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War Crimes Jurisdiction and Due Process: The Bangladesh Experience

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I. INTRODUCTION

In April 1973 the new state of Bangladesh announced its intention to proceed with the trial of 195 Pakistani nationals "for serious crimes, which include genocide, war crimes, crimes against humanity, breaches of article 3 of the Geneva Conventions, murder, rape, and arson."[1] Although state trials of individuals accused of committing war crimes were still occurring,[2] the Bangladesh trials promised to be particularly significant. Not since Nuremberg had there been a criminal inquiry into widespread acts of genocide, crimes against humanity, and war crimes. Deaths in Bangladesh, not to mention other egregious acts such as torture, terror, and rape, numbered in the millions.[3] No post-Nuremberg proceedings,

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1. Press Release, April 17, 1973, *reprinted in* J. PAUST & A. BLAUSTEIN, WAR CRIMES JURISDICTION AND DUE PROCESS: A CASE STUDY OF BANGLADESH 54 (1974). The press release declared further:

> Trials shall be held in Dacca before a Special Tribunal, consisting of judges having the status of judges of the Supreme Court. The trials will be held in accordance with universally recognized judicial norms. Eminent international jurists will be invited to observe the trials. The accused will be afforded facilities to arrange for their defense and to engage counsel of their choice, including foreign counsel. A comprehensive law providing for the constitution of the Tribunal, the procedure to be adopted and other necessary materials is expected to be passed this month. The accused are expected to be produced before the Tribunal by the end of May, 1973.

2. *See, e.g.,* Question of the Punishment of War Criminals and of Persons who have Committed Crimes Against Humanity, Report of the Secretary General, 25 U.N. GAOR Annex I (Agenda Item 30) at 6, U.N. Doc. A/8038/Add. 1 (1970) (Reply of the Federal Republic of Germany, July 9, 1970, to the Secretary General) [hereinafter cited as U.N. S.G. Report A/8038]. Prosecutions of former Nazis still occur in the Soviet Union and other states. *See* N.Y. Times, Feb. 22, 1978, § A, at 9, col. 2 (city ed.) (U.S.S.R.); *id.* Dec. 15, 1977, § A, at 2, col. 3 (late city ed.) (Netherlands); *id.* Aug. 3, 1977, § A, at 5, col. 1 (W. Germany); *id.* July 25, 1977, § A, at 4, col. 6 (U.S.S.R.). *See also* references cited note 5 *infra.*

3. *See* SUBCOMM. ON INT'L ORGS. AND MOVEMENTS, HOUSE COMM. ON FOREIGN AFFAIRS, 93D CONG., 1ST SESS., INTERNATIONAL PROTECTION OF HUMAN RIGHTS 412-32 (Comm. Print 1974); Nanda, *Self-Determination in International Law—The Tragic Tale of Two Cities—Islamabad (West Pakistan) and Dacca (East Pakistan),* 66 AM. J. INT'L L. 321, 322-23 (1972); Nanda, *A Critique of the United Nations Inaction in the Bangladesh Crisis,* 49 DEN. L.J. 53, 55-56 (1972); Suzuki, *Self-Determination and World Public Order: Community Response to Territorial Separation,* 16 VA. J. INT'L L. 779, 805-07 (1976); *Genocide Trial,* Wash. Post, June 15, 1972, at 22, col. 5 (estimated three million killed). *See generally* S. CHOWDHURY, THE GENESIS OF BANGLADESH (1972); GOVERNMENT OF BANGLADESH, BANGLADESH (Bangladesh 1972); MINISTRY OF EXTERNAL AFFAIRS, BANGLADESH DOCUMENTS (India 1971).

not even the Israeli prosecution of Eichmann[4] or United States prosecutions of American servicemen,[5] had involved such a wide range of international criminal charges. Some of the charges posed novel problems. One particular problem was determining how the prosecution of genocide or the prosecution of a violation of common article 3 of the 1949 Geneva Conventions was to proceed.[6]

Equally important political questions surrounded the criminal charges. Although Bangladesh openly sought prosecution, her ally, India, held the 195 Pakistanis accused of committing the crimes as prisoners of war. Could prisoners of war be prosecuted for war crimes and other international law violations, or should they have been returned upon demand to their country of origin when the active hostilities ceased? Could India prosecute the accused for acts that occurred in what is now the state of Bangladesh? Could the new state of Bangladesh or Pakistan prosecute? Must any state that holds and controls prisoners either prosecute those accused of having committed serious violations of international law or extradite them to a state that will prosecute? Finally, would similar breaches of international law by India or Indian troops obviate any jurisdictional competence or duties of India or Bangladesh?

The questions seemed unusual, at least in view of the past practices of international tribunals of the United States in prosecutions of its nationals. Specific criminal applications of relevant international norms had been relatively sparse.[7] There were problems with the applicability of international norms to Bangladesh, especially

4. Attorney General of Israel v. Eichmann, [1965] 45 Pesakim Mehoziim 3 (Israel, Jerusalem d. ct. 1961); 36 INT'L L. REP. 18 (1968), *aff'd*, [1962] 16 Piske Din 2033 (Israel Supreme Court), 36 INT'L L. REP. 277 (1968).

5. Cooper, *My Lai and Military Justice—To What Effect?*, 59 MIL. L. REV. 93 (1973); Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99 (1972); Paust, *Legal Aspects of the My Lai Incident: A Response to Professor Rubin*, 50 ORE. L. REV. 138 (1971), *reprinted in* 3 THE VIETNAM WAR AND INTERNATIONAL LAW 359 (R. Falk ed. 1972); Paust, *After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 TEX. L. REV. 6 (1971); Rubin, *Legal Aspects of the My Lai Incident*, 49 ORE. L. REV. 260 (1970). The last three articles cited are also reprinted in a highly useful series of compilations printed as vols. I-IV, THE VIETNAM WAR AND INTERNATIONAL LAW (R. Falk, ed. 1969-1976).

6. *Compare* Paust, *Legal Aspects of the My Lai Incident*, *supra* note 5 *with* Rubin, *supra* note 5.

7. *See* Bassiouni, *Repression of Breaches of the Geneva Conventions Under the Draft Additional Protocol to the Geneva Conventions of August 12, 1949*, 8 RUT.-CAM. L.J. 185, 188-94 (1977); Paust, *My Lai and Vietnam*, *supra* note 5, at 108-18.

during the state's transition through the legally relevant stages of insurgency, belligerency, and state-to-state warfare.

It would also be necessary to decide whether violations of human rights were prosecutable by the state whose nationals were the victims of substantial and intentional deprivations. Do general human rights protections apply in an armed conflict? What interrelationships exist between human rights, laws of armed conflict, and prohibitions of genocide? The Bangladesh trials would surely be significant for their precedential value, the analyses of the jurisdictional issues, and the final determinations on the competence to prosecute and to sanction. They would perhaps be as significant as Nuremberg. Equally interesting would be the application of international due process guarantees to safeguard the human rights of the accused before, during, and after the trials. No previous court had faced such issues squarely,[8] and few national or international courts had specifically incorporated human rights into due process guarantees.[9]

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8. Of concern to many scholars was the denial of many due process guarantees in the pre-1948 Universal Declaration of Human Rights, post-World War II setting; the standards applied during the trial of General Yamashita were particularly deficient. *See, e.g.*, In re Yamashita, 327 U.S. 1, 26-41 (1945) (Murphy, J., dissenting); Paust, *My Lai and Vietnam, supra* note 5, at 181-82. *Cf.* CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL, arts. 16-25 (containing standards for criminal trials), *reprinted in* 1 TRIALS OF MAJOR WAR CRIMINALS 10-16 (1947); J. PAUST & A. BLAUSTEIN, note 1 *supra*, at 75-78. *See also* Hart, *Yamashita, Nuremberg and Vietnam: Command Responsibility Reappraised*, 25 NAVAL WAR C. REV. 19 (1972); Wright, *Due Process and International Law*, 40 AM. J. INT'L L. 398 (1946); Letter from Jordan Paust to the Editor (in response to Hart, *supra*) *reprinted in* 25 NAVAL WAR C. REV. 103 (1973).

9. Perhaps one of the most significant applications of the 1948 Universal Declaration of Human Rights in an international crimes tribunal would have occurred in the early 1950s under United Nations auspices had military commissions of the United Nations Command proceeded to prosecute persons accused of violating the laws and customs of war during the Korean conflict. Although no trials were actually held, in 1950 and 1951 rules of criminal procedure were drafted by the United Nations Command that are of great historic interest. In many respects they mirrored human rights norms concerning due process and it is not unlikely that direct use of human rights standards would have occurred at U.N. Command trials. The U.N. Command rules are reprinted in J. PAUST & A. BLAUSTEIN, *supra* note 1, at 79-94. Of further interest is that trial observers from at least the International Committee of the Red Cross (ICRC) would have been permitted to attend trials. *See id.* at 93-94 (rule 54). *See also* Paust, *An International Structure for Implementation of the 1949 Geneva Conventions: Needs and Function Analysis*, 1 YALE STUD. WORLD PUB. ORD. 148 (1974) (concerning other possible functions open to U.N. and ICRC participation).

Four months later, in August of 1973, India, Pakistan, and Bangladesh reached an agreement for repatriation of the 91,000 Pakistani prisoners of war being held in India, save those 195 specifically accused of war crimes.[10] Bangladesh had already passed the International Crimes (Tribunals) Act of July 19, 1973, providing for the trial of the accused, and the authors had been requested by Counsel for the Government of Bangladesh to prepare a memorandum on relevant points of law. This memorandum could be received by the tribunals as a "friend of the court" communication from the authors as representatives of the International League for the Rights of Man (now the International League for Human Rights). The authors were also to serve as trial observers and would use the memorandum as a basis for their observation of the trials and subsequent comment upon the proceedings and outcomes. The following is taken from the memorandum submitted by the authors to the Government of Bangladesh.

II. Prisoner of War Protections Do Not Immunize International Crime

Those accused of international crimes are presumably entitled to the protections of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War.[11] Relevant articles of the Convention disclose several basic expectations of the international community in connection with the human rights of the prisoner, the requirements of prisoner repatriation, and the requirements of prosecution for grave breaches of the four 1949 Geneva Conventions. Article 118 states that prisoners of war shall be released and repatriated without delay after the cessation of active hostilities; but article 119 adds: "Prisoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment." Article 99 adds: "No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the

10. *See* J. Paust & A. Blaustein, *supra* note 1, at vi. Earlier, India had publicly agreed to hand over 150 prisoners to Bangladesh for trial. *See* Wash. Post, June 15, 1972, at 22, col. 5. *See also* New York Daily News, May 26, 1972, at 8, col. 2. India had also publicly declared its willingness to hand over all of the 91,000 Pakistani prisoners to Bangladesh for trial if so requested. New York Daily News, Oct. 26, 1972, at 8, col. 1.

11. 47 Stat. 2021, T.I.A.S. No. 3364, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter cited as Prisoners of War Convention].

time the said Act was committed." Taken together, these articles disclose a qualification on the general duty to repatriate, a qualification on what constitutes an indictable offense (which allows deviation from normal repatriation under the operative provisions of article 119), and a recognition that prisoners of war may be tried for violations of international law, including war crimes and genocide.[12]

Moreover, authoritative comment on article 85 of the Convention discusses certain aspects of the procedural safeguards for "prisoners of war accused of war crimes," and adds: "It is obvious that most of the acts committed prior to capture for which a prisoner of war may be tried are violations of the laws and customs of war."[13] This commentary also suggests that prosecution should occur only after the cessation of hostilities, thus necessitating an exception to the general duty to repatriate after the cessation of hostilities.[14] Since article 85 concerns prisoners of war "prosecuted under the laws of the Detaining Power for acts committed prior to capture," it is obvious that the authoritative comment, which discloses that such acts can constitute "violations of the laws and customs of war," assumes a common expectation, elsewhere articulated in greater detail, that any Detaining Power can at least prosecute any prisoner of war who falls into its power for violations of international law prohibiting crimes against peace, war crimes, or crimes against humanity.[15]

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12. *See* G.A. Res. 96, U.N. Doc. A/64, at 189 (1946), *reprinted* in [1946-1947] U.N.Y.B. 255 (unanimously affirming prior to the adoption of the 1949 Geneva Convention that "genocide is a crime under international law."); 3 COMMENTARY, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 417-22 (J. Pictet ed. 1958) [hereinafter cited as COMMENTARY]. *See also* G.A. Res. 2391, 23 U.N. GAOR, Supp. (No. 18) 40, U.N. Doc. A/7218 (1968); J. BAKER & H. CROCKER, THE LAWS OF LAND WARFARE 104, 107-08 (1918) (on the inherited expectation that prisoners of war have no right to release when subject to war crime punishment); BLUNTSCHLI ON THE LAW OF WAR AND NEUTRALITY—A TRANSLATION FROM HIS CODE OF INTERNATIONAL LAW 15, para. 26 (F. Lieber trans.) (U.S. Army T.J.A.G. School, ICL library) [hereinafter cited as BLUNTSCHLI].

13. 3 COMMENTARY, *supra* note 12, at 415. *See also* M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 721-28 (1961); 2 OPPENHEIM'S INTERNATIONAL LAW 390 (7th ed. H. Lauterpacht 1948) [hereinafter cited as OPPENHEIM].

14. *See* 3 COMMENTARY, *supra* note 12, at 416, 422. *See also* 4 *id.* at 596.

15. *See* 3 COMMENTARY, *supra* note 12, at 417-22 (citing portions of the records of the Diplomatic Conference). *See also* Levie, *Maltreatment of Prisoners of War in Vietnam*, 2 THE VIETNAM WAR AND INTERNATIONAL LAW 362, 387-88 (R. Falk ed. 1969); U.S. DEPT. OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ¶¶ 161(b), 163(b), 505(c) (1956) [hereinafter cited as FM 27-10]. This was the cus-

Interrelated with these provisions are articles 129 and 130 which define grave breaches of the Prisoners of War Convention and Contracting Party prosecutorial obligations. Like article 146 of the Geneva Convention Relative to the Protection of Civilian Persons,[16] article 129 states: "[E]ach High Contracting Party shall be under the obligation to search for persons alleged to have committed or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts;"[17] or, the article continues, it may extradite for prosecution in appropriate circumstances. An authoritative commentary on this article states:

> The obligation on the High Contracting Parties to search for persons accused of having committed grave breaches imposes an active duty on them. As soon as a Contracting Party realizes that there is on its territory a person who has committed such a breach, its duty is to assure that the person concerned is arrested and prosecuted with all dispatch.[18]

Assuming that conduct amounts to a "grave breach" of one or several of the Geneva Conventions, there is no exception to the duty to seach for all such violators, and there is no exception to the duty to apprehend them and either prosecute or extradite them for prosecution.[19]

The prisoner of war status of the alleged perpetrator of a grave breach of the Conventions is not relevant to this duty to prosecute.[20] The foreign nationality of the accused does not obviate the

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tomary expectation as well, that any power into whose hands the prisoners fell could initiate criminal proceedings against such prisoners for violations of international law. *See, e.g.*, J. BAKER & H. CROCKER, *supra* note 12, at 104, 107-08; M. MCDOUGAL & F. FELICIANO, *supra* note 13, at 706-21; 2 OPPENHEIM, *supra* note 13, at 390, 566-67 n.1 & 587-88; J. SPAIGHT, WAR RIGHTS ON LAND 461-62 (London 1911).

16. Aug. 12, 1949, [1955] 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287, 386 [hereinafter cited as Civilian Convention].

17. Prisoners of War Convention, *supra* note 11, art. 129.

18. 3 COMMENTARY, *supra* note 12, at 623; *see* 4 *id.* at 593. *See also id.* at 288; Prisoners of War Convention, *supra* note 11, art. 1; G.A. Res. 2840, 26 U.N. GAOR, Supp. (No. 29), U.N. Doc. A/8429, at 88 (1971) (passed 2 days after Pakistan troops surrendered to the commander of the joint India-Bangladesh forces in Bangladesh); G. DRAPER, THE RED CROSS CONVENTIONS 105-06 (1958).

19. *See, e.g.*, G. DRAPER, *supra* note 18, at 105-06; M. MCDOUGAL & F. FELICIANO, *supra* note 13, at 717-18 n.612; FM 27-10, *supra* note 15, ¶¶ 506(b), 507; Paust, *My Lai and Vietnam*, *supra* note 5, at 120-21; Paust, *Legal Aspects of the My Lai Incident*, *supra* note 5, at 149-51.

20. *See, e.g.*, FM 27-10, *supra* note 15, ¶¶ 505(c), 506(c).

duty.[21] The territorial nexus between the situs of the crime and the prosecution is irrelevant,[22] as is also the prosecuting party's nexus with the actual hostilities.[23] Moreover, whether the prosecuting party was a recognized state or merely emerging as such at the time of the alleged breach seems irrelevant since the obligation attaches to every High Contracting Party and jurisdiction is universal.[24] It is arguable that the prosecuting party need not have the recognized status of a state. The only apparent requirement is that the prosecuting party be a High Contracting Party or an entity that agrees to be bound thereby. In any event, it is clear that not only can prisoners of war be prosecuted for violations of international law, but that each High Contracting Party must search for and prosecute or extradite any prisoner of war (or any other person) who has allegedly committed a grave breach of the 1949 Geneva Conventions. Prisoners of war are not immune from prosecution for commission of international crime.

III. INTERNATIONAL LAW AND THE STATE OF BANDLADESH

Since its emergence as a state, Bangladesh has become the 132nd High Contracting Party to the four 1949 Geneva Conven-

21. *See, e.g.*, 3 COMMENTARY, *supra* note 12, at 622, 623 (". . . any person . . . whether a national of that State or an enemy;" ". . . whatever the nationality of the accused. Nationals, friends, enemies . . . ."); 629; 4 *id.* at 529-93; FM 27-10, *supra* note 15, ¶¶ 506(b)-(c), 507.

22. *See, e.g.*, 4 COMMENTARY, *supra* note 12, at 587 (grave breaches should not remain unpunished—need for "universality of punishment"), 592 ("any person"), 597 ("crimes whose authors would be sought for in all countries"), 602 ("applicable to all offenders, whatever their nationality and whatever the place where the offence has been committed"). *See also* 3 *id.* at 619, 626, 629; FM 27-10, *supra* note 15, ¶ 507; 4 COMMENTARY, *supra* note 12, at 587 ("the universality of jurisdiction for grave breaches is some basis for the hope that they will not remain unpunished and the obligation to extradite ensures the universality of punishment"); G. DRAPER, *supra* note 18, M. MCDOUGAL & F. FELICIANO, *supra* note 13, at 719-20; U.K. 3 BRITISH MANUAL OF MILITARY LAW, ¶ 637 (1958); references cited note 7 *supra*.

23. *See* references cited note 22 *supra*. In no other way could the jurisdiction and obligation be universal for each High Contracting Party. Here there is no doubt that there is such a nexus between the actual persons involved and the hostilities.

24. *See* Attorney General of Israel v. Eichmann, 36 INT'L L. REP. 18; references cited note 22 *supra*. Since the law was already in existence and there was universal jurisdiction over offenses, only the particular forum would have been lacking and this in no way contravenes article 99 of the Geneva Prisoner of War Convention. *See* 75 U.N.T.S. at 210.

tions[25] and has declared itself bound by virtue of the previous ratification of those Conventions by the state of Pakistan.[26] Moreover, on December 21, 1971, the United Nations Security Council had also called upon "all those concerned to take all measures necessary to preserve human life and for the observance of the Geneva Conventions of 1949 and to apply in full their provisions as regards the protection of wounded and sick, prisoners of war and civilian population."[27] There has been no objection to the assumption of such responsibilities by the state of Bangladesh. Indeed, under generally accepted principles of international law the new state of Bangladesh should be bound to observe the multilateral treaty commitments of the state of Pakistan pertaining to the laws of war, genocide, and human rights, at least until a formal and permissible claim by its government to the contrary.[28] The forces of the subsequent state are bound to observe the relevant law of armed conflict as the new state emerges, and such forces may not denounce the applicability of the Geneva Conventions until at least one year after the termination of the actual hostilities.[29] These types of multilateral agreements are of a higher order than most and are regarded not merely as state-to-state obligations but as obligations to all of mankind.[30]

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25. *See* 135 INT'L REV. RED CROSS 333 (1972).

26. *See id.* The formal letter was received by the Swiss Federal Council on April 4, 1972.

27. S.C. Res. 307, 26 U.N. SCOR (1621st mtg.) 2, U.N. Doc. S/RES/307 (1971) (vote 13-0-2). *See also* G.A. Res. 2852, 26 U.N. GAOR, Supp. (No. 29) 90, U.N. Doc. A/8429 (1971).

28. *See, e.g.*, M. GREENSPAN, THE MODERN LAW OF LAND WARFARE 623-24 (1959); Mallamud, *Optional Succession to Treaties by Newly Independent States*, 63 AM. J. INT'L L. 782 (1969); Respect for Human Rights in Armed Conflicts, Report of the Secretary General, 25 U.N. GAOR (Agenda Item 47) 65, 69-70, U.N. Doc. A/8052 (1970) [hereinafter cited as U.N. S.G. Report A/8052]. *See generally* M. MCDOUGAL, H. LASSWELL, & J. MILLER, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER (1967) [hereinafter cited as M. MCDOUGAL]; Keith, *Succession to Bilateral Treaties by Seceding States*, 61 AM. J. INT'L L. 521 (1967).

29. *See, e.g.*, 3 COMMENTARY, *supra* note 12, at 37-38; 4 *id.* at 37; INSTITUTE OF LAW, U.S.S.R. ACADEMY OF SCIENCES, INTERNATIONAL LAW 407, 423 (1960); Kelly, *Legal Aspects of Military Operations in Counterinsurgency*, 21 MIL. L. REV. 95, 102 (1963); U.N. S.G. Report A/8052, *supra* note 28, at 62-70; Note, *The Geneva Conventions and the Treatment of Prisoners of War in Vietnam*, 80 HARV. L. REV. 851, 855-58 (1967).

30. *See, e.g.*, 4 COMMENTARY, *supra* note 12, at 15-16; Respect for Human Rights in Armed Conflicts, Report of the Secretary General, 24 U.N. GAOR (Agenda Item 61) 31, U.N. Doc. A/7720 (1969) [hereinafter cited as U.N. S.G.

Since Pakistan had also ratified the 1949 Genocide Convention,[31] which fully applied within the territory of East Pakistan/Bangladesh, Bangladesh has retained those obligations as well. Furthermore, the new state was bound by general customary international law,[32] and according to the Charter of the United Nations,[33] each member of the United Nations is obligated to treat the new state in accordance with the principles of the Charter. Moreover, since Bangladesh has applied for Charter membership, the community is justified in expecting a full compliance by Bangladesh with the principles and purposes of the United Nations articulated in the Charter.[34] Bangladesh has never indicated anything to the contrary.

IV. International Law and the Alleged Criminal Acts

A. *Genocide*

Since Pakistan had ratified[35] the Genocide Convention[36] prior to the period during which the conduct in violation of the Convention is alleged to have occurred, it clearly applied to the accused. Furthermore, since article 1 of the Genocide Convention states that "genocide, whether committed in time of peace or in time of war, is a crime under international law,"[37] it clearly applies during both peace and war times.

Report A/7720]. It would not be good policy to have one formalistic rule for succession to several types of treaties in several contexts where they are different types of policy and community expectations. *See generally* M. McDougal, *supra* note 28.

31. *See* U.N. S.G. Report A/8038, note 2 *supra.*

32. *See, e.g.,* 1 Oppenheim's International Law 18 (8th ed. H. Lauterpacht 1955). *See also* 3 Commentary, *supra* note 12; at 38; references cited note 38 *infra.*

33. *See* U.N. Charter, art. 2, para. 6.

34. *See* U.N. Charter, art. 4, para. 1. For a related authoritative pronouncement on the applicability of the principles and purposes of the Charter to self-determination movements, see Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR, Supp. (no. 28) 121, 122-24, U.N. Doc. A/8028 (1970).

35. 277 U.N.T.S. 347 (in force 10 January 1958).

36. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature,* Dec. 9, 1948, 78 U.N.T.S. 277 (in force Jan. 12, 1951) [hereinafter cited as Genocide Convention].

37. 78 U.N.T.S. at 280.

B. Customary Law of War

The customary international law of war applied to the armed conflict between Pakistan and the forces of the subsequent state of Bangladesh from the period of belligerency.[38] That period began prior to the formal recognition of Bangladesh by India on December 6, 1971, prior to general armed intervention into the conflict by Indian troops in early December 1971, and after the Bangladesh Proclamation of Independence on April 10, 1971.[39] The forces of the

38. BLUNTSCHLI, *supra* note 12, at 3-4; 3 COMMENTARY, *supra* note 12, at 38; H. HALLECK, ELEMENTS OF INTERNATIONAL LAW AND LAWS OF WAR 151-53 (1866); I. HYDE, INTERNATIONAL LAW 198 (2d ed. 1947); 2 OPPENHEIM, *supra* note 13, at 370 n.1, 370-72; Farer, *The Humanitarian Laws of War in Civil Strife: Toward a Definition of "International Armed Conflict,"* 7 REVUE BELGE DE DROIT INTERNATIONAL 20 (1971); FM 27-10, *supra* note 15, ¶ 11(a); Dig. Ops. of JAG, Army, at 244 (GOP 1866) (considered as exemplifying customary law); U.S. Dept. of Army, *Pam. No. 27-161-2;* 1863 Lieber Code, arts. 149-54 (known also as General Orders No. 100, Instructions for the Government of Armies of the United States in the Field, April 24, 1863). *See also* INSTITUTE OF LAW, U.S.S.R. ACADEMY OF SCIENCES, *supra* note 29, at 407; Levie, *supra* note 15, at 373-74.

39. This date is chosen instead of the March 25, 1971, actions in Dacca and the March 27, 1971, heavy fighting in several towns because of the limited overall armed resistance made or possible in March and the later emergence of other conditions. *See generally* BANGLADESH DOCUMENTS, *supra* note 3, at 251-52, 280-99, 349-56, 380-93, 671 *passim;* MacDermot, *Crimes Against Humanity in Bangladesh,* 7 INT'L LAW. 476 (1973); Nanda, *supra* note 3, 66 AM. J. INT'L L. at 324-25. Note also that the "self-determination assistance" to the Bangladesh insurgents in the form of military support, military training, radio stations, and refuge on Indian soil, and the later shellings in exchange fire with Pakistani troops justify the conclusion that a de facto recognition of the state of belligerency occurred at that time. For evidence of such events (but a claim of illegality admittedly hinged upon the main issue of the propriety of the Bangladesh claim to self-determination after the military crackdown in March), see INT'L COMM'N OF JURISTS, THE EVENTS IN EAST PAKISTAN, 1971, at 88-91 (Geneva 1972). "Self-determination assistance" is not incompatible with the purposes and principles of the Charter, but is expressly recognized in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation, note 34 *supra.* Self-determination assistance must obviously come from other than the oppressive elite, and in the process of self-determination in Bangladesh, territorial integrity was to be split as well as independence. Contextual reality and the serving of all goal values require a new reading of article 51 of the Charter as well, for as a people undergoing the peaceful process of self-determination within an entity find that they must seek it without that entity due to a military crackdown, they should be entitled to self-defense and collective self-defense within the full ambit of articles 1, paras. 2, 3; 2, para. 4; and 51 of the Charter (especially in the light of massive violations of human rights of their people). Outside states cannot precipitate violence, but where an armed attack has occurred against a people seeking self-determination it is not improper to assist those being at-

subsequent state of Bangladesh had (1) an armed force with a responsible command structure, (2) the semblance of a government, (3) control of significant amounts of territory in East Pakistan, (4) recognition by others as a belligerent force, and (5) generally followed the laws of war.[40]

The customary law of war includes the principles of the 1907 Hague Convention, No. IV, and numerous additional prescriptions on the conduct of hostilities, the treatment of captives, and the basic protections of the populations involved in armed conflict.[41]

C. *The 1949 Geneva Conventions*

Bangladesh considered itself bound by the Geneva Conventions by virtue of the previous ratification by Pakistan which was at all times bound by the Conventions. The remaining questions were: (1) when did certain provisions of those Conventions apply, and (2) who was entitled to what sort of protection?

It is submitted that sometime after the March 25, 1971, actions in Dacca and the April 10th Bangladesh Proclamation of Independence, common article 3 of the 1949 Geneva Conventions applied specifically in the context of emerging independence and generally to the outbreak of armed hostilities within East Pakistan. There is no definitive view on when this jurisdictional event occurs, but several useful criteria for policy-conscious and rational decision-making have been elaborated by the text writers.[42] More

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tacked. Recall that India had openly recognized that a state of war (*i.e.*, belligerency) had existed at least by May 24, 1971. *See* BANGLADESH DOCUMENTS, *supra* note 3, at 672-82. Evidence of the recognition of an insurgency as of March 27, 1971, also exists in these documents. *See, e.g., id.* at 592, 671.

40. *See, e.g.*, I. HYDE, *supra* note 38, at 198-200; H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW, 175-76, 270-78 (1947); 2 OPPENHEIM, *supra* note 13, at 249. *See generally* 1 HACKWORTH, DIGEST OF INTERNATIONAL LAW 161, 318-27 (1940). *See also* BLUNTSCHLI, *supra* note 12, at 3-4; 2 COMMENTARY, *supra* note 12, at 35-36; J.N. MOORE, LAW AND THE INDO-CHINA WAR 197-201 (1972); U.S. Dept. of Army, *Pam. No. 27-161-2, supra* note 38, at 27-28. Bluntschli would even go further: "[W]hen a people leave their country, and, while endeavoring to acquire a new home, become involved in war, they are unhesitatingly recognized as belligerents. The Romans treated thus all the migrating German nationals." BLUNTSCHLI, *supra* note 12, at 4.

41. *See, e.g.*, United States v. von Leeb, 10 TRIALS OF WAR CRIMINALS 1, 532-34 (1946-1949); Nuremberg Opinion and Judgment, 1 TRIALS OF MAJOR WAR CRIMINALS 253-54 (1947); FM 27-10, *supra* note 15, ¶¶ 6, 25; M. MCDOUGAL, F. FELICIANO, *passim;* Paust, *My Lai and Vietnam, supra* note 5, at 105-06, 108-12, 130 n.125, 139-40 n.156.

42. *See, e.g.*, 4 COMMENTARY, *supra* note 12, at 25-36; U.N. S.G. Report

certain is that once the conflict has reached the level of an actual belligerency (as opposed to an insurgency or some lesser form of armed violence), article 2 of the Geneva Conventions, and thus the bulk of Convention provisions, apply to the conflict.[43] Thus, as the conflict intensifies and the insurgent group gains recognition as a belligerent, the application of the Geneva precepts is expanded.[44] The advent of an armed conflict between troops of Pakistan and India, including the exchange of fire across their borders, undoubtedly made the conflict an international armed conflict governed by article 2 of the Conventions.[45]

A/8052, *supra* note 28, at 42-44, 65-66; Kelly, *supra* note 29, at 97, 99-100. Considering the reports of the events, *see* note 39 *supra,* which refer to seizures of control of several population centers by "defecting East Bengali soldiers and police, supported by Awami League vigilantes" and the large measure of Pakistan uses of counter-force to regain control, it is possible that article 3 of the Geneva Conventions applied soon after March 25, 1971, and probably by April 11, 1971, with the Proclamation of Independence and formation of an army and governmental structure (even though the state of belligerency may not have been reached). *See also* J. BOND, THE RULES OF RIOT: INTERNAL CONFLICT AND THE LAW OF WAR (1974).

43. *See, e.g.,* 2 OPPENHEIM, *supra* note 13, at 370 n.1; Farer, *Humanitarian Law and Armed Conflicts: Toward the Definition of "International Armed Conflict,"* 71 COLUM. L. REV. 37, 69-70 (1971); Farer, note 38 *supra. See also* 3 BRITISH MANUAL OF MILITARY LAW, *supra* note 22, at 6; 3 COMMENTARY, *supra* note 12, at 24, 38; 2B FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 14 (1949) (U.S. Army T.J.A.G. school library, International Law Division) (remarks of the chief of the Soviet delegation at the 1949 Geneva Diplomatic Conference); U.N. S.G. Report A/8052, *supra* note 28, ¶¶ 08-09, at 66.

The new Geneva Protocols will supplement this approach, especially in the case of self-determination struggles. *See* Geneva Conventions, Draft Protocol I, art. 1(4), *reprinted in* 16 INT'L LEGAL MAT. 1397 (1977).

44. Although the Genocide Convention and basic human rights law applied in times of peace as well as war, the only law of armed conflict that applies as well to this situation attaches as peace moves into the condition of armed insurgency. *See* Genocide Convention, *supra* note 36, art. 3. As insurgency moves into belligerency the bulk of the Geneva Conventions apply through common article 2 as well as the customary law of war, the Genocide Convention, and basic human rights. *See* Genocide Convention, note 36 *supra;* Civilian Convention, note 16 *supra;* Prisoners of War Convention, note 1 *supra.*

45. *See, e.g.,* Farer, *Humanitarian Law and Armed Conflicts, supra* note 43; Paust, *Legal Aspects of the My Lai Incident, supra* note 5, at 138-43; U.N. S.G. Report A/8052, *supra* note 28, at 44. *See also* MacDermot, *supra* note 39, at 480 (stating that the Indian invasion "converted" the struggle into an article 2 conflict). Of course, this conversion occurred much earlier when the stage of belligerency was reached. Numerous resolutions by the United Nations Security Council and General Assembly add the weight of demonstrated community expectation to this point.

A determination must be made of who was entitled to what sort of protection at each stage of the conflict, given the expanded applicability of Geneva law. This poses no major difficulty, for under common article 3 of the Conventions the people of East Pakistan were all entitled to protection outlined in the article if they were not directly engaged in combat.[46] When the conflict became an article 2 conflict the people of East Pakistan, in a state of belligerency, were at least entitled to the protection outlined in Part II of the 1949 Geneva Convention Relative to the Protection of Civilian Persons,[47] and a growing body of authority supports the argument that the provisions of common article 3 should have continued to apply as well.[48] When the state of Bangladesh became a reality, the relevant conduct had already occurred, so questions of shifting nationality were not technically relevant. Where the Geneva law seeks to govern the relations of distinct national groups (states or belligerents) under common article 2 and, presumably, more homogeneous entities under common article 3, a policy consideration is raised in contradistinction to the formal language of article 4 of the Geneva Civilian Convention, which would technically preclude the protections of Part III (but expressly not Part II) of that Convention to "nationals" of the offending party. In the context of a belligerency (to which common article 2 applies as well as Part II) where there are substantial differences in group make-up and one of the groups is striving for self-determination, it is both unrealistic and unresponsive to overall community policy and Geneva goal values to continue to treat the populace of such a belligerent as "nationals" of the other belligerent within the meaning of article 4—especially when common interpretation of the word "nation" or "nationals" is not equated with "state" but can refer also to a group of people.[49] Formalistic thinking would otherwise

46. For a detailed elaboration of the article's provisions, see 4 COMMENTARY, *supra* note 12, at 37-44.

47. Civilian Convention, note 16 *supra;* Paust, *Legal Aspects of the My Lai Incident, supra* note 5, at 143-49; U.N. S.G. Report A/7720, *supra* note 30, at 34.

48. *See, e.g.,* 4 COMMENTARY, *supra* note 12, at 14, 34. *See also* G.A. Res. 2853, 26 U.N. GAOR, Supp. (No. 29) 91, U.N. Doc. A/8429 (1971); G.A. Res. 2677, 25 U.N. GAOR, Supp. (No. 28) 77, U.N. Doc. A/8028 (1970); G.A. Res. 2676, *id.* at 76; G.A. Res. 2444, 23 U.N. GAOR, Supp. (No. 18) 50, U.N. Doc. A/7218 (1968) (calling upon "all parties to any armed conflict" to observe the full provisions of Geneva law plus the 1907 Hague Convention and other norms of the law of armed conflict).

49. *See* U.N. S.G. Report A/8052, *supra* note 28, at 62-74; G.A. Res. 2674-77, 25 U.N. GAOR, Supp. (No. 28) 75, U.N. Doc. A/8028 (1970), *reprinted in* 119 INT'L REV. RED CROSS at 54-56, 104-11 (1971). For a most useful approach to treaty

require that the same persons who are entitled to the protection of the customary law of war do not also receive the full protection of Geneva law, which was enacted to increase protection for civilians in times of armed conflict.

In this case, however, the problem may be mooted by the fact that the alleged misconduct would not only be prohibited by common article 3 of the Geneva Conventions (at such a level of conflict), but also by the language of articles 13 and 16 of the Geneva Civilian Convention which prohibits attacks upon, ill-treatment of, or a failure to affirmatively protect all those who are (1) exposed to grave danger in any manner, (2) wounded, (3) sick, (4) infirm, (5) expectant mothers, (6) children under the age of fifteen who were orphans or had been separated from their families as a result of war, or (7) members of a hospital staff protected under article 20 of that Convention.[50]

D. *Other Norms of International Human Rights*

Pakistan and India were bound by the United Nations Charter to take action to assure the "universal respect for, and observance of," international human rights.[51] Documented principles of human rights law include the 1948 Universal Declaration of Human Rights[52] and the 1966 Covenant on Civil and Political Rights.[53] The 1948 Universal Declaration is not directly binding as treaty law, but it has been widely accepted as an authoritative

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interpretation, see M. McDOUGAL, *supra* note 28. *See also* J. BRIERLY, THE LAW OF NATIONS 118-19 (5th ed. 1955); W. WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW (1956); H. WHEATON, ELEMENTS OF INTERNATIONAL LAW 30 (3d ed. 1889) (both on the concept of nation/nationality).

If nationality can be determined by the laws of a state, then once belligerency occurs the laws and regulations promulgated by each belligerent should govern as well, especially in the context of emerging self-determination. The nationals of one belligerent cannot realistically depend upon the other belligerent to protect them (except as bound by law), and in reality their allegiance has shifted to new groups. *See also* BLUNTSCHLI, *supra* note 12, *as quoted in* note 40 *supra.*

50. *See* Paust, *Legal Aspects of the My Lai Incident, supra* note 5, at 143-49.

51. *See* U.N. CHARTER, Preamble, arts. 1(3), 55(c), 56. In an armed conflict the 1949 Geneva Conventions also aid in interpretation of the Charter. *See also* G.A. Res. 2840, note 18 *supra;* M. McDOUGAL, *supra* note 28; Paust, *Human Rights, Human Relations and Overseas Command,* 3 ARMY LAW. 1 (1973).

52. G.A. Res. 217, U.N. Doc. A/810, at 71 (1948) (vote 48 for, 0 against, 8 abstaining). For an analysis of the impact of this Declaration, see J. CAREY, U.N. PROTECTION OF CIVIL AND POLITICAL RIGHTS 12-16, 177-83 (1970).

53. G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 52-58, U.N. Doc. A/6316 (1966) (vote: 106-0-0).

instrument containing many of the protections and state obligations articulated in the United Nations Charter.[54] The wide acceptance of the document, and the fact that it is the most recited resolution of the General Assembly to date, demonstrates a shared expectation and juridical utility. Also, it has been accepted as an authoritative interpretation of the United Nations Charter and as a document that partially evidences general principles of law recognized by civilized nations and general customary international law.[55]

Of recent interest is a resolution from the Istanbul Conference of 1969 entitled the "Istanbul Declaration." It states that man has the right to enjoy lasting peace, to live a full and satisfactory life founded on respect of his rights and of his fundamental liberty, that the universally recognized general principles of law demand that the rule of law be effectively guaranteed everywhere, and "that *it is a human right to be free from all fears, acts of violence and brutality, threats and anxieties likely to injure man in his person, his honour and his dignity.*"[56] [emphasis added.]

Of course, common article 3 of the 1949 Geneva Conventions forbids inhumane treatment, torture, violence to persons, and the

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54. *See* J. CAREY, *supra* note 52, at 9-16. The Declaration maps out much of the general shared content which amplifies the shared meaning of the U.N. Treaty phrase "human rights and fundamental freedoms." *See* Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee,* 60 CORNELL L. REV. 231, 259 (1975); Sohn, *The Human Rights Law of the Charter,* 12 TEX. INT'L L.J. 129, 133-34 (1977).

55. *See* I. BROWNLIE, BASIC DOCUMENTS ON HUMAN RIGHTS 106 (1971); J. CAREY, *supra* note 52, at 9-16. The United Nations Statute of the International Court of Justice, art. 38, obligates the Court to apply not only treaties but also customary international law and the general principles of law recognized by civilized nations. It has also been recognized that the "unanimous enactment by the General Assembly in 1966" of the Covenant of Civil and Political Rights, the Optional Protocol and the Covenant on Economic, Social and Cultural Rights "makes them powerfully persuasive documents for *interpreting* the principles of human rights provided for in the Charter and in the Universal Declaration" (emphasis added). *See* INT'L COMM'N OF JURISTS, *supra* note 39, at 50.

56. Res. 19, XXIst International Conference of the Red Cross, (Istanbul 1969) (emphasis added), *reprinted in* 104 INT'L REV. RED CROSS 620-21 (1969). *See also* J. PICTET, THE PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 51, 52 (1966); Res. 23, U.N. Conf. on Human Rights (Teheran, April-May 1968), U.N. Doc. A/CONF. 32/41 (1968) (adopted by the UNESCO-convened conference with one abstention and no votes against it), *reprinted in* I. BROWNLIE, *supra* note 55, at 253. The resolution referred to widespread violence including "massacres, summary executions, tortures, inhuman treatment of prisoners, killing of civilians in armed conflicts and the use of chemical and biological means of warfare including napalm bombing."

murder of persons taking no active part in an armed conflict not international in character. But the United Nations and two Red Cross Conferences seem to be global efforts to make clear the prohibition of terrorist attacks on the civilian population, massacres, and indiscriminate warfare.

Furthermore, the principles of human rights enunciated in the 1948 Universal Declaration of Human Rights include the right to life and the security of person (article 3); the right to be free from torture or cruel, inhumane, or degrading treatment or punishment (article 5); and certain other related rights against arbitrary deprivation of freedoms (articles 9 and 12).[57] No exception is made to those principles because of the existence of war or the tactics of guerrillas in any armed conflict.[58]

Similar treaty provisions exist in the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms[59] in articles 2 and 3. Although article 15(1) of the Convention allows derogation of the provisions in time of war or other public emergency by a state "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law,"[60] it is expressly provided in article 15(1) that no derogation from article 2 shall be allowed "except in respect of deaths resulting from *lawful* acts of

57. G.A. Res. 217, note 52 *supra*. A 1968 meeting of private experts at Montreal, Canada, issued the "Montreal Statement," which called the 1948 Declaration an authoritative interpretation by the United Nations Charter of the highest order and of customary international law. *See* J. CAREY, *supra* note 52, at 13-14. For an historical background of the prohibition against torture, see Coursier, *The Prohibition of Torture, reprinted in* 126 INT'L REV. RED CROSS 475 (1971).

58. *See also* BLUNTSCHLI, *supra* note 12, at 15, para. 24, stating: "The theory of antiquity that the enemy had no rights is discarded by modern international law as inhuman . . . . Human rights remain in force during war" (note that this statement is over 100 years old). For contemporary concurrences, see G.A. Res. 2675, 25 U.N. GAOR (1922d plen. mtg.) 1, U.N. Doc. A/RES/2675 (1970) & note 49 *supra;* G.A. Res. 2597, 24 U.N. GAOR (1835th plen. mtg.) 1, U.N. Doc. A/RES/2597 (1969); G.A. Res. 2546, 24 U.N. GAOR (1829th plen. mtg.) 1, U.N. Doc. A/RES/2546 (1969); G.A. Res. 2444, note 34 *supra;* S.C. Res. 237, 22 U.N. SCOR (1361st mtg.) 1, U.N. Doc. S/RES/237 (1967); Res. 23, U.N. Conf. on Human Rights, note 56 *supra;* U.N. S.G. Report A/8052, *supra* note 28, at 64, 87 *passim;* U.N. S.G. Report A/7720, *supra* note 30, at 11, 12, 15.

59. *Opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 (1955).

60. An example of other obligations is article 3 of the 1949 Geneva Conventions in cases of an armed conflict not of an international character, and the large body of the rest of the law of war concerning international conflicts, "belligerencies," and "war." *See* Civilian Convention, note 16 *supra;* Prisoners of War Convention, note 1 *supra*.

war" (emphasis added) and no derogation from article 3 (which prohibits torture and inhumane or degrading treatment or punishment) under any circumstances.[61]

The same general principles and rules on derogation from the rights to life and freedom from torture and degrading or inhumane treatment can be found in the 1969 American Convention on Human Rights, articles 4, 5, 8, 25, and 27 (the last three articles dealing with fair trial, judicial protections, and the rule that no suspension of articles 4 or 5 can occur);[62] and the 1966 Covenant on Civil and Political Rights, articles 6, 7, and 4(1) and (2) (the last article expressing the rule that there can be no derogation from the protections of articles 6 and 7).[63]

The United Nations Charter recognizes as a purpose of the United Nations the development of a respect for "the principle of equal rights and self-determination of peoples;"[64] and the General Assembly in its authoritative Declaration on Friendly Relations and Cooperation[65] affirmed that a "subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter." Indeed, it has been recognized that self-determination is now a fundamental human right.[66] The General Assembly also declared:

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

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61. For a recent "applicable" situation, see *Ulster: "Ill-Treatment," Not "Torture,"* Wash. Post, Nov. 17, 1971, at A21. The present authors fail to see the legal relevance of the distinction when a comparison of the conduct prohibited by both article 3 of the 1949 Geneva Conventions and article 3 of the 1950 European Convention on Human Rights is made—each prohibits ill-treatment in the broadest sense ("inhumane" treatment, "cruel," "degrading," "humiliating" treatment, and "violence").

62. *Reproduced in* 65 AM. J. INT'L L. 679-702 (1971) (not yet ratified).

63. G.A. Res. 2200, *supra* note 53.

64. U.N. CHARTER, art. 1(2).

65. G.A. Res. 2625, *supra* note 34.

66. *See id.;* L. CHEN, SELF-DETERMINATION AS A HUMAN RIGHT: TOWARD WORLD ORDER AND HUMAN DIGNITY 198 (W. Reisman & B. Weston eds. 1976); Emerson, *Self-Determination,* 65 AM. J. INT'L L. 459, 460 *passim* (1971) (but qualifying the content of the "right" in terms of community expectation and context); Rosenstock; *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey,* 65 AM. J. INT'L L. 713, 731 (1971); Suzuki, *supra* note 3.

> Every state has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistence to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.[67]

The General Assembly has strongly condemned racism and all totalitarian ideologies and practice, and has declared that such ideologies and practices,

> which are based on terror and racial intolerance, are incompatible with the purposes and principles of the Charter of the United Nations and constitute a gross violation of human rights and fundamental freedoms which may jeopardize world peace and the security of peoples.[68]

The General Assembly also called upon states to prosecute the perpetrators of such violations. Similarly, the General Assembly resolutely condemned "all forms of oppression, tyranny and discrimination, particularly racism and racial discrimination, wherever they occur," and stated that "universal respect for and full exercise of human rights and fundamental freedoms and the elimination of the violation of those rights are urgent and essential to the strengthening of international security . . . ."[69]

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67. G.A. Res. 2625, *supra* note 34; *see* note 110 *infra*. *See also* W. REISMAN, NULLITY AND REVISION 836-58 (1971).

68. G.A. Res. 2545, 24 U.N. GAOR (1829th plen. mtg.) 1, U.N. Doc. A/RES/2545 (1969); *see, e.g.*, G.A. Res. 2438, 23 U.N. GAOR, Supp. (no. 18) 47, U.N. Doc. A/7218 (1968); G.A. Res. 2331, 22 U.N. GAOR (1638th plen. mtg.) 1, U.N. Doc. A/RES/2331 (1967). Terrorism had been condemned under the customary law of war and is prohibited by article 33 of the 1949 Geneva Civilian Convention, note 16 *supra*. *See* Paust, *A Survey of Possible Legal Responses to International Terrorism: Prevention, Punishment and Cooperative Action*, 5 GA. J. INT'L & COMP. L. 431 (1975) (also considering the interrelation of general human rights, self-determination, and terrorism); 1943 Moscow Declaration on German Atrocities, *reprinted in* J. PAUST & A. BLAUSTEIN, *supra* note 1, at 166; 1942 Declaration of St. James on the Punishment of Crimes Against Humanity, *reprinted in* J. PAUST & A. BLAUSTEIN, *supra* note 1, at 168.

On the article 3 prohibition of terrorism, see 4 COMMENTARY, *supra* note 12, at 31, 39-40; Paust, *Terrorism and the International Law of War*, 64 MIL. L. REV. 1 (1974). *Cf.* J. BOND, *supra* note 42, at 84-91 (discussing possible justifications for certain acts of terrorism).

69. Declaration on the Strengthening of International Security, G.A. Res. 2734, 25 U.N. GAOR (1932d plen. mtg.) 6, U.N. Doc. A/RES/2734 (1970). This declaration is also useful in conjunction with others on racism and totalitarianism

V. JURISDICTION AND THE DUTY TO PROSECUTE

A. *Genocide*

Under article 1 of the Genocide Convention the parties "undertake to prevent and to punish" the international crime of genocide. Article 4 provides that persons committing the prohibited acts "shall be punished." It seems clear that parties to the Convention have jurisdictional competence and an obligation to prosecute alleged violators "whether they are constitutionally responsible rulers, public officials or private individuals."[70] Additionally, the parties undertook to enact, in accordance with their respective constitutions, the necessary legislation to give effect to the Convention provisions.[71]

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for a comprehensive reference to the shared expectations of the international community for the interpretation of norms of self-determination, the suppression of self-determination by armed force, and the propriety of foreign intervention when state elites have *not* been "conducting themselves in compliance with the principle of equal rights and self-determination of peoples" and thus are *not* representatives "of a government representing the whole people belonging to the territory without distinction as to race, creed or colour." *See* Declaration on Principles of International Law Concerning Friendly Relations and Cooperation, G.A. Res. 2625, *supra* note 34. The claim of deference by the International Commission of Jurists to the "authority" and "legality" of such an elite and that statement that "it is difficult to see how . . . the people of East Pakistan . . . were entitled in international law to proclaim the Independence of Bangladesh under the principle of self-determination" is preposterous. *See* INT'L COMM'N OF JURISTS, *supra* note 39, at 74-75, 97. At issue here is whether such an elite can claim greater control under martial law and flaunt the expectations of the community with regard to norms of self-determination, oppression, tyranny, racial discrimination, totalitarianism, fundamental human rights and freedoms, and international peace and security on the basis of exclusive interests of the elite in the maintenance of such a control in all of its present territory. *See also* note 110 *infra*. A proper reading of the 1970 Declaration on Friendly Relations is that territorial integrity is *not* protected in the face of a substantial denial of self-determination. *See* Suzuki, note 3 *supra*.

70. Genocide Convention, *supra* note 36, art. 4. *See* Adoption of the Prevention and Punishment of the Crime of Genocide and Text of the Convention, G.A. Res. 260A, 3(1) U.N. GAOR, Res. at 174 (1948).

71. Genocide Convention, *supra* note 36, art. 5. Apparently Pakistan had not done so as of September 14, 1965, or the 1971 period in question. *See* Question of Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity, Note by the Secretary General, 23 U.N. ESCOR 28, U.N. Doc. E/CN.4/927 (1967) [hereinafter cited as ESCOR Note]; MacDermot, *supra* note 39, at 481. Today, this would not seem to obviate the competence of Bangladesh to prosecute violations of international law, since the crime existed but the domestic implementing legislation did not.

Article 6 requires that persons charged with genocide be tried "by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction." It seems reasonable to interpret this provision as granting jurisdictional competence to the new government with authority over the same territory in which the acts were committed.[72] Furthermore, there is no stated restriction as to when such a state should have come into legal existence, and Bangladesh is "the State in the territory of which the act was committed."

The United Nations General Assembly has declared that the crime of genocide as defined in the 1948 Genocide Convention also constitutes a crime against humanity, "even if such acts do not constitute a violation of the domestic law of the country in which they were committed."[73] Thus, Bangladesh has jurisdiction over such acts when they are committed in connection with either crimes against peace or war crimes,[74] even though there is no implementing legislation in Pakistan or in Bangladesh. Two days after the surrender of Pakistani troops to India and Bangladesh the General Assembly additionally affirmed

> that refusal by States to co-operate in the arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity is contrary to the purposes and principles of the Charter of the United Nations and to generally recognized norms of international law.[75]

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72. *See generally,* Genocide Convention, *supra* note 36, Preamble; *id.* art. 1. Nothing in article 6 states that persons charged with genocide *must* be tried in such a state and no other.

73. G.A. Res. 2391, *supra* note 12, at 3 (formally adopting the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (in force Nov. 11, 1970). *See also* G.A. Res. 2583, 24 U.N. GAOR (1834th plen. mtg.), U.N. Doc. A/RES/2583 (1970); Miller, *The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity,* 65 AM. J. INT'L L. 476 (1971).

74. *See* Miller, *supra* note 73, at 488-89; Principles of the Nuremberg Charter and Judgment, G.A. Res. 488, 5 U.N. GAOR, Supp. (No. 12), U.N. Doc. A/1316 (1950). *Cf.* Convention on the Non-Applicability of Statutory Limitation, article 1(b), *adopted by* G.A. Res. 2391, note 12 *supra* ("whether commited in time of war or in time of peace"); U.N. S.G. Report A/7720, *supra* note 30, at 15; MacDermot, *supra* note 39, at 482-83. *See also* G.A. Res. 2583, note 73 *supra.*

75. G.A. Res. 2840, *supra* note 18, at 2. Those purposes and principles would include the obligation to take action to assure "universal respect for, and observance of," international human rights and fundamental freedoms (including human rights in times of armed conflict). *See* U.N. CHARTER, Preamble; *id.* arts. 1(2)-(3), 55(c), 56.

It is also relevant that the early code of Bluntschli on the law of war contained the following declaration:

> Inter-necine wars and wars of annihilation against nations or races susceptible of existence and culture constitute a violation of the law of war.
>
> 1. The war of extermination against the idolatrous inhabitants of Palestine, which the ancient Jews regarded as a holy duty, is today condemned as an act of barbarity, and can no longer be praised as an example worthy of imitation.[76]

There is ample evidence of a customary, inherited expectation that genocide was actually prohibited as a violation of the customary international law of war.[77]

B. *Customary Law of War*

It was early recognized that kings have the right to punish not only those acts committed against themselves or their subjects directly, but also those acts in violation of the law of nations against any person. The right existed primarily because subjection by the king had replaced the individual's right to enforce the law.[78] Today, as human society is forced to exist on the basis of the sovereign state system, it can be argued that it is the duty of the sovereign to execute the community legal expectations.[79] Since we

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76. BLUNTSCHLI, *supra* note 12, at 15. The current example of such fanatically barbarous misdeeds comes under the heading of the *Jihad* or holy war.

77. *See,* G.A. Res. 96, note 12 *supra.* Lemkin, *Genocide as a Crime Under International Law,* 41 AM. J. INT'L L. 145 (1947); Schwelb, *Crimes Against Humanity,* 23 BRIT. Y.B. INT'L L. 178 (1946). *Cf.* Kunz, *The Genocide Convention,* 43 AM. J. INT'L L. 738 (1948) (considering the effect of the Convention on prior law). For authoritative comment on the customary nature of the crime of genocide, see Attorney General of Israel v. Eichmann, 36 INT'L L. REP. 18, §§ 17-20. ("According to an Advisory Opinion of the International Court of Justice of May 28, 1951, given at the request of the United Nations General Assembly on the question of the reservations to the convention, the principles inherent in the convention are acknowledged by the civilized nations as binding on the country even without conventional obligation").

78. Wright, *The Law of the Nuremberg Trial,* 41 AM. J. INT'L L. 38, 55 n.66 (1947). *See also* 2 H. GROTIUS, DE JURE BELLI AC PACIS 523 (Carnegie Endowment for International Peace ed., F. Kelsey trans. 1925); 3 E. DE VATELL, LE DROIT DES GENS OU PRINCIPLES DE LA LOI NATURELLE 163 (Carnegie Endowment for International Peace ed., C. Fenwick trans. 1916); Wright, *supra,* at 56 n.74. ("If an interest is 'protected by international law' every state is obligated by international law not to authorize, and to take due diligence within its jurisdiction to prevent, acts which would violate that interest.")

79. Concerning the split of opinion prior to the 1949 Geneva Conventions as

are forced to live with armed conflict, it should be the duty of belligerent powers, based on the social relationship, to follow the law of war and to punish the violators of that universal law since they are not accessible to the human society through any effective governmental structure other than one where the state predominates. With the power lies responsibility.

In fact, there is ample evidence of the jurisdictional competence of each state to prosecute violations of the law of war and the universal nature of the offense.[80] In the 1919 Report presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties it was declared:

> Every belligerent has, according to international law, the power and authority to try the individuals alleged to be guilty of the crimes of which an enumeration has been given in Chapter II on Violations of the Laws and Customs of War, if such persons have been taken prisoners or have otherwise fallen into its power. Each belligerent

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to whether punishment was required or favored under international law, see Wright, *supra* note 78, at 60. The United States position seems to have been that prosecution or enforcement of the law of war is required. *See, e.g.*, KENT'S COMMENTARY ON INTERNATIONAL LAW 3, 427 (1866) [hereinafter cited as KENT]; W. WINTHROP, MILITARY LAW AND PRECEDENTS 796 (1920); FM 27-10, *supra* note 15, ¶ 506(b) (stating that the duty to prosecute and enforce the law is found in the principles in the 1949 Geneva Conventions, which "*are declaratory of the obligations of belligerents under customary international law* to take measures for the punishment of war crimes committed by all persons, including members of a belligerent's own armed forces." (emphasis supplied.) *See also* U.S. DEP'T OF NAVY, LAW OF NAVAL WARFARE, ¶ 330(a) (1955) ("Belligerent states have the obligation under customary international law to punish their own nationals who violate the laws of war.").

80. *See* 3 BRITISH MANUAL OF MILITARY LAW, *supra* note 22, at 180-82; G. DRAPER, *supra* note 18, at 105-06; M. MCDOUGAL & F. FELICIANO, *supra* note 13, at 330-33, 706-21; RESPONSIBILITY FOR WAR CRIMES AND CRIMES AGAINST HUMANITY—DOCUMENTS 8, 85, 88, 108-09 n.1 (Moscow 1970); Baxter, *The Municipal and International Law Bases of Jurisdiction Over War Crimes*, 28 BRIT. Y.B. INT'L L. 382, 390 (1951); Cowles, *Universality of Jurisdiction Over War Crimes*, 33 CALIF. L. REV. 177 (1945); Glaser, *Culpability in International Criminal Law*, 99 RECUEIL DES COURS 473 (1960); Green, *Trials of Some Minor War Criminals*, 4 INDIAN L. REV. 249 (1950); Gross, *The Punishment of War Criminals*, 2 NETHERLANDS INT'L L. REV. 356 (1955); Kelson, *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, 31 CALIF. L. REV. 530 (1943); Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 21 BRIT. Y.B. INT'L L. 58 (1944); Paust, *My Lai and Vietnam*, *supra* note 5, at 111-25; Schwarzenberger, *International Responsibility in Time of War*, 14 INDIAN Y.B. INT'L AFF. 3 (1965); Schwelb, *supra* note 77, at 178; Wright, *supra* note 78; FM 27-10, *supra* note 15, ¶¶ 505-07.

> has, or has power to set up, pursuant to its own legislation, an appropriate tribunal, military or civil, for the trial of such cases.[81]

This declaration had been made in light of an inherited expectation which had been articulated in numerous works and several court decisions.[82] Past conduct demonstrates a long history of basic expectations though admittedly it lacks fulfillment except in cases where one group has been able to unilaterally force reparation or punishment upon another or has prosecuted its own. This is the present level of development, since the law has been demonstrated but no effective sanction with international enforcement machinery exists.

In fact, there were very few trials of a multinational nature prior to Nuremberg. The lack of trials, however, is not a community denial of law nor of individual responsibility for a violation of that law. One author has stated that there were few trials in the eighteenth and nineteenth centuries not because of any theory of individual immunity from law or sole responsibility resting with the state (the old object/subject confusion), but because nations generally included an amnesty clause in peace treaties or formal declarations.[83] Individual responsibility was recognized, but amnesty often specifically granted, until after World War I when nations

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81. COMMISSION ON THE RESPONSIBILITY OF THE AUTHORS OF THE WAR AND ON ENFORCEMENT OF PENALTIES, REPORT PRESENTED TO THE PRELIMINARY PEACE CONFERENCE, ch IV(b), *reprinted in* 14 AM. J. INT'L L. 95, 121 (1920) [hereinafter cited as COMMISSION REPORT]. Members were: United States, British Empire, France, Italy, Japan, Belgium, Greece, Poland, Rumania, Serbia. *Id.* at 96-97.

82. *See, e.g.*, Henfield's Case, 11 F. Cas. 1099, 1107-08 (No. 6,360) (Pa. 1793) (citing E. DE VATTEL, LAW OF NATIONS 75, 145); BLUNTSCHLI, *supra* note 12, at 46 paras. 66, 87, 134(a); J. GARNER, RECENT DEVELOPMENTS IN INTERNATIONAL LAW 445-46 (1925); 2 H. GROTIUS, *supra* note 78, at 253, 523; H. HALLECK, *supra* note 38, *passim*; KENT, *supra* note 79, at 3, 427 *passim*; M. MCDOUGAL & F. FELICIANO, *supra* note 13, at 706-07; E. DE VATTEL, *supra* note 78; 3 WHARTON'S DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES 326-29 (1886); W. WINTHROP, *supra* note 79, at 778-96; 1921 PROC. AM. SOC'Y INT'L L. 102 (1927); Colby, *War Crimes*, 23 MICH. L. REV. 482 (1925). Garner, *Punishment of Offenders Against the Laws and Customs of War*, 14 AM. J. INT'L L. 70 (1972).

A variety of false views that war crimes merely constituted offenses under municipal law which arose among the myopic and uninformed in the early 1940s can be seen in J. BAKER & H. CROCKER, *supra* note 12, at 104, 107-08; J. SPAIGHT, *supra* note 15, at 461-62; E. STOWELL, INTERNATIONAL LAW 528-31, 597-99 (1931) (at 529 adding that there is a duty to "investigate and inflict appropriate punishment in every case which occurs"); Manner, *The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War*, 37 AM. J. INT'L L. 407, 414-15 (1943).

83. Gross, *supra* note 80, at 356.

began to demand enforcement against individuals by other states as well.[84] In the United States there were several trials for violations of the laws of war prior to the 1870s. Trials after that time were few. In 1868 there had been a state prosecution of a civilian for murder based on international standards of culpability,[85] and in 1873 there was a military tribunal conviction of some Modoc Indians for law of war violations.[86] The nineteenth century saw a few foreign trials for violations of the law of war,[87] but the twentieth century saw many more.[88] Before World War I it was considered sufficient to have the law of war enforced by each state's own military system,[89] and the United States was no exception.[90] Such responsibility, therefore, did not begin only with the world wars of the twentieth century.

Since World War II and the famous trials of war criminals at Nuremberg and the numerous state forums,[91] these inherited expectations of universal jurisdiction have continued, and the United Nations has itself often demanded the prosecution by all states of all war criminals and persons guilty of crimes against humanity.[92]

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84. *Id.*

85. State v. Gut, 13 Minn. 315 (1868), *aff'd,* 76 U.S. 35 (1869).

86. *See* 14 Op. Atty. Gen. 249 (1873) (punishing the acts though Congress had not made them a crime by statute). *See also* W. WINTHROP, *supra* note 79, at 786, 788 n.91.

87. *See* 2 H. MUNRO & E. STOWELL, INTERNATIONAL CASES 222 (1916); W. WINTHROP, *supra* note 79, at 843 n.35; Dunbar, *Some Aspects of the Problem of Superior Orders in the Law of War,* 63 JURID. REV. 234, 238 (1951).

88. *E.g.,* Regina v. Smith (1900), *reported in* Stephen, *Superior Orders as Excuse for Homicide,* 17 L.Q. REV. 87 (1901). *See* MULLINS, *The Leipzig Trials* (1921); Colby, *supra* note 82, at 496-97, 504 (some war criminals had been shot without trial); *German War Trials, Supreme Court at Leipzig,* 16 AM. J. INT'L L. 674 (1922).

89. Colby, *supra* note 82, at 500.

90. *See* Colby, *Courts-Martial and the Laws of War,* 17 AM. J. INT'L L. 109, 111-13 (1923).

91. For a brief survey of these, see J. APPLEMAN, MILITARY TRIBUNALS AND INTERNATIONAL CRIME (1954); M. MCDOUGAL & F. FELICIANO, *supra* note 13, at 707-18.

92. *See, e.g.,* G.A. Res. 2840, *supra* note 18, at 2; G.A. Res. 2583, note 73 *supra;* G.A. Res. 2391, note 12 *supra;* G.A. Res. 170, 2 U.N. GAOR, Res. at 102 (1947); G.A. Res. 96, note 12 *supra;* G.A. Res. 95, U.N. Doc. A/64, at 188 (1946); G.A. Res. 3, U.N. Doc. A/64, at 9 (1946); Res. 1158, 41 U.N. ESCOR, Supp. (No. 1) 22, U.N. Doc. E/4264 (1966); UNITED NATIONS, EVERYMAN'S UNITED NATIONS—A FIVE YEAR SUPPLEMENT 150-51 (1971) (on 1970 G.A. action); U.N. S.G. Report A/8038, *supra* note 2; ESCOR Note, note 71 *supra. See also* G.A. Res. 3074, 28 U.N. GAOR, Supp. (No. 30) 78, U.N. Doc. A/9030 (1973); G.A. Res. 2545, note

The General Assembly has declared that a refusal to cooperate in the arrest, extradition, trial, or punishment of persons guilty of such crimes is contrary to the purposes and principles of the Charter and to generally recognized norms of international law.[93]

A related problem concerns lack of jurisdiction over international crime.No power exists to grant immunity from prosecution, and it is doubtful that the granting of immunity for war crimes would be consistent with the universal nature of these crimes.

There is much evidence of the principle that domestic laws or juridical acts cannot dissipate international criminal responsibility. For example, the Allied Control Council Law No. 10 of January 31, 1946, provided in article II(5) that no statute of limitation, pardon, grant of immunity, or amnesty under the Nazi regime would be admitted as a bar to trial or punishment.[94] Recently the United Nations General Assembly stated that no statutory limitation would apply to war crimes, crimes against humanity, or genocide.[95] The Principles of the Nuremberg Charter and Judgment recognized that governmental orders cannot free a person from criminal responsibility (so governmental acts could hardly do the same), and that even though domestic law "does not impose a penalty for an act which constitutes a crime under international law it does not relieve the person who committed the act from responsibility under international law."[96] And in 1919 the Commission on the Responsibility of the Authors of the War and on Enforcement and Penalties took note of the rule that "no trial or sentence by a court of the enemy country shall bar trial and sen-

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68 *supra* (against racism, dominance by terror, and totalitarian ideologies and practices); G.A. Res. 2438, note 68 *supra* (to the same effect).

93. G.A. Res. 2840, *supra* note 18, at 2. *See also* G.A. Res. 3074, note 92 *supra;* G.A. Res. 96, *supra* note 12, at 188 (affirming that genocide is an international crime and is contrary to "the spirit and aims of the United Nations" as expressed in the principles and purposes of the Charter).

94. *See* 15 TRIALS OF WAR CRIMINALS 25 (1949).

95. G.A. Res. 2391, *supra* note 12, adopted the Convention on the Non-Applicability of Statutes of Limitation to War Crimes and Crimes Against Humanity, article 1 (1968), (by a vote of 58 for, 7 against, with 36 abstaining. Voting against the resolution were: the United States, the United Kingdom, South Africa, Portugal, Honduras, El Salvador, and Australia). *See also* G.A. Res. 3074, note 92 *supra;* G.A. Res. 2840, note 18 *supra;* M. HUDSON, INTERNATIONAL TRIBUNALS 85 (1944) ("No statute of limitations exists in international law to bar the presentation of disputes or claims . . . .").

96. Principles II and IV, Principles of the Nuremberg Charter and Judgment, [1949-50 (II)] Y.B. INT'L L. COMM'N 374, *adopted by* G.A. Res. 488, note 74 *supra. See also* G.A. Res. 3074, note 92 *supra.*

tence by the tribunal or by a national court belonging to one of the Allied or Associated States."[97] An example of the same reasoning can be found in the French case of *Abetz*[98] where it was held that diplomatic immunity was not relevant to a war crimes prosecution since the legal basis of prosecution rests with offenses against the community of nations and therefore any domestic interference through grants of immunity would "subordinate the prosecution to the authorization of the country to which the guilty person belongs."

"Fake" prosecutions designed to result in lesser convictions or in acquittal pose a more serious problem. They can arise when it is known that more serious charges cannot be proven but a decision is made to prosecute the unprovable higher offenses so that the defendant will ultimately avoid conviction for other offenses. Furthermore, a refusal to prosecute can be a violation of international obligations under the Conventions (1) to bring to trial *all* persons alleged to have committed or ordered to be committed "grave breaches" of the Conventions, (2) to take measures necessary for the suppression of all acts contrary to the provisions of the Convention other than grave breaches, and (3) to *respect* and *to ensure respect* for the Conventions in all circumstances. The violation of such obligations would most likely be violations by the state itself, though individuals may also be responsible for failure to execute the law or suppressing violations. No state can absolve itself or any other state or entity of any liability incurred by itself or by another in respect of breaches of the 1949 Geneva Conventions by express recognition of the universal nature of the offenses in that set of Conventions.[99]

C. *The 1949 Geneva Conventions*

The 1949 Geneva Conventions contain common articles, which obligate each High Contracting Party to search for any person alleged to have committed a "grave breach" of the Conventions and to bring to trial such persons or to extradite them under appropriate circumstances to another entity that has made out a prima

97. COMMISSION REPORT, *supra* note 81, at 9.

98. 46 AM. J. INT'L L. 161, 162 (1952) (French Cour de Cassation 1950). *See also* 3 BRITISH MANUAL OF MILITARY LAW, *supra* note 22, at 95 n.2, stating that no refuge is possible in a state bound by the Conventions and that a state cannot exonerate itself or others for violations.

99. *See, e.g.*, Civilian Convention, *supra* note 16, art. 148; G.A. Res. 3074, note 92 *supra*.

facie case against them.[100] These same provisions provide universal jurisdiction over these international offenses by the language obligating each party to prosecute any person who has committed such a breach.[101]

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100. *See* Civilian Convention, note 16 *supra;* Prisoners of War Convention, note 11 *supra.*

101. Violations of Part II of the Civilian Convention of sufficient gravity for the "grave breach" provision to apply constitute crimes of such a universal character. *See* Paust, *Legal Aspects of the My Lai Incident, supra* note 5, at 149-51. Other violations of the Conventions (which do not reach such a gravity) constitute "ordinary" war crimes. *See, e.g.,* GA. Res. 2391, *supra* note 12; 3 BRITISH MANUAL OF MILITARY LAW, *supra* note 22, at 176; 4 COMMENTARY, *supra* note 12, at 583, 593-94; 2 OPPENHEIM, *supra* note 13, at 567 n.2; U.N. S.G. Report A/7720, *supra* note 30, at 43-44; FM 27-10, *supra* note 15, ¶ 499. Since universal jurisdiction attaches to all war crimes, however, nothing dissipates the jurisdictional competence of Bangladesh to prosecute any act contrary to the provisions of the Geneva Conventions (including acts in violation of common article 3). *See also* INT'L COMM'N OF JURISTS, *supra* note 39, at 60.

The Commission has mistakenly stated that the Geneva Conventions "contain no provisions for sanctions in the case of breaches of Article 3" and that grave breach provisions do not cover "victims of offenses under Article 3 . . . ." *Id.* at 54-55. It is pure fabrication to state that violations of common article 3 that reach the gravity of a "grave" breach are excluded from, *e.g.,* Genocide Convention, art. 147. No such language appears in any of the Conventions or any of the ICRC Commentaries. The Convention states that any of the listed acts committed against persons "protected by the present Convention" are grave breaches of the Convention. This means persons protected anywhere in the present Convention or in any of the articles of the Convention. It does not utilize the more restrictive terminology of "protected persons" found, *e.g.,* in Genocide Convention, art. 27 (concerning Part III) but includes the broader category of all "persons protected." Certainly those who are entitled to the protections of article 3 are "persons . . . protected by the Convention." *See* Paust, note 5 *supra.* Moreover, the "grave breach" articles are contained in the section on execution of the Convention (Part IV) (article 3, in each case, is part of "the Convention"). They do not attempt to classify persons but to summarize "grave" breaches according to the gravity of the conduct, outcomes, and effects, and were enacted to ensure a universality of jurisdiction over and punishment of all offenders, whatever their nationality and wherever the offense had been committed. Certainly this is the ordinary meaning of the phrase "persons . . . protected by the Convention" in light of the purpose of the Conventions. Furthermore, there is no specific denial of the customary rule that every violation of the law of war is a war crime, *see, e.g.,* FM 27-10, *supra* note 15, ¶ 499, and that every major infraction of the law of war must be punished by states no matter what the nationality of the accused or the place of the offense. *See id.* ¶ 506(b). Since a violation of article 3 is a violation of the law of war and a war crime, and since all major infractions must be punished by states, it is improper to interpret the grave breach provisions of the Geneva Conventions to restrict that customary expectation without a clear expression of the drafters of the Conventions to the contrary. Since there is no such expression in the Conven-

Furthermore, common article 1 of the Conventions obligates each High Contracting Party (not merely the prosecuting parties) "to respect and to ensure respect for the Convention in all circumstances." As the authoritative comment on the Conventions states, such an obligation:

> is not an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world . . . so universally recognized as an imperative call of civilization . . . . [I]n the event of a Power failing to fulfill its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavor to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.[102]

D. *Other Norms of International Human Rights*

It is incorrect to categorically state that violations of human rights may not be prosecuted as an international crime. Violations of human rights intertwined with the law of armed conflict, genocide, and general crimes against humanity can obviously result in state or international tribunal prosecution. Criminal adjudication of human rights has been sporadic due to the lack of an overall and effective sanctioning process.[103] Beyond the fact that numerous perpetrators of violations of human rights during armed conflict have been punished, there have been past instances of effective sanctioning against individuals for violations of other types of human rights—especially when an *ad hoc* sanction process was expressly constituted under an international agreement.[104]

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tions or the ICRC Commentaries (clear or otherwise), there is no contravention of the inherited expectations.

102. 4 COMMENTARY, *supra* note 12, at 15-16. *See also* U.N. CHARTER, Preamble and arts. 1(3), 55(c), and 56; G.A. Res. 2840, *supra* note 18; U.N. Conf. on Human Rights, Proclamation, para. 10, U.N. Doc. A/CONF. 32/41 (1968) (stating, in effect, that it is the obligation of the international community to cooperate in eradicating "massive denials of human rights" arising out any armed conflict).

103. *See* J. CAREY, *supra* note 52, at 61-69. *See also* H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 35-45, *passim* (1950); McDougal, Lasswell & Chen, *Human Rights and World Public Order,* 63 AM. J. INT'L L. 237, 263 (1969).

104. *See, e.g.,* McDougal & Bebr, *Human Rights in the United Nations,* 58

The violation of the right to self-determination has been declared to offend the United Nations Charter.[105] Moreover, the General Assembly has warned against the use of force to deprive peoples of "their right to self-determination and freedom and independence,"[103] and has repeated this warning in connection with the interrelated principles of articles 2(4) and 1(3) of the Charter. Additionally, the General Assembly reaffirmed that a threat or use of force in contravention of article 2(4) of the Charter "constitutes a violation of international law and the Charter," and that a "war of aggression constitutes a crime against peace, for which there is responsibility under international law." In view of these declarations it seems highly probable that the General Assembly has affirmed that the use of force in violation of article 2(4) of the Charter to deprive a people of self-determination constitutes a crime against peace as well.[107]

Article 2(4) clearly does not merely preclude the threat or use of force against the territorial integrity or political independence of a state, but also prohibits the international use of force inconsistent with the purposes of the organization (such as the promotion of self-determination and the promotion of universal respect for and observance of human rights).[108] The question remains whether,

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AM. J. INT'L L. 603, 611 (1964); H. LAUTERPACHT, *supra* note 103, at 27, 34-35, 38-44, 62, *passim*.

105. *See* G.A. Res. 3297, 29 U.N. GAOR (Agenda Item 67), U.N. Doc. A/RES/3297 (1975) (S. Rhodesia); G.A. Res. 2877, 26 U.N. GAOR, Supp. (No. 29) 111, U.N. Doc. A/8429 (1971) (S. Rhodesia); text at notes 65-67 *supra*.

106. *See* note 65 *supra*.

107. If there was a crime against peace by March 25, 1971, then the crimes against humanity could attach from that date and not a later time when resistance reached the stage of an armed conflict to which war crimes attach. *See* Principle VI(c), Principles of the Nuremberg Charter and Judgment, adopted by G.A. Res. 1316, note 74 *supra*.

108. For a comprehensive reference, see H. LAUTERPACHT, *supra* note 103, at 34-35, 148-51, *passim;* M. MCDOUGAL & F. FELICIANO, *supra* note 13, at 177-79; Paust, *supra* note 68, at 460-61 nn.114-17. *See also,* G.A. Res. 2545, *supra* note 68, at 1 (reaffirming that "racism and similar totalitarian ideologies and practices, which are based on terror and racial intolerance, are incompatible with the purposes and principles of the Charter of the United Nations and constitutes [sic] a gross violation of human rights and fundamental freedoms which may jeopardize world peace and the security of peoples"); G.A. Res. 2438, note 68 *supra* (to the same effect); G.A. Res. 2331, note 68 *supra* (condemning such practice as also constituting "a gross violation . . . of the purposes and principles of the Charter"); Declaration on the Granting of Independence to Colonial Countries, G.A. Res. 1514, 15 U.N. GAOR, Supp. (No. 16) 66, U.N. Doc. A/4684 (1960); G.A. Res. 96, note 12 *supra* (declaring that genocide is also contrary to the "spirit

as the General Assembly seems to affirm, a violation of article 2(4) constitutes a crime against peace. We feel that it does. In the context of the attempt at a peaceful transfer of power and the self-determination of the people of Bangladesh, the actions of the Pakistani military forces on March 25, 1971, and thereafter constituted a threat to international peace. Furthermore, it became a matter of international concern and in view of the preeminent transfer of power, and in the interests of serving the fundamental policies of the Charter,[109] this situation should be equated with the use of force by one state against another to deprive it of its political independence and conduct "in any other manner inconsistent with the purposes of the United Nations Charter." Peace and the rights of man are no less imperiled in this context than when the dominance by armed force of one group against another occurs across pre-existing state boundaries. This is especially true in the increasingly interdependent world of the 1970s. By prohibiting violence, the Charter sought to promote the rights of man. There is no reason why deference to sovereignty should be blind in the face of a totalitarian denial of the sharing of power against fundamental human demands and values.[110]

VI. Human Rights to Due Process of Law

It has been authoritatively declared that the killing of persons in the control of a party without a trial would be "nothing less than plain murder."[111] Moreover, the 1949 Geneva Conventions reiterate

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and aims of the United Nations"); L. Goodrich, E. Hambro & A. Simons, Charter of the United Nations 51-52 (3d ed. 1969); Paust & Blaustein, *The Arab Oil Weapon—A Threat to International Peace,* 68 Am. J. Int'l L. 410, 415-19 (1974).

109. *See* U.N. Charter, Preamble; *id.* art. 55.

110. This reflects the perceptive comments of Professor Myres S. McDougal made in the spring of 1972 at the University of Virginia. Moreoever, the community has not been blind to "totalitarian ideologies and practices," but has strongly condemned them. *See* resolutions cited notes 65, 68 & 108 *supra.* Each group of people should have the right to freely determine for themselves their political status and governmental processes, and such processes must represent "the whole people belonging to the territory" in which that governmental process is constituted. There can be no dictatorships. Authority comes from the people. Failure to recognize this can result in misstatements of the law. *See* Universal Declaration of Human Rights, *supra* note 52, art. 21; Int'l Comm'n of Jurists, *supra* note 39, at 48, 74-75, 97.

111. *See* United States v. List, 11 Trials of War Criminals 757, 1253, 1270 (1948). For earlier evidence of this proposition *see, e.g.,* J. Spaight, *supra* note 15, at 461-62. *See also* Civilian Convention, *supra* note 16, arts. 3, 5, 32-33, 71,

this prohibition and a common provision states that "wilfully depriving a protected person of the rights of fair and regular trial as prescribed in the present Convention" constitutes a "grave breach" of the Conventions.[112] Additionally, the Geneva Conventions require that those being prosecuted for a grave breach of the Conventions shall in all circumstances "benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by" articles 105 through 108 of the Geneva Prisoner of War Convention.[113] If the accused is a prisoner of war, he is entitled to the procedural safeguards of the Geneva Prisoner of War Convention in articles 82 through 104.[114]

Procedural safeguards based on general norms of human rights also apply unless their derogation is permitted in war or public emergency.[115] However, these additional safeguards are never more substantial than those found in articles 82 through 108 of the Geneva Prisoner of War Convention.[116] It has been demonstrated that at least since 1948 mankind has come to expect for every individual "a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."[117] What is sometimes more difficult

147; Prisoner of War Convention, *supra* note 11, arts. 13, 82-108, 130; M. McDOUGAL & F. FELICIANO, *supra* note 13, at 721-28; Paust, *My Lai and Vietnam, supra* note 5, at 143-44, 159-60. For a criticism of earlier trials on due process grounds, *see* Wright, note 8 *supra.*

112. *See, e.g.,* Civilian Convention, *supra* note 16, art. 147.

113. *See, e.g., id.* art. 146; 4 COMMENTARY, *supra* note 12, at 595-96.

114. *See* 3 COMMENTARY, *supra* note 12, at 406-505.

115. *See* Universal Declaration of Human Rights, *supra* note 52, arts. 5, 11, 12; 1966 Covenant on Civil and Political Rights, *supra* note 53, arts. 4, 6, 7, 9-10, 14-15; 1966 Convention on the Elimination of All Forms of Racial Discrimination, arts. 5(a), (b) & 6, *adopted by* G.A. Res. 1904, 18 U.N. GAOR, Supp. (No. 15) 35, U.N. Doc. A/5515 (1963). *See also* European Convention for Protection of Human Rights and Fundamental Freedoms, *supra* note 59, arts. 3, 5, 6, 13, 15; American Convention on Human Rights, *supra* note 62, arts. 4, 5, 7-9, 27; U.N. S.G. Report A/8052, *supra* note 28, at 87.

116. *See* U.N. S.G. Report A/7720, *supra* note 30, at 30. *Cf.* U.N. S.G. Report A/8052, *supra* note 28, at 101-09. Moreover, between the parties, the Geneva Conventions, which have been consented to by almost every nation-state in the world, have the effect of treaty law.

117. Universal Declaration of Human Rights, *supra* note 52, art. 10. *See also id.* art. 11. Since the addition of more members to the General Assembly, there have been other resolutions unanimously affirming the Universal Declaration even though several communist countries had abstained on the original adoption. *See also* J. CAREY, *supra* note 52, at 12-16, 177-83; Kutner, *"International" Due Process for Prisoners of War: The Need for a Special Tribunal of World Habeas Corpus,* 21 U. MIAMI L. REV. 721 (1967).

to ascertain is the shared content of this basic expectation. This is why a consideration of all relevant human rights instruments is useful.[118]

VII. Alleged Violations by India Would Not Immunize International Crime or Suspend Applicability of the Geneva Conventions

It has been argued that if one party breaches the Geneva Conventions, other parties can engage in counter-breaches, or that the Conventions are suspended as between them. This argument is based on the simplistic and incorrect assumption that a breach of the Geneva Convention should be treated similarly to a breach of contract under domestic law or a breach of a bilateral treaty. A better analogy is to the criminal law, since all nations properly expect that one crime does not justify another. In the international legal process even the formalistic Vienna Convention on the Law of Treaties recognizes in article 60(5) that such a limited perspective is totally unacceptable when the treaty provisions relate to the protection of the human person and the treaty is of a humanitarian character.[119] The Geneva Conventions, like the Genocide Convention, are undoubtedly examples of such treaties. Provisions designed to ensure universal sanctions relate to and are designed to ensure a more effective and universal protection of men.[120] A breach by one party does not justify a counter-breach. Similarly, the breaching party is not relieved from further performance under the Conventions since a breach does not suspend the operation of the Conventions[121] and a state cannot absolve itself or any other state of past or future performance by its actions.[122]

Any doubt concerning the state of the law prior to the Conventions on this matter was, as Pictet's Commentary states, dispelled when the High Contracting Parties obligated themselves to respect

118. *See generally* M. McDougal, note 28 *supra.*

119. U.N. Doc. A/CONF. 39/27 (1969), *reprinted at* 63 Am. J. Int'l L. 875 (1969), 8 Int'l Legal Mat. 679 (1969).

120. On the interrelated "system of protection," sanction process and overall expectation that violations will not remain unpunished, *see* 3 Commentary, *supra* note 13, at 18, 617-30; 4 *id.*, *supra* note 13, at 15-16, 583-603. *See also* U.N. S.G. Report A/7720, *supra* note 30, at 31.

121. *See* Vienna Convention, *supra* note 119, art. 60(5). *See also id.*, art. 60(1)-(2) (the "other" parties may suspend ordinary treaties, but not the defaulting party).

122. *See, e.g.*, Civilian Convention, *supra* note 16, arts. 1, 148; notes 19, 94, & 96-99 *supra.*

and to ensure respect for the Conventions in all circumstances.[123] Moreover, these obligations are not state-to-state (nor on a basis of reciprocity) but are obligations to all mankind, and the Conventions are of a much higher order than mere trade compacts or ordinary agreements between states.[124] Even necessity does not justify a deviation from the provisions of the Conventions unless the applicable article so provides.[125] The Advisory Opinion of the International Court of Justice on the Reservation to the Genocide Convention is also relevant. The Court declared:

> The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. . . . Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.[126]

The International Court also declared that "obligations of a State towards the international community as a whole" are "the concern of all States . . . ." The Court also stated:

> [I]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person . . . [*e.g.*, the 1948 Universal Declaration and the 1949 Geneva Conventions].[127]

VIII. POSTSCRIPT

The international crimes trials never took place, not because of lack of jurisdiction but, as is too often the case,[128] because of poli-

123. *See* Civilian Convention, *supra* note 16, art. 1; Prisoners of War Convention, *supra* note 11, art. 1. *See also* U.N. CHARTER, arts. 1(3), 55(c), 56; 3 COMMENTARY, *supra* note 13, at 18; 4 *id.*, *supra* note 13, at 15-16.

124. *See* note 30 *supra*. *See also* Draper, *The Geneva Conventions of 1949*, 114 HAGUE RECUEIL DES COURS 59, 96 (1965); Levie, *supra* note 15, at 365.

125. *See, e.g.*, 4 COMMENTARY, *supra* note 13, at 15-17, 34, 37-39, 200-07; Paust, *My Lai and Vietnam*, *supra* note 5, at 159-60. *See also* United States v. List, 11 TRIALS OF WAR CRIMINALS 757, 1255.

126. Advisory Opinion on Reservations to the Convention on Genocide, [1951] I.C.J. 23. *See also* Schwelb, *The Actio Popularis and International Law*, 2 ISRAEL Y.B. HUMAN RIGHTS 46 (1972).

127. Barcelona Traction Case, [1970] I.C.J. 3, 32.

128. With regard to United States failures to prosecute, *see also* Paust, *After*

tics. The issues of international crime and criminal jurisdiction had become so intermeshed with post-war regional disputes and global politics that Bangladesh finally agreed in 1974 to allow India to repatriate the 195 alleged violators of international law to Pakistan, even though Pakistan did not agree to prosecute grave breaches of the 1949 Geneva Conventions or to sanction any relevant international crime.

Throughout the previous years (1972-73) India and Pakistan had been carrying on separate talks concerning the settlement of old boundary lines.[129] India, Bangladesh, and Pakistan had been involved in talks concerning the return of civilians trapped during the fighting, the repatriation of prisoners of war, and other related matters.[130] At the same time, the Government of Bangladesh was anxious to obtain formal recognition, United Nations membership, and international trade and assistance necessary for a new state's survival.[131] All of these concerns, however, became so interconnected that political pressures finally forced Bangladesh to abandon any hope of carrying out the proposed prosecutions.

Pakistan, contrary to the letter and spirit of the 1949 Geneva Conventions, placed even more pressure on Bangladesh by refusing to release some 400,000 Bengalis (civilians and former members of Pakistan's armed forces) who were being held in Pakistan and utilized as pawns in a complicated power game.[132] To add to the pressure, Pakistan refused to recognize Bangladesh[133] and was joined by the People's Republic of China in an effort to bar admission of the new state to the United Nations.[134] At the United Nations in 1972, China finally did bar Bangladesh from membership when she cast her first veto in the Security Council.[135] Thereafter, Pakistan and China began joint plans for further action to force Bangladesh to allow a return of *all* the Pakistani war prisoners to

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My Lai, note 5 *supra.*

129. *See, e.g.,* Wash. Post, Nov. 2, 1972, at 24; *id.* Aug. 30, 1972, at 18; *id.* Aug. 26, 1972, at 13, col. 1; *id.* July 29, 1972, at 19, col. 3.

130. *See* New York Daily News, May 26, 1972, at 8; note 138 *infra.*

131. *See* Wash. Post, Aug. 26, 1972, at 1, col. 3; *id.* at 13, col. 1.

132. *Id.* at 13, col. 1.

133. *Id. See also id.* Aug. 30, 1972, at 18.

134. Balt. Sun, Aug. 28, 1972, at 2; Wash. Post, Aug. 26, 1972, at 1, col. 3. *Cf.* Wash. Post, Nov. 2, 1972, at 24. *See also id.* Aug. 30, 1972, at 18; U.N. Press Release WS/625, Sept. 21, 1973, at 3 (speech of Pakistani Prime Minister Bhutto to the U.N. General Assembly).

135. Wash. Post, Aug. 26, 1972, at 1, col. 3.

Pakistan and to address other matters of common interest concerning the subcontinent.[136]

China had justified its veto on the grounds that Bangladesh refused to allow repatriation of all the war prisoners in accordance with the 1949 Geneva Conventions.[137] This 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.[138] China and Pakistan clearly had no intention to allow other states to fulfill their obligations to prosecute violations of international law. Political considerations were far more important than fulfillment of international legal responsibility.

On April 17, 1973, when Bangladesh announced its intention to prosecute, it still insisted that it had a right to impose criminal sanctions, at least on the 195 individuals accused of war crimes, genocide, and other violations.[139] By mid-December India and Pakistan had reached a new agreement. India would return *all* the Pakistani war prisoners and detainees to Pakistan, but Bangladesh still had not consented. The new India-Pakistan agreement also led to Pakistan's declaration on December 14th of its intention to drop the Pakistani suit against India before the International Court of Justice, a proceeding initiated on May 11, 1973, by Pakistan.[140] The International Court of Justice accordingly removed the case from its list,[141] thus providing the only judicial record of prior attempts to apply criminal sanctions against those accused of murders, tortures, assaults, and other conduct in violation of international human rights, laws of war, and prohibitions of genocide and crimes against humanity.

All was not finalized, however. Bangladesh still hoped that the trials would proceed as India and Bangladesh had earlier agreed. Nevertheless, in the next three months, the three states reached a

136. *See* Balt. Sun, Aug. 28, 1972, at 2.

137. *See id.;* Wash. Post, Aug. 26, 1972, at 1, col. 3.

138. For further evidence of an incomplete focus on the repatriation-prosecution problem, ignoring general law obligations to prosecute grave breaches, *see* Levie, *The Indo-Pakistani Agreement of August 28, 1973,* 68 AM. J. INT'L L. 95 (1974). *Cf.* Levie, *Legal Aspects of the Continued Detention of the Pakistani Prisoners of War by India,* 67 AM. J. INT'L L. 512, 513-14 (1973) (listing arguments advanced in favor of India).

139. *See also* Levie, *The Indo-Pakistani Agreement, supra* note 138, at 97. Earlier press releases had announced an intention in 1972 to prosecute some 1,200 persons. *See* New York Daily News, May 26, 1972, at 8.

140. *See* Case Concerning Trial of Pakistani Prisoners of War (Pakistan v. India), [1973] I.C.J. 347 (Order 15 XII 73, Gen. List No. 60).

141. *Id.*

major agreement paving the way for a settlement of post-war political and economic difficulties. As part of the agreement, the 195 Pakistani prisoners of war were to be returned to Pakistan.[142] During negotiations, Bangladesh had insisted that Pakistan at least conduct its own trials of the accused and demanded some form of justice.[143] On April 10th, however, all that had come from Pakistan was a qualified apology. The Government of Pakistan "condemned and deeply regretted any crimes that may have been committed."[144] India had already repatriated some 80,000 prisoners, in accordance with the India-Pakistan agreement of December, 1973.[145] Soon the others would also be returned.

Neither India, Pakistan, nor Bangladesh had lived up to their responsibilities under the 1949 Geneva Conventions to search out and prosecute, or extradite for prosecution, those accused of grave breaches of the Conventions—the most serious deprivations of human rights in time of armed conflict since the atrocities of World War II. Repatriation did not end such responsibility, it merely transfered primary prosecutorial responsibility to Pakistan where it remains today. On September 14, 1974, the state of Bangladesh was admitted to the United Nations.[146]

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142. A news account reported the April 9, 1974 agreement as follows:

> NEW DELHI, April 9—India, Pakistan and Bangladesh reached a major breakthrough tonight and signed an agreement to repatriate 195 Pakistani prisoners of war. . . . [T]he war-crimes trial planned for the Pakistani prisoners by Bangladesh, the former Eastern wing of Pakistan, would be dropped.
>
> . . . .
>
> "The trials, tribulations, tensions, and conflicts of the subcontinent will become a thing of the past, something of a bad dream that is best forgotten," said India's Foreign Minister, Swaran Singh, moments after the signing of the agreement here.
>
> The Bangladesh Foreign Minister, Dr. Kamal Hossain, said quietly, "This is a moment for satisfaction. The efforts for enduring peace in the subcontenent will put an end to conflict and confrontation, and the 700 million people of the subcontinent will be able to live as good neighbors."

N.Y. Times, April 10, 1974, at 1, col. 5. For evidence of a different reaction to the agreement, see *id.* May 2, 1974, at 47, col. 4 (letter of R. Borra).

143. *See id.* April 8, 1974, at 11, col. 3.

144. *See id.* April 11, 1974, at 3, col. 1.

145. *Id.* Some sick and wounded prisoners of war had already been repatriated to Pakistan in 1972. *See* Wash. Post, Oct. 1, 1972, at 25.

146. Admission of the People's Republic of Bangladesh to membership in the United Nations, G.A. Res. 3203, 29 U.N. GAOR, U.N. Doc. A/L.728 (1974). The Security Council had approved admission on June 10, 1974.

IX. FINAL COMMENTS

There are many lessons in the Bangladesh experience. Our main concern, however, is with international law and the precedential value of the statutes, memoranda, and sanction efforts involved. The 1973 Bangladesh Act "to provide for the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and other crimes under international law" is of significant precedential value, despite the lack of an actual prosecution of Pakistani prisoners. The 1973 Bangladesh Act represents an important recognition and implementation of international due process guarantees for these accused of international crimes. This act goes beyond the Nuremberg guarantees. Furthermore, it is far more useful evidence of present legal expectation than the 1950 and 1951 United Nations Command rules of criminal procedure. Neither the 1973 Act nor the 1950-1951 rules appear to be widely studied. Neither appear in any international law text[147] although their import to the study of war crimes, genocide, crimes against humanity and human rights to due process seems obvious.

The Bangladesh setting is important as a reflection of a modern, post-Nuremberg problem—the application of the laws of armed conflict, genocide, and general human rights. The Bangladesh case offers a rich source of analysis of the application of modern international norms to both internal and international armed conflict, and an important basis for a post-Nuremberg approach to modern military conflicts. The Bangladesh experience offers a valuable context for exploration of the application of general human rights law to a people seeking self-determination and self-determination assistance by other states. Self-determination struggles, some claim, are the wars of the future—as groups of people seek political independence, economic independence, or the free integration or association with other political entities.[148]

147. With the exception of the authors' text, accompanying note 1 *supra*.

148. On the application of the right to self-determination in various contexts, see L. CHEN, *supra* note 66, at 198; Paust, *Self-Determination: A Definitional Focus*, SELF-DETERMINATION: NATIONAL, REGIONAL, AND GLOBAL PERSPECTIVES (Y. Alexander & R. Friedlander eds. 1978). *See also* U. UMOZURIKE, SELF-DETERMINATION IN INTERNATIONAL LAW (1972); Suzuki, *Extraconstitutional Change and World Public Order: A Prologue to Decision-Making*, 15 HOUS. L. REV. 23 (1977). The relationship between claims to self-determination and claims to engage in certain acts of terrorism is also addressed in Paust, *Terrorism and the International Law of War*, 64 MIL. L. REV. 1 (1974).