

## The United Nations, Humanitarianism, and Human Rights

### *War Crimes/Genocide Trials for Pakistani Soldiers in Bangladesh, 1971–1974*

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*[T]he happenings in East Pakistan constitute one of the most tragic episodes in human history. Of course, it is for future historians to gather facts and make their own evaluations, but it has been a very terrible blot on a page of human history.*

U Thant, Secretary-General of the United Nations, 3 June 1971.<sup>1</sup>

A significant part of the human rights regime established by the United Nations after the Second World War was the protection of group rights and the further regulation of warfare by prosecuting the violators of these new international laws. Unlike the interwar period when the League of Nations stood by haplessly as Italy invaded Abyssinia, the protection of human rights and international law was supposed to have teeth. Thus the United Nations General Assembly passed the Convention on the Prevention and Punishment of Genocide on 9 December 1948 (it came into force in 1951), one day before it adopted the Universal Declaration of Human Rights. On the heels of the Nuremberg Trials, the Genocide Convention provides explicitly for prosecutions of suspects. Article 6 says: “Persons charged with genocide or any other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”<sup>2</sup> What is more, Article 8 stipulates that contracting parties can have recourse to the UN: They “may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide.”

<sup>1</sup> UN Press Section, Office of Public Information, Press Release SG/SM1493, 3 June 1971, UN Archives, Series 228, Box 1, File 2, Acc 77/207, 11.

<sup>2</sup> Convention on the Punishment and Prevention of Genocide: <http://www.un.org/millennium/law/iv-1.htm>.

A year later, in 1949, the Third Geneva Convention was signed by members of the “international community.” With respect to “grave breaches” of that Convention, which overlap in part with the Genocide Convention, it requires states “to enact legislation necessary to provide effective penal sanctions” and “to search for the persons alleged to have committed or ordered the commission of grave breaches and to try such persons before their own courts, or alternatively to hand them over to another contracting state that has made out a prima facie case.”<sup>3</sup> The Convention also requires that states assist one another in criminal proceedings, such as extraditing suspects, as does the Genocide Convention.

Finally, the General Assembly of the UN authorized the Internal Law Commission (ILC) to formulate the principles of the Nuremberg Tribunals, which had been affirmed by the Assembly as part of international law. In 1950, the ILC specified the elements of “Crimes against Peace,” “War Crimes,” as well as “Crimes against Humanity,” which, again, overlapped with the Genocide Convention. They are: “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 connexion with any crime against peace or any war crime.”<sup>4</sup>

Far from guaranteeing the absence of genocide, war crimes, and crimes against humanity, this legal regime stood by for fifty years as the nation-states of the “international community” consistently violated them. The People’s Republic of China was alleged to have committed genocide in Tibet between 1959 and 1960. Dag Hammarskjöld called the massacre of Balubas in the State of South Kasai of the Congo in 1960 “a case of incipient genocide.”<sup>5</sup> The Hutu killing and expulsion of the Tutsi in the Rwandan revolution of 1963–1964 and the Tutsi massacres of Hutu nine years later in Burundi were also genocidal in character. Then there was the secessionist civil war in Nigeria between 1966 and 1970 in which the Igbos were subject to a famine campaign that took perhaps several million lives. In 1965 the massacre of half a million communists in Indonesia also targeted ethnic Chinese in genocidal attacks.<sup>6</sup>

<sup>3</sup> See Antonio Cassese, “On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law,” *European Journal of International Law*, 9 (1998), 5. “Grave breaches” are defined in Article B as “the wilful killing, torture or maltreatment, including biological experiments, the wilful causing of great suffering or serious injury to body or health, and the extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly.”

<sup>4</sup> [http://www.icrc.org/ihl.nsf/INTRO/390? OpenDocument](http://www.icrc.org/ihl.nsf/INTRO/390?OpenDocument). The ILC was established by the UN in 1948 to develop and codify international law: <http://untreaty.un.org/ilc/ilcintro.htm>.

<sup>5</sup> Brian Urquhart, *Hammarskjöld* (New York, 1994), 435, 438–441. After decolonization of the Congo by Belgium, South Kasais sought independence by seceding from the rest of the territory in August 1960. Four months of hostilities ensued with the Congolese central government in which many thousands of civilians were massacred.

<sup>6</sup> R. W. Edwards, Jr., “Contributions of the Genocide Convention to the Development of International Law,” *Ohio NUL Review*, 8 (1981), 300–314.

No trials were mooted by members of the UN. This is a short list of cases until the end of the 1960s. Worse was to follow.

The first successful prosecution for genocide was made by the International Criminal Tribunal for Rwanda (ICTR) only in 1998. Why were so many flagrant breaches of this regime permitted to go unpunished for fifty years? One answer is that only two of the five permanent members of the Security Council had signed the treaty; only in 1988 had all five of them become parties to it. Another answer is that none of these new international treaties set up an international criminal court; national courts were to deal with prosecutions in the first instance, a sure means of preventing justice when it was the state that committed the crimes. The cynical *Realpolitik* of state leaders could rely on Article 2(7) of the UN Charter that guarded state sovereignty.<sup>7</sup> Still others pointed to the stalemate of the Cold War.

All of these factors are relevant, but none go to the heart of the dilemmas that structure the history of human rights prosecutions in the twentieth century. If it is true that nation-states are often the primary perpetrators of genocide and other human rights crimes, it is also the case that they are the context in which such rights can be claimed and redeemed. Just as often, the disintegration of nation-states into civil war leads to gross violations of human rights. Nation-states are not, per se, inimical to human rights. The structure of the international system needs to be factored into the equation. Closer inspection of postwar cases reveals numerous intrinsic dilemmas that are difficult, if impossible to resolve: human rights intervention versus humanitarian aid, striving for human rights versus the imperative of peace and security, the right of nation-states to militarily suppress secessionist/independence movements versus the human rights of its citizens, the interminable debate about the criterion for supreme human rights emergencies that call for humanitarian intervention, the internal tension between the different instruments of international law, and, finally, the agendas of the great powers that protect the regimes committing genocidal crimes.

To illustrate these dilemmas, I focus on the case of the East Pakistani secession and the issue of related war crimes/genocide trials between 1971 and 1974. The reason for this choice is that the West Pakistan Army's brutal, indeed genocidal, suppression of the East Pakistan (now Bangladesh) autonomy/independence movement received more international attention than any other of the above-mentioned cases, yet nothing was done by the UN or nation-states to interdict, let alone condemn, the killing. As I will show, the term "genocide" was used extensively by eyewitnesses, journalists, and politicians throughout 1971 and subsequently. And for the first time since Nuremberg and Tokyo, war crimes trials were seriously considered, in this case by the new

<sup>7</sup> "Nothing contained in the present Charter shall authorize 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": <http://www.un.org/aboutun/charter/chapter1.htm>.

Bangladeshi state, which wanted to prosecute numerous Pakistani soldiers and officials held in Indian custody. Contemporary legal observers thought that such trials would be as significant as the Nuremberg Trials, although they have received surprisingly little scholarly attention since that time.<sup>8</sup> In the high diplomatic drama between Pakistan, India, and Bangladesh, the trial issue was even listed at the International Court of Justice in 1973, the first time such a notification had occurred. Even though the Bangladeshi state enacted a statute to try Pakistanis for war crimes, crimes against humanity, and genocide, however, the trials never eventuated.

I proceed as follows. The first section highlights the vocabulary that the media used in reporting the events. I show that the genocide concept was used extensively by the media and even diplomats to label the human rights atrocities committed by the Pakistani Army during its “Operation Searchlight” against the East Pakistani nationalists. Then I examine how the various UN agencies responded to the crisis in East Pakistan and to the media reporting. Finally, I briefly reconstruct the domestic and international drama of the proposed war crimes/genocide trials.

### The Genocide Debate about the Pakistan Campaign

When Pakistani military violence was unleashed on the evening of 25 March 1971, the press naturally did not call it genocide.<sup>9</sup> Civil war was the vocabulary of the first few days of Western reporting, which noted the existence East Pakistani resistance forces. The *Boston Globe* even spoke about “bloody clashes between staff and students” and the military in what were in truth one-sided massacres.<sup>10</sup> Sydney Schanberg at the *New York Times* was more realistic: “The Pakistani Army is using artillery and heavy machine guns against unarmed East Pakistani civilians to crush the movement for autonomy in this province of 75 million people,” he wrote on 27 March.<sup>11</sup> In successive days, he painted a picture of a well-planned military attack on civilian opposition figures and groups, an image captured by the title of his 29 March report, “Sticks and Spears against Tanks.”<sup>12</sup> Like the editorial of the *Sydney*

<sup>8</sup> John J. Paust and Albert P. Blaustein, “War Crimes Jurisdiction and Due Process: The Bangladesh Experience,” *Vanderbilt Journal of Transnational Law*, 11 (1978), 4. There is no mention in Lawrence Howard Ball, *Prosecuting War Crimes and Genocide: The Twentieth-Century Experience* (Lawrence, Kan., 1999). Generally, see Donald Beachler, “The Politics of Genocide Scholarship: The Case of Bangladesh,” *Patterns of Prejudice*, 41 (2007), 467–492.

<sup>9</sup> For general background to the crisis, see Richard Sisson and Leo E. Rose, *War and Secession: Pakistan, India and the Creation of Bangladesh* (Berkeley, 1990).

<sup>10</sup> “East Pakistan Secedes, Civil War Breaks Out,” *Boston Globe*, 27 March 1971; “Toll Called High: Death Put at 10,000 – Radio Says Army Is in Control,” *New York Times*, 28 March 1971; Editorial, *Daily Telegraph*, 27 March 1971.

<sup>11</sup> Sydney H. Schanberg, “Artillery Used: Civilians Fired On – Sections of Dacca Are Set Ablaze,” *New York Times*, 28 March 1971. The story was filed on 27 March.

<sup>12</sup> Sydney H. Schanberg, “Sticks and Spears against Tanks,” *New York Times*, 29 March 1971; Schanberg, “Heavy Killing Reported,” *New York Times*, 30 March 1971.

*Morning Herald* on 29 March, the civilian casualties were reported as extraordinarily high, between 10,000 and 100,000 –after only three or four days!<sup>13</sup> The reporting was the same in England. The *Daily Telegraph*'s Simon Dring, who, unlike other foreign journalists, managed to avoid expulsion from the country, reported 15,000 dead on 30 March, as well as the specific targets of the terror: students and Hindus, whose women and children were burned alive in their homes.<sup>14</sup> The next day, the *Telegraph* reported that “killing was on a mass scale.”<sup>15</sup>

Given the general rhetorical caution of the media – no one had mentioned “genocide” – it was all the more remarkable that already on 27 March the American Consul General in Dacca, Archer Blood, sent a telegram to Washington headed with the phrase “Selective Genocide”:

1. Here in Decca we are mute and horrified witnesses to a reign of terror by the Pak[istani] Military. Evidence continues to mount that the MLA authorities have list of AWAMI League supporters whom they are systematically eliminating by seeking them out in their homes and shooting them down. 2. Among those marked for extinction in addition to the A.L. hierarchy are student leaders and university faculty... Moreover, with the support of the Pak[istani] military, non-Bengali Muslims are systematically attacking poor people's quarters and murdering Bengalis and Hindus.... Full horror of Pak. Military atrocities will come to light sooner or later. I, therefore, question continued advisability of present USG posture of pretending to believe GOP [Government of Pakistan] false assertions and denying ... that this office is communicating detailed account of events in East Pakistan. We should be expressing our shock, at least privately, to GOP, at this wave of terror directed against their own countrymen by Pak. military.<sup>16</sup>

Using uncannily similar language, the *New York Times* editorial of 7 April, entitled “Bloodbath in Bengal,” condemned Washington's silence on what it called the “indiscriminate slaughter of civilians and the *selective* elimination of leadership groups in the separatist state of East Bengal.”<sup>17</sup> Only a day earlier, with the carnage continuing without condemnation from the White House, Blood and twenty-nine diplomatic colleagues sent another telegram from Dacca – the celebrated “Blood Telegram” – to the State Department headed “Dissent from U.S. Policy Toward East Pakistan.” This unprecedented cable is also worth quoting at length:

Our government has failed to denounce the suppression of democracy. Our government has failed to denounce atrocities. Our government has failed to take forceful measures to protect its citizens while at the same time bending over backwards to

<sup>13</sup> Editorial, *Sydney Morning Herald*, “Plunge into Chaos,” 29 March 1971.

<sup>14</sup> Simon Dring, “Tanks Crush Revolt in Pakistan. 7,000 Slaughtered Homes Burned,” *Daily Telegraph*, 30 March 1971.

<sup>15</sup> “Peace Restored, West Claims,” *Daily Telegraph*, 31 March 1971.

<sup>16</sup> Cabal of U.S. Consulate (Dacca) to the Secretary of State, Washington, DC, “Selective Genocide,” 27 March 1971. National Security Archive Project: [www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB79/BEBB1.pdf](http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB79/BEBB1.pdf).

<sup>17</sup> Editorial, “Bloodbath in Bengal,” *New York Times*, 7 April 1971.

placate the West Pak[istan] dominated government and to lessen any deservedly negative international public relations impact against them. Our government has evidenced what many will consider moral bankruptcy.... But we have chosen not to intervene, even morally, on the grounds that the Awami conflict, in which unfortunately the overworked term genocide is applicable, is purely an internal matter of a sovereign state. Private Americans have expressed disgust. We, as professional civil servants, express our dissent with current policy and fervently hope that our true and lasting interests here can be defined and our policies redirected.<sup>18</sup>

By the time Blood and his colleagues had sent this telegram, the Parliament and Government of India had accused Pakistan of “massacre of defenceless people” that “amounts to genocide.”<sup>19</sup> All along, they took the side of the Bangladeshis who, from the first days of the terror, had deployed the word “genocide.” Only a few days after the crackdown, the Bangla Desh Students Action Committee in London, for instance, said the murder of innocent civilians was “pure and simple genocide” and, conducting a hunger strike outside Downing Street, demanded the British recognition of Bangladesh, pressure on the Pakistani Government, and the raising of the matter in the UN under the Genocide Convention.<sup>20</sup>

As the military campaign unfolded in April and the extent of the violence became more apparent, the general rhetoric increased accordingly. By the middle of the month, India spoke of “savage and medieval butchery” and “pre-planned carnage and systematic genocide.”<sup>21</sup> Schanberg’s reports continued unabated, although they were now filed from India, where he worked after his expulsion. Talking to the refugees who were pouring into the country, he wrote that “[t]here is no way of knowing exactly how many of East Pakistan’s 75 million Bengalis the army has killed, but authoritative reports from many sources agree that the figure is at least in the tens of thousands; some reports put it much higher.”<sup>22</sup> By now the targets of the military were clear too all, as he reported: students, intellectuals, professionals, “and others of leadership calibre – whether they were directly involved in the nationalist movement or not.” Always cautious with his figures, he allowed the victims to speak in their own words, such as a Bengali student, who complained, “This is genocide and people are standing by and looking.... Nobody has spoken out. Has the world no conscience?” If there was reprisal killings against non-Bengalis by Bangladeshi nationalists, Schanberg pointed out that the West Pakistani’s

<sup>18</sup> U.S. Consulate (Dacca) Cable, Dissent from U.S. Policy Toward East Pakistan, April 6, 1971, Confidential, 5 pp. Includes Signatures from the Department of State. Source: RG 59, SN 70-73 Pol and Def. From: Pol Pak-U.S. To: Pol 17-1 Pak-U.S. Box 2535. National Security Archive Project: [www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB79/BEBB8.pdf](http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB79/BEBB8.pdf).

<sup>19</sup> Sydney H. Schanberg, “‘All Part of a Game’ – A Grim and Deadly One,” *New York Times*, 4 April 1971. He reported that India regarded the operation as genocide.

<sup>20</sup> Martin Adeney, “Heavy Fighting and Burnding in Chittagong,” *Guardian*, 31 March 1971.

<sup>21</sup> James P. Sterba, “India Charges Genocide,” *New York Times*, 17 April 1971.

<sup>22</sup> Sydney H. Schanberg, “Bengalis Form a Cabinet as the Bloodshed Goes On,” *New York Times*, 14 April 1971; Schanberg, “Foreign Evacuees from East Pakistan Tell of Grim Fight,” *New York Times*, 7 April 1971.

killing was well planned and systematic. This was a judgment to which the International Commission of Jurists also came a year later.

In general, so far, there was press acknowledgment that Bengalis and Indians used the term “genocide,” while not endorsing it themselves, although Peggy Durdin, in a long piece in the *New York Times* in early May, called the killing the “one of the bloodiest slaughters of modern times.”<sup>23</sup> The breakthrough came in mid-June when Anthony Mascarenhas, assistant editor of the *Morning News* in Karachi and an official war correspondent attached to 9th Pakistani Division in East Pakistan, fled to London – he was also a correspondent for the *Sunday Times* – to report what he had seen. The *Sunday Times* devoted two sections plus an editorial to this story, one about him, and a long article in his own words, both under the prominent headlines of “Genocide.”<sup>24</sup> Though Bengalis had been responsible for retributive killing of non-Bengalis, the editors wrote, “when all this has been said, there is no escaping the terrible charge of deliberate premeditated extermination leveled by the facts against the present Pakistani Government.”<sup>25</sup>

For the first time, the Western public was presented with insider information about Operation Searchlight, replete with incriminating quotations from Pakistani leaders and officers.<sup>26</sup> A skilful writer, Mascarenhas knew what allusion to invoke for a Western audience. Yahya Khan, the Pakistani President, was “pushing through its own ‘final solution’ of the East Bengal problem.” Officers he interviewed told him that they were “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.” “Pogroms” were instituted against recalcitrant villages in “kill and burn” missions. Entire “villages [were] devastated by ‘punitive action,’” which authorities called a “cleansing process.” Hindus were targeted for “annihilation,” because they were thought to be a minority of unscrupulous merchants who dominated the economy and siphoned off wealth to India. They “completely undermined the Muslim masses with their money,” said one officer. What is more, they were Hinduizing Bengali culture. Like Schanberg, Mascarenhas thought that the terror was not a spontaneous reaction to Bengali violence but was planned by Punjabi political and military elites.

The critical rhetoric now intensified, and images of the violence appeared in the press. An editorial in the *Hong Kong Standard* spoke of “Another Genghis!” a few weeks later, playing on the fact that the Pakistani military general was named Tikka Khan. He was worse than Genghis, the paper opined, because at least the Mongol leader had founded an empire. By contrast, “Tikka Khan and his gang of uniformed cut-throats will be remembered for trying to destroy

<sup>23</sup> Perry Durdin, “The Political Tidal Wave That Struck East Pakistan,” *New York Times*, 2 May 1971.

<sup>24</sup> “Genocide,” *Sunday Times*, 13 June 1971.

<sup>25</sup> Editorial, “Stop the Killing,” *Sunday Times*, 13 June 1971.

<sup>26</sup> Anthony Mascarenhas, “Genocide,” *Sunday Times*, 13 June 1971.

the people of half a nation.”<sup>27</sup> A week later, *Time* magazine, in an article highlighting India’s refugee crisis, quoted the Indian Foreign Minister Swaran Singh’s charge that supplying Pakistan with arms “amounts to condonation [*sic*] of genocide.”<sup>28</sup> When Senator Edward Kennedy visited India in August in his capacity as Chairman of the Senate Judiciary Subcommittee on Refugees, he condemned the Nixon administration’s continued arms aid to Pakistan and for damaging relations with India. He joined India in denouncing the Pakistani policy as genocidal.<sup>29</sup>

Even as war between Pakistan and India loomed in November and then broke out in December, the press continued to highlight the scorched earth tactics of the Pakistani Army.<sup>30</sup> The writer Alvin Toffler, who visited India’s refugee camps, wrote of “West Pakistan’s genocidal attack” on refugees and condemned his government’s support of Pakistan.<sup>31</sup> Anthony Lewis, also in the *New York Times*, denounced U.S. policy, going so far as to compare Yahya Kahn’s policies with those of Hitler’s early days:

in terms of results – in terms of human beings killed, brutalized or made refugees – Yahya’s record compares quite favorably with Hitler’s early years. The West Pakistanis have killed several hundred thousand civilians in the east, and an estimated ten million have fled to India. The victims are Bengali or Hindus, not Czechs or Poles or Jews, and perhaps therefore less meaningful to us in the West. But to the victims the crimes is the same.<sup>32</sup>

An American witness of the carnage described it as “terror beyond description,” and her story was prominently featured in the newspaper.<sup>33</sup>

With the war effectively over by mid-December and the country liberated by the Indian invasion, journalists could return to the field and report their findings. Like the Bengali press, which announced the discovery of mass graves in many stories in late December and January, their American colleagues also related the scale of the killing, which typically amounted to tens of thousands for each locality,<sup>34</sup> in total between 500,000 and 1.5 million.<sup>35</sup> Schanberg’s

<sup>27</sup> Editorial, “Another Genghis!” *Hong Kong Standard*, 25 June 1971.

<sup>28</sup> “Pakistan: The Ravaging of Golden Bengal,” *Time*, Monday, 2 August 1971.

<sup>29</sup> Sydney H. Schanberg, “Kennedy, in India, Terms Pakistani Drive Genocide,” *New York Times*, 18 August 1971.

<sup>30</sup> Malcolm W. Browne, “East Pakistan Town after Raid by Army: Fire and Destruction,” *New York Times*, 6 November 1971.

<sup>31</sup> Alvin Toffler, “The Ravaged People of East Pakistan,” *New York Times*, 5 December 1971.

<sup>32</sup> Anthony Lewis, “The Wringing of Hands,” *New York Times*, 6 December 1971; Lewis, “Not to Be Forgotten,” *New York Times*, 20 December 1971, India’s representative to the Security Council, Sen, quoted this article approvingly the same day: 1,608th Meeting, 6 December 1971, 8.

<sup>33</sup> Lewis M. Simons, “Witness Calls E. Pakistan ‘Terror beyond Description,’” *Washington Post*, 15 December 1971.

<sup>34</sup> Fox Butterfield, “Day of Terror for 50,000 Bengalis: Thousands Were Slain, Homes Razed,” *New York Times*, 30 December 1971.

<sup>35</sup> “‘Who Knows How Many Millions Have Been Killed’ in the East?” *New York Times*, 22 December 1971.

headline of 24 January 1972 reflected this line of reporting: “Bengalis’ Land a Vast Cemetery.”<sup>36</sup> Particularly notorious was the massacre of hundreds of intellectuals and professionals in Dacca by the Pakistani Army in the last days of the war, an event commemorated today.<sup>37</sup> Although retributive violence against collaborators was widely noted (also in the U.S. television news), the efforts of guerrilla leaders and the Awami League leader, Mujib, to stop it were also reported.<sup>38</sup> At this point, in the first half of 1972, the massive scale of the rapes of East Bengali women received attention, such as in a long piece in *The New York Times* by Aubrey Menen in July.<sup>39</sup>

By this time, Neil McDermot, the former English Labour cabinet minister, had arrived in Dacca as head of the International Commission of Jurists, which had determined to investigate “The Events of East Pakistan, 1971,” as it called its report, delivered in June 1972. It considered the genocide question in its recommendation. With the caution characteristic of lawyers, it dismissed the widespread belief of Bengalis that the repression as a whole constituted genocide:

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.<sup>40</sup>

But the selectivity of the Pakistani repression, which was apparent to world opinion from the beginning – that is, to eliminate members of the Awami League, students, and Hindus – was significant, because it evinced an intention to destroy those groups as such. Of these groups,

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 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.<sup>41</sup>

<sup>36</sup> Sydney H. Schanberg, “Bengalis’ Land a Vast Cemetery,” *New York Times*, 24 January 1972.

<sup>37</sup> Fox Butterfield, “A Journalist Is Linked to Murder of Bengalis,” *New York Times*, 3 January 1972.

<sup>38</sup> James P. Sterba, “In Dacca, Killings amid the Revelry,” *New York Times*, 18 December 1971.

<sup>39</sup> Aubrey Menen, “The Rapes of Bangladesh,” *New York Times*, 23 July 1972. For analysis, see Nayanika Mookherjee, “‘Remembering to Forget’: Public Secrecy and Memory of Sexual Violence in the Bangladesh War of 1971,” *Journal of the Royal Anthropological Institute*, 12 (2006), 433–450; Susan Brownmiller, *Against Our Will: Men, Women, and Rape* (New York, 1993).

<sup>40</sup> ICJ Report, *The Events of East Pakistan, 1971* (Geneva, 1972).

<sup>41</sup> *Ibid.*

Here MacDermot was at one with Mujibur, the new Bangladeshi President, who said on 17 April 1971 that Yahya had engaged in “pre-planned genocide”<sup>42</sup> McDermot thought trials were feasible and viable, and he wanted to convince Bangladesh to constitute an international court with a majority of neutral judges, like the Allies had done after World War II, and invoke international penal law. But this was not to be, he noted:

In the Western world there seems to be a considerable body of opinion which thinks there ought not to be any trials of those alleged to be responsible.... Unfortunately, there is no one able and willing to set up such a tribunal. The efforts within the U.N. to promote the establishment of such an international criminal court have, for the time being at least, foundered. Even more modest proposals ... have been blocked. There are, it seems, too many governments with too many skeletons for them to agree to any effective enforcement machinery for human rights.<sup>43</sup>

The estimated number of dead varied widely. Between 300,000 and 3 million Bengalis (not just Hindus) were killed between late March and December 1971. We now turn to the diplomacy that led to these gloomy observations.

### The UN and the Genocide Question

Not once did any body of the United Nations directly consider the crack-down by the Pakistani Army in East Bengal. The Secretary-General wrote to Pakistan’s President on 22 April expressing deep concern about the situation and offering Pakistan all possible assistance. President Kahn replied on 3 May welcoming such assistance, which he said would administered by his own agencies but promising full cooperation. At all times, Pakistan gave the impression of being a willing and able member of the international community. In his correspondence, the Secretary-General emphasized the humanitarian and nonpolitical nature of his interest and his respect for Pakistan’s sovereignty. After all, he needed Pakistan’s consent for UN personnel to be stationed in East Pakistan and for the UN to do its work there generally. Coincidentally, the Indian Government wrote to the Secretary-General on 23 April with a request for assistance with the mounting number of refugees. A three-man UN team visited India from 7 to 19 May, and on 19 May the Secretary-General appealed to governments to support India with humanitarian aid.<sup>44</sup> Henceforth, under the auspices of the UN High Commissioner for Refugees, the UN undertook the largest humanitarian operation of its existence, coordinating a massive, international relief operation to provide food and other necessities to the refugees, above all in India. An inspection of the UN files

<sup>42</sup> Indian representative to the Security Council, Sen, quoting Mujibur, UN 6 December 1971, 8.

<sup>43</sup> Neil MacDermot, “Crimes against Humanity in Bangladesh,” *International Lawyer*, 7 (1972), 483–484.

<sup>44</sup> “Text of Appeal by SG for Emergency Assistance to Refugees from EP in India,” UN Press Section, Office of Public Information, Press Release SG/SM1478, 19 May 1971. UN Archives Series 228, Box 1, File 2, Acc 77/207.

shows that the bulk of its correspondence concerned the logistics of this relief effort: petitioning states for money and equipment, dealing with logjams and delays, attending to the misuse of UN infrastructure, and seeing to the mass transportation of grain and rice. The UN engagement on East Pakistan, then, was driven by humanitarian, not human rights, issues. “United Nations activity in East Pakistan is solely humanitarian in nature,” the Secretary-General emphasized to media correspondents. “There is no ‘peace-keeping’ element in its terms of reference, and it is entirely misleading and erroneous to refer to it as a ‘United Nations force’ or United Nations observers.”<sup>45</sup>

From the outset, the Secretary-General’s position was that the refugees should be repatriated as soon as possible, but he was restrained by his office about how that should occur, especially if he and others did not feel licensed to lecture Pakistan about its domestic politics. That was a matter for the Security Council, whose President he addressed with an urgent letter on 20 July. The conflict was complex, and he did not wish to take sides: “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 UN as a whole which must be met.” Accordingly, human rights rhetoric was a distraction:

In the tragic circumstances such as those prevailing in the Sub-Continent, it is all too easy to make moral judgements. It is far more difficult to face up to the political and human realities of the situation and to help the peoples concerned to find a way out of their enormous difficulties. It is this latter course which, in my view, the UN must follow.

He did hint at applying great power pressure to Pakistan:

The political aspects of this matter are of such far-reaching importance that the Secretary-General is not in a position to suggest precise courses of action before the members of the Security Council have taken note of the problem. I believe, however, that the UN, with its long experiences 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.<sup>46</sup>

But the Security Council never took the hint and did not explicitly consider the situation on the subcontinent until an outright international conflict was on its hands in December, when India invaded East Pakistan. In fact, the President of the Council did not reply to Thant’s letter.

Matters were no different in other areas of the UN. The Committee on the Elimination of Racial Discrimination, which was established under

<sup>45</sup> “Note to Correspondents,” UN Press Section, Office of Public Information, Note No. 3675, 2 August 1971. UN Archives Series 228, Box 1, File 2, Acc 77/207.

<sup>46</sup> “Statement by the Secretary General,” UN Press Section, Office of Public Information, Press Release SG/SM/1516 IHA 32 REF/63, 2 August 1971. UN Archives Series 230, Box 2, File 11, Acc 77/207, “General-Press Reports and Clippings – Feb. 1972-Jan. 1974.”

the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 (coming into force in 1969), met in April and September 1971 and did not seriously consider East Pakistan. Although it decided that Pakistan's report was inadequate, the Committee did not specify which aspects needed elaboration or correction. Pakistan did not submit a supplementary paper in September, and the Committee did not complain to the General Assembly about this failure in its report.<sup>47</sup>

India raised the killings and its security problems at the Economic and Social Council in May, and Pakistan predictably objected that "A sovereign State has the right to suppress secession," cleverly mentioning the United States' Civil War. This argument clearly made an impact, because no member questioned Pakistan further. Nor did they at the next meeting in July. The default position of the members was to praise India for dealing with the refugees and to call for their return and for restraint.<sup>48</sup> Also in July, the situation was mentioned in the Social Committee of the Economic and Social Council and at the 51st Plenary Session of the Council, at which the High Commissioner for Refugees made a report on the refugee crisis. The Council referred the report to the General Assembly without debate.<sup>49</sup>

An exasperated Indira Gandhi tried unsuccessfully to rebut the Pakistani position by conceding that "every country has some movement of secession." Consequently, she understood that "every country is afraid of what would happen to themselves if they gave support to Bangla Desh." But the current situation was "quite different," she insisted, "because it is not just a small part of the country that is asking for rights. It happens to be the majority of the country, not a small part wanting to go away." As might be expected, her arguments were ignored, and she was left to complain about the United Nations staff who say "We will come and see what is happening in India, but we will not prevent genocide, the mass murder, the raping of women that is taking place in East Bengal."<sup>50</sup> Media observers were not reticent to raise the issues, as the exchange between the Secretary-General and the President of the United Nations Correspondents Association (UNCA) in June 1971 demonstrates. The UNCA President asked:

Millions of Pakistani citizens have already crossed Pakistan's international borders to seek refuge in India and each day more are still crossing, thus turning military operations in East Pakistan into a potential threat to India's economic and political stability. At what point do you think that the UN might consider the events as ceasing to be an internal matter of Pakistan's?

<sup>47</sup> Ved P. Nanda, "A Critique of the United Nations Inaction in the Bangladesh Crisis," *Denver Law Journal*, 49 (1972/73), 53-68.

<sup>48</sup> Donald F. Keys, "Justice vs. the Sovereign State: The Ordeal of Bangladesh," *New Federalist*, 17:105 (Jan./Feb. 1972), 5-8.

<sup>49</sup> ICJ, *The Events in East Pakistan*, 1971.

<sup>50</sup> Indira Gandhi, *India and Bangla Desh: Selected Speeches and Statements, March to December 1971* (New Delhi, 1972), 31, 98.

Finally, the West Pakistan Army's action in Bangla Desh has already resulted in nearly a million deaths, 4.8 million refugees in India, and many millions more refugees and destitute people inside Bangla Desh. This is a record far more appalling [*sic*] than the Indo-China war, paralleled only by Hitler and Genghis Khan. Yet you and the UN have remained silent, dealing only with peripheral humanitarian problems in a half-hearted way. Does the UN deserve public support with such a record?

The Secretary-General avoided the issues in his reply:

Regarding the happenings in East Pakistan in the last part of March and in April, I am sure that most of you are aware of the action I took on the first two days of those happenings. I offered the Government of Pakistan the international Organization's humanitarian involvement in the area. Of course, the Government of Pakistan complied with my request at last and Mr. Kittani, the Assistant SG for Inter-Agency Affairs, has arrived in Karachi just today, and he is proceeding to Islamabad in the afternoon to discuss with the Pakistani authorities on the modalities of channelling humanitarian aid and materials to afflicted East Pakistan.

In this connexion, I must say that from all information available to me since the beginning of April, the happenings in East Pakistan constitute one of the most tragic episodes in human history. Of course, it is for future historians to gather facts and make their own evaluations, but it has been a very terrible blot on a page of human history. I very much hope that the negotiations now going on between Mr. Kittani and Pakistani authorities will generate appropriate and effective channels of international aid to the afflicted areas.<sup>51</sup>

The tone of the Secretary-General prevailed within the UN throughout the year. There was no joy for human rights advocates in the Sub-Commission on Prevention of Discrimination of Minorities, a body of the Commission on Human Rights charged by the Economic and Social Council with studying "persistent and consistent patterns of Human Rights violations." It met between 2 and 20 August but did not study the East Pakistan case as authorized. Only the representation of twenty-two nongovernmental organizations, led by the delegate of the International Commission of Jurists, put it on the agenda. The delegate spoke before the Sub-Commission on 16 August, quoting eyewitnesses to the terror and highlighting "gross violations of human rights."<sup>52</sup> He requested that the Sub-Commission examine the situation in East Pakistan and make recommendations to the Commission on Human Rights. Again Pakistan said that the UN could not consider human rights in East Pakistan because its role did not extend to internal questions. If it did, separatism would be encouraged, and, besides, no consistent pattern of discriminatory violence was apparent. Both sides had committed violations.<sup>53</sup> Again

<sup>51</sup> "Press Release," UN Press Section, Office of Public Information, Press Release SG/SM1493, 3 June 1971, UN Archives, Series 228, Box 1, File 2, Acc 77/207, 11-13.

<sup>52</sup> Keys, "Justice vs. the Sovereign State."

<sup>53</sup> John Salzberg, "UN Prevention of Human Rights Violations: The Bangladesh Case," *International Organization*, 27:1 (1973), 118.

these arguments were compelling. Members said they should not consider “political” issues, and the matter was laid to rest without any determination. The United States, China, and the Arab and African states trusted Pakistan to deal with its domestic problems. The African states were particularly nervous about secessionist movements after the Biafra and Congo episodes of the 1960s.<sup>54</sup>

By the time that the General Assembly, its Third (Social, Humanitarian, and Cultural) Committee, and the Security Council seriously considered the crisis on the subcontinent, it was too late. They were overtaken by events. Frustrated by the inaction of the international community, indeed by its active and de facto support of Pakistan, India took matters into its own hands, supporting the East Bengali/Mukti Bahini independence forces that were waging a draining insurgency against the Pakistani military all year, and then invading in early December in the name of humanitarian intervention.<sup>55</sup> With more than double the number of Pakistani troops, it won the war in two weeks and occupied Dacca in ten days, on 13 December.<sup>56</sup> During November and December, the General Assembly, the Third Committee, and, belatedly, the Security Council debated stillborn resolutions. But the debates still reveal the international consensus about the relationship between separatist movements, counter-insurgency, human rights, and humanitarian intervention.

With the exception of the Soviet Union and its allies, the nation-states of the world criticized India for its invasion and urged a ceasefire and mutual withdrawal to international borders even though such an outcome would leave Pakistan in control of East Pakistan. India and the USSR also raised the issue of genocide and war crimes in the Security Council, as well as the will of the East Bengali people, which was not acknowledged by other members of the Council:

[S]everal principles have been quoted by various delegations [said the Indian representative Sen]: sovereignty, territorial integrity, non-interference in other people’s affairs, and so on. But I wonder why we should be shy about speaking of human rights. What happened to the Convention on genocide? What happened to all the other social rights and conventions which you have so solemnly accepted? Are we therefore to be

<sup>54</sup> Keys, “Justice vs. the Sovereign State,” 5–6; ICJ, *The Events in East Pakistan, 1971*.

<sup>55</sup> Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford, 2000), ch. 2; Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (The Hague, 1999), 113–120; Anthony Clark Arend and Robert J. Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (London, 1993), 119; Richard B. Lillich, *Humanitarian Intervention and the United Nations* (Charlottesville, Va., 1973); Thomas M. Franck and Nigel S. Rodley, “After Bangladesh: The Law of Humanitarian Intervention by Military Force,” *American Journal of International Law*, 67 (April 1973), 275–305.

<sup>56</sup> Onkar Marwah, “India’s Military-Intervention in East Pakistan, 1971–1972,” *Modern Asian Studies*, 13 (1979), 549–580; Robert Victor Jackson, *South Asian Crisis: India, Pakistan, and Bangla Desh; A Political and Historical Analysis of the 1971 War* (New York, 1975).

selective in serving what is known as the motto of our era: peace, progress and justice? What happened to the justice part?<sup>57</sup>

Not once were these points addressed by other members of the Council. Most intransigent was China, which, close to Pakistan and mindful of its Tibet question, insisted that East Pakistan was solely an internal matter. There was general sympathy for the refugees (though not by China), but Pakistan's military behavior was never mentioned. The Council, like the General Assembly, was concerned with ending the war and returning to normality as soon as possible. The Saudis complained that Bangladesh had been created by Indian interference rather than by genuine self-determination, by which they presumably meant a successful war of independence without third-party participation.<sup>58</sup>

As might be expected, India objected to the rush for reconciliation, attacking the UN for not responding to the genocide: "So there is no normalcy; there is only butchery." There could be no realistic return of refugees, certainly not with pious calls for political normality, if Pakistan was left in charge of East Bengal, said Sen, the Indian representative to the Council. He was the only one to mention the mass rapes, humiliation, and trauma that Pakistan had occasioned. India, he declared, "shall not be a party to any solution that will mean continuation of oppression of East Pakistan people. ... So long as we have any light of civilized behaviour left in us, we shall protect them."<sup>59</sup>

For its part, Pakistan had already arrogated the UN and the name of civilization to its cause. On 29 November, on the eve of the Indian invasion, Yahya Khan asked that UN observers be stationed in East Pakistan to report on Indian border violations, and earlier he had requested the good offices of the Secretary-General to resolve tensions with India. India had always rejected such entreaties, pointing out in vain that the cause of the refugee crisis needed to be addressed first.<sup>60</sup> In the end, Pakistan angrily accused the Council of not protecting it from Indian aggression and dismemberment.<sup>61</sup> After its defeat later in December 1971, Pakistan suddenly became very vocal about genocide, circulating reports about the mass murder of the Bihari minority in East Pakistan and calling for their protection. With Chinese support, it held India responsible as the occupying power and requested Security Council intervention and action through its special representative. India's naval blockade, Pakistan complained, causes "widespread starvation and famine" and

<sup>57</sup> Security Council Official Reports, 1608th Meeting, 6 December 1971, 27. On 5 December, the USSR representative asked: "What, indeed, has happened to our conventions on genocide, human rights, self-determination, and so on?" *Ibid.*, 32.

<sup>58</sup> *UN Yearbook*, 1971, 15 December 1971, 155.

<sup>59</sup> Security Council Official Reports, 1604th Meeting, 4 December 1971, 16.

<sup>60</sup> UN Archives, Background – East Pakistan-Pakistan Correspondence, April-December 1971 (1 of 3). Series 228, Box 1, File 3, ACC 77/207. 29 November 1971 from Kahn to SG.

<sup>61</sup> *UN Yearbook*, 1971, 31 December 1971, 158–159.

“cannot but be considered an outrage to world conscience.”<sup>62</sup> This was not the only element of its counter-campaign against India in the UN and international public sphere. The other was the fate of some 90,000 Pakistani soldiers held by Indian forces in Bangladesh after their surrender.

### The Pakistani POWs and the War Crimes/Genocide Trials

Upon liberation and with Pakistani soldiers in custody, Mujib, the Bangladeshi leader, declared that war criminals among them would be put on trial for war crimes, crimes against humanity, and genocide. On 31 December 1971, Pakistan complained to the Secretary-General about these proposed trials, which they said would violate the Geneva Convention of 1971 and the Security Council’s resolution of 21 December about the exchange of prisoners of war.<sup>63</sup> Indeed, three days before the war had ended, on 13 December, Pakistan complained to the UN about a “serious breach of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 committed by the Government of India and its armed forces” in relation to an apparent Indian threat to hand over the Pakistani POWs to the Mukti Bahini if they did not surrender.<sup>64</sup> As would soon become apparent, India’s and Bangladesh’s alleged violations of the Geneva Convention would become the main plank of the Pakistani campaign against these countries in 1972 and 1973. The Pakistani strategy, then, revolved around pressuring the UN for the release of the POWs and preventing their prosecution. In doing so, it sought to take the moral high ground, painting its opponents as violators of international humanitarian law and delinquents of the international community. They largely succeeded, and they were not alone. During 1972 and 1973, the UN was inundated with petitions from expatriate Pakistani groups around the world for the release of the POWs, but also from some NGOs and human rights groups who agreed with the Pakistani case based on the Geneva Convention. Before long, a sign hung at Islamabad Airport reading “90,000 Pakistan prisoners rotting in Indian ghettos. Is world conscience asleep?”<sup>65</sup>

The tide of public opinion began to turn a little against Bangladesh in 1972 and 1973 as other issues pressed themselves on the agenda. With a ruined economy and oncoming famine, Bangladesh once again faced starvation and a continuing humanitarian crisis.<sup>66</sup> In March 1972, the *Christian Scientist Monitor* was appealing to Indira Gandhi to reconsider her position on the

<sup>62</sup> UN Archives, Series 228, Box 1, File 3, ACC 77/207. Letter of 15 December 1971 from Pakistan Mission to UN.

<sup>63</sup> *UN Yearbook*, 1971, 31 December 1971, 159.

<sup>64</sup> General Assembly, 26th session, Agenda item 102. 3 December 1971 A/8587/S10452. UN Archives, Series 228, Box 1, File 3, ACC 77/207.

<sup>65</sup> David Holden, “Why 75,000 Stay Trapped in a Triangle of Bitterness,” *Sunday Times*, 3 June 1973.

<sup>66</sup> Sydney H. Schanberg, “With Economy in Ruins, Bangladesh Faces Food Crisis,” *New York Times*, 30 March 1972.

POW issue so that it would not prevent peace negotiations.<sup>67</sup> The continuing plight of the Bihari minority also received press coverage, especially in view of their status as a sticking point in negotiations between Pakistan, India, and Bangladesh: Bangladesh wanted many of them to migrate to Pakistan, but Pakistan did not want them.<sup>68</sup> Then there were the widespread reports of inefficiency, corruption, and stolen aid that sullied the reputation of the new government.<sup>69</sup> The mood was summarized by an editorial in the *Guardian* in November 1972:

On the Indian sub-continent at this moment, almost 12 months since the war that redrew all its maps, there are still 90,000 Pakistani prisoners of war locked in India camps ...; at least 700,000 Biharis embattled in Bangladesh compounds, not fully belonging to the new country, not welcome by other lands; 400,000 Bengalis, a huge majority of them desperate for repatriation, existing on diminishing incomes or state encampments within Pakistan; not to mention 30,000 or more alleged collaborators, held inside Sheikh Mujib's appallingly overcrowded gaols for many months and now, at least, beginning to race a flood of trials where sheer weight of numbers drains hope of decent justice. On the most benign calculations ... there are a million and a quarter people living ... under unlimited detention and in extreme fear.<sup>70</sup>

The attention of "civilized" opinion, so to speak, was on these people, not on putting the POWs on trial. A few months later, in March 1973, officials in the General Secretariat of the United Nations noted "marked and significant increase in volume of criticism, both in the European and American press and by influential officials in donor governments, of continued detention of prisoners of war by the Government of Bangladesh and also of implied threat to expel those Biharis who have not opted for Bangladesh nationality." This would not augur well for "the ability of the Secretary-General effectively to generate further support for Bangladesh," he noted.<sup>71</sup>

Some members of the Security Council were more direct. While the United States, which had recognized Bangladesh in April 1972, urged it to return the POWs in accordance with the Geneva Convention, China said its continuing violation of that Convention showed that Bangladesh was not fit for membership of the United Nations.<sup>72</sup> Indeed, in August 1972, China was aghast that India and Bangladesh proposed to conduct trials of war criminals, which it said showed contempt for the UN Charter. Now, China's representative

<sup>67</sup> *Christian Scientist Monitor*, 30 March 1972.

<sup>68</sup> Peter Preston, "Ifs and Bhutto," *Telegraph*, 30 March 1972.

<sup>69</sup> James P. Sterba, "Bangladesh Drifts in Sea of Corruption and Confusion," *New York Times*, 4 October 1972.

<sup>70</sup> Editorial, "A Time to Be Recognized," *Guardian*, 15 November 1972.

<sup>71</sup> Cable from Jackson/Urquhart to Umbricht, Dacca, 16 March 1973. East Pakistan-Code Unnumbered, Outgoing April 1971-March 1973, Series 232, Box 2, File 1, ACC 77/207. A/754.

<sup>72</sup> Security Council Official Records, 1660th Meeting, 25 August 1972, 6.

concluded, India was trying to impose Bangladesh on the world community and use the POWs to pressure Pakistan on this matter and Kashmir.<sup>73</sup>

Mujib was undeterred. By all accounts, he had no choice. According to UN observers in Dacca, the line between pogroms against Biharis and collaborators and public order was very thin, and the trials were a necessary sop to public opinion. For all that, the government promised fair trials on the Nuremberg model. During 1972, preparations for the trials unfolded in the form of evidence gathering. Even by March, however, it was no secret that the Indian Government was concerned that such trials might prevent a deal with Pakistan.<sup>74</sup> Perhaps to balance these imperatives, Mujib let it be known to senior UN negotiators in October that he was prepared to settle “90% of claims” with Pakistan if he could do so as an equal with the new Pakistani President, Zulfikar Ali Bhutto. The UN official noted of the planned trials, “Personally I think the soup will not be eaten as hot as it is cooked. Please inform 38th floor.”<sup>75</sup> Indeed, a meeting with Mujib a month later revealed that he did not intend to punish any of the Pakistani prisoners. He wanted only international recognition of their crimes, a point he also made in election speeches in early 1973: “not out of vindictiveness but the world should know what the Pakistani army did.” The other prisoners could be returned forthwith.<sup>76</sup> By all accounts, Mujib used the word “genocide” in his conversations, prompting the UN official to ask for advice about “the exact implication of [the] expression ‘Genocide.’”<sup>77</sup> Even by late 1972, it had not occurred to senior UN staff what this word really meant and entailed.

The same could not be said of the International Commission of Jurists, whose report earlier that year stated that strong *prima facie* cases could be made out against Pakistani personnel for breaches of the Geneva Convention and the Genocide Convention. The report went into some detail about the points of law, but it had clearly not been registered at the United Nations. The report concluded: “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.”<sup>78</sup>

<sup>73</sup> *Ibid.*, 8–9.

<sup>74</sup> Sydney H. Schanberg, “India Opens War for Dacca Trials,” *New York Times*, 18 March 1972. East Pakistan-Code Unnumbered, Outgoing April 1971–March 1973, Series 232, Box 2, File 1, ACC 77/207. A/754. Cable from Henry, Dacca, to Secretary General, Guyer/Urquhart, 20 December 1971.

<sup>75</sup> East Pakistan-Code Unnumbered, Outgoing April 1971–March 1973, Series 232, Box 2, File 1, ACC 77/207. A/754. Memo from Umbricht to Jackson, 11 October 1972.

<sup>76</sup> Cable to the Secretary General from Guyer, Dacca, 15 November 1972; East Pakistan, Cable Unnumbered only, Incoming May 1971 to March 1973, Series 232, Box 2, File 2, ACC 77/207. A/254. Cable to Secretary General from Umbricht, Dacca, 27 February 1973.

<sup>77</sup> East Pakistan, Cable Unnumbered only, Incoming May 1971 to March 1973, Series 232, Box 2, File 2, ACC 77/207. A/254. Geyer to Secretary General, Dacca, 13 November 1972.

<sup>78</sup> ICJ, *The Events in East Pakistan, 1971*.

Pakistan's reaction to the proposed trials was not only to launch legal action in the International Court of Justice and to badger the United Nations. Its leaders made threats of their own. In January 1972, Bhutto threatened to prosecute Bengalis in Pakistan – 400,000 Bengalis were stranded in West Pakistan, which included 30,000 soldiers and 17,000 civil servants – for having opted to emigrate to Bangladesh.<sup>79</sup> The President had his own domestic concerns. If the trials became a “big *tamasha* [carnival], palm tree justice,” the President feared, “The story will come to this side and things will become unmanageable.” The perception that internal Pakistani stability was at stake was shared by journalists, such as David Holden at the *Sunday Times*, who reported in June 1973 that “it is widely agreed in Islamabad that the Pakistan Army's reaction to any trials in Dacca would be violence. In other words, Bengalis in Pakistan would also go on trial for ‘treason’ during the war, and the mutual recriminations would probably put any settlement whatever out of reach indefinitely.”<sup>80</sup> Pakistan also rejected Bangladesh's authority to hold trials, because “the alleged criminal acts were committed in a part of Pakistan.” Instead, Pakistan “would constitute a judicial tribunal of such character and composition as will inspire international confidence.”<sup>81</sup> In the event, India did pressure Bangladesh to return all the prisoners and drop the trials; in return Pakistan recognized Bangladesh, whose standing rose in the international community.

## Conclusion

Roughly fifty years separate the Nuremberg Trials from the ad hoc tribunals established by the Security Council in 1993 and 1994 to prosecute perpetrators of war crimes, crimes against humanity, and genocide in the former Yugoslavia and Rwanda, respectively. The passing of the Rome Statute to establish the International Criminal Court soon thereafter, in 1998, led some commentators to regard the 1990s as the endpoint of a humanitarian development begun in the later 1940s. “For advocates of peace through justice,” wrote one, “the last decade of the twentieth century marks a turning point in international legal history comparable only to the Nuremberg and Tokyo Trials of the 1940s.”<sup>82</sup> Now that the Cold War was over and the political will for humanitarian intervention and prosecution had been generated, the international community was moving into a new,

<sup>79</sup> East Pakistan, Cable Unnumbered only, Incoming May 1971 to March 1973, Series 232, Box 2, File 2, ACC 77/207. A/254. DSCO4294, Cable to SG from Umbricht, Dacca, 23 January 1972

<sup>80</sup> Holden, “Why 75,000 Stay Trapped in a Triangle of Bitterness.”

<sup>81</sup> S. M. Burke, “The Postwar Diplomacy of the Indo-Pakistani War of 1971,” *Asian Survey*, 13 (1973), 1038.

<sup>82</sup> David Wippman, “Atrocities, Deterrence, and the Limits of International Justice,” *Fordham International Law Journal*, 23 (1999/2000), 473.

more optimistic phase of its development. Or so these legal scholars would like us to have believed.<sup>83</sup>

The teleological view is too optimistic. After all, Sudan has been a signatory to the Convention since 2004, but that did not prevent it conducting a genocidal counter-insurgency in Darfur with relative impunity. In fact, the Darfur case shows that the pattern of events in East Pakistan between 1971 and 1974 represents the norm rather than the exception in international relations and human rights diplomacy, notwithstanding the indictment of the Sudanese President by the International Criminal Court. Even where such conflicts can be seen as genocidal, as in the East Pakistan case, state leaders find secessionist movements too threatening to be able to link their own suppression of them with the genocide concept. The question raised by M. Maniruzzaman Mia, the former Vice-Chancellor of Dacca University, is salient: “The savagery of the Pakistani army during the nine month period also raised a pertinent question: should a government have the unfettered right to do whatever it likes within its territory and get away with it without being censured by the world community?”<sup>84</sup> The answer is that even if it does not formally possess such a right, it can indeed do so.

The view of legal scholars that national sovereignty is the enemy of humanitarian law only partially captures the different tensions in play in the prosecution of gross human rights violations. Although it is true that the vast majority of states did not want to arm the UN with the capacity to interfere with Pakistan’s brutal suppression of East Pakistan, the UN was also overwhelmed by its humanitarian mission. The Bangladeshi case shows that international human rights law, which states consider “political” (relating to gross breaches of human rights), and humanitarian agendas, which are not “political” (such as aiding refugees and famine relief), can clash and lead to the promotion of one at the expense of the other. Of course, in reality, humanitarian relief can also be considered political by a regime, such as Burma’s, which was reluctant to admit aid workers in the aftermath of devastating storms in 2007. And, of course, the decision to regard humanitarian aid as nonpolitical is, in fact, highly political. By refusing to pressure Pakistan to negotiate further with the East Pakistani nationalists, who had won an election after all, the international system of states was giving an effective green light to terroristic solutions to internal political problems. And yet, if he had threatened UN censure for “Operation Searchlight,” the Secretary-General would likely have been unable to mount the UN humanitarian operation.

<sup>83</sup> Richard Falk, “Humanitarian Intervention: A Forum,” *The Nation*, 14 July 2003; Thomas G. Weiss, “The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era,” *Security Dialogue*, 35 (2004), 135–153; Michael Barnett, “The New United Nations Politics of Peace: From Juridical Sovereignty to Empirical Sovereignty,” *Global Governance*, 1 (1995), 79–97.

<sup>84</sup> M. Maniruzzaman Mia, “Violation of Human Rights and Genocide in Bangladesh,” in Kabir Chaudhury et al. (eds.), *A Nation is Born* (Calcutta, 1972), 33.

We also need to consider the proposition that the meaning of human rights is not unequivocal, that human rights rhetoric is open to differing interpretations, and that human rights constituencies can be mobilized in contradictory directions. Thus Pakistan invoked the conscience of the world and “civilized opinion” in relation to its captured prisoners and minorities in Bangladesh while pouring scorn on Indian and Bengali claims of genocide by its military forces. And much of the world were convinced by its case.

It is important to note, too, that smaller, postcolonial states backed Pakistan fully. African and Arab-Muslim countries were sympathetic to Pakistan’s self-presentation as a minor country about to be dismembered by an avaricious neighbor (India), and the Muslim countries generally favored Pakistan’s occasional Jihadist rhetoric. At the same time, Syria’s representative in the Security Council was happy to speak about Israel’s “geopolitical murder” of Syrian Arabs but not about East Pakistan.<sup>85</sup> Indeed, the fetishization of state sovereignty was particularly strong in post-colonial states. For them, the rhetoric of human rights and genocide could function as a neo-imperial technology of intervention in their affairs by the UN and great powers that controlled the Security Council. In the period of decolonization, then – including the Bangladesh case – the noninterference principle trumped the interference principle of the human rights/genocide rhetoric. Rather than see the opposition between these principles as the struggle between cynicism and human rights, like many in the “genocide studies” field, it makes more historical sense to see them as rival, constituent principles of the international system.

If consciousness of genocide made a “comeback” in the 1990s, this had less to do with the humanization of the international system than the greater depth of international society. As in the past, the great powers and the UN ignored a genocidal crisis, this time in Rwanda, but the scale and visibility of the killing, the palpable lack of agency of the victims, and the intensity of journalistic and academic attention meant that the “system” could not ignore the case after the fact. But does this subsequent prosecution really represent a breakthrough for human rights? Similar outrage was expressed in Britain, France, and the United States about the fate of Armenians in the Ottoman Empire in the 1890s and during the First World War. Great power politics prevented the effective prosecution of the leaders of the genocide.

The same pattern of events is recurring in Darfur today because prosecutions of war criminals and other violators of humanitarian law are virtually impossible where the guilty parties remain leaders of states. In such cases, war crimes/genocide trials become a diplomatic problem that can hinder the speedy resolution of international conflict. For this reason, human rights justice can conflict with the imperative of the UN to maintain peace and security. For instance, in the Bangladesh case, the UN needed to negotiate and deal with the Pakistani government to administer its aid to refugees as well as to mediate about prisoners of war and massive population exchanges. It could

<sup>85</sup> Security Council Official Records, 1580th Meeting, 16 September 1971, 30.

not do so if it was also threatening to put its negotiating partners or their underlings on trial. You cannot have victors' justice without a victory.

This dilemma suggests that the international system of states needs to be distinguished from "international society." Elements in the international public sphere, such as the International Commission of Jurists, spoke openly of war crimes and genocide, recommending trials of suspected criminals. These and other voices were ignored. Has this situation changed dramatically since then? The teleological account of postwar developments in human rights and genocide prosecutions seems implausible in view of the continuing tendency of great powers to flaunt international humanitarian law when it suits them. It makes more sense to conceive of the international system as comprising dilemmas rather than constituted by moral perfidy alone.

