The Events in East Pakistan, 1971

A LEGAL STUDY
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TABLE OF CONTENTS

		Page
PREFACE		5
PART I:	Introduction	7
PART II:	Outline of Events in East Pakistan	
	(a) 1-25 March, 1971	15
	(b) 25 March-18 December, 1971	24
PART III:	Legal Position under Pakistan Law	46
PART IV:	Legal Position under International Penal Law	49
PART V:	Right of Self-Determination in International Law	65
PART VI:	The Role of the United Nations	76
PART VII:	The Role of India	87
SUMMARY OF CONCLUSIONS		97

PREFACE

In September 1971 an international conference of jurists convened in Aspen, Colorado, by the ICJ and the Aspen Institute for Humanistic Studies called upon the International Commission of Jurists to set up a Commission of Enquiry into the events in East Pakistan. A Commission of three prominent international lawyers was accordingly appointed in November with the following terms of reference:

> ' To enquire into the reported violations of human rights and the rule of law in East Pakistan since March 1, 1971, and, insofar as they are shown to be well-founded, to enquire into their nature, extent and causes and to report, with recommendations.'

The Indian Government and the provisional Government of Bangladesh agreed to cooperate fully with the Commission, but unfortunately the former Pakistan Government refused their cooperation, contending that the subject of the enquiry was a purely internal matter.

The Commission were due to leave for India in December to take evidence there, when open hostilities broke out between India and Pakistan. The Indian Government asked that the visit of the Commission should be postponed, but as the members of the Commission were not available at a later date, the Commission of Enquiry had to be cancelled.

However, as a great deal of valuable documentary evidence had been collected, together with some oral evidence, it was decided that the Secretariat of the ICJ should prepare this Staff Study covering the same ground as the proposed Commission of Enquiry. The scope of the Study was extended to consider the application of the right of self-determination of peoples, the role of the United Nations and the role of India.

This Staff Study contains a factual account of the events which occurred in East Pakistan from March to December 1971, together with a discussion of some of the legal issues involved. The factual account is based partly upon published books, partly upon contemporary newspaper accounts, partly upon sworn depositions of refugees in India, and partly upon oral and written statements of evidence given to the International Commission of Jurists between October 1971 and March 1972. Nearly all these statements have been made by European and American nationals who were in East Pakistan at the time.

The discussion of the legal issues deals with some highly controversial subjects, but whenever we have formed a view on these issues, we have thought it better to state our view clearly without equivocation. In doing so, we wish to stress that this is a Staff Study for which the Secretariat is alone responsible. It does not commit the individual Members of the International Commission of Jurists.

We have sought to make this Study as objective as possible but recognise that we have suffered from the disadvantage that the former Pakistan Government refused to cooperate in helping us to obtain evidence from their side. Nor have we had an opportunity to obtain the comments of President Bhutto upon our text, and in particular upon our references to him.

We wish to express our gratitude to all those who have helped us in the preparation of this Study. We wish to acknowledge in particular the assistance we have received from the following books: *The Pakistan Crisis*, by David Loshak, Heinemann, London, 1971; *The Great Tragedy*, by Zulfikar Ali Bhutto, Pakistan People's Party, 1971; *The East Pakistan Tragedy*, by L. F. Rushbrook Williams, Tom Stacey, London, 1971; *The Rape of Bangladesh*, by Anthony Mascarenhas, Vikas Publications, Delhi, 1971; the *White Paper on the Crisis in East Pakistan*, Government of Pakistan, 1971; *Bangla Desh Documents*, Ministry of External Affairs, New Delhi, 1971; and from articles and reports by journalists, in particular the following: Peter Hazelhurst, The Times, London; Martin Woollacott and Martin Adeney, The Guardian, London; Simon Dring and Clare Hollingsworth, The Daily Telegraph, London; Sydney H. Schanberg and Malcolm W. Browne, The New York Times and International Herald Tribune; Henry S. Hayward, Christian Science Monitor.

Niall MacDermot,

Secretary-General
International Commission of Jurists

Geneva,
June 1972

PART I:

INTRODUCTION

A study of the East Pakistan crisis of 1971 calls for at least a brief summary of some of the events which led up to it.

The state of Pakistan came into existence through the inability of the Hindu and Moslem communities to reach agreement on a common constitution at the time of the British withdrawal from India.

The struggle for independence in the Indian sub-continent had been waged between the two world wars. At first, both Hindus and Muslims thought in terms of a federal state, but after the serious communal riots which accompanied the provincial elections in 1937, Mr. Jinnah, the Muslim leader, supported the demand for partition.

In 1940, the Muslim League held a Conference at Lahore when the following resolution was passed, indicating that more than one Muslim state was then in contemplation:

> ' That geographically contiguous units be demarcated into regions which should be constituted with such territorial readjustments as may be necessary, that the areas in which the Muslims are numerically in a majority as in the North-Western and Eastern zones of India should be grouped to constitute independent states in which the constituent units shall be autonomous and sovereign.'

At that Conference Mr. Jinnah said that Hindus and Muslims could never evolve a common nationality.

By 1946, opinion in the Muslim League had moved in favour of a single state of Pakistan. On 9 April, 1946, at a meeting of the Muslim League federal and provincial legislators, who were the elected representatives of the vast majority of Muslims, a motion proposed by Mr. H. S. Suhrawady, himself a Bengali, was adopted in these terms:

> ' That the zones comprising Bengal and Assam in the North East, and the Punjab, North-West Frontier Province, Sind and Baluchistan in the North West of India, namely Pakistan zones where the Muslims are in a dominant majority, be constituted into a sovereign independent state, and that an unequivocal undertaking be given to implement the establishment of Pakistan.'

Efforts by the British Government to maintain the unity of the sub-continent in a federal state proved abortive. The 1946 British Cabinet Mission ' suggested a three-tier federation, with a central government responsible for foreign affairs, defence, and communication, two regions, one comprising the predominantly Muslim provinces and one the predominantly Hindu provinces each responsible for such other matters as were assigned to them by the provinces, and provinces with all residuary powers '.[1] They proposed a constituent assembly to draw up a constitution on this basis. At first the plan was accepted by both the Muslim League and the Indian National Congress, but shortly afterwards Mr. Nehru criticised the plan in terms which, it may be noted, were later paralleled by the West Pakistan criticism of the Awami League's Six Points. He argued that ' defence and communication obviously included the control of many industries; foreign affairs inevitably included foreign trade; the centre must necessarily control currency and credit; it was highly improbable that there would be grouping of provinces into regions '.[2]

When it became impossible to achieve agreement on a single state, the British Government resolved to give independence on a basis of partition. The state legislators representing those parts of the Punjab and Bengal where the Moslems were in a majority were consulted by the British authorities. They were asked to state whether they would prefer that the Punjab and Bengal respectively should remain as united provinces under India or be partitioned in such a way that the preponderating Muslim areas contiguous to each other would be formed into separate provincial units within the state of Pakistan. The legislators passed resolutions in favour of partitioning both the Punjab and Bengal. In making this decision they showed that they attached greater importance to belonging to a unified Islamic state than they did to maintaining the unity of the former provinces, in spite of their common history, language and culture. The religion of Islam was accorded a primacy as the determining principle over all other principles.

Accordingly, the British parliament passed the Indian Independence Act, 1947, and the two separate states of India and Pakistan came into being, each being autonomous dominions with a Governor-General appointed by the Crown.

The name of Pakistan, first thought of in 1930, is composed of letters from Islamic provinces or countries, Punjab, Afghania (the old North West Frontier region of India), Kashmir, Iran, Sind, Turkharistan, Afghanistan and Baluchistan. It may have been ominous for the future of Pakistan, but Bengal was not one of the regions which lent its letters to the name. Pakistan also means in Urdu ' the land of the spiritually pure and clean '.

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[1] Gledhill, A., 1957, *Pakistan*, Stevens & Sons Ltd., London, p. 60.

[2] Op cit., p. 61.

The new state of Pakistan had one of the largest populations in the world (then 76 million; in 1971 135 million). It was divided into two ' wings ', vastly different from each other and separated by 1,200 miles of Indian territory. West Pakistan, with an area of 310,000 square miles, contained large areas of desert and barren mountainous regions. The people are tall, lighter skinned, active and energetic, and in many ways closer in spirit to the countries of the Middle East than to Asia. Their language is Urdu, their staple crop wheat. East Pakistan, with an area of only 55,000 square miles, is a densely populated fertile area, much of which is flooded annually by the Ganges and Brahmaputra rivers and their numerous tributaries (into whose delta flows five times the quantity of water flowing through the delta of the Mississippi). The people are short, dark skinned, easy going and, no doubt, influenced by the hot humid climate, less energetic than the West Pakistanis. Their staple crop is rice. Their language is Bengali, with a rich literature and culture of its own. Although the Muslims were in the vast majority in East Bengal, it was the Hindu minority who before independence provided most of the land-owning, mercantile and educated class.[3] East Bengal formed part of a larger region, geographically, economically and linguistically, of which Calcutta was the capital and outlet to the rest of the world.

At the time of partition, millions of Muslims migrated from India to settle in Pakistan. Among those who went to East Pakistan were many Urdu-speaking Muslims. These came to be referred to generally as Biharis, although only a part came from Bihar. Owing to the language difference, assimilation proved difficult in areas where there were large concentrations of Biharis and hostility and resentment developed between the Biharis and the Bengalis. In addition to the differences in language, race, temperament, culture, diet, geography and climate, there were few historic or economic links between the two wings of Pakistan. Their real common bond was their religion. As subsequent events have shown, this proved an insufficient cement to bind together the two halves of the new state. Even here there were differences, in that the Bengali Muslims tended to be less fanatical in their religious zeal. Although there had at times been severe and violent communal clashes, the Bengali Muslims had generally come to accept their Hindu minority and neighbours, with whom they had many ties and associations.

Although the majority of the population (55%) lived in East Pakistan, the new state was dominated from the start by the Western wing. There were many reasons for this. The capital, almost inevitably, was in the west which contained the only large port, Karachi, the military headquarters, Rawalpindi, what little industry there was, and the better economic substructure. The army, which came to play an

[3] Rushbrook Williams, L., 1972, *The East Pakistan Tragedy*, Tom Stacey Ltd. London, p. 15.

increasingly dominant part in the new state, was drawn from the more militaristic peoples of the west, and the civil service also was very largely western, in part due to the fact that a substantial part of the administrative class in the former East Bengal had been Hindu.

Instead of setting out to rectify the imbalance, the leaders of the new state appeared insensitive to the aspirations of the Bengali majority. As early as 1948, in a speech at Dacca University, Mr. Jinnah told the Bengalis: ' Make no mistake about it. There can only be one state language and that can only be Urdu.' President Ayub Khan later declared: ' It is quite clear to me that with two national languages we cannot become a one-nation state; we shall continue to remain a multi-nation state.' But the leaders of Pakistan did not follow the logic of this and allow the two wings to develop as two federated nations. Instead, East Pakistan came to experience what seemed to them to be a colonialist domination by a remote alien element, who neither understood nor sympathised with their national aspirations and who as they believed, deprived them of what they regarded as their fair share of investment and economic development.

Moreover, the disastrous conflict with India over Kashmir, which was of burning importance to the Western wing, was a remote issue to the Eastern wing, and the economic break with India which followed it had the effect of cutting East Pakistan off from their natural trading partners in the adjoining Indian provinces. East Pakistan became a captive market for the high priced goods of the new West Pakistan industry, and found that their area, whose jute and tea crops provided two thirds of the country's exports, received less than a third of its imports, less than half of its development funds and less than a quarter of its foreign aid.

The initial period of parliamentary democracy in Pakistan on the British model was hardly a success. Owing to the early death of Mr. Jinnah and the assassination of the first Prime Minister, Mr. Liaquat Ali Khan, the country was deprived of its two leaders of stature. The political life ' degenerated rapidly into a squalid tangle of self-seeking and corruption. Tensions, basically economic but needing sound political solutions, built up between the two wings and between the provincial units within the west wing itself. Wrangling and delay in the legislature over framing of a constitution declined into a game of political intrigue. By 1958, the nation's affairs had reached a state of chaos . . . ' [4]

The army, led by General Ayub Khan, decided to take charge and there followed 13 years of military rule, lasting until the fall of President Yahya Khan in December 1971. The new military regime, aided by the civil servants, achieved a great deal in tackling many of Pakistan's economic and social problems. The first military governor

[4] Loshak, D., 1971, *Pakistan Crisis*, Heinemann, London, p. 13.

of East Pakistan, Lt.-Gen. Azam Khan, was a popular figure and succeeded in redressing many local grievances, but he was replaced in 1961. The inherent conflicts between the two wings remained, and as time went on were accentuated by the neglect of Bengali interests. When eventually the leaders did make attempts to rectify this situation, as both Ayub and Yahya Khan did, their efforts proved to be too little and late.

From the time of the new Constitution in 1962, Pakistan outwardly enjoyed a system of democratic government known as ' basic democracy ', but in reality the government remained a military dictatorship. Corruption, which had first been largely eradicated under Ayub's presidency, became rife again. Social inequality increased, with two thirds of the country's industrial wealth and four fifths of its banking and insurance concentrated in the famous 22 west wing families. After the Kashmir war of 1965, the army's prestige diminished, rioting became prevalent in both wings, and harsh repressive measures were adopted.

In 1969, faced with growing disorder, President Ayub Khan attempted to negotiate with opposition leaders on the basis of constitutional and economic reform. Political prisoners were released, including the former Foreign Minister, Mr. Bhutto, and the Awami League leader, Sheikh Mujibur Rahman, who was then being tried on the Agatarla conspiracy case. But the attempt failed. The army was not prepared to yield to the demands from the opposition parties of both wings for full democracy with direct elections, abrogation of the emergency regulations and of press censorship, and wide-spread nationalisation. Still less would they grant the demand from the Eastern wing for substantial autonomy on the basis of the Awami League's Six Points. Rioting continued and the resultant breakdown led President Ayub Khan to hand over power to General Yahya Khan.

With the reimposition of martial law, order was soon restored. Confidence was established by General Yahya Khan's declared intention to return the country as soon as possible to civilian rule. Within four months of taking over, he ordered preparation of electoral lists on the basis of universal franchise. In November he promised a general election on October 5, 1970, to elect a constituent assembly, and allowed the parties to start campaigning on January 1. The elections were for the first time to be held on the one-man, one-vote principle, which assured East Pakistan a majority of votes and of seats. West Pakistan was to be divided into provinces and cease to be one administrative unit, and the two wings were to be granted ' maximum autonomy . . . consistent with the integrity and solidarity of the nation '.

On March 28, 1970, President Yahya Khan published the Legal Framework Order, laying down the conditions and procedure for establishing a new constitution. The essential conflict between the two wings is revealed by comparing the ' fundamental principles of

the Constitution ' contained in clause 20 of the Order with the Awami League's Six Points. Both agreed that Pakistan should be a federal republic but the differences lay in the conception of the Central Government's powers. The Six Points declared that the Federal Government should be responsible only for defence and foreign affairs; there should be two separate mutually convertible currencies or, if one currency, regional reserve banks to prevent the transfer of resources and flight of capital from one region to the other. Fiscal policy was to be the responsibility of the federating units, who were to provide the central government with the necessary resources for defence and foreign affairs. The regional governments were to be responsible for foreign trade and aid, and were to be empowered to maintain their own militia or para-military force. The ' fundamental principles ' in the Legal Framework Order proclaimed that ' Pakistan shall be so united in a Federation that the independance, the territorial integrity and the national solidarity of Pakistan are ensured, and that the unity of the Federation is not in any way impaired '. The provinces were to have ' maximum autonomy, that is to say maximum legislative, administrative and financial powers ', but the federal government was to have ' adequate powers, including legislative, administrative and financial powers, to discharge its responsibilities in relation to external and internal affairs and to preserve the independence and integrity of the country '.

There was an obvious conflict here. The exclusion of foreign trade and aid from the purview of the central government as proposed by the Six Points, would deprive it of real control over foreign policy, and its inability to levy taxes directly would subject its defence programme to a veto by the provinces. The Awami League leaders never succeeded in showing convincingly how the Six Points would give the central government any real control over foreign affairs and defence.

In spite of these implications of the Six Points, President Yahya Khan allowed the Awami League to campaign on the basis of the Six Points. He could hardly have been expected to foresee Sheikh Mujibur Rahman's astonishing victory in the subsequent elections, giving the Awami League an absolute majority in the Assembly. He no doubt assumed that, when it came to the point, Sheikh Mujibur, whom he knew to be a realistic politician, would be prepared to compromise substantially on the issue of central government powers.

Owing to the cataclysmic cyclone which ravaged the coastal district of East Bengal on the night of 12/13 November, the elections were postponed until December. When the election was eventually completed, the Awami League had won 167 out of the 169 East Pakistan seats, and Mr. Bhutto's Pakistan Peoples' Party had won 85 of the 144 West Pakistan seats.

This remarkable result was contributed to by the strong reaction of the people of East Pakistan against what they believed to be the callous indifference and neglect of President Yahya Khan and the

West Pakistan controlled government in dealing with the unprecedented horror of the November cyclone.

Under the Legal Framework Order, the President was to decide when the Assembly was to meet. Once assembled it was to frame a new Constitution within 120 days or stand dissolved. On February 13, 1971, the President announced that the National Assembly was to meet at Dacca on March 3. By this time the differences between the main parties to the conflict had already crystallised.

On December 22, the Secretary of the Awami League, Mr. Tajuddin Ahmed, claimed that his party having won an absolute majority had a clear mandate and was quite competent to frame a constitution and to form a central government on its own. Sheikh Mujibur Rahman, with greater realism, declared on January 3 that his party would not frame a constitution on its own, even though it had a majority. He refused, however, to negotiate on the Six Points, saying that they were now public property and no longer negotiable.

This was the crux of the conflict. The majority party in the west, led by Mr. Bhutto, was convinced that a Federation based on the Six Points would be a Federation in name only. At best it would lead to a feeble Confederation, unable and unwilling to maintain a tough policy towards India; at worst it would result in the division of the country into two states. These fears were evidently shared by the military leaders in the west, including President Yahya Khan, as would be known to Mr. Bhutto.

President Yahya Khan, who had publicly described Sheikh Mujibur Rahman as the ' future Prime Minister of the country ' on January 14, seemed to be sparing no efforts in seeking to find a way out of the impasse, but to no avail. In truth no compromise was possible so long as both sides continued to regard the central issue of economic independence for East Pakistan as not being negotiable. Mr. Bhutto announced on February 15 that his party would not attend the Constituent Assembly unless there was ' some amount of reciprocity ' from the Awami League. Sheikh Mujibur replied at a press conference on February 21, asserting that ' Our stand is absolutely clear. The Constitution will be framed on the basis of the Six Points.' He also denied that the Six Points would leave the central government at the mercy of the provinces and contended that they were designed only to safeguard provincial autonomy. The Awami League leaders maintained throughout that the proper forum for discussing the constitution was the Constituent Assembly.

Whatever willingness Sheikh Mujibur Rahman might have had to compromise on the Six Points in other circumstances, his absolute electoral victory made it impossible to do so. It was not that he was too weak to oppose the extremists in his party; he had frequently done so before with courage and success. But to renounce on the Six Points which were essential to achieve real autonomy, particularly

economic autonomy, for East Pakistan, would have meant going back on everything he had said in his long and now successful political struggle. The deadlock which was reached arose from the impossibility of finding ' a way of reconciling east wing needs with west wing demands, of making one nation out of what are essentially two '.[5]

There is some evidence to suggest that by February 15, the military leaders in the west had already reached a decision that the Bengalis should, if necessary, be frustrated by force of arms from achieving the autonomy on which they were so plainly bent. President Yahya Khan, as will be seen, continued to seek a political solution, or at least went through the motions of doing so, but in the meantime the military build-up of West Pakistan forces in East Pakistan also continued.

On February 19, the army moved out of their cantonment at Dacca and began to set up check points and machine gun posts about the town.

On February 21, President Yahya Khan dismissed his ten man civilian cabinet and called in all five provincial governors and martial law administrators. The army had taken over full control.

On February 26, 27 and 28 the Awami League met in conference in Dacca to settle their draft constitution for submission to the Constituent Assembly. They did so amid growing apprehension owing to the increasing military activity in Dacca and the rumours beginning to circulate that the Assembly would be postponed.

On February 28, Mr. Bhutto demanded that either the 120-day limit for the Constituent Assembly be removed or the opening session be postponed, declaring that if it was held on March 3 as planned, there would be a hartal (general strike) throughout West Pakistan ' from Preshawar to Karachi '.

President Yahya Khan responded in a broadcast the next day by postponing the Assembly indefinitely.

[5] Loshak, D., *op. cit.*, p. 18.

PART II

THE EVENTS IN EAST PAKISTAN, (a) 1-25 March, 1971

The postponement of the Constituent Assembly came as a shattering disillusionment to the Awami League and their supporters throughout East Pakistan. It was seen as a betrayal and as proof of the determination of the army and of the West Pakistan authorities to deny them the fruits of their electoral victory.

Sheikh Mujibur Rahman's reaction was to call a five-day general strike (hartal) throughout East Pakistan. In a statement on 2 March, he said ' In this critical hour it is the sacred duty of each and every Bengali in every walk of life, including government employees, not to cooperate with anti-people forces and instead to do everything in their power to foil the conspiracy against Bangladesh '. The response was complete. Normal life was paralysed. Transport and communications ceased. All factories, offices and shops were closed. Any who attempted to open them were roughly handled by Awami League vigilantes. The streets were filled with marching, chanting, protesting processions.

At first the army tried to assert their authority and this resulted in Dacca, Khulna, Jessore and elsewhere in a number of clashes between them and demonstrators and looters, in which the army opened fire on unarmed civilians. The Pakistan authorities later stated that a total of 172 persons had been killed in this period, but some of them were killed in intercommunal clashes.

As from March 3, the army were ordered to return to their cantonments and remained there until March 25. The Pakistan authorities say that their purpose was to avoid further clashes during the period of negotiation. Some have suggested that the army were holding their fire until they were ready to strike, but this seems unlikely as few, if any, units were flown into East Pakistan between 4 and 25 March. Whatever the reason for the withdrawal, it had the effect of keeping down the violence in a period of extreme tension.

Apart from some serious riots in Chittagong on and after the night of 3 March, and some less severe incidents on the same day at Jessore and Khulna, there was remarkably little communal violence during the hartal. The events at Chittagong on the night of 3/4 March are described as follow in the Pakistan White Paper:

' At Chittagong, violent mobs led by Awami League storm troopers attacked the Wireless Colony and several other localities, committing wanton acts of loot, arson, killing and rape. In one locality (Ferozeshah Colony), 700 houses were set on fire and their inmates including men, women and children were burnt to death. Those who tried to flee, were either killed or seriously wounded. Apart from those burnt alive, whose bodies were found later, over 300 persons were killed or wounded on 3 and 4 March.' [1]

According to information received from foreign nationals in Chittagong, which is believed to be reliable, the incident began when Bengali demonstrators passed in procession through Bihari areas in order to make the Biharis keep to the hartal. The demonstrators were fired upon by Biharis, and a serious riot followed in which people were killed on both sides and a substantial number of Bihari houses were burnt. The number killed on both sides may have reached 200. It is to be noted that by giving a joint estimate of 300 for killed and wounded, the White Paper does not give any estimate of the number of deaths. The rioting continued sporadically for a number of days until order was restored by the Awami League on orders from Sheikh Mujibur Rahman.

On March 3, President Yahya Khan invited 12 leaders of the main political groups in the newly elected National Assembly to meet at Dacca on 10 March in an effort to solve the crisis. Sheikh Mujibur rejected the invitation the same evening and started issuing a series of instructions or ' directives ' to implement a ' non-violent and non-cooperation movement '. These included an injunction not to pay taxes.

At his press conference on 2 March, Sheikh Mujibur Rahman stated that the Awami League would hold a public meeting at Dacca on 7 March where he would ' outline a programme for achieving the right of self-determination for the people of Bengal '.[2] This phrase was, of course, an allusion to the principle of self-determination of peoples under the Charter of the United Nations. The general expectation was that he would then declare the independence of Bangladesh. Perhaps to avert this, President Yahya Khan in an address to the nation on 6 March announced that the National Assembly would meet on 25 March. He added the warning:

' Let me make it absolutely clear that no matter what happens, as long as I am in command of the Pakistan Armed Forces and Head of the State, I will ensure complete and absolute integrity of Pakistan. Let there be no mistake on this point. I have a duty towards millions of people of East and West Pakistan to preserve this country. They expect this from me and I shall not fail them.'

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[1] *The Crisis in East Pakistan*, Government of Pakistan, 5 August, 1971, p. 31.

[2] *Washington Post*, 3 March 1971.

On 7 March, Sheikh Mujibur replied by putting forward four demands which had to be accepted before the Awami League would consider attending the National Assembly. These were:

(1) immediate withdrawal of martial law;

(2) immediate withdrawal of all military personnel to their barracks;

(3) an official enquiry into army killings in East Pakistan;

(4) immediate transfer of power to the elected representatives of the people (i.e. before the National Assembly met).

A fifth demand was added later that reinforcements of army units from West Pakistan must cease.

The first four demands were in effect a demand that President Yahya Khan should accept the then status quo. According to the Awami League representatives these demands were never in terms rejected. It was clear, however, that for President Yahya Khan to have implemented formally the first and fourth demands would have amounted to a complete surrender. The second was already in force and the third was accepted in principle, though agreement was never reached on the form of the enquiry. The fifth demand, of course, was not accepted.

As from 7 March, the general strike was replaced by a ' return to normal ' under what amounted in fact, though not in name, to a provisional government by the Awami League. The civil service, police, even the judges acknowledged the authority of their ' directives '. The new governor, General Tikka Khan was unable at that time to find anyone prepared to swear him into office. Gradually the shops, banks and offices began to open again. Some acts of violence did of course occur but, contrary to the contention of the Pakistan Government in their White Paper [3], the Awami League leaders were in general successful in maintaining the non-violent character of the resistance. Indeed, even in the White Paper the only killings alleged to have occurred between 6 and 24 March were

(a) the killing of a demonstrator by a shopkeeper whose shop was being attacked at Khulna on 6 March;

(b) the killing of two escaping prisoners by police at Comilla on 12 March, and

(c) the killing of 3 people by the army when barricades were formed at Joydevpur on 19 March. (At the time, Bengali police estimated that about 15 civilians were killed by the army in this incident.[4])

Not a single person is alleged to have been killed by mobs or by supporters of the Awami League between those dates.[5]

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[3] Op. cit., p. 15.

[4] Martin Adeney, *Venture*, Vol. 23, No. 5, p. 9, Fabian Society, London.

[5] Op. cit., pp. 32-38.

The Awami League leaders were determined to maintain the policy of non-violence. Several incidents bear witness to this. It is reported that order was restored in Chittagong at the beginning of March by a Commission sent from Dacca. In mid-March some young Awami League supporters set up check-points on the approaches to Dacca airport in order to search fugitives to West Pakistan to see that they were not taking large sums of money or jewelry with them. This led to one case of violence with the victim being taken to hospital. The check-points were dismantled on personal orders from Sheikh Mujibur Rahman. The Awami League leaders knew they had nothing to gain and everything to lose from violence, as it could only lead to severe repression by the army. There is no doubt that they were remarkably successful in this. The Anglican Bishop of Dacca gives the following description, which tallies with many other similar reports:

> ' I left Dacca by road at 5.30 a.m. on March 1, and travelled safely and uneventfully to Khulna. That evening I learnt on the wireless that there had been some hooliganism in Dacca and several non-Bengali shops had been looted, but that Sheikh Mujibur Rahman had used his personal influence to stop the trouble. I also heard that on Monday there was to be a ' hartal ' in Dacca, and on Tuesday there was to be a three day ' hartal ' throughout the province. On the Monday I travelled some 70 miles safely and uneventfully. During the ' hartal ' my car was taken back to Dacca with two Scottish visitors, and took two days for the journey, because the ' hartal ' only stopped at 2.00 p.m. each day. They arrived in Dacca safely and uneventfully. Thereafter up till the 17th March I was travelling by train, road and river, passing through six districts, and I travelled in the utmost peace and security. None of the people whom I spoke to on my way seemed to have any anxiety about the situation.
>
> There was, it is true, a non-cooperation movement going on at the time.... It could be said that the de facto government of the country was then in the hands of Sheikh Mujibur. But to speak of a break-down of law and order is a great exaggeration. There was both law and order. The non-cooperation, apart from the one incident in Dacca mentioned above, was being strictly non-violent.... '

We do not suggest that there were no other acts of violence during this period. There is evidence to show that attacks were made on non-Bengalis in Rangpur during the week ending March 13, and at Saidpur on March 24, during which shops and properties were burnt and a number of people killed. But considering the state of tension which prevailed, the extent of the violence was surprisingly restricted. Students and Awami League supporters were, however, preparing themselves for an eventual armed conflict. Many accounts have been given on the Pakistani side of looting of arms and ammunition and preparation of petrol and hand-made bombs manufactured from stolen chemicals. While the army remained in their cantonments,

they were subjected to a blockade by Awami League supporters, so that fresh rations and other civilian supplies were prevented from reaching them. This action added to the fury of the army attack when it came.

On March 15 President Yahya Khan flew again to Dacca to hold constitutional talks with Sheikh Mujibur Rahman. Leaders of various West Pakistan parties arrived later in Dacca to join in the talks. The Pakistan Government's version of these talks is given in their White Paper.[6]

The Bangladesh Government have not yet published an official account of the negotiations. The fullest account has been given by Mr. Rehman Sobhan, an adviser to Sheikh Mujibur Rahman on constitutional and economic policy.[7]

According to the Pakistan White Paper, by 20 March President Yahya Khan had provisionally agreed to make a proclamation providing for an interim constitution until a new constitution had been drawn up by the National Assembly. Under the interim constitution, Yahya Khan was to continue as President and Head of State under the 1962 Constitution with a Cabinet of Ministers selected from representatives of the political parties of East and West Pakistan; the powers of the central legislature were to be as provided in the 1962 Constitution save for ' certain limitations and modifications to be agreed upon with respect to the Province of East Pakistan '; Provincial Governors were to be appointed by the President and Provisional Cabinets appointed from the members of the Provincial or National Assemblies to aid and advise the Governors; martial law was to be revoked as from the day the Provincial Cabinets took office, but if ever it appeared to the President that a situation had arisen in which the government of a province could not be carried on, the President was to be able to assume to himself the executive government of the province. All this was to be subject to the agreement of other political leaders and to the ' all-important question of legal validity '. This referred to an objection raised by President Yahya Khan's advisers that if martial law was revoked, the instrument establishing the Central and Provisional Government would have no legal validity; ' a constitutional vacuum would therefore be created in the country '. Considering the number of constitutional irregularities which had already occurred in the short history of the state of Pakistan[8], this objection showed a surprising degree of constitutional sensitivity. Mujibur Rahman's legal expert, Dr. Kamal Hossein,[9] was convinced

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[6] Op. cit., pp. 16-27.

[7] *Negotiating for Bangladesh: A Participant's View*, Sobhan, R., July 1971, South Asian Review, Vol. 4, No. 4, p. 315.

[8] See Part III below.

[9] Now Minister for Law in the Bangladesh Cabinet.

that there was no validity in the objection. He suggested, and it was agreed, that the opinion should be sought of the leading Pakistan constitutional lawyer, Mr. A. K. Brohi[10]. Mr. Brohi's opinion supported the view of the Awami League that the objection was invalid. He advised that a precedent was to be found in the method of transferring power from the British Government at the time of Independence. According to the Awami League representatives, this opinion was accepted by President Yahya Khan and his legal adviser, ex-Chief Justice Cornelius, ' and it disappeared from the dialogues at an early stage '.[11]

The unexpected degree of progress which had been made in the talks led President Yahya Khan to call Mr. Bhutto to Dacca, where he arrived with his aides on 21 March. It was soon evident that there was no area of agreement between him and Sheikh Mujibur Rahman. He insisted that martial law should be retained until the new constitution was in force, and, in order to prevent the exercise by the Awami League of what he termed their ' brute majority ', he maintained that no law or constitution should be able to be presented in the National Assembly unless approved by a majority of the members of each wing, and any constitution approved by the National Assembly should still be subject to the Presidential veto under the Legal Framework Order.[12] It may be assumed that Mr. Bhutto's objection was to ensure that there was no lawful way in which East Bengal could obtain their economic independence, still less their political independence.

The 23rd March was ' Pakistan Day ', and was provocatively declared in Dacca to be ' Resistance Day '. Sheikh Mujibur Rahman took the salute at an armed march past from his residence, from which the new Bangladesh flag was unfurled. This flag was flown from hundreds of public and private buildings all over the country. Sheikh Mujibur Rahman issued a ' declaration of emancipation '.

On the same day his representatives produced to the President's advisers a draft proclamation going well beyond the proposals which appeared to have been provisionally agreed three days earlier and, in one important respect beyond even the Six Points. The Awami League draft, which is set out in full as an Appendix to the White Paper[13] provided for:

(1) martial law to stand revoked in a province from the day when the Provincial Governor (who was to be irremovable) took office, and in any event within seven days of the proclamation;

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[10] Mr. Brohi later defended Sheikh Mujibur Rahman at his secret trial before a military tribunal after his arrest.

[11] Sobhan, R., op. cit., p. 323.

[12] *The Crisis in East Pakistan*, op. cit., p. 21.

[13] Op. cit., pp. 47-59.

(2) members of the National Assembly from ' the State of Bangladesh ' were to sit as a separate Constituent Convention to frame a constitution for the State of Bangladesh within 45 days, and members from the States of West Pakistan (Punjab, Sind, North-West Frontier Province and Balukistan) were to do likewise for a constitution for the States of West Pakistan;

(3) the National Assembly was then to ' sit together as a sovereign body for the purpose of framing a constitution for the Confederation of Pakistan ' (not, as in the Six Points, a Federation), and the President was to be deprived of the power of veto which he had reserved for himself under the Legal Framework Order;

(4) the provincial government and legislature of East Pakistan were to have substantially increased powers during the interim period, including foreign trade and aid, control of finance and taxation and control of their own state bank.

On the face of them, these provisions would have ensured complete freedom for East Pakistan to determine its own destiny, and also complete control over the central constitution-making process and the central government. In view of the use which was subsequently made of this draft in justification of the army's action, the Awami League's account of how this document came to be prepared is of importance. When by March 20 a fair amount of agreement seemed to have been reached on an interim constitution, the Awami League representatives urged President Yahya Khan to bring over a statutory draftsman to draw up the necessary proclamation. President Yahya Khan kept pressing the Awami League to produce their own draft. Unwisely perhaps, they eventually agreed to do so. In the circumstances, and with no agreement secured from Mr. Bhutto, the Awami League could hardly have been expected to draft a compromise proposal. Their draft (which appears to have been based on their draft constitution prepared for submission to the Constituent Assembly) expresses their negotiating position. They claim that they put it forward, not in the belief that it would be accepted in full, but expecting it to lead to more specific negotiations. Moreover, they contend that at no stage were their proposals rejected by President Yahya Khan, who kept referring matters for discussion by the expert advisers on both sides. The Awami League representatives are now convinced that President Yahya Khan never had any intention of reaching an agreement with the Awami League, and was merely playing for time.

Others believe that President Yahya Khan would, for his part, have been ready to accept an accommodation with the Awami League but that agreement could not be achieved with Mr. Bhutto. For example, the Times correspondent, Mr. Peter Hazelhurst has written:

> ' It was Bhutto who finally brought the President to take the decision which set East Bengal on fire. When the President put the Sheikh's pro-

posal to the West Pakistan leaders, Bhutto pointed out that if the Martial Law was withdrawn, Pakistan would be broken up into five sovereign States, the moment the President restored the power to the Provinces. He expressed the fear that Sheikh Mujibur Rahman was trying to liquidate the Central Government, because when the President withdrew the Martial Law, he had no sanction to carry on as Head of the State. Half-convinced, the President went back to Sheikh Mujibur Rahman and expressed these fears. He promised Mujib that he would withdraw the Martial Law the moment the National Assembly met and gave the Central Government some form of validity. Sheikh Mujib reiterated his demand for the immediate withdrawal of the Martial Law . . . ' [14]

According to the White Paper, the talks broke down because the Awami League representatives were not prepared to compromise on the essential features of their proposed proclamation [15], and because their proposals were unacceptable to Mr. Bhutto or to the other party leaders from West Pakistan, or to President Yahya Khan and the army.[16]

It is impossible to reconcile the accounts given by the two sides. Wherever the truth lies, it can be said that the Awami League believed that the election results, coupled with the complete support they had received from the people and all organs of government in East Pakistan since 2 March, entitled them to the degree of autonomy which they had claimed in the Six Points. When that was finally refused to them, they considered that they were entitled to claim the independence of Bangladesh in accordance with the principle of the right of self-determination. The justification for this claim in international law will be considered later.[17] To President Yahya Khan and to the other army leaders, the claim to autonomy and the conduct of the Awami League appeared as treason. By 25 March the President had evidently concluded that no negotiated settlement was possible. There was no need to protract the fruitless constitutional negotiations any further. The army's contingency plans were brought into force. It struck, and struck with terrifying brutality.

The White Paper asserts that reports had become available of Awami League plans to launch an armed rebellion in the early hours

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[14] Peter Hazelhurst *The Times*, London, June 4, 1971.

[15] Op. cit., pp. 25 and 26.

[16] The Awami League representatives assert that this was not suggested to them, even at this late stage. It now seems clear that the decision to break off the negotiations and to start the army ' crack-down ' must have been taken at the latest on March 24. However, at a further meeting on the evening of that day, President Yahya Khan's advisers did not reject the proposals and agreed to telephone Dr. Kamal Hossein next morning with a view to arranging a further meeting on the next day to discuss its terms. This was ' the telephone call which never came.'

[17] See Part V below.

of 26 March, and puts this forward as the explanation and justification of the army's action.[18] According to the White Paper the operational plan was as follows:

(a) East Bengali Regiment troops would occupy Dacca and Chittagong to prevent the landing of Pakistan Army reinforcements by air or sea;

(b) the remaining East Bengali troops with the help of the East Pakistan Rifles and the police would move to eliminate the Armed Forces at various cantonments and stations;

(c) the East Pakistan Regiment would occupy border posts to keep it open for aid, arms and ammunition from India;

(d) Indian troops would come to the assistance of the Awami League once the latter succeeded in occupying the key centres and paralysing the Pakistani army.

The source of this information is not given, but it seems inherently probable, as well as being consistent with subsequent events, that there would have been a contingency plan of this nature. It must have been evident to all concerned that if the political talks broke down, the army would leave their cantonments and use force to restore the authority of the martial law regime and bring the ' non-cooperation movement ' to an end. The only alternative to surrender would then be armed resistance. Reports that the talks were foundering was common knowledge by the evening of March 24 and this resulted in outbreaks of violence in a number of centres on 25 March.

We do not feel able to accept that the army's action was caused by a discovery of an Awami League plan to launch an armed rebellion. Rather, it was caused by President Yahya Khan's decision to break off further negotiations and reassert his authority. The nature of the action taken was, however, influenced by the knowledge that it would convert the hitherto passive resistance into an armed resistance by defecting East Bengali troops and police and by those Awami League supporters and students who had succeeded in collecting arms.

The White Paper also asserts that ' the action of the Federal Government on 25 March, 1971, was designed to restore law and order, which had broken down completely during the period of the Awami League's ' non-violent, non-cooperation ' movement '.[19] As has been seen, the charge that there had been a complete breakdown of law and order is not justified, at least up to 24 March. The breakdown in law and order which then occurred was a consequence of the breakdown in talks, of the decision to reassert the authority of the army, and of the armed resistance to that decision.

[18] Op. cit., p. 27. The alleged operational plan is set out on p. 40.

[19] *Op. cit.*, Introduction.

(b) 25 March - 18 December, 1971

The Indictment

An American who was working in a rural area in the interior throughout the period from March to December, has written a powerful and passionate indictment of the Pakistan Army and auxiliary forces in these terms:

> ' For nine months all human rights were completely suspended in East Pakistan. Not only the Government and the Army, but every soldier with a gun had supreme authority over life and death and property, and could use that authority at will . . .
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> . . .
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> The military reign of terror in East Pakistan was directed almost exclusively against the unarmed civilian population. It was not a civil war of soldiers against a rebel army. It can be divded roughly into three phases. First, there was the general repression launched against all Bengalis, which began in March and continued with varying intensity for nine months. The second phase was the concentrated persecution of the Hindus, with the explicit intention of eliminating the eight to ten million Hindus left in the country, either by murdering them or driving them out. This second phase was accompanied by a secondary persecution of the Hindus by their Muslim neighbors with encouragement from the Army. The third phase was the Collective Punitive Reprisal Program which increased tremendously when the freedom fighters began hitting back.
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> The first phase began in earnest on March 26th. The Army simply loosed a reign of terror against all Bengalis on the theory that if they were sufficiently savage and brutal, they would break the spirit of the Bengali people, and not only stop the rebellion but ensure that it would never happen again. In the beginning this reign of terror took place in and around the cities. Prime targets of the army were anyone who were or could be leaders; Awami League politicians, professors, students, businessmen. But any Bengali was fair game for any soldier. Although later on this general program of repression of everyone was toned down, it never completely ceased. And throughout the entire nine months in which at least a million died and millions more fled the country, the Army remained immune from censure or punishment. Rather they were highly praised by the President for their activities. Justice was completely dead throughout the country.
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> In April the second phase, the concentrated persecution of the Hindus, began. By the beginning of May it was obvious to observers that it was the Government's avowed intention to kill or drive out of the country all of the eight to ten million Hindus in East Pakistan. Throughout the country, the Army was searching out Hindu villages and deliberately destroying them and murdering the people. They would attack a village suddenly and swiftly, killing anyone they encountered, whether men, women or children. They would then loot and burn the village to make sure that the poor people had nothing to return to. Not even a pretence was

made of being just. The only evidence needed against these people was the fact that they were Hindus. The Army would come into a new area, enquire where the Hindus lived, and proceed to wipe them out. Sometimes they would claim that the village was harbouring freedom fighters, but never did they make any investigation to see if the charges were true. Throughout the country, literally thousands of Hindu villages were destroyed in this way. These people lost their homes, their possessions, their life savings, their means of livelihood, and often their lives. Yet they were guilty of no crime, and were not even accused of a crime. They were simply marked for extermination.

After the Army had clearly indicated that they were out to exterminate the Hindu population, the lower element among the Bengali Muslims began to take part in the terrorism. Their motive was both hatred for the Hindus, and greed. For the expulsion of the Hindus would enable them to take over their lands and possessions. To satisfy their greed they stooped to drive out their neighbors and let women and children suffer and starve and die. Local Muslim leaders and Union Board Chairmen ordered the Hindus in their area to get out within 24 hours, or they would call in the Army against them. Knowing that it was not an idle threat, the Hindus had no choice but to flee. In many areas, mo re harm was done to Bengali Hindus by Bengali Muslims than by the West Pakistan Army.

What was behind this persecution of the Hindus? After a month of repression it was evident that the military reign of terror was not succeeding as planned. The Muslim army resented the fact that they had to kill their Muslim brothers when so many Hindus were available. And there was a danger that the rebellion would succeed since the savagery of the repression had angered the entire nation. So the Army changed its tactics to make the Bengali revolt look like an Indian instigated rebellion. They attacked the Hindus as Indian agents and called on all Muslims to unite against the common enemy. They succeeded in getting many Muslims to collaborate with them out of greed, but the general run of Muslims were not fooled by the move. They knew well who the real enemy was.

The third phase of the Army program, that of Collective Punitive Reprisals went into high gear when the freedom fighters began to return from training and started their work of sabotage and harassment of the military. This was the worst phase of all in its cruelty and injustice toward civilians. Whenever any act of sabotage occurred, the Army would immediately rush troops to the area. The freedom fighters would of course be long gone, so the Army would punish all the surrounding villages, burning and killing at will. No effort was made to look for the guilty. The Army pattern of slaughter in reprisal became so standardised that if a bridge or pylon was blown up during the night, the entire civilian population of the area would abandon their homes before daylight and flee into the interior. This prevented the Army from killing so many, but it did not stop them from looting and burning the homes. Day after day the sky was billowing with smoke as thousands of homes were put to the torch . . .

My own personal experience underlines the complete indifference of the Army to the question of innocence or guilt. When a train was blown up nearby, the local doctor at first refused to go to the help of the victims

because if the Army should show up they would immediately kill everyone on the scene. I knew it was dangerous and that his fear was reasonable, so I agreed to accompany him. When we were still too far from the wreck to be identified the Army opened fire on us. The fact that there was no evidence of guilt was of no consequence. We saved our lives only by abandoning our boat and swimming to shore. In another boat in the area a man was killed and his five year old son was fatally wounded. The little fellow lingered for a month in our makeshift hospital, and finally died in pain and in fear. During his long month of misery, every time he heard a gunshot, he thought the Army was after him again and he would whimper to his grieving mother, ' Mummy, will they shoot me again? Mummy, please don't let them shoot me again '. These words from a five year old tell more about the situation in East Pakistan, than volumes of testimony could. This is what the Army created for the children of Bengal.

The final figures on all this horror, the full extent of the terrorism and of the denial of every human right will probably never be known. A million may have died, or two million or three. There may have been 10 million refugees or only five million. The exact number is really immaterial. It is definitely one of the most shameful episodes in the history of the human race; and it happened in the enlightened 20th Century. And it will happen somewhere again, if the Nations of the World take no steps to prevent it.'

The author writes: ' At least in the beginning I could be considered an unbiased observer of events. But after watching them bringing in wounded children, and after visiting a few of the pillaged villages, and after being shot at myself, I probably lost a bit of my objectivity.' His account does not, of course, give the whole picture. It says nothing of the attacks made on non-Bengalis. It makes no allowance for the fact that the Army were combatting an insurgent force which included several thousand rebel Bengali soldiers fighting under civilian cover with the help of the civilian population. It accuses all Pakistanis equally, whereas evidence shows that there were occasions when the army acted with restraint, and where individual officers or soldiers could not bring themselves to carry out their sanguinary missions in full. There may even have been some occasions, as the Pakistani army claim, when excesses by soldiers led to courts martial, but if so they were rare.

We have quoted extensively from this document as it gives a typical account of the way the army's operations appeared to the civilian population and describes the pattern of the massive violations of human rights committed over a period of nine months against the population of East Pakistan by the Pakistan Army aided by the Razakars and other auxiliary forces.

The principle features of this ruthless oppression were the indiscriminate killing of civilians, including women and children and the poorest and weakest members of the community; the attempt to exterminate or drive out of the country a large part of the Hindu

population; the arrest, torture and killing of Awami League activists, students, professional and business men and other potential leaders among the Bengalis; the raping of women; the destruction of villages and towns; and the looting of property. All this was done on a scale which is difficult to comprehend.

The Crack-down in Dacca

President Yahya Khan returned to Karachi on 25 March, and at 10 p.m. that night the army began to leave their cantonment in Dacca. Under the orders of General Tikka Khan the troops unleashed a terrible orgy of killing and destruction, lasting some 48 hours, which came to be known as the army ' crack-down '. An estimated three battalions were used, one armoured, one infantry and one artillery. It is impossible to estimate accurately the numbers of civilian killed in these 48 hours. All that can be said is that they are to be numbered in thousands.

The operation was carefully planned. No shooting began for nearly two hours. The army concentrated on surrounding and occupying strategic points and taking up their positions. The firing began a little before midnight and lasted throughout the night till 6.00 or 7.00 a.m. It was resumed the next day and continued intermittently through the following night and day.

One of the first targets was the University of Dacca, where the attack was directed both at the students and at the University staff. Many of the students who were militant supporters of the Awami League had taken an active part in demonstrations in support of the ' hartal ' and non-cooperation movement.

Warning of the impending attack was received during the evening. The students erected some rather amateurish road-blocks at the entrances to the University campus. These students were unarmed. The attack on the campus started at about one o'clock in the morning. The first attack was directed at Iqbal Hall, which was the centre of the student wing of the Awami League. The army's fire is described as having come from ' all types of arms, mortars, tanks, cannon, machine gun fire and tracer bullets '. The noise was deafening and continued through the night until 7.00 a.m.

After Iqbal Hall, the attack was directed against Salimullah Hall and later at Jagannath Hall, where students belonged to Hindu and other minorities. These Halls were invaded and those students who could not escape were ruthlessly killed. The Halls were set on fire together with a number of other University buildings.

The only place from which any resistance was offered was Iqbal Hall from which came some small arms fire, but this stopped after no more than 35 or 40 minutes. The light nature of the resistance is borne out by the fact that the control centre was heard by several witnesses

to enquire over the army radio of the officer leading the attack how many guns had been found in Iqbal Hall. The officer replied ' Only 50 rifles '. He was then ordered to add the number of all rifles and small arms taken in house-to-house searches throughout the city as the recorded number of small arms found at Iqbal Hall.

In addition to attacking the student halls, the army raided the blocks of flats where the University teachers lived. Anthony Mascarenhas, the West Pakistan journalist who was officially attached to the Pakistan Army 9th Division and who later fled to Europe and published a detailed account of the army atrocities, states that he was later told by three separate army officers that the army had lists of people to be liquidated. This is borne out by the fact that only some staff quarters were attacked, but in those which were, the orders appear to have been to kill all adult males. Some people had almost miraculous escapes. Professor Anisur Rahman has given a moving account of how he was saved by having placed a lock on the outside of his door, which led his assailants to think he was away. He and his wife and children crawled about on their hands and knees for some 48 hours in order not to be seen from the ground. In the meantime they heard his colleagues, Professor Guhathakurda and Professor Muniruzzaman dragged out of their flats and shot. It was said afterwards that Professor Muniruzzaman, who spoke Urdu, was shot by accident, and his family was given compensation by the Government.

Those who were able to talk to their assailants in Urdu were often spared. The wife of one lecturer who spoke fluent Urdu was told by a soldier that their orders were to kill everybody, but they found it difficult to carry out the order. Some were spared by pathetic entreaties made by their families.

Altogether ten university teachers were killed, including a renowned Professor of Philosophy, Dr. G. C. Dev. Estimates of the number of students killed vary but seem to have totalled some hundreds. The number would have been higher but for the fact that the University had been closed since March 7 and many students had gone to their homes. A mass grave was dug on the open ground outside the Jagannath and Salimullah Halls. Bodies were collected in trucks from Iqbal Hall and elsewhere on the campus and were thrown into the grave and loosely covered with earth bulldozed into the grave. Some witnesses speak of the sight of arms and legs sticking up out of the grave.

The libraries of the University Halls were burnt out. The Library of the British Council building on the campus was attacked in the mistaken belief that it was the University Library. An eight man Bengali police guard at the British Council premises were shot to death in a small room where they were hiding. A group of about 30 civilians from a nearby slum quarter who had sought refuge on top of one of the blocks of university teachers' flats were similarly wiped out.

Fearful as was the attack at the University, the greatest slaughter was aimed at the poorest sections of the community living in old parts of the town and in compounds of lightly built huts of bamboo and matting scattered about the city. The raid on the old town began shortly after midnight. Anyone seen on the streets was killed and the sound of firing continued through the night. Twenty taxi drivers who had been sleeping in their taxis on a rank in Victoria Square were killed. A crowd of some 300 coolies and waiting passengers sheltering in the launch station of the river ferry were wiped out. On the following morning the continuation of the curfew throughout the city was announced on the wireless. Many who had not heard this went out in the morning and were peremptorily shot. During the day of 26 March the army returned in force to the old town and set fire to whole streets and rows of shops. Those attempting to escape were fired at. Among the explanations which have been suggested are that the army thought that this was where the defecting East Bengali soldiers from the army had hidden and that it was in the poorer quarters that the Awami League found its greatest support. The army later described these operations as ' slum clearance '. Whatever the reason, no attempt was made to discriminate. Hindu and Muslim areas alike were set on fire and anyone to be seen on the streets was fired upon.

The areas destroyed in this way included the Hindu temple to Kali Bhari and the two villages where some 2,000 Hindus lived on the Dacca race course; the Hindu areas of Chakri Putti; large areas of ' bustee ' houses along the rail track in the old town and near the University, and numerous shopping areas or ' bazaars '. Among those specifically mentioned are Riya Bazaar, Shankari Bazaar, Sakhri Bazaar, the old timber market, Luxmi Bazaar and Shantinagar Bazaar.

After the first onslaught, the burning and killing continued for some days, directed more specifically against the homes of active Awami League leaders and against Hindus.

Shankhari Patti, a street in the old town, where the conch-shell craftsmen lived, was closed at both ends. Everyone was ordered to leave the houses. Hindus were separated from Muslims, and the Muslims were ordered to return to their houses. The Hindus were then machine gunned to death.

Missionaries who asked why Hindus were being killed were repeatedly told by way of justification ' Hindus are enemies of the state '. Many witnesses testify that the army seemed obsessed with the idea that the movement for autonomy in East Pakistan was inspired by the Hindus, who represented less than 20% of the population. Victims of West Pakistani propaganda, they were erroneously but firmly convinced that the Bengali people in general and the Awami League in particular were dominated by this Hindu element and that they in turn were the agents of India, bent on destroying the

Islamic State of Pakistan. It is likely that most Hindus voted for the Awami League in the 1970 elections, but the belief that the Awami League was inspired and run by Hindus was quite false. Its leaders and inspirers were all Muslim, and very few Hindu names appeared among their membership.

Other prime targets of the army during the crack-down were the East Pakistan Rifles and the East Pakistan police. Bengalis in the East Pakistan Rifles had obtained warning of the impending attack on the night of 25 March. They rightly surmised that their compound at Peelkhana near the New Market would be attacked and they warned local residents to leave their homes. Fighting continued for some hours between the West Pakistan and Bengali forces before the Bengalis were overpowered or fled. The police barracks at Rajarbagh were also attacked. In these attacks tanks opened fire first; then troops moved in and levelled the men's sleeping quarters, firing incendiary rounds into the buildings. Not many are believed to have escaped.[1] Police stations throughout the city were also targets for attacks. Hundreds of police and police recruits were killed. A police inspector was reported as saying on the morning of 27 March, ' I am looking for my constables. I have 240 in my district and so far I have only found 30 of them, all dead.' [2] Even the guard at the President's House, who until then had apparently been thought sufficiently loyal to protect President Yahya Khan, were wiped out to a man.

The Biharis were not slow to join in the attacks on Bengalis. In Mohammedpur, which was predominantly a Bihari area, the houses of Bengalis were raided by armed Biharis on 26 March and the Bengalis were driven out of the area.

In the early morning of 26 March a message was intercepted passing over the army radio from the army headquarters to unit commanders throughout the city, congratulating them on the night's work. The message ended, ' You have saved Pakistan '. This phrase was echoed by Mr. Bhutto. After flying back to Karachi on 26 March he declared ' Pakistan is saved '.

On 26 March the radio of the Bangladesh Liberation Army declared Bangladesh a sovereign and independent state, and a call for resistance was made to the Bengali people. With the exception of Sheikh Mujibur Rahman, who waited at his home until arrested at 1.30 a.m., the Awami League leaders escaped and set up a self-proclaimed government of Bangladesh with its headquarters in Calcutta.

On the night of March 26 President Yahya Khan in a broadcast to the nation declared that he had ordered the armed forces ' to do

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[1] Simon Dring, of Daily Telegraph (London), in *Washington Post*, March 30, 1971.

[2] Ibid.

their duty and fully restore the authority of the Government '. The Awami League was banned, press censorship was imposed and all political activity forbidden.

Civil War

Thus the scene was set for a brutal civil war, in which each side was convinced that the cause they were fighting for was right. The Pakistan army, the Biharis, the Muslim League and the members of the Jamaat-e-Islam were fighting for the unity of an Islamic Pakistan. The Bengalis were fighting for the right to run their own country without interference and exploitation from outside.

The West Pakistanis thought that a short sharp lesson would suffice to subjugate the Bengalis. They certainly succeeded in the beginning at Dacca. Observers talk of a sullen and cowed population in a dead city. ' It is clear ', one of them remarked, ' that the first aim was terrify people into submission. All vehicles had soldiers standing with their finger on the trigger of their automatic weapons . . . I have seen people suddenly stampede from a main road simply because a military vehicle was seen coming down the road. Similarly, I have seen a stampede simply because a rickshaw tyre had burst.'

Another writer has described how ' within three days, the city was quiet — too quiet. The regime claimed that everything was returning swiftly to normal, that the miscreants and the criminal elements had been taken care of. But that normality was no more than the absence of activity, it was the normality of the graveyard. Tens of thousands had fled Dacca, thousands were dead. Those who remained had no choice but to carry on as best they could, under the heel of the occupying army. In so far as fighting subsided, things were ' normal ', otherwise not.' [3]

When the Pakistan forces realised that the initial crack-down had failed to subdue the Bengali population and that resistance was continuing, they concentrated their attention upon three groups, Awami Leaguers, intellectuals and students, and the Hindus. Sometimes only the men belonging to these groups were shot. One Pakistani officer is quoted as saying: ' We are humane, we don't shoot women and children.' On many occasions, however, women and children were shot as well.

Outside Dacca the picture was very different.

The nucleus of the armed resistance was drawn from the Bengalis in the army and police force who had escaped the army's attacks. In a number of towns these forces succeeded in keeping the West Pakistan army confined to their cantonment until reinforcements came, or compelled them to break out from the town to seek assistance. During

[3] David Loshak, *Pakistan Crisis*, 1971, Heineman, London, p. 88.

these days and weeks when the insurgent forces were in command, there were many attacks upon Biharis whose sympathy with the West Pakistanis was well known and who, as Urdu speakers, were regarded as an alien element and identified with the West Pakistani ' enemy '. The Biharis, of course, regarded themselves as loyal citizens of Pakistan.

At Jessore the contingent of the East Bengal Regiment were called together and told they were to take a holiday; they were to give up their arms and go home. This they did, but as they left they were fired upon and some fifty killed. The rest dispersed but gathered again in secret and that night raided the armoury and re-armed themselves. They managed to contain the rest of the troops in the cantonment for four days until their ammunition ran out, when they disappeared either to their homes or to join the ' Mukti Bahini ' liberation forces.

At Dinajpur there was a three-day running battle between the local contingent of the East Pakistan Rifles and soldiers of the Punjabi regiment. The Punjabi troops were forced to make a tactical withdrawal from the town to await reinforcement.

At Chittagong, which was the main recruiting centre of the East Bengal Regiment, the EBR forces gained control of the town for a period of about 15 days before sufficient reinforcements arrived to enable the army to drive them out. Fighting there in fact began the day before the army crack-down in Dacca. A munition ship had arrived in Chittagong. The stevedores refused to unload it. When the army attempted to do so there was fighting. Road blocks were set up in the town and when the army attempted to get their supplies through there was fierce fighting with many casualties on both sides. At 11.30 p.m. on 25 March (i.e. 1½ hours after the army moved out of their cantonment at Dacca) the East Pakistan Rifles mutinied in Chittagong cantonment and came out in support of the Awami League and gained control of the town.

In Patna and Kushtia the West Pakistani army companies were wiped out. Other places where the army was attacked or contained were Rajshahi, Sylhet, Comilla, Feni and Khulna.

Attacks on Biharis

There can be no doubt that in many of these towns where there was a substantial Bihari population, the Bengalis turned against the Biharis during the short period they were in control and some terrible massacres resulted. Among the places where this happened were Chittagong, Khulna, Jessore, Comilla, Rangpur, Phulbari, Dinajpur and Mymensingh. In areas where the non-Bengalis were in a majority, as in some of the railway towns, the Biharis turned and attacked the Bengalis. For example, in Paksey nearly all the Bengalis who had not fled were murdered.

Anthony Mascarenhas has described the attacks on the non-Bengalis in these terms:

> ' Thousands of families of unfortunate Muslims, many of them refugees from Bihar who chose Pakistan at the time of the partition riots in 1947, were mercilessly wiped out. Women were raped, or had their breasts torn out with specially fashioned knives. Children did not escape the horror: the lucky ones were killed with their parents; but many thousands of others must go through what life remains for them with eyes gouged out and limbs amputated. More than 20,000 bodies of non-Bengalis have been found in the main towns, such as Chittagong, Khulna and Jessore. The real toll, I was told everywhere in East Bengal, may have been as high as 100,000, for thousands of non-Bengalis have vanished without a trace. The Government of Pakistan has let the world know about that first horror. What it has suppressed is the second and worse horror which followed when its own army took over the killing. West Pakistan officials privately calculate that altogether both sides have killed 250,000 people.' [4]

One may doubt these figures which, like all figures of victims of atrocities, tend to be greatly exaggerated.

A description of the indiscriminate killing during this period has been given by an American engineer who was working on a construction project at Kaptai, near Chittagong. We have quoted from it at length as it gives a vivid picture of the terror which reigned and of the blind hatred which motivated the killings on both sides:

> ' Shortly after March 1, we received word from some British friends in Chittagong that Bengali mobs had begun looting and burning the homes and businesses of the West Pakistani residents and were beating, and in some cases killing, West Pakistanis as well as Hindus.
>
> On the night of March 9, my expatriate staff and I decided to depart Kaptai. As we passed through Chittagong we noted three of four fires. A service station attendant told my driver these were homes and businesses of ' Biharis '.
>
> We returned to Kaptai on March 23. There was a small Army garrison stationed at Kaptai. They were a part of the East African Rifles which was a regiment of Bengalis with mostly Punjabi officers and N.C.O.'s. The garrison was quartered in an old school building about 400 yards from our residences.
>
> On the morning of March 26 around 9 a.m. we heard shooting coming from the school. I went to investigate and found a large crowd gathered there. Some of the crowd was shooting toward one of the upstairs school rooms. I was told that the previous night all Punjabis in the Army garrison (about 26 or 27) had been arrested and locked in the school-room. Now someone in the crowd was claiming that shots had come from the room. After removing a sheet of roofing several men with guns gathered around the opening and began firing into the room. After a

[4] Anthony Mascarenhas, *Sunday Times*, London, June 13, 1971.

few minutes they came down and began dispersing the crowd. I later learned that the commanding officer, who was under house arrest within sight of the school, was slowly beaten and bayoneted to death as his staff was being shot. The officer's wife, in a state of terror, asked the mob to kill her too. She was beaten to death. Their small son was spared and taken in by a Bengali family.

I met immediately with the local Awami League leader and the Power Station Manager, a Bengali named Shamsuddin. The Awami League leader said the people had been told to remain peaceful and that he had peace patrols roaming the area, but that he could not control the large mobs. Shamsuddin told me that the mobs had killed many Biharis the night before and thrown their bodies over the spillway of the dam. He said he just managed to talk the mob out of taking his three West Pakistani engineers but felt they were still in great danger.

All India radio began an almost continuous propaganda barrage of East Pakistan. This inflammatory propaganda roused the mobs in Kaptai to new frenzies. After all known Biharis, including at least two of our employees, had been killed, a search was begun for ' imposters '. On about the third day of the trouble we saw two Bengali soldiers marching away a servant who worked in the housing area. A few seconds later we heard a shot and ran out into the road. The servant had fallen partway down a ravine. A crowd quickly gathered and, when it became apparent the servant was still alive, dragged him up onto the road. One of the soldiers motioned the crowd away, knelt and very deliberately fired another bullet into the body. After a short while the death-limp body was dragged and rolled into the back of a pickup and hauled away. It had been found out that although the servant had been living in Kaptai over 20 years, he was born in India. By this time the mobs were killing anyone not a ' son-of-the-soil '.

Friends and acquaintances in Chittagong said that on the night of March 25 Bengali mobs descended on the homes of all known Biharis and especially those military personnel living outside their cantonment. The mobs slaughtered entire families and I heard many horrible descriptions of this massacre. The mutinous East Pakistan Rifles along with irregulars laid siege to the Chittagong military cantonment. After seven or eight days the siege was broken by a relief detachment which had force-marched from the cantonment at Camilla. I am told that when the entrapped garrison broke out it was with a terrible vengeance. The slightest resistance was cause for annihilation of everyone in a particular area. For instance, the Army made a habit of destroying, by tank cannon, everything within a wide radius of hostile roadblocks. I saw the remains of a completely razed three to four square block area of Chittagong near the entrance to the port area. I was told that after encountering resistance here the Army encircled and set fire to the entire area and shot all who fled. Hundreds of men, women and children were said to have perished here.

When the East Pakistan Rifles and Bengali irregulars began retreating from the fighting around Chittagong, many of them passed through Kaptai en route to Rangamati and the Indian border areas. These renegades began looting their fellow Bengalis as they came through Kaptai. They also began to murder the surviving wives and children of previously killed Biharis. They demanded and took food, clothing and

other supplies from the local residents. By April 10, everyone in Kaptai, including myself had become terrified of these deserters. Mr. Shamsuddin suggested, and I agreed, that he and several members of his staff, along with families, move into the houses around my residence.

After great pressure from implied threats, Shamsuddin had finally handed his three West Pakistani engineers over to a mob after he was told they would not be harmed, only held in jail at Rangamati. Shamsuddin agreed to hand over the engineers provided two Bengali members of his staff be allowed to accompany the engineers on their trip to the jail. This was agreed and they were taken away. Everyone felt certain these men would be killed but they were spared. When I last heard of them they were safe with their families in Dacca. Shamsuddin, although a Bengali, attempted on several occasions, at great risk to himself and his family, to stop the killings by the mobs but with little success. Also he saw to it that the existing generating units remained in operation throughout the trouble.

An Army unit arrived in Kaptai on the morning of April 14. Except for those in our area Kaptai and surroundings were completely deserted. The unit consisted of a tank, two jeeps, a half-track and about 250 infantry. As they approached the tank fired blanks from its cannon and the soldiers fired intermittent bursts from their weapons. The object seemed to be to cower the inhabitants with the noise. The army immediately began burning the shanties (' bustees ') in which most of the people had lived. The bazaar and a few permanent type dwellings were also burned.

While his troops were searching the area, the commanding officer and his staff took tea in our residence. They congratulated and warmly praised Shamsuddin and his staff for their attempts to maintain order and for keeping the generating units in operation. The C.O. said that the Army's objective was to restore normality as quickly as possible. One of the officers told of a terrible scene they had come upon in a town about 10 miles from Kaptai challed Chandaghorna. About 40 to 50 women and children — survivors of previously killed Biharis — had been taken into a loft building where they had been hacked, stabbed and beaten to death. He said this grizzly scene had driven the troops to an almost incontrollable rage and he said it was fortunate that Kaptai was deserted except for us.

[Mr. Shamsuddin was later taken from the house by two Pakistan soldiers.] We ran after them. They were taken behind the fire station which was about 250 yards away. Just as we arrived at the station we heard two shots. Shamsuddin and another man lay dead on the grass, each with a bullet through his chest.

The officer-in-charge appeared and questioned the soldier who had done the killing. We later found this man was a Major. After questioning by the O.I.C. the Major's weapon was taken and the Major was ordered immediately to Chittagong. The O.I.C. told us the whole thing was a tragic mistake. Later I was told what had happened. While directing the search of the area the Major and his driver came upon a woman with a small child who told that her husband and son had been killed by the Bengalis. She charged that Shamsuddin was the leader of the mobs and instigator of the atrocities. The women was taken to the fire

station and the Major and his aide set off to find Shamsuddin. When Shamsuddin was brought before the woman she immediately identified him and the Major instantly carried out the executions. The man who died with Shamsuddin had also been accused by the woman, who was crazed by fear and grief.'

The Army's Attacks

It is clear that when the army regained control of these centres, the vengeance wreaked by them and the Biharis upon the Bengali population was horrific.

The army shot, killed and destroyed at sight on the least suspicion, and burnt down village after village, especially those inhabited by Hindus.

The army commander in one town was reported as saying: ' When people start shooting you shoot back. We killed them all. You don't go around counting the bodies of your enemies, you throw them in the rivers and be done with it.' [5]

Hariharpara village near Dacca was turned into an extermination camp. People were brought in trucks and bound together in batches and taken to the river edge where they were made to wade into the water and then shot. The army were assisted by local Biharis who, at the end of the war, fled to Bihari colonies at Mohammedpur, Mirpur and the Adanjee Jute Mill.[6]

Italian missionaries at Jessore have described the mass killings there beginning on April 4. One of them was told by Pakistani soldiers that they had received orders to kill everybody. ' And they did it ', he commented, ' men, women, babies . . . I cannot describe it. It was too terrible . . . ' An Italian priest was walking down a street. Soldiers shouted to him to come over with his hands up. He did so and as he approached they shot him dead. Another priest who witnessed this said ' They often did it that way '.[7]

Most of the estimates made on both sides of numbers killed are, we believe, much exaggerated and wholly unreliable. The figure of 250,000 quoted above as a Pakistan estimate of the total killed on both sides up to June 1971, may be also be an exaggeration, but it carries with it an implied admission by the Pakistan army with fearsome implications. In March 1972 Mr. Bhutto told an Indian correspondent that the Pakistan estimate of the numbers killed by the army was 40,000 to 50,000. General Tikka Khan told Clare Hollingsworth, the Daily Telegraph correspondent, that his estimate of the number killed by the army up to August was 15,000 and for the whole period till

[5] Malcolm W. Browne, *New York Times*, May 9, 1971.

[6] Lewis M. Simons, *Washington Post*, 21 January, 1972.

[7] U.P.I. report, 13 December, 1971.

December was 30,000. Even these figures are appalling. As Clare Hollingsworth pointed out in reply to General Tikka Khan, 15,000 was the total number killed on both sides in the battle of Alamein, probably the bloodiest battle outside Russia in World War II.

Mascarenhas reported that he was repeatedly told by senior military officers in Dacca and Comilla, ' We are determined to cleanse East Pakistan once and for all of the threat of secession, even if it means killing off two million people and ruling the province as a colony for 30 years '. His evidence is of particular value, not only because he heard such remarks made by Pakistan officers when ' off-guard ', but because he made contemporaneous records of the conversations in his diaries, many of which he smuggled out with him. Perhaps the most damning statement of all those he heard was one made by Major-General Shaukat Riza, commanding the 9th Division:

> ' You must be absolutely sure that we have not undertaken such a drastic and expensive operation — expensive both in men and money — for nothing. We have undertaken a job. We are going to finish it, not hand it over half done to the politicians so that they can mess it up again. The army can't keep coming back like this every three or four years. It has a more important task. I assure you that when we have got through with what we are doing there will never be need again for such an operation.' [8]

Statements of this kind make clear that the atrocities committed against the population of East Pakistan were part of a deliberate policy by a disciplined force. As such, they differed in character from the mob violence committed at times by Bengalis against Biharis. To quote Anthony Mascarenhas again (from a taped interview):

> ' What struck me was the impression I got, a very hard impression, that this was a regular pattern. It wasn't somebody venting his spleen, but he had clear orders to clean up. It was the pattern of the killing. You killed first Hindus, you killed everyone of the East Pakistan Rifles, the police, or the East Bengal Regiment you found, you killed the students, the male students, if you got a woman student you probably did something else, the teachers . . . The teachers are supposed to have been corrupted by the Hindus. It is the pattern that is most frightening. I have seen the partition riots in Delhi in 1947. That was mob frenzy. It was completely different here. This was organised killing, this is what was terrifying about it. It was not being done by mobs. It was a systematic organised thing.'

By the middle of May, the army was in full control of the towns of East Pakistan, most of which had been evacuated by more than half their residents and rows of buildings and houses razed to the ground.

[8] *Sunday Times*, London, June 13, 1971.

The Report of a World Bank Mission on East Pakistan dated July 8, 1971, described Dacca and other towns in early June 1971 as follows:

> ' The first thing that strikes one — whether in Dacca or travelling in the countryside — is that there seems to be very few people about. The situation varies greatly from Dacca, where our collective impression is that no more than 50% of the usual population is in evidence during the day; to Chittagong, where only a third of the population appears, and these feel it necessary to indicate their ' loyalty ' by displaying Pakistani flags on their vehicles or their persons; to Kushtia, where no more than 10% of the normal population remains; to Bhola, where virtually the total population seems to be in place. One ominous development is that the population is reliably reported to have doubled in areas of Patuakhali and other parts of the coastal region where the food situation is already critical and there is serious doubt that even the normal population can be supplied with adequate foodgrains over the coming months.
>
> This is the impression one gains by day. After dark the situation is more unusual still. Most areas have curfews. In Sylhet it is 7.30 p.m. to 5.00 a.m.; in Chittagong 10.00 p.m. to 6.00 a.m.; in Dacca curfew was abolished on the 11th June. Whatever the curfew hours, the streets begin to clear in mid-afternoon and are completely deserted by dark.
>
> . . .
>
> People fear to venture forth and, as a result, commerce has virtually ceased and economic activity generally is at a very low ebb. Clearly, despite improvements in some areas and taking the Province as a whole, widespread fear among the population has persisted beyond the initial phase of heavy fighting. It appears that this is not just a concomitant of the army extending its control into the countryside and the villages off the main highways, although at this stage the mere appearance of military units often suffices to engender fear. However, there is also no question that punitive measures by the military are continuing; even if directed at particular elements (such as known or suspected Awami Leaguers, students or Hindus), these have the effect of fostering fear among the population at large. At the same time, insurgent activity is continuing. This is not only disruptive in itself, but also often leads to massive army retaliation. In short the general atmosphere remains very tense and incompatible with the resumption of normal activities in the Province as a whole.'

The Report went on to describe the army destructions ' with a trail of devastation running from Khulna to Jessore to Kushtia to Padna, Bogra, Rangpur and Dinajpur ', and then stated ' however, one similarity for all districts is that all remained very far from normal up to the time of our departure from East Pakistan on June 11 '.

On 28 June, 1971, President Yahya Khan once again addressed the nation and announced plans for framing a new constitution. He admitted that ' normalcy in its accepted meaning can never return to a country without full participation of the people in its administra-

tion . . . and this can happen only when the representatives of the people assume responsibility for the administration of the country '.

He promised that he would be able to achieve this goal in a matter of four months or so, but in the meantime the slaughter and destruction by the army continued. On the day of his broadcast to the nation, an Associated Press dispatch from Dacca quoted reliable sources as saying that the army had attacked five villages within the past four days. The army continued to run amok. Mascarenhas has recounted how the West Pakistan army systematically massacred tens of thousans of Bengalis. He described how one Major Iftihar set fire to a row of houses in a Hindu village and ruefully said on the following day ' I burnt only sixty houses, if it hadn't rained I would have got the whole bloody lot '.[9] These missions were officially known as ' kill and burn missions '. This title is itself sufficient to show that they were a flagrant breach of the Geneva Conventions.[10]

Mascarenhas has also told of Hindus hunted and killed, and truckloads of human beings disposed of with a flick of a pencil.

The Refugees

It was to escape this terrible slaughter that the refugees fled in millions to the safety of the Indian border. It is estimated that the population of Dacca, a city of well over a million inhabitants, was reduced by some 25%. Jessore, formerly a town of over 100,000 was reduced to about 10,000 by the time of the liberation. A similar exodus occurred from other towns. The population of thousands of destroyed villages fled in their entirety.

The evidence of the massive and indiscriminate destruction of villages is overwhelming. To give some precise examples: the Anglican Bishop of Dacca writes: ' From a place called Jalirpar (south of Faridpur) I travelled south to Kadambari, about 5 miles. I did not see a single homestead that had not been burnt down.' He explained that the road had been built up on both sides. The Reverend Phil Parshall, a U.S. missionary, travelled in April by rickshaw from Golando to Faridpur, a distance of 18 miles, with another missionary. ' We tried to count ', he said, ' and to reckon that 80% of the houses on both sides were destroyed. No distinction was made between Hindus and Muslims.' In June, Clare Hollingsworth of the Daily Telegraph, returned to Dacca. She was flown to the north of the country in a low-flying helicopter. ' I tried to count the burnt out villages ', she said, ' but just lost count.'

Faced with the mounting flow of refugees, the Pakistan Government declared variously that they were lured into India by false promises, that they were prevented by India from returning to

[9] *Sunday Times*, London, June 13, 1971.

[10] See Part IV below.

Pakistan, and that only 2.2 million of the people in the camps were refugees, the rest being homeless Hindus from the streets of Calcutta.

Dr. Homer Jack, Secretary of the World Conference for Religion and Peace, particularly investigated these claims and found them all to be without foundation. ' All (the refugees) left their homeland because of killings, of lootings. They did not leave because of Indian promises, they heard none.' He talked to an Indian district magistrate about the allegation that the refugees were prevented from returning. The magistrate told Dr. Jack ' that he would love to have some or all of the 600,000 refugees living in his small geographical area leave. He said that the sooner they go back, the better, but none of them are going back.' On the figures given by the Pakistan Government, Dr. Jack had the following to say:

> ' I obviously was not in a position to count the refugees personally. Perhaps the Indian figure is inflated, but more probably Pakistan for her own purposes is only counting the Muslims who are refugees and the six or more million Hindu refugees who are still Pakistani citizens have been conveniently excluded from Islamabad's tally. [11]

Relief workers from the refugee camps deny categorically the suggestion that the ' refugees ' included homeless Hindus from India. One recalled an earlier unsuccessful attempt of the Indian Government to resettle the homeless of Calcutta in camps outside the city. They just returned to the streets from which they had come.

Rape

Another feature on which very many accounts agree is the wholesale rape of women and young girls by Pakistan soldiers. The Bangladesh Government allege that over 70,000 women were made pregnant as a result of these rapes. Whatever the precise numbers, the teams of American and British surgeons carrying out abortions and the widespread government efforts to persuade people to accept these girls into the community, testify to the scale on which raping occurred. The officers turned a blind eye to this savagery, and when challenged denied that it occurred. In many cases the officers themselves kept young girls locked up to serve their pleasure.

Razakars

While the guerillas were stepping up their activities, the Pakistan authorities were bringing over police and ' rangers ' from West Pakistan and recruiting men locally for the auxiliary force known as

[11] Statement by Dr. Homer Jack to the Sub-Committee to Investigate Problems Connected with Refugees and Escapees, of the Committee on the Judiciary United States Senate, Ninety-Second Congress, First Session, September 30, 1971, p. 295.

the Razakars. Their task was to try to maintain control of the inner areas while the Pakistan army was deployed on the frontier to try to prevent infiltration of Mukti Bahini from India and to counter the threat of invasion from India which they feared. In areas with a large non-Bengali population, many of the Razakars were Biharis. In other areas, and particularly in rural areas, they were recuited from the Bengalis. Some were fanatical Muslims, others were recruited from the criminal population. They were often joined in their brutal repression by local ' dacoity ' (armed robbers) who saw an opportunity for easy money. Looting and extortion by Razakars and West Pakistan police was on a colossal scale. A senior police official who investigated complaints against Razakars in the Chittagong area after the end of the war has reported that many of them claimed that they had to loot in order to meet the demands of the West Pakistan officials in charge of them. From the enquiries he had made he was satisfied that in many cases this was true.

In some areas the brutality of the West Pakistan police and Razakars was such that the people said that they wished that the Pakistan army would return.

The Mukti Bahini

Despite General Yahya Khan's claim at the end of July that all was normal in East Pakistan, the challenge of the guerillas was growing every day, and large areas of the country were under their control.

The terrain of the country, the nearby sanctuary across the Indian frontier, and the support of the civilian population all served to make the circumstances ideal for guerilla warfare. Communications were easily severed by blowing road and railway bridges, and the main export industries of tea and jute were largely brought to a halt. Two expatriate tea planters disappeared at the beginning of June and there is evidence to show that one was murdered in Sylhet on June 14 as part of a campaign to dissuade expatriates from collaborating with the Pakistan Government.

When the Mukti Bahini regained control of a rural area, it was their practice to mete out rough justice against Razakars and dacoity who had pillaged and terrorised the population.

At the end of August President Yahya Khan tried to obtain the cooperation of the population by more peaceful methods. General Tikka Khan was replaced by a civilian governor, Dr. A. M. Malik, with a civilian cabinet. On 5 September, the President declared a general amnesty and many suspects were released. The President said he hoped the amnesty would ' remove all manner of doubt, fear and anxiety from the minds of those who may have committed offences during the course of and due to the heat generated by political dis-

turbances in East Pakistan and gone outside the country or underground '. He invited men to return to their homeland and rejoin their families and resume their normal vocations.

After all that the army had done, it is not surprising that there was virtually no response to President Yahya Khan's appeal. In September and October guerilla activities increased still further. The disorganised and undisciplined groups of insurgents developed into a more effective and reasonably well organised guerrilla force. India helped with arms, sanctuary and training. By the middle of October it was estimated that there were about 80,000 West Pakistani troops opposed by somewhere between 50,000 and 100,000 Mukti Bahini.

One of the most dramatic of the guerrilla successes was the damaging and sinking of ships in East Pakistan's two major harbours. Sidney Schanberg reported in October, ' the latest casualty was a Greek tanker, which Bengali frogmen damaged in Chittagong about a week ago. Some shipping lines are thinking of halting all their traffic into East Pakistan. That would be a severe blow to the ability of the Pakistan Government to support its military occupation there.' [12]

Reprisals

The result of the increased guerrilla activities was an increased stream of refugees into India. Every act of sabotage was followed by reprisals by the armed forces who continued to ' burn and kill ' whole villages. The villagers fled, often as soon as the acts of sabotage occurred, and before the reprisals came.

On 25 October 1971, President Yahya Khan invited the Secretary-General of the United Nations to visit India and Pakistan in order to discuss the withdrawal of troops from both sides of the Indian frontier, with U.N. observers in the frontier areas. The Indian Government and the provisional government of Bangladesh not unnaturally opposed the plan, which would have operated to the advantage of the Pakistan Government. By that time the Pakistani troops had almost completely withdrawn from the interior of East Bengal, and the war against the guerrillas was largely left to the Razakars and West Pakistani police.

The successes of the Mukti Bahini in Dacca, where there were many foreign journalists and diplomats was particularly galling to the Pakistan authorities. Explosions were heard almost nightly. A curfew was declared on 18 November, and a house to house search was instigated. Over a hundred ' miscreants ' were arrested. Threats of reprisals against persons living within a radius of 100 yards of any explosion served to check these Mukti Bahini activities in Dacca.

[12] Sidney H. Schanberg, *New York Times*, October 10, 1971.

Meanwhile, on the Indian frontier, firing from both sides had been increasing for some time. On 21 November, the Indian Government admitted to making raids with tanks into East Pakistan during which they captured and brought back to India some Pakistani tanks. They said it had been found necessary to modify previous instructions to Indian troops not to cross the border because ' opposition forces were seen advancing in tanks '.

On 23 November, President Yahya Khan declared a state of emergency following an alleged four-pronged attack by India towards Jessore, Chittagong, Sylhet and Rangpur, and on 24 November, the Pakistan Government called up all its military reservists. India had already mobilised reservists during the month of October.

Border skirmishes between Indians and Pakistanis became more frequent and widespread. They continued until 3 December when the Pakistan airforce launched their ' pre-emptive air strike ' against Indian airfields over a wide area in the western sector. The airfields attacked were at Amritsar, Pathankot, Srinagar, Awantipur, Uttarlai, Jodhpur, Ambala and Agra. Agra is 330 miles inside the Indian border and 110 miles from New Delhi.

There have been many speculations why Pakistan launched this attack which they must have realised was likely to lead to a full-scale war. Whatever the reason, India made the predictable response. Prime Minister Indira Ghandi declared ' Some hours ago Pakistan launched a full-scale war against us '. The Indian Army then invaded Pakistan on both the eastern and western fronts. On 6 December, India recognised Bangladesh as an independent state.

On 7 December, President Yahya Khan announced he had formed a coalition government with an elderly East Pakistani at its head. This was Nurul Amin, an independent, who was one of the two non-Awami League members of the Assembly elected from East Pakistan. His deputy was Mr. Bhutto who explained that ' during the present emergency, I have agreed to temporarily accept the second position in the civilian government with the understanding that wars do not last for ever and that things must be changed afterwards. After all, Mr. Nurul Amin represents only himself, whereas I represent the people of West Pakistan.'

The war which Mr. Bhutto had said could not last for ever in fact lasted for twelve days. On 12 December, Indian parachutists landed near Dacca and on 14 December Indian troops began their assault on the city. Dr. Malik's civil administration resigned on the same day.

On 15 December, President Yahya Khan authorised General A. A. K. Niazi to take the necessary measures to stop the fighting. On the same day Mr. Bhutto dramatically walked out of the Security

Council in New York. On the following day, 16 December, the Pakistan military and auxiliary forces surrendered unconditionally at Dacca.

The Final Killings

While the population were throwing flowers on Indian troops, some of the Bengali guerrilla forces started killing ' collaborators ' and West Pakistanis. Lt-General Jagjit Singh Aurora, General Officer commanding the Indian and Bangladesh forces in the eastern theatre, was forced to state that he was allowing Pakistan soldiers to keep their arms for self-protection.

The prime target of the Bengali forces were the hated Razakars. One incident which gained immediate world wide publicity as it occurred in front of the television cameras, was the stabbing to death at the Sports Ground of four Razakars. This was carried out by one of the irregular guerrilla units who were not under the control or orders of the Bangladesh government in exile. It was led by a Colonel Abdul Kadir Siddiqui.

It must be remembered that these incidents occurred in the immediate aftermath of a most brutal civil war, and took place at a time when no government had yet been established in Dacca, let alone been able to take action to restore law and order. As soon as the new government was established and in particular after Sheikh Mujibur Rahman returned to Dacca early in January to assume the office of Prime Minister, all the authority of the new Government was brought to bear to stop these revenge killings and to leave the fate of collaborators to be determined by the courts after due process of law. In general this policy has been successful, though feelings against the Biharis are such that explosions of mob violence against them may recur. One such outburst occurred in Khulna in March 1972, when some 200 Biharis are believed to have been killed by a Bengali mob.

These reprisal actions became all the more understandable when it was learned how large numbers of intellectuals and leading Bengali figures had been rounded up and put to death within the last few days before the surrender of the Pakistan army.

It is impossible to assess the precise number of those killed in this way between 11 and 14 December. Some have suggested as many as 2,000, others indicate some hundreds. Lists have been published giving the names of some of the victims. Nine university teachers have been named as killed, and at least another 15 were searched for but managed to escape. Eight journalists have been named as being among the victims.

These murders were perpetrated by members of Al Badr, a Bengali organisation which came into being after 25 March, 1971, and which is believed to have been the action section of Jamaat-e-Islam, the

extremist Muslim Party. Their goal was to wipe out all Bengalis who advocated independence and the creation of a secular state. It has been alleged that the Al Badr raids were directed by a group of Pakistani officers, who are said to have approved the list of those to be assassinated.

The Al Badr raids were carried out at night, the victims being led away blindfolded at gun point, never to return. Many were taken to the Dacca College of Physical Education building. A janitor at the College stated ' They brought in hundreds of people, all nicely dressed and tied up. We could hear the screaming all the time from the rooms.'

The victims were later taken in trucks to a deserted brickyard near Mohammedpur. The only known survivor, who managed to loosen the rope with which he was tied and escaped, has described how these prisoners were tortured before being taken out to be shot. The victims included women, one of whom was an editor who was found with two bayonet wounds, one through the eye and one in the stomach, and two bullet wounds. It is alleged that a heart specialist, Dr. Fazle Rabbe, had been cut open and his heart ripped out.

Similar atrocities are alleged to have been committed in other parts of East Pakistan in the closing days of the war.

The insensate vengeance and hatred which led to these killings in the closing stages of the war is a grim epilogue to the record of systematic repression in East Pakistan from March to December.

PART III:

LEGAL POSITION UNDER PAKISTAN LAW

Before considering the legality of the action taken by Sheikh Mujibur Rahman and the Awami League in March, 1971, it may be useful to consider the legal basis of the military regime headed by President Yahya Khan, and of his Legal Framework Order.

Martial law was first proclaimed in Pakistan on October 7, 1958, by President Iskander Mirza, when he appointed Ayub Khan as Chief Martial Law Administrator. Although the 1956 Constitution had acknowledged, in Article 196, the possibility of martial law, the President did not purport to act under that Constitution. Indeed he abrogated the 1956 Constitution at the same time as proclaiming martial law.

Only 10 days later, Ayub Khan deposed Mirza and assumed the powers of President of Pakistan. The revolutionary nature of this seizure of power was recognised at the time by the Chief Justice of Pakistan, Muhammed Munir;

> ' If the revolution is victorious in the sense that the persons assuming power under the change can successfully require the inhabitants of the country to conform to the new regime, then the revolution itself becomes a law-creating fact because thereafter its own legality is judged not by reference to the old Constitution but by reference to its own success ... The essential condition to determine whether a constitution has been annulled is the efficacy of the change. If the territory and the people remain essentially the same ... the revolutionary government and the new constitution are, according to international law, the legitimate government and the valid constitution of the State. Thus a victorious revolution or a successful coup d'état is an internationally recognised legal method of changing a Constitution.' [1]

Ayub Khan's presidency derived further authority from the elections held in 1962, when the martial law administration was replaced by the new 1962 Constitution with a National Assembly.

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[1] *State v. Dosso*, PLD SC (Pak) 533 ff. The Supreme Court of Pakistan overruled this decision on April 20, 1972, in the case of *Malik Ghulam Jilani and Altaf Gauhar v. Province of Sind and others*, Dawn Newspaper, Karachi, April 23, 1972.

With the breakdown of his administration in March, 1969, Ayub Khan dissolved the Assembly and called on General Yahya Khan to take over the power and authority of the government. The 1962 Constitution, from which Ayub Khan then derived his authority, empowered him to appoint Yahya Khan as Chief Martial Law Administrator, but it did not authorise him to transfer to him the presidency. On his resignation the Speaker of the National Assembly should have become Acting President, but the Speaker was an East Pakistani.

On taking power, General Yahya Khan issued a Proclamation purporting to abrogate the 1962 Constitution and appointing himself President with absolute powers under martial law. A few days later he issued the Provisional Constitution Order, under which he purported to bring back the 1962 Constitution subject to his own overriding powers.

Section 29 of the Constitution provides that:

> ' (1) If at a time when the National Assembly stands dissolved or is not in session, the President is satisfied that circumstances exist which render immediate legislation necessary, he may, subject to this Article, make and promulgate such ordinances as the circumstances appear to him to require, and such ordinance shall, subject to this Article, have the same force of law as an act of the Central Legislature.'

The Section stipulates that the National Assembly must approve the ordinance either within a period of 42 days after the first meeting of the National Assembly or within the period of 180 days of the promulgation of the ordinance.

This provision was not followed, as Yahya Khan continued to legislate by order without submitting his ordinances to the Assembly in accordance with Section 29 of the Constitution. That he was aware of this deficiency appears from Section 2 of the Legal Framework Order, 1970, which says ' This Order shall have effect notwithstanding anything to the contrary in the Provisional Constitution Order, the Constitution of 1962 of the Islamic Republic of Pakistan or any other law for the time being in force.'

It follows that if the Constitution of 1962 is to be regarded as still being in force, the Legal Framework Order, 1970, was invalid. If the Order is to be regarded as valid, it can only be on the basis that President Yahya Khan had assumed absolute legislative as well as executive powers. This again was an unconstitutional and illegal act, and has since been declared to be such by the Supreme Court of Pakistan.[2]

[2] ' There can be no question that the military rule sought to be imposed upon the country by General Agha Muhammed Yahya Khan was entirely illegal ', per Chief Justice Hamoodur Rahman, *ibid.*

As has been seen, Sheikh Mujibur Rahman responded to President Yahya Khan's postponement on March 1, 1971, of the Constituent Assembly by calling a hartal (general strike) throughout East Pakistan. This was the very action which Mr. Bhutto had threatened in West Pakistan on February 28, if the Assembly were allowed to proceed.

The general strike and the directives issued by Sheikh Mujibur which had the effect of setting up a provisional Awami League government in East Pakistan, were clearly illegal in terms of President Yahya Khan's martial law regime and under that ' law ' justified the use of such force as was necessary to restore the authority of the military government. On the other hand, if the army authorities had not intervened, it is clear that all the organs of government in East Pakistan, including the judiciary, the civil service and the East Pakistan units of the armed forces were prepared to accept the authority and directions of the Awami League. Applying the test of Chief Justice Muhammed Munir, if the legality of the new regime were to be judged not by reference to the old Constitution but by reference to its own success, it had a powerful claim to be recognised, at least in East Pakistan, as a validly constituted government. Moreover, unlike General Yahya Khan's access to power, it had the added authority of an overwhelming victory at a fair and free election. If the ursurpation of power by General Yahya Khan is accepted to be illegal, in the constitutional vacuum which resulted Sheikh Mujibur Rahman and the Awami League, following their electoral victory, would seem to have had a better title to constitute a provisional government of Pakistan than anyone else.

PART IV.

LEGAL POSITION UNDER INTERNATIONAL PENAL LAW

In this part of the study the events in East Pakistan from March 25 to December 31, 1971, are examined under international penal law. This can be considered independently of the issues raised in Parts III and V. Whatever view is taken of the legality or otherwise of General Yahya Khan's martial law regime, or of the right or otherwise of the people of Bangladesh to self-determination, there was as from the time of the army ' crack-down ' on March 25 a military conflict in East Pakistan. The response of the Awami League leaders to the crack-down was to proclaim the independence of Bangladesh, to set up a provisional government and to call for the support of the people in a war of liberation. The provisional government was formally declared on Pakistan soil but its headquarters was based in Calcutta. As the claims of this provisional government were not recognised by any power until after the outbreak of the India-Pakistan war, the conflict was not until then of an international character. Nevertheless, being an armed conflict, certain duties were imposed on the parties to the conflict under international penal law.

From the point of view of the Pakistan army, their operations were designed to ' restore order ' and uphold the authority of the state. Their task was to capture and disarm the defecting East Bengali soldiers and police, and the Awami League supporters and students who had obtained arms to use against them. They suffered from the usual difficulties of an army seeking to combat insurgents who are not in uniform and to whom the great majority of the civilian population are sympathetic. In fairness to the Pakistani army, it should be said that history has shown that in such circumstances armies do tend, however wrongly, to make indiscriminate attacks on the civilian population. Even so, the gravity of the crimes committed by the Pakistani army and their auxiliaries cannot be condoned on these grounds.

The atrocities which were committed, and be it said the atrocities committed on both sides, involved the commission of many crimes under the domestic law of Pakistan. The shooting of unarmed civilians, except pursuant to the lawful judgment of a properly constituted court, is murder. It is clear that murder, arson, rape, looting and

many other crimes both under the civil and military law of Pakistan were committed on a vast scale. However, the legal position is here considered under international rather than domestic penal law. We propose to consider it under certain conventions to which Pakistan was a party, namely the Geneva Conventions of 1949 and the Genocide Convention, 1948, and under international customary law including the applicability of the concept of crimes against humanity.

The International Bill of Human Rights

The question of specific offences under international penal law should be considered against the background of those documents which are coming to be known as the International Bill of Human Rights, as well as of the International Convention on the Elimination of All Forms of Racial Discrimination. While not themselves giving rise to any procedures against individuals in international penal law, these documents enshrine important principles of international law which are relevant when considering the specific offences. The International Bill of Human Rights comprises the Universal Declaration of Human Rights, the Covenant on Economic, Social and Cultural Rights, the Covenant on Civil and Political Rights and the Optional Protocol.[1] While not in the form of a convention, the Universal Declaration of Human Rights is now widely regarded as forming part of international customary law, and although the two Covenants and the Optional Protocol have not received sufficient ratifications to bring them into force, the unanimous enactment by the General Assembly in 1966 makes them powerfully persuasive documents for interpreting the principles of human rights provided for in the Charter and in the Universal Declaration. The Declaration itself was proclaimed by the General Assembly as ' a common standard of achievement for all peoples and all nations '.[2]

It goes without saying that many of the provisions of the Universal Declaration of Human Rights were violated in the situation of hatred, violence and destruction which prevailed in East Pakistan. Among the articles breached during the period of hostilities, without going back to the period preceding 25 March, one may mention Article 2, guaranteeing equal rights; Article 3, guaranteeing the right to life, liberty and security of the person; Article 5, prohibiting cruel, inhuman or degrading treatment; Article 7, guaranteeing equal protection against all discrimination; Article 9, prohibiting arbitrary arrest, detention or exile; Article 17, guaranteeing protection against the arbitrary deprivation of property; and Articles 18 and 19, guaranteeing freedom of thought, religion and expression of opinion.

[1] cf. *Human Rights: A Compilation of International Instruments of the United Nations*, A/CONF. 32/4 (1967), pp. 1-18.

[2] cf. *Preamble to the Universal Declaration of Human Rights*, G. A. Res 217A (III), 10 Dec. 1948.

It is to be expected that in a civil war there will be some derogation from the rights contained in the Universal Declaration. The limits of such derogation are laid down in Article 4 of the International Covenant on Civil and Political Rights, which provides that:

> ' In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.'

It is specifically provided in this Article that no derogation may be made under this provision from (inter alia) Article 6 (' No-one shall be arbitrarily deprived of his life '), 7 (' No-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment '), 16 (' Everyone shall have the right to recognition everywhere as a person before the law ') and 18 (' Everyone shall have the right to freedom of thought, conscience and religion ').

Although the interpretation of the words ' the extent strictly required by the exigencies of the situation ' will always be relatively subjective, the systematic destruction of life and property carried out by the Pakistan army and auxiliary forces may fairly be said to have been out of all proportion to the professed aim of maintaining law and order and establishing the authority of the Pakistan Government. Moreover, the killing and arbitrary arrest, detention and torture of members of the Awami League, of students and of Hindus, for no other reason than that they belonged to these groups, were clear violations of these principles.

Convention on the Elimination of Racial Discrimination

Another relevant document is the International Convention on the Elimination of All Forms of Racial Discrimination, which Pakistan was the third country in the world to ratify. Under Article 1, racial discrimination is defined as

> ' . . . any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.'

Each State Party undertakes under Article 2 ' to engage in no act or practice of racial discrimination against persons, groups of persons or institutions ', and to ensure that all public authorities act in accordance with this obligation. There is a procedure under Articles 11

and 14 of the Convention for the consideration by a Committee of complaints (' communications ') from State Parties or from individuals or groups claiming to be victims of a violation of the rights set forth in the Convention. But the enforcement of the Convention by penal and civil procedures is a duty imposed on the State Parties. Under Article 5, the State Parties undertake to prohibit and to eliminate racial discrimination in all its forms, ' notably in the enjoyment of . . . the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution '. Under Article 6, State Parties undertake to ' assure to everyone within their jurisdiction effective protection and remedies through the competent national tribunals . . . as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination '.

The words ' race ' and ' racial ' do not have a precise scientific signification. Indeed, a study made by UNESCO came to the conclusion that biologically there was no such thing as ' race '.[3] By using the terms ' race, colour, descent, national and ethnic origin ', it is clear that the Convention was intended to cover the whole spectrum of group discrimination based on motivations of a racial nature in the broadest sense in which the term is used. In this sense, discrimination against the Bengalis as a group, with their historical, linguistic, cultural, social and physical differences from the people of West Pakistan, would seem to fall within the term racial discrimination.[4] The Urdu-speaking non-Bengalis also constituted a distinct group, and the very fact that were termed ' Biharis ' indicates that they were regarded as being of a different national or ethnic origin. Discrimination against them as a group would, therefore, also fall within the term racial discrimination.

Some of the actions of the Pakistan army and auxiliary forces appear to have been directed against Bengalis simply because they were Bengalis. How else are the ' slum clearances ' in Dacca to be explained, in cases where they were not directed against Hindus? If, as has been alleged, university teachers and other intellectuals were killed simply because they constituted a potential future leadership for Bengalis, that also could be evidence of racial discrimination. The treatment of all Hindus as ' enemies of the State 'and therefore as qualifying for liquidation, in that it appears to have been due to an association of Hindus with India, would also seem to have been a case of discrimination based on ' descent, or national or ethnic origin '. Equally, the reprisal killing of Biharis and burning of their houses by Bengalis would seem to have been based upon similar

[3] cf. Lerner, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination*, 1970, pp. 41-42.

[4] cf. generally Coleman, *Revue Internationale des Droits de l'Homme*, 1969, pp. 622-623.

motives of racial discrimination. It is true that the great majority of Biharis were regarded as being the allies of and collaborators with the hated West Pakistani 'enemy', but when the killing and destruction of property was directed against Biharis as such it is hard to resist the conclusion that it was a form of racial discrimination.

The Geneva Conventions

The Geneva Conventions of 1949 proved a landmark in international law by formulating categories of offences which are prohibited in armed conflicts 'not of an international character'. The laws of war as formulated in the Hague Convention applied only to international wars.

Article 3, which is common to all the Geneva Conventions must be regarded as the basic text in this field. It has the advantage of being accepted unquestionably as representing the minimum of humanitarian law. It has been recognised almost universally, since virtually all countries are Parties to the Convention.

This Article provides:

'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.

(2) The wounded and sick shall be collected and cared for.'

During the drafting of this Article some states sought to restrict its application to cases where the insurgent forces had attained a certain level of stability and authority, such as having an organised

military force and an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention. These amendments were not accepted and in our view the opinion expressed in the Commentary of the International Committee of the Red Cross that the scope of this article must be as wide as possible is to be preferred. The obligation is absolute for each of the parties and the reciprocity clause in the original draft was deliberately dropped.[5]

While there was never any period when East Pakistan was free from attacks by the insurgent forces, it is probably true to say that by May 1971 there were few if any areas which were in the control of the insurgents. However, when the Mukti Bahini returned from being equipped and trained in India, there were substantial areas, particularly rural areas, which were under their control. Some of the insurgent commanders set up forms of courts to administer rough justice to ' collaborators ', but there were no regularly constituted courts as required by paragraph (1) (d) of the Article. If the Article were to apply only on a basis of mutuality, the insurgents would not be entitled to claim the benefit of the article, at least in relation to paragraph (1) (d). As we have shown, however, the Article is binding on both sides, irrespective of the compliance or capacity to comply of the other party.

There is hardly a phrase of this Article which does not appear to have been violated on a massive scale by the Pakistani army and auxiliary forces throughout the period from 25 March to the surrender of the Pakistani forces on 16 December. The evidence indicates that breaches of these provisions also occurred, though on a lesser scale, in the attacks made by some Bengali units against Biharis and other non-Bengali civilians.

The massacre of unarmed civilians, the destruction of villages and parts of towns, the rape of women, the torture and intimidation of prisoners, the taking and killing of hostages, the frequent executions without trial, the failure to tend the sick and wounded, all these, wherever they occurred, and whether as acts of repression and intimidation or as punitive measures or as reprisals were inexcusable crimes, and often aggravated by an ' adverse distinction ' founded on race or religion.

One of the weaknesses of the Geneva Conventions is that they contain no provisions for sanctions in the case of breaches of Article 3. The articles of the Convention which impose a duty to search out and bring to justice persons who have committed ' grave breaches ' (e.g. Articles 146 and 147 of the Fourth Convention relative to the Protection of Civilian Persons in Time of War) applies only to offences against persons or property protected by the Conventions, and this

[5] Commentary on the Fourth Geneva Convention, I.C.R.C., 1958, Geneva, pp. 35-37.

does not include victims of offences under Article 3. Nevertheless, the duties imposed by Article 3 remain, and it is submitted that an international court set up to try offenders under international penal law would have jurisdiction to consider charges brought for breaches of the Article.

The provisions of the Conventions will also apply in respect of war crimes committed during the period of the international war, i.e. between 4 and 16 December.

Genocide Convention

Both sides have accused the other of the crime of ' genocide ', and in view of the scale of the killings this is hardly surprising. Genocide has become a highly emotive term, often used by laymen to describe any large scale massacre of civilians. To lawyers, however, the term has a more precise connotation.

Article I and the relevant parts of Article II of the Genocide Convention, 1948, read as follows:

> ' Article I. The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.'
>
> ' Article II. In the present Convention, genocide means any of the following acts committeed with intent to destroy, in whole or in part, a national, ethnical, racial or religious groups as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> . . . '

This Convention was ratified by Pakistan, and under Article V, Pakistan undertook to enact the necessary legislation to give effect to the provisions of the Convention under internal law and to provide effective penalities for persons guilty of genocide. At the time of the hostilities in 1971 Pakistan had not yet complied with this obligation and genocide did not therefore constitute a crime under the domestic law of Pakistan. However, as Article I declared genocide to be ' a crime under international law ', as soon as Pakistan ratified the Convention, genocide became an international crime applicable to all persons within the territory of Pakistan.[6]

Article III of the Convention provides that ' the following acts shall be punishable:

(a) Genocide;

(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

[6] cf. Oppenheim: *International Law: A Treatise*, 8th Ed., Vol. I, p. 750.

(d) Attempt to commit genocide;

(e) Complicity in genocide.'

Under Article IV

' Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.'

Returning to the definition of genocide in Article II, it will be seen that the essence of the offence lies in a particular intent, namely the intent to destroy in whole or in part a national, ethnical, racial or religious group as such. It is not, for example, enough to show that a large number of persons belonging to a particular group were killed or intended to be killed. It must be shown that they were to be killed ' as such ', i.e. simply because they belonged to that group. Moreover, the group must be a ' national, ethnic, racial or religious group '. To kill members of a political group as such is not genocide.

Many people in Bangladesh no doubt feel that the whole of the military action and repressive measures taken by the Pakistan army and their auxiliary forces constituted genocide, aimed at destroying in whole or in part the Bengali nation or people as a national, ethnic or racial group. All that need be said is that there may be difficulties in establishing this proposition in a court of law. To prevent a nation from attaining political autonomy does not constitute genocide: the intention must be to destroy in whole or in part the people as such. The Bengali people number some 75 million. It can hardly be suggested that the intention was to destroy the Bengali people. As to the destruction of part of the Bengali people, there can be no doubt that very many Bengalis were killed. We find it quite impossible to assess the total numbers, and we cannot place great confidence in the various estimates which have been made from time to time. However, it appears to be indubitable that the killed are to be numbered in tens of thousands and probably in hundreds of thousands. But this in itself is not sufficient to establish that the intent was to kill them simply because they belonged to the Bengali people as such.

After the initial holocaust of the army crack-down in Dacca, the Pakistani authorities appear to have been pursuing in particular members of three identifiable groups, namely members of the Awami League, students and Hindus. Anyone who was identified as belonging to one of these groups was liable to be shot at sight, or to be arrested and in many cases severely ill-treated, or to have his home destroyed. The fact that these groups were singled out for special attention itself militates against the finding that the intent was to destroy in whole or in part the Bengali people as such.

This does not mean, of course, that particular acts may not have constituted genocide against part of the Bengali people. In any case where large numbers were massacred and it can be shown that on the

particular occasion the intent was to kill Bengalis indiscriminately as such, then a crime of genocide would be established. There would seem to be a prima facie case to show that this was the intention on some occasions, as for example during the indiscriminate killing of civilians in the poorer quarters of Dacca during the ' crack-down '.

As far as the other three groups are concerned, namely members of the Awami League, students and Hindus, only Hindus would seem to fall within the definition of ' a national, ethnical, racial or religious group '. There is overwhelming evidence that Hindus were slaughtered and their houses and villages destroyed simply because they were Hindus. The oft repeated phrase ' Hindus are enemies of the state ' as a justification for the killing does not gainsay the intent to commit genocide; rather does it confirm the intention. The Nazis regarded the Jews as enemies of the state and killed them as such. In our view there is a strong prima facie case that the crime of genocide was committed against the group comprising the Hindu population of East Bengal.

It will be noted that under the provisions of Article IV, ' constitutionally responsible rulers, public officials or private individuals ' are liable to be punished for acts of genocide. Act of State cannot provide a defence. What is less clear is whether and to what extent the defence of ' superior orders ' is available to a person charged with genocide. An article in the original draft expressly excluded this defence, but this article was rejected when the Convention was finally approved. Many authorities consider, however, that principle IV of the Nuremberg Principles is of general application. This provides that ' the fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him '.

The question of whether the killing of non-Bengalis by Bengalis involved crimes of genocide involves difficult questions of law and fact in determining whether the necessary intent existed. It is to be noted that if these killings did constitute genocide, then it would seem that all massacres pursuant to communal violence are to be regarded as genocide. For our part, we find it difficult to accept that spontaneous and frenzied mob violence against a particular section of the community from whom the mob senses danger and hostility is to be regarded as possessing the necessary element of conscious intent to constitute the crime of genocide. Of course, the matter would be different if it could be shown that particular defendants as leaders of the mob possessed that intent and worked up the frenzy of the mob in order to achieve their purpose.

Customary Law: Crimes Against Humanity

The violations of human rights which occurred in East Pakistan are also to be considered in international law from the point of view

of customary law. One of the most authoritative statements of the principles of customary international law in the field of human rights is found in the Nuremberg Principles.

The International Military Tribunal at Nuremberg was one of the first tribunals to try the members of the government of a sovereign state for violations of international law in its treatment of its own nationals. The Charter of London, which was signed on August 8, 1946, by the victorious powers of the U.S.A., the U.S.S.R., France and the U.K., defined war crimes and crimes against humanity and constituted an International Military Tribunal to apply that law.[7] In the words of the Tribunal:

> ' The Charter is not an arbitrary exercise of power on the part of the victorious nations, but . . . it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.' [8]

The principle that a sovereign is bound to a minimum standard of humanity in his treatment of his citizens has its basis in customary international law. The Preamble of the Hague Convention stated that in cases not covered by the laws of war, the victims of war were nonetheless protected by ' the principles of the law of nations, derived from the usages established among civilised peoples, from the laws of humanity, and from the dictates of public conscience '. The doctrine of humanitarian intervention allowed a state to intervene forcibly in certain circumstances to prevent another state from treating its own nationals in such a way as to ' shock the conscience of mankind '. The United Nations Charter explicitly recognises what earlier writers on international law accepted, that all people are entitled to respect for certain fundamental human rights by all governments, including their own.[9]

The Charter of London, as only a four-power treaty, might have difficulty in itself in claiming to establish international law, but after its inception nineteen other nations acceded to it, and it was incorporated into the peace treaties signed with many of the axis powers, thus bringing to quite a substantial number the nations which formally agreed to its formulations. In 1950, the United Nations General Assembly accepted as part of international law the Nuremberg Principles as formulated by the International Law Commission at their request.[10] Finally a number of international treaties such as the International Covenants of Human Rights and the Genocide Con-

[7] 82 U.N.T.S. 279.

[8] Judgment of the Nuremberg Tribunal, p. 216, quoted in Wright, The Law of the Nuremberg Trial in *International Criminal Law*, Mueller & Wise, eds. (1965).

[9] Wright, *supra*, p. 264-265.

[10] Woetzel, *The Nuremberg Ttrial in International Law*, 1962, p. 233.

vention, as well as the Universal Declaration of Human Rights passed by the General Assembly in 1948, embody many of the principles of Nuremberg within their provisions. Thus the principles of Nuremberg are today fully accepted as a part of international customary law.

The Nuremberg Principles, as formulated by the International Law Commission, define war crimes as:

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

Crimes against humanity are defined as:

> ' Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.'

A ' crime against peace ' is defined as

> ' (i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
>
> (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).'

The Nuremberg Principles were formulated in relation to an international war situation and there has been much discussion as to how far they are applicable under customary international law to an internal war situation, i.e. to ' an armed conflict not of an international character '.

As far as ' crimes against peace ' are concerned, it is plain that the definition relates only to the outbreak of an international war, and at least up to December 3, 1971, no question arises of a ' crime against peace ' in East Pakistan.

The application of war crimes is less simple. The definition is in very general terms and includes crimes committed against civilian populations and property. Some writers take the view that the definition in terms of violations of the laws of war or customs of war limits war crimes to offences committed in international wars. In our view this restrictive interpretation fails to recognise the very wide scope which the United Nations plainly wanted to give to these principles, and they should be considered equally applicable in an internal war situation. The adoption of Article 3 of the Geneva Conventions itself shows that the international laws of war extend to

internal war situations and accordingly ' war crimes ' should, at the least, include breaches of Article 3.

The notion of ' crimes against humanity ' has undergone a similar evolution. This is particularly well set out in the report of the United Nations Working Group of Experts commissioned to study the question of *apartheid* from the point of view of international penal law.[11] The report prepared by the Rapporteur, Professor Felix Ermacora, is an important document.

In the Nuremberg formulation, there is some overlapping between war crimes and crimes against humanity, but crimes against an enemy civilian population were in general intended to be covered by the term ' war crimes ' and crimes against a belligerent's own population by the term ' crimes against humanity '. The Nuremberg Principles, as stated, relate crimes against humanity to crimes ' in execution of or in connection with any crime against peace or any war crime '. There seems to be no reason in principle why the concept of crimes against humanity in international law should be confined to an international war, or indeed to a war situation at all. This is certainly the view which has been taken in the United Nations.

Since the United Nations have been dealing with the policy of *apartheid*, various decisions have condemned the policy as being ' incompatible with the principle of the charter of the U.N. and constituting a crime against humanity '.[12] During its 26th session the General Assembly adopted a number of resolutions which are relevant to this issue:

> ' (a) Resolution 2775 F (XXVI), entitled ' Establishment of Bantustans ', contains the following preambular paragraphs:
>
> ' *Recalling* its resolutions 95 (I) of 11 December 1946, in which it affirmed the principles of international law recognized by the Charter of the International Military Tribunal, Nürnberg, and the judgment of the Tribunal,
>
> ' *Bearing in mind* the obligations of all States under international law, the Charter of the United Nations, the human rights principles and the Geneva Conventions,
>
> ' *Noting further* that under the aforementioned resolution crimes against humanity are committed when enslavement, deportation and other inhuman acts are enforced against any civilian population on political, racial or religious grounds.'
>
> (b) Resolution 2784 (XXVI), entitled ' Elimination of all forms of racial discrimination ', adopted on 6 December 1971, in paragraph 1 of section II ' *Reaffirms* that *apartheid* is a crime against humanity '.
>
> (c) Resolution 2786 (XXVI), entitled ' Draft convention on the suppression and punishment of the crime of *apartheid* ', adopted on 6 December 1971, contains the following preambular paragraph:

[11] UN Document E/CN. 4/1075, 15 February 1972.

[12] Ibid., p. 5.

' *Firmly convinced* that *apartheid* constitutes a total negation of the purposes and principles of the Charter of the United Nations and is a crime against humanity '.'

Perhaps the most authoritative statement that ' crimes against humanity ' are not limited to international war situations is contained in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity which entered into force on 11 November 1970. Article 1 of the Convention provides:

' No statutory limitation shall apply to the following crimes, irrespective of the date of their commission:

' (a) War crimes as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, particularly the ' grave breaches ' enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims;

' (b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of *apartheid*, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed.'

Pakistan voted for this Convention, and although she has not ratified it so as to be bound by the restriction on periods of statutory limitation, her vote in favour of it involves an acceptance of the principle that crimes against humanity are not limited to international war situations.

If it be accepted that the concepts of war crimes and crimes against humanity were applicable to the hostilities in Pakistan, there is abundant evidence that war crimes were committed by the Pakistani army and auxiliary forces and that many crimes against humanity were also committed. It does not seem necessary to repeat here again the nature of the systematic actions of the Pakistani army and auxiliary forces which fall within the definition of war crimes and crimes against humanity.

A more difficult question is whether the reprisal attacks made by Bengalis against non-Bengalis, in particular between 26 March and mid-April, 1971, are also to be regarded as war crimes and/or as crimes against humanity. The scale of the crimes was of a lesser magnitude, but nevertheless was probably sufficient to qualify for consideration as crimes against humanity. A crime against humanity requires a certain magnitude of violence before it becomes the concern

of the international community in that it must surpass ' in magnitude or savagery any limits of what is tolerable by modern civilisations '.[13]

As in the case of genocide, we doubt whether atrocities committed by unorganised mobs in spontaneous outbursts should be considered as crimes under international penal law. However, any individuals who knowingly incited a mob to violence could be held guilty of a crime against humanity.[14] So also where the attacks were made by organised forces.

Individual Responsibility

The remaining questions to be considered are those of individual responsibility under international law for violations of human rights, and where such responsibility exists, what proceedings fall to be taken against those responsible and in what form.

We are not concerned with any political issues which may be involved in deciding whether particular individuals should be prosecuted in connection with the violations of human rights which have occurred. We are concerned only to examine what in international law is the liability of individuals to prosecution and what duty lies upon states who may decide to prosecute them.

The question whether and the extent to which individual persons are subject to international law is much disputed, but the one field in which it is now clearly established that individual persons are bound by international law is that of human rights. The Nuremberg Principles explicitly state that ' any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment ' (Principle I), that ' crimes against peace ', ' war crimes ' and ' crimes against humanity ' are ' punishable as crimes under international law ' (Principle VI), and that complicity in the commission of these crimes is itself a crime under international law (Principle VII). Moreover, ' the fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law ' (Principle III), and ' the fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him ' (Principle IV). Furthermore, ' the fact that internal law does not impose a penalty for an act which constitutes a crime under internal law does not relieve the person who committed the act from responsibility under international law ' (Principle II).

[13] Opening speech of Justice Jackson, Chief U.S. prosecutor at Nuremberg, cited in Schwelb, *Crimes against Humanity* (1946), 23 B.Y.I.L. 178, 195.

[14] cf. the case of Julius Streicher, convicted at Nuremberg of crimes against humanity for inciting people through his newspaper, *Der Stürmer*, to murder and extermination of Jews; Woetzel, *supra*, p. 10.

In our view these principles are declaratory of principles of general application in international law, and apply in internal war situations as much as in international wars. The effect of these principles is that the individual officers and soldiers who carried out the ' kill and burn ' missions and other crimes under international law are liable to be prosecuted and punished unless there was no moral choice open to them. Those who ordered the commission of the crimes are liable to prosecution. Equally, those who passed on the orders or who, knowing of these crimes or the orders for them, failed to prevent their being carried out when they had the opportunity to do so, are themselves guilty of ' complicity ' in the commision of the crimes.

Form of Tribunal

What form of tribunals should be established for the trial of persons accused of these crimes? Clearly they may be tried under the domestic criminal law either before the normal criminal courts or before special tribunals established for the purpose. The persons charged have, of course, the right to a fair trial on the facts and law (Nuremberg Principles, Principle V). This should include the right to counsel of their choice, who may be an advocate from another country. The law under which they are to be tried must be law which was applicable at the time when and at the place where the offences were committed.

Although the Government of Bangladesh is entitled to hold any such trials under domestic law before domestic tribunals, it is suggested that there are cogent reasons why it would be preferable if those considered principally responsible for these offences were tried under international law before an international tribunal. If, as has been reported, senior Pakistani officers and officials are to be tried, it would be easier to satisfy international opinion that they have received a fair trial if the tribunal is international in character. In this connection, it should be recalled that the International Military Tribunal at Nuremberg was widely criticised for being composed exclusively of judges from the victorious countries. It is suggested, therefore, that it would be preferable if a majority of the judges were from neutral countries. In a situation of this kind, one would prefer to see an international tribunal constituted under the authority of the United Nations to try those principally accused. In present circumstances it is regrettably the fact that no such initiative is to be expected, though the Prime Minister of Bangladesh has made clear that his Government would welcome such a tribunal. If an international tribunal is to be constituted, it would have to be by the Bangladesh Government itself. For this reason, and on the assumption that the procedure to be adopted is likely to be the ordinary criminal law procedure of the country (which is based on and follows the English

common law procedure), it seems reasonable that the Court should be presided over by a Bangladesh judge.

Assuming that such a tribunal is established under Bangladesh law, there would seem to be no reason why offences should not be charged both under international law and under the domestic law of Bangladesh.

An additional reason for preferring charges under international law arises in relation to the crime of genocide. As we have seen above, it would not be possible to charge persons with genocide under Bangladesh domestic law without passing retrospective legislation but no such difficulty would arise in relation to a charge preferred under international law.[15]

[15] See p. 55 above.

PART V:

RIGHT OF SELF-DETERMINATION IN INTERNATIONAL LAW

The principle of the right of a people to self-determination seems self-evident, but there is no more explosive issue in today's world. What constitutes a people? In what circumstances can they claim the right? What is the extent of the right? Does it include a right to secession? How is the right to be reconciled with the principle of the territorial integrity of each Member State of the United Nations?

The problem was succinctly stated by U Thant in his ' Introduction to the Report of the Secretary-General ' in 1971:

> ' I feel obliged to mention a problem which has been almost daily in my mind during my time as Secretary-General. I refer to the violation of human rights within the frontiers of a state. Theoretically, the United Nations has little standing in such situations — and they are all too common . . .
>
> ' A related problem which often confronts us and to which as yet no acceptable answer has been found in the provisions of the Charter, is the conflict between the principles of the integrity of sovereign States and the assertion of the right to self-determination, and even secession, by a large group within a sovereign State. Here again, as in the case of human rights, a dangerous deadlock can paralyse the ability of the U.N. to help those involved.'

The notion of the right of a people to self-determination amounts to a de jure recognition of a sociological phenomenon: the concept that certain human groups constitute ' peoples ' and that a people constitutes an entity having a legal personality or status analogous with that of a human person, and is accordingly entitled to certain rights and fundamental liberties which, like those of the individual, must be respected. In practice the sovereignty which, according to the principle of self-determination, should rest with peoples, is assumed by organs of the state, and in many if not most states of the world any attempt by a group within an existing state to assert the right of self-determination will be regarded as a form of treason. In consequence, the will to assert the right is often manifested by a violent challenge to an established power with a view to obtaining by force a change of

status, the legitimacy of which will be sanctioned if and only if the use of force carries the day.

The concept of self-determination finds its origin in the modern concept of nationalism in which the sovereignty of the feudal Prince is replaced by the sovereignty of the people. This revolutionary and recent intervention arose from the evolution of ideas during the 17th and 18th centuries which were institutionalised in the French Revolution. The Declaration of the Rights of Man established the legal basis for these nationalist and revolutionary rights, the rights of peoples and of individuals. The socio-juridical transformation was radical. All the attributes formerly attaching to the person of the Prince were conferred on the ' sovereign people '. The new sovereign became a new socio-juridical entity, the Nation, in which was vested the sole authority to exercise the right of sovereignty.

If we consider the question in this original context, we are led to the conclusion that the right of a people to self-determination means, legally speaking, the right of a people to constitute, either alone or jointly with other peoples, a sovereign nation. This interpretation is confirmed by the Charter of the United Nations, whose Preamble opens with the words:

> ' We the Peoples of the United Nations . . . ',

thus marking the difference between People and Nation. And by Article 1 (2) of the Charter, one of the purposes of the United Nations is:

> ' To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . . '.

It is even more clearly stated in the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights. Article 1, which is common to both Covenants, reads:

> ' 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development;
>
> 2. . . .
>
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.'

The important principle is, therefore, established that the duty to ' promote the realisation of the right of self-determination ' is imposed upon all State Parties and not merely upon the colonial powers. This implies some limitation upon the absolute sovereignty of existing nation states.

Article 1 of the two International Conventions on Human Rights follows the wording of Article 2 of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples. Similar terms are to be found again in the important ' Declaration of Principles of International Law concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations ', which was approved by the General Assembly in 1970 by Resolution 2625 (XXV). This is the most authoritative statement of the principles of international law relevant to the questions of self-determination and territorial integrity. The conflicting principles are stated in the Preamble to the Declaration in these terms:

> ' The General Assembly,
>
> . . .
>
> Convinced that the subjection of peoples to alien subjugation, domination and exploitation constitutes a major obstacle to the promotion of international peace and security,
>
> Convinced that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among states, based on respect for the principle of sovereign equality,
>
> Convinced in consequence that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a state or country or at its political independence is incompatible with the purposes and principles of the Charter, . . .'

The Declaration then proclaims 7 principles of international law relating to friendly relations and cooperation among states. One of these is ' The principle of equal rights and self-determination of peoples '.

Under this principle it is stated:

> ' By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the Charter.'

The form which self-determination may take is stated in these terms:

> ' The establishment of a sovereign and independent state, the free association or integration with an independent state or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.'

Finally, the duty of a state towards a people claiming the right to self-determination is stated as follows:

' Every state has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuance of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.'

One cannot fail to be struck by the extremely wide scope of these provisions asserting the sovereign right of all peoples to self-determination. Moreover, it is the free determination by a people of the form of their political status, without external interference, which constitutes the exercise of their right to self-determination; a decision freely taken automatically leads to the acquisition of a status, and it becomes an infringement of international law for any state to attempt to deprive them of that status by forcible action, and if any state does so, other states should give support to the people asserting their right of self-determination.

Turning to the conflicting principle of territorial integrity we find it stated under ' The Principle of Sovereign Equality of States ' that ' all states enjoy sovereign equality ', and that sovereign equality includes as one of its elements:

'(d) The territorial integrity and political independence of the state are inviolable.'

This principle has to be given full weight when considering the extent of the right of self-determination of peoples. Not only does the general part of the resolution assert that ' each principle should be construed in the context of other principles ', but under the principle of equal rights and self-determination of peoples it is expressly stated:

' Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.'

This courageous attempt to reconcile the two conflicting principles still leaves a number of difficulties. In the first part it says that the principle of territorial integrity is to prevail in the case of sovereign states conducting themselves ' in compliance with the principle of equal rights and self-determination of peoples '. This seems to recognise that a state may include more than one ' people ', each of whom is entitled to self-determination, but implies that self-determination is something which can be achieved within the framework of a larger state. Presumably what is contemplated is a reasonable measure of

autonomy, perhaps within a federal state. If so, the term ' self-determination ' in this passage has a different meaning from the passages quoted earlier which equate self-determination with freedom and independence. The final phrase makes clear that if a state is conducted in compliance with the principles of equal rights and self-determination of peoples, it must have a government representing ' the whole people belonging to the territory without distinction as to race, creed or colour '.

This passage must also be considered in the light of another principle not referred to in the Declaration of Principles. It is a widely held view among international lawyers that the right of self-determination is a right which can be exercised once only. According to this view, if a people or their representatives have once chosen to join with others within either a unitary or a federal state, that choice is a final exercise of their right to self-determination; they cannot afterwards claim the right to secede under the principle of the right to self-determination. It was on this principle that the claim to independence of the southern states in the American Civil War and of Biafra in the Nigerian Civil War was resisted. It is submitted, however, that this principle is subject to the requirement that the government does comply with the principle of equal rights and does represent the whole people without distinction. If one of the constituent peoples of a state is denied equal rights and is discriminated against, it is submitted that their full right of self-determination will revive.

Against the background of these legal principles, we propose to consider:

(1) whether the population of East Pakistan constituted a ' people ' in the sense in which the term is used in the U.N. Charter and other relevant instruments of international law;

(2) if the answer is ' yes ', whether the people of East Pakistan were entitled in international law to assert a right to independence under the principle of self-determination.

In considering these questions, we shall base our judgments on the texts already referred to, incorporating the general consensus of opinion of the Nations of the world on this subject, and we shall strive to interpret them in a restrictive sense, in view of the obvious dangers involved in adopting an excessively wide interpretation.

(1) *Did the Population of East Pakistan Constitute a ' People ' ?*

First, we must seek to establish, as best we can, what constitutes ' a people ' having the right to self-determination. As we have seen, the Declaration of Principles of International Law is silent on this question, and equally, no guidance is to be obtained from the Charter of the United Nations or the two International Covenants on Human Rights.

It may be helpful to begin by examining what groups do not, or not necessarily, constitute a people. Clearly there can be many minorities, linguistic, racial or religious, which have legitimate rights as such, but which are not entitled to claim the right to self-determination. Regional groupings and regional loyalties may be very real and of great importance, without their populations constituting peoples within the meaning of this doctrine. Again, a tribe is not to be regarded as such as a people, but rather as a group of clans. Successful nations achieve a real unity in diversity of many different elements. The right of self-determination is not intended to encourage separatism for every grouping which goes to make up the complex pattern of a historical nation.

The difficulties of the problem perhaps become clearer if one tries to establish a list of the characteristics possessed by a people, to establish as it were a composite picture permitting its identification.

If we look at the human communities recognised as peoples, we find that their members usually have certain characteristics in common, which act as a bond between them. The nature of the more important of these common features may be:

— historical,
— racial or ethnic,
— cultural or linguistic,
— religious or ideological,
— geographical or territorial,
— economic,
— quantitative.

This list, which is far from exhaustive, suggests that none of the elements concerned is, by itself, either essential or sufficiently conclusive to prove that a particular group constitutes a people. Indeed, all the elements combined do not necessarily constitute proof: large numbers of persons may live together within the same territory, have the same economic interests, the same language, the same religion, belong to the same ethnic group, without necessarily constituting a people. On the other hand, a more heterogeneous group of persons, having less in common, may nevertheless constitute a people.

To explain this apparent contradiction, we have to realise that our composite portrait lacks one essential and indeed indispensable characteristic — a characteristic which is not physical but rather ideological and historical: a people begins to exist only when it becomes conscious of its own identity and asserts its will to exist. A modern example is the ancient Jewish people who have exerted their will to exist as a separate Israeli nation only during the present century. This leads us to suggest that the fact of constituting a people is a political phenomenon, that the right of self-determination is founded on political considerations and that the exercise of that right is a political act.

What is plain is that there is no single, authentic answer to the question ' what is a people '? All the official texts ignore it, presumably owing to the difficulty of definition. In a matter where passions are so easily aroused, this ambiguity is dangerous and can lead to extremely grave consequences. We do not propose ourselves to attempt to formulate any comprehensive definition. Rather, in the absence of any accepted objective criteria, we propose to consider the question whether Bangladesh constituted a people by applying the various criteria referred to above.

Historically, the links between East and West Pakistan are of modern origin, apart from the fact of their both having been included in the much larger Moghul and British empires. Racially, if we may use this non-scientific term to express differences of physical appearance, dominant characteristics and behaviour, the population of the eastern and western wings may be said to be of different races, though both belonged to the wider Indo-Aryan race. Linguistically there was a marked difference. In East Pakistan 98% of the population spoke Bengali, compared with under 2% speaking Urdu, the principal language of Pakistan. The languages, which are written with a different script, each have a rich culture and literature of their own. Religion was the chief common factor shared between the two wings. Though there were important regligious minorities, the great majority of both populations practised the Moslem religion, and as we have seen it was the determination to create a strong Islamic state which was the principal motive force in the foundation of Pakistan. Geographically, the eastern and western wings were separated by over a thousand miles of foreign territory, and their geographical features were very different. This in turn was reflected in social differences. The staple diet of West Pakistan was corn and that of East Pakistan was rice. West Pakistan turned naturally for its cultural and commercial exchanges towards the Arab Middle East and Iran, East Pakistan towards India and the Asian Far East. Economically, the two wings hardly comprised a natural unity, and the economic conflict with India resulted in East Pakistan being cut off from their natural economic outlets and trading partners in the neighbouring parts of India. Quantitatively, each of the wings was large enough in population and territory to constitute a separate nation state.

Together these various factors constitute a strong body of presumptive evidence in support of the contention that there existed a distinct Bengali people. The only real common bond was the Moslem religion. It is important to remember, however, the profound hold which this religion has upon its adherents, the concept of an Islamic state being one in which the whole culture and civilisation is permeated by Moslem ideology.

Turning to the last of the suggested criteria, the conscious identity of themselves as a people and with the political will to self-government, it was only in the later political evolution of the state of Pakistan that

one finds significant evidence that the people of East Pakistan thought of themselves as a separate people. Long before the foundation of Pakistan there was, of course, a Bengali people which included the predominantly Hindu population of West Bengal. It was, however, by a deliberate choice of the state legislators in 1946 that the decision was made that East Bengal should join the Moslem state of Pakistan rather than maintain the unity of Bengal within a secular Indian state.

The first landmark in the move towards greater autonomy of East Pakistan was the 1954 elections, when the United Front in East Pakistan won 97% of the seats, and routed the Moslem League which had constituted the foundation of the unitary Pakistan state. Although the struggle was one for greater provincial autonomy, the motive force was an awakening national consciousness and the determination, clearly expressed by democratic means, to free themselves from the domination of West Pakistan.

In the 1970 elections the population had a further opportunity to express their views. The results of these elections, by their near unanimity, take on the force of a referendum. There can be no doubt that the principle which won that consensus of opinion was the single basic notion of autonomy, the religious question having played little or no part in the voting. As regards the juridical framework within which that autonomy might be realised, while there were some who believed that autonomy could never be achieved without secession, the great majority of voters were content to accept the Awami League proposals for autonomy within a federal constitution. What is of significance for our present purpose is that the electorate of East Pakistan showed that what they really hoped for was to be able at last to manage their own affairs as they wished, without having to receive orders from or render account to people whom they tended to see as a domineering and alien power whose attitudes and behaviour had provoked resentment.

It seems impossible to deny that the result of the 1970 election established that the population of East Pakistan now considered themselves a people with a natural consciousness of their own and were claiming a high degree of autonomy within the federal state of Pakistan. In these circumstance, assuming as we do that an independent nation state may include more than one ' people ', we consider that by 1970 the population of East Pakistan constituted a separate ' people ' within the ' whole people ' of the state of Pakistan.

(2) *Were the People of East Pakistan Entitled in International Law to Assert a Right of Independence under the Principle of Self-Determination?*

The starting point on this issue was the decision by the elected representatives of what became East Pakistan to opt for union with West Pakistan rather than for union with West Bengal within the state of India. Many would argue that this constituted an exercise by the

people of East Bengal of their right (if any) of self-determination. As against this it may be said that this question had not been an issue in the campaign when the legislators were elected, and that the choices open to them did not include independence for East Pakistan. Nevertheless, they were elected representatives at the time and it seems right to accept that this was an exercise of the right of self-determination by the people of what became East Pakistan. In these circumstances, no further exercise of the right would arise in international law so long as they were being accorded ' equal rights and self-determination . . . and thus [were] possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour '.

A strong case can be made out for saying that the people of East Pakistan would have been entitled to claim independence before the 1970 election on the grounds that the denial of ' equal rights ' which they had suffered since the institution of the state of Pakistan brought into force their right of self-determination. Until the 1970 election, they had never been allowed equal representation, the doctrine of ' parity ' between the two wings being itself a denial of equality. Bengalis were heavily under-represented at all levels of the civil service and military forces. The economic and social disparities were even more striking. East Pakistan was consistently denied its fair share of investment, economic aid and development, and the per capita income of its population which was 18% lower than that of the west in 1949-50 was 75% lower by 1967-68. There was the same disparity in social, educational and health fields. It is these factors which led the people of East Pakistan to claim that they were in the words of the Declaration of Principles approved by Resolution 2625 subject to ' alien subjugation, domination, and exploitation [which] constitutes a violation of the principle [of self-determination], as well as a denial of fundamental human rights, and is contrary to the Charter '.

After the 1970 election the case for saying that East Pakistan was being denied equal rights largely disappears. These elections were for the first time held on the basis of one man one vote in order to elect an assembly to draw up a new constitution. There was no discrimination against East Pakistan either in the conduct of the election or in terms of the Legal Framework Order under which it was held. That Order contained conditions about the powers of the central government, and directive principles to safeguard the Islamic State, but these applied equally to East and West Pakistan. The Awami League would no doubt contend that the refusal to grant the Six Points was itself a denial of ' the principle of equal rights and self-determination of peoples '. As we have seen, the Declaration of Principles of International Law seems to imply that a separate people within a nation state are entitled to a high level of self-government in order to develop their own cultural, social and economic institutions. But how is it to be determined what that level should be? On what criteria can it be

said that the Six Points complied with the principle, whereas a federal constitution within the Legal Framework Order would not have done?

The reason why President Yahya Khan would not allow a constitution to be drawn up in accordance with the Six Points is clear. He considered that in any constitution which would have resulted, the powers of the central government of Pakistan would have been weakened to the point where the future territorial integrity and political unity of Pakistan was threatened. It is easy to understand this attitude. As a military leader, it came naturally to him to think that a strong central government was the best and indeed the only way of maintaining the unity of the state. As he believed in the legality of his own Presidency and of his martial law regime, and was supported in this belief by the earlier decision of the Supreme Court in Dosso's case [1], he naturally considered that he was entitled and indeed that it was his duty to refuse to permit a constitution to be drawn up which did not comply with the conditions he had laid down in the Legal Framework Order.

We have already considered in Part III the legality of the martial law regime under Pakistan law, and have seen that the Legal Framework Order under which the elections were held was invalid. It may be argued from this that the Constituent Assembly itself was invalid and that the only way of returning to legality was by recalling the old National Assembly elected under the 1956 Constitution, and transferring the Presidency to the Speaker of the Assembly. In the circumstances prevailing, and in particular after the result of the 1970 election, whatever the strict legal position may have been, the old assembly would have lacked any political authority. The only practical way, it is submitted, of returning to legality would have been by convening the Constituent Assembly and allowing it to draw up a new constitution. These, however, are matters of domestic law. President Yahya Khan's regime had been internationally recognised as the Government of Pakistan, and its authority could not be challenged in international law.

It must also be remembered that the Awami League had no mandate for independence, not did they claim to have one. They had fought the election on the Six Points programme of autonomy within a federal constitution. It was only when the army made it clear by their crack-down that they were not prepared to entertain a constitution on this basis that the Awami League leaders proclaimed the independence of Bangladesh and called for armed resistance.

Therefore, if the Declaration of Principles of International Law is accepted as laying down the proper criteria, it is difficult to see how it can be contended that in March 1971 the people of East Pakistan,

[1] See Part III above.

or the leaders of the Awami League on their behalf, were entitled in international law to proclaim the independence of Bangladesh under the principle of self-determination of people.

It does not follow from this, of course, that the action of the Awami League leaders in calling for armed resistance to the army cannot be justified under the domestic law. As we have seen, the martial law regime was illegal and the old constitution had broken down and was completely discredited. It was necessary to draw up a new constitution for the state of Pakistan. The 1970 elections had resulted in a clear decision in favour of a certain level of provincial self-government. Let it be conceded in favour of General Yahya Khan that this would have seriously weakened the power of the central government. Nevertheless, it still recognised the territorial integrity and political unity of Pakistan. It may be that the only way of maintaining this unity was by reducing the power of the central government. As we have seen in Part I, the all-India constitution which Mr. Jinnah would have been prepared to accept in 1946 would also have resulted in a weak central government. Provided that the majority were ready, as they were, to grant an equal degree of autonomy to the people of West Pakistan, it is difficult to see why on democratic principles their will was not entitled to prevail. If the people of West Pakistan were not prepared to accept a constitution on this basis, the only remedy would have been partition of the state. The minority were not entitled to force their preferred constitution upon the majority.

In our view it was not in accordance with the principles of the Charter of the United Nations for a self-appointed and illegal military regime to arrogate to itself the right to impose a different form of constitution upon the country, which was contrary to the expressed will of the majority. As the army had resorted to force to impose their will, the leaders of the majority party were entitled to call for armed resistance to defeat this action by an illegal regime.

PART VI:

THE ROLE OF THE UNITED NATIONS

The inaction of the United Nations Organisation in face of the East Pakistan crisis has been widely commented upon. For some it is proof of the impotence of the organisation. The simple answer to this is that the United Nations cannot, by its nature, be more effective than the members who comprise it. It provides a machinery through which the nations of the world can act, if they have the will to do so. The events in East Pakistan could have been dealt with by the United Nations either as gross violations of human rights, or as a threat to international peace, or both.

Violations of Human Rights

The earlier parts of this Study have shown that the events in East Pakistan involved gross violations of human rights. These violations began in March 1971 and continued until Pakistan's defeat in December, but the United Nations did not take any action to prevent them. The Secretary-General, on his own initiative, launched a humanitarian relief programme. No United Nations organ would consider the human rights violations in East Pakistan, in spite of appeals by India and by Non-Governmental Organisations. When the Security Council was finally seized of the question in December, it refused to consider the origins of the situation but dealt only with the India-Pakistan conflict.

What authority does the United Nations have to deal with gross violations of human rights? What procedures and organs could have been utilised to deal with the human rights violations in East Pakistan? To what extent were these procedures and organs utilised? What implications does the United Nations' response to the East Pakistan situation have in terms of the United Nations' adequacy to deal with future situations of this kind? Are new procedures or organs desirable?

The United Nations Charter establishes as one of the Organisation's basic purposes ' promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion ' (Article 1 (3)). In Article 56 ' All Members pledge themselves to take joint and separate action in cooperation with the Organisation for the achievement ' of these purposes.

On the other hand, Article 2 (7) states that except for enforcement measures by the Security Council ' Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter . . . '. As a consequence of Article 2 (7), the United Nations for many years has avoided dealing with violations of human rights in specific states.

The General Assembly, however, in Resolution 2144 (XXI) of October 26, 1966, called upon the Economic and Social Council and the Commission on Human Rights ' to give urgent consideration to ways and means of improving the capacity of the United Nations to put a stop to violations of human rights wherever they may occur '. The Commission on Human Rights in Resolution 8 (XXIII) of March 16, 1967, invited the Sub-Commission on Prevention of Discrimination and Protection of Minorities ' to bring to the attention of the Commission any situation which it has reasonable cause to believe reveals a consistent pattern of violations of human rights and fundamental freedoms, in any country, including policies of racial discrimination, segregation and apartheid, with particular reference to colonial and other dependent territories '. The Commission also authorised the Sub-Commission in making such a recommendation to prepare a report ' containing information on violations of human rights and fundamental freedoms from all available sources '. The Economic and Social Council approved these decisions by the Commission in Resolution 1235 (XLII) of June 6, 1967.

In addition, the Economic and Social Council in Resolution 1503 (XLVIII) of May 27, 1970, established procedures for the review of communications sent by individuals and groups alleging the violation of human rights. The Sub-Commission, which will make the initial review of the communications, in Resolution 1 (XXIV) of August 13, 1971, established the rules of admissibility of communications. These special procedures respecting the review of communications do not derogate from the general authority of the Economic and Social Council, the Commission and the Sub-Commission to study independently of these procedures situations which reveal a consistent pattern of violations of human rights on the basis of all available information.

The United Nations has decided, by virtue of these resolutions, that gross violations of human rights are not exclusively within the domestic jurisdiction of states and, therefore, Article 2 (7) does not apply. Any of the organs responsible for promoting human rights — the General Assembly, ECOSOC, the Commission on Human Rights, and the Sub-Commission on the Prevention of Discrimination and Protection of Minorities — had the authority and the duty to consider the reports of human rights violations in East Pakistan.

Threat to International Peace

In addition to the general exception to Article 2 (7), in cases revealing a consistent pattern of violations of human rights there is a specific exception in the closing words of Article 2 (7): ' . . . but this principle shall not prejudice the application of enforcement measures under Chapter VII.' Chapter VII is entitled ' Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression' and comprises Articles 39-51. Any action to be taken under Chapter VII must be taken by or under the authority of the Security Council.

Possible Action by the Security Council

Pursuant to its primary responsibility under Article 24 for maintaining international peace and security, the Security Council could have investigated the crisis under Article 34 as ' a situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuation of the . . . situation is likely to endanger the maintenance of international peace and security '.

Equally, any member of the United Nations could have brought the ' situation ' to the attention of the Security Council under Article 35, or the Secretary-General could have done so under Article 99.

If the Security Council had met to consider the situation, its first duty under Article 39 would have been to determine whether there existed ' any threat to the peace, breach of the peace or act of aggression ', and is so, determine what recommendations to make or what measures to take to maintain or restore international peace or security.

The Security Council did not, in fact, meet until after international hostilities had broken out in December. Hindsight now establishes that there was a threat to peace, but no great foresight was required in order to recognise this threat at the time. Particularly was this so after the Secretary-General's Note to the Security Council of July 20, 1971, in which he drew attention to three features of the situation which previous experience had shown to present grave dangers to peace, namely:

(1) the violent emotions aroused by the persecution of religious or linguistic groups;

(2) the conflict between the principle of territorial integrity and self-determination of peoples; and

(3) the long-standing tension between India and Pakistan.

In his memorandum, the Secretary-General indicated the futility of treating the relief aspects of the situation alone and implied that the Security Council should undertake measures to prevent the outbreak of armed conflict:

' In the light of the information available to me, *I have reluctantly come to the conclusion that the time is past when the international community can continue to stand by, watching the situation deteriorate and hoping that relief programmes, humanitarian efforts and good intentions will be enough to turn the tide of human misery and potential disaster. I am deeply concerned about the possible consequences of the present situation, not only in the humanitarian sense, but also as a potential threat to peace and security* and for its bearing on the future of the United Nations as an effective instrument for international co-operation and action. It seems to me that the present tragic situation, in which humanitarian, economic and political problems are mixed in such a way as almost to defy any distinction between them, presents a challenge to the United Nations as a whole which must be met. Other situations of this kind may well occur in the future. If the Organisation faces up to such a situation now, it may be able to develop the new skill and the new strength required to face future situations of this kind. . . . *The United Nations, with its long experience in peace keeping and with its varied resources for conciliation and persuasion, must, and should, now play a more forthright role in attempting both to mitigate the human tragedy which has already taken place and to avert the further deterioration of the situation.*' [1]

It is difficult to resist the conclusion that if the Security Council had met before December 1971 to consider the situation they would have determined that it constituted a threat to the peace. (As no international violence had occurred, it could hardly have determined that there was a ' breach of the peace ' or an ' act of aggression ', *pace* India's contention in a later debate in the Third Committee that the flow of refugees across the border constituted a ' civilian invasion '.)

If the Security Council had so determined it could, notwithstanding the domestic nature of the dispute, have taken under Chapter VII either non-military measures under Article 41 (including severance of economic relations, of communications, and of diplomatic relations) or ' such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security '.

Any such decision would, however, have required under Article 27 (3) an affirmative vote of seven members including the concurring vote of the permanent members. It was, of course, the impossibility of reaching agreement among the permanent members which was responsible for the inaction of the Security Council.

Even if agreement had been possible, it must be recognised that measures of the kind envisaged under Articles 41 and 42 are not necessarily best suited to achieving the objects which the situation called for, namely the protection of the different sections of the population of East Pakistan against gross violations of human rights, and the prevention of outside interference in the internal dispute, without supporting or favouring one side or the other to that dispute.

[1] Italics added. UN document S/10410, pp. 2, 3-4.

Before taking any action under Articles 41 and 42, the Security Council may also under Article 40 ' call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable '. These could include such measures as sending a fact-finding committee, or observer groups, or a peace-keeping force. As this Article is in Chapter VII, such provisional measures could have been taken without the consent of the Pakistan Government, but in practice it is unlikely that any such force would be sent without the consent of the government of the country concerned and, in a case of this kind, of the leaders of the insurgent forces or liberation army.

The Security Council could also, under Article 36, have recommended ' appropriate procedures and methods of adjustment ' with a view to the pacific settlement of the dispute or situation. The procedures and methods which the Security Council could have recommended under this Article would include procedures for negotiation or mediation as well as the measures open to it under Article 40.

Possible Measures by the General Assembly

The General Assembly has a general power under Article 10 to discuss any matters within the scope of the Charter and, subject to Article 12, to make recommendations to member states, to the Security Council or both. (Article 12 bars the General Assembly from making any recommendation while the Security Council is exercising its functions in respect of the dispute or the situation; as we have seen, that limitation did not apply.)

There is also a similar power in respect of matters relating to international peace and security under Article 11 (2).

Under Article 14 ' the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations '.

These purposes and principles include (Article 1 (3)), ' to achieve international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion '.

It may be noted in passing that the fact that Article 14 authorises the General Assembly to act in this way indicates that a situation involving a gross violation of human rights within a state should not be considered one which is ' essentially ' within the jurisdiction of the state concerned, if it impairs the general welfare or friendly relations among nations.

The General Assembly could, therefore, have made recommendations either:

(1) generally, under Article 10; or
(2) if they had determined that there was a threat to international peace or security, under Article 11; or
(3) if they had determined that the violations of human rights occurring in East Pakistan were likely to impair the general welfare or friendly relations among nations, under Article 14.

The actions which they could have recommended under these Articles would include those open to the Security Council, such as a fact-finding committee or observer groups or a peace-keeping force.

It may be that the General Assembly could also have acted under Article 55, which provides that:

> ' With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> . . .
>
> (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.'

Under Article 56, ' all Members pledge themselves to take joint and separate action in cooperation with the Organisation for the achievement of the purposes set forth in Article 55 '.

Committee on the Elimination of Racial Discrimination

As was seen in Part IV of this Study, many of the violations of human rights committed both against Bengalis and Biharis appear to have fallen within the terms of the International Convention on the Elimination of All Forms of Racial Discrimination. A procedure is available for the consideration of ' communications ' from individuals or groups claiming to be victims of violations or from State Parties.

The Convention provides for a Committee on the Elimination of Racial Discrimination which consists of eighteen experts who serve in their personal capacity. The Committee reviews reports submitted every two years by the states parties to the Convention and may request additional information from the states parties. Furthermore, the Convention provides that ' if a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee '. If the dispute between the two states parties is not resolved, an *ad hoc* Conciliation Commission may be established which will investigate the situation and make ' such recommendations as it may think proper for the amicable solution of the dispute '.

India and Pakistan are both states parties to the Convention. The Committee on the Elimination of Racial Discrimation met twice

between the events of March 1971, and December 1971. The Committee considered a report by the Government of Pakistan at its April session and decided the report was inadequate and requested the government to submit additional information. The Committee did not specify in what particular areas the Pakistan report was deficient. Pakistan failed to submit the supplementary report requested for the September session of the Committee. The Committee did not make any mention of this omission in its report to the General Assembly.

No complaint was submitted to the Committee concerning the events in East Pakistan. If any of the states parties had initiated such a complaint it would have brought into being the Conciliation Commission which would have investigated the facts fully and made recommendations, and this Conciliation Commission would have been established even if Pakistan had objected to its creation.

Opportunities for Discussion of the Situation in the United Nations

Apart from the power of any Member under Article 35 to bring the situation to the attention of the Security Council or the General Assembly or the Committee on the Elimination of Racial Discrimination, ample opportunities in fact arose for discussing it.

The situation was first raised in the Social Committee of ECOSOC in July, and at the 51st Plenary Session of ECOSOC the United Nations High Commissioner for Refugees (UNHCR) reported on the refugee problem. The Council decided to refer the report to the General Assembly without debate.

On August 16, 1971, a representative of the International Commission of Jurists, speaking on their behalf and on behalf of 21 other non-governmental organisations, requested the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities to examine the situation in East Pakistan and to make recommendations to the Commission on Human Rights on measures to be taken to protect human rights and fundamental freedoms in East Pakistan. After a short debate the matter was closed without any conclusion being reached.

The matter was also raised by India in September 1971, in the Special Committee on Colonialism, but the Committee decided that since the General Assembly had not classified East Pakistan as a colonial territory, it was not authorised to discuss the situation.

In the Introduction to his report to the General Assembly, the Secretary-General stated his belief that the United Nations had to take some action with regard to the situation in East Pakistan, but he did not specifically suggest any action by the General Assembly. Representatives of several countries mentioned the East Pakistan situation in the general debate in the Assembly. The representative of Guyana (The Hon. Shridath S. Ramphal) proclaimed that human

rights were not divisable and asked that it be acknowledged ' that gross violations of human rights wherever they occur in the world are the legitimate concern of the international community; that matters cease to be essentially within the domestic jurisdiction of a state when they give rise to humanitarian issues of such magnitude that the international community must of necessity grapple with them.' The representative of Sierra Leone suggested that an observer team be sent to East Pakistan.

The Third Committee of the General Assembly, which handles the social, cultural and human rights items, decided to consider the humanitarian aspects of the East Pakistan situation. Although the Committee was not supposed to discuss the political aspects, the debate inevitably dealt with these aspects even if in an indirect manner.

The representative of New Zealand, Ambassador John Scott, noted that:

> ' At the heart of the problem was the desire of the people of East Pakistan for greater control of their own affairs — a problem that could only be solved by negotiations between the Government of Pakistan and those who had been freely elected by the people of East Pakistan as their representatives. If the flow of refugees was to be stopped and war avoided, it was essential that such negotiations should begin; the United Nations and other Governments might be able to help if they were called upon to do so.' [2]

New Zealand and the Netherlands submitted a draft resolution which included both a paragraph on Pakistan's internal political situation and India-Pakistan relations. The draft resolution appealed to Pakistan ' to intensify its efforts to create conditions which would restore the climate of confidence indispensable for the promotion of voluntary repatriation ' and appealed to India ' to continue to promote an atmosphere of good-neighbourliness which would diminish tensions in the area and encourage the refugees to return to their homes '.[3] Even these indirect suggestions were too strong for most states. Ambassador Abdulrahim Farah of Somalia ' questioned the advisability ' of including these paragraphs ' since they were controversial and might divert the Committee's attention from the main objective, which was essentially humanitarian '[4]

The resolution finally adopted by the General Assembly (Resolution 2790 (XXVI), December 6, 1971) ' Urges all Member States in accordance with the purposes and principles of the Charter of the United Nations to intensify their efforts to bring about conditions necessary for the speedy and voluntary repatriation of the refugees to their homes ', and notes that the return of the refugees ' requires

[2] A/C.3/SR.1877, November 19, 1971, pp. 13-14.

[3] A/C.3/L.1885, November 18, 1971, paras. 3 and 4.

[4] A/C.3/SR.1879, November 22, 1971, p. 3.

a favourable climate which all persons of goodwill should work to bring about in a spirit of respect for the principles of the Charter of the United Nations '.

The wording of this Resolution illustrates the cautious and unrealistic attitude in which most member states viewed the situation in East Pakistan. The discussion in the Third Committee took place just a few weeks before the outbreak of the India-Pakistan war, yet provisions on the political factors were considered too ' controversial '. Ironically, the General Assembly adopted the Resolution several days after the full-scale war begun. Events had overtaken the decision by the General Assembly.

Security Council and General Assembly Attempt to Stop the India-Pakistan War

The Security Council finally became seized of the situation in the Indian subcontinent on December 4, when nine members called for a meeting on ' the deteriorating situation which has led to armed clashes between India and Pakistan '.

In the Security Council Ambassador Y. A. Malik of the Soviet Union vetoed two draft resolutions calling for immediate cease-fire and withdrawal of troops on the grounds that they failed to stress the need for a political settlement in East Pakistan. He criticised members of the Council for viewing the situation as a purely India-Pakistan conflict. He insisted that the Council must consider the origin of the conflict — the Pakistan army's use of repression:

> ' It is entirely clear that if the military administration of Pakistan had not interrupted the talks with the lawful representatives of the Pakistani people and had not carried out its mass repressions, the Security Council and the world community would not have to be dealing with consideration of the question of the domestic crisis in East Pakistan and its international consequences.' [5]

He asserted that:

> ' Under the Charter the Security Council unquestionably has the right to examine the causes of the emergence of dangerous situations that threaten international peace and security. The Security Council likewise has the right to call upon a State or States to take steps to eliminate the causes involved and to adopt measures to prevent such cases from aggravating the international situation and resulting in the threat of direct military conflict.' [6]

After the Soviet vetoes, the Council referred the matter to the General Assembly under the ' Uniting for Peace ' resolution.

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[5] S/PV.1606, December 4, 1971, p. 133-135.

[6] *Ibid.*, pp. 127 and 128-130.

On December 7, the General Assembly promptly adopted by a vote of 104 in favour, 11 against, with 10 abstentions, a resolution calling for an immediate cease-fire and withdrawal of troops. The overwhelming vote reflected the disapproving attitude by most states to the secession of Bangladesh from Pakistan and India's armed intervention. Many of them were no doubt anxious to discourage dissident minorities in their own states from taking the same course. Certain states, however, ctiticised the Security Council for not taking action earlier which might have averted the crisis:

> ' *From the very start, as far back as April of this year, there was an imminent threat to international peace and security, justifying prompt action by the Security Council.* There could have been recourse to the various alternative means contemplated in and provided for by Article 33 of the Charter. Why, then, did the Security Council adopt the Nelson touch, and avert its gaze from the clouds that were gathering over the eastern portion of the subcontinent? It will be the historian's task to seek the answer to that question, in order to save this Organisation from a similar dereliction of duty in the future.' [7]

> ' . . . all of us together, as Member States of the United Nations, also bear our share of responsibility for insufficient engagement and commitment in defining and ascertaining the real causes of the crisis, and for failing to take effective measures to overcome them in time. Here I have especially in mind the passive attitude and immobilism of the Security Council when it received the memorandum of the Secretary-General of 20 July, in which the Secretary-General pointed out that the developments in the Indian subcontinent constituted a danger for peace in that area.' [8]

The United States on December 12 requested that the Security Council be reconvened due to India's ' defiance of world opinion ' in not respecting the General Assembly's call for cease-fire and withdrawal of troops. Ambassador George H. Bush stated that Pakistan's use of force in March ' does not . . . justify the actions of India in intervening militarily and places in jeopardy the territorial integrity and political independence of its neighbour Pakistan '.[9] The draft resolutions at the second series of Council meetings on the whole showed greater attention to the need for a political settlement between Pakistan and the elected leaders of East Pakistan, but India's military success in Bangladesh made these proposals academic. After the surrender of the Pakistan forces in Bangladesh and a *de facto* cease-fire in both Pakistan and Bangladesh, the Security Council adopted a resolution demanding strict observance of the cease-fire and withdrawal of troops ' as soon as practicable '. The Council did not insist

[7] Italics added. Ambassador H. S. Amerasinghe (Ceylon), A/PV.2003, December 7, 1971, p. 11.

[8] Ambassador L. Mojsov (Yugoslavia), *ibid.*, p. 57.

[9] S/PV. 1611, December 12, 1971, p. 11.

on India withdrawing its troops from Bangladesh immediately since it recognised its usefulness in protecting from reprisal the persons who collaborated with the Pakistan Government.

The Lessons of East Pakistan for the United Nations

The inability of the United Nations to have any significant impact on the events in East Pakistan suggests that the Organisation should reconsider some of its basic attitudes towards situations of this kind. The most serious omission of the United Nations was its failure to act upon the authenticated reports of massive killings and other gross violations of human rights committed by the Pakistan army in East Pakistan. The United Nations had recognised in the abstract that respect for human rights is an essential condition for the maintenance of international peace and security. As recently as 1970 the General Assembly declared that ' universal respect for and full exercise of human rights and fundamental freedoms and the elimination of the violation of those rights are urgent and essential to the strengthening of international security, and hence resolutely condemns all forms of oppression, tyranny and discrimination, particularly racism and racial discrimination, wherever they occur '.[10]

It is submitted that the United Nations should act upon this principle in particular situations where governments are conducting massive violations of human rights against their people. The Security Council should be convened immediately to take measures which will persuade the government concerned to discontinue the repression. The Council will be more likely to be able to reduce tensions and create conditions for a pacific settlement of the dispute before neighbouring states have become involved. More speedy procedures are also needed for investigating situations of this kind. On April 5, 1972, a representative of the International Commission of Jurists urged the United Nations Commission on Human Rights to seek the authority to be able to hold emergency sessions to deal with urgent situations involving the imminent threat of wilful destruction of human life on a massive scale.

[10] General Assembly Resolution 2734 (XXV), Declaration on the Strengthening of International Security, December 16, 1970, para. 22.

PART VII:

THE ROLE OF INDIA

The Rules of Good Neighbourliness

As the violence spread in East Pakistan the flood of refugees fleeing from that violence took on such vast proportions that it created a formidable problem for India. In face of this invasion of refugees, the Indian Government adopted a policy whose impact on events in East Pakistan was decisive. During a first phase, from the end of March to the end of November 1971, various measures were taken of direct or indirect assistance to the insurgents, including an increasingly active military assistance which finally led to frontier incidents and engagements between Indian and Pakistani troops. Then, on December 3, took place the Pakistani air attack on Indian air bases, and India's retaliation in the form of a massive land attack which led to the surrender of the Pakistani forces in East Pakistan. By these acts, first of assistance and later of armed intervention, did India contravene its international obligations? Or did India have adequate legal motives to justify those acts?

It should be borne in mind that according to the terms of Article 2 of the Charter India, like Pakistan and all other Member States of the United Nations, was bound to settle its international disputes by peaceful means and to ' refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State '. Moreover, in accordance with international customary law India's first duty was to maintain an attitude of neutrality and to refrain from interfering in the hostilities which had broken out in the neighbouring State. Indeed, subject to other considerations which will be discussed later, the traditional rule of neutrality in respect of belligerents engaged in a civil war was applicable to India up to December 6, 1971, the date on which she recognised Bangladesh as an independent country.

We will consider first the legality of the assistance given by India to the insurgents who were fighting for an independent Bangladesh, and then the legality of India's armed attack, resulting in the surrender of the Pakistani armed forces in East Pakistan.

Assistance to Insurgents

If India's actions had been limited to receiving and offering shelter to the Bangladesh leaders claiming to constitute a ' government in exile ', granting them certain practical facilities such as the use of its radio services for broadcasts intended for Bangladesh, and even building up troop concentrations along its frontiers with Pakistan, they would not have offered very serious cause for protest on the part of Pakistan. The right of sanctuary for belligerents is recognised in customary law, and as to the radio broadcasts, the mass media of a neutral nation may be permitted to take whichever side in the controversy they may select. It may be that the radio programmes from India served to increase the flow of refugees, by increasing their fear of the Pakistan army, and by making it known that the Indian Government was prepared to allow them to cross the frontier and to provide for them in refugee camps. But none of these things involved an infringement of neutrality. As regards the concentration of troops along the frontiers, while this may be seen as the expression of an unfriendly and mistrustful attitude, it is nonetheless a current practice, even among states which are particularly careful to maintain an attitude of strict neutrality when civil war is raging in a neighbouring country.

More serious, however, from the point of view of international law, is the military assistance given by India to the Bangladesh insurgents. This assistance is not admitted by India, but there seems to be little doubt that the Bangladesh guerrilla forces, the Mukti Bahini, were able to recruit and train volunteers on Indian soil, and were given the necessary arms, amunition and logistic support to enable them to mount operations from Indian territory. According to the principles of customary international law, India was under a duty to observe neutrality by refraining from providing either of the belligerents with any military supplies or allowing them to use her neutral territory for the transit of military forces or for the preparation or launching of military operations. It appears clear that these obligations under the customary laws of neutrality were not respected by India.

If the people of East Pakistan had been justified in international law in asserting their independence under the principle of self-determination, then by virtue of Article 2 of the United Nations Charter they would have been entitled to seek and to receive support in accordance with the aims and principles of the Charter, and India, like all other states, would have had a duty to ' promote the realisation of the right of self-determination ' (U.N. Resolution 2625). We have already expressed the view, however, that it cannot be established that the principle of self-determination of peoples applied to this situation, and India's assistance to the insurgents cannot, therefore, be justified under this principle.

In any event, any such assistance in promoting a right of self-determination must be ' in accordance with the provisions of the Charter '. The Declaration on Principles of International Law approved in Resolution 2625 states (in the section dealing with the principle that states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations) that

> ' Every state has the duty to refrain from organising or encouraging the organisation of irregular forces or armed bands, including mercenaries, for incursion into the territory of another state.'

and that

> ' Every state has the duty to refrain from organising, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organised activities within its territory directed towards the commission of such acts, *when the acts referred to in the present paragraph involve a threat or use of force.*' (our italics)

On the face of it, certain of India's actions fall within the terms of this condemnation, namely the provision of military supplies to the insurgents and the granting of facilities to recruit and train guerrilla forces on Indian soil. India's involvement appears to have gone further than this. There can be no doubt that India did take military action against Pakistan before the outbreak of open war. Apart from shelling across the frontier which had gone on for some time on both sides, each alleging it was done by way of retaliation, more serious operations occurred towards the end of November. As we have seen, the Indian army penetrated several miles into Pakistan territory with tank forces and indeed captured and brought back to India some Pakistan tanks. India's justification was that this action was directed to stopping the attacks being made and being prepared by Pakistan forces against Indian territory. It is always difficult to pass judgment on conflicting claims concerning frontier incidents, but it is hard to see how these attacks by India can be justified. These hostilities did, however, retain the character of frontier incidents up to December 3.

In these circumstances, what was the justification for the preventive attack, or ' pre-emptive strike ' by the Pakistan airforce against Indian air bases on December 3? The only justification for resorting to force expressly recognised by the United Nations Charter — and then only subject to certain conditions — is that referred to in Article 51, that is to say ' the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations '. Customary international law authorises military action in self-defence only where there exists a ' necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment

for deliberations '.[1] Moreover, the response to the attack must be proportionate to the threat which the attack represents.

We find it difficult to see how the military action taken by India up to the date of the Pakistan air attack justified more than frontier reprisals of the kind which had been taking place on both sides for some time. It was natural that Pakistan should want to put a stop to the Mukti Bahini's Indian based guerilla operations, and the pursuit of guerillas on to Indian territory or attacks on training centres in India could no doubt have been justified upon this ground. But the Pakistan air raids on Indian air bases hundreds of miles away from the frontier with East Pakistan cannot be justified either on the basis of reprisals or as self-defence.

India's reaction to Pakistan's ' pre-emptive strike ' was to treat it as an act of aggression, a *casus belli*, justifying India in sending her forces into the territory of Pakistan. Soon thereafter India recognised the Government of Bangladesh as an independent sovereign state and from then on India's justification for her action was that she was giving aid to this government in its war of liberation against Pakistan. And so the internal conflict between the two provinces of Pakistan became an international armed conflict of the conventional type.

While it is difficult to establish accurately the exact moment at which the Indian troops came into action, it seems that there was an interval of about two days between the Pakistani preventive attack and the Indian retaliation. A surprise attack of this type certainly offers sufficient justification for retaliation, and probably is sufficiently grave to constitute a *casus belli*. Various writers have speculated upon the motives underlying Pakistan's air attack against India and India's reply to it. It has been suggested that Pakistan intended to precipitate the war and thought she would be able to achieve military successes on the western front which would strengthen her hand in the negotiations she anticipated would result from a United Nations intervention. On the other hand it has been suggested that India seized upon the opportunity offered by the air attack to transform into a *casus belli* an event which was certainly serious but which might have been seen as an isolated ' incident ' had she not preferred to magnify its importance and treat it as an ' aggression '.

It would be unwise to embark on a judgment of either party based on their supposed intentions. We restrict ourselves to the facts. In our view the circumstances, technically, justified a declaration of war and India's claim that she was acting in self-defence in accordance with Article 51 of the Charter of the United Nations was legally valid. It does not follow, however, that all of India's subsequent actions can be justified on grounds of self-defence.

[1] 29 British and Foreign State Papers 1129, 1138 (remarks of Mr. Webster, April 24, 1841).

As we have observed in relation to Pakistan's air attack, the doctrine of self-defence requires that the response to an attack should be proportionate to the threat which the attack represents. We find it difficult to accept that the scale of India's armed action was motivated solely by military considerations based on the need to protect her national frontiers and territory. India, of course, also argues that as from December 6, when she recognised the Government of Bangladesh, her action was justified as legitimate support for her new ally in its struggle for independence.

This is a dangerous doctrine, and would set at nought all the principles of international law enjoining neutrality on third-parties in a civil war situation. All that a neighbouring country would need to do would be to grant recognition to the rebel forces in order to justify her intervention in their support. It becomes necessary, therefore, to look further into the circumstances in order to determine what justification, if any, there was for India's full-scale invasion of Pakistani territory.

In the Name of Humanity

Neither the military operations, nor the political developments which followed, offer support for the allegation that India wanted to take advantage of the situation in order to settle its account with Pakistan and put an end to the dispute on the western frontier which had not been settled by armed conflict a few years earlier. But it is clear that India did intend to use military action to free Bangladesh and enable it to become a sovereign state independent of Pakistan. On what grounds, if any, can the resort to force for this purpose be justified in international law? The answer is complex and involves matters of international concern as well as India's own direct interests.

We have already rejected the proposition that India's actions can be justified in international law as support to a people who were asserting a right to self-determination.

We may also recall the 1950 treaty between India and Pakistan, by which the two contracting parties solemnly guaranteed for all citizens within their respective territories absolute equality, regardless of religious distinctions, and security in respect of their lives, culture, property and personal dignity.[2] This treaty is important because it gives India a direct interest in the way in which Pakistan treats its Hindu minority, and it means that Pakistan cannot claim that this is a question falling solely within its domestic jurisdiction. The treaty officially recognised the real character of the problem as an international, and not merely an internal, affair. There can hardly be any doubt that the large-scale and systematic discrimination and persecution of which the Hindus were victims from March to December

[2] 131 United Nations Treaty Series 3 (8 April, 1950).

1971 constituted a violation by Pakistan both of its international treaty obligations and of its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination. One may, however, question whether these violations alone, if there had been no additional circumstances, would have constituted a sufficient justification for launching the war. Moreover, the religious question, important though it was, does not seem to have been the decisive factor in the crisis which finally led to war.

Closely linked with the preceding problem is that of the refugees, which again has both national and international aspects. No exact figures are known. India claimed that at the beginning of December 1971 the total number exceeded 10 million, and the judgment of most impartial observers appears to confirm that the number was of that order.

One can get some impression of the scale of this migration, or ' civil invasion ' as Mrs Indira Gandhi fairly called it, by comparing it with the total estimated number of refugees in the world. These were estimated in 1959 at about 15 million and in 1970 at 17.6 million, which would give an average annual increase of something less than 200,000.[3] When one realises that the ' tidal wave ' of refugees into India probably raised the world figure, in a little over six months, from 17.6 million to about 27.6 million and that only a single country was affected, one begins to understand what the impact on that country must have been. Quite apart from the social and political repercussions provoked by this flood of destitute humanity pouring into an area already over-populated, with large numbers living in great poverty, the sheer cost of harbouring the refugees until the end of December 1971 has been estimated at over 500 million dollars. About half of this was provided by international assistance, but there was no assurance that this level of international aid would continue, still less that it would increase.

It is probable that the effect on the Indian economy was such as to disrupt, possibly even to halt for several years, the normal economic development of the whole country. The World Bank estimated that if the refugees had remained on Indian soil for a further three months, the cost of that further period might have amounted to 700 million dollars. We find neither historical precedent nor juridical definition applicable to this situation. It was not an ' armed attack ' in the sense of the Charter, nor even a provocation on the part of Pakistan, nor a blockade — although it gravely threatened India's economy. It must be recognised that India's vital economic interests were at stake and that the only possible solution to the problem was to be found in the creation of political conditions which would make it possible to repatriate the refugees. The United Nations, as we have seen, was

[3] U.S. Committee for Refugees, World Refugee Reports 1969 and 1970.

doing nothing to bring about those conditions, and it is hard to see how they would have been achieved without the liberation of Bangladesh.

This problem of the refugees involved a further and far from negligible problem of a humanitarian nature. Indeed, it is in this realm of humanitarian law, in the widest sense of the term, that Pakistan was most vulnerable. In addition to the appalling brutalities which were continuing within East Pakistan, the condition in which the refugees were forced to live, in spite of Indian and international assistance, itself involved a massive violation of human rights. One need only consider the physical conditions and the appalling death rate which actually resulted and that which might have resulted in the long term. Should India have allowed these mass deaths to continue? Within East Pakistan, the insecurity which had provoked the exodus had not diminished. Human rights were still violated on a major scale and the general and systematic nature of the inhuman treatment inflicted on the Bangladesh population was evidence of a crime against humanity. Was this massacre to be allowed to continue?

This brings us to the traditional doctrine of humanitarian intervention which Sir Hersh Lauterpacht, in the last edition of Oppenheim's International Law [4] defines as follows:

> ' . . . when a State renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible.'

And Professor Borchard [5] defines more clearly the form that such intervention may take:

> ' When these human rights are habitually violated, one or more states may intervene in the name of the society of Nations and may take such measures as to substitute at least temporarily, if not permanently, its own sovereignty for that of the state thus controlled. Whatever the origin, therefore, of the rights of the individual, it seems assured that these essential rights rest upon the ultimate sanction of international law, and will be protected, in the last resort, by the most appropriate organ of the international community.'

Humanitarian intervention has been described by Professors McDougal and Reisman as ' a venerable institution of customary international law . . . regarded as accepted law by most contemporary international lawyers '.[6] It was accepted by both Grotius and Vattel,

[4] Oppenheim, L., 1962, *International Law*, 8th ed., Vol. I, p. 312 (ed. H. Lauterpacht).

[5] Borchard, 1922, *Diplomatic Protection of Citizens Abroad*, p. 14.

[6] *International Lawyer*, Vol. 3, No. 2, p. 438.

and it has been invoked many times since. Examples are the armed intervention by Great Britain, France and Russia against Turkey which led to the independence of the Greek nation in 1830, and the Syrian intervention by France in 1860 following the protocol of the Conference of Paris.

The unilateral use of this ancient and respected doctrine, which is the expression of a profound and innate sense of justice corresponding to the natural feelings and reactions of the average person, is nevertheless questionable from two points of view. First of all it may open the door to all sorts of abuses and risks and be used as a pretext for acts of aggression. The justification for it is liable to be subjective, whereas one would wish to see the reasons for a humanitarian intervention established objectively. Secondly, it is reasonable to suggest that as a result of the creation of the United States Organisation (and possibly of Regional Organisations such as the Council of Europe) there has been a transfer of authority and responsibility and that henceforth humanitarian intervention is a matter to be dealt with by international bodies rather than individual nations. By virtue of Article 39 of the Charter it is in the first instance the responsibility of the Security Council to ' determine the existence of any threat to the peace . . . and . . . decide what measures shall be taken '. This means that it is for the Security Council to decide whether or not a collective humanitarian intervention is called for or, in certain cases, to authorise action on the part of an individual state, and the Member States are bound to accept this decision and to assist in its implementation. The General Assembly, for its part, may make recommendations in accordance with Article 55 of the Charter concerning the ' universal respect for, and observance of, human rights and fundamental freedoms for all ', and indeed Article 56 translates this general obligation into a specific duty for each of the Member States, who ' pledge themselves to take joint and separate action in cooperation with the Organisation for the achievement of (these) purposes '.

Some authorities have argued that the right of unilateral intervention has been completely supplanted by these procedures for collective humanitarian intervention under the United Nations.[7] But what if violations of human rights on a massive scale are not even considered in the United Nations to see whether they constitute a ' threat to the peace ', and if international organisations offer no redress or hope of redress? Must everyone remain impassive in the face of acts which revolt the human conscience, paralysed by considerations which are primarily of a procedural nature or even — which is worse — by procedural obstruction? When it is clear that

[7] e.g. Jessup, *Modern Law of Nations* (1949), p. 170; Ganji, *International Protection of Human Rights*, 1962, Geneva, p. 44; Thomas & Thomas, *The Dominican Republic Crisis 1965*, Hammarskjold Forum, 1967, p. 20; the contrary view, namely that the right of unilateral humanitarian intervention remains unaffected, is stated by McDougal & Reisman, *International Lawyer* Vol. 3, No. 2, p. 444.

the international authorities cannot or will not discharge their responsibilities, it would seem logical to resort again to customary international law, to accept its rules and the validity of the doctrine of humanitarian intervention.

At the same time, to avoid the obvious dangers implicit in this doctrine, it is suggested that before unilateral humanitarian intervention by a single nation can be justified, the following requirements should be satisfied:

1. The state against which measures are to be taken must have shown itself manifestly guilty in respect of its citizens of systematic cruelty and persecution to the point at which
   (a) their fundamental human rights are denied them, and
   (b) the conscience of mankind is shocked and finds that cruelty and persecution intolerable.
2. The circumstances must be such that no practicable peaceful means of resolving the problem is available, such as negotiations with the state which is at fault, intermediation, or submission to a competent international organisation.
3. The international community must have had the opportunity within the limits imposed by the circumstances:
   (a) to ascertain whether the conditions justifying humanitarian intervention do in fact exist, and
   (b) itself to solve the problem and change the situation by applying such measures as it may deem appropriate.
4. If the international community does not avail itself of the opportunities offered and fails to act in order to prevent or put a stop to widespread violations of human rights which have been called to its attention, thereby leaving no choice but intervention, then a state or group of states will be justified in acting in the name of humanity provided that:
   (a) before resorting to force it will deliver a clear ultimatum or ' peremptory demand ' to the state concerned insisting that positive actions be taken to ameliorate the situation;
   (b) it will resort to force only within the strict limits of what is absolutely necessary in order to prevent further violations of fundamental human rights;
   (c) it will submit reports on its actions to the competent international agency to enable the latter to know what is being done and to intervene if it sees fit to do so;
   (d) it will withdraw the troops involved in the intervention as soon as possible.

In our present world it is only in quite exceptional circumstances that unilateral action on the part of a state can be considered as legally justified on the basis of the doctrine of humanitarian intervention,

particularly if that action involves the use of force on a scale of some magnitude. Unilateral action is likely to be arbitrary and to lack the disinterested character which humanitarian intervention should possess. In the situation with which we are concerned, and on the basis of the rules we have laid down, India might be accused of not having pursued all possible peaceful means of solving the problem since she did not submit the matter to the Security Council — a step, we may add, which no Member State of the United Nations saw fit to take. Such a reproach may seem somewhat unrealistic, since it was plain to all that there was no prospect of the Members of the Council reaching an agreement capable of offering any possibility of an effective solution, and nothing could have been worse than a show of decision which would have paralysed action without providing a positive solution. In our view the circumstances were wholly exceptional; it was becoming more and more urgent to find a solution, both for humanitarian reasons and because the refugee burden which India was bearing had become intolerable, with no solution or even any hope of a solution in sight. Events having been allowed to reach this point, it is difficult to see what other choice India could have made.

It must be emphasised that humanitarian intervention is not the ground of justification which India has herself put forward. As we have seen, India claims to have acted first in self-defence, and secondly in giving support to the new Government of Bangladesh which she recognised when the hostilities began. We have given our reasons for not accepting the validity of these claims. If India had wished to justify her action on the principle of humanitarian intervention she should have first made a ' peremptory demand ' to Pakistan insisting that positive actions be taken to rectify the violations of human rights.[8] As far as we are aware no such demand was made.

In conclusion, therefore, we consider that India's armed intervention would have been justified if she had acted under the doctrine of humanitarian intervention, and further that India would have been entitled to act unilaterally under this doctrine in view of the growing and intolerable burden which the refugees were casting upon India and in view of the inability of international organisations to take any effective action to bring to an end the massive violations of human rights in East Pakistan which were causing the flow of refugees. We also consider that the degree of force used was no greater than was necessary in order to bring to an end these violations of human rights.

[8] cf. Ganji, *op. cit.*, pp. 14, 15 and 38.

SUMMARY OF CONCLUSIONS

The following is a summary of the principal conclusions in this study:

(1) During the civil war from 25 March to 3 December and during the international war from 4 to 18 December, massive violations of human rights occurred in East Pakistan. These were committed (a) by the Pakistani army and auxiliary forces against Bengalis, and in particular against members of the Awami League, students and Hindus, and (b) by Bengali insurgent forces and mobs against Biharis and other non-Bengalis (Part II (b)).

(2) These violations involved the indiscriminate killing of civilians, including women and children; the attempt to exterminate or drive out of the country a large part of the Hindu population of approximately 10 million people; the arrest, torture and killing without trial of suspects; the raping of women; the destruction of villages and towns; and the looting of property. The scale of these crimes was massive, but it is impossible to quantify them. Figures given by both sides tend to be greatly exaggerated (Part II (b)).

(3) In addition to criminal offences under domestic law, there is a strong *prima facie* case that criminal offences were committed in international law, namely war crimes and crimes against humanity under the law relating to armed conflict, breaches of Article 3 of the Geneva Conventions 1949, and acts of genocide under the Genocide Convention 1949 (Part IV).

(4) Persons who have committed or were responsible for such crimes are liable to be tried under international law by an international court. If, as has been reported, the Bangladesh government are to put on trial senior Pakistani officers and civilians, they should set up an international court for the purpose with a majority of judges from neutral countries (Part IV).

(5) The martial law regime of General Yahya Khan was unconstitutional and illegal under domestic Pakistan law, but owing to its recognition by other states its validity cannot be challenged under international law (Part III).

(6) The Awami League leaders were not entitled in international law to proclaim the independence of Bangladesh in March 1971 under the principle of the right of self-determination of peoples (Part V).

(7) They were, however, justified under domestic law in using force to resist the attempt by the self-appointed and illegal military regime to impose a different form of constitution upon the country to that approved by the majority of the people in a fair and free election (Part V).

(8) The United Nations failed to use its available machinery to deal with the situation either with a view to terminating the gross violations of human rights which were occurring or to deal with the threat to international peace which they constituted (Part VI).

(9) India's supply of arms and training facilities to the insurgent forces was in breach of her duty of neutrality under international law (Part VII).

(10) India's claim that her invasion of Pakistan was justified in international law under the doctrine of self-defence and on the grounds that she was acting in support of her Bangladesh ally cannot be accepted (Part VII).

(11) India could, however, have justified the invasion on the grounds of humanitarian intervention, in view of the failure of the United Nations to deal with the massive violations of human rights in East Pakistan which were causing a continuing and intolerable refugee burden to India (Part. VII).

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