THE ROLE OF THE INTERNATIONAL COMMUNITY IN PROTECTING THE PHYSICAL EXISTENCE OF MINORITIES: A CASE STUDY OF PAKISTAN

Javaid Rehman*

I. Introduction

The right to physical existence of all individuals, whether seen singularly or collectively as groups, is of a fundamental and peremptory character. Although the right to physical existence remains paramount and pre-eminent, it can stretch the developing norms of international law of human rights to their limits; the right is generally violated, or at

* Dr. Javaid Rehman B.A., LL.B., LL.M., Ph.D., Law Department, University of Leeds. Dr. Rehman was a contributor to the World Directory of Minorities (London: Minority Rights Group, 1997).

1 "In any consideration of the rights of Minorities under contemporary international law, the right of existence must be a necessary prerequisite for other rights": P. Thornberry, International Law and the Rights of Minorities (Oxford: Clarendon Press, 1991), 57; Y. Dinstein, "The Right to Life, Physical Integrity and Liberty" in International Bill of Human Rights: The Covenant on Civil and Political Rights, ed. L. Henkin (New York: Columbia University Press, 1981), 114-137; P. Sieghart, The Lawful Rights of Mankind (Oxford: Oxford University Press, 1986), 107; "amongst all human rights, the primacy of the right to life is unanimously agreed to be pre-eminent and essential: it is the sine qua non, for all other human rights depend for their potential existence on the preservation of human life": B. Whitaker, The Study of the Question of the Prevention and Punishment of the Crime of Genocide (Revised and Updated) UN Doc E/CN.4/Sub.2/1985/6; "there must surely be unanimity among members of the United Nations on the primacy of the right to life. The emphasis on human rights would be quite meaningless without the survival of living subjects to be the carriers of these rights. And the circumstances of the founding of the United Nations, as well as its charter, declarations, and covenants, seem to establish without doubt that in the midst of the sharpest conflict of ideologies, of values, and of national interest there is unanimity among the member states on the primacy of the right to life": L. Kuper, The Prevention of Genocide (New Haven: Yale University Press, 1985), 3; "who can doubt that right to life in a literal sense is the most basic rights of all": I. Claude, Jr, National Minorities: An International Problem (Cambridge, Mass: Harvard University Press, 1955), 156.
least its violation is tolerated by sovereign States, who are the main subjects of international law. The present article is written with two primary objectives. Firstly, the paper while marking the fifty years of independent history of Pakistan, highlights two unfortunate instances where persecution, discrimination and physical extermination of ethnic, linguistic and religious groups has taken place. The first incident took place at the time of the partition of British India and despite the magnitude of the tragedy has not received due consideration in international legal literature. The second case involves the persecution, discrimination and genocide of the population of East Pakistan which prior to 1971 formed part of Pakistan. Secondly, through the case study of Pakistan, the paper attempts to show that while the international community has remained apathetic largely due to political considerations and constraints, the current international legal norms relating to the protection of the rights of minorities, are in themselves inadequate in a number of ways.

The paper is divided into five main sections. After the present introductory section, section II analyses the international legal obligations incurred by Pakistan in relation to the protection of physical existence of minorities. Sections III and IV present a detailed legal analysis of the situations where it is contended that genocidal activities have been conducted. In each instance the role of the international community is analysed. The final section provides concluding comments and observations.

II. International Legal Obligations of Pakistan in Relation to Protecting the Physical Existence of Minorities

The rules relating to the prohibition of the physical extermination of minorities in contemporary international law, are reflected in the Convention on the Prevention and Punishment of the Crime of Genocide (1948) (hereafter the Genocide Convention), and the definitional

---

2 "... It is almost impossible for this [genocide] to be committed other than at the connivance or toleration of state authorities": L. Green, "International Criminal Law and the Protection of Human Rights", in Contemporary Problems of International Law: Essays in Honour of Schwanzenburger on his Eightieth Birthday, ed. B. Cheng and E. Brown (London: Stevens and Sons Limited, 1988), 116-137, 35.

3 77 UNTS 277; HMSO, Misc. No (1966), Cmnd. 2904.
provisions of the treaty can be treated as providing the minimum that international legal norms afford to minorities. Considering the value of the Genocide Convention it is significant to note that Pakistan showed a keen interest in its rapid adoption, voting for it both in the Sixth Committee and in the Plenary Session of the General Assembly. It is a party to the Genocide Convention and the *Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity*, thus reaffirming the provisions contained in these instruments. Although Pakistan has not enacted any specific legislation to give effect to the provisions of either of these conventions, it is clear that she still remains bound by their provisions under international law.

While there are difficulties in laying assertive claims as regards the criminalization of cultural genocide in conventional as well as customary law the *travaux préparatoires* of the Genocide Convention reveal that Pakistan considered "cultural" genocide as a crime under international law. The force of authority for this assertion derives from the position adopted by the delegation of Pakistan in the UN General Assembly where the issue was being debated. During the debates the representative of Pakistan in the Sixth Committee, spearheaded an

4 Thornberry, *supra* n.1, at 105.
5 754 UNTS 73; 8 ILM 68; 1968 YBHR 459; 9 IJIL 317; ratified by Pakistan 10 January 1958.
6 See *The Reply of Pakistan in Question of the Punishment of War Criminals and of Persons who have Committed Crimes against Humanity, Report to the Secretary General* 25 UN GAOR Annex I (Agenda Item 30), at 24, UN Doc. A/8038/Add 1, 1970.
8 Thornberry, *supra* n.1, at 392.
emotional charge of "cultural" genocide conducted by India at the time of partition. Pakistan made strenuous efforts to have cultural genocide specifically incorporated in the Convention, and its failure was taken as a serious blow to the cultural contribution of smaller groups. In the plenary meeting Pakistan's representative Begum Ikramullah said:

"... it must be realised that very often a people did not differ from its neighbours by its racial characteristics but by its spiritual heritage. To deprive a human group of its separate culture could thus destroy its individuality as completely as physical annihilation. Moreover, those guilty of the crime of mass extermination committed that crime because the existence of a community endowed with a separate cultural life was intolerable to them. In other words physical genocide was only the means, the end was the destruction of a peoples' spiritual individuality."  

Pakistan has also manifested strong support for the principle of equality and non-discrimination for all individuals regardless of race, colour, religion and sex. It actively participated in the preparation and adoption of the Universal Declaration of Human Rights, despite resistance from certain religious elements protesting that some provisions of the Declaration were contrary to the spirit of Islam. This active participation was prompted by a belief, in the words of its representative Begum Ikramullah, in the dignity and worth of man. She stated:

"... It was imperative that the peoples of the World should recognise the existence of a code of civilized behaviour which would apply not only in international relations but also in domestic affairs."

In the international forum Pakistan has demonstrated not only its

10 LeBlanc, supra n.9, at 206; Claude, Jr, supra n.1, at 155.
11 According to S. Ikramullah, Pakistan's Representative at the UN, the deletion of the provisions relating to cultural genocide "destroyed the very letter and spirit of Resolution of December 1946 because it effectively deprived the contributions of small groups of people" S. Ikramullah, Pakistan Horizon (Karachi: Pakistan Publishing House, 1948), 234.
14 GAOR, 3rd Session, Part 1, third Committee, 90th meeting, 1st Oct. 1948, 37.
commitment towards establishing a regime of non-discrimination and equality of treatment for all individuals regardless of race, religion and sex but initiated moves to protect its religious minorities. In 1950, it entered into treaty obligations with India in relation to the protection of its minorities and established a ministry to ensure the observation of these international obligations. 15

Pakistan was also actively involved in the adoption of a number of international instruments including the International Covenants. Indeed, in so far as the issue of protection of groups is concerned Pakistan has taken an extremely firm and positive stance. In addition to the vigorous stance put forward by the Pakistani delegate on the subject of "cultural" genocide, the views of the Pakistani representative during the debates on Article 27 of the International Covenant on Civil and Political Rights (ICCPR) are of significance. Article 27 of the ICCPR, it needs to be noted, continues to be the single most important provision in an internationally binding instrument which aims to provide a direct protection to individuals belonging to ethnic, linguistic and religious minorities at the global level. The Pakistani representative, Begum Aziz Ahmed considered "[article 27] to be the most important in the whole Covenant. The existing text was satisfactory, and she was prepared to vote for it as it stood .... There were several religious minorities in Pakistan whose sentiments had always been respected and protected by law. In Pakistan, freedom of religion, language and culture was not only advocated but practised with pride". 16 Pakistan also played a key role in the preparation of the Convention on the Elimination of All forms of Racial Discrimination, and was in fact the third State to have ratified it, 17 an apparent reflection on the part of the State towards establishing a regime of racial non-discrimination.

15 131 UNTS (1950).
17 "Pakistan was among the very first states to sign the Convention and the third to ratify it", Sixth Periodic Report of Pakistan before the Committee, CERD/C/66/Add.10 para 8.
III. Physical Extermination of Religious Minorities Committed after the Partition of India

The ancient history of India bears considerable scars of the traditional rivalry between Hindus and Muslims. The failure of these communities to reach a constitutional settlement and the prospect of partition flared up these traditional hostilities to the extent of an open conflict. As the independence of India approached, with the knowledge that a partition was to take place, communal violence broke out with an unprecedented ferocity in various parts of the country. The incision was arbitrary, it was also “unforeseen in magnitude, unordered in pattern, unreasoned in savagery ... as many Indians would lose their lives in that swift splurge as Americans in four years of combat in World War II”.

While acting as a catalyst to the most savage genocidal conflict with open attempts at annihilating religious groups it is also reputed to have conceived the largest inter-country transfer of population in the twentieth century. According to Ben Whitaker and his colleagues “in all nearly one million people were killed during the period of partition. A total of some eight million refugees moved from India to Pakistan and a similar exodus of Hindus and Sikhs took place in the reverse direction”. The frenzy and madness that this partition brought about, took its toll on the religious minorities on both sides of the frontier. Innocent Muslims, Hindus and Sikh civilians were involved in the bloody “holy” wars. While the Muslim minorities left behind in India

19 Ziring, supra n.18, at 67; A. Gledhill, Pakistan: The Development of its Laws (London: Stevens and Sons, 1957), 60.
22 Whitaker, supra n.1, at 7.
became an easy prey for the Hindus, equally brutal massacres took place inside the frontier of Pakistan of Hindus and Sikhs.

In a majority of instances angry and violent mobs, infuriated at the (often widely exaggerated) stories of the killings and torture of their co-religionists, and the rape, assaults and other forms of degradation of their women produced such venom and fury that they lost all senses and in a determined mood of vengeance went ahead to kill in the most tortuous manner possible anyone, belonging to the opposing religion. Everywhere in India and Pakistan, religious minorities became victims of a campaign of physical extermination and their harrowing stories have filled volumes.23

The province of Punjab vivisected in an artificial manner, had left nearly 5 million Hindus and Sikhs in Pakistan and over 5 million Muslims in India.24 Not surprisingly it became one of the worst affected areas, where nearly half a million people perished becoming victims of the genocidal conflict. Describing the incidents that took place in Punjab during August-September 1947, Collins and Lapierre state:

It would be unique, a cataclysm without precedent, unforeseen in magnitude, unordered in pattern, unreasoned in savagery. For six terrible weeks, like the ravages of the medieval plague, a mania for murder would sweep across the face of northern India. There would be no sanctuary from its scourge, no corner free from the contagion of its virus. Half as many Indians would lose their lives in that swift splurge as Americans in four years of combat in World War II.25

Similarly Bengal witnessed particularly distressing incidents of mass torture and killings. Collins and Lapierre provide the following account:

mobs howling in quasi-religious fervour came bursting from the slums, wavering clubs, iron bars, shovels, any instrument capable of smashing to a pulp any Hindu in their path and left the bodies in cities gutters ... Later, the Hindu mobs came storming out of the neighbours, looking for Muslims to slaughter. Never in all its violent history, had Calcutta known 24 hours as savage as packed with human viciousness like water-soaked logs, scores of bloated cadavers bobbed down the hooghly river towards

24 Kuper, supra n.23, at 65; Collins and Lapierre, supra n.20, at 284.
25 Collins and Lapierre, supra n.20, at 284.
the sea. Other corpses, savagely mutilated, littered the city's streets. Everywhere, the weak and helpless suffering most...

Admittedly, the forces of confusion that were unleashed by the unplanned and disorganised partition of India and the hostile environment of charges and counter-charges make it extremely difficult to gauge those who were responsible for such large scale genocide. Nonetheless, acts of genocide, regardless as to whether by public officials or private individuals, are punishable. Having said that there is also sufficient evidence to suggest that the new governments of India and Pakistan were, to an extent, responsible for allowing the physical extermination of the minorities to take place. The views of a British officer stationed in West Pakistan are instructive when he says that "despite noble professions there was no real desire to punish those who robbed, raped and murdered the minority communities, rather there was a disposition to punish those who tried to protect them". It may well be that in such frenzied conditions it is difficult to maintain law and order, but there remains substantial evidence that members of the police and army were themselves suffering from communal hatred. In a number of cases the government officials through their actions encouraged unruly mobs to carry out and perpetuate massacres. According to Kuper, "part of the difficulty was that the forces of law and order proved unreliable, having become infected by communal fears and hatreds. The police, the military, railway clerks and other officials, were often themselves involved in massacres or did not intervene". In Lahore, whole street of Hindu homes were ablaze, while Muslim police and troops stood by watching. Another example is that of Sheikhupra where:

the entire Hindu and Sikh community was herded into an enormous "godown", a huge warehouse used by the town bank to store the sacks of grain held as collateral for its loans. Once inside, the helpless Hindus were machine gunned by Moslem police and army deserters. There were no

26 Supra n.20, at 284.
28 Moon, supra n.23, at 237.
29 Kuper, supra n.23, at 67.
30 Supra n.23, at 67.
31 Collins and Lappierre, supra n.20, at 285.
survivors. A number of sources corroborate the view of complicity on the part of law enforcing agencies during massacres which were carried out by unruly mobs. It is argued that the armed forces that were assigned the task to prevent any such occurrences, often failed to take action while some joined in the plundering and looting themselves. While millions of Hindus and Sikhs were forced to flee from their homes, in Punjab and Sindh, the urge to drive them out was due to a considerable extent to the greed of taking over land and property left by their fleeing victims. The Governments of India and Pakistan had promised to protect the lives and properties of their religious minorities, a view subsequently reaffirmed by the 1950 treaty between the two States. In actual practice, however the properties of these persecuted minorities was taken away permanently, never to be returned. In Pakistan, in a number of instances, the properties taken away from Hindus and Sikhs were arbitrarily distributed amongst political supporters. Besides that large settlements of refugees were established despite resentment on the part of the local population.

The role of the international community

The incision of India in such arbitrary a manner had momentous consequences as far as the issue of physical protection of minorities was concerned. It resulted in the extermination of more than one million civilians and the creation of at least twelve million refugees, one of the biggest human migrations of history. More importantly being the first

32 Supra n.20, at 287.
33 Supra n. 20, at 284.
34 UNTS 131, 3 (8th April) 1950.
major act of genocidal activity since the Nuremberg trials and adoption of the General Assembly Resolution 96(I), it was to reflect, on a practical plane the weaknesses that were inherent in the issue of physical protection of minority groups. It is contended that while the Nuremberg trials set a clear precedent, the tone of the General Assembly, in Resolution 96(I) was declaratory of the principles of international law and was binding on all States, including those that emerged subsequent to the adoption of the Resolution. 38

The debates of the United Nations clearly reflect the view that both India and Pakistan recognised the international legal obligations relating to the protection of minorities. 39 On the other hand it was equally clear that as far as this issue of protection of minorities was concerned, the whole environment was one of charges and counter-charges of incompetence, indifference, of being accomplices or participants to genocide. 40 Hence Pakistan's official declaration to the Security Council stated:

It became clear that [the government of India] were determined to leave no Muslims in East Punjab. The Pakistan government appealed to the government of British Commonwealth to arrange a conference to find ways and means of removing the serious threat to the peace and security of the Sub-continent, but Indian government opposed this proposal. 41

Although the governments of both Pakistan and India promised to undertake strict measures to ensure the protection of their minorities, subsequently reconfirmed by the 1950 treaty, 42 it is submitted that their acts failed to put these intentions into practice. Both States have denied having any involvement into the genocidal conflict. There were no

The Role of Indian Muslim Refugees in the Constitutional Developments of Pakistan", Contemporary South Asia 3/2 (1994), 111-129; Whitaker et al, supra n.21, at 7.


39 See LeBlance, supra n.9.


41 3 SCOR, Supp for Nov. 1948, 77-8; also see No 64 289th-290th meeting 7 May, 21, 312 meeting, 3 June supp for June 1948, 78.

42 131 UNTS 3 (8 April 1950).
serious investigations, and no trials were held for involvement of
individuals in acts of genocide. While millions were devastated, both
the States of India and Pakistan were in a position to refute any
imputability as well as deny any complicity with any acts of genocide.

IV. Genocide in the Former East Pakistan

There is substantial evidence to suggest that Pakistan had been
involved in committing large-scale violations of human rights including
physical extermination of various minorities in the former East
Pakistan. The reason that led to such an unfortunate scenario lie
primarily in large scale discrimination and attempts at forced
assimilation of the Bengalis of East Pakistan and treating it as a colony of
West Pakistan. The alleged atrocities, including large-scale genocide,
was a consequence of the civil war which began following a decision of
the military leaders to postpone the calling of the National Assembly
which was also to frame a new, democratic constitution for Pakistan.
The Assembly members had been elected through the general elections
held in the country in December 1970, the first ever based on adult
franchise. The Awami League (the main Bengali opposition party)
scored a dramatic and overwhelming victory, obtaining 167 of 313 in
the National Assembly. It had an overwhelming victory in East Pakistan
having gained 160/162 seats. The unequivocal and complete support
which the Awami League had, is reflected from the fact that the party
managed to win all but two seats in the National Assembly. The
election results came as a shock to the West Pakistan military and
politicians and their unwillingness to allow the Awami League to frame a

43 Personal Interviews.
44 A. Mascarenhas, The Rape of Bangladesh (Delhi: Vikas Publications, 1971);
International Commission of Jurist, supra n.7; Kuper, supra n.23, at 76-80;
R. Jahan, “The Bengalis of East Pakistan” in Genocide and Human Rights: A
Global Anthology, ed. J. Potter (Lanham: University Press of America,
1982), 256-258.
45 V. Nanda, “Self-Determination in International law: The Tragic Tale of
Two Cities — Islamabad and Dacca”, American Journal of International
Inaction in the Bangladesh Crises”, Denver Law Journal 49 (1976), 53-67;
E. Suzuki, “Self-Determination and World Public Order: Community
Response to Territorial Separation”, Virginia Journal of International Law
16 (1978), 779-862.
new constitution (based on their 6 points manifesto seeking greater autonomy) and form the government led to the postponement of the calling of the session of the Assembly.

This gesture of the West Pakistan army was, however, widely perceived in East Pakistan as another move to deny the Bengalis their legitimate democratic rights. Sheikh Mujib-ur-Rehman, the Awami League leaders’ call for a general strike led to a large-scale civil disobedience movement with a refusal to pay taxes and a total strike in government businesses and offices. The West Pakistan rulers, instead of ameliorating the political grievances of the Bengalis, attempted to resolve the problems through use of military force. On the 25th of March 1971, the Pakistan military struck with devastating brutality, with the intention of “weeding-out” all opposition, and the country of all anti-Islamic elements, in particular the Hindus.

However, the official contention remains that the military actions taken after 25 March 1971 were purely to bring the civil war to an end. According to the White Paper that was produced by Pakistan government:

The action of Federal government on 25 March 1971, was designed to restore Law and Order, which had broken down completely during the Awami League’s non-violent non-co-operation movement.46

The real picture, however, was completely different. It was in fact the denial of the legitimate demands of the rights of Bengalis with the postponement of the calling of the newly elected National Assembly to draft a constitution for Pakistan which prompted the non-co-operation movement and the decision instead to coerce the Bengalis through brutal use of force that created a law and order situation. According to the International Commission of Jurists:

The charge that there had been a complete breakdown of Law and order is not justified, at least up to 24 March. The breakdown of Law and order which then occurred was a consequence of the breakdown in talks, of the decision to re-assert the authority of the army, and of armed resistance to that decision.47

The scale of the atrocities committed by the West Pakistan forces


47 International Commission of Jurists, supra n.7, at 23.
were horrendous and difficult to find parallels with. According to J Salzburg the atrocities committed in East Pakistan included:

- Killing and torture;
- Mistreatment of women and children;
- Mistreatment of civilians in armed conflict;
- Religious discrimination;
- Arbitrary deprivation of property;
- Suppression of the freedom of speech, the press and assembly;
- Suppression of the right of migration.

Exact figures are not available although it is estimated that between 1-3 million people died and roughly 10 million were forced to become refugees. The events subsequent to March 1971 make it quite obvious that the army was determined to physically exterminate at least certain sections of the population including the Mukhti Bhani activists, the students and Bengali Hindus.

The sheer brutality with which the campaign was conducted to exterminate the Bengalis, and in particular the Hindus, provides one of unfortunate examples of human history. The International Commission of Jurists opine:

The principal features of this ruthless operation were indiscriminate killing of civilians, including women and children and the poorest and weakest members of the community, the attempt to exterminate or drive out of the country a large part of the Hindu population; the arrest, torture and killing of Awami League activists, students, professional and business men and other potential leaders among the Bengalis, the raping of women, the destruction of villages and towns; and the looting of property. All this was done on a scale difficult to comprehend.

49 Figures have varied considerably according to the political inclination of the commentator. Jahan puts the figure at between 1-3 million supra n.44, at 257; Kuper, supra n.23, at 79; L. Kuper, The Prevention of Genocide (New Haven: Yale University Press, 1985), 48. According to Whitaker “Three million has become established as the number of people who were killed in all during the period of terror between March and December 1971”; Whitaker et al, supra n.21, at 8.
50 “In the early 1970’s ten million people left what is now Bangladesh and fled to India”: P. Hyndman “Developing Refugee Law in Asia Pacific Region: Some issues and prognosis”, Asian Yearbook of International Law, 1 (1990), 19-44, 23.
51 See Nanda, “A Critique” supra n.45, at 55.
52 International Commission of Jurists, supra n. 7, at 26-27.
The role of the international community

In the face of this clear evidence of massive violations of individual and collective rights including large scale genocide, the organs of the United Nations remained unwilling or unable to take any action. Under the United Nations Charter the key guardian of international peace and security is the Security Council. Although the extent to which the Security Council could act in situations where there are gross violations of human rights but may not have any international dimensions is not crystal clear, it nonetheless has the discretion to determine under the provisions of Chapter VII whether there exists a threat to international peace and security.

According to article 39, the Security Council: “shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”. It is arguable that since the start of the conflict in March 1971, on numerous occasions, action was called for on the part of the Security Council. Indeed, the memorandum of the Secretary-General in July 1971 makes the point very clear when he says:

... I have reluctantly come to the conclusion that the time is past when the international community can continue to stand by, watching the situation deteriorate and hoping that relief programmes, humanitarian efforts and good intentions will be enough to turn the tide of human misery and

53 Ibid, at 98.
54 See P. Malanczuk, Humanitarian Intervention and the Legitimacy of the Use of Force (Amsterdam: Het Spinhuis, 1993), Inaugural Lecture at the University of Amsterdam 22 January, 1993, 16-23; also see I. Brownlie, “Humanitarian Intervention” in Law and Civil War in the Modern World, ed. J. Moore (Baltimore: John Hopkins University Press, 1974), 26; “A finding of a ‘threat to the peace’ is, to a large degree, a political decision on the part of the Council and so such a finding as regards a wholly internal situation is not precluded. Generally, however, the permanent members are not going to exercise this discretion unless the situation has potential international repression which could affect their interests or even involve them in an escalating conflict”: N. White, The United Nations and the Maintenance of International Peace and Security (Manchester: Manchester University Press, 1990), 36; R. Higgins, The United Nations: Appearance and Reality, Josephine Onoh Memorial Lecture (Hull: University Press, 1993), 10.
potential disaster. *I am deeply concerned about the possible consequences of the present situation, not only in the humanitarian sense, but also as a potential threat to peace and security and for its bearing on the future of the United Nations as an effective instrument for international co-operation and action.*

There were serious political differences on the issue of East Pakistan in the Security Council and it was "seized" of the matter only after active hostilities broke out between India and Pakistan in December 1971, nine months after the civil war had started with its consequent violations of human rights and mass exodus of refugees. Ultimately when it did begin its deliberations on 4th December, the political and ideological differences immediately came to surface.

The Indian and Pakistan governments charged and counter-charged each other. While the Indian representative accused Pakistan of denying the legitimate aspirations of autonomy to the Bengalis and of committing genocide, the Pakistan delegate refuting all these allegations counter-charged India of provoking and encouraging a secessionist movement. The issue became a pawn in the hands of the major powers, with the US and China supporting Pakistan and asking for an immediate cease-fire and military withdrawal, and the Soviets siding with India and insisting on the immediacy of a political settlement in East Pakistan. Ultimately these political and ideological differences prevented any form of action with the Soviets Vetoing a draft Resolution.

Given this impasse in the Security Council, the matter was then referred to the General Assembly, who could take action under the Uniting for Peace Resolution. There was a sense of urgency in the General Assembly and a strong consensus on the ways things should operate. It must, however, be noted that this consensus suggests that the prime concern of the members was upon the insistence of the territorial integrity, State sovereignty and the retention of status quo. Kuper accurately describes the situation:

The basis of this consensus [in the General Assembly] was the commitment to two general principles of international relations between independent states, namely, respect for their sovereignty and their territorial integrity,
and non-interference in their internal affairs. To this must be added the fear of fragmentation as a result of the exercise of the right to self-determination.\textsuperscript{59}

The Indian invasion of East Pakistan in December 1971 was unacceptable to the majority and the action was deplored in the General Assembly.\textsuperscript{60} Indeed, the vote on the issue overwhelmingly:

Reflected the disapproving attitude by most states to the secession of Bangladesh from Pakistan and India's armed intervention. Many of them were no doubt anxious to discourage dissident minorities in their own states from taking the same course ... The US on December 12 requested that the Security Council be re-convened due to "India's defiance of world opinion" in respecting the General Assembly's call for cease fire and withdrawal of troops.\textsuperscript{61}

The actions taken in other UN organs, including those specifically related to Human Rights had shown a similar unease. The issue was brought before Sub-Commission largely as a result of the initiatives of those international Non-Governmental Organisations, which have a consultative status with the ECOSOC. Salzburg, a representative of the International Commission of Jurists, added his voice to the plea that the Sub-Commission take action under the mandate of ECOSOC Resolution 1235 (XLII). However, the stance adopted by members of the sub-commission was far from being satisfactory and conspicuously failed to show any real concern for the violations of the rights of the Bengalis.

Mr Janis, the Indian observer pointed to the human rights situation and in particular, the influx of millions of refugees into India.\textsuperscript{62} The representative of Pakistan, Mr Khan challenged these assertions, arguing that the present matter was beyond the scope of the consideration of United Nations bodies since it affected the territorial integrity of States.\textsuperscript{63} As to other members of the Sub-Commission, the participation remained minimal, and only three members actually participated in the

\textsuperscript{59} Kuper, \textit{supra} n.49, at 58.

\textsuperscript{60} The General Assembly vote was 104-11 (10 abstentions) calling for an immediate cease-fire and instant withdrawal of Indian troops GA Resolution 2793 XXVI, 7 December 1971.

\textsuperscript{61} International Commission of Justice, \textit{supra} n.7, at 85; S/VP. 1611, December 12, 1971, 11.

\textsuperscript{62} For his comments see UN Doc E/CN.4/Sub SR.625-35, 1971, 139-144.

\textsuperscript{63} For his comments \textit{supra} n.62, at 145-6.
debates,\textsuperscript{64} and indeed one of them remained opposed to any discussion in the belief that these matters fell within the domestic jurisdiction as provided by article 2(7) of the UN Charter.\textsuperscript{65}

Although there was some consideration of the conflict, the concern that was shown, at most related to humanitarian issues. Only one member, Branimic Jankovic from the former Yugoslavia, deplored the apathetic approach urging the members of the Sub-Commission not to remain silent as a matter of individual conscience arguing “that when faced with a situation affecting tens of thousands of persons, members were inclined to suppress their feelings and conscience. But in such a situation, the sub-commission should not remain silent ... “.\textsuperscript{66}

The Sub-Commission unfortunately remained silent, and failed to take any action under Res. 1235 (XLII). The sounds of silence, however were not only characterised in the Sub-Commission, but transcended through the entire fabric of the UN organisation. The Commission on Human Rights did not meet at all during the East Pakistan crisis. Although, the treaty based body of the Convention on the Elimination of All forms of Racial Discrimination did meet twice during 1971, it failed to show any real concern for violations of human rights.

The crisis of East Pakistan had its roots in the racially discriminatory and undemocratic political and constitutional stance of the West Pakistan politicians and army, and Pakistan being a party to the said convention, the committee had the mandate to inquire into greater detail the constitutional and political shortcomings of Pakistan. Having decided that Pakistan’s report was not adequate, the committee in its April session asked Pakistan, alongside 16 other States to provide supplementary information at the committee next session due in September. No subsequent action was undertaken in its September session nor did Pakistan comply with the committee’s earlier requests. Admittedly there was some consideration of the matter in the Economic and Social Council in July 1971\textsuperscript{67}, and in the third committee of the General Assembly,\textsuperscript{68} though the focus of the concern related largely to humanitarian aspects.

\textsuperscript{64} Supra n.62, at 74, 146.
\textsuperscript{65} Supra n.62, at 74
\textsuperscript{66} Supra n. 62, at 74-75.
\textsuperscript{67} UN Monthly Chronicle (No 8) 1972, August-September, 1971.
\textsuperscript{68} UN Monthly Chronicle (No 11) 124-126, December 1971.
While the United Nations remained deadlocked over the issue, the fate of East-Pakistan was sealed by the final Indian invasion and surrender of the Pakistani troops in December 1971. The failure of the United Nations to take any positive action, and its inability to make any constructive use of the array of its human rights instruments were echoed in the comments of the Indian Ambassador when he exclaimed "what, indeed, has happened to our convention on genocide, human rights, self-determination and so on". Reflecting on the general disillusionment Salzburg writes:

The United Nations never deliberately considered the massacres of at least several hundred thousand persons and the perpetration of forms of gross violations of human rights in Bangladesh, formerly East Pakistan, from March to December 1971. The United Nations non-response to these tragic events represents a serious omission in the exercise of its responsibility to promote human rights. Prompt United Nations consideration of the human rights violations when they were first reported might have prevented further violations as well as the secession of Bangladesh from Pakistan and the hostilities between India and Pakistan. The Bangladesh experience vividly illustrates the inextricable relationship between the United Nations Charter principles of promoting human rights and maintaining peace and security. It also illustrates unfortunately, that member states consider that the charter's principles of non-interference in matters essentially within the domestic jurisdiction of a member state may prohibit UN intervention until a situation reaches a level of international conflict incapable of a non-violent solution. Scholars of UN affairs should consider the implications of Bangladesh experience in terms of UN capability to prevent human right violations.

It remains clear that ever since active civil war started on 25 March 1971, Indian actions, in providing active military support to *Mukhti Bhani* (the insurgent group) and its subsequent engagement in the military operations towards the end of November 1971, with the invasion and occupation of some of Pakistan's territory and capture of its military armament were in breach of the customary and treaty norms of non-intervention into the affairs of another State.

It seems doubtful that even after the pre-emptive strikes on the part of the Pakistan military on Indian territory, the full scale invasion of India could be sufficiently justified simply on the orthodox and

69 S/PV/606, 32.
It has to be conceded that India was forced to accept nearly 10 million refugees and their maintenance was having serious consequences for the Indian economy. Equally it needs to be noted that the treatment of the Hindu population by Pakistan, particularly with reference to the 1950 treaty did provide India with a more immediate concern than the rest of the international community. On the other hand, Indian political motives remain extremely important and could not be overlooked.

It is clearly arguable that while Indian politicians occasionally and rather inconsistently relied upon the doctrine of humanitarian intervention, India had strong political interests in the breaking-up of the State of Pakistan, and that the invasion and subsequent defeat of the Pakistan army was not so much prompted by humanitarian concerns or a desire to uphold the principles of human rights and self-determination but by a desire to break up its arch enemy, whose existence it had with grave reluctance and only grudgingly accepted.

Equally instructive is Nanda's argument when he says "As to India's motives, it unquestionably must have welcomed the opportunity to split Pakistan into two countries and weaken it, thereby minimising the perceived threat to India from a stronger Neighbour". India itself has been involved in a number of instances notably in Kashmir, Nagaland and Punjab where it has prima facie denied the minorities aspirations of


"We are glad that we have on this particular occasion absolutely nothing but the purest of motives and the purest of intention; to rescue the people of East Bengal from what they are suffering", per Indian Ambassador S/PV/606, 18.


autonomous development or self-determination.\textsuperscript{75}

\textit{Issue of punishment of individuals involved in genocide}

If the East Pakistan saga was to exemplify the view that in an environment where political concerns predominate any humanitarian values (making the \textit{prevention} of the physical extermination and genocide of minorities difficult and cumbersome) the \textit{punishment} of those involved in such crimes was to prove impossible. Despite the coming into effect of the Genocide Convention, article IX of which provides the International Court with the compulsory jurisdiction to settle dispute amongst contracting parties in relation to “interpretation, application and fulfilment of the Convention”, States have remained reluctant to bring any such disputes before the International Court. The tragedy of East Pakistan was also, at long last, to break the silence of this provision of the Convention, with the proceedings instituted being the first ones in the 20 year history of the Convention.\textsuperscript{76}

Ironically it was neither Bangladesh, India or any other State sympathetic to the cause of the Bengalis that initiated the action but the Pakistan government itself which brought interim proceeding against India as a tactical move.\textsuperscript{77} India, which had custody of Pakistan’s prisoners of war, had agreed with Bangladesh that it would hand over to Bangladesh several thousand individuals who would then be charged with a number of war crimes including genocide. On 11 May 1973

\textsuperscript{75} \textit{Supra} n.73.

\textsuperscript{76} In relation to Article IX which provides for the jurisdiction of the ICJ, the imprint of Pakistan remains significant. Pakistan’s allegations in relation to cultural genocide as conducted by India led the Indian delegate to fear a clause providing for the courts jurisdiction “would make it possible for an unfriendly state to charge, on vague and insubstantial allegations that another state was responsible for genocide within its territory”: UN GAOR, Sixth Committee (103 mtg.) 437 (1948); also note the position of India in relation to the issue of Jurisdiction of the International Court of Justice on Article IX of Genocide Convention See The International Court of Justice, \textit{Pleadings Oral Arguments, Documents, The case concerning the Trial of Prisoners of War (Pakistan v India)}, ICJ pleadings, the Opening of the Oral proceedings and the views of Mr. Bakhtiar, Counsel for Pakistan, 47.

\textsuperscript{77} \textit{Trial of Pakistan Prisoners of War}, ICJ Reports 1973, 347; H. Levie, “Legal Aspects of the Continued Detention of the Pakistani Prisoners of War by India”, \textit{American Journal of International Law} 67 (1973), 512-516.
Pakistan, in an attempt to prevent the trials and to secure their repatriation to Pakistan, filed an application with the ICJ instituting proceedings against India seeking interim measures of protection.\textsuperscript{78}

Pakistan had been of the view that India was acting in violation of the third and fourth Geneva Convention of 1949 by detaining 92,000 Pakistani prisoners of war whom India had a duty to repatriate. Similarly in Pakistan's view, were any trials to be conducted, Bangladesh would neither have the jurisdiction nor provide an appropriate forum. It claimed jurisdiction to try the persons accused of genocide in its own tribunals contending that Bangladesh could not provide a "competent tribunal" as was envisaged by article VI of the Genocide Convention since the atmosphere prevailing in those trials would be highly emotional and extremely prejudicial to the accused.\textsuperscript{79} Pakistan in its application sought the following interim measures:

1. That the process of repatriation of prisoners of war and civilian internees in accordance with international law, which has already begun, should not be interrupted by virtue of charges of genocide against a certain number of individuals detained in India.
2. That such individuals, as are in the custody of India and are charged with alleged acts of genocide, should not be transferred to 'Bangladesh' for trial till such time as Pakistan's claim to exclusive jurisdiction and the lack of any other Government or authority in this respect has been adjudged by the Court.\textsuperscript{80}

However, already in April 1973, Bangladesh had announced that it


\textsuperscript{79} "... It is not possible to have a "Competent Tribunal" within the meaning of Article VI of the Genocide Convention in "Bangladesh" in view of the extreme emotionally charged situation that prevails there. This was demonstrated in the recent trials of the "Collaborators" when Sir Dingle Foot, the Chief Counsel for Dr A.M Malik the former Governor of East Pakistan, and others, was allowed to enter Dacca on 13 November 1972, and the former Governor and other eminent persons were convicted and sentenced to brutal punishments after summary proceedings for so-called complicity with the Pakistan forces in the alleged acts of genocide. Moreover, the requirements of a "competent Tribunal" are that it must apply international law, have impartial judges and allow the accused to be defended by counsel of their choice. Further no retrospective application of law is permissible": The International Court of Justice, \textit{Pleadings Oral Arguments, Documents}, supra n.76, para 10, 6-7.

\textsuperscript{80} \textit{Supra} n. 76, at 17-18.
would proceed to try 195 Pakistani nationals “for serious crimes, which include genocide, war crimes, crimes against humanity, breaches of article 3 of the genocide convention, murder rape and arson”. It also legislated an International Crimes (Tribunals) Act in July 1973 providing for the trials of those accused 195 prisoners, and had requested a number of experts to come and observe as trial observers.

The case before the international Court was to prove short-lived never proceeding to a discussion of the merits, being settled by agreement between India and Pakistan in August 1973, and leading to Pakistan’s Declaration of 14 December to drop the suit against India. Through the aforementioned accord India and Pakistan reached an agreement for the repatriation of 91,000 prisoners of War and civil internees that were held by India, save for the 195 soldiers that were alleged to have been primarily involved in committing war crimes and genocide. Sufficient evidence, it is submitted, would have been available at that time to try those involved in war crimes, crimes against humanity and genocide. As far as trials for genocide were concerned Bangladesh had already accepted that it was obliged to act in accordance with the provisions of the Genocide convention.

It would be appropriate here to counter the two objections raised subsequently by the Pakistan government. The first one relates to the territorial jurisdiction of Bangladesh, that Bangladesh could not be an appropriate forum to try persons accused of committing genocide. However a closer analysis of article VI exposes the fallacy of this argument. Article VI requires such trials to take place “by a competent tribunal of the State in the territory of which the act was committed, or by such penal tribunal as may have jurisdiction”. Since there is no restriction as to the timing of the coming to existence of a new State, it would have seemed perfectly compatible with the intentions of the article, firstly to treat Bangladesh as “the State in the territory of which the act was committed” and secondly to regard the newly formed government as having jurisdictional competence to try the alleged


82 India-Pakistan Agreement on Repatriation of Prisoners of War, 12 ILM (1973), 1080-84.

83 See India-Pakistan: Agreement on Bilateral Relations and statements on its implementation, 3 July 1972, 11 ILM (1972), 954-957.
offenders.\textsuperscript{84} It is clear that Bangladesh as a successor State to Pakistan could appropriately and legitimately claim jurisdiction, to try war crimes and crimes against humanity and genocide.\textsuperscript{85}

The other objection relates to the absence of implementing legislation criminalizing acts of genocide and putting in effect the provision V of the Convention in either Pakistan or Bangladesh. As we have noted already, at all material times Pakistan was a party to the Genocide Convention, although it had not adopted any domestic legislation to give effect to its provisions. It nonetheless remains clear, it was bound under international law by the provisions of the Convention as article 1 of the Convention on the Non-applicability of Statutory Limitation to War Crimes and Crimes against Humanity confirms “even if such acts do not constitute a violation of domestic law of the country in which they were committed”. Hence it could be stated with a degree of certainty that it was not an issue of jurisdiction, evidence or even the custody of the accused but one of the politics of international law.

Despite the fact that Bangladesh had emerged as an independent sovereign State and was \textit{prima facie} in a position to try war criminals, it needed recognition and political and economic support from the international community. Pressure was introduced by Pakistan with the refusal to release nearly 400,000 Bengalis which included both civilians and former members of armed forces.\textsuperscript{86} According to Paust and Blaustein:

Pakistan, contrary to the letter and spirit of the 1949 convention placed even more pressure on Bangladesh by refusing to release some 400,000 Bengalis (civilians and former members of Pakistan Armed forces) who were being held in Pakistan and utilised as pawns in complicated power game.\textsuperscript{87}

Pakistan, alongside China put further pressure on Bangladesh by refusing to recognise it as an independent State\textsuperscript{88} and indeed the urge to pressurise was so strong that it led to China’s casting of the first veto as a permanent member of the Security Council barring membership of Bangladesh.\textsuperscript{89} The first application of Bangladesh (for United Nations

\textsuperscript{84} Paust and Blaustien, \textit{supra} n.7, at 21.
\textsuperscript{85} \textit{Supra} n.7.
\textsuperscript{86} Washington Post, August 26, 1972.
\textsuperscript{87} \textit{Supra} n.7, at 35.
\textsuperscript{88} Keesings 25-31 March, 1974, 26423; \textit{Washington Post}, August 30 at 18.
\textsuperscript{89} See SCOR, 27th Year, Supp for July, August and September, S/10759; SC.
membership) was vetoed by China, the grounds given were the alleged refusal of Bangladesh to comply with General Assembly Resolutions concerning repatriation of prisoners and withdrawal of foreign troops. The grounds on which this veto was cast, related to the claim that Bangladesh, in refusing to repatriate Pakistani prisoners of war, had acted in violation of the 1949 Geneva Conventions, which as Paust and Blaustein comment:

... was a curious twist of the Geneva Conventions, especially in view of the obligations of Bangladesh and India to prosecute those accused of grave breaches of the Conventions. China and Pakistan clearly had no intention to fulfil their obligations to prosecute violations of international law. Political considerations were far more important than fulfilment of international legal responsibility.

The accountability for genocide and physical extermination of minority groups was unfortunately compromised by political ideals. In an agreement signed in Delhi on 9th April 1974, it was agreed to repatriate the 195 alleged perpetrators of genocide and other crimes of international law, implicitly recognising that none of these men involved would ever be tried or held accountable for the genocide committed in the former East Pakistan. As far as the issue of human rights was concerned the comment bearing any meaning was an apology by the government of Pakistan stating that, “it condemned and deeply regretted any crimes that may have been committed”.


90 Supra n.89: 1659 meeting, August 1972 (11-1 China, 3 Guinea, Somalia, and Sudan).

91 Supra n.89.


V. Conclusions

In the absence of States upholding and protecting the rights of minorities and punishing those involved in violating these rights, it is difficult to promote or protect the rights of minorities. There are a number of substantive weaknesses in the whole prohibition of genocide; States like Pakistan have not hesitated to capitalise on these. Fifty years on, the genocidal massacres that took place at the time of the partition have remained an unfortunate segment in memories of those who lost their precious possessions—their loved one. Similarly, the case of East Pakistan provides one of the most tragic examples of State authorities engaging and perpetuating acts of genocide. However, despite the presence of substantial evidence of physical extermination and genocide of minorities, the international community generally failed to take any concerted action. Indian actions, it is contended, were prompted by political considerations, though they nonetheless helped Bengalis in ridding themselves of an ugly form of oppression and persecution.

A sadder and perhaps more unfortunate element of the whole saga, is the fact that no trials could be held for war crimes, crimes against humanity and genocide; the international community failed once again to hold responsible and punish those individuals who had conducted such activities. Accountability for genocide was compromised by political interests. According to Professor Cherif Bassiouni:

Notwithstanding the enormous victimization and the apparent effort of Bangladesh, abetted by India, to prosecute such violation, political considerations prevailed and Bangladesh did not carry out its intentions. It did so in exchange for political recognition by Pakistan and once this recognition was given, India returned the Pakistani detainees and accused war criminals who thus escaped individual criminal responsibility. 94

Professor Lemkin once remarked, “new conceptions require new terms”, 95 he then went on to coin the term “genocide”. 96 At that time

96 “By ‘genocide’ we mean the destruction of a nation or of an ethnic group. This new word, coined by the author to denote an old practice in its modern development, is made from the ancient Greek word genos (race, tribe) and the Latin, cide (Killing), thus corresponding in its formation to such words as tyrannicide, homicide, infanticide etc.”: supra n.95, at 79.
there was the belief that in the face of genocide committed by the Nazis and their allies, the spirit of humanity was at its lowest ebb; nothing could match what was happening to the Jews in Europe. Fifty years on, the tragedies of Yugoslavia, Rwanda and Afghanistan have led to new conceptions and a new terminology - "ethnic cleansing". 97

The Genocide Convention reflects the conviction that national, ethnical, racial and religious groups have a fundamental right to physical existence. The contracting parties had committed themselves to the view that "... genocide whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish". 98 In the history of the United Nations the position that the international community adopted in cases of conflict involving minority groups on the one hand and the State on the other, unfortunately left many of these groups vulnerable to cultural as well as physical extermination. In contemporary terms, despite the apparent end to the cold war and the emergence of the "New world order", in so far as the protection of the rights of minorities is concerned, there has not been much cause for optimism. Having said that there are currently initiatives towards the setting up of an international criminal court. 99

The ad hoc international tribunal set-up by the Security Council for punishing those involved in genocide and crimes of international


98 Article 1.

humanitarian law in the former Yugoslavia\textsuperscript{100} and Rwanda\textsuperscript{101} has also made a slow and controversial start.\textsuperscript{102} Let us hope, that unlike so many cases, including the cases of the Indian Sub-Continent after 1947 and East Pakistan during 1971, a measure of justice could be achieved this time round.

