
WORKING PAPER

A CRITICAL EVALUATION OF THE
INTERNATIONAL COMMISSION OF
JURISTS' REPORT ON THE
BANGLADESHI GENOCIDE

TANWEER AKRAM⁺

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ABSTRACT

The International Commission of Jurists (1972) report, *The Events in East Pakistan, 1971*, is a valuable contemporaneous report on the Bangladeshi genocide. It provides a factual background to the genocide that occurred in East Pakistan amidst Bangladesh's war of national liberation. It also examines various issues related to the genocide and the war of national liberation that are pertinent to contemporary questions, such as humanitarian intervention. This essay provides a critical evaluation of the ICJ report.

Key words: Bangladesh, East Pakistan, Bangladeshi genocide, India-Pakistan War, national liberation, International Commission of Jurists, humanitarian intervention

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A major genocide occurred in Bangladesh (then East Pakistan) in 1971 during the country's war of national liberation. However, western scholarly literature on this genocide is limited. The International Commission of Jurists (ICJ) published a legal study (1972) of the genocide, immediately after the genocide was terminated due to Indian military intervention. The Indian military intervention in East Pakistan also led to the independence of Bangladesh from Pakistan. The ICJ report is a useful, contemporaneous, and independent assessment of the Bangladeshi genocide. It was carried out by a non-government international organization composed of eminent jurists. The ICJ report gives a background to the genocide and addresses various questions of international law, genocide and humanitarian intervention that are relevant to contemporary problems.

This essay critically evaluates the ICJ report and points out its merits and limitations. It has four sections. The *first section* provides some background information on the Bangladeshi genocide. The *second section* recounts the Indian and international response to the genocide. The *third section* discusses the key findings of the ICJ report. The *fourth section* evaluates the ICJ report's merits and limitations. The *final section* concludes.

Section I: Background Information

When Britain ended its occupation of India in 1947, its former Indian colony was divided into two countries, namely, India and Pakistan. Pakistan consisted of two wings: West Pakistan (now Pakistan) and East Pakistan (now Bangladesh).



The population of Pakistan was composed of several ethnic groups. The population East Pakistan was overwhelmingly Bengali, whereas the population of West Pakistan consisted of various ethnic groups, including the Punjabis, Pushtoons, Sindhis, Baluch, and so on. Most of the population of West Pakistan was overwhelmingly Muslim (nearly 95% of the population). East Pakistan's Bengali population was also predominantly Muslim (more than 85%). But in contrast to West Pakistan, East Pakistan had a large number of Hindu minority population (nearly 13%). Both Muslims and Hindus in East Pakistan belonged to the same Bengali ethnic community.

The Bengalis of East Pakistan constituted the majority of the population of united Pakistan. The population of East Pakistan amounted to 67.4 million in 1970, whereas the population of West Pakistan amounted to 65.7 million. But throughout the history of united Pakistan state power was concentrated primarily in the hands of West Pakistani ethnic groups, particularly the Punjabis who formed the bulk of the bureaucracy and the military forces. The grievances of the Bengalis were hence manifested in the call for the provincial autonomy of East Pakistan and for fair and equitable allocation of resources between the two wings of Pakistan (Islam 2003). The inability of the Bengalis in Pakistan to establish their economic, political and social rights within the framework of united Pakistan led to a quest for autonomy for East Pakistan. But united Pakistan for most of its history was under authoritarian rule in various guises

and did not have an institutional mechanism to mitigate or redress the grievances of the Bengalis. The failure of the Bengalis' constitutional quest for autonomy led to the emergence of a national liberation movement that culminated in the independence of Bangladesh from Pakistan after a violent war of national liberation (Akram 2006, Blood 2002, Islam 2003, Mascarenhas 1971, Muhith 1996 and Sisson and Rose 1991).

In 1969 the dictatorial regime of Ayub Khan was overthrown due to a popular upsurge throughout Pakistan. Ayub Khan handed over power to General Yahya Khan, the head of Pakistan's army. The new military regime that came to power announced that it had no intention of remaining in power for long. Its stated goal was to transfer power to the people's representatives. It admitted that East Pakistan had been denied a rightful share in Pakistan's decision-making process.

In the national elections that took place in 1970 not only did the Awami League, the Bengali nationalist party, emerge as the victorious party in East Pakistan, but it also obtained a majority of seats in the national constituent assembly of united Pakistan. The Awami League ran on a campaign of provincial political autonomy and a minimalist concept of united Pakistan. The Pakistani ruling class did not anticipate that the Awami League would be able to secure a majority in the national constituent assembly and hence draw the constitution of Pakistan. Following the election results, the Pakistani ruling class, which was essentially composed of West Pakistani ethnic groups and led by the Pakistani army, was determined to prevent Bengalis and specifically the Awami League from attaining state power. The Pakistani ruling class decided to use the army to squash the Bengali national liberation movement. The genocide occurred in Bangladesh during its war of national liberation (Akman 2002).

The breakdown of negotiations between the Pakistani military junta and the Awami League following the elections provided a pretext for the Pakistani army to carry out massacres against the Bengalis. The Pakistani army had started rapidly building up its military force after the elections in East Pakistan (Mascarenhas 1971). The negotiations were also a useful smoke screen to continue military build-up and buy time to transfer military equipment and armed personnel from West to East Pakistan in order to carry out a crackdown on the Bengali political leadership and the nationalist movement (Muhith 1992). With the breakdown of negotiations between the regime and the Awami League,

the Pakistani military forces began its program of massacres as part of its attempt to suppress the Bengali nationalist movement (Quaderi 1972).

The martial law facilitated the army's actions. The massacres started with a program called "Operation Searchlight," which was designed to disarm and liquidate Bengali policemen, soldiers and military officers, to arrest and kill nationalist Bengali politicians, to attack university areas and to kill and round up professionals, intellectuals, and students (Siddiq 1997 and Safiullah 1989).

There are a range of estimates for the death toll and the number of refugees fleeing from the massacres, starvations, and havoc created by the Pakistani army in East Pakistan. The victims of the genocide increased over time. The availability of information about ongoing crimes was initially limited because the Pakistani army provided only restricted access to foreign and independent journalists (Mascarenhas 1971, Rahman 1980, and Quaderi 1972).

The estimates of the total number of victims and refugees vary (see Table 1 and Table 2), depending on who published the report and when it was published. But over time, as more foreign journalists came to grips with the scale of the atrocities, information become more widespread. Gradually more refugees and victims fled East Pakistan, reaching India and other countries and providing more detailed accounts of the atrocities and the killings. More information about the scale of atrocities become widely available as the provisional Government of Bangladesh in exile started campaigning for its cause, and as the Bengali Diaspora began organizing itself (Rahman 1980 and Muhith 1996).

Table 1

Reporting Source	Date	Reported number of people killed, mil.
<i>The Baltimore Sun</i>	May 14, 1971	0.5
<i>The Momento, Caracas</i>	June 13, 1971	0.5-1.0
<i>Washington Daily News</i>	June 30, 1971	0.2
World Bank Report	June 1971	0.2
<i>Die Zeit, Bonn</i>	July 9, 1971	0.5
<i>New York Times</i>	July 14, 1971	0.20 -0.25
<i>Wall Street Journal</i>	July 23, 1971	0.2-1.0
<i>The Christian Science Monitor</i>	July 31, 1971	0.25-1.00

<i>Newsweek</i>	August 2, 1971	0.25
<i>Time</i>	September 2, 1972	0.2-1.0
<i>Newsweek</i>	March 27, 1972	1.5
<i>National Geographic</i>	September 1972	3.0
Source: http://www.virtualbangladesh.com/history/holocaust.html		

Table 2

Reporting Source	Date	Reported number of refugees, mil.
<i>Washington Daily News</i>	June 30, 1971	6.0
<i>Die Zeit</i>	July 9, 1971	6.0
<i>New York Times</i>	July 14, 1971	6.0
<i>St. Louis Post-Dispatch</i>	August 1, 1971	6.0
<i>Newsweek</i>	August 2, 1971	7.5
Senator Edward Kennedy	August 15, 1971	12.0
<i>Time</i>	September 2, 1971	7.5
The UN in Bangladesh	1972	10.0
<i>Newsweek</i>	March 27, 1972	10.0
Source: http://www.virtualbangladesh.com/history/holocaust.html		

The responsibility for the genocide that took place against the Bengalis in East Pakistan in 1971 lies with the Government of Pakistan and in particular the Pakistan Army which acted in concert with its local collaborator militias. The actions of the state of Pakistan should be considerable genocidal because its actions were intended to stamp out Bengali national liberation movement and to crush the national feelings and aspirations of the Bengalis, who constituted the overwhelming majority of the population of East Pakistan. The Pakistan Army's actions that can be deemed as genocide include:

- Killing members of the Bengali ethnic or national group: killing of Bengali civilians, including women and children, Bengali Hindus, Bengali students, Bengali intellectuals, Bengali professors and professionals, political leaders including members of the Awami League and other secular and leftist political leaders opposed to West Pakistani hegemony.
- Causing serious bodily or mental harm to members of the group by systematically torturing civilians and combatants, injuring civilians, and raping women, including under-aged girls.

- Deliberately inflicting damages on the group conditions of life calculated to bring about its physical destruction in whole or in part, such as the destruction of university areas, the burning of villages, the dispossession of the population, forcing the flight of population within the country and outside of the country, the ethnic cleansing of Bengalis, attacks on Bengali Hindu urban and rural areas, the destruction of physical infrastructure, and the disproportionate use of force against civilian and armed resistance.

The actions of the state of Pakistan and the Pakistani army revealed an “intent to destroy, in whole or in part, a national, ethnical, racial or religious group.” The Pakistani ruling class and Pakistan’s military wanted to crush Bengalis’ legitimate quest for autonomy and national self-determination through the illegitimate use of violence on civilian population and non-combatants. They resorted to genocide in order to stifle Bengalis’ attempt to obtain state power.

International law is quite clear about what constitutes genocide. The UN Convention on the Prevention and Punishment of the Crime of Genocide (1948) provides a well-defined, objective, and operational definition of “genocide” in international law. Any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, counts as genocide: killing members of the group, causing serious bodily or mental harm to members of the group, and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, according to the UN Genocide convention. The convention defines clearly what acts are to be punishable under international law: namely (a) genocide, (b) conspiracy to commit genocide, (c) direct and public incitement to commit genocide, (d) attempt to commit genocide and (e) complicity in genocide. The state of Pakistan was and still is a signatory to the genocide convention. Hence, its actions were and are subject to the provisions of the genocide convention.

In their actions against Bengalis and the Bengali armed resistance, the state of Pakistan also violated the fourth Geneva Convention relative to the protection of civilian persons in times of war. The Pakistani army violated various acts of the convention, even though Pakistan army officials were well versed in the Geneva Conventions.

The responsibility for the genocide and for war crimes lies with the Government of Pakistan, the Pakistani Army and various organs of the state and

various collaborator militias and Pakistani politicians, such as Z.A. Bhutto of Pakistan People's Party for engaging in genocide, conspiracy to commit genocide, and complicity in genocide.

There were some Bengali reprisals against West Pakistani and other Urdu-speaking civilians in East Pakistan. Several attacks took place on West Pakistani civilians before and during the war by mobs and militants. Also, there were some attacks on the Urdu-speaking Bihari community in Bangladesh after the war by mobs and renegade guerilla leaders. Some renegade guerilla leaders attacked Pakistani prisoners of war and collaborator militias. But this was put to a stop by the Indian army and by the Government of Bangladesh.

After the independence of Bangladesh, the Government of Bangladesh offered Biharis Bangladeshi citizenship and amnesty for participation in massacres and war crimes. The government of Bangladesh stepped in to protect the Bihari community from retaliations, even though some freedom fighters wanted vengeance. But some retaliation and revenge attacks took place. The Bihari community, by and large, rejected the offer for Bangladeshi citizenship and wanted to return to Pakistan. However, the Government of Pakistan refused to accept most Biharis. As a result, many Biharis still languish in Bangladesh as refugees.

Section II: Indian and International Response to the Bangladeshi Genocide

The Pakistani army's decision to crackdown on the Bengali nationalist movement and commit massacres against the Bengalis population resulted in a massive flow of refugees from East Pakistan to neighboring Indian states, particularly to West Bengal. Millions of refugees fled across the border to India, where hundreds of refugee camps were set up. The provisional Government of Bangladesh took shelter in India. Various armed resistance groups retreated to India to create clandestine base of operations.

India supported Bengali insurgency and resistance and faced border skirmishes with Pakistan. Nevertheless, Indian authorities made a good faith diplomatic and political effort to resolve the conflict and facilitate the return of refugees, and showed considerable patience. However, the Western powers and the UN did nothing to terminate the ongoing genocide and civil war. The Yahya regime and the Nixon Administration rejected all proposals for political settlement and peace.

The Nixon administration remained largely supportive of the Pakistani regime (Sisson and Rose 1991). The U.S. backing of the regime and its complicity with the Pakistani army is now well documented. Despite the protestations of East Pakistan-based U.S. diplomats', the Nixon administration and Mr. Henry Kissinger in particular, continued to support Pakistan and provided direct and indirectly support, including military and strategic support to the regime, which in turn emboldened the Pakistani ruling class and the Pakistan army in its ruthless brutality. Indeed, so odious was the Nixon Administration's support for Pakistan's military regime that a number of U.S. State Department officials strongly protested at the "tilt" of the U.S. policy (Blood 2002). Muhith (1996) summarizes a wide range of U.S. responses to the Bangladeshi genocide and the struggle for national liberation. Public opinion and the media in the U.S. were largely in favor of the Bangladesh cause. The Bengali Diaspora in the U.S. organized support for the liberation of Bangladesh and for exerting pressure on Pakistan and tried to mobilize lobbying efforts and public opinion to its cause.

The U.S. administration's policy favored the Pakistan regime in spite of detailed knowledge and reliable reports of the Pakistani army's killing of civilians, widespread massacres, and political suppression. The information was widely available in the contemporaneous mainstream Western press at the time. The U.S. administration was also informed of ongoing massacres in detailed diplomatic cables and correspondences filed by its own diplomats in the field and by various multilateral agencies, including a special World Bank Mission to Bangladesh (Blood 2002, Quaderi 1972, and U.S. Department of State 2005). Several U.S. consulate diplomats in Dhaka expressed grave concern and called upon the U.S. administration to publicly condemn Pakistani Army's genocidal actions and to reprimand the Pakistani regime.

The U.S. administration overruled the concerns of its own dissenting diplomats, such as Archer Blood (see Blood 2002), and the concerns of some officials of multilateral agencies. Instead, the Administration decided to continue to offer indirect and direct support to the military regime. President Richard Nixon and his national security advisor Henry Kissinger regarded India as a "Soviet stooge," minimized reports of Pakistani genocide and crimes against civilians (Burr 2005). Documents released by the U.S. State Department (2005) show that the administration was fully aware of the atrocities and ignored Bengalis' long quest for regional autonomy and democratic aspirations. A key factor behind Nixon and Kissinger's stance was that Pakistan was providing a

covert communication link and a useful conduit for the U.S.'s rapprochement with China.

Nixon and Kissinger ignored India's attempt to find a diplomatic resolution to the crisis and to put to an end to the ongoing genocide. They regarded Mrs. Indira Gandhi's attempt to find a resolution through diplomatic means as serving Soviet interests in Asia. Nixon and Kissinger ordered a U.S. aircraft carrier and other naval forces into the Bay of Bengal to pressure India against military intervention in East Pakistan. They assured China that if it took measures against India, the U.S. would oppose international efforts to exert pressure on China to show its support for U.S. allies. However, the quick surrender of the Pakistani forces to Indo-Bangladesh forces in East Pakistan ended the genocide and voided Nixon and Kissinger's attempt to preserve a united Pakistan.

India saw the East Pakistan crisis as an once-in-a-lifetime opportunity to dismantle the state of Pakistan, its arch enemy. Pakistan, however, declared war first and attacked Indian territory by bombing its airfields. India's direct intervention took place *after* Pakistan's declaration of war on India and air raids on Indian territory.

In the case of East Pakistan, the international community failed to stop an ongoing genocide. Indeed, the inaction of the international community became an obstacle to the termination of the genocide. India had exhausted all efforts through diplomatic means. Indian military intervention in Bangladesh clearly terminated an ongoing genocide. Moreover Indian military presence in Bangladesh immediately after the war also helped reduce the possibility of widespread Bengali backlash against Bihari civilians and Pakistani soldiers and helped stabilize the country. Indian army intervention in East Pakistan/Bangladesh was very quick. India achieved easy and decisive victory over the Pakistani army in East Pakistan. The military intervention was followed by a rapid and *full* military withdrawal from Bangladesh (in early 1972, taking less than three months). The Pakistani army's surrender agreement with India and Bangladesh joint forces explicitly stated that the provisions of Geneva conventions would be upheld for Pakistan military and civilians in Bangladesh.

Section III: The ICJ Report

The International Commission of Jurists is a prominent human rights non-government organization. It was founded in Berlin in 1952 and is headquartered in Geneva. Its membership is composed of eminent jurists representing different

legal systems of the world. The ICJ is a non-government organization with consultative status with the UN. The objective of the commission is “to defend the Rule of Law” and “work towards the full observance of the provisions of the Universal Declaration of Human Rights.” It is widely viewed as an impartial organization.

In September 1971 an international conference called upon the ICJ to set up a Commission of Enquiry into the Events in East Pakistan. Thereafter the ICJ set up a committee of three prominent international lawyers (unnamed in the report) with the mandate: “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 ICJ report, *The Events in East Pakistan, 1971*, is an outcome of the inquiry of the committee. However, it is a staff report, not the Commission’s own view. The ICJ published its report on East Pakistan in early 1972, right after the genocide was terminated and Bangladesh had become independent after the surrender of the Pakistan army to the Indian and Bangladeshi forces in mid-December of the previous year.

Members of the Commission at the time of the publication of the report included jurists from both Western countries and Third World nations. Members from Third World countries included among others the President of the Court of Appeal of Ceylon (Sri Lanka), former Chief Justice of Nigeria, former Minister of Foreign Affairs of Peru, former Solicitor General of the Philippines, former judge of the Supreme Court of Burma, former Chief Justice of Chile, former Chief Justice of the Sudan, and the President of the Supreme Court of Cyprus. The members of the ICJ from Western countries included the former Chief Justice of the Supreme Court of Japan, former Lord Chancellor of England, former Prime Minister of France, Chief Justice of the Supreme Court of Puerto Rico, and former Chief Justice of the Supreme Court of Norway.

The Government of India agreed to cooperate with ICJ’s inquiry commission. The provisional Government of Bangladesh also agreed to cooperate. The Government of Pakistan, however, refused to do so, stating to the ICJ that “the subject of the enquiry was a purely internal matter.”

The inquiry committee was scheduled to visit the region in December 1971 in order to obtain first-hand information. However, the committee’s planned visit to the region was cancelled due to the Indo-Pakistan war which broke out in

December 1971. No subsequent visit was undertaken. As a result, the report is based solely on previously collected documents and oral evidence obtained by the ICJ rather than first-hand information. It gives a factual account of the events and also discusses legal issues pertaining to the genocide, war crimes, crimes against humanity and questions of the right of self-determination, unilateral declaration of independence, and the role of the UN and the international community. Oral and written statements of evidence were given to the ICJ between Oct 1971 and Mar 1972. Only statements by Westerners (that is, Europeans and Americans) were considered.

The ICJ report provides a background to the events and gives a detailed outline of the events. It covers the period during the negotiations between the Awami League and the Pakistan military regime (March 1 – March 25, 1971). It also covers the period of the genocide and the war of national liberation (March 25 – December 18, 1971). It then goes on to discuss the legal position under Pakistani and international law, the legal position under international penal law, the right of self-determination in international law, the role of the UN and the role of India. The report arrives at several findings about the events of East Pakistan during Bangladesh's war of national liberation. Its findings are important for political, moral and legal reasons. Its key findings are discussed below.

Massive violations of human rights: The ICJ report recognizes that “massive violations of human rights occurred in East Pakistan.” The report states that human rights violations 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.”

The ICJ report observes that “violations involved the indiscriminate killing of civilians, including women and children.” It holds the Pakistani army responsible for “the attempt to exterminate or drive out of the country a large part of the Hindu population of approximately 10 million people.” It also finds the Pakistani army responsible for “the arrest, torture and killing without trial of suspects; the raping of women; the destruction of villages and towns; and the looting of property.”

Genocide, War Crimes, and Crimes against Humanity: The ICJ report opines that “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 [1948]." [emphasis added]

Unilateral Declaration of Independence: According to the ICJ report, the Awami League leadership's unilateral declaration of independence was invalid under international law but its resistance to Pakistani army's actions was legitimate. The report states: "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." The report acknowledges that "they [Awami League leadership] 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."

Failure of the United Nations: The ICJ report states that the United Nations' failed to deal adequately with the grave events in East Pakistan. The report notes that "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." [emphasis added]

India's Role: The ICJ report takes the Indian authorities to task for the violation of neutrality and interference in the internal affairs of Pakistan, its neighboring country. It admonishes the Indian authorities because "India's supply of arms and training facilities to the insurgent forces was in breach of her duty of neutrality under international law."

The ICJ report regards Indian military intervention in East Pakistan as unjustified on the grounds of self-defense. The ICJ report concludes that "India's claim that her invasion of Pakistan was justified in international law under the doctrine of self-defense and on the grounds that she was acting in support of her Bangladesh ally cannot be accepted."

Humanitarian Intervention: However, the ICJ report judges that India's intervention in East Pakistan could be justified on humanitarian criteria. The report acknowledges that "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."

Section IV: A Critical Evaluation of ICJ's Findings

The ICJ report's findings have to be critically evaluated. The report has both merits and limitations.

Merits. The key merit of the ICJ report is that it renders an objective account of the events. It is impartial and balanced. It provides the historical background necessary to understand the events in questions. The report is empirical and fact-based. It relies on news reports and oral testimonies that were then available to the ICJ. It uses information that was then widely available in the mainstream Western press. It is fairly thorough in discussing the moral and the legal issues pertaining to the genocide and points out the responsibility of various parties involved in the conflict.

Limitations. The ICJ report does have certain limitations. Because the visit to the region by the members of the inquiry committee was cancelled, it is not based on direct collection of evidence. The inquiry committee did not undertake a firsthand investigation either during war of the liberation or after the liberation of Bangladesh. It did not conduct interviews of the victims, refugees and ordinary people. It did not conduct interviews with government officials. Its failure to consult the provisional Government of Bangladesh is particularly disappointing especially since the provisional government offered to cooperate with the ICJ. The provisional government had direct contact with many of the victims, particularly those refugees who fled to India from East Pakistan.

The ICJ report did not use any evidence that was available *after* the war and the independence of Bangladesh. The ICJ report was not followed up with a more detailed study that could have supplemented the obtained information with additional facts and would have been useful in providing estimates of the full scale of the genocide and the war crimes. The ICJ does not pay enough attention to the fact that by the time its report came out, the independence and the emergence of Bangladesh by time its report appeared was an irrevocable *fait accompli* and hence that the discussion of the right of self-determination and the legality of Awami League's unilateral declaration of independence had become largely moot.

It would have been better if the ICJ report emphatically acknowledged that the questions of genocide, war crimes and crimes against humanity are *separate* from the question of Bangladesh seceding from the state of Pakistan and the legality of its unilateral declaration of independence.

The ICJ report's main findings are critically evaluated below.

Massive Human Rights Violations and Genocide: The ICJ report is correct in reporting that massive violations of human rights occurred and was carried out by the Pakistani army and collaborator militias in East Pakistan in 1971. The ICJ report is also correct in reporting that there were Bengali retaliations against Bihari civilians. But the report made no attempt to assess the magnitude of the atrocity. Since it was obvious from the already available evidence that the main responsibility for the massacres and atrocities were with the Pakistani state and the Pakistani army, the report could have affirmed this unambiguously. The report should have stated that the massacres against Bengalis carried out by the Pakistani army were much larger in absolute number, scope and intensity than the massacres carried out against Bihari civilians carried out by Bengali mobs. Furthermore, Pakistani military had armed some Biharis and encourage them to join collaborator militias.

The bulk of human rights violations and massacres in East Pakistan in 1971 were committed by the Pakistani army against the Bengali population. The total population of East Pakistan was approximately 68 million in 1971. Bengalis constituted about 67 million, and Pakistani civilians were less than 1 million (maximum). The estimated number of Bengali victims ranges from 1.5 million to 3.0 million people killed, which would be around of 2.2% to 4.5% of East Pakistan's Bengali population. The number of Bengali refugees who fled across the border to India is in the range of 8 million to 10 million refugees, amounting to about 12% to 15% of the Bengali population. The number of Pakistani/Bihari civilian killed is in the range of 20 thousand to 30 thousand, amounting in the range of 2% to 3% of East Pakistan's Bihari population.

The scale of Bengali retaliation against Biharis and Pakistani civilians was much limited in scope intensity and numbers compared to the scale of Pakistani army's and collaborators' massacres against Bengalis. Bengali reprisals were carried out mostly by mobs and sometimes by renegade militias, whereas Pakistani massacres and atrocities were that of a state army and backed by the state. The insurgent actions were mostly directed against the Pakistan army, strategic military targets, and collaborators. Some reprisals against Pakistani civilians and prisoners of war by the guerilla forces took place after the war, but the Indian forces and the Government of Bangladesh stopped these quickly.

The ICJ report points out that widespread and indiscriminate killings occurred in East Pakistan. The Pakistani army killed civilians, including women, and children. Specific targeting of Hindus was a feature of the Pakistani military campaign. The raping of women, including under-aged girls, was also a feature of the Pakistani military campaign and its attempt to subjugate the population. The Pakistan army created internal and international cross-border refugee problem by their dispossession of the population and by creating panic amongst the Bengali population, particularly Bengali Hindus and those affiliated with the Awami League and leftist progressive politics.

Tribunal for War Crimes and Genocide: The ICJ report argued in principle for an international trial for war crimes and crimes against humanity and genocide that occurred in East Pakistan during Bangladesh's war of liberation. But the ICJ failed to carry through on the call for international trial or to advocate for a mechanism that would lead to an international tribunal. The ICJ and the international community failed to be vocal on subsequent steps. Other major international human right organizations and the UN and its component agencies neither did anything nor follow up on the ICJ report about the genocide. As a result, there was no international commission of inquiry examining the evidence of war crimes and genocide in East Pakistan/Bangladesh.

The Government of Bangladesh was also responsible for the failure in pressing for justice. There were a number of factors which were responsible for the government's inaction. The government was primarily focused on rehabilitation and rebuilding the country after war. The government was concerned about establishing security and stability. External factors also contributed to Government of Bangladesh's inaction. The Government of Bangladesh needed international assistance from Western countries (the U.S., and the U.K.) and multilateral donor agencies (such as the World Bank) and Muslim-majority countries (such as Saudi Arabia) that were allied or otherwise involved with Pakistan. India, the Soviet Union, and socialist countries were strategic allies of the new Bangladeshi regime. But neither the Western countries nor India and the socialist bloc countries were keen about international trials.

As a result of unfavorable internal and external conditions, the Government of Bangladesh made no concrete, concerted effort to bring to justice those responsible for genocide, war crimes, and crimes against humanity. Pakistani prisoners of war, including army officers and commanders, who surrendered to Bangladesh and Indian forces, were handed over to Pakistan through India. But there were no trials of military commanders in either Bangladesh, Pakistan, or

India. Only a few local collaborators were brought to justice initially, and some prominent collaborators were stripped of their citizenship. Surprisingly even the Indian authorities and Mrs. Indira Gandhi were not interested in setting up a war crime tribunal even though Pakistan had committed acts of aggression, engaged in a war of aggression, and perpetrated genocide.

The Bangladesh authorities did institute a Collaborators Tribunal Order (1972) as an initial attempt to bring various collaborators to trail. However, Sheik Mujib, the Prime Minister of Bangladesh, offered amnesty on the second anniversary of Victory Day (Dec 16, 1973). The Bangladesh authorities did not set up an inquiry commission. There was no South Africa-style Truth and Reconciliation Commission. As a result those who collaborated with the Pakistan army in committing war crimes, crimes against humanity and genocide did not even have to publicly apologize for their crimes.

The ICJ report provides only a perfunctory discussion of the need for an international tribunal. It does not propose plans for holding a trial and punishing those responsible for genocide, war crimes and crimes against humanity. The report does not also address the need for compensating the victims of these crimes.

Unilateral Declaration of Independence and Secession: The ICJ report asserts that the Awami League's unilateral declaration of independence of Bangladesh is not valid under international law. The concept of unilateral declaration of independence is indeed not recognized as such in international law. The doctrines of international law are very conservative and are pro *status quo*; as such there is limited scope for unilateral declaration of independence and hence unilateral actions are rarely accepted in international law. International law, however, recognizes the principle and the right to self-determination.

While the ICJ report is correct in pointing out that under a strict interpretation of international law, the Awami League's unilateral declaration of independence would be not recognized as legal under international law, it fails to appreciate the historical context in which the Awami League was compelled to declare independence. The Awami League had anticipated that the Pakistan army was about commit massacres and pogroms against the civilian population in order to crush Bengalis' national aspirations. Moreover, the secession of East Pakistan (Bangladesh) from united Pakistan was that of the *majority* of the population seceding from the state. This would make it qualitatively different from, for the

example, the case of attempted secession of the Southern states from the United States of America, or of Biafra from Nigeria. In light of Awami League's specific six-point program and the specific history of Bengalis' constitutional struggle for provincial autonomy and the Pakistani military regime's refusal to accept the six-point program and its nullification of Awami League's overwhelming victory in national elections and the army's decision to crush Bengali national movement through violent means. The Awami League was left with no choice but to declare independence unilaterally and to wage a struggle for complete independence from united Pakistan. To its credit, the ICJ report acknowledges the right to resistance, including armed resistance to the occupation army, genocide and crimes against humanity.

The Failure of the United Nations: The ICJ report holds the United Nations responsible for failing to terminate the genocide. The UN failed to act because of most member states, particularly the Western powers, including the United States, supported the *status quo*. The UN did little to stop the genocide and civil war in East Pakistan. It was rendered impotent to act because of (i) the reluctance of member states to raise issues concerning the "internal affairs" of another member state, and (ii) Western and most Muslim-majority countries' and Third World countries' support for Pakistan.

During the crisis, the UN provided valuable humanitarian assistance during the crisis to refugees who fled to India. It also provided crucial assistance afterwards as well to enable rehabilitation and resettlement of the refugees. Obviously more international aid and assistance, including government and private aid, could have saved more lives.

The Soviet veto in the UN Security Council played a vital role in securing the independence of Bangladesh and in providing cover for India's military intervention that liberated Bangladesh. The U.S. and the Western powers was using the Security Council to call for a cease fire when India retaliated against Pakistan aggression and had intervened in East Pakistan to liberate it from Pakistani rule. If the UN had imposed a ceasefire on India, the Pakistani army would have been able to continue its pogroms of oppressing and terrifying the population of Bangladesh (East Pakistan). A ceasefire would have enabled the Pakistani army to concentrate on its objective of crushing the Bengali nationalist movement without having to worry about possible military actions by India.

India's Role and Humanitarian Intervention: India and Pakistan had a long history of animosity and had fought two wars previously in 1948 and 1965. As a result of Pakistani army's massacres and genocide in East Pakistan, India faced

the world's largest influx of refugee fleeing civil war, persecution and genocide. This influx of refugees poses a grave economic, political and social problem. India allowed the functioning of the provisional Government of Bangladesh that escaped to India. The Indian reaction to the humanitarian crisis in East Pakistan was mostly commendable, particularly in light of its own resource constraints.

Since Indian military intervention took place *after* Pakistan declared war on India, contrary to the ICJ report's arguments, India could tenably claim that its intervention in "[East] Pakistan was justified in international law under the doctrine of self-defense." There are several factors that motivated India's military intervention in East Pakistan. These include self-defense, long-term rivalry with Pakistan, failure to resolve the refugee problem through diplomatic initiative, economic pressure due to the refugee problem, concern about the plight of refugees, concern about the ongoing genocide in East Pakistan against Bengalis and the Hindu community in particular and concern about the prospects of ultra-left radicalization that could possibly have a destabilizing effect on the northern eastern region of the Indian subcontinent, particularly India's West Bengal. Indian actions were dictated by self-interested reasons: the Indian authorities were overwhelmed by India's security and strategic considerations and by the fact that Pakistan had committed a war of aggression on India. Nevertheless, while humanitarian objectives were not emphasized in India's official stance in international forums, it was a *factor* in Indian decision-making and was part of the official rhetoric.

However, India did *not* attempt to justify its military action and support from the provisional Government of Bangladesh "on the grounds of humanitarian intervention." International law recognizes the *possibility* of humanitarian intervention. But examples of genuine humanitarian intervention in contemporary history of states are rare. In the annals of contemporary history there are few examples of *genuine* humanitarian intervention, such as (a) the case of Indian intervention in East Pakistan/Bangladesh and (b) the case of Vietnamese intervention in Cambodia.

The rhetoric and the slogan of humanitarian intervention are often used for armed aggression and imperial goals. Hence, the criterion for judging humanitarian intervention has to be quite stringent. The criterion for humanitarian military intervention has to be high and the burden of proof must be on those who advocate military intervention.

Section V: Conclusion

The ICJ's report, *The Events of East Pakistan, 1971*, is a useful study, particularly since there is a dearth of western scholarship on the Bangladeshi genocide. The report provides a useful contemporaneous comment on the events, based on careful analysis of facts and background information.

The ICJ report makes an attempt to address various legal issues and political issues. It rebukes the United Nations and the international community for their failure to stop the genocide. It also addresses the issue of the right to self-determination of a people. The report disputes the legal validity of Awami League's unilateral declaration of independence but acknowledges the right of a people facing genocide and war crimes to resist the actions of an illegitimate military regime. The report admonishes India for its violations of neutrality and its military intervention in East Pakistan/Bangladesh. But it admits that India could have justified its military intervention on humanitarian grounds in light of the failure of the international community to terminate an ongoing genocide.

The report's value lies as a near contemporaneous testimony to the Bangladeshi genocide and as legal commentary by eminent jurists knowledgeable about the facts and legal issues rather than for its specific pronouncements. Various aspects of the ICJ report's assessments pertaining to the Bangladeshi genocide and the war of the national liberation can be disputed.

Contrary to ICJ report's pronouncements the Awami League's unilateral declaration of independence was justified morally, politically and legally given the failure of the Pakistan military regime to adhere to its declared goals of handing over state power to the elected representatives of the people.

The ICJ's criticism of Indian intervention in East Pakistan is not tenable. As for India's military intervention, since it took place only *after* Pakistan declared war on India and attacked its territory, India's military action can be justified as self-defense. Indian actions also terminated a major genocide of the twentieth century as the report acknowledges.

Another key failure of the report is that it failed to move the International Commission of Jurists to call upon national and international authorities to hold a trial or set up an international tribunal on genocides, war crimes, and crimes against humanity. Neither ICJ nor any other international human rights organizations made any systematic attempt to mobilize governments and global public opinion to bring the criminals to justice.

Despite these and other limitations, the ICJ report is a valuable document because it was published right after the termination of the Bangladeshi genocide. Its discussion of various issues, such as the role of the UN and the failure of the international community, international law, the question of self-determination, and humanitarian military intervention remain quite illuminating and are relevant to discussion of contemporary questions in the twenty-first century.

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