

Crimes Against Humanity in Bangladesh[†]

In April 1972 the writer paid a visit to Dacca with two objects in view. The first was to obtain further information for the study which the staff of the International Commission of Jurists was preparing on the events in East Pakistan in 1971. This is now available.¹ It contains a summary of the events and an analysis of the legal implications from the point of view of Pakistani internal law, international penal law, the right of self-determination, the role of the UN, and the role of India.

The second object was to seek to persuade the government of Bangladesh that if, as stated, they are to bring to trial senior Pakistani generals and officials on charges of war crimes and crimes against humanity, they should do so under international penal law before an international tribunal containing a majority of judges from neutral countries.

In order to explain why this was urged upon the Bangladesh government, the nature of the violations of human rights which occurred on both sides will be outlined briefly, followed by comments upon their implications under international penal law, before dealing with the trial procedures which the Commission suggested should be followed.

The serious violence began on the night of March 25, 1971, at the end of three weeks of inconclusive talks in Dacca between President Yahya Khan and Sheikh Mujibur Rahman. These were aimed at reaching agreement upon the broad lines of a new constitution to replace the military régime which had usurped power in March 1969.²

*Secretary-General International Commission of Jurists; former Minister of State in the Government of the United Kingdom.

[†]Based on an address by the author to the American Bar Association Section of International Law on August 16, 1972, at San Francisco.

¹*The Events in East Pakistan, 1971*, available from the International Commission of Jurists, 109 route de Chêne, 1224 Chêne-Bougeries/Geneva, Switzerland. Price U.S. \$3 (postage free).

²It will be remembered that in elections to the East Pakistan Constituent Assembly in December, 1970, the Awami League, led by Sheikh Mujibur Rahman had won 167 of the 169 East Pakistan seats, constituting a majority of the entire Assembly. The number of seats allocated to West Pakistan was 144. The Constituent Assembly was due to meet in Dacca on March 3, but President Yahya Khan postponed the meeting for further talks.

During the three-week period, the Pakistan army remained in their cantonments, and it is hardly an exaggeration to say that the Awami League led by Mujibur Rahman had provided the de facto government of East Pakistan. Considering the prevailing tensions, there had been remarkably little violence, apart from one major outburst against the Biharis in Chittagong from 3 to 7 March.³

On March 25 President Yahya Khan flew back to West Pakistan, and at 10 PM the army left their cantonment in Dacca. At the time it was said that their object was to restore law and order. Later it was stated that the object was to forestall an armed uprising planned for the next morning by defecting Bengali troops and police, and by Awami League supporters. In the Commission's staff study neither of these explanations was accepted, for reasons stated. The more simple and obvious explanation seemed likely to be the right one, namely, that when President Yahya Khan concluded that there was no basis for agreement upon a constitutional settlement, he decided to reassert the authority of his military régime over East Pakistan.

It was not till 1:30 the next morning that Sheikh Mujibur Rahman was arrested at his home, where he was waiting quietly for his captors—hardly the conduct of a leader of a planned armed uprising. The other Awami League leaders fled, and on the next day proclaimed a sovereign and independent state of Bangladesh accompanied by a call to the Bengali people to resist the army.

The main targets of the army's attack at Dacca were the University, the police headquarters, various bazaars or shopping areas, many of the poorer quarters of the city and the Hindu areas.

At the University the student halls were attacked. Light small arms resistance came from one of the halls but was overcome after some 35 minutes. The army shooting continued, however, till about 7:00 AM. The students killed were buried in a mass grave dug with a bulldozer, and are believed to have numbered some hundreds. Ten of the University staff were taken from their quarters and shot peremptorily. One of them, Professor Munirazzaman, was later said to have been shot by accident, and his relatives were paid compensation by the Pakistan government. There could hardly be clearer confirmation of the illegal nature of the shootings.

The police headquarters were attacked with tanks. Any who did not escape were killed. The bazaars were burnt to the ground, as were large

³The "Biharis" is the name given to the Urdu speaking Moslems who came from India to East Pakistan, mostly from Bihar, at the time of the partition of India and the founding of the state of Pakistan in 1947. They tended to remain in closely knit groups, concentrated in the main towns, continuing to speak Urdu and never becoming fully integrated into the Bengali-speaking community. There had been outbursts of communal strife against them at earlier periods of tension.

areas of the poorer quarters and the Hindu quarters. The fleeing inhabitants were machine gunned.

The shooting continued intermittently for 48 hours. According to conservative estimates, some two thousand to three thousand civilians were killed. The effect in Dacca was a cowed population, but in other parts of the country a very different situation prevailed.

In many of the main population centers defecting East Bengali soldiers and police, supported by Awami League vigilantes, seized control. The West Pakistani army was besieged in their cantonments or forced to flee to seek reinforcements. In two places army companies were wiped out.

As information about the conduct of the army in Dacca became known, vengeance was wreaked against the Biharis and some frightful massacres resulted. In some places, such as Chittagong, it was up to two or three weeks before the army regained control of these other centers. When they did so, savage measures of repression followed, beginning first in towns and then in the surrounding villages.

The army were supported by Razakars, a locally recruited paramilitary force. In areas where there were Biharis, the Razakars were recruited largely from the Biharis, but in many areas they were recruited from Bengalis who were loyal to the West Pakistan connection. Later, when the army went to guard the frontiers with India, the task of preserving "law and order" in the interior fell upon these auxiliaries and upon "rangers" and police brought from West Pakistan.

The general pattern of repression was as follows:

(1) People denounced as Awami League supporters, students or Hindus were simply taken out and shot. The killing of Hindus was justified on the grounds that "Hindus are enemies of the people." The army appear to have been the victims of their own propaganda, which erroneously proclaimed that it was the Hindus, acting as the agents of India, who had led the Awami League and the people of East Bengal to demand autonomy. In fact, all the leaders of the Awami League were Moslems, and there were few Hindus among its membership.

(2) Any areas or villages from which shots were alleged to have been fired, or assistance given to guerrillas, were destroyed, and those of the inhabitants who did not flee were shot.

(3) If any attempt was made to blow a bridge, every building within 150 yards was razed to the ground.

(4) Hindu villages were destroyed and those of the inhabitants who did not flee were shot.

The scale of the destruction of villages was truly colossal, and was not confined to the initial period. Indeed it was intensified when the guerrilla forces trained in India returned after June.

The result of this systematic repression was a flood of refugees to India on an unprecedented scale. We have no reason to think that the Indian estimate of 10 million refugees is exaggerated.

Two other features of the repression should be mentioned. Rape is alleged to have occurred on a very wide scale. The numbers may have been exaggerated, but the fact that a special state agency has been created to deal with the resulting social problem of unmarried mothers is evidence of the magnitude of the problem. Secondly, there are many accounts of the torture of political prisoners when, as occurred after June, the authorities arrested rather than shot suspects. In some cases older suspects were made to watch while the younger detainees were beaten.

It is outside the scope of this subject to discuss the legality of the military assistance given by India to the Mukti Bahini guerrilla forces, though the Commission's staff study does so. As is well-known, the events in East Pakistan were brought to a speedy termination by the Indian invasion on December 6 and the 12-day war leading to the surrender of the West Pakistan army. During the closing days of the war, there was a further wave of shootings of university teachers and other professional and leading persons among the Bengalis.

It is not surprising that in the early days, after the surrender, there were some savage reprisals. One incident, in which former Razakars were bayoneted to death on the Sports Ground at Dacca, received world-wide publicity since it occurred in front of television cameras. This and similar incidents occurred before any new governmental authority had been established. When Sheikh Mujibur Rahman was released and returned, he used all his authority to stop these reprisals, and promised that those responsible for "war crimes" would be dealt with by due process of law.

In considering the atrocities committed on both sides, a distinction is to be drawn between crimes committed as part of a systematic policy of repression carried out by a disciplined armed force, and crimes committed by undisciplined and frenzied mobs. The distinction is brought out clearly in the remarkable accounts given by Anthony Mascarenhas. He was a notable journalist from West Pakistan, a Christian who came originally from Goa, and who was an official correspondent attached to the 9th Pakistani Division stationed in the Comilla area. Horrified by the brutality of the army repression, he later fled to the west and published his account of what he saw. Amongst other things, he speaks of the operations directed against the civilian population known officially as "kill and burn" missions. There could hardly be clearer evidence of the violation of the Geneva Conventions.

One may wonder how it is possible that a disciplined army would carry out such violations of human rights. Three factors are perhaps relevant.

First, it must be remembered that the army were exposed to all the difficulties of an armed force, fighting against an insurgent guerrilla force disguised in civilian clothing, and operating under cover of a generally sympathetic civilian population. Secondly, the army did what it did in the cause of patriotism and in the cause of religion, and for them this was the same cause. Pakistan was founded as an Islamic state, and almost its sole unifying feature was the Islam religion. Those who were seeking to weaken or dismember the unity of the state were seen as enemies of Islam. The war against them was a holy war. Thirdly, there was a massive barrier between the opposing forces in the language barrier. Evidence shows that the worst crimes in armed conflicts occur between people who cannot communicate with each other. One has only to think in recent times of the Mi Lai massacre, or of the little publicized destruction of Eritrean villages, and annihilation of their inhabitants by Amharic-speaking soldiers of the Ethiopian army. Whilst none of these factors excuse, they may help to explain how these atrocities occurred.

International Penal Law

Many of the brutalities committed were, of course, violations of what Professor Frank Newman terms the International Bill of Human Rights, i.e., the Universal Declaration, the two International Covenants and the Optional Protocol. The Covenant on Civil and Political Rights recognizes that there may be some derogation from these rights in time of public emergency "to the extent strictly required by the exigencies of the situation," and provided that they do not involve discrimination. But no derogation is allowed from the articles dealing with the right to life; torture, cruel and inhuman or degrading treatment or punishment; the right to recognition as a person before the law; and the right to freedom of thought, conscience and religion. These breaches do not, of course, at present give rise to any enforcement procedures or sanctions.

It can also be argued that some breaches of the Convention on the Elimination of Racial Discrimination occurred. There is a procedure for submitting complaints about violations to a U.N. Committee, but it was never invoked.

Perhaps the clearest breaches in international law were those of Article 3 of the Geneva Conventions dealing with "armed conflicts not of an international character," a category into which the hostilities clearly fell until December 6, when the Indian invasion converted the struggle into an international war. Article 3 provides that "Persons taking no active part in the hostilities . . . shall in all circumstances be treated with humanity without any adverse distinction founded on race, colour, religion or faith, sex,

birth or wealth or any other similar criteria.” There are also specific prohibitions of murder, mutilation, cruel treatment, taking of hostages, and humiliating or degrading treatment. Unfortunately, no specific sanctions are provided. Even the duty to search out and bring to justice persons who committed “grave measures” does not apply to breaches of Article 3.

It has been widely alleged by the Bangalees, as the people of Bangladesh are called, that the Pakistan army was guilty of genocide. Genocide has become a highly emotive term widely used to cover any large-scale killings. Under the Genocide Convention, genocide means the killing of members of a national, ethnic, racial or religious group as such, with intent to destroy the group in whole or in part; it also includes the doing of certain other acts with that intent, including deliberately inflicting on the group, conditions of life calculated to bring about their physical destruction in whole or in part.

We believe that there would be great difficulty in establishing the intent to destroy the Bengali people as such, though there may have been specific incidents in which the necessary intent could be established. In the case of the attacks on Hindus, however, there seems to be a strong *prima facie* case of the intent to destroy them “as such.” The question whether the attacks on Biharis were genocide must also be considered. The Biharis appear to have been an identifiable national, ethnic or racial group. The more difficult question is whether acts of mob frenzy carried with them the necessary intent to constitute this crime. The Commission’s Staff Study inclines to the view that they do not, but that individuals who consciously stirred up the mob with this intent would be guilty of genocide.

The Genocide Convention had been ratified by Pakistan, but at the time of these events the government had not enacted the necessary legislation in accordance with Article 5, to give effect to the Convention under Pakistani law and provide effective penalties. However, under the Convention, genocide is declared to be “a crime under international law” and so, at least when the Convention was ratified by Pakistan, genocide became a crime under international law applicable to all persons resident within Pakistan. It follows that while a person could not be charged under Bangladesh law with genocide, save under retroactive legislation, no element of retroaction would arise if charges were preferred under international penal law.

The Genocide Convention provides expressly in Article 4 that persons committing genocide “shall be punished” whether they are constitutionally recognizable rulers, public officials or individuals. A more difficult question is whether the defense of “superior orders” is available. A clause in the original draft which would have excluded it was left out. However, if, as I believe, the Nuremberg Principles are declaratory of general principles of international penal law, then superior orders would not provide a defense.

This leads us to consider the scope of customary international penal law and the concept of "crimes against humanity."

The Nuremberg Principles as formulated by the International Law Commission and approved by the U.N. General Assembly are, of course, the principal statement on this subject, and contain a well-known definition of war crimes and crimes against humanity.

Crimes against humanity are defined as "murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population or persecution on political, racial or religious grounds [when done] in the execution of or in connection with any crime against peace or any war crime." Crimes against peace are, in effect, acts of international aggression, and war crimes are "violations of the laws or customs of war."

Many eminent authorities take the view that this definition restricts war crimes and, in consequence, crimes against humanity to crimes in connection with international wars.

The Commission's Staff Study respectfully argues to the contrary. In summarising the arguments, the need for brevity results in a more dogmatic statement than is warranted:

(1) The Nuremberg Principles themselves derive from the Charter of the Nuremberg International Military Tribunal. As the Tribunal was set up to try crimes committed in connection with an international war, it is not surprising that the terminology used relates more specifically to an international war situation. But, as the Tribunal itself said, that Charter was "the expression of international law existing at the time of its creation." If that be right, then the concept of crimes against humanity can be of a much wider scope, and not limited to international wars. Support for this view is to be found in the ancient doctrine of humanitarian intervention, by which a state could be prevented from acting towards its own nationals in such a way as to shock the conscience of mankind.

(2) In any case, the laws of war are not restricted to international wars. Although the Geneva Conventions do not provide enforcement procedures for breaches of Article 3, this article is nonetheless part of the laws of war, and breaches of it in international war situations are "violations of the laws or customs of war."

(3) The U.N. Assembly in resolution after resolution has declared *apartheid* and various of the practices carried out under that policy to be "a crime against humanity." The subject is dealt with fully in the report of the UN Working Group of Experts which studied *apartheid* from the point of view of international penal law (E/CN.4/1075, Feb. 15, 1972).

(4) Finally, and perhaps strongest of all, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes

Against Humanity, which entered into force on November 11, 1970, provides in Article 1:

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

- (a) War Crimes [as defined in the Nuremberg Principles] . . .
- (b) Crimes against humanity whether committed in time of war or in time of peace, as they are defined in the Nuremberg Charter and confirmed by resolutions of the General Assembly. . . .

Pakistan voted for this Convention. Although Pakistan has not so ratified it as to be bound by the restrictions on periods of statutory limitation, it is submitted that her affirmative vote involves acceptance that crimes against humanity are not restricted to international war situations.

The matter is of practical importance, since it affects the question whether, if Bangladesh does set up an international tribunal, it will be able to try under international penal law persons alleged to have committed "crimes against humanity." In this case, the defendants would be entitled to the procedural protections for a fair trial provided for in the Nuremberg Principles.

Trial Procedures

The preliminary question is whether the Pakistani generals and senior officials should be tried at all. It is by no means certain that they will be. Immensely important political considerations are involved, apart from the question whether sufficient evidence is available to establish responsibility of the accused for the crimes which were committed.

In the Western world there seems to be a considerable body of opinion which thinks there ought not to be any trials of those alleged to be responsible. Approaching the matter as a lawyer, it is difficult to see why persons said to be responsible for terrible crimes committed on a massive scale should not be brought to justice, especially when private vengeance has been deterred by assurances that those responsible would be brought to trial. It is, of course, true that with notable exceptions, such as the trial of Lieutenant Calley, it is usually only enemy forces who are brought to trial for war crimes. But this does not seem to be a good reason for bringing no one to trial at all. In any event, as we have seen, there is a duty to punish, and therefore to prosecute, those who are responsible for genocide.

If there is to be a trial, what kind of court should there be? Sheikh Mujibur Rahman asked at an early stage in public speeches that an international tribunal should be sent to Bangladesh to try "war criminals." Unfortunately, there is no one able and willing to set up such a tribunal. The efforts within the U.N. to promote the establishment of an inter-

national criminal court have, for the time being at least, foundered. Even more modest proposals, such as the U.N. High Commissioner for Human Rights, so sturdily promoted by Ambassador Rita Hauser, have been blocked. There are, it seems, too many governments with too many skeletons for them to agree to any effective enforcement machinery for human rights.

The Commission's purpose in Bangladesh was to try to persuade the government that, if they do hold such a trial, they should themselves constitute an International Court for the purpose, much in the way that the victorious allies did at Nuremberg and Tokyo after World War II. They were urged to go further than the allied powers did, and instead of having a tribunal of the victors to try the vanquished, to have a tribunal with a majority of neutral judges. They were also urged to prefer charges under international penal law and not merely under domestic law.

There are two arguments which may weigh heavily with them, namely, that this is the only way of trying charges of genocide without retroactive legislation, and it is the only way of persuading world opinion that the trial is an act of justice and not an act of vengeance.

The argument that they would be making legal history I found to have less appeal for them. It tends to be only lawyers, and only some lawyers at that, who are interested in legal innovation. For them it is an attractive argument. At least it could be said that some lasting benefit would be derived for humanity from all the suffering of the Bengali people, if it helps to carry us a few paces further along the road to the international enforcement of human rights.