

**The Obligation to Investigate and  
Prosecute Past Atrocity:**  
*Examining States' Response to the 1971  
Bangladesh Genocide*

Tapos Kumar Das



Empowerment through Law of the Common People

**The Obligation to Investigate and  
Prosecute Past Atrocity:  
*Examining States' Response to the 1971  
Bangladesh Genocide***

**Tapos Kumar Das**



Empowerment through Law of the Common People

**The Obligation to Investigate and Prosecute Past  
Atrocity: Examining States' Response to the 1971  
Bangladesh Genocide**

**Published by**

Empowerment through Law of the Common People (ELCOP)  
First Published in July 2020

**Copyright**

Reserved by Author

Cover image: [www.observerbd.com](http://www.observerbd.com)

**Printing**

Momin Offset Press, Dhaka

**ISBN:** 978-984-34-8287-7

**Price:** Tk. 250, USD 15

# Contents

<i>Foreword</i>	v
<i>Acknowledgements</i>	viii
<i>Abstract</i>	ix
<i>Key Findings</i>	xi
<i>Abbreviations</i>	xiii
<b>Prologue</b>	1
<b>Part 1: War and Atrocity</b>	6
1.1 Background of the 1971-armed Conflict	6
1.2 Nature of the 1971-armed Conflict	9
1.3 The Statehood of Bangladesh	12
1.4 Applicable Laws	15
<b>Part 2: Pakistan’s Liability under International Law</b>	17
2.1. Liability for Violation of Human Rights	17
2.2 Liability for the Crime Against Humanity	20
2.3 Breach of the IHL	23
2.4 Liability for Genocide	26
<b>Part 3: Pakistan’s Obligation to Investigate and Prosecute Past Atrocity</b>	33
3.1 Obligation for Gross Violation of Human Rights and CAH	34
3.2 Obligation under the IHL	38
3.3 Obligation under the Genocide Convention	42
3.4 Right to Truth and Obligation to Provide Remedy	44
3.5 The Obligation to Cease Internationally Wrongful Act	47

<b>Part 4: States' Response to the 1971 Bangladesh Genocide</b>	<b>50</b>
4.1 Trial of the Bangladeshi Collaborators	51
4.2 Trial of the Pakistani POWs	57
4.3 Resumption of the Domestic Prosecution and Pushback	69
4.4 Accountability and Recognition for the 1971 Genocide	80
<b>Epilogue</b>	<b>83</b>
<b>Annexure</b>	<b>85</b>
1974 Tri-patriate Agreement of Bangladesh-Pakistan-India	85

## Foreword

It is an established truth that 'international crimes' are subject to universal jurisdiction. Such jurisdiction does not merely confer upon states a right to investigate and prosecute international crimes irrespective of when they were committed, recently or some decades ago, but it also burdens states with an obligation to prosecute such crimes. This latter characteristic of universal jurisdiction is more often found to be dormant in legal discourse and that provides the members of the international community a semblance of 'impunity' for failing to comply with relevant international legal obligations. In this context, the present book—"The Obligation to Investigate and Prosecute Past Atrocity: Examining States' Response to the 1971 Bangladesh Genocide" by Mr. Tapos Kumar Das is an eye-opener and fills in existing legal vacuum in the area.

Mr. Das very rightly points out that atrocities committed by the Pakistani armed forces and their collaborators during the 1971 Bangladesh war "constituted breach of international laws and obligations, and attracted responsibilities thereunder." It is undeniably true that prosecution of past atrocity "deters future repression by establishing an instance of accountability. It helps the victim society to regain faith in the rule of law and human dignity."

The author very categorically expresses his firm conviction that the "consciousness against the past abuses of human rights is contingent on the exposure of the atrocities and accountability of the perpetrators, and a state's failure to investigate and prosecute the past abuses might be characterized as a denial of human rights." Though the author concentrates on three states of the sub-continent- Bangladesh, India and Pakistan, and shows how they failed (India and Pakistan fully; Bangladesh partially) to prosecute the international crimes committed by Pakistani military and their local collaborators in Bangladesh in 1971, the reader will feel the inner significance of the author's thoughts that it is not merely a

failure of these three states but more importantly it is a dismal failure of the international community to rise up to the occasion to prosecute these crimes. The author makes perceptive references to extra-legal factors leading to such non-compliance with international legal obligations of *erga omnes* nature and the reader is left with a feeling as to how high ideals of justice and fairness fall victim to political, economic and like interests of 'powerful actors' in international relations. Findings by the author reinforce the truth that 'law is crystallized politics.'

Mr. Das introduces a concept of "non-criminal accountability of the 1971 genocide", which I find quite intriguing. While one may find it difficult to accept the notion of non-criminal liability for heinous crimes, it would be not that simple to shrug it off owing to its pragmatic and feasible nature. Moreover, it appears to be commensurate with the notion and forms of 'transitional justice', efficacy of which has been proved on a number of occasions in different parts of the globe.

Author's handling of various criticisms directed against prosecution of international crimes by domestic tribunals is based on sound legal arguments and reasoning. In so doing, this book enriches the existing jurisprudence in the concerned area.

One cannot but strongly agree with Mr. Das when he argues that there exists no authority or power, and for that matter no state has the jurisdiction to 'offer clemency' to perpetrators of international crimes. This holds true on both legal and moral grounds.

Recognition, prosecution and punishment of genocide in 1971 is not an issue of revenge – it is more a question of moral strength and efficacy as well as legitimacy of international legal order.

This book is small, in terms of pages, but it speaks volumes! Anyone interested in international criminal jurisprudence would be immensely benefited by going through the pages of this enlightening research work.

ELCOP- Empowerment through Law of the Common People has done a commendable job by publishing this book.

I indeed feel honored to have been asked to write the foreword for this excellent work.



**Prof. (Dr.) Mizanur Rahman**

26 July 2020

LLM (1<sup>st</sup> Class Honours), DICL (Double)  
Dip. in Journalism (1<sup>st</sup> Class), MCL (Cum Laude),  
PGD in Legal Studies (Distinction), PhD  
Director,  
Centre for Advanced Legal Studies (CALs),  
University of Dhaka, and  
Former Chairman,  
National Human Rights Commission, Bangladesh

## Acknowledgements

This book is a slightly revised version of my thesis paper completed for partial fulfillment of the requirements for the Advanced LLM in Public International Law at Leiden University in June 2020.

First and foremost, my sincere gratitude to my research supervisor Dr. J.M. Iverson, Assistant Professor in Grotius Centre for International Legal Studies, Leiden University. His insightful counseling shaped my initial research proposal and made it a legal one. I am grateful for all the thoughtful remarks which have improved the thesis as well as my progression as a legal researcher. I am also in debt to my teachers from Leiden University including Prof. Horst Fischer, Prof. Carsten Stahn, Dr. Robert Heinsch, Dr. Giulia Pinzauti, and Dr. Jason Rudall for thesis related conversations and references.

I would like to extend my appreciation to my wife Aditi, daughters Amrita and Ashmita, my family, and colleagues particularly Muhammad Abu Sayeed and Suprobhat Paul, who have been my source of perseverance despite being miles away. As always, Prof. Mizanur Rahman has made me indebted by agreeing to write the foreword of this book. Thank you, sir, for being our constant source of inspiration. I have no word to thank enough Prof. Dr. Rumana Islam and Barrister Tapas Kanti Baul for their untiring mentoring for my academic progression. Barrister Baul, the incumbent Executive Director of the ELCOP deserves special appreciation to make this publication possible. Errors in the publication, if any, are mine only.

**Tapos Kumar Das, July 2020**

## Abstract

State's obligations in armed conflict are regulated by both national and international law. Yet, in case of conflict, the obligation under international law shall have primacy over that of national law. A state cannot derogate its obligation under the IHL and IHRL for the minimum guarantee of human rights and humanitarian protection during the armed conflict irrespective of its nature as an IAC, NIAC, or internal disturbance. International law requires the states to investigate and prosecute violations of CIL, IHRL, and IHL which constitute international crimes, in particular genocide, CAH, war crimes, or other gross violations of human rights, and other serious violations of IHL. Furthermore, the characterization of the crime of genocide as *jus cogens* gives rise to the obligation *erga omnes* to investigate and prosecute the crimes and not to allow any impunity to the perpetrators. Victims' right to truth, justice, and remedy also underpin this obligation. Omission to investigate and prosecute past atrocities gives rise to a separate breach of international obligation and constitutes a continuing internationally wrongful act.

The factual study undertaken in the thesis reveals that during the 1971-armed conflict, Pakistan's use of force against the Bengali people breached substantive obligations under IHRL, IHL, and CIL and gave rise to the procedural obligation to investigate and prosecute the crimes and provide the victims a remedy. Yet, Pakistan only undertook a judicial inquiry and no investigation or legal proceeding ensued. On the contrary, Bangladesh has been prosecuting Bengali perpetrators pursuant to the obligation *erga omnes*. However, its attempt to bring Pakistani perpetrators to justice had failed due to Pakistan's opposition, international pressure, and geopolitics.

The obligation for atrocious crimes particularly CAH, war crimes, and genocide are not barred by limitation. So, this study proposes that as per the applicable IHRL, IHL, and CIL Pakistan is

required to investigate and prosecute the 1971-atrocities and provide a remedy to the victims. The omission of this obligation constitutes continuing internationally wrongful act which Pakistan must cease. Also, Pakistan's breach of the *jus cogens* norm created an obligation *erga omnes* allowing any state to exercise universal jurisdiction for accountability of the perpetrators.

This research finds that prosecution of the 1971-atrocities is possible under national or international judicial forum constituted for this purpose. Like Bangladesh, Pakistan may constitute a domestic tribunal, or both states may agree to establish an international tribunal. An international tribunal constituted under the UN mandate would ensure both fair justice and criminal accountability. Yet, due to long delay and geopolitics, establishing an international tribunal might be difficult and non-criminal accountability like "recognition" and "reparation" might be an alternative justice. An International Fact-Finding Commission constituted either under the Geneva Conventions or UN resolution might be engaged in determining liability for the 1971-atrocities. The unimpeachable nature of the Commission's determination can mitigate tension between Bangladesh and Pakistan regarding the denial of the 1971-atrocities. Moreover, states' recognition of the Commission's determination might discharge their obligation *erga omnes* concerning the 1971 Bangladesh genocide, and offer minimum justice to the victims.

## Key Findings

A state's use of force in armed conflict irrespective of its nature as an IAC, NIAC, or internal disturbance is subject to the limitations prescribed by the IHRL, IHL, and CIL. [sections 2.1-2.3]

During the 1971-armed conflict, Pakistan's use of force against the Bengali people breached the minimum guarantee of human rights and humanitarian protection provided by the IHRL, IHL, and CIL. [sections 2.1-2.4]

Atrocities committed by the Pakistani forces constituting genocide, CAH, serious breach of CA3, and gross violation of human rights were attributable to Pakistan requiring it to perform the procedural obligations i.e., to investigate and prosecute the perpetrators and provide a remedy to the victims. [sections 2.1-2.4]

The breach of *jus cogens* norms, particularly, the crime of genocide created an obligation *erga omnes* for Pakistan and other states to undertake accountability measure against the perpetrators. [sections 3.1-3.3]

Pakistan's omission to initiate any post-conflict accountability measure violates obligations under the applicable IHRL and IHL treaties making it responsible for the continuing internationally wrongful act. [sections 3.4-3.5]

Obligations for atrocious crimes are not barred by limitation. So, Pakistan still owes an international obligation to address the 1971-atrocities. Its responsibility to cease the continuing internationally wrongful act also underscores the procedural obligation to investigate and prosecute the past atrocities. [section 3.5]

A competent national tribunal constituted by Pakistan or any other state in the exercise of obligation *erga omnes* can seek criminal accountability. Yet, an international tribunal constituted under the UN mandate would be more legitimate for the interest of justice. [section 4.4]

In the absence of any criminal accountability, non-criminal accountability might be a minimum justice for the victims. An International Fact-Finding Commission may be constituted for the determination of liability for the 1971-atrocities, recognition of the genocide, and reparation for the victims. [section 4.4]