the oppressed ‘people’.² While territorial integrity is interpreted to include the concepts of sovereignty, non-intervention and the prohibition on the use of force to maintain stability and

¹ John Dugard, “Conflicting Values and Competing Rights: Self-determination and Territorial Integrity” in *Collected Course of the Hague Academy of International Law*, The Hague Academy of International Law, Volume 357 (2013) p. 75.

² Matthew Saul, “The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?” *11 Human Rights Law Review* (2011) pp. 609-644; Matthias Vanhullebusch, “Wars of National Liberation and Non-International Armed Conflicts” *12 ISIL Year Book of International Humanitarian and Refugee Law* (2012-2013) p. 36; James Summers, “The Status of Self-Determination in International Law: A Question of Legal Significance or Political Importance” *14 Finnish Yearbook of International Law* (2003) p. 283.

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4 predictability in the international legal and political order.³ Both the norms must be seen as a norm
5 of equal rank. John Dugard argued that most states would probably rank territorial integrity higher
6 in terms of the hierarchical normativity.⁴ In reality, the sovereignty-based arguments have not been
7 effective enough to prevent the ‘people’ in many states from engaging in wars of national liberation
8 in exercising their right to self-determination and independence.⁵ Though the room left for self-
9 determination in the process of attaining independence is very slight beyond the decolonization.⁶
10 However, the emergence of Bangladesh as a 136th nation, which was called East Pakistan prior to
11 its independence, after nine months of the liberation war, was the classic example of a successful
12 exercise of self-determination in a postcolonial context.⁷ The struggle for independence that began
13 with its unilateral declaration on March 26, 1971 and ended with the physical liberation of the
14 Pakistani occupied military from the territory of Bangladesh on December 16, 1971. However, the
15 road to freedom for the ‘people’ of Bangladesh was arduous and torturous, smeared with blood,
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34 ³ Christian Marxsen, “Territorial Integrity in International Law: Its Concepts and Implications for Crimea” 75 *Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht (Heidelberg Journal of International Law)* (2015)
35 pp. 7-26; Samuel K N Blay, “Territorial Integrity and Political Independence” in R. Wolfrum (eds.), *Max Planck*
36 *Encyclopedia of Public International Law* (Oxford University Press, 2013) p.1; John Dugard, *The Secession of States*
37 *and Their Recognition in the Wake of Kosovo* (Brill/Nijhoff: Leiden, 2013) p. 122; Oji Umzurike, *International Law*
38 *and Colonialism in Africa* (Nwamife Publishers, Enugu, Nigeria, 1979) p. 125. Likewise, James Crawford argued that
39 a state is entitled to protect itself against any challenges to its territorial integrity, see, James Crawford, “Report by
40 James Crawford: Response to Experts Reports of the Amicus Curiae” in A. F Bayefsky (eds.), *Self-Determination in*
41 *International Law: Quebec and Lessons Learned* (Kluwer Law International, The Hague, 2000) p. 158.
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44 ⁴ John Dugard (n 1). This issue has attracted considerable attention in the existing literature, e.g., Joshua Castellino,
45 “Territorial Integrity and the Right to Self-Determination: An Examination of the Conceptual Tools” 33 *Brooklyn*
46 *Journal of International Law* (2008) pp. 503-568; Michael M. Gunter, “Self-Determination or Territorial Integrity:
47 The United Nations in Confusion” 141 *World Affairs* (1979) pp. 203-216. M. Koskenniemi without looking at the
48 issue from hierarchical approach, he addressed the conflict from community and sovereignty based theories, see,
49 Martti Koskenniemi, *From Apology to Utopia: The Structure of the International Legal Argument* (Cambridge
50 University Press, 2006) p. 60. However, in every case of war of liberation one of these principles will prevail over the
51 other, see Antonio Cassese, *Self-Determination of Peoples: A Legal Appraisal* (Cambridge University Press,
52 Cambridge, 1995) pp. 333-334, where he used the term secession instead of war of liberation, though these two
53 concepts do not always complement each other.
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55 ⁵ Allan Rosas, “Wars of National Liberation — International or Non-International Armed conflicts?” 4 *Instant*
56 *Research on Peace and Violence* (1974) pp. 31-37.
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58 ⁶ Rupert Emerson, “Self-Determination” 65 *American Journal of International Law* (1971) pp. 459 at 465.

59 ⁷ Srinath Raghavan, *1971: A Global History of the Creation of Bangladesh* (Harvard University Press, 2013); Anthony
60 Mascarenhas, *Bangladesh: A Legacy of Blood* (1986).
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4 toil and sacrifices, which has overshadowed all other struggles for independence in contemporary
5 history.⁸
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8 While the Bangladesh liberation war itself is a story of the sacrifice of millions of lives and the
9 valour for the Bengali nation in the face of a vicious and brutal attack on a helpless people,
10 ironically, the national triumph of the Bangladesh liberation war has not been properly portrayed
11 in the existing literature.⁹ James Crawford dismisses Bangladesh as a successful example of
12 secession which was achieved as a result of foreign (Indian) military intervention in special
13 circumstances.¹⁰ The International Commission of Jurist (ICJ) also considered the conflict as an
14 internal affair of Pakistan and maintained that the internal conflict transformed into an IAC
15 between India and Pakistan on December 1971.¹¹ It utterly denies the legitimacy of the national
16 liberation war of Bangladesh. It is also argued that it was India's military force, not the Bangladesh
17 Freedom Fighters, which triumphed over Pakistan's armed forces,¹² and the emergence of
18 Bangladesh was a victory for the use of force by India.¹³ Instead of addressing the atrocities
19 committed by Pakistan in the territory of Bangladesh, the United Nation focused on the
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34 ⁸ *The Chief Prosecutor v Professor Ghulam Azam*, International Crimes Tribunal of Bangladesh (ICT-BD) Case No.
35 06 of 2011, ICT-1 Judgment (July 15, 2013) para. 11; Niall MacDermot, Q.C., "Crimes against Humanity in
36 Bangladesh" 7 *International Lawyer* (1973) p. 479.

37 ⁹ Though the spirit of the liberation war is at the Centre of the Bangladeshi nationalism, in Pakistan the war is elided.
38 Instead of defining the 1971 conflict as a war of liberation, unfortunately, the so-called name that the war received is
39 *third Indo-Pakistan war*. See, Special Issue: "The Indo-Pakistan War", *Pakistaniaat: A Journal of Pakistan Studies*,
40 2:3 (2010); see also, Richard Sisson and Leo E. Rose, *War and Secession: Pakistan, India and the Creation of*
41 *Bangladesh* (Berkeley and Los Angeles: University of California Press, 1990).

42 ¹⁰ James Crawford, "State Practice and International Law in Relation to Secession" 69 *British Yearbook of*
43 *International Law*, (1998) p. 114; *The Creation of States in International Law* (Oxford: Clarendon Press, 1979).

44 ¹¹ International Commission of Jurist (ICJ), *The Events in East Pakistan, 1971: A Legal Study* (Geneva, 1972)
45 [https://www.icj.org/wp-content/uploads/1972/06/Bangladesh-events-East-Pakistan-1971-thematic-report-1972-](https://www.icj.org/wp-content/uploads/1972/06/Bangladesh-events-East-Pakistan-1971-thematic-report-1972-eng.pdf)
46 [eng.pdf](https://www.icj.org/wp-content/uploads/1972/06/Bangladesh-events-East-Pakistan-1971-thematic-report-1972-eng.pdf). It is to be mentioned here that the liberation war began in late March 1971 between the liberation movement
47 of Bangladesh and the military of Pakistan. India directly involved in the conflict through a pre-emptive attack by
48 Pakistani warplanes on December 3, 1971. Subsequently, India recognized the independence of Bangladesh and the
49 war ended on 16 December 1971 with the surrender of all Pakistani military personnel present in Bangladesh before
50 the Joint Indian and Bangladeshi forces in Dhaka. The *Indo-Pak War* from December 3-16, 1971 did not affect the
51 nature of the liberation war, rather it helped Bangladesh liberate the occupied army from its territory, see, John
52 Dugard, "State Practice" in: *Collected Course of the Hague Academy of International Law*, The Hague Academy of
53 International Law, Volume 357 (2013) P. 147.

54 ¹² Willem Van Schendel, "A War within a War: Mizo rebels and the Bangladesh liberation struggle" 50 *Modern Asian*
55 *Studies* (2016) p. 77.

56 ¹³ Joshua Castellino, "The secession of Bangladesh: Setting New Standards in International Law" 7 *Asian Yearbook*
57 *of International Law* (2000) p. 83.
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4 international repercussions of India's assistance or intervention or use of force.¹⁴ Arguably, it was
5 a deliberate effort to validate the atrocities of the Pakistan authorities during 1971 and also to
6 represent Pakistan as the ultimate victim of the conflict. This creates confusion and also raises
7 some pressing legal questions regarding the legal nature of the conflict. This article explores that
8 the legal definition of the 1971 war depends upon the clarification of several pertinent questions.
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11 First, could the 1971 conflict be defined as a war of liberation under international law? Second,
12 didn't the 'people' of Bangladesh fight for their legitimate right to self-determination? This
13 question gives rise to two more questions: (a) what was the international legal status of the right
14 to self-determination in 1971 and how that could be linked with characterizing the war; and (b)
15 whether the right to self-determination is applied beyond the process of decolonization? Third,
16 didn't the proclamation of independence establish Bangladesh an independent state on the day it
17 was made (26th March/10th April 1971) and trigger the application of the laws for IAC? Fourth,
18 had India's direct and indirect assistance or intervention in the liberation war transformed the legal
19 definition of the conflict?
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22 All these factors taken together may help in defining the nature of the 1971 armed conflict in
23 Bangladesh. The normative framework of this article mainly argues that the 1971 war in
24 Bangladesh was an IAC which should be interpreted to include liberation war against the neo-
25 colonialism of Pakistan. One can argue that why the present study is necessary after 48 years of
26 the independence of Bangladesh? In fact, it has been necessitated for two primary reasons.
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29 Firstly, the study is necessary to have a clearly defined narratives about the legal definition of
30 the liberation war of Bangladesh, which is inextricably linked to establish that Bangladesh became
31 victim of international crimes and also to uncover how the Bangladesh liberation movement waged
32 a war of resistance against an aggressor in due exercise of the right to self-determination.
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49 ¹⁴ From 5-21 December, 1971 both the United Nation Security Council (UNSC) and United Nation General Assembly
50 (UNGA) discussed the conflict and UNSC failed to adopt several resolutions due to Soviet vetoes. Later the issue was
51 referred before the UNGA and it passed resolution 2793 (XXVI) of 1971, which effectively demanded that India
52 withdraw from East-Pakistan. At the UN, India justified its position on the ground of self-defense against airfield
53 attacks and refugee aggression. India explicitly accused Pakistan of genocide and blamed the UN for not taking actions
54 for the implementation of the Genocide Convention, human rights and self-determination of the 'people' of
55 Bangladesh. For further study, see, Andreas S. Kolb, *The UN Security Council Members' Responsibility to Protect: A*
56 *Legal Analysis* (Max-Planck- Heidelberg: Springer, 2018) 262-65; International Commission of Jurist (ICJ) (n 10) pp.
57 26-27; International Commission on Intervention and State Sovereignty, *The Responsibility to Protect- Research,*
58 *Bibliography, Background: Supplementary Volume to the Report of the International Commission on Intervention and*
59 *State Sovereignty* (Ottawa: International Development Research Centre, 2001) pp. 55-67.
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4 Narratives of the past are also crucial for creating an identity as a nation and also for laying claim
5 to particular rights and notions. A nation which was born out of a bloody liberation war has an
6 extreme urge to clarify the legal nature of the conflict out of which it has emerged.
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10 Secondly, the study of the qualification of the 1971 armed conflict as international or non-
11 international is necessary to specify the applicable humanitarian laws during the conflict. Most
12 importantly, it helps parties determine the ways to prosecute the perpetrators of the war.
13 Bangladesh as a first developing country enacted domestic legislation to prosecute war criminals
14 of the 1971 war.¹⁵ Two national tribunals were established and 35 judgments have been delivered
15 till date, 37 cases are pending and nearly 500 cases are under investigation.¹⁶ Unfortunately, the
16 prosecution did not frame any independent charge for the commission of 'war crimes', though the
17 ICT Act of 1973 explicitly incorporates it within the subject matter jurisdiction of the tribunal.¹⁷
18 This is perhaps because of the complexity in establishing such a plea, which largely depends upon
19 the characterization of war.
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22 This article explores three likely avenues based on which the conflict might be defined as an
23 IAC. It strongly argues that India's assistance was a response to the call for help from a newly
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35 ¹⁵ After the inaction of UN Security Council, the government of newly independent Bangladesh immediately after
36 seceding from Pakistan enacted International War Crimes (Tribunals) Act 1973 to prosecute the perpetrators of the
37 most grievous and heinous crimes committed in 1971 atrocities, see, Ved P. Nanda, "A Critique of the United Nations
38 Inaction in The Bangladesh Crisis", 49 *Denver Law Journal* (1973) p. 53. However no Tribunal was set up and no
39 trial took place under the Act until the Awami government established the International Criminal Tribunal (ICT-BD)
40 on March 25, 2010. For further study, see, Suzannah Linton, "Completing the Circle: Accountability for the Crimes
41 of the 1971 Bangladesh War of Liberation" 21 *Criminal Law Forum*, (2010) pp. 191-311 and "Dealing with the
42 Legacies of the Past: Thoughts on the Way Forward for Bangladesh" in Mofidul Hoque (eds.), *Bangladesh Genocide
43 1971 and the Quest for Justice* (Liberation War Museum, Dhaka, Bangladesh, 2009) pp. 155-162; M Rafiqul Islam,
44 "National Trial of International Crimes in Bangladesh: Its Significance in International Criminal Law" and "Adoption
45 of the International Crimes (Tribunals) Act 1973: Its History and Application, Non-retroactivity and Amendments" in
46 Mofidul Haque & Umme Wara (eds.), *From Genocide to Justice: National and Global Perspective* (Liberation War
47 Museum, Dhaka, Bangladesh, 2014) pp. 51-70 and 71-92; Md. Abu Saleh, "The Compatibility of International Crimes
48 (Tribunals) Act 1973 with Rome Statute of the International Criminal Court" *The ICRC 4th National Student
49 Conference on International Humanitarian Law, Gujrat, India* (20 February 2015).

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52 ¹⁶ Tapas Kanti Baul, "The Trial of 1971 Genocide: Reflection on ICT-BD" *Law and Our rights Page, The Daily Star*
53 (March 26, 2019) <https://www.thedailystar.net/law-our-rights/law-vision/news/the-trial-1971-genocide-reflection-ictbd-1720285>.

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56 ¹⁷ The ICT Act of 1973 has two provisions [section 3(2) (d) & (e)] for war crimes and neither of which expressly
57 provides for persecutions of grave breaches of the Geneva Conventions of 1949. It has defined war crimes mainly as
58 a violation of laws and customs of war in the territory of Bangladesh. See, Md. Abu Saleh, "The Prosecution of 'War
59 Crimes' under the International Crimes (Tribunal) Act 1973: Contextualizing from the Jurisprudence of International
60 Tribunals" 3rd *International Conference on Genocide and Mass Violence, University of Dhaka* (24-25 March 2019).
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4 independent country against such an aggressor that grossly violated human rights of the people
5 and committed war crimes in the territory of Bangladesh. And India might have some other
6 political and economic interests but that did not play any decisive role in defining the nature of the
7 conflict.
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10 11 12 13 **2. Defining the 1971 War of Liberation in Bangladesh as an IAC**

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15 What then is a liberation war? War of liberation is defined as ‘the armed struggle waged by a
16 people through its liberation movement against the established government to reach self-
17 determination.’¹⁸ The national liberation movements and governments have opposing views of
18 such wars. The first party to the conflict views it as just war and indeed a legitimate exercise of a
19 right to revolution waged to achieve the right to self-determination.¹⁹ On the other hand, the
20 government considers challenges to their authority as acts of terrorists and criminals with the
21 motive of destroying public order and the territorial integrity and therefore attempts to deal with
22 such violence under national criminal or martial law.²⁰ However, many liberation movements
23 through armed struggle led to the independence of their territories.²¹
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32 The conclusion of Additional Protocol 1 of 1977 to the Geneva Conventions of 1949 transformed
33 the liberation movements into the type of IAC. Article 1(4) of Protocol 1 provides:

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35 The situations referred to in the preceding paragraph include armed conflicts in which peoples
36 are fighting against colonial domination and alien occupation and against racist régimes in the
37 exercise of their right of self-determination, as enshrined in the Charter of the United Nations
38 and the Declaration on Principles of International Law concerning Friendly Relations and Co-
39 operation among States in accordance with the Charter of the United Nations.
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44 Thus this provision brings liberation war into the scope of IAC. The drafting of this Article was
45 highly contentious and the scope of application was also debated.²² The ICRC commentary
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49 ¹⁸ Natalino Ronzitti, “Resort to Force in Wars of National Liberation” in Antonio Cassese (eds.), *Current Problems*
50 *of International Law* (1975) pp. 319-353.

51 ¹⁹ Noelle Higgins, “International Law and Wars of National Liberation” *Oxford Bibliographies in International*
52 *Relations* (2014).

53 ²⁰ *Ibid.*

54 ²¹ The independence of Angola and Namibia is the result of active armed struggles which were viewed as wars of
55 national liberation movements, see, Konstantinos Mastorodimos, “The Character of the Conflict in Gaza: Another
56 Argument towards Abolishing the Distinction between International and Non-international Armed Conflicts” *12*
57 *International Community Law Review* (2010) p. 451.

58 ²² Claude Pilloud et al., *Commentary to the Protocol Additional to the Geneva Conventions of 12 August 1949, and*
59 *Relating to the Protection of Victims of International Armed Conflicts (Protocol 1) 8 June 1977* (1987).
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4 clarified that the word ‘include’ should be interpreted to encompass only conflicts against colonial
5 domination, alien occupation or racist regime within the definition of IAC.²³ Allan Rosas
6 interpreted that there should be an obvious ethnical, cultural and geographical distance between
7 the rulers and the ruled.²⁴
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11 Article 96(3) of the Additional Protocol 1 also provides a mechanism of accession whereby
12 national liberation movements can agree to apply and be bound by the protocol 1 through a
13 unilateral declaration. Upon the acceptance of the Protocol, the liberation authority will have the
14 same rights and obligations as state parties to the Conventions and the Protocol. These liberation
15 movements are considered to be states for the application of IHL and Geneva Conventions, though
16 they may lack several characteristics of statehood.²⁵ The legislation of Additional Protocol 1 is a
17 formal recognition of the legitimate struggles of national liberation movements in international
18 law.²⁶
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26 The adoption of additional protocol 1 has changed the traditional understanding of the
27 international armed conflict. Depending upon this protocol, it can be argued that the Bangladesh
28 liberation war was an IAC. But there are three issues to be resolved before characterizing
29 Bangladesh liberation war as an international war between the liberation movement and the
30 Pakistani military regime. First, how to justify the liberation movement of 1971 in East-Pakistan
31 against the colonial, alien or racist regime as enumerated in the AP 1? Second, whether the protocol
32 of 1977 could be applied retrospectively to the Bangladesh liberation war of 1971? Third, did the
33 Bangladesh Freedom Fighters (BFF) have legal personality to be eligible for the application of the
34 rules of international armed conflict?
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51 ²³ *Ibid.*

52 ²⁴ Allan Rosas (n 5) p. 33.

53 ²⁵ The existing international law does not require the satisfaction of the four elements of a state to legitimize the wars
54 on national liberation. It was argued that territorial control could be a defining factor of the liberation war. Neither
55 treaty laws nor customs support such a conclusion. L.C Green argues that no groups which have been recognized as a
56 national liberation movement have been in such control of any part of the national territory with the exception of
57 Angola, see L.C Green, *the Contemporary Law of Armed Conflict* (3rd edition, 2008) p. 83.

58 ²⁶ Josalee S. Deinla, “International Law and Wars of National Liberation against Neo-Colonialism” *88 Philippine Law*
59 *Journal* (2014) p. 25.
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2.1 The Special Colonial Feature of East Pakistan (Bangladesh)

The definition of IAC under AP 1 includes liberation war against colonial domination, alien occupation or racist regime.²⁷ Colonialism has been traditionally defined as a political-economic relationship between a dominant Western nation and a subjugated non-Western people.²⁸ How did the East-West Pakistan relationship from '1947-1971' fit this definition of colonialism? Or could the relationship be described as 'neo-colonial' special situation?

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.²⁹ The East and West wings of Pakistan were separated by 1600 kilometers of alien Indian territory and historically these two wings had a separate and distinct identity. While the East wing (East Pakistan) being associated with Pakistan became independent from the British colonial rule, the subsequent Pakistan regime infringed the terms of association by forcefully denying the autonomous status of East Pakistan.³⁰ All the expectation of the people of East Pakistan was frustrated by the minority ruling elite of West Pakistan.³¹ The Bengalis 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.³² East Pakistan was the major market and captive one for the West, as the producer of primary commodities to feed the industries of the West, as like India provided Britain with much of the liquidity and market for its industrialization.³³ All foreign exchange earned by the East had to be surrendered to the West and in the first two decades of the independence, such net transfer of resources was officially estimated at one billion dollars.³⁴ This figure portrays the level of economic disparity between two wings which was an intolerable

²⁷ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)* 8 June 1977, 1125 UNTS 3, art 1(4).

²⁸ Ved P. Nanda, "Self-Determination in International law: The Tragic Tale of Two Cities-Islamabad (West Pakistan) and Dacca (East Pakistan)" 66 *American Journal of International Law* (1972) p. 321.

²⁹ *The Chief Prosecutor v Motiur Rahman Nizami*, International Crimes Tribunal of Bangladesh (ICT-BD) Case No. 03 of 2011, ICT-1 Judgment (Oct.29, 2014) para. 9.

³⁰ M Rafiqul Islam, "Self-Determination in a Non-colonial Situation: The Bangladesh experience" 14 *The Rajshahi University Studies* (1986) p. 294. It is to be mentioned that East-Pakistan associated with Pakistan following a referendum that took place in 1946.

³¹ *Ibid.*

³² W. J Brands, "Pakistan's Disintegration" 27 *World Today* (1971) p. 319; see also, Jagmohan Meher, "Dynamics of Pakistan's Disintegration: The Case of East Pakistan 1947-1971" 71 *India Quarterly* (2015) pp. 300-317.

³³ Ved P. Nanda (n 28) p.330.

³⁴ Bill Gourgey, "Bangladesh's Leader: Sheikh Mujib" 23 *Venture, London* (1971) p.13.

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4 structure of injustice.³⁵ The West became more dominant and rich at the cost of the East as the
5 colonial master. The *per capita* income of West was 100 percent greater than the East.³⁶ Almost
6 80 percent of Pakistan's budget was spent in the West, while the Bengalis of the East constituted
7 the majority of the population of united Pakistan.³⁷ Thus the Awami League, the largest political
8 party in East Pakistan under the leadership of Sheikh Mujibur Rahman, adopted the six-point
9 program in 1966 in response to the asserted neo-colonial status of the East.³⁸

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11 In addition, the long-cherished culture of the Bengalis was threatened by the federal government
12 of Pakistan just as they felt during the British regime.³⁹ The cultural imperialism of the West over
13 the East approximated all the parameters of racism. The military regime of Pakistan functioned as
14 a vehicle to hold the East as a colony by force. The 1970 general election in Pakistan gave the
15 Awami League an overwhelming endorsement of its six-point demands. M.A Bhashani, a Bengali
16 leader called the result of the election a referendum for a sovereign and independent Bangladesh.⁴⁰
17 The Pakistani military regime led by Yahya Khan was determined to prevent Bengalis from
18 attaining state power and Yahya's postponement of the convening of the National Assembly was
19 greeted with mass demonstration and slogans of *Joi Bangla* (Long live independent Bengal).⁴¹ In
20 late February 1971, Yahya Khan was reported to have stated: 'kill three million of them, and the
21 rest will eat out of our hands'.⁴² General Niazi, the commander of the Pakistani military force

35 A. H. M. Nuruddin Chowdhury, "Economic Policy and Industrial Growth in Pakistan: A Review" *10 The Pakistan Development Review* (1970) pp. 264, 268.

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

37 Rasheduzzaman, "The Awami League in the Political Development of Pakistan" *10 Asian Survey* (1970) pp. 574, 583.

38 *Ibid.*, it is to be mentioned that Awami League's six-point manifesto aimed at obtaining economic and political autonomy for the Bengali people, see, R.V Jackson, *South Asian Crisis: India, Pakistan and Bangladesh: A Political and Historical Analysis of the 1971 War* (New York, Praeger, 1975) p. 21. Sheikh Mujib had urged the Pakistani regime to negotiate and find a solution and he stated that the manifesto for autonomy is not directed against the people of West Pakistan, but the central leadership denounced the East Pakistani demands as a conspiracy to destroy Pakistan, see, A. Leivan, *Pakistan: A Hard Country* (London, Allen Lane, 2011) p. 59.

39 To give one example, Bangla language (the language of the majority) is one of the factors that gave the people of the East a cultural solidarity and yet the West politicians attempted to make Urdu (the language of minority West urban elites) the only official language of Pakistan. It generated profound concern about cultural, linguistic and ethnic identity among the people of the East and it culminated into a five-year-long language movement and it led to the loss of many innocent lives in 1952, see, Hasan Zaheer, *The Separation of East Pakistan: The Rise and Realization of Bengali Muslim Nationalism* (Oxford University Press, 1994) pp. 20-25.

40 Jai Bangla Jai, *Far Eastern Economic Review*, January 16, 1971 pp. 20-21, quoted from Ved P Nanda (n 28).

41 Ved P Nanda (n 28) p. 331.

42 Sayed Anwar Hussain, "Genocide in Bangladesh, 1971: Fixing Responsibility" in Mofidul Hoque (eds.), *Bangladesh Genocide 1971 and the Quest for Justice* (Bangladesh War Museum, Dhaka, Bangladesh, 2009) p. 45.

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4 considered East Pakistan 'a low laying of low lying people', and he considered Hindues as Jews to
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6 Nazis, scum and vermin that should best be exterminated.⁴³

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8 Therefore, with a view to denying the democratic right of 75 million people of East Pakistan, the
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10 Pakistani military regime struck East Pakistan on the night of March 25, 1971 without warning
11 and committed atrocities unparalleled in the history using mortars, tanks, rockets, bombs and
12 machine guns against the civilian population including student hostels of the universities.⁴⁴ While
13 launching the military operation against the sleeping Bengalis in the name of the operation
14 searchlight, the Pakistani authority directed their troops saying 'we want land, not the men'.⁴⁵ On
15 March 26, 1971, Sheikh Mujibur Rahman, the leader of the elected Pakistan majority party
16 declared Bangladesh (formerly called East Pakistan) as an independent state calling for liberation
17 war against the occupied Pakistani regime.⁴⁶ On April 4, 1971, the Bangladesh liberation force
18 was formed under the command of Col M. A. G Osmani.⁴⁷ The people of Bangladesh fought
19 valiantly with the support of the few civilized and friendly allies and liberated Bangladesh from
20 foreign occupation on December 16, 1971. If blood is the price of freedom than Bangladesh has
21 overpaid.⁴⁸ Bangladesh won the liberation war in exchange of losing three million lives and *izzat*
22 of two hundred and thousands of women.⁴⁹ Hundreds and thousands of houses were burnt into
23 ashes and 10 million people were forced to become refugee in the neighboring state India and
24 another 65 million people were kept prisoners in their own home in their own motherland by the
25 foreign occupation.⁵⁰

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39 All the above-mentioned factors strongly support that the people of East Pakistan were subjected
40 to alien subjugation, domination, and exploitation which fulfilled all the criteria of the colonial
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45 ⁴³ *Ibid.*

46 ⁴⁴ *Ibid.*

47 ⁴⁵ M. Harun-Ar-Rashid, "Bangladesh Genocide and Trial of the Perpetrators" in Mofidul Hoque (eds.), *Bangladesh Genocide 1971 and the Quest for Justice* (Liberation War Museum, Dhaka, Bangladesh, 2009) p. 80.

48 ⁴⁶ The Proclamation of Independence, Seventh Schedule of the Constitution of the People's Republic of Bangladesh, Mujibnagar, Bangladesh, 10 April 1971.

49 ⁴⁷ Bina D'Costa, "War Crimes, Justice and the Politics of Memory" in Mofidul Hoque and Umme Wara (eds.), *Bangladesh Genocide and the Issue of Justice* (Liberation War Museum, Dhaka, Bangladesh, 2013) p.135.

50 ⁴⁸ M. Harun-Ar-Rashid (n 45) p. 80.

51 ⁴⁹ Belal Sarkar, *Uccho Maddomik Itihash* (Dhaka: Hasan Books, 1998) p. 198. Here *Izzat* means dignity and chastity of women. The Pakistani military committed *izzat* by raping Bengali women. For details see, Rubaiyat Hossain, "Trauma of the Women, Trauma of the Nation: A Feminist Discourse on *Izzat*" in Mofidul Hoque (eds.), *Bangladesh Genocide 1971 and the Quest for Justice* (Liberation War Museum, Dhaka, Bangladesh, 2009) pp. 98-112.

52 ⁵⁰ M. Harun-Ar-Rashid (n 45) p. 80.

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4 situation. Hence the military regime of Pakistan for all practical purposes was completely alien to
5 the East and they very well approached the boundary of racism from every count. It will not be an
6 exaggeration if anyone compares the West regime of 1971 with Hitler's Nazi regime.
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10 ***2.2 The Applicability of AP 1 of 1977 to the Bangladesh Liberation War of 1971***

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12 In principle, it is difficult to establish the application of the treaty provision retrospectively to the
13 Bangladesh liberation war to determine the nature of the 1971 armed conflict. While it is argued
14 that the provisions related to the war of liberations under Additional protocol 1 are the reflection
15 of the customary international norms, which evolved during 1960s-70s.⁵¹ The state practice has
16 been reflected through several resolutions passed by the UN before the adoption of AP 1 and it is
17 also based upon the notion of the right of the 'people' concerned to independence, even when, the
18 implementation of this right has not been sanctioned by the international community.
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26 The UN adopted a number of resolutions with large majorities characterizing the wars of national
27 liberation as international armed conflicts to be governed by the Geneva Conventions. In 1968, the
28 UN General Assembly adopted a resolution 2444 of XXIII on 19 December 1968, which states:
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31 Further confirms the decision of the Teheran Conference to recognize the right of freedom
32 fighters in southern Africa and in colonial Territories, when captured, to be treated as prisoners
33 of War under the Geneva Conventions of 1949.⁵²
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37 This was reiterated in a number of other UN resolutions in the same and following years. The UN
38 resolution 2621 (XXV) of October 12, 1970, granted prisoner-of-war treatment under the 3rd
39 Geneva Convention for the freedom fighters under detention.⁵³ Moreover, this resolution
40 recognized the inherent right to struggle against alien domination. The UN resolutions 2707
41 (XXV) of 14 December 1970, 2795 (XXVI) and 2796 (XXVI) of 10 December 1971 called for
42 the application of the Geneva Convention related to the protection of civilian persons during the
43 war of liberation. The UN resolutions 2548 (XXIV) of 11 December 1969 and 2708 (XXV) of 14
44 December 1970 affirmed that the practice of using mercenaries against national liberation
45 movements constitutes a criminal act. Furthermore, the UN resolutions 2674 (XXV) of 9
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55 ⁵¹ Amanda Alexander, "International Humanitarian Law, Post-colonialism and the 1977 Geneva Protocol 1" *17*
56 *Melbourne Journal of International Law* (2016) pp. 1-36; Rene Kosirnik, "The 1977 Protocols: A Landmark in the
57 development of International Humanitarian Law" *37 International Review of Red-cross* (1997) pp. 483-505.

58 ⁵² UNGA Res 2444 (1968).

59 ⁵³ UNGR Res 2621 (1970).
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4 December 1970 and 2852 (XXVI) of 20 December 1971 pointed out the need for the increased
5 protection of persons struggling for freedom against colonial and alien domination and a racist
6 regime which was echoed in AP 1. One of the most important resolutions in the matter of liberation
7 war came in December 1973, the UN adopted resolution 3103 (XXVIII) on Basic Principles of the
8 Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist
9 Regimes stating that the 3rd and 4th Geneva Conventions of 1949 should apply to combatants
10 struggling the wars of liberation. The Resolution recognized the legitimacy of the liberation war
11 in the exercise of the right to self-determination, alleging that any attempt to suppress such fight
12 is not only incompatible with the UN Charter and other relevant international instruments but also
13 constitutes a threat to international peace and security.⁵⁴ Though this resolution came after the end
14 of the war, nevertheless, it was in continuation of the evolution of the customary norms defining
15 the status of the liberation war.
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18 Relying on this resolution, the ICRC commentary commented that the war of liberation was
19 regarded as IAC even prior to the adoption of AP 1.⁵⁵ While the AP 1 was the result of majority
20 vote, culminated from the diplomatic conference that began in 1974. The fact that the provision of
21 the protocol relating to the war of liberation has been opposed by just one country is also an
22 indication of the state practice at the global level to consider the liberation war as international
23 armed conflict under customary international law.⁵⁶ The Egyptian delegate, on behalf of the third
24 world countries, submitted how international practice on the bilateral, regional and universal levels
25 had established beyond doubt the international character of wars of national liberation.⁵⁷ Greece
26 and Australia also submitted in similar terms. These submissions had not been opposed by any
27 state.⁵⁸ Similarly, the adoption of resolutions suggests that states applied the humanitarian
28 protections of the conventions without ratifying the type of conflict, thus pointing to the possible
29 evolution of an *opinion juris*.⁵⁹ Besides, during the 1971 ICRC conference, most of the experts of
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52 ⁵⁴ UNGA Res 3103 (1973).

53 ⁵⁵ Claude Pilloud et al. (n 55); Josalee S. Deinla (n 26) p.13.

54 ⁵⁶ Professor Cassese mentions that when the provision of the liberation war was put to vote in 1977, 87 voted in favour
55 and 1 against and that was Israel, see, Antonio Cassese (n 4) p. 278.

56 ⁵⁷ Heather A Wilson, *International Law and Use of Force by National Liberation Movement* (Clarendon, 1998) p.
57 128.

58 ⁵⁸ *Ibid.*

59 ⁵⁹ Suzannah Linton (n 15) p. 252.
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4 Commission II considered that the wars of liberations were international armed conflict.⁶⁰ It is
5 debated whether the UN resolutions suffice to form the state practice and *opinio juris* necessary to
6 prove the existence of the customary rule in 1971. The similar question was posted before the ICJ
7 in *Nicaragua case*.⁶¹ The court stated:

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11 General Assembly resolutions, even if they are not binding, may sometimes have normative
12 value. They can, in certain circumstances, provide evidence important for establishing the
13 existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a
14 given General Assembly resolution, it is necessary to look at its content and the conditions of
15 its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative
16 character.⁶²

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

27 28 29 30 31 32 33 34 35 **2.3 Legal Personality of the Bangladesh Freedom Fighters (BFF) under International Law**

36 The legal personality of the parties to a conflict is essential for the applicability of the laws relating
37 to international armed conflict. It is argued that the concerned parties must be subject of
38 international law solely for the application of the laws of armed conflict. In this regard, reference
39 can be made to Article 4 of the AP 1, which states:
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46 ⁶⁰ ICRC, *Protection of Victims of Non-International Armed Conflicts, Document V submitted to the 1971 Conference*
47 *of Government Experts* (1971) p. 31; Allan Rosas (n 5) p. 35.

48 ⁶¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits)
49 [1986] International Court of Justice (ICJ) [hereinafter *Nicaragua Case*].

50 ⁶² *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (1996) International Court of Justice (ICJ)
51 pp. 254-255, para. 70.

52 ⁶³ International Law Association (ILA), *Statement of Principles Applicable to the Formation of General Customary*
53 *International Law* (2000) p. 19, quoted from Stephen Allen, "The Chagos Advisory Opinion and the Decolonization
54 of Mauritius" *23 American Society of International Law Insight* (2019)
55 <https://www.asil.org/insights/volume/23/issue/2/chagos-advisory-opinion-and-decolonization-mauritius>, it was stated
56 that the act of voting and accompanying statements may qualify as state practice.
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58 ⁶⁴ M Rafiqul Islam, *National Trials of International Crimes in Bangladesh: Transitional Justice as Reflected in*
59 *Judgments* (University Press Limited, 2019) p. 139.
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4 The application of the Conventions and of this Protocol, as well as the conclusion of the
5 agreements provided for therein, shall not affect the legal status of the Parties to the conflict.
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7 Neither the occupation of a territory nor the application of the Conventions and this Protocol
8 shall affect the legal status of the territory in question.
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11 Traditionally, only states can be parties to international conflicts. However, the evolving doctrine
12 regulating wars of national liberation as described above recognized the liberation movement as a
13 legitimate party to the conflict having a legal personality for the application of international
14 humanitarian law. While these entities are in a process of formation into new independent states.
15
16 It is imperative to examine whether the entities of liberation movements fit within the definition
17 of the ‘subject’ to the international armed conflicts under Geneva Conventions. Common Article
18 2 of the four Geneva Conventions of 1949 lays down the applicability of the conventions, which
19 states:
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25 The present Convention shall apply to all cases of declared war or of any other armed conflict
26 which may arise between two or more of the High Contracting Parties, even if the state of
27 war is not recognized by one of them. The Convention shall also apply to all cases of partial
28 or total occupation of the territory of a High Contracting Party, even if the said occupation
29 meets with no armed resistance.
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32 Although one of the Powers in conflict may not be a party to the present Convention, the
33 Powers who are parties thereto shall remain bound by it in their mutual relations. They shall
34 furthermore be bound by the Convention in relation to the said Power, if the latter accepts
35 and applies the provisions thereof.
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40 This provision does not speak of states but ‘parties’ and ‘powers’ for the application of the
41 conventions. Common articles 60, 59, 139 and 155 state that these conventions shall be open to
42 any power for accession. These provisions can be broadly interpreted to include liberation
43 movements as party or power to the convention.⁶⁵ Though such construction was criticized for
44 being contrary to the intention of the drafters.⁶⁶ In fact, there were cases when these provisions
45 have been practically invoked by the national liberation movements. The provisional revolutionary
46 government of Algeria made an *ad hoc* declaration of acceptance or accession to the conventions
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58 ⁶⁵ Noelle Higgins, “The Regulation of Armed Non-State Actors: Promoting the Application of the Laws of War to
59 Conflicts Involving National Liberation Movements” *17 Human Rights Brief* (2009) p. 7.

60 ⁶⁶ *Ibid.*
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4 in 1960.⁶⁷ Another example was the declaration by the PLO of its intention to accede to the Geneva
5 Conventions.⁶⁸ The question arises, whether the Bangladesh liberation movement acceded to the
6 Geneva Conventions during the 1971 armed conflict. However, such accession or declaration was
7 not necessary because the provisional government of the liberation movement declared under
8 ‘Laws Continuance Enforcement Order’ on 10th April 1971 that they would be governed by the
9 laws which were in force at the time of the beginning of the liberation war. Since Pakistan was a
10 party to Geneva Conventions, the BFF would be entitled to the like status under the Conventions
11 as soon as the war began.
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15 Besides, state practice at the UN level also suggests that BFF was entitled to the protection under
16 Geneva Conventions. The UN resolution 2396 (XXIII) dealing with South African conflicts stated
17 that the freedom fighters should be treated as prisoners-of-war under the terms of international
18 law, namely the 3rd Geneva Convention of 1949.⁶⁹ Likewise, the freedom fighters of the liberation
19 war in the Portuguese African territories were called by the UN to be protected under 3rd and 4th
20 Geneva Conventions.⁷⁰ The International Conference on human rights in 1968 also called for
21 freedom fighters, if detained, be treated as prisoners of war or political prisoners.⁷¹ This legal status
22 of the freedom fighters was reproduced in several resolutions of the UN.⁷² The UN secretary
23 general’s second report on human rights in armed conflict in 1970 reviewed the human rights
24 protection and suggested the application of Geneva conventions to the freedom fighters and
25 recommended the amendment of the treaty to cover national liberation struggles and freedom
26 fighters within the ambit of the international humanitarian law framework.⁷³
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30 The Geneva conventions and the subsequent practice at the global level approve the legal
31 personality of the liberation movement and therefore the BFF would be regarded as a combatant
32 in the Bangladesh liberation war which was an IAC. It is to be noted that the BFF was constituted
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48 ⁶⁷ Mohammed Bedjaoui, *Law and the Algerian Revolution* (International Association of Lawyers, Brussels, 1961) pp.
49 189-199.
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51 ⁶⁸ Noelle Higgins (n 65) p. 11.

52 ⁶⁹ The Policies of Apartheid of the Government of South Africa, UNGA Res 2396 (1968).

53 ⁷⁰ Question of Territories under Portuguese Administration, UNGA Res 2707 (1970).

54 ⁷¹ International conference on human rights, Tehran, Resolution XXIII (1968).

55 ⁷² Programme of Action for the full implementation of the declaration on the granting of independence to colonial
56 countries and peoples, UNGA Res 2621 (1970); UNGA Res 2444 (1968); UNGA Res 2621 (1970); and UNGA Res
57 2674 (1970).
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59 ⁷³ The Secretary-General, *Respect for Human Rights in Armed Conflicts: Report of the Secretary-General* UN Doc.
60 A/8052 (Sept. 10, 1970) pp.197-199.
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4 on April 4, 1971, as the Bangladesh Armed Forces, which consisted of the regular deserted Bengali
5 members of the then Pakistani force, East Pakistan Rifles (EPR), police forces, and trained
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8 civilians under the control of the provisional government of Bangladesh.⁷⁴
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10 11 **3. The 1971 War as an IAC in Due Fulfillment of the Right to Self-Determination of the** 12 **‘People’ of Bangladesh** 13 14

15 It is for the people to determine the destiny of the territory and not the territory the destiny of
16
17 the people.⁷⁵
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19 The first and foremost issue that needs to be addressed when seeking to examine the status of a
20 conflict as a war of national liberation, is if a claim of the ‘people’ to the right of self-determination
21 made?⁷⁶ Wars of liberation are defined in connection with the right to self-determination.⁷⁷ The
22 understanding of such war had been confirmed in AP 1 in reference with this right.⁷⁸ What is right
23 to self-determination? And who are those ‘peoples’ who may exercise the right to self-
24 determination? Perhaps these are very difficult questions to answer, as pointed out by Sir Ivor
25 Jennings in 1956:
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31 Nearly forty years ago, a Professor of Political Science, who was also President of the United
32 States, President Wilson, enunciated a doctrine which was ridiculous, but which was widely
33 accepted as a sensible proposition, the doctrine of self-determination. On the surface, it seemed
34 reasonable: let the people decide. It was in fact ridiculous because the people cannot decide
35 until someone decides who the people are.⁷⁹
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40 Today, the principle of self-determination is embodied in multiple international legal instruments
41 and has crystallized into a rule of customary international law, binding on all states.⁸⁰ In *Chagos*
42 *case*, the ICJ declared that the respect for the right to self-determination is an obligation *erga*
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50 ⁷⁴ Sadik Salik, *Witness to Surrender* (Dhaka University Press Limited, 1997) pp. 99-100; Bina D’Costa (n 47).

51 ⁷⁵ *Western Sahara, Advisory Opinion* (1975) International Court of Justice (ICJ) para. 122.

52 ⁷⁶ Noelle Higgins & Kieran O’Reilly, “The Use of Force, Wars of National Liberation and the Right to Self-
53 Determination in the South Ossetian Conflict” 9 *International Criminal Law Review* (2009) p. 575.

54 ⁷⁷ Natalino Ronzitti (n 18) p. 321.

55 ⁷⁸ Additional Protocol 1 (n 27) art. 1 (4).

56 ⁷⁹ Sir Ivor Jennings, *The Approach to Self-Government* (1956) p. 56, quoted in Noelle Higgins & Kieran O’Reilly (n
57 76) p. 575.

58 ⁸⁰ Milena Sterio, *The Right to Self-Determination under International Law: ‘Selfistans’, Secession, and the Rule of*
59 *the Great Powers* (Routledge, 2013) p. 9.
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4 *omnes*, all states have a legal interest in protecting that right.⁸¹ Antonio Cassese argued that the
5 right of self-determination constitutes a peremptory norm of international law.⁸² Alexander
6 Orakhelashvili echoed that the right of peoples of self-determination is undoubtedly part of *jus*
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8 *cogens* because of its fundamental importance.⁸³
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11 The Bangladesh liberation war was an early assertion by the Bengali people of their right to self-
12 determination against the *de-facto* internal colonialism of Pakistan.⁸⁴ Whether did BFF engage in
13 the liberation movement for the due fulfillment of their legitimate right of self-determination?⁸⁵ It
14 is inevitable to examine the international legal status of the right to self-determination in 1971 and
15 also the role of this right both in characterizing and legitimizing the 1971 liberation war.
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19 The term self-determination received formal international legal status with the signing of the UN
20 Charter and Articles 1(2) and 55 included explicit references to this right.⁸⁶ The Charter is silent
21 on whether these two provisions could be used for legitimizing the struggle for liberation both in
22 colonialized and decolonized context. It has been partially contributed by the declarations and
23 resolutions adopted by UN General Assembly. Article 21 of the Universal Declaration on Human
24 Rights outlines the fundamental right of everyone to take direct or indirect part in the government
25 and the will of the people has been declared as the basis of the authority of the government.⁸⁷ The
26 preamble of the Declaration audaciously justified the act of rebellion as a last resort against tyranny
27 and oppression.⁸⁸ In 1952 the UNGA passed a resolution calling member states to uphold the
28 principle of self-determination of all peoples and nations.⁸⁹ A landmark resolution was passed by
29 UNGA in 1960 in clarifying the concept of the right to self-determination.⁹⁰ This resolution states:
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45 ⁸¹ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion* (2019)
46 International Court of Justice (ICJ) paras. 132-182 [hereafter *the Chagos Advisory Opinion*].

47 ⁸² Antonio Cassese (n 4) p. 172.

48 ⁸³ Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press, 2008) p. 51.

49 ⁸⁴ M Rafiqul Islam (64) p. 140.

50 ⁸⁵ M Rafiqul Islam, *The Bangladesh Liberation Movement: International Legal Implications* (Dhaka University press,
51 1987) pp. 36-62.

52 ⁸⁶ *Charter of the United Nations, 26 June 1945*, UNTS XVI, art 1(2) of the Charter states: ‘to develop friendly relations
53 among nations based on respect for the principle of equal rights and self-determination of peoples’; and art 55 of the
54 Charter provides: ‘respect for the principle of equal rights and self-determination of peoples’.

55 ⁸⁷ *Universal Declaration on Human Rights (UDHR), 10 December 1948*, UNGA Res 217 A (III) art 21.

56 ⁸⁸ UDHR, *Ibid.*, preamble.

57 ⁸⁹ UNGA Res 637 (1952).

58 ⁹⁰ Declaration on the Granting of Independence to Colonial Countries and peoples, UNGA Res 1514 (1960).
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4 All peoples have the right of self-determination. They are free to politically determine the
5 force of this right and to freely struggle for economic, social, and cultural development. All
6 armed actions and measures of repression, of any type whatsoever, against dependent peoples
7 are to be halted in order to make it possible for them to peacefully and freely enjoy their right
8 to full independence. The integrity of their national territory will be respected.⁹¹
9

10 It was argued that the principle of self-determination as developed by UN charter and UN
11 resolutions led to the establishment and consolidation of the international character of wars of
12 national liberation both within and outside the framework of international organizations.⁹²
13 Furthermore, the UNGR resolution 2105 (XX) of 1965 recognized the legitimacy of the struggle
14 of colonial peoples against colonial domination in the exercise of their right to self-determination
15 and independence and invited all states to support the liberation movements.⁹³ The right of self-
16 determination was also recognized as human rights in Article 1 of the ICCPR in 1966.⁹⁴ The most
17 notable development in relation to self-development is the UN resolution 2625 (XXV) of 1970 on
18 the Principles of International Law Concerning Friendly Relations and Co-operation among States
19 in Accordance with the Charter of the UN.⁹⁵ This declaration stated that the subjugation,
20 domination, and exploitation of peoples violates fundamental rights of self-determination and the
21 establishment of a sovereign and independent state, the free association or integration with an
22 independent state or the emergence into any other political status freely determined by a people
23 constitute modes of implementing the right of self-determination by the people.⁹⁶
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38 This declaration had also led to the universal recognition of the legally binding nature of the
39 principle of self-determination.⁹⁷ All these development during the 1960s and early 1970s suggest
40 that the Bangladesh liberation movement was a legitimate armed resistance against the forcible
41 denial of the right to self-determination of the Bengali people by the then oppressive ruler of
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47 ⁹¹ *Ibid.*

48 ⁹² Georges Abi-Saab, "Wars of National Liberation in the Geneva Conventions and Protocols" *165 Recueil Des Cours*
49 (1979) p. 369.

50 ⁹³ UNGR Res 2105 (1965).

51 ⁹⁴ *International Covenant on Civil and Political Rights (ICCPR)*, 16 December 1966, UN Treaty Series 999, art 1.

52 ⁹⁵ UNGR Res 2625 (1970).

53 ⁹⁶ *Ibid.*

54 ⁹⁷ Edre U. Olalia, "The Status in International Law of National Liberation Movements and Their Use of Armed
55 Force" *International Association of People's Lawyers*, P. 9,
56 <http://www.iadllaw.org/files/THE%20STATUS%20IN%20INTERNATIONAL%20LAW%20OF%20NATIONAL%20LIBERATION%20MOVEMENTS%20AND%20THEIR%20USE%20OF%20ARMED%20FORCE%20by%20Edre%20Olalia.pdf> .
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4 Pakistan. The right of the liberation movement in the exercise of the right to self-determination
5 had *locus standi* in international law during 1971. While the formal proclamation of independence
6 of Bangladesh reaffirmed the declaration of independence ‘in due fulfillment of the legitimate right
7 of self-determination of the peoples of Bangladesh.’⁹⁸ However, one can argue whether the right
8 to self-determination could be applied beyond the colonial context? Whether UN resolutions
9 regulating self-determination were legally binding during 1971? Whether Bangladesh liberation
10 movement truly represented ‘peoples’ mandate to right of self-determination?
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17 With regard to the first question, the paper argues that the Bangladesh liberation movement was
18 in the due exercise of the right to self-determination against the *de-facto* internal colonialism of
19 Pakistan and therefore it should be characterized as an IAC. There is enough literature on how the
20 oppressive Pakistani military regime forcibly denied the inalienable right to self-determination of
21 the Bengalis.⁹⁹ Moreover, the nature of the Bangladesh liberation movement was *sue generis*,
22 which should not be equated with other non-colonial liberation movements. The second part of the
23 paper has already shed light on the colonial feature of East Pakistan. A number of factors: i.e., the
24 subjugation of the East by the West, political domination, economic exploitation, racial
25 discrimination, persistent denial of human rights and military oppression strongly establish that all
26 aspects of traditional colonialism were present in East Pakistan. Accordingly, it could be contended
27 that the people of East Pakistan would be entitled to colonial self-determination like any other
28 colonial people. The perceived domination, racial and linguistic exploitation by West originally
29 rooted the ground for a legitimate struggle for self-determination against a regime which could be
30 qualified as a racist and an alien oppressive regime.¹⁰⁰ Moreover, it was justified because of the
31 widespread violations of human rights and the excessive use of force by Pakistan that caused the
32 loss of millions of Bengalis.¹⁰¹ The question of whether and to what extent the legal right of self-
33 determination applies beyond the colonial context was contested in the *Kosovo case*.¹⁰² The court
34 considered that the state’s right to territorial integrity is not opposable to groups within it, and so
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52 ⁹⁸ The Proclamation of Independence of Bangladesh (n 46).

53 ⁹⁹ M Rafiqul Islam (n 30), (n 64), (n 85), Ved P Nanda (n 28) and so on.

54 ¹⁰⁰ Willem Van Schendel, *A History of Bangladesh* (Cambridge: Cambridge University Press, 2009); Anisur Rahman
55 (n 36) p. 235; Anagh Sengupta & Sanya Parmar, “A Critical Analysis of the Legality of Unilateral Declaration of
56 Independence in the Light of the Right to Self Determination” *3 King's Student Law Review* (2012) p. 189.

57 ¹⁰¹ David Raic, *Statehood and the law of Self-Determination* (2002) p. 339.

58 ¹⁰² *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory*
59 *Opinion* (2010) International Court of Justice (ICJ).
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4 whether such groups have a right to self-determination is beside the point as far as their acts are
5 concerned: they are not subject to an obligation to respect this territorial integrity at all.¹⁰³ Besides,
6 the right of self-determination beyond colonial context has already received considerable attention
7 in the existing literature.¹⁰⁴ Anderson considers that the contemporary international law of self-
8 determination provides a unilateral right of secession for peoples subject to consistent and
9 egregious human rights violations by the existing state.¹⁰⁵ He has also argued that the right to
10 territorial integrity remains as long as states guarantee self-determination and human rights of their
11 peoples.¹⁰⁶ There is no denying that the military regime of the West not only violated fundamental
12 human rights of the people of the East but also committed genocide, crimes against humanity and
13 war crimes during the 1971 war. The violence can only be compared with the slaughters committed
14 by the Nazis.¹⁰⁷ Thus the 1971 war of liberation was the legitimate exercise of the right to self-
15 determination of the Bengalis and which could be justified both from colonial and non-colonial
16 context.

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28 With regard to the second question, the paper argues that the right to self-determination of the
29 Bengalis in 1971 liberation war should be crystallized as a customary rule binding on all States
30 including Pakistan. A similar question was posed before ICJ in the *Chagos case*, whether the UN
31 resolutions (1514 of 1960 and 1541 of 1970) defining the right to self-determination had the
32 declaratory character as a customary norm.¹⁰⁸ The Court considered that:

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Although resolution 1514 (XV) is formally a recommendation, it has a declaratory character
with regard to the right to self-determination as a customary norm, in view of its content and
the conditions of its adoption. The resolution was adopted by 89 votes with 9 abstentions.

None of the States participating in the vote contested the existence of the right of peoples to

¹⁰³ *Ibid.*, these lines are quoted from Ralph Wilde, “Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo” 105 *The American Journal of International Law* (2011) p. 304.

¹⁰⁴ Glen Anderson, “A Post-Millennial Non-Colonial Secession: A Right to Unilateral Non-Colonial Secession” 49 *Vanderbilt Journal of Transnational Law* (2016) p. 1183; Glen Anderson, “Unilateral Non-Colonial Secession and Internal Self-Determination: A Right of Newly Seceded Peoples to Democracy” 34 *Arizona Journal of International and Comparative Law* (2016) pp. 1-64.

¹⁰⁵ Glen Anderson *Ibid.*, p. 14.

¹⁰⁶ *Ibid.*, p.15.

¹⁰⁷ Rumana Islam, “Trail of War Criminals of 1971: An Appraisal” in Mofidul Hoque (eds.), *Bangladesh Genocide 1971 and the Quest for Justice* (Liberation War Museum, Dhaka, Bangladesh, 2009) p. 16.

¹⁰⁸ *The Chagos Advisory Opinion* (n 81).

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4 self-determination. Some States justified their abstention on the basis of the time required for
5 the implementation of such a right.¹⁰⁹
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8 The adoption of a number of resolutions clarified the content and scope of the right to self-
9 determination and therefore the 1971 Bangladesh liberation war was waged in fulfilling this right.
10 In *Chagos case*, Judge Cancado Trindade in his separate opinion stated that the continuation of the
11 colonialism in the Chagos archipelago was the fundamental violation of the right to self-
12 determination of the Chagossians and therefore it was a crime.¹¹⁰ He further argued that this right
13 is endowed *with jus cogens* character. He stated: ‘There is no justification for not having addressed
14 it. The fundamental right of peoples to self-determination indeed belongs to the realm of *ius*
15 *cogens*, and entails obligations *erga omnes*, with all legal consequences ensuing therefrom.’¹¹¹
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22 Turning back to the third question, this paper considers that the independence of Bangladesh is
23 one of the successful examples of the invocation of the right to self-determination of the Bengali
24 ‘people’. Under the principle of self-determination, a group with common identity and link to a
25 defined territory to be entitled to exercise this right, it must qualify as a ‘people’.¹¹² While there is
26 no settled definition of ‘people’ in international law. Defining the term in relation with ethnicity
27 is fluid and in many cases undesirable.¹¹³ It is well suited to define it as a right of the majority or
28 whole or all people within an accepted political unit.¹¹⁴ This approach has been reflected in the
29 UN Declaration on Friendly Relations and subsequently under the ICCPR.¹¹⁵ According to this
30 approach, the numerically inferior do not enjoy the right so as not to derogate territorial integrity,
31 among other things.¹¹⁶ The landslide victory of the Awami League of East Pakistan under the
32 leadership of Sheikh Mujibur Rahman in the first ever national election of Pakistan in 1970
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45 ¹⁰⁹ *The Chagos Advisory Opinion* (n 81) para. 152.

46 ¹¹⁰ *The Chagos Advisory Opinion* (n 81), Separate opinion of Judge Cancado Trindade, para. 25.

47 ¹¹¹ *Ibid.*, para 119.

48 ¹¹² Michael .P. Scharf, “Earned Sovereignty: Judicial Underpinnings” *31 Denver Journal of International Law and*
49 *Policy* (2003) pp. 373-379.

50 ¹¹³ Kathleen McVay, “Self-determination in New Contexts: The Self-determination of Refugees and Forced Migrants
51 in International law” *28 Utrecht Journal of International and European Law* (2012) p. 37.

52 ¹¹⁴ Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations*
53 (Oxford University Press, 1963) pp. 11-57.

54 ¹¹⁵ ICCPR, (n 94) art 1 confirms the view mentioning the right of all peoples and art 27 deals with the right of the
55 minority, see, Gaetano Pentassuglis, “State Sovereignty, Minorities and Self-Determination: A Comprehensive Legal
56 View” *9 International Journal of Minority and Group Rights* (2002) pp. 303-324, quoted in Josalee S. Deinla (n 26)
57 p. 14.

58 ¹¹⁶ Josalee S. Deinla (n 26) p. 14.
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4 reflected the mandate of the ‘people’ for their right to self-determination.¹¹⁷ Pakistan government
5 did not hand over power to the leader of the majority party as democratic norms required.¹¹⁸
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7 Following the above concerns, a movement started in this part of Pakistan and Bangabandhu in his
8 historic speech of 7th March 1971 urged for independence if people's verdict is not respected and
9 power is not handed out to East Pakistan.¹¹⁹ The members of the National Provincial Assemblies
10 elected in the 1970 election from East Pakistan led the liberation movement of Bangladesh truly
11 representing the ‘people’ of Bangladesh.¹²⁰
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19 **4. The Proclamation of Independence and the 1971 War as an IAC between Bangladesh** 20 **and Pakistan**

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22 Bangladesh has been the only entity that has successfully seceded through a Unilateral Declaration
23 of Independence (UDI) without the consent of the parent State in 1971.¹²¹ Bangladesh declared its
24 independence through a formal UDI on 10 April 1971.¹²² The proclamation states:
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28 In due fulfillment of the legitimate right of self-determination of the people of Bangladesh,
29 duly made a declaration of independence at Dacca on March 26, 1971, and urged the people
30 of Bangladesh to defend the honour and integrity of Bangladesh... We the elected
31 representatives of the people of Bangladesh... declare and constitute Bangladesh to be a
32 sovereign People's Republic and thereby confirm the declaration of independence already
33 made by Bangabandhu Sheikh Mujibur Rahman.¹²³
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38 Beforehand, Sheikh Mujibur Rahman verbally declared the independence on 26th March 1971.¹²⁴
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40 The Declaration states:

41 I call upon the people of Bangladesh wherever you might be and with whatever you have, to
42 resist the army of occupation to the last. Your fight must go on until the last soldier of the
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46 ¹¹⁷ In the provincial assembly election, Awami League won 288 seats out of 300 and bagged 89% of the total votes
47 cast, similarly in the general election it won 160 out of 162 seats in East Pakistan. See, Mohammad Rizwan, “The
48 Elections 1970: From Ballot to Nowhere” *3 Asian Journal of Science and Humanities* (2014) pp. 28-36; Sharif al
49 Mujahid, “Pakistan: First General Elections” *3 Asian Survey* (1971) p.11.

50 ¹¹⁸ *The Chief Prosecutor v. Professor Ghulam Azam* (n 18) para.7.

51 ¹¹⁹ *Ibid.*

52 ¹²⁰ Moudud Ahmed, *Bangladesh: Constitutional Quest for Autonomy* (2nd edn, Dhaka: University Press Limited, 1991)
53 p. 244; Mahmudul Islam, *Constitutional Law of Bangladesh* (3rd edn, Dhaka, Mullick Brothers Publication, 2012).

54 ¹²¹ James Crawford, *The Creation of States in International Law* (Oxford, 2006) p. 142.

55 ¹²² The Proclamation of Independence of Bangladesh (n 46).

56 ¹²³ *Ibid.*

57 ¹²⁴ Declaration of Independence by the father of the nation, Bangabandhu Sheikh Mujibur Rahman shortly after
58 midnight of 25th March, I.E. Early Hours of 26th March 1971, Sixth Schedule, Article 150(2) of the Constitution.
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4 Pakistan occupation army is expelled from the soil of Bangladesh and final victory is
5 achieved.¹²⁵
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8 The UDI explicitly proclaimed that Bangladesh declared itself as an independent state in due
9 fulfillment of the right to self-determination. This raised some pressing questions. Did this
10 declaration fall within the ambit of international law and if so to what extent was it relevant in
11 determining the legality of the UDI of Bangladesh? Or did it fall outside the jurisdiction of
12 international law altogether? The answer to these questions is intrinsically linked with the
13 characterization of the 1971 armed conflict.
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18 The question of the legal nature of UDI has been contested in the existing literature.¹²⁶ It is
19 argued that the claim for independence through UDI does conflict with the principle of territorial
20 integrity of states and thereby illegal under international law.¹²⁷ It is important to examine whether
21 international law really supports this argument?
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26 This question arose in the context of the 2010 advisory opinion on the accordance with
27 international law of the unilateral declaration of independence in respect of Kosovo.¹²⁸ The UN
28 General Assembly asked ICJ to provide its opinion on whether the UDI of Kosovo was in
29 accordance with international law.¹²⁹ The court proceeded to examine the legality of UDI in
30 international law, instead of determining the statehood.¹³⁰ The court first examined the practice of
31 states regarding the UDI under two phases.¹³¹ In the first phase, during the eighteenth, nineteenth
32 and early twentieth centuries and the court notes that there were many instances of UDI, sometimes
33 a UDI succeeded and at others failed.¹³² The court stated:
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40 ‘In no case, however, does the practice of States as a whole suggest that the act of promulgating
41 the declaration was regarded as contrary to international law. On the contrary, State practice
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47 ¹²⁵ *Ibid.*

48 ¹²⁶ Jure Vidm, “Conceptualizing Declarations of Independence in International Law” 32 *Oxford Journal of Legal*
49 *Studies* (2012) pp. 153-177; M Rafiqul Islam, “The Status of the Unilateral Declaration of Independence in
50 International Law: The Case of Bangladesh” 23 *Indian Journal of International Law* (1983) pp. 1-16; Alexander
51 Orakhelashvili, “Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence
52 in Kosovo” 12 *Max Planck Year Book of United Nations Law* (2009) p. 13.

53 ¹²⁷ Alexander Orakhelashvili *Ibid.*, p. 13.

54 ¹²⁸ *Kosovo case* (n 102).

55 ¹²⁹ *Ibid.*, para. 51.

56 ¹³⁰ *Ibid.*, para. 78-121.

57 ¹³¹ *Ibid.*, paras.79-84.

58 ¹³² *Ibid.*, para. 79.
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4 during this period points clearly to the conclusion that international law contained no
5 prohibition of declarations of independence.¹³³
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8 In the second phase, during the second half of the twentieth century, the international law of the
9 right to self-determination developed in such a way as to create an inalienable right to
10 independence for the peoples and many new states were created as a result of the exercise of this
11 right.¹³⁴ Likewise, the court opines, ‘The practice of States in these latter cases does not point to
12 the emergence in international law of a new rule prohibiting the making of a declaration of
13 independence in such cases.’¹³⁵ Furthermore, the court affirmed the principle of state sovereignty
14 as enshrined under article 2(4) of the UN Charter and in a number of UN resolutions.¹³⁶ However,
15 the court opined that this principle of territorial integrity is limited to the sphere of inter-state
16 relations and it is not concerned with UDI.¹³⁷ Thus the court made a remarkable statement:
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19 The illegality attached to the declarations of independence thus stemmed not from the
20 unilateral character of these declarations as such, but from the fact that they were, or would
21 have been, connected with the unlawful use of force or other egregious violations of norms of
22 general international law, in particular, those of a peremptory character (*jus cogens*).¹³⁸
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24 The court noted that the debate regarding the external or internal aspect of the right to self-
25 determination is not linked with the question of the legality or the illegality of UDI under
26 international law.¹³⁹ The court concluded finding that there is nothing in international law that
27 prevents an entity from declaring its unilateral independence and therefore, Kosovo's declaration
28 of independence did not violate international law.¹⁴⁰
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42 ¹³³ *Ibid.*

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44 ¹³⁴ *Ibid.*, the court has referred to some other cases in this regard, quoted, *Legal Consequences for States of the*
45 *Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*
46 *(1970), Advisory Opinion (1971) International Court of Justice (ICJ) pp. 31-32, paras. 52-53; East Timor (Portugal v.*
47 *Australia) (Merit Judgment) (1995) International Court of Justice (ICJ) p. 102, para. 29; Legal Consequences of the*
48 *Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (2004) International Court of Justice*
49 *(ICJ) pp. 171-172, para. 88.*

50 ¹³⁵ *Ibid.*

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52 ¹³⁶ *Ibid.*, The court notes that the UNGAR 2625 (XXV), entitled ‘Declaration on Principles of International Law
53 concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations;
54 which reflects customary international law as mentioned in *Nicaragua case* (n 61) pp. 101-103, paras. 191-193, quoted
55 from para. 80 of the *Kosovo case*.

56 ¹³⁷ *Ibid.*, para. 80.

57 ¹³⁸ *Ibid.*, para. 81.

58 ¹³⁹ *Ibid.*, paras. 82-83.

59 ¹⁴⁰ *Ibid.*, paras. 84, 119, 122.
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4 Relying upon the findings of this case, from the date of UDI, which was 10th April 1971
5 (formally) or 26 March 1971 (informally), the sovereignty of Pakistan ceased to exist in East-
6 Pakistan and Bangladesh became an independent state. Being a foreign state's troops, those
7 Pakistani troops remaining in the territory of Bangladesh after the date of UDI became 'occupation
8 army'.¹⁴¹
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13 Therefore, the liberation war which was between the liberation movement and the government
14 forces of Pakistan turned into a conflict between the People's Republic of Bangladesh and the
15 Islamic Republic of Pakistan. Accordingly, the 1971 armed conflict became the subject matter of
16 common Article 2 of the four Geneva Conventions of 1949, which defines the scope of the
17 application of the conventions and contributes to establishing a distinction between IAC and
18 NIAC. Arguably, the 1971 situation in Bangladesh satisfied the test of this article under two sub-
19 clauses. First, it was an IAC between Bangladesh and Pakistan under common Article 2(1), though
20 there was no such declaration of war from any side and it is also not necessary under this clause.
21 Second, it was an IAC between Bangladesh and Pakistan under common Article 2(2). Bangladesh
22 being an independent state was under the Pakistan military occupation from 10th April 1971 to 16th
23 December 1971, and such occupation met violent armed resistance.
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28 Thus the UDI has not only successfully established Bangladesh as a sovereign state but also
29 triggered the application of the Geneva Conventions and other principles of war applicable in IAC.
30 It has also significance in holding Pakistan responsible for the violations of Geneva rules of
31 warfare and also for the excessive use of force which is prohibited under the preemptory norm of
32 international law. Though the international commission of jurist in its report of 1972 assessed that
33 the Awami League's UDI was not valid under international law, even under the principle of self-
34 determination.¹⁴² Suzannah Linton interpreted the report arguing that Bangladesh did not come into
35 existence at that stage and remained part of Pakistan.¹⁴³ M Rafiqul Islam vigorously challenged
36 the assessment of the commission.¹⁴⁴ Though the determination of statehood is not relevant in
37 examining the legality of UDI under international law, arguably, Bangladesh achieved all four
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57 ¹⁴¹ M Rafiqul Islam (n 64) p. 140.

58 ¹⁴² The International Commission of Jurist's Report (n 11) pp. 49-97.

59 ¹⁴³ Suzannah Linton (n 15) p. 200.

60 ¹⁴⁴ *Ibid.*, see also, M Rafiqul Islam (n 85).
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4 elements of statehood with the proclamation of independence on 10th April 1971.¹⁴⁵ Moreover, the
5 discussion on the statehood of Bangladesh is beyond the scope of the paper. It is to be mentioned
6 that the determination of statehood is not even necessary in defining war of liberation as an IAC.¹⁴⁶
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10 11 **5. India's Assistance and the Status of the 1971 Armed Conflict**

12 The former part of the article made a clear case of a successful secession of a new state called
13 Bangladesh through UDI just immediately after the military crackdown by Pakistan. There was no
14 bar under international law that could have prevented Bangladesh from achieving statehood. M
15 Rafiqul Islam argued that the creation of Bangladesh by a UDI has become the source of its
16 legitimacy in international law.¹⁴⁷ Bangladesh waged armed resistance against Pakistan in due
17 fulfillment of its right to self-determination against the internal colonialism of Pakistan. It took
18 almost nine months to liberate the newly born state from the occupation of Pakistan. Pakistan
19 committed horrendous atrocities upon the Bengalis in the form of genocide, crimes against
20 humanity, a crime of aggression and war crimes.
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30 Certainly, it was the legal duty of the international community to assist the liberation movement
31 during 1971 and this obligation could be explained as an obligation '*erga omnes*', arguably '*jus*
32 *cogens*', from where no derogation is permitted. India was one of the few countries that responded
33 to the brutal atrocities by giving support to the new government of Bangladesh. Though India had
34 some other political and non-political interests.¹⁴⁸ Ironically India's support which was requested
35 by Bangladesh is viewed as an instance of the clear use of force against the territorial integrity of
36 Pakistan.¹⁴⁹ However, some authors considered it as a paradigmatic case of justified humanitarian
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46 ¹⁴⁵ Bangladesh, the then East Pakistan had its own population of 75 million and a defined land territory of 147,610 km
47 and an elected *de-facto* government, later provisional *de-jure* government formed on the 10th April 1971 with an
48 interim constitution and the sovereignty was proclaimed by the UDI. For details see, M Rafiqul Islam, (n 85).
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50 ¹⁴⁶ L.C Green (n 25); Josalee S. Deinla (n 26).
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52 ¹⁴⁷ M Rafiqul Islam (n 64) p.140.
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54 ¹⁴⁸ Zaglul Haider, "A Revisit to the Indian Role in the Bangladesh Liberation War" *44 Journal of Asian and African*
55 *Studies* (2009) pp. 537-551, he categorically listed out six factors behind India's involvement in the war and India
56 largely expected that Bangladesh would be an extension of the Indian market and India would emerge as an Asian
57 superpower; Sonia Cordera, "India's Response to the 1971 East Pakistan Crisis: Hidden and Open Reasons for
58 Intervention" *17 Journal of Genocide Research* (2015) pp. 45-62, she argued that humanitarian reason behind India's
59 involvement was only one side of the picture, political and economic interest drove the actions of India in the 1971
60 war.
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62 ¹⁴⁹ Onkar Marwah, "India's Military Intervention in East Pakistan" *13 Modern Asian Studies* (1979) pp. 549-580.
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4 intervention.¹⁵⁰ One prominent Indian scholar considered it as one of the world's successful cases
5 of humanitarian intervention against genocide and which he referred as the proper application of
6 the 'responsibility to protect' (R2P) principle by India.¹⁵¹ India considered itself as a victim of
7 Pakistan's aggression in Bangladesh, as Indira Gandhi the then Prime Minister of India called the
8 refugee burden 'a new kind of aggression' against her country.¹⁵² But India found no support at
9 the UN,¹⁵³ rather India was castigated for violating Pakistan's sovereignty and threatening
10 international order.¹⁵⁴ This raises some significant legal issues. Is it illegal to assist people/just
11 liberation movement who are entitled to self-determination under international law but denied by
12 alien domination or a racist regime? Did the traditional debate between the right to self-
13 determination and territorial integrity fit for the liberation movement of Bangladesh, while it is
14 ethnically and geographically distinct from Pakistan? Can excessive use of force in the form of
15 genocide be used against the 'people' to deprive their right to self-determination? Can the
16 liberation movement to free its territory from foreign occupation seek assistance from third parties?
17 Is not it a legal obligation for the requested state to give them assistance? Whether India's
18 assistance in the liberation movement transformed the nature of the 1971 armed conflict/
19 Bangladesh liberation war?
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33 Perhaps, some of these questions have already been partially answered. However, some of the
34 issues are even beyond the scope of the paper. The paper focuses upon those issues which are
35 pertinent in defining the nature of the 1971 armed conflict. With regard to the last question, the
36 paper argues that India's assistance in the liberation war did not affect the nature of the liberation
37 war. Could it be examined by applying the *Tadic* or *Nicaragua* test? Do these tests really suit
38 while it is a question of defining a liberation war? Or when it is the question of supporting a newly
39 independent state? Or when it is a question of assisting the legitimate exercise of the right to
40 independence under the principle of self-determination of the 'people' whose human rights are
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51 ¹⁵⁰ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (1977) pp. 101-08.

52 ¹⁵¹ Pratap Bhanu Mehta, "Reluctant India" 22 *Journal of Democracy* (2011) p.100.

53 ¹⁵² Indira Gandhi, Statement at National Press Club in Washington, D.C. (November 5, 1971), reprinted in Indira
54 Gandhi, *The Years of Endeavour: Selected Speeches of Indira Gandhi*, August 196-August 1972, at 549, quoted from
55 Gary J. Bass, "The Indian Way of Humanitarian Intervention" 40 *The Yale Journal of International Law* (2015) p.
56 226.

57 ¹⁵³ Rene Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press, 2002) pp. 299-
58 300.

59 ¹⁵⁴ Gary J. Bass (n 152) p. 229.
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4 grossly violated by an oppressive regime? In fact, India assisted Bangladesh liberation movement
5 in compliance with the UNGA 2105 (XX) of 1965, where UN called member states to provide
6 material and moral support to the national liberation movements.¹⁵⁵ This favourable position of
7 UN for liberation movement was reiterated in the Declaration on Principles of International Law
8 Concerning Friendly Relations and Co-operation among States' which states:
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13 a. all peoples have the right freely to determine their political status;
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15 b. every State has the duty to respect this right and to promote its realization;
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17 c. every State has the duty to refrain from any forcible action which deprives peoples of this
18 right;
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20 d. in their actions against, and resistance to, such forcible action, peoples are entitled to seek
21 and receive support in accordance with the purposes and principles of the Charter;
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23 e. under the Charter, the territory of a colony or other non-self-governing territory has a status
24 separate and distinct from that of the State administering it.¹⁵⁶
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27 Relying upon this declaration it can be argued that it was the duty of the international community
28 to help Bangladesh liberate its territory from alien occupation and the 'people' of Bangladesh were
29 legally entitled to seek and receive support in realizing the right to independence under the
30 principle of self-determination under international law. The ICJ in *Chagos Advisory Opinion*
31 invoked UN resolutions relating to self-determination and urged that all states are under a duty to
32 cooperate in the realization of the principle of self-determination.¹⁵⁷ Judges Trindade and
33 Robinson, in their separate opinions appealed that states are under a duty not to assist the United
34 Kingdom in committing an internationally wrongful act and if they do so, they run the risk of being
35 found complicit in this breach of international law.¹⁵⁸ However, this is a matter of another debate
36 why India's assistance has been rigorously scrutinized in the existing literature and surprisingly
37 the US and China's backing in the commission of genocide has not attracted the attention of the
38 international community.
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48 There is a need to differentiate humanitarian intervention from humanitarian assistance. The
49 former raises doubt, the other is appreciated. Yogesh K Tyagi argued that the concept of
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55 ¹⁵⁵ UNGA Res 2105 (1965).

56 ¹⁵⁶ UNGA Res 2105 (1965); quoted from Josalee S. Deinla (n 26) p. 12.

57 ¹⁵⁷ *The Chagos Advisory Opinion* (n 81).

58 ¹⁵⁸ *The Chagos Advisory Opinion* (n 81); see also, *International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, 2001*, arts 16, 40 41(2).
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4 humanitarian assistance has acquired the status of customary international law.¹⁵⁹ Therefore,
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6 India's assistance in the liberation war should be appreciated from the viewpoint of international
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8 law. Though India's assistance did not play any role in the decision to the liberation movement,
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10 rather it assisted the 'people' to fulfill their legitimate right to independence under international
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12 law.¹⁶⁰ Anwar Hussain contended that the US and China by supporting Pakistan and opposing
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14 Bangladesh became a party to the genocide.¹⁶¹ However, all these issues did not affect the nature
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16 of the liberation war in Bangladesh, though a conscious attempt was made to portray the liberation
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18 war as an internal affair of Pakistan. Possibly, this is why the world witnessed one of the most
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20 human catastrophes of the 20th Century in the territory of Bangladesh during the liberation war of
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22 1971.

23 24 **6. Conclusion**

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26 The preceding analysis reveals that the people of Bangladesh (the then East Pakistan) waged an
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28 arm resistance through liberation movement against the *de-facto* colonialism of Pakistan to fulfill
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30 their legitimate right to independence under the principle of self-determination. This article argued
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32 that the 1971 conflict in Bangladesh could be defined as an IAC from three different perspectives:
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34 (a) it was an IAC between the Bangladesh liberation movement and the Pakistani military regime
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36 as defined under article 1(4) of AP 1 as well as under customary international law; (b) it was an
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38 IAC between the 'people' of Bangladesh (East Pakistan) and the *de-facto* colonialism of Pakistan,
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40 which was in due exercise of the right to self-determination of the Bengali people under
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42 international law; and (c) it was an IAC between the People's Republic of Bangladesh and the
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44 Islamic Republic of Pakistan or the Pakistani occupation regime under common Article 2 of the
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46 Geneva Conventions, since Bangladesh became an independent state through a UDI. These
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48 arguments strongly invalidate all the attempts to portray the liberation war as a separatist
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50 movement or as an internal affair of Pakistan and trigger the application of IHL principles
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52 regulating IAC, which are more comprehensive than the rules regulating NIAL. However, India's

53 ¹⁵⁹ Yogesh K. Tyagi, "The Concept of Humanitarian Intervention Revisited" *16 Michigan Journal of International*
54 *Law* (1995) pp. 891-892. He further argued that this norm has satisfied both *opinio juris* and state practice elements
55 of the customary norm: the satisfaction of *opinion juris* requirement is evident from the acceptance of various
56 obligations under Articles 2 (5), 1 (3), 55 and 56 of the UN charter and several UN resolutions indicate the same; as
57 of state practice, there have been innumerable cases where countries responded to such calls for aid.
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59 ¹⁶⁰ John Dugard (n 10) p. 75.

60 ¹⁶¹ Sayed Anwar Hossain (n 42) p. 47.
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involvement should be viewed as a classic example of humanitarian assistance towards the realization of the right to self-determination of the people. India could also be considered as an ally to the newly independent neighbouring state to fight against an aggressor, since Bangladesh as a first nation was born out of a UDI on March 26, 1971. While there was no bar in international law that could have prevented Bangladesh from declaring itself as an independent state. Therefore, the sovereignty of Pakistan ceased to exist on the very day of the UDI and the Pakistani troops became occupation army in the territory of Bangladesh. The paper concludes arguing that no confusion should be left for the ICT-BD in characterizing the nature of the war as an IAC as well as in framing independent charges for ‘war crimes’ for the violation of the laws and customs of warfare and any other humanitarian rules applicable during IAC as defined in the ICT Act of 1973. Till date, it is a missed opportunity for the national tribunals of Bangladesh not to define the nature of the conflict, hopefully, in future, such confusion will be phased out by the ongoing tribunal.